Legal and Other Fictions of Civil Recovery: Is it possible to reconcile the Civil Recovery of the Proceeds of Grand Corruption with Criminal Justice and Human Rights?

For our beautiful daughter Ava and our precious puppies Rosie and Ralph

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Abstract

Owing to corruption, between US$20 billion and $40 billion is estimated to be in flight from developing countries annually - with only $5 billion in stolen assets having been successfully repatriated in the past 15 years. The Arab Spring served only to strengthen the view that civil recovery is a helpful tool in the fight against the evils of corruption. However, difficult tensions exist between civil recovery and principles of criminal justice and human rights, including the presumption of innocence and the right to property. This thesis is centrally concerned with the civil classification of the civil recovery regime of England and Wales, as provided for in Part 5 of the Proceeds of Crime Act 2002 (POCA 2002), and its use to recover the proceeds of grand corruption. I conclude that grand corruption is a serious criminal wrong requiring it to be, except in a very limited number of exceptions, prosecuted in the criminal law. I also conclude that there are strong human rights-based objections to the court's classification of civil recovery as 'civil', and that Part 5 powers ought to be considered criminal in substance thereby attracting the procedural protections of the criminal law and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The core values of liberty, autonomy and freedom that underpin human rights are threatened by Part 5 proceedings since assets are recovered without any criminal conviction or any of the enhanced protections of the criminal law. Yet, at the same time, the recovery and repatriation of illicit assets through civil recovery can enhance human rights, in particular social and economic rights, and corrupt acts can in themselves constitute a violation of human rights. The

thesis concludes that despite the important potential human rights benefits of civil recovery, the weakening of certain protections of Article 6 by the use of civil recovery can only be justified in extreme cases when clear criteria are met.

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List of Abbreviations

AC	anti-corruption
AML	anti-money laundering
ARA	Asset Recovery Agency
CARIN	Camden Asset Recovery Inter-Agency Network
CESCR	Committee on Economic, Social and Cultural Rights
ECtHR	European Court of Human Rights
EU	European Union
FATF	Financial Action Task Force
G8	Group of Eight
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JCHR	Joint Committee on Human Rights
NCA	National Crime Agency
NCB	Non-conviction Based
NGO	Non-governmental Organisation
OECD	Organisation for Economic Cooperation and Development
PIU	Performance and Innovative Unit
PEPs	Politically Exposed Persons
SARS	Suspicious Activity Reports

SOCA	Serious Organised Crime Agency
StAR	Stolen Asset Recovery
TI	Transparency International
UKSC	UK Supreme Court
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNODC	United Nations Office on Drugs and Crime

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1. Introduction

Corruption has been endemic in all human societies: from Ancient Greece[1] to post-Revolutionary France, with the fall of Maximilien 'The Incorruptible' Robespierre,[2] to the more recent fall of the golden-gun-toting Muammar Gaddafi in Libya. Owing to corruption, between US$20 billion and $40 billion is estimated to be in flight from developing countries annually - with only $5 billion in stolen assets having been successfully repatriated in the past 15 years.[3] This is despite efforts made by international organisations and governments since the 1970s to enhance the prevention of corrupt activities. The scale of the corruption that led to the Arab Spring, the brutality of Ben Ali's Tunisian police State, the terror of Gadaffi's dictatorship and the corrupt enrichment of the Egyptian ruling elite,[4] only strengthened the view that civil recovery is a helpful tool in the fight against the evils of corruption. However, difficult tensions exist between civil recovery and principles of criminal justice and human rights, including the presumption of innocence and the right to property.

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[1] Philip Bosman, 'Corruption and Integrity in Ancient Greece and Rome. Acta Classica Supplementum' XI UNISA Classics Colloquium Integrity & Corruption in Antiquity 21 - 23 October 2010

[2] Lucas Colin, *The French Revolution and the creation of modern political culture Vol.2, The Political Culture of the French Revolution; Conference on the Political Culture of the French Revolution* (Pergamon 1988) 12-30

[3] Stolen Asset Recovery (StAR) Initiative Handbook <www.worldbank.org/ star> accessed 1 September 2013

[4] Penny Green and Tony Ward 'State Crime: A Dialectical View' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th ed, OUP 2012)

This thesis is centrally concerned with the civil classification of the civil recovery regime of England and Wales, as provided for in Part 5 of the Proceeds of Crime Act 2002 (POCA 2002), and its use to recover the proceeds of grand corruption. Part 5 of POCA 2002 introduced in the UK groundbreaking provisions that enabled the recovery of criminal proceeds through wholly civil legal processes.[5] The term 'civil recovery' is not without controversy. Peter Aldridge makes the following point, going to the heart of this thesis' concern, that 'civil recovery is not taking back or getting back property that has previously been the State's. It is State appropriation of property'.[6]

Part 5 recovery exemplifies the increasing use of civil law for crime-control purposes with a view to overcoming weaknesses in criminal law approaches. Part 5 proceedings arguably circumvent the enhanced protections of the criminal law owing to it not being conviction based; rather a person is effectively deprived of their property on the basis of allegations of the property being obtained through unlawful conduct. I conclude that despite the courts finding in favour of classifying civil recovery as 'civil', Part 5 powers ought to be considered criminal in substance thereby attracting the procedural protections of the criminal law and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).[7]

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[5] M. Michelle Gallant, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar 2005) 109-112

[6] Peter Alldridge 'Civil Recovery in England and Wales: An Appraisal' in Colin King, Clive Walker and Jimmy Gurulé (eds) *The Palgrave handbook of criminal and terrorism financing law* (Palgrave 2018)

[7] Colin King, 'Using Civil Processes in Pursuit of Criminal Law Objectives: a Case Study of Non-conviction-based Asset Forfeiture' (2012) 16 *Int'l J Evidence & Proof* 339; Liz

I will briefly set out the key terms employed in the work. This thesis focuses on 'grand corruption', which refers to the major corruption offences perpetrated by heads of State and other senior officials.[8] Grand corruption usually takes the form of bribery payments and the embezzlement and misappropriation of State assets.[9] For the purposes of this thesis, 'asset recovery' refers to the process of recovering the proceeds of crime, including those crimes associated with grand corruption.[10] Within asset recovery, there are typically two avenues of confiscation used internationally to recover the proceeds and instrumentalities of crime: civil forfeiture (non conviction based) and criminal confiscation (post-conviction).

In connection to the recovery of the proceeds of grand corruption, there are two main strands to the argument against their civil recovery. First, grand corruption is a criminal wrong that ought to be punished in the criminal law (criminalisation argument). Second, Part 5 of POCA 2002 is a punitive criminal measure that ought to be conviction-based and protected by the safeguards of the criminal law (penalisation argument). Furthermore, there are strong human rights objections to the non-conviction based (NCB) nature, and civil classification, of Part 5 proceedings. The

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Campbell, *Organised Crime and the Law: a Comparative Analysis* (Hart 2013) 201-202; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 13-14, 19-20, 260-262. See also Audrey Guinchard, 'Fixing the Boundaries of the Concept of Crime: the Challenge for Human Rights', *International and Comparative Law Quarterly* (2005) 719-734

[8] Jason Sharman, 'Chasing Kleptocrats' Loot: Narrowing the Effectiveness Gap' U4 Issue 2012 4, 1 <www.u4.no/publications/chasing-kleptocrats-loot-narrowing-the-effectiveness-gap/> accessed 20 November 2013

[9] Colin Nicholls and others, *Corruption and Misuse of Public Office* (2nd edn, OUP 2010) 1-2

[10] Radha Ivory, *The Human Rights of Bad Guys* (2014) 5-10. For definitional issues with 'asset recovery' see King in King, Walker and Gurulé (n 6) 378

recent 800th anniversary of the Magna Carta is a testament to the long tradition of legal rights and civil liberties in the UK. The Magna Carta and the Bill of Rights of 1689 severely restricted free wheeling forfeiture without protection by the law.[11] This thesis argues that there are grounds for the claim that the use of Part 5 proceedings in the context of grand corruption represents a movement away from the protection of fundamental democratic principles. The thesis explores whether it is possible to reconcile the different interests in civil recovery: on the one hand the fundamental rights of public officials whose property is the subject of a civil recovery order, and on the other hand the civil and political (CP) and social and economic (SE) rights of her countrywomen and the wider public interest to live in a corruption-free society.[12]

2. Methodology

The methodological approach of this thesis is based on an extensive review of the relevant case law, human rights law, anti-corruption and criminal justice literature. I draw on the work of the following academics: Peter Alldridge,[13] Andrew Ashworth,[14]

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[11] Cecil Greek 'Drug Control and Asset Seizures: A Review of the History of Forfeiture and in England and Colonial America' in Thomas Mieczkowski (ed) *Drugs, Crime and Social Policy* (Boston, Allyn and Bacon 1992) 109ff

[12] Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (The Hamlyn Trust 2002), 108-110

[13] Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and the Taxation of the Proceeds of Crime* (Hart Publishing 2003); 'The Limits of Confiscation' (2011) 11 *Criminal Law Review* 827; 'Two Key Areas in Proceeds of Crime Law' (2014) *Criminal Law Review* 170, Alldridge, 'Civil Recovery in England and Wales: An Appraisal' in King, Walker and Gurulé (n 6)

[14] Andrew Ashworth, 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (2004) *Law Quarterly Review*, 120: 263-291; 'Four Threats to the Presumption of Innocence' (2006) 123 *S African LJ* 63, 70-76; *Principles of Criminal Law* (5th edn, OUP 2006)

Colin King,[15] Lucia Zedner,[16] Andrew Bodner,[17] Johan Boucht,[18] Liz Campbell,[19] Sandra Fredman,[20] Radha Ivory,[21] Liora Lazarus,[22] Tim Owen and Ian Smith.[23] Within this framework, an examination of the civil recovery and criminal confiscation systems of England and Wales is undertaken. The approach is three-fold. Part I seeks to provide the necessary factual background and conceptual apparatus to come to a fuller understanding of the contemporary landscape of corruption and asset recovery. Part II undertakes a normative critique of Part 5 proceedings wherein the constitutional limits of Part 5 of POCA 2002 are examined. In order to do this, a

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[15] Colin King, 'Using Civil Processes' (n 7) 339; 'Civil Forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland' (2013) 34 Legal Studies 5

[16] Lucia Zedner, *Criminal Justice* (Clarenden Law Series 2004); 'Preventive justice or pre-punishment? The case of control orders ' (2007) 60 Current Legal Problems 174; 'Terrorism, the ticking bomb, and criminal justice values ' (2008) 73 *Criminal Justice Matters* 18; 'Security, the State, and the Citizen: The Changing Architecture of Crime Control' (2010) 13 New Criminal Law Review 379–403; 'Terrorizing Criminal Law' (2014) 8 *Criminal Law and Philosophy* 99

[17] Andrew Bodner, 'An Overview of the Law of the UK Concerning the Proceeds of Crime' (International Bar Association Conference Madrid 2009)

[18] Johan Boucht, 'Civil Asset Forfeiture and the Presumption of Innocence - Particularly in the Light of Art. 6(2) ECHR' (2014) 2 *New J of European Crim* L 192; The Limits of Asset Confiscation On the Legitimacy of Extended Appropriation of Criminal Proceeds (Hart Publishing 2017)

[19] Liz Campbell, 'Theorising Asset Forfeiture in Ireland' (2007) *Journal of Criminal Law* 441-460; 'The Recovery of 'Criminal' Assets in New Zealand, Ireland and England: Fighting Organised Crime in the Civil Realm,' (2010) *Victoria University of Wellington Law Review* 15-36; *Organised Crime and the Law: a Comparative Analysis* (Hart 2013)

[20] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008)

[21] Ivory, (n 10) 10-50

[22] Benjamin Goold and Liora Lazarus, (eds) *Security and Human Rights* (Hart Publishing 2009)

[23] Ian Smith, Tim Owen and Andrew Bodnar, *Asset Recovery, Criminal Confiscation, and Civil Recovery* (LexisNexis 2003)

conceptual analysis of criminal and civil law, and punitive and preventive measures is undertaken. This analysis is followed by an application of the leading Strasbourg test used to distinguish criminal from civil measures to Part 5 of POCA 2002.[24] Part III explores the difficulties of framing and balancing competing rights and duties arising in the fight against grand corruption. It examines the consequences of civil recovery for fundamental guarantees and protections, concluding that Part 5 proceedings fall short of the requirements of Article 6. It then explores whether the different interests in civil recovery can be reconciled: the fundamental rights of public officials whose property is the subject of a civil recovery order; the social and economic rights of his/her countrywomen; and the wider public interest to live in a corruption-free society and to suppress grand corruption. The key question answered is whether the weakening of certain protections of Article 6 by civil recovery can be justified, and if so, what criteria will need to be met to provide sufficient justification to employ civil recovery?

The conceptual apparatus required to analyse civil recovery spans civil remedial justice to criminal punitive justice, and it is between these end points that liberal democratic societies attempt to balance the public interest in crime control and individual human rights:[25] 'the individual and collective, the political and the legal, and political sovereignty and the rule of law.'[26]

[24] King, 'Using Civil Forfeiture' (n 7) 337-363
[25] Gallant, *Money Laundering* (n 5) 120-137
[26] Goold and Lazarus (n 22) 4-5

3. Conclusions

The thesis concludes that the use of Part 5 proceedings to recover the proceeds of grand corruption is highly questionable. The objections raised with respect to the use of Part 5 proceedings in the context of grand corruption are three-fold and interrelated. First, despite the importance of the effective recovery of the proceeds of grand corruption, the abhorrent consequences of grand corruption imply that grand corruption ought to be seen as serious enough to be subject to condemnation and punishment in the criminal law (criminalisation argument).[36] Second, Part 5 proceedings should be classified as a criminal measure protected by the criminal safeguards since it is punitive in nature (penalisation argument). Part 5 proceedings participate in many of the characteristics associated with punishment: censure, hard treatment and culpability, as well as the relevant authorities possessing significant powers under Part 5 of POCA 2002.[37] Third, even in the context of combatting the serious problem of grand corruption, protection of human rights principles requires that the recovery of assets ought to be, except in extreme circumstances, subsequent to a criminal conviction and classified as a criminal measure protected by the enhanced criminal safeguards (human rights argument).

Despite these objections, the courts nonetheless accept the use of civil recovery, consistently holding civil recovery to be a preventive civil measure as opposed to a punitive criminal measure. The rationale for this continued civil classification and the use of civil recovery partially lies in the numerous barriers to successful criminal confiscation and the complex nature of organised crime and grand corruption. These twin obstacles mean that the proceeds of grand

corruption cannot always be pursued through the channels of the criminal law.[34] The grave consequences of grand corruption, coupled with the significant barriers to successful asset recovery, make the use of civil recovery to dispossess the ruling elite of potentially illicitly obtained assets even more appealing at the level of politics and policy.

The core values of liberty, autonomy and freedom that underpin human rights are threatened by Part 5 proceedings since assets are recovered without any criminal conviction or any of the enhanced protections of the criminal law. At the same time, the recovery and repatriation of illicit assets through civil recovery can enhance human rights, in particular social and economic rights, and corrupt acts can in themselves constitute a violation of human rights. Civil recovery can be seen as an example of the dilemmas and complexity that arise where the State is under a duty to respect, protect and fulfil civil and political rights as well as social and economic rights. The thesis concludes that despite the important potential human rights benefits of civil recovery, the weakening of certain protections of Article 6 by the use of civil recovery can only be justified in extreme cases when clear criteria are met.

4. Summary of Chapters

Part I: Contemporary landscape of corruption and asset recovery

Part I provides the background and conceptual apparatus with which to understand the contemporary landscape of corruption and asset recovery.

Chapter 1: Conceptual analysis of corruption

Chapter 1 outlines the genesis, history and effectiveness of the international legal framework recently emerging to combat corruption. Chapter 1 also undertakes a conceptual analysis of corruption beginning with an examination of the definition, scale and consequences of corruption, together with its relationship to organised crime and money laundering.

Chapter 2: Conceptual analysis of asset recovery

Chapter 2 examines asset recovery as a tool to combat corruption, as well as the theoretical and empirical justifications for its use. The conceptual analysis begins with a detailed definition of asset recovery before moving on to sketch the basic law governing asset recovery, its rationale and the various types of asset recovery. The analysis proceeds by turning to its effectiveness within the broader anti-corruption framework and to the numerous barriers needing to be overcome before successful repatriation can occur. With a view to preparing the ground for the analytical project of Part II, the final section of Chapter 2 considers civil recovery as a type of legal fiction and as part of the 'civil-isation' of criminal law.

Part II: Normative critique of Part 5 civil recovery – criminalisation and penalisation arguments

Part II undertakes a normative critique of Part 5 civil proceedings wherein the constitutional limits of Part 5 of POCA 2002 are examined. Part II normatively critiques the Part 5 provisions by first undertaking a conceptual analysis of civil recovery and criminal confiscation prior to examining the leading Strasbourg jurisprudence. It is concluded that civil recovery represents a 'prevalence of purpose and policy over truth',[35] and that the distinction between civil recovery and criminal confiscation is arguably not much more than a form of lexical hocus-pocus.

Chapter 3: Conceptual grounds for criminal classification of Part 5 civil recovery

In Chapter 3, a conceptual analysis of criminal and civil law measures, as well as of punitive and preventive measures, is undertaken. Despite judicial determinations to the contrary, I conclude that the conceptual apparatus of civil recovery is fundamentally flawed, *viz*. the conceptual distinctions made between preventive and punitive measures, and between *in rem* and *in personam* proceedings. I conclude that the *in rem* nature of Part 5 of POCA 2002 and subsequent civil classification is based on the legal fiction that it is the property itself that is guilty, and not the person in possession of that property.

Chapter 4: Case law grounds for criminal classification of Part 5 civil recovery (penalisation argument)

In Chapter 4, the leading Strasbourg test used to distinguish criminal from civil measures is applied to Part 5 of POCA 2002 (*Engel v The Netherlands*).[38] I argue that Part 5 proceedings can be determined as criminal under the three *Engel* criteria: 1) the classification of the offence in national law, 2) the nature of the offence (objective classification) and 3) the nature and severity of the sanction.[39] Strasbourg has yet to comprehensively investigate civil recovery, so in the light of this fact I turn to other asset recovery cases for guidance.[27] I conclude that it is unlikely that the ECtHR will determine Part 5 civil recovery to be criminal in nature.

Chapter 5: Civil recovery: a sufficient link to extend Article 6(2)?

Chapter 5 concludes that despite Strasbourg being unlikely to find Part 5 recovery criminal in nature, Part 5 recovery could still fall within the scope of Article 6(2).[40] This is owing to a series of Strasbourg decisions demonstrating that if links between civil and criminal proceedings are sufficiently close then Article 6(2) may still apply. The jurisprudence suggests that if a link can be established between criminal and Part 5 proceedings it would most likely be owing to the presence of incriminating language used in Part 5 proceedings.[42] The jurisprudence strongly suggests that the EctHR will not see a sufficient proximity link obtaining between criminal proceedings and Part 5 proceedings since, in both legislation and procedure,

[27] The criminal confiscation cases, the Customs and Excise forfeiture cases, the Strasbourg jurisprudence on Non-Conviction Based (NCB) confiscation and forfeiture orders that do not follow conviction, and the Italian mafia prevention orders

Part 5 proceedings are considered independent of criminal proceedings. However, there is one EctHR criminal confiscation case where a breach of Article 6(2) was found owing to the assets being confiscated subsequent to the acquittal of the defendant (*Geerings*). I argue that if the reasoning of this case is applied to Part 5 proceedings that follow an acquittal then there are grounds for claiming a proximity link between Part 5 proceedings and the prior criminal proceedings.[43]

Part III: Tensions between the collective and individual interests in combatting grand corruption

In the third part of the thesis, the difficulties of framing and balancing competing rights and duties arising in the fight against grand corruption are explored. Chapter 6 examines more closely the consequences of civil recovery for fundamental guarantees and protections, concluding that Part 5 proceedings do not meet all of the requirements of Article 6. Chapter 7 examines whether the different interests in civil recovery can be reconciled: on the one hand, the fundamental rights of public officials whose property is the subject of a civil recovery order and on the other hand the social and economic rights of her countrywomen and the wider public interest to live in a corruption-free society.

Chapter 6: Impact of civil recovery on fundamental guarantees and protections

Classifying Part 5 proceedings as civil carries with it significant consequences. The classification of civil recovery as a civil measure circumvents certain key due process protections of the criminal law. I conclude that the civil standard of proof based on

the balance of probabilities is not compatible with Article 6(2) when Part 5 recovery occurs subsequent to an acquittal owing to the criminal, punitive nature of Part 5 recovery as well as the characteristics and rationale for the presumption of innocence. I also conclude that Part 5 proceedings cannot be reconciled with the minimum rights of Article 6(3)(a), 6(3)(b), 6(3)(d) and 6(3)(e).

Chapter 7: Tensions between civil recovery and human rights

Chapter 7 concludes that the weakening of certain protections of Article 6 can only be justified when three conditions are met. These conditions are derived from the analytic framework developed by Andrew Ashworth, drawing on Dworkinian rights analysis, to help resolve the conflicts that arise in relation to Articles 5 and 6 in the context of combatting serious crime. I determine that if the three conditions are met it is possible to justify, on a case by case basis, the use of civil recovery to combat grand corruption. The first condition requires that the threat of grand corruption has a sufficiently strong empirical foundation (*bona fide* Condition). The second condition requires the State to initially undertake a three-step approach to tackling serious crime which requires that the most serious offences be criminalised and that there are sufficient resources allocated to the investigation, prosecution and conviction of these serious offences. The second condition then turns to the criteria that must be met to justify the protection of another individual right and/or the public interest to live in a corruption-free society (Human Rights/Public Interest Condition). The third condition requires that civil recovery effectively

contributes to the fulfilment of the social and economic rights of the victims of grand corruption and/or the public interest (Effectiveness Condition).

Chapter 8: Conclusion

Chapter 8 draws together the conclusions from the thesis. I conclude that the use of Part 5 proceedings to recover the proceeds of grand corruption is highly questionable. The objections raised with respect to the use of Part 5 proceedings in the context of grand corruption are three-fold and interrelated (criminalisation argument, penalisation argument, human rights argument). I further conclude that in instances in which an appeal is made to civil recovery, the use of civil recovery can only be justified in extreme circumstances, on a case by case basis, and when the criteria identified and argued for in this work have been satisfied.

Part I: Contemporary landscape of corruption and asset recovery

Chapter 1: Conceptual analysis of corruption

1. Conceptual tools for assessing the asset recovery legislation

The meaning of 'corruption' is derived from the Latin word 'corruptus' meaning 'to break'.[28] Corruption has long been held as an inescapable part of life with incalculable detrimental social and economic consequences.[29] However, it is only in the past two decades that the international community has begun to invest considerable resources to try to bring an end to this global phenomenon.[30] The tripartite structure of Part I seeks to provide the necessary factual background and conceptual apparatus to better understand the contemporary landscape of corruption and asset recovery. The first part outlines the genesis and history of the international legal framework that has recently emerged to combat corruption. The second part undertakes a conceptual analysis of corruption and asset recovery, beginning with an examination of the definition and scale of corruption. Thereafter, I evaluate the effectiveness of anti-corruption and asset recovery regimes in general, and then examine the case of the UK. With a view to preparing the ground for the analytical project of Part II, the final sections of Part I considers civil recovery as a type of legal fiction and as part of the 'civil-isation' of criminal law.

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[28] Nicholls and others (n 9) 1-2
[29] Adam Graycar and Russell Smith, *Handbook of Global Research and Practice in Corruption* (Edward Elgar 2011) 3-12
[30] Daniel Thelesklaf and Pedro Pereira (eds), *Non-state Actors in Asset Recovery* (Peter Lang 2011) xxvi-vii

Any normative critique of Part 5 recovery requires clarification on what exactly is meant by corruption, asset recovery and civil recovery. While corruption is not a wholly owned subsidiary of governments,[31] I will focus on 'grand corruption', which refers to the major corruption offences perpetrated by heads of State and other senior officials. This term is used interchangeably with the term 'kleptocracy', which literally means 'rule by thieves'.[32] 'Civil recovery' refers to confiscation through judicial procedures related to a criminal offence for which a criminal conviction is not required.[33] Although these definitions are drawn from a wide array of soft and hard international legal instruments, none are universally accepted. [34]

Our analysis of civil recovery ought to also be informed by developments in criminal justice policy. Criminal justice policy has been characterised by a rise in preventive measures and a clash between two sets of ideologies – the promotion of human rights and the struggle against serious crime. These ideologies are themselves underpinned by a more fundamental clash in law and legal theory between idealism, with its idealistic desire for legality, and pragmatism, with its demand for extra-legal powers.[35] Additionally, criminal justice policy is subject to an increasing 'politics of

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[31] Tony Blair and Christopher Hitchens, 'Religion is a force for good in the world' BBC World Service Radio 4 December 2010

[32] Sharman, 'Chasing Kleptocrats' (n 8) 5-6

[33] Glossary of the FATF Recommendations <http://www.fatf-gafi.org/pages/glossary/n-r/> accessed 20 June 2014

[34] Ivory (n 10) 10

[35] Anthony Duff 'Perversions and Subversions of Criminal Law' in Anthony Duff and others (eds) *The Boundaries of the Criminal Law* (OUP 2010) 67-70, 88-93; Victor Ramraj 'Between Idealism and Pragmatism: Legal and Political Constraints on State Power in Times of Crisis' in Goold and Lazarus (n 22) 185-88; Lacey and Zedner in Maguire (n 4) 159-182, 179

rights scepticism' which sees a strong philosophical critique of the moral foundation of human rights claims and considerable political controversy regarding their judicial and constitutional protection.[36] These conflicting goals of criminal justice policy result in criminal procedure and evidence being approached from that of human rights or that of the sceptic whose overriding concern is for 'public safety' and 'public interest' considerations such as combatting corruption. In the context of civil recovery, a rights-based approach would prioritise the rights of a public official who is the subject of a civil recovery order by respecting the guarantees of Article 6. While sceptics would argue that certain guarantees of Article 6 ought to give way in order to combat grand corruption.[37]

Since the mid-twentieth century, the tension between a rights-based approach and a policy-based approach to criminal procedure and evidence has intensified owing to the entrenchment of human rights protections and the heightened international call to combat serious crime. Running parallel to these twin developments is the over-development of particular state functions. In the context of civil recovery, the clash between human rights and international efforts to combat corruption can be mapped onto the regulatory state, with its spread of the traditional policing and prosecutorial burden to the Asset Recovery Agency and High Court; as well as the preventive state, with its re-orientation away from reactive policing and post-hoc punishment; and finally the authoritarian state, with its evasion of

[36] Goold and Lazarus (n 22) 25-32
[37] Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (The Hamlyn Trust 2002) 38-43

procedural protections on public interest grounds.[38] It is possible to conclude that the criminal justice process is in some sense a victim of its own success with the rigorous structures and principles imposed by the criminal process and human rights law leading authorities to pursue proceedings in less procedurally rigorous 'non-criminal' legal spaces.[39]

2. Corruption and asset recovery in context

This section sketches a history of the main components of the global anti-money laundering (AML) and AC framework most relevant to grand corruption. The literature on corruption and asset recovery is part of a larger body of legal and political work on money laundering, terrorism and the war on drugs. This body of work is enriched by perspectives drawn from economics, public policy, human rights, criminal law and criminology.[40] Although much of this interdisciplinary work is beyond the scope of this thesis, where relevant its findings will be incorporated. This inquiry is situated on a legal landscape principally framed by public international law, the primary sources of which are international treaties, international customs, and general principles of law representing fundamental rules in national legal systems.

[38] Lucia Zedner and Andrew Ashworth, 'Defending the Criminal Law: Reflections on the changing character of crime, procedure, and sanctions' (2008) 2 *Journal of Criminal Law and Philosophy* 37-44. The various state labels are less intended to describe different kinds of state but rather the over-development of different state functions. For example, the overdevelopment of the authoritarian state 'function' is characterised by populist punitivism and public protection

[39] Zedner and Ashworth, 'Defending the Criminal Law' (n 38) 48-49; Zedner, 'Preventive justice or pre-punishment?' (n 16) 201; Lucia Zedner 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Lazarus and Goold (n 22) 80-82

[40] Graycar (n 29) 3-12. Thank you to John Hill for his expertise on AML

The subsidiary sources are found in judicial decisions, the relevant academic canon and the non-binding 'soft laws' enacted in relation to anti-corruption (AC).[41]

2.1 History of the anti-corruption and asset recovery framework

Corrupt practices and the laundering of corrupt assets have existed for centuries, yet the international AML and AC framework is still in its nascency.[42] Asset recovery is part of the 'follow the money' approach to crime control. Although the antecedents of asset recovery can be traced to the medieval world, asset recovery regimes in their modern form have existed only since the 1970s.[43] The history of asset recovery shows that from its very inception confiscation has been the subject of criticism. Throughout the eighteenth century this mechanism was heavily criticised for being little more than a way for absolute sovereigns to dispossess the rising moneyed classes.[44] In continental Europe, confiscation was abolished around the time of the French Revolution; it was formally abolished in the UK approximately a century later, after a prolonged period of disuse. In many jurisdictions, limited forms of confiscation did continue as a safety measure in relation to dangerous objects.[45] Asset recovery re-emerged in the US in the 1970s, and then elsewhere, as a response to

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[41] Ivory (n 10) 15-18. See also Charter of UN; Statute of International Court of Justice (ICJ Statute) (San Francisco 26 June 1945) 3 Bevans 1179, 59 Stat. 1055, TS No 993, entered into force 24 Oct 1945; Ian Brownlie, *Principles of International Law* (7th edn, OUP 2008) 5; Antonio Cassese, *International Law* (2nd edn, OUP 2004) 183

[42] Sharman, 'Chasing Kleptocrats' (n 8) 1-3

[43] Alldridge, *Money Laundering Law* (n 13) 71-88; Jeffrey Simser 'Perspectives on Civil Forfeiture' in Simon Young (eds), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting* (Edward Elgar 2009) 13-23

[44] Mark Pieth (ed), *Recovering Stolen Assets* (Peter Lang 2008) 6

[45] Mark Pieth, Lucinda Low and Peter Cullen (eds), *The OECD Convention on Bribery*: *A Commentary* (Cambridge University Press 2007) 254-258

drug trafficking and terrorism, and in more recent years as a response to organised crime and corruption.[46]

To understand the evolution of the fight against money laundering and corruption, it is important to place this movement in its broader, historical context. Technological advancements, the hollowing of the nation-State, and hyper-interconnectivity associated with globalisation have all influenced the nature and scope of corruption, as well as the efforts to combat it.[47] By the beginning of the twenty-first century, these trends contributed to the internationalisation of the national AC law enforcement model and the widespread adoption of international and regional AC treaties. There are now 39 major economic powers that have ratified the Organisation for Economic Cooperation and Development Anti-Bribery Convention (OECD Bribery Convention) and 165 States parties have signed up to the United Nations Convention Against Corruption 2005 (UNCAC).

The year 1997 saw the coming to the end of a 30 year reign of Zaire's kleptocratic dictator, Mobutu Sese Seko, which significantly helped mould popular and policy perceptions of kleptocracy, and elevate this issue onto the international policy agenda. The adoption of UNCAC in 2005 can be viewed as the culmination of a group of rich and poor states, intergovernmental and nongovernmental

[46] Alldridge, *Money Laundering Law* (n 13) 71-88. See also Camden Asset Recovery Inter-Agency Network (CARIN) <www.assetrecovery.org> accessed 1 March 2014
[47] Jonathan Tickner, Sarah Gabriel and Alan Bacarese (eds), *Getting the Deal Through: Asset Recovery in 19 jurisdictions Worldwide* (Peters & Peters 2013) 1-10

organisations, all agreeing that corruption is an international problem requiring a coordinated international response, inclusive of effective asset recovery. [48]

Socio-economic developments since the end of the WWII have also influenced the AC movement. For example, the rise of two of the key legal devices used to combat corruption, confiscation and the criminalisation of money laundering and corruption, are intimately tied with the post-WWII growth in legislation governing 'victimless' crimes, of which financial crime is a prime example. [49] The AC movement has additionally been influenced by the extent of corruption existent in the latter part of the twentieth century in both the developed and developing world. Pervasive, endemic corruption in newly independent States in a globalised economy undermined the view that 'development' alone could resolve the multiple problems besetting the Global South. At the same time, confidence in the decline of corruption in developed countries began to evaporate owing to numerous political scandals, such as the implosion of the Italian political system after the 'tangentopoli' revelations and the British 'cash for questions' affair in the early 1990s. [50]

Transnational corruption caught the eye of US policymakers in the 1970s when the US Securities and Exchange Commission found that more than 400 US based companies had made illegal payments of well over US $300 million to foreign

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[48] Jason Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cornell University Press 2017) 26-32

[49] Guy Stessens, *Money Laundering: a New International Law Enforcement Model* (CUP 2000) 4-15

[50] Robert Williams and Alan Doig (eds), *Controlling Corruption (The Politics of Corruption, 4) (No 4)* (Edward Elgar 2000) 16-26

government officials and political parties to ensure the facilitation of trade.[51] The modern international AC framework was born with the 1978 US Foreign Corrupt Practices Act.[52] Through various legal instruments, the US AC framework was exported from the US to the rest of the world. On the international plane, this occurred through the OECD Bribery Convention and UNCAC, and regionally through, for example, the 1996 Inter-American Convention Against Corruption and the 2003 African Union Convention on Preventing and Combating Corruption.[53] In the 1990s the EU also adopted numerous AC conventions.[54] Other UN conventions, such as the UN Convention against Transnational Organised Crime (the Palermo Convention) which is committed to preventing organised crime, contains helpful tools that can also be used in the fight against corruption.[55] The Palermo Convention foreshadowed key principles contained in the UNCAC with both 'corruption' and money laundering included in this Convention.[56]

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[51] Indira Carr, 'The United Nations Convention On Corruption: Making a Real Difference to the Quality of Life of Millions?' (2006) 3(3) *Manchester Journal of Economic Law* 3-4

[52] Elizabeth Spahn, 'Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the UNCAC' (2013) 23 *Ind Int'l & Comp L Rev* 1, 3-10

[53] Inter-American Convention against Corruption, Caracas, 29 Mar 1996, in force 6 Mar 1997; African Union Convention on Preventing and Combatting Corruption 2003, Maputo, 11 Jul 2003, in force 5 Aug 2006

[54] See e.g. Criminal Law Convention on Corruption, Strasbourg, 27 Jan 1999, in force 1 Jul 2002

[55] UN Convention against Transnational Organised Crime, New York 15 November 2000, in force 29 September 2003, 2225 UNTS (2000) 40 ILM 353; Sharman, 'Chasing Kleptocrats' (n 8) 1-2

[56] Sharman 'Despot's Guide' (n 48) 47. Article 8 of Palermo Convention obliges States Parties to criminalise bribery of national public officials. Article 6 requests the 'criminalisation' of the laundering of the proceeds of crime. Palermo Convention only becomes applicable when the offences of bribery and money laundering are both 'transnational in nature and involve an organized criminal group'

In addition to these international and regional legal instruments, soft law international mechanisms for accountability have emerged in the form of the Financial Action Task Force (FATF) Standards on Combating Money Laundering, Terrorist Financing and Proliferation Financing.[57] The normative values underpinning this international framework vary between morality, efficient free market competition, levelling the playing field for global business, development economics, respect for local law, and more recently the protection of human rights and the rule of law.[58]

While the codification of these anti-kleptocracy norms into law is valuable, by itself the UNCAC and the various AC conventions do little to practically help victim countries get their 'stolen money' back. In response to this, in September 2007 the World Bank and United Nations Office on Drugs and Crime jointly formed the Stolen Asset Recovery Initiative (StAR). The underlying motivation for this new initiative was governed by the view that anti-corruption efforts tended to be on the source countries for grand corruption, with inadequate focus on those hosting the resulting wealth (rich countries and offshore financial centers). A similar initiative was created by the G20, the Anti-Corruption Working Group, while the G7 set up the Deauville Partnership to help Arab states trace and repatriate stolen wealth.[59]

The next section will examine the definition of corruption, its scale and consequences, together with its relationship to organised crime and money

[57] Alldridge, *Money Laundering Law* (n 13) 104-106
[58] Spahn (n 51) 1-3
[59] Sharman 'Despot's Guide' (n 48) 49-52

laundering.[60]

2.2 Conceptual analysis of corruption

2.2.1 Definition of Corruption

Grand corruption, along with genocide, war crimes, torture, and police violence are core examples of State crimes.[61] Corruption is generally taken to mean the abuse of public office for private gain which States are obliged to criminalise within their territorial and extraterritorial jurisdictions.[62] Corruption has always been part of human relationships, affecting all countries regardless of their location or level of development.[63] Corruption is identified in most cultures, even if cultural relativism may have resulted in differing standards and values. The derivatives of the word 'corruption' in the major Indo-European and Semitic languages all contain similar connotations.[64] Condemnation for corruption is also found in every major religious tradition from Buddhism to Sikhism, Christianity to Islam.[65] Although there is a lack of international legal consensus on the definition of corruption, over the last decade instruments to combat corruption have become firmly entrenched in public international law.[66]

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[60] Sharman 'Despot's Guide' (n 48) 196
[61] Green and Ward in Maguire (n 4)
[62] Ivory (n 10) 15-27
[63] Graycar (n 29) 3-12
[64] Ivory (n 10) 16
[65] Abiola Makinwa, *Private Remedies for Corruption: Towards an International Framework* (Eleven International Publishing 2013) 40-45
[66] Ivory (n 10) 16-19

Corruption is also considered a type of 'transnational crime' where 'transnational crime' has been interpreted as 'the indirect suppression by international law, through domestic penal law, of criminal activities that have actual or potential trans-boundary effects'. Through the various 'suppression conventions', transnational crimes, including corruption, are addressed domestically through national laws and legal systems, as well as through international cooperation.[67]

Despite corruption being rooted in the transnational criminal arena, corruption is rarely expressly defined in the AC 'suppression conventions', or the soft law instruments agreed on by members of international and regional organisations since the 1990s.[68] The global corruption treaty UNCAC uses the term 'corruption' and its variants over seventy times, but does not define corruption in the abstract nor does it supply a list of acts or omissions to be considered 'corrupt'. Rather, it focuses on the concept of inducing another to act 'improperly',[69] and requires each State Party to adopt legal measures to establish certain criminal offences, including bribery, embezzlement, misappropriation or other diversions of property by public officials, trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, embezzlement in the private sector, money laundering, concealment of property obtained as the result of any of those offences and the obstruction of justice.[70]

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[67] Neil Boister, 'TCL?' (2003) 14 *EJIL* 955, 961; Ivory (n 10) 17-21
[68] Boister (n 63) 954; Cassese (n 41) 18–21; Ivory (n 10) 15-27
[69] Ivory (n 10) 101
[70] Nicholls and others (n 9) 2-3

In addition to the insights garnered from within the legal paradigm, further insights into the phenomenon of corruption can be found in the numerous economic, psychosocial and anthropological writings on corruption. When viewed through these prisms, corruption can be identified as a product of the interplay between 'primary human imperatives' and a socio-economic system bent on suppressing those imperatives – where primary human imperatives include both looking after one's personal interests and familial commitments. On this analysis, instances of corruption can be placed on a spectrum reflecting a gradation in tensions between these primary human imperatives and the larger socio-economic system. At its weakest, this tension manifests itself, for example, in the tendency for people to look out for themselves and those closest to them.[71] At its strongest, this tendency can lead to criminality in the form of inducing another to act 'improperly', in the sense provided for in UNCAC.

Although there is no common definition of corruption it is certainly agreed that corruption is a problem of serious proportions. We now turn to examine the scale of these proportions.

2.2.2 Scale of the problem

Corruption is evident throughout history but how large precisely is the problem of corruption? Measuring corruption, as with any illicit activity, is problematic owing to its hidden and multifaceted nature, and this is compounded by an absence of agreement on definition.[72] The magnitude of corruption-related wealth is difficult to estimate, as are the value of corrupt assets that cross borders owing to money

[71] Marcus Felson 'Corruption in the Broad Sweep of History' in Graycar (n 29) 12-18
[72] Finn Heinrich and Robin Hodess, 'Measuring Corruption' in Graycar (n 29) 18-34

laundering.[73] Due to the illegal nature of the transactions, precise statistics are not available and it is therefore impossible to derive a faithful estimate of the amount of money that is globally laundered annually.[74] Despite this, the literature on the scale of money laundering and corruption indicates that the level of illicit financial flows, however defined, is obscene.[75] For example, it is estimated that the former Indonesian leader Suharto embezzled between US $15-35 billion, while the former ruling thieves Marcos of the Philippines, Mobutu of Zaire and Abacha of Nigeria are alleged to have embezzled up to US $5 billion each.[76]

International public opinion in relation to corruption echoes these quantitative estimates and unsettling case studies. According to the world's largest public opinion survey on corruption, the Global Corruption Barometer 2013, conducted by the non-governmental organisation (NGO) Transparency International, more than half of people believe that the level of corruption in their countries had increased over the previous two years, with political institutions considered the most corrupt of all.[77] Similarly, in relation to the effectiveness of AC measures, the Global Corruption Barometer 2017 found that nearly six in ten people thought that their

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[73] Dimitris Ziouvas, 'International Asset Recovery and the United Nations Convention Against Corruption' in King, Walker and Gurulé (n 6) 592

[74] FATF Glossary <https://www.fatf-gafi.org/faq/moneylaundering/> accessed 9 September 2020

[75] Sharman, 'Chasing Kleptocrats' (n 8) 4-5

[76] Jack Smith 'The Recovery of Stolen Assets: a fundamental Principle of the UNCAC' (2007) 2 (U4 Brief) 2 <www.cmi.no/publications/file/2751-the-recovery-of-stolen-assets.pdf> accessed 3 February 2014

[77] Transparency International, 'The Global Corruption Barometer 2013' < www.transparency.org/gcb2013> accessed 12 May 2014. See Indira Carr, 'Fighting Corruption Through Regional and International Conventions: A Satisfactory Solution?' (2007) *European Journal of Crime, Criminal Law and Criminal Justice'* 125-128

government was doing poorly in the fight against corruption in their country.[78] These statistics warrant corruption being labelled as a serious global problem with serious global, and local, consequences.

2.2.3 Consequences of corruption

There is extensive analysis on, and acceptance of, the corrosive effects of corruption. At the Fourth High Level Forum on Aid Effectiveness it was recognised by representatives from across the globe that corruption poses many immediate and long-term threats to democracy, justice, the environment and the economy.[79] Corruption is a serious obstacle to economic and social development; undermining the fairness, stability and efficiency of a society.[80] For example, it is estimated that for every US $100 million lost through corruption, 250,000 water connections for poor households could be funded. Corruption leaves no arena of life untouched, from access to clean water and clean air to life expectancy rates, poverty levels and security.[81] Corruption undermines the rule of law, foreign aid, economic investment and public policies; it drains currency reserves, reduces the tax base, increases

[78] Transparency International, 'The Global Corruption Barometer 2017' <https://www.transparency.org/whatwedo/publication/people_and_corruption_citizens_voices_from_around_the_world> accessed 19 May 2019

[79] Francesca Recanatini 'Assessing Corruption at Country Level' in Graycar (n 29) 34-65. See also Busan Partnership for Effective Development Cooperation (2011) <www.oecd.org/dac/effectiveness/49650173.pdf> accessed 29 November 2013

[80] Division for Treaty Affairs United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2nd Rev edn, UN 2012) iv-v; Peter Langseth, 'Measuring Corruption' in Charles Sampford, *Measuring Corruption* (Ashgate 2006) ch 2

[81] Smith (n 78) 1-2

inequalities and hinders economic competition.[82] Corruption disproportionally affects the poorest and most vulnerable in society. Corruption undermines the human rights of vulnerable and disadvantaged people by distorting the rules regarding allocation, inclusion and accountability that regulate access to the distribution of public resources in favour of corrupt interests. Corruption subverts these rules, and the more this subversion diminishes these rules, the less space there is for human rights.[83]

The evidence is abundantly clear, corruption plays a role in the exacerbation of all of the major problems facing the world.[84] A closer look at bribery can help us to see the first order and second order effects of corruption. The first order effects of bribery include the inefficiency and unfairness introduced by the payment of the bribes themselves in terms of both the effects of bribes on the allocation of public benefits and costs, and the transactions costs of giving and receiving illegal payments. Furthermore, the search for bribes can affect the allocation of investment funds within a country and help determine the overall level of investment. The second order effects concern the disposition of bribery revenues. The illegal nature of bribe-payments limits the way the funds can be used owing to the inherent need to have

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[82] Sharman, 'Chasing Kleptocrats' (n 8) 21-22; Division for Treaty Affairs United Nations (n 77) 223-229

[83] Magdalena Sepúlveda Carmona, 'Corruption and Human Rights: Making the Connection' (Transparency International 2009) 119; Transparency International, *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities* (Transparency International 2010) 33-34. For further discussion of the impact of corruption on human rights see section 2.2.2 of Chapter 7 of the of thesis

[84] Jay Albanese and Philip Reichel (eds), *Transnational Organized Crime: An Overview of Six Continents* (Sage Publications 2014), pt II; Campbell, 'The Recovery' (n 19) 15-20

their illicit origin concealed. Bribery revenues need to be laundered and this encourages investment of these funds outside national borders, and/or into illegal business ventures.[85]

To unpack further the concept of corruption it must be examined in the context of its transnational bedfellows, money laundering and organised crime. I now turn to the intimate and unholy alliance between corruption, organised crime and money laundering.

2.2.4 Corruption, organised crime and money laundering nexus

Put simply 'clean money is worth more than dirty money'. The ability of kleptocrats to transfer and conceal their stolen assets effectively is a critical link in the chain of grand corruption.[86] Money laundering refers to the process by which illicit gains generated from criminal activity are concealed.[87] Hence, fighting money laundering is inextricably linked with fighting corruption.[88] Numerous studies show that nearly all cases of grand corruption rely on corporate vehicles and legal structures, such as companies and trusts in the onshore and offshore world, to conceal the true beneficial

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[85] Susan Rose-Ackerman, 'Democracy and 'grand' corruption' (1996) *International Social Science Journal* 366; Susan Rose-Ackerman and Bonnie Palifka (eds) *Corruption and Government: Causes, Consequences, and Reform* (CUP 2016)

[86] Leila Talani 'Globalization, Money Laundering and the City of London' in King, Walker and Gurulé (n 6) 57-79

[87] FATF, 'Corruption A Reference Guide' (2012) <www.fatf-gafi.org/media/fatf/documents/reports/Corruption%20Reference%20Guide%20and%20Information%20Note%202012.pdf> accessed 13 October 2013

[88] FATF, 'Report Specific Risk Factors in Laundering the Proceeds of Corruption' (June 2012) <www.fatf-gafi.org/media/fatf/documents/reports/Specific%20Risk%20Factors%20in%20the%20Laundering%20of%20Proceeds%20of%20Corruption.pdf> accessed 20 October 2013

owner(s) of corrupt assets.[89] There also exists a facilitative, mutually reinforcing relationship between corruption and organised crime. [90]

The central role played by corrupt exchanges in any organised criminal activity ought to suggest that these two offences are complementary: corruption as a tool of organised crime, and organised crime as a developmental stage in in corrupt processes. Corruption is a key characteristic of organised crime itself since its provision of illicit goods and services requires an element of connivance or protection from those in the public sector. Organised criminals often need corrupt representatives within institutional agencies to shield them from prosecution or to gain access to markets and other resources. [91]

Organised crime is normally taken to refer to a criminal enterprise working to profit from illicit activities typically maintained through force, monopolistic control and the corruption of public officials.[92] Usually, only 'traditional' criminals, such as drug traffickers and people smugglers, are considered to be perpetrators of organised crime. However, some argue that this is inadequate since an alliance formed between a corrupt official, their family members and others, including banks, the police and

[89] Emile van der Does de Willebois, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets* (World Bank 2011) 1-102
[90] FATF, *Corruption A Reference Guide and Information Note* (FATF July 2011)
[91] Mirela Loredana Nițu and Adriana Magdalena Sandu, 'Corruption and Organised Crime' *Contemporary Readings in Law and Social Justice* 5(2) 2013 454–460, 455-56; Phillip Gounev, 'Organised crime, corruption and the private sector' in Philip Gounev and Vincenzo Ruggiero, *Corruption and Organized Crime in Europe: Illegal Partnerships* (Routeledge 2012) 20-21
[92] Jan van Dijik and Toine Spapens, 'Transnational Organised Crime Networks' in Albanese and Reichel (n 81) 213-226

military, could also be legitimately categorised as organised crime.[93] This 'Kleptocratic interdependence' has been called 'a parasitic symbiosis between the public and the private sectors' in which different groups become a 'parasitic state class' which in turn contribute to an increase in the alienation felt by those groups excluded from the advantages of corruption.[94]

This 'symbiotic organised crime group' can be viewed as involving a series of transactions, where the transactions occur between a network of individuals involved in a common activity and the individuals themselves are not necessarily members of the same culturally homogenous group. In gaining access to the legitimate economy, and to the realm of institutional politics, powerful organised crime groups are able to straddle legality and illegality. Which sees conventional criminal markets and white-collar and corporate crime interacting with legitimate markets.[95]

Closer examination of one particular type of corruption utilised by organised crime groups, namely internal fraud carried out in collusion with external fraudsters, can garner insights into how the legal-illegal nexus operates within the private sector. When organised criminals penetrate and take advantage of a private company without the knowledge and against the will of its owner(s) it is an example of 'the abuse of professional power for personal profit'.[96] Our example here will be the

[93] Michael Levi and Nicholas Lord, 'Links Between Corruption and Organised Crime and Research Gaps' in Thelesklaf and Pereira (n 30) 39-62
[94] Ruggiero and Gounev, 'Corruption and the disappearance of the victim' in Gounev and Ruggiero (n 93) 20-21; Williams and Doig, *Controlling Corruption* (n 49) 16, 25-26; Kate Gillespie and Gwenn Okruhlik, 'The Political Dimensions of Corruption Cleanups: A Framework for Analysis' (1991) 24 *Comparative Politics* 1, 77-9
[95] Niţu and Sandu (n 93) 455-56
[96] Ruggiero and Gounev, 'Corruption and the disappearance of the victim' in Gounev and Ruggiero (n 93) 56-60

procurement, trafficking and sale of the illegal commodities of cigarettes and alcohol. It should be noted that the problems with empirical data on corruption are only heightened when trying to analyse private sector corruption as the corrupt exchange between members of the underworld and managers or employees is not systematically collected. The dearth of empirical knowledge is further exacerbated by the fact that fraud, especially when involving a corrupt employee, is underreported by companies even when detected.[97]

The stages involved in private sector corruption related to cigarettes and alcohol are briefly set out as follows. At the procurement stage, the managers of cigarette and alcohol distributing companies could be corrupted into selling quantities with the clear understanding that the goods will be re-exported as contraband. At the trafficking stage, drivers or managers within transport companies, including international bus and truck companies, or airline staff, could be paid off to transport any illegal commodity. At the distribution stage, bar or restaurant staff or store sales staff, typically with management's knowledge, could be corrupted into selling contraband cigarettes or alcohol.[98] The money generated from this illegal activity will then need to be laundered through, for example, the financial sector or real estate sector.

Various Kroll Reports highlight a number of corruption trends in the financial and real estate sector. Money launderers use off-shore companies, shell companies, trusts

[97] International surveys such as the Kroll/Economist Intelligence Unit Global Fraud Report offer the most systematic collection of information on the phenomenon of private sector corruption

[98] Phillip Gounev, 'Organised crime, corruption and the private sector' in Gounev and (n 93) 58

and foundations to create schemes whereby bank complicity is difficult to prove or not required. Additionally, small locally owned banks are more frequent targets, because they usually have fewer internal controls compared with the larger international banks. As well as taking advantage of complex financial structures, the real estate sector is regularly utilised by organised crime groups. The purpose of acquiring real estate is to launder the proceeds of crimes already committed, and to acquire cash-intensive businesses that would allow continuous money laundering of criminal proceeds. It is often corrupt employees or managers in property management companies, real-estate investment companies, and realty companies that facilitate these money laundering schemes.[99]

A corollary of the close connection between corruption and money laundering is that a sound AML regime has the potential to contribute significantly to the fight against corruption. A strong AML regime helps to uncover evidence of corruption through the identification of suspicious movements of financial assets, thus increasing the chances of a successful prosecution of the perpetrator of the crime. An effective AML regime also enables the tracing of criminal proceeds to facilitate their preservation, recovery and ultimate return to their rightful owner.[100] The twenty-first century approach to combatting money laundering and corruption includes: private

[99] Kroll/Economist Intelligence Unit (2008) Global Fraud Report: Annual Editions 2008/2009. Kroll; Kroll/Economist Intelligence Unit (2011) Global Fraud Report: Annual Editions 2011/2012; Kroll/Economist Intelligence Unit (2019) Global Fraud Report: Annual Editions 2019/2020 < https://www.kroll.com/en/insights/publications/global-fraud-and-risk-report-2019> accessed 24 September 2020. See also Gounev, 'Organised crime, corruption and the private sector' in Gounev and Ruggiero (n 93) 56-60

[100] Indira Carr and Miriam Goldby, 'Recovering the Proceeds of Corruption: UNCAC and Anti-money laundering Standards' (2011) 2 *Journal of Business Law* 170-193

sector measures such as preventative systems and controls within financial institutions (e.g. filing Suspicious Activity Reports (SARs)); methods based in traditional criminal law and administrative law concerning taxation; civil litigation through regime change lawsuits; and civil recovery.

This section has explored the definition of corruption, its significant scale and consequences, together with its relationship to organised crime and money laundering. As well as exploring a brief history of the main components of the global AML and AC framework most relevant to grand corruption. With this sketch of corruption and the international AC framework now in place, we are in a position to turn to an analysis of the concept of asset recovery, with especial focus on civil recovery.

Chapter 2: Conceptual analysis of asset recovery

Here I move beyond the rhetoric of asset recovery by examining the reality of this much vaunted AC tool, as well as the theoretical and empirical justifications for its use. I will start with a definition of asset recovery and move onto a sketch of the basic law governing asset recovery, the various types of asset recovery and its rationale. Our analysis will then turn to its effectiveness within the broader AC framework and to the numerous barriers that must be overcome before successful repatriation can occur.

1. Nuts and bolts of asset recovery

There are no agreed-upon definitions of asset recovery employed in public international law but it is generally held to mean the recovery of the proceeds or instrumentalities of crime.[101] This thesis is concerned with the recovery of the proceeds of corruption, rather than the broader proceeds or instrumentalities of crime. Taxonomically, 'confiscation' and 'forfeiture' are types of asset recovery. There is a lack of consensus between academics, policy makers and practitioners about what 'confiscation' and 'forfeiture' mean with the specific meaning given often dependant on the jurisdiction.[102] For the purposes of this analysis, we will use the FATF definition which is similar to the widely used UNODC definition. The term 'confiscation', which includes forfeiture where applicable, means the permanent

[101] Ivory (n 10) 27-34

[102] King in King, Walker and Gurulé (n 6) 378-383. See UNODC *Manual on International cooperation for the Purposes of Confiscation of Proceeds of* Crime (UN 2012: 2); Derek Hodgson, *Profits of Crime and Their Recovery: Report of a Committee Chaired by Sir Derek Hodgson* (Heinemann 1984) 4-5

deprivation of funds or other assets by order of a competent authority or a court. Confiscation, or forfeiture, proceedings take place through a judicial or administrative procedure transferring the ownership of specified funds or other assets to, typically, the State.[103]

There are typically two avenues of confiscation used internationally to recover the proceeds and instrumentalities of crime: civil forfeiture/recovery and criminal confiscation. Additionally, assets can be recovered through private civil actions and administrative confiscation.[104] Confiscation measures can be further classified according to the relation between the property at stake and the acts for which confiscation is being pronounced. The scope of this inquiry is limited to the confiscation of the proceeds of crime (*fructum sceleris or productum sceleris*), which relates to the financial gains obtained through criminal activities. Confiscation procedures can also be differentiated on the basis of liability. Confiscation proceedings are conducted either against a person (*in personam*) where there is a claim against a person for a crime or breach of a legal duty, or against the property (*in rem)* where there is an action asserting a proprietary claim over the assets.[105]

Whichever avenue is pursued the objectives and fundamental processes for recovery are essentially the same. The common stages of asset recovery involve the collection of intelligence, evidence and tracing of assets, securing the assets, the court

[103] FATF, 'Best Practices on Confiscation' (FATF 2012)
[104] Jean-Pierre Brun and others, *Stolen Asset Recovery Initiative Asset Recovery Handbook: a Guide for Practitioners* (World Bank 2011) 5-9
[105] Stessens, *Money Laundering* (n 48) 29-40

process, the enforcement of orders, and finally the return of assets.[106] The international framework for asset recovery is provided for in UNCAC, the central international convention underpinning the AC framework. UNCAC globalised the fight against corruption and the use of asset recovery measures. The provisions of UNCAC essentially cover five topics: prevention, criminalisation and law enforcement measures; international cooperation; asset recovery; technical assistance; information exchange. The inclusion of asset recovery as a fundamental principle of UNCAC can be viewed as its most significant and innovative feature.[107]

Chapter V of UNCAC provides for a range of flexible measures for the return of assets.[108] It specifies two general approaches to recovery: direct recovery of property, including civil actions,[109] and recovery through international cooperation in confiscation.[110] Parties need only consider adopting confiscation without a criminal conviction, i.e. civil forfeiture/recovery, in cases in which the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases.[111] A further groundbreaking provision of UNCAC is that the proceeds of corruption once confiscated must be returned to the victims of corruption.[112] Article 57 covers the return of assets and requires state parties to ensure that confiscated property is

[106] Brun (n 95) 103-120
[107] UNCAC Preamble; Division for Treaty Affairs United Nations (n 77) 193-229. See also Smith (n 78) 1-4
[108] UNODC, 'Legislative Guide for Implementation of UNCAC' (2006) para 708
[109] UNCAC, art 53
[110] UNCAC, art 54
[111] UNCAC, art 54(1)(c)
[112] UNCAC, art 57; Simon Young, 'Why Civil Actions Against Corruption?' (2009) 16 2 *Journal of Financial Crime* 144

returned to the requesting state whilst taking into account the *bona fide* rights of third parties who may be the legitimate owners.[113] It should be noted that there are a number of practical difficulties in successfully repatriating assets to requesting states, which are addressed in further detail in Chapter 7 of this work. Throughout UNCAC there is the requirement that State Parties respect the fundamental principles of due process.[114]

UNCAC includes a list of offences including private and public sector corruption, active and passive bribery, trading in influence, illicit enrichment, abuse of function, and laundering and concealing the proceeds of corruption.[115] The Convention also covers obstacles to enforcement, such as the use of force, threats or the offer of bribes in order to induce false testimony.[116] The Convention's preventive measures range from provisions on banking secrecy to the creation of financial intelligence units. Additionally, states are required to put in place procedures that ensure relevant gatekeepers, such as banks, are aware of the sources of their funds as well as the names of beneficiaries.[117]

With these UNCAC provisions in mind, I now turn to the justifications proffered for the use of asset recovery as well as the barriers to its use.

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[113] UNCAC, art 57
[114] UNCAC, art 32(2), 30(6); Ivory (n 10) 117
[115] UNCAC, Article 15 – 24. See also Indira Carr and Robert Jago, 'Corruption, the UNCAC and Asset Recovery' in Colin King and Clive Walker, *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate 2014) 207-216
[116] UNCAC, Article 32. See also Carr and Jago, 'Corruption, the UNCAC and Asset Recovery' in King and Walker, *Dirty Assets* (n 118)210
[117] UNCAC, Articles 38–40, 43–46, 52. See also Carr and Jago , 'Corruption, the UNCAC and Asset Recovery' in King and Walker, *Dirty Assets* (n 118) 210-19

1.1 Rationale for asset recovery

The rationale for asset recovery varies considerably across jurisdictions: some focus on deterrence, others emphasise restitution of property to the victims of crime, while still for others the focus is on prevention of crime.[118] At the heart of all asset recovery efforts lies the assumption that most crime is profit driven, and so the critical justification for asset recovery tends to be its ability to convey the message that crime does not pay.[119]

The three prominent justifications advanced for asset recovery centre on revenue, crime reduction and punishment, respectively. [120] With respect to revenue, asset recovery can generate significant revenue flows to fund government programs and initiatives.[121] With respect to crime reduction, asset recovery plays a deterrent and incapacitative role in the following ways: by reducing the expected gains from corruption; by deterring crime by reinforcing the idea that 'crime does not pay'; by disrupting organised crime networks; by removing the working capital for future criminality; by improving crime detection rates generally by providing a deeper

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[118] Pieth, Low and Cullen, *OECD Convention* (n 45) 255-56; Simser in Young (n 43) 13-23; Division for Treaty Affairs United Nations (n 77) 193-229; Theodore Greenberg, *Stolen Asset Recovery A Good Practices Guide for Non Conviction Based Confiscation* (World Bank 2009) 103-104

[119] Performance and Innovation Unit (PIU), 'Recovering the Proceeds of Crime' (UK Cabinet Office 2000) 5-46 < http://webarchive.nationalarchives.gov.uk/+/http:/www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf> accessed 13 December 2013

[120] Matthew Fleming, 'An Examination of the Means of Establishing the Efficacy of Asset Recovery and AML Policies' (Phd thesis, University College London 2008) 22-24

[121] Mark Vlasic and Gregory Cooper, 'Beyond the Duvalier Legacy: What New "Arab Spring" Governments Can Learn from Haiti' (2011) 10 *Nw J Int'l Hum Rts* 19-20

understanding of corruption; by preventing the legitimate economy from being distorted with ill-gotten gains; by helping to weaken the influence of corrupt officials; by removing negative role models.[122] With respect to punishment, asset recovery may serve a punitive role in a corrective justice framework as well as offering a semblance of justice for victims.[123] Asset recovery can help to protect a community, while also serving larger political ends. The robust enforcement of asset recovery is viewed as one of the conditions for being a responsible member of the international community, while domestically it demonstrates that law enforcement is making efforts to combat crime, which is in line with the vote winning rhetoric of a tough-on-corruption image. [124]

The justifications for asset recovery are also applicable to civil recovery. However, a further impetus for the adoption of this particular type of asset recovery is the 'ineffectiveness of the criminal confiscation legislation.'[125] In the UK, the recognition of a need for 'a wider and more intrusive confiscatory reach to counter increasingly well organised and sophisticated criminal activity' led to the creation of a civil recovery system.[126] In the US context, Stephen Cassella argues where it is not

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[122] PIU (n 78) 5-7; King in King, Walker and Gurulé (n 6) 377. See also European Commission, *Communication from the Commission to the European Parliament and the Council. Proceeds of Organised Crime. Ensuring that 'crime does not pay'* COM (2008) 766, 3-4

[123] Vlasic and Cooper (n 108) 19-20

[124] Jennifer Hendry and Colin King, 'Expediency, legitimacy, and the rule of law: a systems perspective on civil/criminal procedural hybrids' (2017) *Criminal Law and Philosophy* 11 (4) 733-57; Fleming (n 107) 9

[125] Anthony Kennedy, 'Justifying the civil recovery of criminal proceeds' 2005 12 1 *Journal of Financial Crime* 8 20

[126] Anthony Kennedy, 'An Evaluation of the recovery of criminal proceeds in the UK' (2007) 10(1) *Journal of Money Laundering Control,* 33 – 46, 37

possible to obtain a confiscation order as part of a criminal case, it is essential that the forfeiture laws have a civil component allowing the State to recover the proceeds of crime independently of whether there is a criminal prosecution.[127]

Despite the many legitimate reasons for pursuing asset recovery and the significant progress that has been made over the last thirty years in terms of asset recovery legislation and its implementation and practices,[128] there remain numerous obstacles to asset recovery. I have briefly outlined the complex and technical nature of asset recovery, and will now consider the legal and other barriers to the successful repatriation of illicit assets.

1.2 Barriers to asset recovery

The main barriers to asset recovery fall under three distinct but related headings: general and institutional barriers; legal barriers; operational and communication barriers. Overall, experts agree that there are some twenty-nine barriers to successful asset recovery; the greatest obstacle of which is a 'lack of political will' since the effectiveness of asset recovery is heavily contingent on whether there is strong government support. This is closely followed by problems of lack of adherence to, and enforcement of, AML measures since the theft of public funds is only possible through the involvement of financial service providers across the globe.[129] Most of

[127] Stephen Cassella, 'The case for civil forfeiture: Why *in Rem* proceedings are an essential tool for recovering the proceeds of crime' *Journal of Financial Crime* 11, 1 8 - 14

[128] Smith (n 78) 1-4

[129] Transparency International, 'Recovering Stolen Assets: A Problem of Scope and Dimension' (TI 2011)

the legal barriers relate to the onerous requirements of mutual legal assistance, excessive banking secrecy, a lack of civil recovery procedures and an array of overly burdensome procedural and evidentiary laws. Finally, given that asset recovery is so dependent on international cooperation, in practice asset recovery tends to face often crippling operational impediments resulting from inadequate processes and poor channels of communication between national and international parties.

Perhaps one of the greatest hurdles to successful recovery in grand corruption cases is the requirement that the confiscation of stolen assets follow a criminal conviction.[130] There are significant hurdles arising out of insufficiencies in evidence that are unable to meet the criminal standard of proof.[131] Furthermore, the influence of corrupt officials and other practical realities, such as death or flight, may prevent criminal investigations, or at the very least severely delay them.[132] Civil recovery is thus considered a helpful tool against corruption. Corrupt leaders may protect themselves from prosecution with constitutional amendments creating lifelong immunity, as in the case of the former Chilean leader Augusto Pinochet with his implementation of 'senator for life' status. Or a corrupt leader might die before a criminal conviction can be obtained, as in the case of former President Abacha of Nigeria, or flee, as in the case of former President Alberto Fujimori of Peru.[133]

<http://issuu.com/transparencyinternational/docs/working_paper_022011_reovering_stolen_assets_en?e=2496456/3323486> accessed 24 May 2014

[130] Kevin Stephenson, *Barriers to Asset Recovery Stolen Asset Recovery Initiative* (World Bank 2011) 66-69

[131] Young (n 43) 3

[132] Stephenson (n 114) 66-69

[133] Young (n 43) 19-20

Taking a closer look at the early phases of the efforts to recover the $3 - $5 billion alleged to have been misappropriated in the 1990s by Nigeria's Sani Abacha and his associates helps to illustrate some of these barriers. By the time President Obasanjo (Abacha's successor) left office in 2007, he had secured the recovery of approximately $ 2 billion in assets and triggered some vital international initiatives against money laundering. However, President Obasanjo's efforts were hindered by a combination of obstacles. Externally, the anti-corruption campaign had insufficient international political will with, for example, inadequate cooperation from Switzerland, the UK and other governments. At the domestic level, it was undermined by: a lack of transparency, an excessive fixation with the Abacha loot rather than the corruption by other leaders, inadequate legal and accounting skills, a lack of cooperation from accused persons, and limited domestic political will.[134] All of these hurdles have an impact on the effectiveness of the AC framework, a topic to which I now turn.

1.3 Effectiveness of anti-corruption and asset recovery measures

The AC movement ought to be viewed as an on-going, often painstakingly slow, struggle to embed a cultural intolerance to corruption. UNCAC should rightly be viewed as a great triumph in the fight against corruption, representing the crystallisation of valuable international AC norms. In many respects though, this triumph marks a victory that is largely only limited to the statute books. While it remains true that since UNCAC's ratification considerable progress has been made in

[134] David U. Enweremadu, Nigeria's Quest to Recover Looted Assets: The Abacha Affair, *Africa Spectrum* 48(2) 51-66

streamlining the international and national AC frameworks, only a handful of countries can claim practical successes in the fight against grand corruption.[135] To effectively combat corruption a global multi-pronged strategy is required. This must be aimed at both the demand and supply side of corruption and implemented by a constellation of actors in the public and private spheres: governments, development agencies, international organisations, law enforcement, the private sector,[136] NGOs[137] and the media.[138]

From Tunisia to Yemen, the corruption of Middle Eastern regimes played a significant role in motivating the activists of the Arab Spring.[139] Yet despite strong political impetus to repatriate corruptly stolen assets to these Victim States and the hard work of the Arab Forum on Asset Recovery (AFAR), only minimal assets have been recovered so far.[140] The ex-leader of Libya Muammar Gaddafi is estimated to

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[135] Eric Uslaner, *Corruption, Inequality, and the Rule of Law: the Bulging Pocket Makes the Easy Life* (CUP 2008) 3-25; Tickner (n 47) 1-10

[136] Indira Carr and Opi Outhwaite, 'Controlling Corruption through Corporate Social Responsibility and Corporate Governance: Theory and Practice' (2011) *Journal of Corporate Law Studies*, 11 (2) 299-341; Carr and Goldby (n 91) 170-193

[137] Indira Carr and Opi Outhwaite, 'The Role of Non-Governmental Organisations (NGOs) in Combating Corruption: Theory and Practice' *Suffolk University Law Review* XLIV (2011) (3) 615-664

[138] Thelesklaf and Pereira (n 30) 1-16; World Bank, *Tracking Anti-Corruption and Asset Recovery Commitments A Progress Report and Recommendations for Action* (World Bank 2011) 51-55; Gretta Zinkernagel, Charles Monteith and Pedro Pereira, *Emerging Trends in Asset Recovery* (Basel Institute on Governance) (Peter Lang 2013) 347-353

[139] Stuart Levey, Fighting Corruption After the Arab Spring Harnessing Countries' Desire to Improve their Reputations for Integrity *Foreign Affairs* June 16 2011 < https://www.foreignaffairs.com/articles/middle-east/2011-06-16/fighting-corruption-after-arab-spring> accessed 25 May 2018

[140] Ziouvas in King, Walker and Gurulé (n 6) 607-8. See also The Economist 'Making a Hash of Finding the Cash' (5 November 2013) <https://www.economist.com/international/2013/05/11/making-a-hash-of-finding-the-cash> accessed 18 April 2019; Arab Forum on Asset Recovery is an

have looted between US $30-80 billion, while the former Tunisian leader, Zine el-Abidine Ben Ali, is alleged to have stolen between US $3-5 billion. Thus far only US $1 billion has been located, and far less than that amount has been repatriated. There have, however, been some notable successes witnessed over the past two decades. Overall, there is an upward trend in the success rates of asset recovery and in the willingness of governments and judges to implement asset recovery measures.[141] Such success stories include Nigeria and the Philippines recovering over US $700 million and US $600 million respectively.[142]

Despite the progress made, there remains a vicious cycle operating in the battle against corruption. The high levels of corruption in many countries prevent the full implementation of AC and AML measures and thwart the effectiveness of institutions charged with combating it.[143] Although there is no one-size-fits-all approach to combating corruption,[144] some common obstacles in the international fight against corruption have been identified. Anti-corruption strategies can be initiated at a variety of levels: international, regional, national, sub-national and local, yet all anti-corruption strategies are beset by problems of transferability,

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initiative in support of asset recovery efforts by Arab Countries in Transition <https://star.worldbank.org/ArabForum/About> accessed 20 September 2019; Transparency International, 'Just One House Recovered by UK from Arab Spring States' (24 November 2016) <*https://www.transparency.org.uk/press-releases/just-one-house-recovered-by-uk-from-arab-spring-states/* accessed 19 April 2019; Transparency International, *'Spring Cleaning'* (November 2016) <https://www.transparency.org.uk/publications/spring-cleaning/> accessed 19 April 2019

[141] Tickner (n 47) 1-10

[142] Smith (n 78) 1-4

[143] Thelesklaf and Pereira (n 30) 183-190

[144] Richard Heeks and Harald Mathisen, 'Understanding Success and Failure of Anti-Corruption Initiatives' (2012) 58 5 *Crime, Law and Social Change* 533-549

sustainability, cost effectiveness, sequencing and intent.[145]

Pursuing the proceeds of corruption is complex, costly and time-consuming owing to the global character of the financial network and the ease with which the proceeds of corruption can be transmitted.[146] Further obstacles include inadequate funding for domestic law enforcement efforts;[147] a lack of jurisdiction; divergent notions of corruption under domestic criminal law; numerous barriers to efficient international cooperation and implementation of AML measures.[148] The difficulty in implementing AML measures can be seen, for example, when persons associated with grand corruption circumvent banking Customer Due Diligence (CDD) controls by taking advantage of family members, friends or complex corporate structures as agents or intermediaries to layer the proceeds of their misdeeds. Additional obstacles faced by AML regimes emanate from those methods of laundering the proceeds of corruption that do not involve the financial system or that fall under FATF's definition of 'designated non-financial businesses and professions'. These methods include the layering of proceeds by transacting with businesses such as dealers in luxury goods, haute couture houses, auction houses and antiques dealers. [149]

There is however a more fundamental conceptual problem impeding the efforts to combat grand corruption which comes from an overly narrow analysis of

[145] Williams and Doig, *Controlling Corruption* (n 49) 16, 25-26
[146] Carr and Goldby (n 91) 170-193
[147] World Bank (n 121) 12-14
[148] Guy Stessens, 'The International Fight against Corruption' (2001) 72 *International Review of Penal Law* 894, 900-904
[149] Carr and Goldby (n 91) 170-193

corruption as a law-enforcement issue.[150] This narrow focus ignores the complex, inter-woven nature of corruption which is rooted in broader economic and legal inequalities.[151] The literature points to different strands of thinking when addressing how best to tackle corruption. Some anti-corruption specialists argue that corruption matters are best viewed as a subset of governance problems and that these governance problems are themselves a manifestation of structural/systemic facets of the underlying political economy. Contrastively, other specialists see the sources of corruption more narrowly, favouring instead the targeting of the most vulnerable parts of State activity. Examples include corrupt activities in customs services and procurement procedures. [152] However, these more targeted corruption measures tend to ignore the complex range of programmatic and bureaucratic reforms required to reduce the monopoly power of officials within political and bureaucratic structures. Any hope of reducing this monopolistic power requires, *inter alia,* vigorous, independent checks on power, a division of power within the State, an effective electoral system, and enforcement of the rule of law in commercial and political life. The prevention of endemic corruption at the highest levels of the political system also requires reducing the role of government within the economy, reforming government regulatory policies to incorporate market-based tests, and improving law enforcement and administrative systems.[153] The World Bank's

[150] Michael Johnston, 'Why Do So Many Anti-Corruption Efforts Fail?' (2011-2012) l 67 *NYU Ann Surv Am L* 467
[151] Uslaner (n 118) 36-32
[152] Williams and Doig, *Controlling Corruption* (n 49) 16-26
[153] Ackerman, 'Democracy' (n 82) 377-379; Susan Rose-Ackerman, *Corruption: a study in political economy* (Academic Press 1978)

description of their AC approach illustrates well the extent of the response required to combat corruption:

> [A] multi-pronged strategy that uses economic policy reform, administrative and civil service reform, improvement of legal and judicial systems, improvement of public expenditure and financial management and strengthening public oversight and other external accountability mechanisms.[154]

Resolutions passed at the third and fourth Conference of State Parties to the UNCAC (COSP 3 and 4) further illustrates the problems arising from the implementation of more targeted corruption measures contained in Chapter V of UNCAC (asset recovery). A fundamental weakness of the UNCAC is that State parties to the Convention are assumed to have the political will to take action when citizens become victims of grand corruption.[155] However, this fails to take into account the fact that generally State parties do not prosecute corruption, take a proactive approach to mutual legal assistance requests, nor make spontaneous disclosures of information on stolen assets. In practice, it is difficult for jurisdictions to track the money trail. Moreover, even when action is pursued the mutual legal assistance system is slow to respond. Kleptocrats tend not to leave stolen money in their own country as money

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[154] Carr and Goldby (n 91) 170-193; World Bank, *Helping Countries Combat Corruption Progress at the World Bank since 1997* (World Bank 2000) < http://documents.worldbank.org/curated/en/280381468739163146/Helping-countries-combat-corruption-progress-at-the-World-Bank-since-1997> accessed 2 March 2017

[155] Tim Daniel and James Maton, 'Is the UNCAC an effective deterrent to grand corruption?' in Jeremy Horder and Peter Alldridge, *Modern Bribery Law: Comparative Perspectives* (CUP 2013) 295-296, 316-322. See also Resolution 4/4 CAC/COSP/2011/L.5/Rev.2 <www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session4-resoltuions.html> accessed 18 February 2017

moves internationally at a fraction of a second thereby diminishing the effectiveness of any such effort at cooperation.[156]

To prevent the flow of stolen assets and return them to their country of origin requires overcoming obstacles as described. Preventing corruption can thus be accomplished only through simultaneous efforts undertaken by both Northern and Southern countries. To bring to justice corrupt leaders who steal their nation's wealth, a more transparent and accountable legal and financial governance framework is required within the world's financial centres. Concurrently, a well-integrated international asset recovery regime operating within both the requesting and the requested States is essential in successfully locating and repatriating the billions of dollars stolen through corruption.[157] It is important to keep in mind that anti-corruption legislation could only ever provide a partial solution,[158] and that it must therefore be drafted to appropriately reflect contextual realities so as to avoid an ineffective, one-size-fits-all approach.[159] Moreover, without effective monitoring

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[156] Jeffrey Simser, 'Asset Recovery and Kleptocracy' (2010) 17 *Journal of Financial Crime* 3 324-327

[157] Daniel Kaufmann, 'Revisiting Anti-Corruption Strategies: Tilt Towards Incentive-Driven Approaches?' in UNDP, *Corruption & Integrity Improvement Initiatives in Developing Countries* (UNDP 1998) 63-79; Fred Anderson, 'Recovering stolen assets: A problem of scope and dimension'<http://issuu.com/transparencyinternational/docs/working_paper_022011_reovering_stolen_assets_en?e=2496456/3323486> accessed 23 November 2016

[158] Indira Carr, 'Corruption, Legal Solutions and Limits of Law' (2007) 3 *International Journal of Law in Context* 227-255

[159] Richard Heeks and Harald Mathisen, 'Understanding Success and Failure of Anti-Corruption Initiatives' (2012) 58 5 *Crime, Law and Social Change* 533-549

and robust enforcement mechanisms, UNCAC is destined to remain just another set of rules, and as with all sets of rules it is vulnerable to being broken.[160]

The debate on the causes of corruption and their best response strategies continues because it is a complex, multi-faceted phenomenon requiring significant State resources.[161] Having outlined the limited success of the AC and asset recovery measures, this chapter will now turn to focussing more closely on an evaluation of asset recovery measures.

The assumptions underpinning the ability of asset recovery to reduce serious, acquisitive crime are widely agreed to be at best unprovable, and at worst fundamentally flawed.[162] Despite the rhetoric, no empirical research has yet been undertaken to establish its impact on crime. The ongoing calls for a comprehensive evaluation of these measures invite a response and the glaring empirical lacunae should be addressed.[163] There is scant evidence pointing to revenue generated from asset recovery benefitting victims of corruption, or funding anti-poverty projects.[164] Fundamentally, questions persist on what constitutes the key performance indicators

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[160] Carr, 'The United Nations' (n 50) 43

[161] Williams and Doig, *Controlling Corruption* (n 49) 16-26

[162] Karen Bullock and Stuart Lister, 'Post-Conviction Confiscation of Assets in England and Wales: Rhetoric and Reality' in King and Walker *Dirty Assets* (n 118) 47-71; King in King, Walker and Gurulé (n 6) 378 (criticism of economic returns of asset recovery). See also Committee of Public Accounts, *Confiscation Orders* (HC 942, 2013-2014); National Audit Office, *Confiscation Orders* (HC 738, 2013-2014)

[163] Jackie Harvey 'Asset Recovery: Substantive or Symbolic?' in King and Walker, *Dirty Assets* (n 118) 183-203; Michael Levi, 'New Frontiers of Criminal Liability: Money Laundering and Proceeds of Crime' (2000) 3(3) *Journal of Money Laundering Control* 223-32. For exploration of law in Canadian practice see M. Michelle Gallant 'An Empirical Glimpse of Civil Forfeiture Actions in Canada' in King, Walker and Gurulé (n 6) 543-563

[164] Simser in Young (n 43) 15-16; Zinkernagel (n 121) 305-347

of asset recovery. For instance, should the focus be on the 'money' or the 'impact' i.e. the level of disruption caused to corrupt activities? There has been a notable lack of clarity on such questions in the 15 years since POCA 2002 was enacted.[165]

While no positive correlation between international asset recovery and international development has been observed, or with reductions in the levels of corruption, experts nonetheless agree that robust AC and asset recovery regimes can enhance development and political accountability.

Some argue that lying at the root of the failure of asset recovery is the so-called 'governance paradox'. This process describes the flight of capital from the 'corrupt South' to the 'clean North'.[166] It is characterised by corrupt officials placing illicitly obtained assets in the international financial system through Northern countries, whose governments and financial institutions claim to have superior AML systems and processes.[167]

On balance, it could be argued that the value of asset recovery lies more in its moral symbolism and communicative properties than in its instrumental role as an effective AC policy and vehicle for crime control.[168] Part of the problem with the asset recovery model is that it is predicated on the assumption that criminals are 'rational cost-benefit calculators'.[169] It may be more accurate to view the criminal as a

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[165] King in King, Walker and Gurulé (n 6) 384
[166] Sharman, 'Chasing Kleptocrats' (n 8) 11-15
[167] Abdelmalek Alaoui, 'Three Years Later: The Arab Spring And The Hunt For Former Dictators' Assets' Forbes (1 Sept 2014) <www.forbes.com/sites/kerryadolan/2014/01/09/three-years-later-the-arab-spring-and-the-hunt-for-former-dictators-assets/> accessed 30 January 2014
[168] Bullock and Lister in King and Walker, *Dirty Assets* (n 118) 69
[169] Tom Blickman, 'Countering Illicit and Unregulated Money Flows: Money Laundering, Tax Evasion and Financial Regulation' (Transnational Institute

'complex product of psycho-socio-economic conditions', incurable by the threat of being stripped of their assets.[170] In the final analysis, a panacea for the perennial problem of corruption may never be found, but asset recovery, and in particular civil recovery, continues to be considered an important component in any AC toolkit. The effectiveness of UNCAC will depend ultimately on its implementation in the ratifying States and the extent to which these States are willing to enforce their AC laws.[171] I now turn to civil recovery with particular attention being paid to the UK regime and its effectiveness.

2. Civil forfeiture/recovery

Civil forfeiture/recovery has received strong endorsement at the highest levels of international decision-making, from the UN to the FATF and the G8.[172] Article 54(1)(c) of UNCAC requests State Parties to consider taking measures to permit confiscation without a criminal conviction if the offender cannot be prosecuted by reason of death, flight or in other appropriate cases. Most academic scholarship on civil forfeiture/recovery traces its origins to the 'deodands doctrine' that animated

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December 2009) 10 <http://www.tni.org/sites/www.tni.org/files/download/crime3_0.pdf> accessed 17 March 2014

[170] RT Naylor 'Towards a general theory of profit-driven crimes' (2003) 43 *British Journal of Criminology* 81ff; Rowan Bosworth-Davies, 'Money Laundering –Chapter Four' (2007) 10(1) *Journal of Money Laundering Control* 66, 88

[171] Carr and Jago, 'Corruption, the UNCAC and Asset Recovery' in King and Walker, *Dirty Assets* (n 118) 203-226

[172] SC Res 1617, 29 July 2005, UN SCOR, UN Doc S/RES/1617 (2005); FATF Recommendations 4, 36. See Jon Peter Rui, 'NCB confiscation in the European Union' (November 2012) 13 3 *ERA Forum* 349, 350-355

the English law from the Middle Ages up until the mid-nineteenth century. This doctrine allowed for retributive action against inanimate objects. A 'deodand' was a thing forfeited to the crown for pious uses as a result of 'it' causing the death of a person.

Traditionally, under the deodand's doctrine, forfeiture occurred after conviction for a felony(ies) and/or treason, while Admiralty forfeiture occurred after a breach of maritime or customs law.[173] It is the civil statutory forfeiture regime under Admiralty law, pursued through the civil courts, that is the true forerunner of modern *in rem* forfeiture. The Admiralty laws were passed to enforce the Navigation Acts to help ensure favourable trading relations between the British Empire and the rest of the world. To ensure compliance with the Navigation Acts, forfeiture penalties and an elaborate customs system were used to enforce them. In the eighteenth century, the concept of *in rem* jurisdiction (against the thing) became common in Admiralty law so that the vessel, rather than the captain, for example, could be sued if the vessel committed a wrong.[174] Civil forfeiture has been largely unused since the eighteenth century only emerging in the 1970s and 1980s in response to weaknesses in the criminal forfeiture model.[175]

There are many linguistic devices used to refer to civil recovery, including civil

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[173] *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 680; Campbell, *Organised Crime* (n 19) 203-204; *Austin v US*, 509 US 602, 612 (1993). See also Greek in Mieczkowski (n 6) 109-37

[174] Leonard Levy, *A License to Steal: The Forfeiture of Property* (UNC 1996) 1-20; Todd Barnett, 'Legal Fiction and Forfeiture: Historical Analysis of the Civil Asset Reform Act' (2001-2002) 40 *Duq L Rev* 77, 87-92

[175] Stephen Cassella 'An Overview of Asset Forfeiture in the US' in Young (n 43) 27; Campbell, *Organised Crime* (n 19) 201

asset forfeiture, NCB confiscation, civil forfeiture or confiscation.[176] Whatever term is employed, the hallmark of civil recovery is the lower civil standard of proof (on the balance of probabilities rather than beyond a reasonable doubt) and the *in rem* character at all stages of the asset recovery process.[177] The distinguishing feature of civil recovery, and that which takes it out of the criminal realm, is liability. Unlike in criminal confiscation, liability in civil recovery attaches to the 'guilty' thing, regardless of the *bona fides* of the current owner.[178] During civil recovery proceedings the court is not concerned with the guilt of a person (*in personam)*, but rather has to establish the presence of certain facts and circumstances, such as the financial capacity of the person to acquire the assets with his/her legal income. It is these characteristics, and the nature of grand corruption itself, which has contributed to this method of asset recovery often being deemed more attractive to those involved in the modern day fight against grand corruption, certainly at least when compared to traditional criminal confiscation.[179]

In terms of mapping the territory of civil recovery, there is a longer history within the common law world in jurisdictions such as the US, South Africa, and Ireland; an increasing number of civil law jurisdictions now though also have civil recovery provisions.[180] The focus of civil recovery on the financial assets of those

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[176] Jeffrey Simser, 'Perspectives on Civil Forfeiture' (2009) 2 <www.worldbank.org> accessed 20 October 2013
[177] Young (n 43) 2
[178] Stessens, *Money Laundering* (n 48) 30-33; Gallant, *Money Laundering* (n 5) 112-18; Ivory (n 10) 141-142
[179] Pieth (n 44) 5-9
[180] Simser in Young (n 43) 13-23

engaged in criminal activities is part of an emerging proactive approach to organised crime, terrorism and corruption.[181] There are two routes most commonly followed within the civil recovery paradigm. The first occurs within the context of criminal proceedings where the criminal procedural laws apply. The second approach occurs outside criminal proceedings in, for example, a civil or administrative proceeding that can occur separately from, or in conjunction with, any related criminal proceedings.[182] The focus of this inquiry is on the latter type of civil proceedings in the UK, to which I now turn.

3. UK asset recovery regime

The UK has a robust asset recovery regime comprised of four avenues for recovery: one form of conviction based criminal confiscation and three forms of NCB asset forfeiture - civil recovery, cash forfeiture and criminal taxation.[183] The early confiscation regimes under the Drug Trafficking Offences Act 1986, the Criminal Justice Act 1988, and the Drug Trafficking Act 1994 did not have an enviable track record in the recovery of criminal assets. In 2000, the UK Cabinet Office comprehensively reviewed the entire asset recovery regime. Consequently, in 2002 the Proceeds of Crime Act was introduced to consolidate the money laundering and

[181] King and Walker, *Dirty Assets* (n 118) 1. See also Cabinet Office and Home Office, 'Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime' (Stationary Office 2009)
[182] Pieth (n 44) 5-9
[183] Attorney General's Office, Attorney General's Office, 'Asset Recovery Powers for Prosecutors: Guidance and Background Note 2009' (29 November 2012) < https://www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009> accessed 5 November 2019

confiscation regime.[184] POCA 2002 brought into force a broad suite of powers predicated on the assumption that following the money trail would largely solve the problems associated with the conventional criminal justice system. These powers include sweeping provisions on AML,[185] post-conviction confiscation,[186] civil recovery[187] and the taxation of assets.[188]

The Part 5 civil recovery provisions authorise the recovery of 'property obtained through unlawful conduct', which includes both civil recovery for amounts over £10,000 in the High Court,[189] where proceedings usually occur in the Administrative Court, and the recovery of cash in summary proceedings.[190] This thesis is concerned with the first procedure. Under Part 5 of POCA 2002, for a civil recovery order to be made the court must be satisfied that the property is either 'recoverable property' or 'associated property', and must determine whether the property is, on the balance of probabilities, more likely than not to be the proceeds of unlawful conduct. Under POCA 2002, 'recoverable property' is defined as 'property obtained through unlawful conduct' (whether his own conduct or another's),[191] and property is obtained through unlawful conduct if a person obtains it 'by or in return for the conduct'.[192] 'Associated property' includes any interest in the recoverable

[184] Angela Leong, 'Asset Recovery under POCA 2002: The UK Experience' in Young (n 43) 187-228
[185] POCA, pt 7; King and Walker, *Dirty Assets* (n 118) 3
[186] POCA, pt 2; King and Walker, *Dirty Assets* (n 118) 3
[187] POCA, pt 5; King and Walker, *Dirty Assets* (n 118) 3
[188] POCA, pt 6; King and Walker, *Dirty Assets* (n 118) 3
[189] POCA 2002, pt 5 Ch 2 s287
[190] POCA 2002, pt 5 Ch 3
[191] POCA 2002, ss 304(1)
[192] POCA 2002, ss 242(1)

property.[193] These provisions have considerable jurisdictional reach as 'unlawful conduct' is defined as conduct occurring in the UK that is unlawful under the criminal law, and as any conduct occurring outside of the UK that is unlawful where it occurred and would be unlawful if it occurred in the UK.[194]

The Attorney-General's guidance for prosecutors provides useful clarification on the nexus between some of the Part 5 provisions, and the permitted inferences that can be drawn. Essentially, under Part 5:

> [I]t is not necessary to prove the commission of a particular criminal offence by a particular person on a particular occasion. It is sufficient to prove that the property was obtained through offending of a particular type.**[195]**

The power to recover civil proceedings before the High Court is reserved to, amongst others, the National Crime Agency (NCA), the DPP and the Director of the Serious Fraud Office.[196] The directors of the various authorities are required to exercise their functions under POCA 2002 'in the way best calculated to contribute to the reduction of crime'.[197] In exercising their functions the directors must have regard to guidance issued by the Secretary of State and the Attorney General.[198] Importantly, pursuant to section 2A(4) of POCA 2002 the guidance must indicate that '…the reduction of

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[193] POCA 2002, ss 245(1) and ss 304(1); *Singh v Director of the Assets Recovery Agency* [2005] EWCA Civ 580, [2005] 1 WLR 3747; Mark Sutherland Williams, Michael Hopmeier and Rupert Jones, *Millington and Sutherland Williams On the Proceeds of Crime* (4th edn, OUP 2013); 297-298
[194] POCA 2002, s 241
[195] Attorney General's Office (n 166)
[196] POCA 2002, ss 316(1)
[197] POCA 2002, s 2A
[198] Attorney General's Office (n 166)

crime is in general best secured by means of criminal investigations and criminal proceedings.'[199]

Civil recovery is therefore usually supposed to only be pursued where criminal investigations or proceedings cannot be proceeded with. However, it is possible to invoke civil recovery proceedings even though proceedings have not been brought for a criminal offence in connection with the property.[200] Scenarios that would lead to such an invocation include where there may be insufficient grounds for a prosecution, or the suspect is outside of the jurisdiction, or has died. Civil recovery can also be pursued where the defendant has been acquitted, where a conviction has been quashed,[201] or where a conviction is feasible, but use of the NCB powers might better serve the overall public interest. The public interest grounds for civil recovery include when the use of NCB powers better meets an urgent need to take action to prevent or stop offending which is causing immediate harm to the public, or where civil recovery represents a better deployment of resources to target someone with significant property which cannot be explained by legitimate income.[202]

Before this chapter turns to the effectiveness of asset recovery it is useful to briefly set out the key characteristics of post-conviction confiscation of assets provided for in Part 2-4 of POCA 2002. A confiscation order can only be made subsequent to conviction and all of the enhanced procedural protections of the criminal process

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[199] POCA 2002, ss 2A(4)
[200] POCA 2002, ss 240(2); *Director of the Asset Recovery Agency v Taher* [2006] EWHC 3406 (Admin); Williams, Hopmeier and Jones (n 196) 294-295; Hendry and King, 'Expediency' (n 127)
[201] *Olden v Serious Organised Crime Agency* [2010] EWCA Civ 143; Hendry and King, 'Expediency' (n 127) 745-746
[202] Attorney General's Office (n 166)

apply at the criminal trial, However, at the confiscation hearing, post-conviction, the standard of proof employed is the civil one.[203]

3.1 Effectiveness of UK asset recovery

The comprehensive asset recovery provisions under POCA 2002 mean that the UK has in law, at least, sufficient asset recovery powers, but there is considerable evidence to suggest that in practice the UK asset recovery regime is inadequate. Indeed, closer scrutiny of the UK statistics on the amounts recovered reveals some of the serious weaknesses in the UK asset recovery regime. An evaluation of the effectiveness of the UK asset recovery regime must incorporate the methodological concern on how the extremely high estimates on the total levels of criminal assets are even determined. Many argue that the expectations for the performance of asset recovery measures are thus set at an unrealistically high level.[204] A number of assessments of the UK's broader AML regime highlights the difficulties in assessing, and the limitations of, the UK asset recovery regime. Jackie Harvey in her 2005 assessment of the UK AML policies concludes that the inability to quantify the volume of money laundering activity and hence the effectiveness of countermeasures, including asset recovery measures, has forced reliance on a 'second best input

[203] Alldridge, 'Two Key Areas' (n 13) 173–74; Hendry and King, 'Expediency' (n 127) 745-746

[204] Home Office, 'Rebalancing the Criminal Justice System in Favour of Law-abiding Majority: Cutting Crime, Reducing Re-offending and Protecting the Public' (London: Home Office, 2008) 36; Bullock and Lister in King and Walker, *Dirty Assets* (n 118) 47-71

approach' that, instead, is focused on the whole compliance activity.[205] While Peter Sproat's work concludes that the POCA measures appear to have been infrequently employed against the threat of organised crime.[206] Empirical research highlights problems of data access in the field of asset recovery[207] and there are significant difficulties in gaining reliable asset recovery statistics in the UK, in terms of amounts seized and the different types of orders obtained. The more recent work of Jackie Harvey shows that the asset recovery figures between the various UK asset recovery agencies do not even match up.[208]

We must remain sceptical regarding the impact of asset recovery on criminal activity which had not been verified on a large scale.[209] However, asset recovery appears to have had some impact on the behaviour of criminals. The recent work of Jackie Harvey and Sam Sittlington adopts a qualitative approach through focus groups drawn from representatives of those involved in, and impacted by, AML (law

[205] Jackie Harvey, 'An Evaluation of Money Laundering Policies' 2005 8(4) *Journal of Money Laundering Control* 339–345

[206] Peter Alan Sproat, 'An evaluation of the UK's anti-money laundering and asset recovery regime' *Crime Law Soc Change* (2007) 47, 169–184

[207] Antoinette Verhage, 'Compliance and AML in Belgium: A booming sector with growing pains' (2009) 12(2) *Journal of Money Laundering Control* 113–133; Peter Sproat, 'The serious and organised crime agency and the National Crime Squad: A comparison of their output from open source materials' (2011) 21(3) *Policing and Society* 343–351; Sam Sittlington and Jackie Harvey, 'Prevention of money laundering and the role of asset recovery', (2018) 70 *Crime Law and Social Change* 429

[208] Harvey in King and Walker, *Dirty Assets* (n 118) 183-203

[209] Sittlington and Harvey, 'Prevention of money laundering' (n 190) 421, 428; Petrus van Duyne, Jackie Harvey, and Liliya Gelemerova, 'The Monty Python Flying Circus of Money Laundering and the Question of Proportionality' in Georgios Antonopolous (ed), *Illegal Entrepreneurship, Organized Crime and Social Control: Essays in Honour of Professor Dick Hobbs* (Springer Studies in Organized Crime 2016) 14-16

enforcement, prosecution, ex-offenders).[210] Their qualitative research provides some thought-provoking insights:

> You know in the old days you had the, what was termed, the ordinary decent criminal, the burglars and people like that, getting caught and jail was part of their life...they knew it was down the road there somewhere...I think they understand there is a chance and they plan accordingly' (Group E, ex-offender)[211]

> I think there are quite a few cases where a felon would be happy enough to plead guilty to whatever charges are before the court because they know they're not looking at substantial jail time, whatever but when it comes to taking their assets off them...that's when the real fight comes' (Group C, Prosecutors)[212]

The information obtained from the focus groups suggest that individuals who commit money laundering offences are not deterred from going to prison, this is seen as part of the job. However, a fear of having their assets confiscated does factor in these individuals choices. The qualitative study does, at first glance, show that the additional POCA 2002 powers of asset recovery have been successfully deterrent with criminals responding to asset recovery as a very real additional risk. However, on closer examination it is a risk that is seen as having to be mitigated rather than avoided with criminals looking to their defence teams to negotiate the best 'combination outcome' (e.g. conviction but no confiscation of assets) rather than asset recovery influencing them to desist from crime in the first place. However, owing to a lack of empirical research, it is not clear what the deterrent effect of imprisonment *v.* asset recovery is on corrupt officials who typically do not factor prison sentences

[210] Sittlington and Harvey, 'Prevention of money laundering' (n 190) 429. See also Gallant in King, Walker and Gurulé (n 6) 543-563
[211] Sittlington and Harvey, 'Prevention of money laundering' (n 190) 434
[212] Sittlington and Harvey, 'Prevention of money laundering' (n 190) 433

into their career trajectories in anything like the same way as 'ordinary decent criminals'.[213]

The information obtained from the focus groups further reveals that, in practice, the targets of civil recovery are not the crime targets that POCA 2002 intended. Instead, law enforcement, prosecutors and the judiciary, focus on the lowest hanging fruit of the criminal world: those cases which are easiest to prove or have identified assets without the need for a resource intensive, time consuming and complex financial investigation.[214] Based on the research of Harvey and Sittlington, it would also appear that courts consider confiscation as an alternative, rather than additional, to a custodial sentence. This is in conflict with the intention of the legislation that provides for confiscation to be dealt with at the end of the sentencing, and not instead of the sentencing. Furthermore, the prosecutors who were interviewed stated that their preference was for the predicate crime to be pursued, rather than the money laundering charges. They were seemingly content to leave the money laundering to civil recovery actions. This approach conflicts with the normative grounds for prosecuting criminals and from the clear intention of the POCA 2002.[215]

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[213] Sittlington and Harvey, 'Prevention of money laundering' (n 190) 434

[214] Michael Levi, 'Money laundering and its regulation' (2002) 582 *Annals of the American Academy of Political and Social Science* July, 181–194; Sittlington and Harvey, 'Prevention of money laundering' (n 190) 429; Jackie Harvey and Siu Fung Lau, 'Crime-money, reputation and reporting' (2009) 52(1) *Crime Law and Social Change*, 57–72; Petrus van Duyne and others, 'Bricks don't talk. Searching for crime money in real estate' in Petrus van Duyne and others (eds), *Crime, money and criminal mobility in Europe* (Wolf Legal Publishers 2009); Petrus van Duyne and Vander Beken, 'The incantations of the EU organised crime policy making' (2009) 51(2) *Crime Law and Social Change*, 261–281; Harvey in King and Walker, *Dirty Assets* (n 118)

[215] Sittlington and Harvey, 'Prevention of money laundering' (n 190) 437-439

It is worth reflecting on the fact that the targets of civil recovery are often the low hanging fruit of the criminal world. This aspect of the practical operation of civil recovery is part of a much broader trend found in the criminal justice system: the highly disproportionate criminalisation of the poor and the powerless.[216] Until the 1970s, 'crimes of the suits' were largely ignored when compared against the moral panic which surrounded 'crimes of the streets'.[217] However, the financial crisis of 2007 solidified the emerging narrative that white-collar offenders can be 'bad guys'.[218] Nonetheless, crimes committed by the dominant elite with their massively more impactful harms felt by property and people,[219] rarely feature in the mainstream media and are comparatively absent from the criminological literature as well as the criminal justice system.[220] It remains the case that it is the poor that disproportionately pay the price through both the pains of victimisation of crimes and

[216] David Nelken 'White-collar and Corporate Crime' in Maguire (n 4)
[217] Hagan 2010 in Maguire (n 4)
[218] Francis T Cullen and others, 'Bad guys: Why the public supports punishing white-collar offenders' (2009) 51 *Crime Law Soc Change* 31–34
[219] Robert Reiner, *Crime, The Mystery of the Common-Sense Concept* (Wiley 2016) 8-9
[220] Paddy Hillyard and others (eds), *Beyond criminology: Taking Harm Seriously* (Pluto 2004) 16; Michel Levi, 'The Media Construction of Financial White-Collar Crimes' (2006) 46(6) *British Journal of Criminology*; Reiner, *Crime* (n 222) 86

disproportionate punishment.[221] A key exception to this formal political focus on street crime is financial crimes and corruption. [222]

Despite these exceptions to the rule, there is an ongoing trend, on the one hand, for a rolled-back, non-interventionist State for the regulation and policing of the powerful and, on the other, a strong, interventionist, law and order State for the powerless.[223] This difference in approach is seen in the practical operation of Part 5 of POCA 2002, and also in the abuses of the US civil asset recovery regime which often targets minor offenders and innocent property owners rather than the upper echelons of the criminal world.[224] US examples include an El Salvadoran cleaner in

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[221] Ashworth, *Human Rights* (n 37) 3, 23, 77; Hazel Croall, *Understanding White Collar Crime* (Open University 2001) 29; Neal Shover and John Paul Wright (ed) Crimes of Privilege: Readings in White-Collar Crime (OUP 2000); Roy Coleman and others, *State, Power, Crime* (Sage 2009) 111-158; Gary Slapper and Steve Tombs, *Corporate Crime* (Longman 1999) 84. Pamela Davies, Peter Francis and Victor Jupp (ed), *Invisible Crimes: their victims and their regulation* (Macmillan 1999) 1-16; Penny Green and Tony Ward, *State Crime: Governments, Violence and Corruption* (Pluto Press 2014) 1-11. There are a number of mechanisms through which the 'collective ignorance' regarding crimes of the powerful are maintained: ideologies of business, media representations of crime, the nature of victimisation, causal complexity, methodological problems, and the unequal nature of existing power relations. Moreover, the 'influence of affluence' affects the definition and the sanctioning of harms as the corporate and political elites have the power to shape the definition of crime, the operation of the criminal justice system, the collective imagination on crime, and the unequal nature of access to justice.

[222] Over the past 20 years, there has been a 'corruption eruption' with corruption now at the top of the global political agenda and firmly within the purview of academia and NGOs. See Slapper and Tombs, *Corporate Crime* (n 204) 86-100; Hillyard and others, 'Beyond Criminology' (n 223) 17; Organisation for Economic Co-operation and Development, *No Longer Business as Usual Fighting Bribery and Corruption* (OECD Publishing 2000) <http://ezproxy.ouls.ox.ac.uk:4406/governance/no-longer-business-as-usual_9789264187788-en> accessed 30 May 2015

[223] Coleman (n 204) 158-162

[224] Brant Hadaway, 'Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture (2000-2001) 55 *U Miami L Rev* 81-82; Karen Dillon, 'Taking Cash Into Custody Across U.S., Police Dodge

Northwest D.C. whose car was seized when her son was driving it and was pulled over for a minor traffic violation, and was also found to have a handgun. Another involves the African American grandparents in Philadelphia whose family home of half a century was seized by heavily armed police because their son was caught selling US $20 worth of marijuana from their porch.[225]

Notwithstanding the numerous weaknesses with the UK asset recovery statistics, the past decade has witnessed a steady upward trend in the amounts recovered by UK government agencies.[226] In 2012-13, the Serious Organised Crime Agency (SOCA) used its criminal and civil powers to deny criminals access to £56.9 million, with an additional £425.6 million denied by partners as a result of SOCA activity, including £388.9 million overseas. Of these amounts, £4.6 million was recovered through Civil Recovery Orders under Part 5 of POCA 2002.[227] In 2017-18,

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State Seizure Laws, Kansas City Star (May 19, 2000) <www.kcstar.com/projects/drugforfeit/ new3.htm> accessed 30 June 2017; John Worrall, 'Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement' (May/June 2001) 29(3) *LJ of Criminal Justice* 171-187; Kennedy, 'An Evaluation of the recovery of criminal proceeds' (n 128) 37; Peter Alan Sproat 'The new policing of assets and the new assets of policing: A tentative financial cost-benefit analysis of the UK's anti-money laundering and asset recovery regime' (2007) 10 3 *Journal of Money Laundering Control*, 277-299; John Worrall and Tomislav Kovandzic, 'Is Policing for Profit? Answers from Asset Forfeiture' (2008) 7(2) *Criminology & Public Policy* 219-244; Jerome Skolnick, 'Policing Should Not Be For Profit' (2008) 7(2) *Criminology & Public Policy* 257-261

[225] Sarah Stillman, 'Taken' *The New Yorker* (August 12 and 19 2013) <https://www.newyorker.com/magazine/2013/08/12/taken> accessed 23 August 2016; Richard D Emery 'Civil Forfeiture and Accountability' *New York Times* (10 December 2014) <https://www.nytimes.com/2014/12/11/opinion/civil-forfeiture-and-accountability.html> accessed 23 August 2016

[226] Williams, Hopmeier and Jones (n 196) 293-294

[227] SOCA, 'Annual Report and Accounts 2012/13' <www.gov.uk/government/uploads/system/uploads/attachment_data/file/246722/0273.pdf> accessed 21 July 2014

the National Crime Agency (NCA), SOCA's replacement, froze £44.4 million and recovered £8.7 million through Civil Recovery Orders. In 2017-18, the value of assets restrained in the UK and overseas as a result of activity by the International Corruption Unit (ICU) exceeded £683 million, while the cumulative amount of assets confiscated exceeded £55 million.[228] In June 2015, the ICU became operational within the NCA with a remit to investigate serious international bribery, corruption and related money laundering. Unfortunately, there are no specific figures for grand corruption offences.[229] More recently, in 2018-19, £6.2 million was confiscated, £8.6 million in cash forfeited, and £7.7 million recovered through civil recovery orders.[230] In 2019-20, almost £150 million criminal assets were frozen or seized and £9 million forfeited. However, there are no statistics available on the amounts specifically recovered under Part 5 of POCA.[231]

Despite these successes, when the annual average that the Government acquires from the proceeds of crime, approximately £150 million,[232] is compared to

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[228] NCA, 'Annual Report 2017-18' <https://nationalcrimeagency.gov.uk/who-we-are/publications/177-nca-annual-report-accounts-2017-18/file> accessed 15 May 2019

[229] Nicholls (n 9) 276-277

[230] NCA, 'Annual Report 2018-19' 24 <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/329-nca-annual-report-accounts-2018-19/file> accessed 2 September 2020

[231] NCA, 'Annual Report 2019-20' < https://www.nationalcrimeagency.gov.uk/who-we-are/publications/467-national-crime-agency-annual-report-and-accounts-2019-20/file> accessed 2 September 2020

[232] Alldridge in King, Walker and Gurulé (n 6) 533; CPS, Proceeds of Crime Strategy (2014) <www.cps.gov.uk/proceeds-crime> accessed 19 April 2019

the estimated total of UK criminal assets worth an estimated £2 billion per annum, the performance of the UK asset recovery regime fairs only modestly. [233]

Numerous reports confirm this discouraging state of affairs. For example, in March 2014 a report published by the House of Commons Public Accounts Committee was highly critical of the performance of government agencies involved in asset recovery, particularly on the basis of value for money.[234] The National Audit Office found that in 2012-13 roughly 26p in every £100 of criminal proceeds were confiscated.[235] The figures confirm that the UK asset recovery regime is certainly left wanting. Indeed, some of the weaknesses in the UK asset recovery regime resulted in the introduction of Unexplained Wealth Orders (UWOs) by the Criminal Finances Act 2017 (CFA 2017) which came into force on 31 January 2018.[236] The CFA provides law enforcement agencies further powers to recover the proceeds of crime, tackle money laundering, tax evasion and corruption, and combat the financing of terrorism. Andy Lewis, Head of Asset Denial at the NCA, describes UWOs as 'hugely powerful tools'[237]

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[233] Richard Dubourg and Stephen Prichard (eds), 'The Impact of Organised Crime in the UK: Revenues and Economic and Social Costs' (Home Office 2008) 54-55; Tristram Hicks, 'Not so Bleak as Odd: confiscation-National Audit Office Report' <http://www.moneylaunderingbulletin.com/legalandregulatory/assetsrecovery/not-so-bleak-as-odd-confiscation---the-national-audit-office-report-95826.htm> accessed 14 January 2014

[234] Committee of Public Accounts, *Confiscation Orders* (HC *2013–14, 942*); Jackie Harvey and Siu Fang Lau 'Crime-money records, recovery and their meaning' in Petrus van Duyne and others (eds), *European Crime Markets at Cross-Roads: Extended and Extending Criminal Europe* (Wolf Legal Publishers 2008), ch 13

[235] Bullock and Lister in King and Walker (n 102) 47-71; National Audit Office, *Confiscation Orders* (HC 2013–14, 738)

[236] Section 1 of CFA amends Part 8 of POCA by inserting sections 362A - 362H

[237] NCA, *Court dismisses UWO appeal by Zamira Hajiyeva* <https://www.nationalcrimeagency.gov.uk/news/court-dismisses-uwo-appeal-by-zamira-hajiyeva> accessed 8 September 2020

that 'flush out evidence' enabling enforcement agencies to take forward civil recovery action under POCA.[238] UWOs require a person who is suspected of involvement in or association with serious criminality to explain the origin of assets that appear to be disproportionate to their known income. A failure to provide a response would give rise to a presumption that the property was recoverable in any subsequent civil recovery action. The Government's Explanatory Notes to the 2017 Act explain how UWOs:

> 12. … require a person who is suspected of involvement in or association with serious criminality to explain the origin of assets that appear to be disproportionate to their known income. A failure to provide a full response would give rise to a presumption that the property was recoverable, in order to assist any subsequent civil recovery action….Law enforcement agencies often have reasonable grounds to suspect that identified assets of such persons are the proceeds of serious crime. However, they are often unable to freeze or recover the assets under the previous provisions in POCA due to an inability to obtain evidence (often due to the inability to rely on full cooperation from other jurisdictions to obtain evidence).
>
> 13. The Act also allows for this power to be applied to politicians or officials from outside the European Economic Area (EEA), or those associated with them i.e. Politically Exposed Persons (PEPs). A UWO made in relation to a non-EEA PEP would not require suspicion of serious criminality. This measure reflects the concern about those involved in corruption overseas, laundering the proceeds of crime in the UK; and the fact that it may be difficult for law enforcement agencies to satisfy the evidential standard at the outset of an investigation given that all relevant information may be outside of the jurisdiction.[239]

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[238] Home Office, Criminal Finances Bill — Unexplained Wealth Orders Impact Assessment (10 January 2017) (IANo:HO0260) 5. Peter Sproat, Unexplained Wealth Orders: An Explanation, Assessment and Set of Predictions *Journal Of Criminal Law* 82 (3) (2018) 232-244, 232. See also *NCA v Hajiyeva* [2020] EWCA Civ 108

[239] CFA 2017 Explanatory Notes <https://www.legislation.gov.uk/ukpga/2017/22/notes/division/3/index.htm> accessed 7 September 2020

The official figures show the overall disappointing performance of the UK asset recovery regime. However, there still remains the ongoing concern about how to measure the effectiveness of civil recovery, and asset recovery more generally, and what outcomes are required for them to be deemed successful measures. There has been no thorough, detailed empirical investigation into, for example, the deterrent effect of asset recovery or the extent to which it ameliorates the effect of serious organised crime and corruption. This lack of empirical data means that we are limited in the extent we can assess the effectiveness of asset recovery. If asset recovery were to be shown to be a significant deterrent then it of course reinforces its appeal as a weapon against serious crime. Nonetheless, even proven efficiency cannot be allowed to sacrifice principle and the cast aside human rights protections. With a view to completing the groundwork for the normative project of Part II, I now supply a panoramic view of the field of civil recovery.

3.2 The contours of civil recovery

There are two main axes for undertaking a meta-analysis of civil recovery, situating it at the intersection of broader influences operating at the macroeconomic, political, legal and social level. The first axis is rooted in a process that has been described as the 'civil-isation of criminal law': the process by which the civil law is used to pursue criminal law objectives. The second axis is rooted in a process that involves the use

of 'legal fictions': the process that uses a rule that assumes as true something that is clearly false.[240] I now turn to the first axis.

3.2.1 Civil-isation of criminal law: use of civil law in pursuit of criminal law objectives

Here I explore the terrain of civil recovery by examining its operative conditions. There are a number of explanations proffered for the vigorous promotion of civil preventive measures, such as civil recovery. These include: public protection or averting the risk of harm; a pragmatic response to the limits of criminal law and, in particular, its limited capacity to tackle certain categories of harm or putative harm; the evidential benefits in resorting to civil processes, for example, the avoidance of the strict application of the hearsay rule in criminal proceedings.;[241] a political response where countries must be seen to be doing something as they struggle to combat corruption; the State's desire to spread 'prosecutorial; or policing burden onto other bodies or, at least partially, divest itself of responsibility for crime control'; and an instance of policy transfer from the US.[242]

Civil recovery leans away from the traditional criminal justice system and towards the civil justice system.[243] The re-orientation from criminal to civil is largely attributable to the purported focus of civil recovery on the financial profits of crime as opposed to the prosecution, conviction and punishment of those individuals

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[240] Encyclopedia Britannica < http://global.britannica.com/EBchecked/topic/334854/legal-fiction> accessed 8 September 2014

[241] Hendry and King, 'Expediency' (n 127) 743-744

[242] Ashworth and Zedner in Duff and others (n 35) 59-87

[243] King, 'Using Civil Processes' (n 7) 339; Alldridge, *Money Laundering Law* (n 13) 223-250

allegedly committing the crime.[244] Civil recovery is part of the broader paradigm shift that has witnessed an increasing use of civil law to pursue criminal law objectives.[245]

The greater use of hybrid civil-criminal processes is part of a recent trend which has seen mounting challenges to, and 'attacks' on,[246] the model of the criminal trial. The paradigm of the criminal law and the criminal trial is being eroded by the State in its pursuit of other agendas such as greater regulation, an emphasis on prevention, and an authoritarianism closely tied to penal populism and the demand for public protection.[247] The recent deviations from the paradigm of criminal law and the criminal trial show that a 'full-dressed criminal trial is increasingly regarded as an expensive luxury, to be confined to really serious crimes'.[248] To come to a fuller understanding of this trend, it is necessary to situate the analysis within the broader historical and socio-political context of the politics of lawmaking.[249] Equally relevant is the role played by the State in the prevention of harm, in particular when viewed through the lens of preventive justice.[250] First I turn to the politics of law making and then to the role of the State and preventive justice.

As with any other enactment of legislation and public policy construction, civil recovery is subject to the influences of what may be termed the 'politics of lawmaking'. As we have seen, what drives this political culture is the desire to be efficient and the desire to be seen to be doing something. Civil recovery is adopted

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[244] Campbell, *Organised Crime* (n 19) 227-228; King, 'Civil Forfeiture' (n 15) 371-372
[245] Gallant, *Money Laundering* (n 5) 20-54
[246] Duff and others (n 35) 1-4
[247] Zedner and Ashworth, 'Defending the Criminal Law' (n 38) 44, 48-49
[248] Zedner and Ashworth, 'Defending the Criminal Law' (n 38) 38
[249] Ashworth, *Principles of Criminal Law* (n 14) 22-25
[250] Ashworth and Zedner, *Preventive Justice* (n 7) 1ff

by virtue of a belief in the requirement for an effective asset recovery regime, a requirement that is considered impeded by the more onerous protections of criminal proceedings.[251]

In the context of combatting corruption, as with many areas of financial crime, prosecution is no longer regarded as the most appropriate and cost-effective enforcement mechanism.[252] POCA 2002 was introduced specifically to remedy perceived failures of existing criminal justice processes in tackling serious and organised crime. With Lord Goldsmith stating during the passage of the Proceeds of Crime Bill:

> 'Someone at the centre of a criminal organisation may succeed in distancing himself sufficiently from the criminal acts themselves so that there is not sufficient evidence to demonstrate actual criminal participation on his part. Witnesses may decline to come forward because they feel intimidated. Alternatively, there may be strong evidence that the luxury house ... the yachts and the fast motor cars have not been acquired by any lawful activity because none is apparent. It may also be plain from intelligence that the person is someone engaged in criminal activity, but it may not be clear what type of crime. It could be drug trafficking, money laundering or bank robbery. However, the prosecution may not be able to say exactly what is the crime, and thus the person will be entitled to … [be] … acquitted of each and every offence. If, in a criminal trial, the prosecution cannot prove that the person before the court is in fact guilty of this bank robbery or that act of money laundering, then he is entitled to be acquitted. Yet it is as plain as a pikestaff that his money has been acquired as the proceeds of crime.'[253]

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[251] Ashworth, *Principles of Criminal Law* (n 14) 23

[252] Zedner and Ashworth, 'Defending the Criminal Law' (n 38) 21; Peter Alldridge, 'Bribery and the changing pattern of criminal prosecution' in Horder and Alldridge, *Modern Bribery* (n 138) 220

[253] House of Lords Debate, Proceeds of Crime Bill, 25 June 2002, vol 636, cc 1270–71, per Lord Goldsmith; Hendry and King, '*How far is too far? Theorising non conviction based asset forfeiture'* (2015) 11 (4) *International Journal of Law in Context* 398-411, 401

Collin King and Jennifer Hendry succinctly describes the perceived failures which led to the adoption of Part 5 of POCA 2002:

> The civil recovery powers under Part 5 of POCA stemmed from concern about the extent of the problems allegedly faced by law enforcement. That saw the 'Mr. Bigs' of organised criminal activity insulated against traditional law enforcement owing to the remoteness from the 'coal-face' and consequent certain degree of immunity, caused by the hierarchical nature of organised criminal activity.[254]

As well as 'politics of law-making', developments in asset recovery can be elucidated by a brief overview of the fundamental duties residing in the State. While the role of the State in Western liberal democracies is a highly involved subject, of particular salience to the development of asset recovery are the core duties that centre on the prevention of harm and the provision of security. These protective goals are inextricably bound up in a State's duty to do 'justice'. This duty requires respect for human rights and maintenance of rule-of-law values. The State-sponsored preventive justice enterprise is deemed by many governments as vital in ensuring the safety and security of its citizens. However, numerous objections have been raised in relation to this 'penology of prevention'. Andrew Ashworth and Lucia Zedner, for example, present a critique of preventive justice that is relevant to civil recovery. The preventive venture is criticised on the basis of it being used to extend the boundaries of criminal law, and for placing measures beyond, or parallel, to the criminal process. This results in the circumvention of the more stringent procedural safeguards inherent to the processes of the criminal justice system.[255]

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[254] Hendry and King, 'Expediency' (n 127) 733-757
[255] Ashworth and Zedner, *Preventive Justice* (n 7) 7-13, 20-32, 250-267

Modern asset recovery is a useful arena in which to observe how the politics of lawmaking and the civil-isation of criminal law interact. Liz Campbell provides an insightful account on how civil recovery has contributed to the recasting of the criminal justice system witnessed by the recent shifts in the traditional role of the State and the role of criminal and civil law within the State. This shift has resulted in a move away from the individual, with its focus on norms of due process, to the collective, with its focus on security and public protection. Asset recovery is a central dynamic in the re-orientation away from a criminal justice, rights-based, approach to a more utilitarian and consequentialist approach.

Civil recovery falls squarely within this broader shift in focus. This shift is characterised by a movement from individual to societal interests; from guilt and culpability to social harm; from due process to crime control. As well as a departure from principles of the criminal justice system, with its emphasis on justice, to a more pragmatic orientation seeking to neutralise threats posed by corruption and organised crime. Finally, there is a shift from the traditional aims of punishment, viz. retribution, rehabilitation and reintegration, to a focus on the prevention of further crime, while still nonetheless implicitly censuring 'wrongdoers'.[256] I will now turn to the second axis for undertaking a meta-analysis of civil recovery, legal fictions.

3.2.2 Legal fictions of asset recovery

In ordinary life, in literature or in law, the line that demarcates fiction from reality

[256] Campbell, *Organised Crime* (n 19) 227-28, 242-244

can be unclear.[257] In the context of asset recovery, there has been considerable recent academic work attempting to expose the 'unreality' of civil recovery.[258] Legal fictions have been used since the first century BC and many consider civil recovery a modern exemplar of a legal fiction. The reason for this is two-fold: the personification fiction arising from its *in rem* character and the classification fiction derived from it being categorised as a civil procedure.[259]

A legal fiction is perhaps best described as a 'posed proposition' rather than a proved fact.[260] Where the proposition is inferred from a deliberately shortened causal chain[261] designed to serve a singular aim: the assertion of an equivalence or identity only to secure a particular doctrinal result.[262] Legal fictions remain popular with legislators and the judiciary owing to benefits emanating from their use: they facilitate thought, contribute significantly to the evolution of law and serve as handy terminological devices. Despite these benefits, modern theorists doubt the propriety of their use in certain contexts.[263] With the rise of the human rights movement, nowhere are these concerns more apparent than in the context of criminal law.[264] Many academics and activists assert that legal fictions thwart essential constitutional

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[257] Simon Stern 'Legal Fictions and Exclusionary Rules' in William Twining and Maksymilian Del Mar (eds) *Legal Fictions in Theory and Practice* (Springer 2015)
[258] King, 'Civil Forfeiture' (n 15) 375
[259] Peter Alldridge, 'Some Uses of Legal Fictions in Criminal Law' in Twining and Mar (n 260)
[260] Stern in Twining and Mar (n 260)
[261] King, 'Using Civil Processes' (n 7)
[262] Alf Ross, 'Legal Fictions' in Graham Hughes (ed), *Law, Reason, and Justice: Essays in Legal Philosophy* (NYUP 1969) 231-232
[263] Barnett (n 157) 83-85
[264] Alldridge in Twining and Mar (n 260)

principles, such as freedom from double jeopardy, as well as human rights, such as the right to privacy and the right to private property. Perhaps the most fundamental of the objections is that these fictions promote falsehoods that are employed simply to promote the use of one rule when another should in fact be applied. Such fictions prioritise convenience over the pursuit of truth and so severely undermine the very esteem in which the law should be held.[265]

Many argue that civil recovery is an irrational and unjust concoction, that it is entirely artificial to conclude that inanimate and insentient objects,[266] such as financial assets, are 'criminal' or 'at fault'.[267] The *in rem*/*in personam* distinction of asset recovery has been seen to defy common sense on two fronts. Firstly, it is nonsensical to prosecute an object as if it were a person; secondly, that it is fallacious to classify the seizure of a person's property as technically not being a punitive measure against the owner of the property. [268] Despite the conceptual objections to the *in rem/in personam* distinction, the ECtHR recently reiterated its validity in a seizing proceeds of corruption case:

> [I]t's well established case law to the effect that proceedings for confiscation such as civil proceedings *in rem* in the present case, which do not stem from a criminal conviction or sentencing proceedings and thus do not qualify as a penalty but rather represent a measure of control of the use of property within the meaning of article 1 of Protocol No. 1, cannot amount to 'the determination of a criminal charge' within the meaning of article 6(1) of the Convention and should be

[265] Barnett (n 157) 82
[266] Alldridge in Twining and Mar (n 260)
[267] King, 'Civil forfeiture' (n 15) 378-9; Campbell, *Organised Crime* (n 19) 227-228
[268] King, 'Civil Forfeiture' (n 15) 374-375

examined under the 'civil' head of that provision'.[269]

I have explored the contours of civil recovery and can now investigate the ambiguities in the relationship between civil recovery and human rights, as well as the difficulties of framing and balancing competing rights and duties arising in the fight against grand corruption.

4. Introduction: civil recovery and human rights

Civil recovery can be seen as an example of the dilemmas and complexity that arise where the State is under a duty to respect, protect and fulfil CP rights as well as SE rights.[270] The key question is whether the weakening of certain protections of Article 6 by civil recovery can be justified, and if so, what criteria will need to be satisfied in order to supply a sufficient justification to employ civil recovery. In relation to serious crimes, Andrew Ashworth asks, 'Why bother with human rights when public safety is at risk?'.[271] A similar question can be asked in relation to grand corruption: 'Why bother with the human rights of public officials when the basic needs of her countrywomen are at risk?'. We will explore this question and whether it is possible to reconcile the different interests in civil recovery: on the one hand the fundamental rights of public officials whose property is the subject of a civil recovery order, and

[269] *Gogitidze and others v Georgia* App no 36862/05 (ECtHR, 12 August 2015) [221]. See also *Gogitidze v Georgia* Lloyd's Rep Financial Crime International section [2016] [427]-[431]

[270] Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in Julian Roberts and Lucia Zedner (ed) *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (OUP 2012) 149. Thank you to Professor Lazarus for excellent DPhil supervision

[271] Ashworth, *Human Rights* (n 37) 1

on the other hand the CP and SE rights of her countrywomen and the wider public interest to live in a corruption-free society.[272]

The adoption of UNCAC sent a clear message to the international community that the link between socio-economic rights and corruption can no longer be overlooked. The links between SE rights and anti-corruption measures are highlighted in the Foreward and Preamble to the UNCAC as well as the *Travaux Préparatoires*. Corruption has a 'profoundly negative impact' on socio-economic development,[273] undermining 'Government's ability to provide basic services' and is a 'major obstacle to poverty alleviation and development'. Sustainable development is identified as particularly threatened by 'cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States...'[274] while the UNCAC provisions assist governments to access 'resources to reconstruct and rehabilitate their societies'.[275] The links between SE rights, anti-corruption measures, and the contribution of asset recovery and asset return towards the achievement of the Sustainable Development Goals, was affirmed at the recent UNODC International Expert Meeting on the return of stolen assets held in May 2019.[276]

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[272] Ashworth, *Human Rights* (n 37) 108-110

[273] TRAVAUX PRÉPARATOIRES of the negotiations for the elaboration of the United Nations Convention against Corruption xvi; Preamble 3 <www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf> accessed 1 August 2019

[274] UNCAC, Preamble

[275] UNCAC, Forward (Secretary General Kofi A Annan)

[276] 'Return of assets to Kenya through a multi-party framework for the return of assets from Crime and Corruption in Kenya (FRACCK)' (UNODC International Expert Meeting on the return of stolen assets, Addis Ababa, 7-9 May 2019 <https://www.unodc.org/unodc/en/corruption/meetings/addis-egm-2019.html>

With a view to preparing the ground for the substantive analytical project of this work, I will situate the tensions between civil recovery and human rights against the backdrop of the broader relevant context which influences the use of civil recovery to combat grand corruption. Relevant to our analysis is the scope of positive rights. More specifically the examination of how a positive conception of human rights, which gives equal weight to CP rights and SE rights, when framed with a 'hierarchy of rights' approach can allow for a more structured analysis of the rights that arise in the efforts to combat grand corruption.

In chapter 7 I undertake an assessment of whether the weakening of certain protections of Article 6 by civil recovery can be justified. The criteria for this assessment are derived from the analytic framework developed by Andrew Ashworth to help resolve the conflicts that arise in relation to Articles 5 and 6 in the context of serious crimes. This 'hierarchy of rights' framework draws on Dworkinian rights theory and is helpful in exploring the justifications for honouring human rights in the context of criminal procedure. Here, this framework allows for a structured analysis of the conflict that arises in relation to Article 6 in the context of the serious crimes of grand corruption.

At this stage, it is useful to summarise the main conclusions reached in this thesis. The core values of liberty, autonomy and freedom underpinning human rights are threatened by Part 5 civil recovery proceedings since assets are recovered

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accessed 3 August 2019; Shane Nainappan, Asset recovery supports Sustainable development Goals "a symbiotic relationship" <www.unodc.org/documents/corruption/AddisEGM2019/Presentations/4. ICAR Presentation Addis FINAL.pdf> accessed 3 August 2019

without any criminal conviction or any of the enhanced protections of the criminal law. The thesis argues that the civil classification of civil recovery, when it is in fact criminal in nature, means that certain protections of Article 6 are violated. However, at the same time, the thesis argues that the prevention of corruption and repatriation of illicit assets through civil recovery can enhance human rights, especially those of the International Covenant on Economic, Social and Cultural Rights (ICESCR), since corrupt acts can in themselves constitute a violation of human rights. For example, a corrupt act can violate the right to equality and non-discrimination in the context of CP rights. While in the context of SE rights, corrupt public acts can violate the rights to housing, health and education, as well as Article 2(1) of the ICESCR which provides that each State party undertakes to take steps to the maximum of its available resources to progressively achieve the full realisation of ICESCR rights.

The framework developed by the International Council on Human Rights Policy (ICHRP) is useful for our analysis because it provides a thicker account[277] of the harms of grand corruption. The ICHRP framework is able to account for the direct harms that arise when a corrupt act violates a right, as well as the indirect and remote harms caused by the poverty and social unrest resulting from grand corruption. Indeed, it is this thicker account of the harms of grand corruption that often motivates policy makers to employ policy responses outside of the criminal justice system, such as civil recovery, to reduce the level of harm caused. A direct violation can occur when

[277] Hillyard and others, 'Beyond Criminology' (n 223) Ch15, Ch 16. See also Maguire (n 4) 159-182; Karen Engle, Zinaida Miller and DM Davis (eds), *Anti-impunity and the Human Rights Agenda* (CUP 2016) 1-3, 7-8; Reiner, *Crime* (n 222) 99-102. See analysis of the social harm approach and the critical literature on the anti-impunity impetus in international criminal law

a corrupt act is deliberately used as a means to violate a civil and political or social right e.g. when an official embezzles funds set aside to buy and distribute food and consequently violates the right to food. An indirect violation occurs when corruption is an essential factor contributing to a chain of events eventually leading to a violation. An example would be the dumping of toxic waste due to a public official being bribed, which in turn violates the rights to health and life. A remote violation takes place when many other factors as well as corruption contribute to the human rights violation e.g. when electoral corruption leads to societal protest which are then violently repressed by the State.[278]

The Strasbourg and English jurisprudence, international standards and government policy all indicate that civil recovery is here to stay. However, the thesis concludes that despite this international consensus in favour of civil recovery and the important potential human rights benefits of civil recovery, the weakening of certain protections of Article 6 can only be justified when three conditions are met. Despite the acceptance of by both the UK and Strasbourg of the de facto extension of the criminal law without the enhanced protections, the analytic framework offered in this work is nonetheless useful. This framework could assist the courts and policymakers to on a case by case basis to ensure that a structured analysis is undertaken which considers all of the competing rights involved with civil recovery in grand corruption cases. The first condition requires that the threat of grand corruption has a sufficiently strong empirical foundation; the threat must be more than just rhetoric

[278] Carmona, 'Corruption and Human Rights' (n 85)

employed by the State to encroach on individual rights (*bona fide* Condition).[279] The second condition requires that clear criteria be applied in order to determine the extent to which a weakening of Article 6 rights can be justified in order to protect another individual right and/or the public interest (Human Rights/Public Interest Condition).[280] The third condition provides that civil recovery must effectively contribute to the fulfilment of the rights of the victims of grand corruption and/or the public interest to live in a corruption-free society (Effectiveness Condition).

Prior to applying these conditions to civil recovery, it is helpful to locate the tensions between civil recovery and human rights against a broader backdrop in which they operate. This is useful for two reasons. First, civil recovery is related to, and affected by, the broader context in which it operates. Second, examining the broader context in which civil recovery operates assists with the clarification of key concepts that form part of the analytic framework used to assess whether weakening certain protections of Article 6 is justified.

4.1 Civil recovery and human rights in context

This section will refine some key concepts to help clarify whether the employment of civil recovery to combat corruption can be justified. It will first undertake a conceptual analysis of positive and negative rights, beginning with an examination of the nature of, justification for, and relationship between, these rights. To help achieve this, I will examine the historical development of CP rights and SE rights. I will then

[279] Ashworth, *Human Rights* (n 37) 126
[280] Ashworth, *Human Rights* (n 37) 110-113

move on to examine the relationship between human rights and corruption with especial focus on the impact of corruption on the rights contained in the ICESCR and International Covenant on Civil and Political Rights (ICCPR).

4.2 Positive and negative rights

Any conceptual analysis of positive and negative rights ought to start with an examination of their analytical structure and foundational moral arguments. I will then examine the international acceptance of human rights as including positive rights which has seen a shift from a conception of rights as a limitation on State action to one which now views rights as demands for such action.[281]

All human rights give rise to both negative and positive duties with the structure of human rights imposing three different types of obligations on States: the obligations to respect, protect and fulfil. The obligation to respect requires States to refrain from interfering with the enjoyment of rights. The obligation to protect requires States to prevent violations of such rights by third parties. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realisation of such rights.[282] The

[281] Fredman (n 20); Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 15 – 22, 127-130, 181

[282] Marija Jovanovic, 'Human trafficking, human rights and the right to be free from slavery, servitude and force labour' (DPhil thesis, University of Oxford 2016); Henry Shue *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton University Press 1996) 160. See also Final Report by Asbjorn Eide, 'The Right to Adequate Food as a Human Right' (UN Sub-Commission for the Promotion and Protection of Human Rights, UN Doc E/CN4/Sub2/1987/23, 1987); Fredman, *Human Rights Transformed* (n 20) 2; Maastricht Guidelines on Violation of Economic, Social

Committee on Economic Social and Cultural Rights (CESCR) further divides the obligation to fulfil into three subcategories: facilitate, provide, and promote.[283]

Contemporary theorists such as Sandra Fredman agree that too narrow a view of human rights is taken where the focus is on the protection of an individual's freedom from a potentially hostile State (duties of restraint). Rights incorporate the notion that States have a duty to respect and protect by taking action to enable people to exercise their rights (positive duties). A conception of rights as limitations is premised on 'a conception of freedom as absence of interference' and 'a characterisation of the State as separate from and opposed to the individual'.[284] However, the values of freedom, equality, solidarity and democracy, which underpin human rights, logically entail that the corresponding duties are both positive and negative.[285] In the words of Shue: 'taking rights seriously means taking duties seriously'[286] with part of the rationale for imposing positive duties on States grounded in the need to provide 'practical and effective' protection of fundamental

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and Cultural Rights' reprinted in (1998) 20 *Human Rights Quarterly* 691 (Guideline 6); Jeff King, *Judging Social Rights* (Cambridge Studies in Constitutional Law) (CUP 2012) 14. See also Jovanovic analysis in relation to *Vriend* v *Alberta* [1998] 1 SCR 493 (SCC); *R* v *Secretary of State for the Home Department, ex parte Limbuela* [2005] UKHL 66 [920] Lord Brown: '[I]t seems to me generally unhelpful to attempt to analyse obligations ... as negative or positive, and the State's conduct as active or passive. Time and again these are shown to be false dichotomies.'

[283] CESCR, General Comment No 14, The Right to the Highest Attainable Standard of Health (Art 12) (2000), para 37; Ann Peters, *Corruption and Human Rights* Basel Institute on Governance Working Paper Series 2015

[284] Fredman (n 20) 1-3

[285] Fredman, *Human Rights Transformed* (n 20) 3; Amartya Sen, *Development as Freedom* (OUP Oxford 1999)

[286] Shue (285) 167, Lazarus, 'Positive Obligations' (n 273) 146

rights.[287] Accordingly, any defensible conception of human rights must recognise rights to 'security and subsistence' owing to the fact, for instance, that CP rights are of limited use to people who are too malnourished to exercise them.[288] One significant consequence of such a conception of human rights is that it places CP and SE rights alongside each other, thereby collapsing the artificial distinction between them.[289]

Despite the growing international acceptance of human rights as including positive rights there remains a powerfully entrenched set of dichotomies that associates the rule of law with 'procedural' or 'formal' justice, private law, CP rights, 'negative' freedom and government constraint contrasted with 'substantive justice', public law, SE rights, 'positive' freedom, and administrative discretion. The distinction between duties of restraint and positive duties has pitted freedom against equality and liberalism against socialism, resulting in the inviolability of justiciable CP rights and the negotiability of non-justiciable SE rights.[290] While positive duties undoubtedly constitute a part of mainstream human rights discourse and practice, their scope and extent have not been firmly settled but are rather determined on a case by case basis.[291]

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[287] John Graham Merrils, *The Development of International Law by the ECtHR* (MUP 1993) 102-103; Jovanovic (n 285) 194

[288]King, *Judging Social Rights* (n 285) 1-20

[289] UN Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (26 May 2004); Jovanovic (n 285) 190-196

[290] Stephen Humphreys, 'Are Social Rights Compatible with the Rule of Law? A Realist Inquiry' *Global Law Working Paper* 10/06 (NYU) 5, 32

[291] Jovanovic (n 285) 190-196; Mowbray (n 284) 2, with reference to the Judge Martens' Dissenting Opinion in ECtHR, 19 February 1996, *Gul v Switzerland* App no 23218/94 (19 February 1996)

Nonetheless, the values underpinning a commitment to a broader conception of human rights is a positive conception of freedom which entails not just an absence of interference with rights but a genuine ability to exercise these rights, and a substantive view of equality which insists that everyone be able to exercise their rights.[292] If freedom is a fundamental value then freedom for some must be freedom for all where the primacy of individual autonomy can only be asserted on the basis that autonomy should be equally available to all. This positive view of freedom draws on the insights of theorists such as Amartya Sen who see freedom as agency and human rights as facilitating the exercise of the freedom guaranteed. Sen developed a positive notion of freedom as agency through his 'capability theory' which requires positive action to be understood as enhancing individuals' capability sets, thereby necessitating the:

> [R]emoval of major sources of un-freedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over-activity of repressive states. [293]

It is clear that constraints can arise as much from poverty, poor health, and lack of education as from tyranny and intolerance. Building on Sen's approach, Martha Nussbaum takes the conceptual apparatus of capability into the heartland of human rights law through an account of how capabilities can provide a basis for central constitutional principles which citizens have a right to demand from their

[292] Fredman, *Human Rights Transformed* (n 20) 3, 30; Sen (n 288) 3-5; Lazarus, 'Positive Obligations (n 273)
[293] Fredman, *Human Rights Transformed* (n 20) 3; Sen (n 288) 3-5

government.[294] Joseph Raz's reformulation of the harm principle also supports the case for positive duties contributing to the enhancement of individuals' capability sets. Raz widens the traditional notion of harm - that the government is only entitled to use coercion to restrict one person's individual freedom to prevent her causing harm to another - to include failing to improve the situation of another, which allows us to derive the duty to contribute positively to society directly from the duty not to harm others. Accordingly, a failure to promote the autonomy of others in society is just as much a manifestation of harm as intruding on their legitimate area of autonomy.

On this account of the harm principle, the use of coercion to impose duties to contribute to the autonomy of others and to ensure compliance with laws that promote the autonomy of others, is legitimated. By recognising that harm includes failing to promote another's autonomy, this reformulated harm principle legitimates limits on negative freedom in order to promote positive freedom.[295] However, does the use of coercion to impose duties to contribute to the autonomy of others permit employing civil recovery as a way to contribute to the autonomy of individuals living in a corrupt regime? Does the restriction of negative freedom in order to promote positive freedom warrant limiting the right to a fair trial of a public official whose property is the subject of a civil recovery order so as to promote the freedoms contained in the Covenants? These questions will be explored later in chapter 7. At this juncture, however, the scope and legitimacy of coercion in the context of positive

[294] Fredman, *Human Rights Transformed* (n 20) 9-12; Martha Nussbaum, *Women and Human Development* (CUP 2000) 12
[295] Fredman, *Human Rights Transformed* (n 20) 28-29

duties requires further investigation. The insightful work of Liora Lazarus on positive obligations and 'coercive overreach' will form the basis of this investigation.

Lazarus explores the ambiguous relationship between the criminal law, justice and human rights where human rights both limit coercion by the State as well as requiring it. Of concern here is the coercive duties that activate the sharp end of the State's criminal law enforcement mechanism or military apparatus. Lazarus convincingly argues that when such duties as these are described as 'protective duties' this descriptor is incomplete because these are in fact 'coercive duties' that require the State to coerce individuals who harm or individuals who are at risk of harming in order to fulfil the duty.[296] Lazarus demonstrates that while human rights are used to limit the excesses of security and law and order politics, increasingly, human rights, cast as positive rights, have resulted in claims for the extension of the criminal law, the creation of preventative duties or 'protective policing measures'.[297] Therefore:

> [A] process whereby the human rights of those subject to harm – such as the right to life, the right against torture, inhuman and degrading treatment, the right to private life, the right against discrimination, and the right to security – have combined to influence the scope of the criminal law and create coercive duties on the State to criminalise, prevent, police and prosecute harmful acts.[298]

Similarly, the human rights of those subject to the harm of grand corruption, and the public interest in combatting grand corruption, arguably have combined to create a

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[296] Lazarus, 'Positive Obligations (n 273) 146-150; Mowbray (n 284) 15-22, 127-30, 181; John McBride, 'Protecting Life: a Positive Obligation to Help' 24 (1999) *European Law Review Human Rights Survey* HR/43. Lazarus L et al, *The Relationship Between Rights and Responsibilities* (2009) 18/09 Ministry of Justice Research Series

[297] Lazarus, 'Positive Obligations (n 273) 166-168; Mowbray (n 284) 15

[298] Lazarus, 'Positive Obligations (n 273) 146-147

coercive duty on the State to police, prevent and criminalise harmful corrupt acts. This coercive duty on the State encourages the State to use measures, such as civil recovery, which extend the criminal law. Civil recovery extends the criminal law since while it is formally a civil measure it is in truth not unlike 'the sharp end of the State's criminal law enforcement mechanism'. The 'sharpness' of civil recovery is derived from Part 5 proceedings possessing many of the intrinsic characteristics of the criminal law and punitive measures: censure, hard treatment and culpability, as well as the relevant authorities possessing significant powers under Part 5 of POCA 2002.[299] Part 5 powers ought to thus be considered criminal in substance since it imposes criminal punishment in the realm of civil law.[300]

Conceptualising civil recovery as a coercive positive duty may help us to critically evaluate the legitimacy of civil recovery as a tool to combat grand corruption. Civil recovery legislation can be conceptualised as the exercise of a positive duty to protect SE rights but we must 'balance' this duty with the duties of restraint under CP rights (see section 3 of this Chapter). The State's use of civil recovery to combat grand corruption can be viewed as an example of the State coercing public officials suspected of grand corruption. A potential normative argument, and perhaps the best justification, for such a coercive policy is one based on the protection of socio-economic rights. Policy-makers and the legislature evidently consider this coercion to be legitimate owing to the public official's suspected corrupt act causing harm or posing a risk of harm, and the coercion is

[299] Campbell, *Organised Crime* (n 19) 217-218
[300] See section 4 of chapter 3 and chapter 4 of the thesis

considered necessary in order to fulfil a human rights duty. In the context of grand corruption, the human rights duty to be fulfilled is the CP and SE rights of those person's harmed by grand corruption – such as the right to a fair trial and the right to health. These rights combine to influence the scope of the criminal law since the public official whose property is subject to a civil recovery order is effectively being subjected to a criminal law measure in the civil arena without the protections of the criminal law.

The adoption of UNCAC is analogous to developments in gender violence. In relation to gender violence, Lazarus identifies how, since the adoption of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the international law activity in this area has also influenced the scope of the criminal law and the way in which criminal institutions behave.[301] While this international activity has not established positive duties directed at the coercion of perpetrators of gender violence, it has led to the extension of the criminal law and a strong intensification of the policing and prosecution of acts of gender violence.[302]

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[301] Lazarus, 'Positive Obligations (n 273) 141-142; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); 19th General Recommendation of the CEDAW Committee General Recommendation 19 of January 29, 1992; General Assembly Declaration on the Elimination of Violence Against Women (DEVW) General Assembly Resolution 48/104 of 20 December 1993, Article 4; Committee of Ministers of the Council of Europe in their Recommendation (2002) Recommendation No. R (2002) 5 adopted by the Committee of Ministers on 30 April 2002 and Explanatory Memorandum. H/Inf (2004). See also Liora Lazarus, '*The Human Rights Framework Relating to the Handling, Investigation and Prosecution of Rape Complaints', Annex A to the Stern Report on The Handling of Rape Complaints* (2010)

[302] Lazarus, 'Positive Obligations (n 273) 142-143; *MC v Bulgaria* Application 39278/98, (2005) 40 EHRR 20, para 166

Since the adoption of UNCAC the approach to combatting corruption echoes some of these trends.

The UNCAC notes that States 'shall endeavour to establish and promote effective practices aimed at the prevention of corruption'[303] as well as ensure that there are 'effective, proportionate and dissuasive criminal or non-criminal sanctions' for corruption-related offences.[304] States are encouraged to use asset recovery measures including civil recovery, [305] develop codes of conduct for public officials,[306] establish appropriate systems of procurement[307] and private sector accounting and auditing standards,[308] and maintain a comprehensive regulatory and supervisory regime to prevent money laundering.[309]

These UNCAC provisions have led to a strong intensification of the efforts to police and prosecute acts of corruption and an increase in the efforts to manage these activities through the regulation of the public and private sector. The escalation in the efforts to combat acts of corruption is evidenced at the level of policy by the increase in the anti-corruption measures that the inter-governmental body the Financial Action Task Force requires Member States to adopt.[310] At the level of practice, the increased resources dedicated to combatting corruption is evidenced by

[303] UNCAC, Art 5(2)
[304] UNCAC, Art 26(4)
[305] UNCAC, Art 31
[306] UNCAC, Art 8(1)
[307] UNCAC, Art 9(1)
[308] UNCAC, Art 12(1)
[309] UNCAC, Art 14
[310] FATF, Corruption <www.fatf-gafi.org/publications/corruption/?hf=10&b=0&s=desc(fatf releasedate)> accessed 3 July 2019

a greater proportion of government budgets being allocated to anti-corruption measures and by a relative rise in the number of corruption-related prosecutions and asset recovery operations worldwide.[311] At the same time as the increase in the international efforts to combat corruption, there has been a trend cutting the other way, with the substantive under-criminalisation[312] of corrupt acts through an intensification of the attempts to prevent corruption through measures outside of the criminal law. These measures outside of the criminal law, such as civil recovery, have resulted in a *de facto* extension of the criminal law without the protections of the criminal law.

The right to security is a useful case study to demonstrate the concerns raised by the development of coercive duties.[313] The indeterminate nature of the right to security makes it difficult not only to frame the coercive duties of this right but also how it heightens the risk of its political exploitation. The right to live in a corruption-free society is more tangible than the concept of security. Yet, in practice, the political and judicial rhetoric and reasoning employed by public interest arguments offered in support of 'security' are similarly employed to fight serious crime and corruption, and the associated assertion of the right to live in a corruption-free society, are used to justify increasingly intrusive measures such as civil recovery.[314]

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311 See for example www.transparency.org/news/pressrelease/20120906_rise_in_prosecutions_makes_it_harder_to_get_away_with_foreign_brib accessed 29 January 2017

312 Lacey and Zedner in Maguire (n 4) 152-189

313 Lazarus, 'Positive Obligations' (n 273) 146-153

314 ibid

The key question that arises when a coercive duty is established is how much coercion is required to fulfil the right or rights of individuals at harm, or at risk of harm? In the context of combatting grand corruption, States are under a protective duty as a consequence of the positive rights contained in, for example, the ICESCR and ICCPR. However, we must determine how much coercion can legitimately be exercised in order to fulfil the duty to realise these rights. Is it legitimate for the coercion to take the form of civil recovery, with its weakening of the right to a fair trial? Is civil recovery able to strike a balance between the rights of the persons subjected to harm (or at risk of harm), in our context the individuals living in a corrupt regime, and the perpetrator (or potential perpetrator) of the harm, which in our context is the public official whose property is the subject of a civil recovery order?[315] While we might be able to accept that ICESCR and ICCPR rights give rise to justified coercion by the State, and that the necessary correlative of these rights is a duty on individuals to respect the rights of others and the State is justified in enforcing these, is it legitimate for the scope of coercive duties to include the weakening of the right to a fair trial of an official whose property is the subject of a civil recovery order? I attempt to answer these questions in chapter 7. I draw the conclusion that unless civil recovery meets the three conditions (*bona* fide Condition, Human Rights/Public Interest Condition, Effectiveness Condition) this measure can be characterised as 'coercive overreach' and the pragmatic arguments offered for its deployment involve

[315] Lazarus, 'Positive Obligations' (n 273) 148-150

a sacrifice of principle on the basis of a political calculation without the required empirical and normative support.[316]

I will now continue with the clarification of key terms by turning to the historical development of CP and SE rights. An examination of this history will help us better understand the 'hierarchy of rights' approach that forms part of the analytic framework for assessing whether the weakening of certain protections of Article 6 by civil recovery can be justified.

4.3 Civil and political rights and social and economic rights

In 1948, the Universal Declaration of Human Rights declared that CP and SE rights are of equal status and equally important to human welfare.[317] However, during the Cold War, the distinctions between negative and positive rights were mapped onto the divisions of world politics, and since the 1970s have been reflected in the 'North-South divide' between the developed and developing worlds.[318] The sharpness of the divide between these two clusters of rights is reflected in the architecture of both international and European human rights documents: the ICCPR covers CP rights whereas the ICESCR covers SE rights.[319] A similar pattern is evident at the European

[316] Zedner and Ashworth, 'Defending the Criminal Law' (n 38) 39-45
[317] Ruth Gavison "The Relationships between Civil and Political and Social and Economic Rights" in Jean-Marc Coicaud, Michael Doyle and Anne-Marie Gardner, *The Globalization of human rights* (UNU 2002)1-3
[318] Fredman, *Human Rights Transformed* (n 20) 1ff; Henry Steiner, Patrick Alston and Ryan Goodman International Human Rights in Context (3rd edn, OUP 2007) 263
[319] Gavison in Coicaud, Doyle and Gardner (n 320) 4

level where the ECHR covers a separate set of rights from the European Social Charter (ESC).[320]

In law and in practice these rights remain separate despite the ongoing recognition of their interdependence and the efforts to promote linkages between human rights and development communities.[321] The ICCPR and ECHR are justiciable while the ICSECR and ESC are subject to alternative methods, and this has resulted in a toleration of the infringement of basic SE rights at a level that would never be accepted for breaches of CP rights. While CP rights are declared and immediately effective, SE rights are only realisable progressively and are subject to available resources.[322]

An adapted version of Andrew Ashworth's 'hierarchy of rights' approach,[323] developed to help resolve conflicts between Convention rights, can be employed to help overcome the traditional prioritisation of CP rights over SE rights and to resolve conflicts between ICCPR and ICESCR rights. Ashworth's approach, which draws on Dworkinian rights analysis, could help establish a clear hierarchy of rights and

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[320] Ashworth, *Human Rights* (n 37) 81. The Charter on Fundamental Rights of the European Union is, however, an example of a legal instrument where civil and political and social and economic rights are placed side by side

[321] Philip Alston and Mary Robinson (eds), *Human rights and development: Towards Mutual Reinforcement* (OUP 2005) 1-4; The Proclamation of Teheran para 13 in Final Act of the International Conference on Human Rights UN doc. A/CONF 32/41 (1968); Commission on Human Rights res. 4 (XXXIII)(1977); General Assembly res 32/120 (1977); General Assembly Res. 55/2 (2000); Fredman, *Human Rights Transformed* (n 20) 2; Shue, *Basic Rights* (n 285) 160; James Thuo Gathii, 'Defining the Relationship between Human Rights and Corruption' *University of Pennsylvania Journal of International Law* 31 (2009); Maastricht Guidelines (Guideline 6) (n 285)

[322] Fredman, *Human Rights Transformed* (n 20) 1-5; Gavison in Coicaud, Doyle and Gardner (n 320); Gathii (n 324)

[323] See chapter 7 of thesis

develop new modes of reasoning and discussion that acknowledge the fact that certain rights are more subject to subsistence claims than others and allow subsistence considerations to play a different role in respect of rights of different weights.[324] In terms of relevance to human welfare and dignity, the need to avoid a life reduced by corruption to a struggle for subsistence may often be more primary and central than the need to gain political liberty.[325] Rather than political discussions of balancing and proportionality obscuring genuine conflicts between the promotion of CP and SE concerns and the pursuit of a corruption free society, a hierarchy of rights approach could allow a structured consideration of the value of CP and SE rights.[326]

We have seen that CP rights are necessary, but not sufficient, as guarantors of human dignity and that the exercise of CP rights cannot be rich and full without subsistence needs being met (such as a basic freedom from hunger). In the light of this, Ruth Gavison argues that the real question then is whether societies should redistribute some of their resources to guarantee an adequate level of welfare for all its members.[327] For our purposes, a key question is whether it is normatively legitimate to use civil recovery as a way to address some of these redistribution issues. I will attempt to explore this question in chapter 7. With a view to further preparing the ground for this endeavour, I will first outline the apparatus of the

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[324] Goold and Lazarus (n 22)16-17
[325] Gavison in Coicaud, Doyle and Gardner (n 320) 41-43; Robert Nozick, *State, Anarchy and Utopia* (Blackwell 1974) 40-41
[326] Goold and Lazarus (n 22) 16; Ronald Dworkin, 'The Threat of Patriotism' *New York Review of Books* (28 February 2002); Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) *The Journal of Political Philosophy* 191
[327] Gavison in Coicaud, Doyle and Gardner (n 320) 40-41

ICESCR and examine the impact of corruption on the rights contained in the ICESCR and ICCPR.

4.3.1 International Covenant on Economic, Social and Cultural Rights

The ICESCR rights are non-justiciable and are realisable progressively subject to available resources.[328] States are only required to *recognise* the rights to work,[329] health,[330] education,[331] social security,[332] an adequate standard of living,[333] just and favourable conditions of work,[334] and participation in and enjoyment of the fruits of culture and science.[335] The concept of 'minimum core' seeks to establish a minimum legal content for the indeterminate claims of ESC rights[336] that requires every State party to ensure the satisfaction of a minimum core obligation of 'at the very least, minimum essential levels of each of the rights.'[337]

The delivery of ESC rights is governed by standards developed under international human rights law which include: availability, accessibility, acceptability, and adaptability. These four specific standards have developed under international human rights law to protect the core content of ESC rights, govern their delivery, and

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[328] Fredman, *Human Rights Transformed* (n 20) 1-5; Gavison in Coicaud, Doyle and Gardner (n 320); Gathii (n 324) 173
[329] ICESCR, Article 6
[330] ICESCR, Article 12
[331] ICESCR, Article 13
[332] ICESCR, Article 9
[333] ICESCR, Article 11
[334] ICESCR, Article 7
[335] ICESCR, Article 15; Alston and Robinson (n 324) 31; Gathii (n 324) 173
[336] Young (n 43)
[337] Gathii (n 324) 183

help to measure the extent of their fulfilment.[338] The principle of 'availability' implies that public services are sufficient in quantity and quality to meet the needs of the community in question. The principle of 'accessibility' requires that services are allocated and provided to the whole community without discrimination and are within reach. The principle of 'acceptability' requires that services must respect local values and cultures and should be acceptable in form and content to the community in question. Finally, the principle of 'adaptability' implies that services should be adapted to the needs of communities or individuals in different social and cultural settings and to changing local and national contexts. Section 5.2.2 below intends to explore the impact of corruption on each of these standards.[339] Before doing so, this section will set out the requirements of Article 2(1) that govern States' obligations to use the 'maximum of available resources' to realise ESC rights.

The ICESCR specifically provides that States are under an obligation to use the 'maximum of available resources' to realise these rights, and that this shall be done by applying 'all appropriate means…'. Article 2(1) provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

[338] Carmona, 'Corruption and Human Rights' (n 85) 48
[339] Transparency International, 'Integrating Human Rights' (n 80) 60-62; Carmona, 'Corruption and Human Rights' (n 85) 48

The Limburg Principles on the Implementation of Economic, Social and Cultural Rights identify four dimensions along which 'maximum of available resources' is to be understood: State Parties have an obligation, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all; the resources referred to are those made available from within both the State and the international community through international co-operation and assistance; to determine whether adequate measures have been taken for the realisation of the rights, attention shall be paid to equitable and effective use of and access to the available resources; and priority given to the need to assure that at a minimum everyone has their subsistence requirements met as well as having essential services provided for.[340] While the CESCR does not specifically define the term 'resources', their expansive view of this term is evidenced by their reference to 'all resources' at a State's disposition.

It cannot be denied that financial resources are scarce in many countries, thereby making compliance with obligations pertaining to SE rights difficult. However, according to the ICESCR, the key question is not whether sufficient financial resources are available, but whether every effort has been made to employ all the resources that are at a States' disposal and whether the potential for increasing those financial resources has been addressed to an acceptable degree.[341] To this end,

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[340] Article 2(1) ICESCR; Committee on Economic, Social and Cultural Rights, The Nature of States Parties Obligations 9, UNODC E/1991/23 (Dec 12, 1990); Sigrun Skogly, 'The Requirement of Using the "Maximum of Available Resources" for Human Rights Realisation: A Question of Quality as well as Quantity?' (2012) 12(3) *Human Rights Law* Review, 398-399; Gathii (n 324). See also Asbjorn Eide, The Right to Adequate Food as a Human Right <http://www.fao.org/3/w9990e/w9990e03.htm> accessed 25 February 2018

[341] Skogly (n 343) 398-400

individuals and communities should take an active role in enhancing and creating resources with activists and academics alike suggesting that a more diverse approach ought to be taken to our understanding of how resources are made available.[342] In the light of these factors, in an urgent effort to satisfy the minimum obligations of SE rights, are States justified to employ civil recovery to combat the debilitating consequences of grand corruption for SE rights? In the context of combatting grand corruption, could the failure of a State to utilise civil recovery to contribute to the fulfilment of SE rights be considered a failure of the State to increase potential financial resources 'to a sufficient extent'? These questions will be considered in chapter 7.

I now move on to examine the relationship between human rights and corruption with particular focus on the impact of corruption on the rights contained in the ICCPR and ICESCR.

4.3.2 Corruption and human rights

The principal aim here is to examine the ways in which corruption can constitute a violation of existing human rights, with particular attention given to linking specific

[342] Skogly (n 343) 393-94; Radhika Balakrishnan and Diane Elson, 'Auditing Economic Policy in the Light of Obligations on Economic and Social Right' (2008) 5 *Essex Human Rights Review* 1-2; Colin Harvey and Eoin Rooney, 'Integrating Human Rights? Socio-Economic Rights and Budget Analysis' (2010) 3 *European Human Rights Law Review* 266; International Budget Project, 'Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights' (2004) <http://internationalbudget.org/wp-content/uploads/Dignity-Counts-A-Guide-to-Using-Budget-Analysis-to-Advance-Human-Rights- English.pdf> accessed 23 May 2016; Food and Agricultural Organisation, *Budget Work to Advance the Right to Food* (FAO 2009)

acts of corruption to State obligations under the ICCPR and the ICESCR. The principal manners in which corruption can constitute a violation of human rights is from its perpetuating discrimination, it preventing the full realisation of SE rights, and its leading to the infringement of certain CP rights.[343] Prior to examining these principal manners, the broader connection between corruption and human rights will first be briefly set out.

Martine Boersma is the author of one of the only comprehensive works designed to analyse the links between corruption and human rights. Boersma's proposal is that there are five dimensions along which corruption and human rights are connected: i) corruption and human rights violations often exist in the same environment; ii) human rights are necessary tools to fighting corruption, and these rights are often violated by State authorities wishing to silence whistle-blowers; iii) human rights may be violated by anti-corruption measures; iv) anti-corruption reforms may negatively impact upon the human rights of vulnerable groups; and v) corruption may in itself constitute a violation of human rights. I propose that there is an additional sixth dimension that ought to be considered: procedural rights can be used by public officials to defeat corruption investigations and prosecutions. This dimension is important for our purposes as the attempt by public officials to defeat corruption investigations and prosecutions is a key rationale for civil recovery.[344]

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[343] Martine Boersma, *Corruption: a violation of human rights and a crime under international law?* (Cambridge 2012)

[344] Gathii (n 324) 160 (examines three examples of how corruption defendants used the Bill of Rights under the Kenyan Constitution to stop corruption prosecutions). See also *Republic v Jud Comm'n of Inquiry into the Goldenberg Affair ex parte George Saitoti*, petition 102 of 2006 (High Ct of Kenya at Nairobi July 31, 2006)

4.3.2.1 Linking acts of corruption with specific human rights violations

Any examination of corruption in terms of the effects that it has on human rights must involve highlighting the violation of specific rights with an emphasis on the harm caused to individuals.[345] In practice, it is very difficult to link breaches of human rights with specific incidences of corruption.[346] Nonetheless, close attention will be given to the ways in which incidences of corruption can violate SE rights, including the right to health, food, and education, and CP rights, including the right to equality and non-discrimination as well as the right to a fair trial.

It should also be noted that a failure to implement adequate anti-corruption measures can violate State obligations to respect, to protect or to fulfil human rights. If States do not criminalise particular practices or fail to enforce certain criminal provisions they may not prevent or punish forms of corruption that cause violations of rights, and this non-compliance with the obligation to protect may be a vital determinant of State responsibility in corruption cases.[347] A State's inadequate anti-corruption policy can also be viewed as an example of a State's failure to meet its obligation to fulfil human rights since effective anti-corruption measures are a way for a State to comply with the positive obligation to fulfil human rights.[348]

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[345] Carmona, Corruption and Human Rights (n 85) 23; Boersma, *Corruption* (n 346) 368
[346] Zoe Pearson, 'An international human rights approach to corruption' in Peter Larmour and Nick Wolanin (eds) *Corruption and Anti-Corruption* (ANU Press 2013) 51-52
[347] Carmona, Corruption and Human Rights (n 85) 58-61
[348] Peters (n 286) 13-15; CESCR, General Comment No 13, The Right to Education (Art 13) (Adopted at Twenty-first Session of the Committee on Economic, Social and Cultural Rights on 8 Dec 1999) E/C 12/1999/10, para 58. See also Magdalena Sepúlveda Carmona and Julio Bacio Terracino, 'Corruption and Human Rights:

4.3.2.2 Corruption as a violation of SE rights

Corruption is likely to violate the enjoyment of SE rights because States have accepted, under human rights law, a wide range of duties to provide or regulate public services in relation to health, housing, water and education.[349] Corruption takes a multitude of forms but perhaps the most relevant form for a traditional civil recovery case is embezzlement. Embezzlement is defined in UNCAC as

> [M]isappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.[350]

We will therefore first look at the case study of embezzlement which clearly directly violates the rights to health, food, and education. Furthermore, when assessing whether or not an act of corruption violates SE rights, there are two further essential obligations that should be taken into account: the duty that a State has to take steps to realise these rights progressively and its duty to prioritise human rights when allocating resources.[351] To this end, I will first briefly examine how embezzlement

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Making the Connection' in Martine Boersma and Hans Nelen (eds), *Corruption and Human Rights: Interdisciplinary Perspectives* (Antwerp: Intersentia 2010) 27

[349] Boersma, *Corruption* (n 346) 157-158; Report of the SR on the right to education, Mission to Uganda, CHR 56th session, 9 August 1999, UN Doc E/CN.4/2000/6/Add.1, s48; Report of the SR on the right to education, Mission to Turkey, CHR 58th session, 27 March 2002, UN Doc E/CN.4/2000/60/Add.2, s9, 30-32; Report of the SR on the right to education, Mission to Indonesia, CHR 59th session, 4 November 2002, UN Doc E/CN.4/2003/9/Add.1, s9, 47, 50, 63; Report of the SR on the right to education, Mission to China, CHR 60th session, 21 November 2003, UN Doc E/CN.4/2004/45/Add.2, s15, 18, 32.; Report of the SR on the right to food, CHR 59th session, 10 January 2003, UN Doc E/CN.4/2003/54, s27

[350] UNCAC, Art 17

[351] Carmona, Corruption and Human Rights (n 85) 45

violates many of the rights of the ICESCR and then how the State party obligations under Article 2(1) of the ICESCR can be violated by corruption.

The embezzlement of funds allocated to social programmes prevents a State from fulfilling its human rights obligations and violates specific human rights. This corrupt practice may affect a wide range of human rights including the right to health, food, education and a fair trial, and a State's obligation to use the maximum of its available resources in order to achieve the full realisation of ESC rights.[352] Article 12 of the ICESCR establishes the 'right to the highest attainable standard of physical and mental health'.[353] The right to health includes the right to healthcare and the right to the underlying determinants of health, such as safe drinking water, adequate sanitation, adequate supply of safe food, nutrition, housing, occupational health, environmental health and access to health-related information. Another core component of the right, which the State must guarantee under all circumstances regardless of available resources, is access to maternal and child healthcare, including family planning, immunisation against major infectious diseases, appropriate treatment of common diseases and injuries, and the provision of essential drugs.[354] When resources allocated for the health budget are siphoned off by embezzlement, less money becomes available to pay salaries, fund operations, and maintain equipment and buildings. Effects on staff, infrastructure and quality of care will

[352] Boersma, *Corruption* (n 346) 368
[353] CESCR, General Comment No 14
[354] ICHRP, Integrating Human Rights (n 80) 60-62; Gathii (n 324); UN ECON & SOC COUNCIL [ECOSOC], CESCR, The Right to the Highest Attainable Standard of Health: 11/08/2000, CESR Gen Comment 14, 4, UNODC. E/C.12/2000/4 (Aug 11 2000); Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1992) 12 *AUSTL YB INT'L L* 95

inevitably follow. In this way, embezzlement can simultaneously interfere with the availability, accessibility, and quality of the right to health as well as to the underlying determinants of good health including food, housing and safe potable water.[355]

Embezzlement also clearly violates the right to food (Article 11(2) ICESCR) and right to education (Articles 13 and 14 ICESCR). When an official embezzles funds that have been set aside to buy and distribute food then people are deprived of the food they need and to which they are entitled. While the embezzlement of education funds interferes with the availability and quality of the right to education by removing resources that are needed to equip educational institutions and pay teachers. When funds are stolen, pupils suffer because educational equipment will be of lower quality and teachers lack the requisite resources. In these circumstances, the State clearly does not comply with its obligations to fulfil the right to education, and thus the right to education is violated.[356]

State party obligations under Article 2(1) of the ICESCR

Various UN Treaty Bodies confirm that corruption has a negative impact on State resources available for the realisation of ESC rights. For example, the observations of the Committee on the Rights of the Child on Yemen concluded that the serious resource constraints of Yemen was aggravated by widespread corruption.[357] Both Martine Boersma and Ann Peters provide a detailed analysis of the precise ways in

[355] Gathii (n 324). Violations of the right to health and wellbeing are also linked with corruption through the distortion of government expenditure by corrupt officials
[356] Carmona, *Corruption and Human Rights* (n 85) 58-61
[357] Boersma, *Corruption* (n 346) 120

which corruption may violate Article 2(1), based on the text of Article 2(1) and Magdalena Sepúlveda's work on the seven 'hardcore' immediate obligations derived from Article 2(1). While a detailed examination of their analysis is outside the scope of our enquiry here, it is useful to briefly summarise how corruption violates each of the components of Article 2(1).

Article 2(1) contains four components that are subject to monitoring by the CESCR. Each component is a starting point for specific State obligations, including arguably obligations in the field of anti-corruption. The first component – the core obligation – is 'to take steps'. The second component is that the State party must take these steps 'with a view to achieving progressively the full realization' of the ESC rights. The third component requires the State to exhaust all possibilities it has at its disposal ('to the maximum of its available resources'). The fourth component requires the State to employ 'all appropriate means'. Whenever a State party fails to comply with any of these components it is in non-compliance with the ICESCR[358] and each of these components may become difficult or impossible to fulfil in circumstances of grand corruption. The non-compliance with Article 2(1) as a result of grand corruption does not result in an immediate correlative obligation to institute measures such as civil recovery but one can see how policy-makers and legislators

[358] Peters (n 286) 14-15. On the operationalisation of these elements, see Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights (1986), (1987) 9 *Human Rights Quarterly* 122-135; Maastricht Guidelines (n 285); CESCR, General Comment No 3, The Nature of States Parties' Obligations (Art 2, Para 1) (1990). See also Audrey Chapman, 'A Violations Approach for monitoring the International Covenant of Social, Economic and Cultural Rights' (1996) 18 *HRQ* 23-66

might rely on this non-compliance as part of their normative grounds for turning to civil recovery.

I now move on to examine more closely the ways in which corruption can constitute a violation of CP rights.

4.3.2.3 Corruption as a violation of CP rights

The right to equality and non-discrimination

Corruption can violate the fundamental human rights principles of equality and non-discrimination found in the universal and regional human rights conventions. These principles demand that every individual is equal before the law and has the right to be protected by law on an equal basis. [359] The UN Covenants contain ancillary prohibitions against discrimination that apply in connection with the exercise or enjoyment of a right under the Covenants.[360] The ICCPR also contains an autonomous equal treatment provision in Article 26, which is relevant to discrimination in the area of social rights as well as to the economic rights of competitors in public procurement due to the lack of a guarantee of property and economic freedom in the ICCPR. This autonomous right contains several elements: a general right to equality before the

[359] UN Secretary-General Kofi Annan, Foreword UNCAC (2003); Peters (n 286) 23-25; C Raj Kumar, *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance* (Oxford OUP 2011), 36, 46-47; Carmona, *Corruption and Human Rights* (n 85) 34. The principle of equality is enshrined in Article 7 UNHR as well as Article 14 ECHR

[360] Peters (n 286) 23-25; Article 2(2) ICESCR and Article 2(1) ICCPR; Boersma, *Corruption* (n 346) 202

law, a right to equal protection of the law, and a general prohibition against discrimination.[361]

In which ways might corruption violate the right to equality and non-discrimination? The right to equality before the law will be violated if corrupt courts apply the law in an arbitrary fashion i.e. in favour of the bribing party. The right to equal protection of the law, which requires that States ensure substantive equality through legislation, will be violated when corruption in politics leads to a distorted legislative process which fails to respect the right to equal protection under the law. For example, when Members of Parliament acquire their positions by unlawful means, law-making may not serve the purpose of offering equal protection without discrimination. The prohibition of discrimination is slightly more complex in relation to corruption but nonetheless it is reasonable to argue that the discrimination that takes place in cases of corruption is prohibited by Article 26 of the ICCPR. 'Discrimination' is defined in HRC General Comment No. 18 thus

> [A]ny distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing that recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.[362]

If differential treatment is not justified by reasonable and objective grounds, any general distinction might qualify as discrimination. Article 26 covers a non-exhaustive list of prohibited grounds of discrimination demonstrated by reference to

[361] Boersma, *Corruption* (n 346) 204; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 2005) 60
[362] Boersma, *Corruption* (n 346) 204; CESCR General Comment No 18, s 7

discrimination on the ground of 'other status'.[363] Based on this definition, it becomes clear that both direct discrimination (a practice with a discriminatory purpose) as well as indirect discrimination (a practice with a discriminatory effect) are prohibited.[364] Intent by the State to discriminate is not required since indirect discrimination may arise from a State policy that appears neutral but in reality disproportionately affects certain population groups in a negative way.[365] Corruption could fall under the discriminatory head of 'other status' when, for example, preference is given to a bribe-giver.

The right to Equality before the Courts and Tribunals and the Right to a Fair Trial

It is possible to connect cases of judicial corruption to the right to equality before courts and tribunals and the right to a fair trial as enshrined under Article 10 UDHR, Article 14 ICCPR and various human rights treaties including Article 6 ECHR. Article

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[363] Boersma, *Corruption* (n 346) 206; Peters (n 286) 23-25; CESCR, General Comment No 20, Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights) (2009), para 35

[364] Boersma, *Corruption* (n 346) 205; Richard Burchill 'Equality and Non-discrimination' in Alex Conte and Richard Burchill (eds.) *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2nd edn, Ashgate 2009) 290-292

[365] Peters (n 286) 23-25; see CESCR, General Comment No 20 (n 82), para 8: 'guarantee' means that 'discrimination must be eliminated both formally and substantively. [...] States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.' In relation to the right to education, see CESCR, General Comment No 13, para 59: The failure to take measures which address *de facto* educational discrimination violates Article 13. In relation to the right to health, see CESCR, General Comment No 14, The Right to the Highest Attainable Standard of Health (Art 12) (2000), para 50: Denial of access to health services as a result of *de facto* discrimination of particular groups violates the right to health

14(1) guarantees equality before the courts and tribunals, guaranteeing equal access and equality of arms and ensuring the treatment of parties without discrimination.[366] Judicial corruption can constitute a direct violation of the right to equality before courts and tribunals owing to the following effects of judicial corruption. The right to equal access is violated whenever persons are asked to pay bribes in order for their case to be processed or expedited. The principle of 'equality of arms' may be violated by corruption where one party to a dispute is able to bribe a judge which gives this party an unfair advantage.[367] Finally, a corrupt judiciary is highly likely to ignore the principle of treatment without discrimination when the bribing party is favoured. Article 14(1) also gives individuals the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Corrupt acts such as bribe-taking or extortion of bribes by judges destroy the independence of judges[368] while the independence of judges is not possible when appointed due to political or family ties.[369] The fundamental principle of the presumption of innocence provided under Article 14(2) may also be violated in cases of judicial corruption; particularly in cases involving whistle-blowers and political opponents. Finally, Article 14(3) contains a number of minimum guarantees applicable to criminal cases that will be undermined by corruption. For example, where the minimum guarantees of

[366] Boersma, *Corruption* (n 346) 208; CESCR, General Comment No 32, s5
[367] Boersma, *Corruption* (n 346) 208; CESCR, General Comment No 32, s13
[368] Boersma, *Corruption* (n 346) 210; CESCR, General Comment No 32, s21; Nowak (n 864) 321; Carmona, *Corruption and Human Rights* (n 85) 175-178, 287-290
[369] Boersma, *Corruption* (n 346) 209; ICHRP, Making The Connection (n 80) 38; Transparency International (eds) *Global Corruption Report*: *Corruption in Judicial Systems* (CUP 2007) 179-183, 201-204

detainees are not respected the likelihood of police corruption in the form of pressurising the detainee for money will increase.[370]

It is clear that there are numerous ways in which corruption violates both CP and SE rights. Let's now remind ourselves of the conclusions drawn in this work prior to turning to the substantive analytic project of this thesis which asks whether the weakening of certain protections of Article 6 by civil recovery can be justified, and if so, what criteria will need to be met in order to provide sufficient justification to employ civil recovery.

Interim Summary

Civil recovery is an example of a policy-based approach to criminal procedure and evidence that accepts that certain guarantees of Article 6 ought to give way in order to combat serious crimes involving grand corruption. Despite international acceptance of human rights as inclusive of positive rights, there remains a powerfully entrenched set of dichotomies between CP and SE rights. However, the efforts of contemporary theorists to collapse the artificial distinction between CP and SE rights through a substantive conception of freedom and equality is compelling. In the context of grand corruption, I further argue that a 'hierarchy of rights' approach can be meaningfully employed to allow for a more structured analysis of the rights that arise in the efforts to combat grand corruption.

[370] Boersma, *Corruption* (n 346) 156, 211-212; Transparency International (n 80) 225-228

5. Conclusion to Part I

Before moving onto Part II, it is helpful to briefly draw together the thesis thus far. In Part I, I explored the contemporary landscape of corruption and asset recovery by undertaking a conceptual analysis of key terms to clarify what is meant by corruption and asset recovery. We have seen that the international AC and asset recovery framework has been unable to keep pace with the complex global problem of corruption. Civil recovery is part of a broader recent trend employing the civil law for crime control purposes and undermines principles of criminal justice and human rights. Despite these concerns, civil recovery continues to be viewed to be a helpful tool in overcoming the multiple barriers to asset recovery.

In the light of the groundwork laid thus far, Part II aims to normatively critique the Part 5 provisions through, first, a conceptual analysis of civil and criminal recovery and, second, through the leading Strasbourg jurisprudence. In Part II, the thesis concludes that civil recovery represents a 'prevalence of purpose and policy over truth',[371] and that the distinction between civil and criminal recovery is arguably not much more than a form of lexical hocus-pocus.

[371] Boštjan Zupančič, *Criminal Law: its Nature and its Function* (New York 1983) in Alldridge in Twining and Mar (n 260)

Part II: Normative Critique of Part 5 Civil Recovery: criminalisation and penalisation arguments

Chapter 3: Conceptual grounds for criminal classification of Part 5 civil recovery

1. Introduction

The objections proposed here to the use of Part 5 proceedings in the context of grand corruption are three-fold and interrelated. First, despite the importance of effectively recovering the proceeds of grand corruption the abhorrent consequences of grand corruption implies that grand corruption ought to be classified as one of the wrongs that is so serious that it should be condemned and punished in the criminal law (the criminalisation argument).[372] Second, Part 5 proceedings should be classified as a criminal measure protected by at least some of the enhanced criminal safeguards since it is in substance punitive in nature (penalisation argument). Part 5 proceedings involve many of the characteristics associated with punishment: censure, hard treatment and culpability; as well as the relevant authorities possessing significant powers under Part 5 of POCA 2002.[373] Third, even in the context of combatting the serious problem of grand corruption the value of protecting principles of human rights requires that the recovery of assets ought to be subsequent to a criminal

[372] Ashworth and Zedner, *Preventive Justice* (n 7) 106-107; AP Simester and Andreas von Hirsh, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Oxford 2014) ch 2 and 22

[373] Campbell, *Organised Crime* (n 19) 217-218

conviction and classified as a criminal measure protected by the enhanced criminal safeguards (the human rights argument).

Despite judicial determinations to the contrary, I conclude that Part 5 civil recovery is punitive in nature and should accordingly be treated more as a criminal than civil sanction. Part of the explanation for the judicial leanings towards the interpretation of confiscation as preventive involves a disposition of deference to the legislature that invariably results in a reluctance to examine the 'civil' label attributed to civil recovery.[374] A fundamental driver is fear of undermining an important tool against crime: the courts describe applications of traditional processes of criminal law to confiscation as 'useless and unworkable' and ineffective.[375] These efficacy concerns are employed to justify circumventing traditional criminal law safeguards. I aim not to be so constrained by labels[376] and will examine the limits of Part 5 of POCA 2002 through, firstly, a conceptual analysis of criminal and civil law and punitive and preventive measures. And secondly, through the application of the Strasbourg jurisprudence, viz. the leading Strasbourg test of *Engel v the Netherlands.*[377]

The chapter begins with outlining the consequences for fundamental rights guarantees and due process protections under the different classificatory labels.

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[374] King, 'Using Civil Processes' (n 7) 6-12; Ashworth and Zedner, *Preventive Justice* (n 7) 19-20

[375] *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099 (HL) [12]; *Director of the Assets Recovery Agency v Green* [2005] EWHC 3168 (Admin) [17], The Times, 27 February 2006; *Director ARA v Szepietowski* [2007] EWCA Civ 766, [2008] Lloyd's Rep FC 10; Campbell, *Organised Crime* (n 19) 205. See also Douglas Husak, 'Preventive Detention as Punishment: Some Possible Obstacles?' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds) *Prevention and the Limits of the Criminal Law* (OUP 2013) 178-180

[376] *Trop v Dulles* 356 US 86 (1958) [94]; King, 'Using Civil Processes' (n 7) 345

[377] *Engel v Netherlands* (1979-80) 1 EHRR 647

Placing a measure in a particular legal context or procedural channel should not determine jurisprudential principle without reference to the normatively prior question of whether the choice of context is itself defensible.[378] Where the effect is to criminalise and the outcome is the coerced imposition of pain, the technical designation of such an order as civil rather than criminal ought not to take it outside the realm of punishment.[379] Before turning to the three primary arguments of this thesis: grand corruption should be prosecuted through the criminal law; the punitive nature of Part 5 of POCA 2002 means that it should be classified as a criminal measure protected by the enhanced criminal safeguards; and the value of protecting principles of human rights requires that the recovery of assets ought to be subsequent to a criminal conviction and classified as a criminal measure.

2. Consequences of criminal conviction and criminal classification: applicability of fundamental guarantees and protections

If civil recovery is contingent on a criminal conviction or classified as a 'criminal charge' or 'criminal penalty' then the additional safeguards and protections of criminal proceedings apply.[380] The difficulties inherent in appropriately classifying asset recovery measures have certainly given rise to a plethora of challenges before

[378] Zedner, 'Seeking Security' in Lazarus and Goold (n 22) 257-265; Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Anthony Duff and Stuart Green (eds), *Philosophical Foundations of the Criminal Law* (Oxford University Press 2011) 294
[379] Zedner, 'Preventive justice or pre-punishment?' (n 16) 175
[380] King, 'Using Civil Processes' (n 7) 342-343; Ashworth and Zedner, *Preventive Justice* (n 7) 19-20

the courts: in relation to the retrospective application of punishment, the right to a fair trial and the right to property.[381]

Despite these classificatory challenges, the UK civil recovery powers have operated fairly successfully without violating commonly held principles or perceptions of justice.[382] However, we should not allow this to conceal the fact that many traditional protections of the criminal law are absent from Part 5 of POCA 2002 while the effects of being subject to a civil recovery order is not wholly dissimilar to being criminally convicted. Civil recovery proceedings possess a number of the characteristics found in proceedings that involve a criminal conviction. Not only does civil recovery use many of the powers found in criminal proceedings it also implements a high level of condemnation and censure. In both a criminal conviction and civil recovery proceedings, at its instigation the proceedings may involve the State establishing publicly that unlawful activity has occurred and ultimately end with the confiscation of assets. This clearly can have very significant detrimental consequences for the individual(s) involved in the proceedings that warrants the additional protections of criminal law.

The principal right affected by the classification of civil recovery as 'civil' is the right to a fair trial, in particular the presumption of innocence – a protection that is

[381] POCA, ss 266(3)(b): court cannot include in a recovery order measures that are incompatible with rights under the ECHR; POCA, ss 316(3): retrospectivity expressly made; *Szepietowsk*i (n 250) [18]: seems civil recovery powers can be used retrospectively; Williams, Hopmeier and Jones (n 196) [347]
[382] Alldridge, 'Two Key' (n 13) 188

only applicable to criminal proceedings.[383] Article 6 provides for the right to a fair trial as follows:

> **Right to a fair trial**
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> b. to have adequate time and facilities for the preparation of his defence;
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 6(1) applies to both civil and criminal proceedings, whereas Article 6(2) and (3) are applicable only to criminal proceedings. Article 6(1) is a 'modified' presumption of innocence where the rights of defence apply to all matters as part of a general fair hearing. In order for a trial to be fair, proceedings must occur within a reasonable timeframe by an independent and impartial tribunal established by

[383] Smith, Owen and Bodnar (n 23) 21-22; King, 'Civil Forfeiture' (n 15) 371ff; Ashworth and Zedner, *Preventive Justice* (n 7) 16

law.[384] A fair trial includes a right against self-incrimination, a presumption of innocence, equality of arms and rights of access to court.

Article 6(2) and (3) provide for a presumption of innocence and rights of defence in relation to criminal proceedings only. It should be noted though that even if proceedings are deemed to be civil in nature the State cannot dispense with its general obligations under Article 6. In the UK criminal confiscation case of *McIntosh*, Lord Bingham concluded that in relation to such orders all protections of Article 6(1) apply at each stage and, further, that the court must act with scrupulous fairness in making its assessment to ensure that neither the accused nor any third party suffers any injustice.[385]

There are undoubtedly significant consequences that result from classifying Part 5 proceedings as civil. This classification of civil recovery as a civil measure circumvents certain key due process protections of the criminal law. Part 5 proceedings employ a lower civil standard of proof - on the 'balance of probabilities', which is a dilution of the criminal standard of proof – 'beyond a reasonable doubt'.[386] Furthermore, in civil recovery proceedings there is no requirement to allege a specific unlawful act and evidence that would not be admissible in a criminal trial ends up being admissible, such as inferences from silence and hearsay evidence.[387] The point of the POI is that it provides 'a process of calling upon the executive to account for its

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[384] Robin White, Elizabeth Wicks and Clare, Ovey, *Jacobs, White and Ovey: the European Convention on Human Rights* (OUP 2014), ch 12-13
[385] *Her Majesty's Advocate v McIntosh* [2001] UKPC D 1, [2003] 1 AC 1078
[386] Gallant, *Money Laundering* (n 5) 20-25
[387] POCA, s46; Alldridge, 'Two Key Areas' (n 13) 186-187; Alldridge in King, Walker and Gurulé (n 6) 530-532

request to have a citizen officially condemned and punished for an offence.' Without this process of public accountability of the executive for its criminal accusations, there can be no civil liberties and the citizen would in effect be accountable to the executive.[388]

The conclusion that Part 5 of POCA 2002 creates a problematic convergence of criminal allegations adjudicated in the absence of the more stringent evidentiary rules and standard of proof of the criminal law is difficult to avoid.[389] This convergence is relevant to the argument that grand corruption should be prosecuted through the criminal law. I now turn to this argument.

3. Criminalisation argument: why grand corruption is a criminal wrong

The abhorrent consequences of grand corruption implies that grand corruption ought to be classified as one of the wrongs that is so serious that it should be condemned and punished in the criminal law.[390] The use of the criminal law is important because it underlines the moral nature of offending and remains the most powerful moral condemnation of harmful activities. [391] Corruption offences are one of the clearest example of moralised notion of crime as a wrong or even evil (*mala in se*).[392] However, large-scale international corruption cases increasingly use both the

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[388] Peter Ramsay, 'Democratic Limits to Preventive Criminal Law' in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law* (n 378) 226
[389] Gallant, *Money Laundering* (n 5) 20-25
[390] Douglas Husak, *Overcriminalisation: The Limits of the Criminal Law* (OUP 2008) ch 2 and 3; Simester and Hirsh (n 375) ch 2, ch 11; Ashworth and Zedner, *Preventive Justice* (n 7) 17
[391] Croall, 'Understanding White Collar' (n 224) 151-152
[392] Lacey and Zedner in Maguire (n 4) 159-182

criminal process and civil proceedings to recover corrupt assets.[393] Part 5 of POCA 2002 allows for the confiscation of the proceeds of grand corruption in the civil courts and is arguably at times an example of the inappropriate use of civil law for crime-control strategies. A further basis for the objection to the use of civil law to confiscate the proceeds of grand corruption is rooted in the following normative problem. How does one reconcile the fact that a minor offence, such as a non-fatal road traffic offence or the theft of a small amount, is classified as criminal and protected by criminal safeguards while a proceeding that involves an allegation of grand corruption is classifiable as civil and thus operates without such safeguards?[394]

The courts have echoed these concerns. Thomas LJ in the UK Court of Appeal *Innospec* corruption case described grand corruption offences as '…at the top end of serious corporate offending both in terms of culpability and harm. It is deliberate intentional wrongdoing. It causes serious harm'.[395] He describes how the serious criminality involved in corruption demands that criminal rather civil sanctions be imposed, and be seen to be imposed. He went onto suggest that any applications for civil penalties should only be heard in conjunction with criminal proceedings.

The justifications for the application of the criminal law provide a useful lens through which to investigate the rationale for the criminal prosecution of grand corruption. Motivating the application of criminal law are justifications for the use of State power in prohibiting wrongs enacted against an individual or a fundamental

[393] Nicholls and others (n 9) 276-277
[394] Campbell, *Organised Crime* (n 19) 201ff
[395] *R v Innospec Ltd* [2010] Lloyd's rep FC 462, [2010] Crim LR 665 [38]; Nicholls and others (n 9) 257-258

social value or institution. These justifications relate to democratic principles as well as to concepts such as harm and culpability. Associated with the concepts of harm and culpability is liability. There are different types of liability, including civil and criminal liability, reflecting the different degrees of harm and culpability. The existence of these different types of liability forms the basis of the argument that the grave consequences of grand corruption implies that grand corruption ought to be classified as one of the wrongs that is so serious that it must, except in a very limited number of exceptions e.g. death, be condemned and punished in the criminal law.[396]

Typically, criminal liability is an expression of the most punitive condemnation that society can inflict through the State. Conviction for an offence opens the possibility of a coercive sentence, imposition of the censure of conviction and the imposition of the highest level of punishment. [397] The fact that different types of liability exist suggests that some wrongs warrant civil liability but not criminal liability. Criminal liability requires the highest level of State justification since it is typically employed in cases of major harm and wrongdoing. It is the special significance and gravity of the consequences of conviction, with all the legal and social implications, that supports the argument for the safeguards of human rights law and the criminal law, specifically the criminal trial. A criminal trial can be seen as a communicative process that calls the defendant to answer, and through which he can challenge the accusations of wrongdoing made against him. The trial is a

[396] Ashworth, *Principles of Criminal Law* (n 14) 1-2,4-6
[397] Zedner and Ashworth, 'Defending the Criminal Law' (n 38) 21

communicative forum which involves mutual relations of responsibility between the participants.[398]

The adjudication of guilt involved in criminal cases can be seen as a public restatement of societal boundaries and a public reinforcement of the concept of individual responsibility. The criminal law focuses on the individual offender yet it also serves a broader and more constructive function: 'a ceremony through which society expresses the ideology of individual free will and responsibility, reaffirms moral rules, and forges a social consensus.'[399]

The question about the criminalisation of grand corruption must be understood in the context of two dominant and divergent trends that have characterised the practices of criminalisation over the past two decades (over-criminalisation and under-criminalisation).[400] On the one hand, it is often argued that we face a crisis of over-criminalisation: far too much is criminalised that ought not to be criminal with the criminal law far exceeding its proper boundaries. Over-criminalisation is considered a perversion of the criminal law, in the sense that the criminal law is used in manners not according with its 'proper purposes or with the principles appropriate to those purposes.' Over-criminalisation refers to the criminalisation of conduct that does not constitute a public wrong, or the process where citizens are required to answer, on pain of conviction and punishment, for

[398] Duff and others (n 35) 1-4
[399] Mary M Cheh, 'Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction' (1991) 42 *Hastings LJ* 1325-35
[400] Ashworth and Zedner in Duff and others (n 35) 60-87

conduct not constituting a presumptive public wrong.[401] Examples of over-criminalisation that are often cited are the ridiculous and rarely enforced laws such as the State of Delaware punishing by up to six months' imprisonment sales of perfume or lotion when offered in the market as a beverage.[402] Husak moves beyond the 'over-criminalisation headlines' to identify three kinds of recent types of over-criminalisation: overlapping offenses where the same conduct is criminalised again and again; crimes of risk prevention where the possibility of harm is criminalised; and ancillary offenses where a defendant is believed to have committed a primary or core offense, but prosecution is unlikely to be successful or is otherwise considered undesirable.

On the other hand, it is often argued that there is a genuine problem of under-criminalisation and that the criminal law should be extended to various threats. This is viewed as a subversion of the criminal law in the sense that non-criminal methods of control and regulation are used against public wrongs, when arguably it is the criminal law which should be used.[403] This subversion has witnessed a recourse to diversion (for example through fixed penalties and hybrid measures) and downgrading, through greater use of summary trials, stronger incentives to plead guilty, and an increase in strict liability.[404]

The perils of under-criminalisation are no less grave than those of over-criminalisation where the result is that 'disproportionate, ill-defined, and often

[401] Duff in Duff and others (n 35) 88-93
[402] Husak, *Overcriminalisation* (n 378) 35; Eric Luna, 'The Overcriminalization Phenomenon' (2005) 54 *American University Law Review* 703-706
[403] Ashworth and Zedner in Duff and others (n 35) 59-87
[404] Duff and others in Duff and others (n 35) 13-16

burdensome intrusions upon individual liberty are imposed in the name of prevention without appropriate procedural safeguards'. [405] Civil recovery may constitute under-criminalisation insofar as it excludes appropriate procedural safeguards and other protections for the individual, which would otherwise be available if civil recovery were classified as criminal.[406] The objection to such provisions that subvert the criminal law rests on the claim that the polity should deal honestly with its citizens, such as define certain types of action as public wrongs and declare that we should refrain from such actions because they are wrong. It is the wrongfulness of those actions that justifies the convictions and punishments to which their perpetrators are liable. By contrast, civil recovery is not in this sense honest because it is directed ultimately at unlawful conduct that does indeed constitute a public wrong yet civil recovery does not treat that conduct as a public wrong, or the property-holder as a responsible citizen, since it does not call the person whose property is the subject of a civil recovery order to answer through a criminal process.[407]

A brief review of the reasons for not criminalising a public wrong lends further support to the argument that civil recovery ought not to be used, and that moreover grand corruption ought to be criminalised and punished in the criminal law. There are three considerations. First, some wrongs are simply too trivial to warrant the attention of the criminal law. Second, the costs of enforcing the criminalisation of a

[405] Ashworth and Zedner in Duff and others (n 35) 59-87
[406] Ashworth and Zedner, 'Just Prevention' in Duff and Green, *Philosophical Foundations* (n 253) 281; Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15 *New Criminal Law Review* 542, 544-547
[407] Duff in Duff and others (n 35) 110

public wrong would be 'so great, and the chances of doing it justly and effectively so small.' Third, there might be kinds of public wrong that cause or threaten serious harm, but should not be criminalised owing to the primacy of ensuring that the harm is repaired, rather than calling on those who caused it to public, criminal account.[408] The second and third considerations listed here are offered to help shift the focus *from* the prosecution of grand corruption *to* the use of civil recovery. Yet as we have seen there is no empirical evidence to support such a shift.

In instances involving criminal conduct and consequent punitive treatment, the protections of criminal procedure and trial ought to be upheld. As Ashworth and Zedner succinctly put it:

> A defence of the liberal model of the criminal law and the criminal trial rests on the proposition that, at the level of justification, there is a necessary link between the censure of conviction, liability to (significant) punishment, and the need to respect the dignity of the individual defendant through the upholding of rights.[409]

This model of the criminal law and criminal trial implies that the censure of civil recovery, its indirect liability for punishment, and the loss of property and loss of enhanced protections of criminal law, warrants civil recovery being post-conviction and benefitting from the enhanced protections of the criminal law except in a very limited number of circumstances (e.g. when criminal conviction is not possible owing to death or flight). These enhanced protections would undermine the underlying rationale of civil recovery and it is technically possible to achieve enhanced procedural protections in a civil context. Nonetheless, the procedure should be

[408] Duff in Duff and others (n 35) 90-108
[409] Zedner and Ashworth, 'Defending the Criminal Law' (n 38) 48-49

criminal, rather than just provide enhanced rights, owing to the moral signalling function that only the criminal law can perform. The fact that civil recovery measures are not currently criminal means that there is not sufficient signalling of moral censure for the unlawful activity associated with civil recovery orders (see section 4.1 below for further analysis in relation to criminal law and censure).

An interesting final consideration is *who* are the perpetrators of grand corruption, and does their identity in any way influence the strength of the criminalisation argument? In the context of grand corruption, it is the powerful elite that is the 'small and unpopular minority'[410] that is the focus of the State's anti-corruption measures. Traditionally, it is the rights of the powerless 'outcasts and outlaws'[411] who need to be protected from the State and majority vote.[412] The 'powerless' who are typically the subject of State interference include the 'suitable enemies' of the 'underclass', 'unlawful combatants' with their persistent criminality and 'irregular citizens' such as asylum seekers and terrorist suspects.[413]

Where there is a high level of public interest in combating corruption and repatriating assets, the pressure to weaken individual rights is heightened.[414] This is especially so when the individual rights to be protected are those of the dominant

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[410] Zedner, 'Seeking Security' in Lazarus and Goold (n 22) 267 in relation to sexual offenders

[411] Andrew Ashworth and John Gardner, 'Neighbouring on the oppressive: the government's 'Anti-Social Behaviour Order' proposals"' (1998) 16 *Criminal Justice* 7, 25; Peter Ramsay, 'What is anti-social behaviour?' *Criminal Law Review* (2004) 1

[412] ibid

[413] Hillyard and others, 'Beyond Criminology' (n 223) Ch 16; Zedner, 'Security, the State' (n 16) 389; Phil Scratton, *Power, Conflict and Criminalisation* (Routeledge 2007) 149

[414] Ashworth, *Human Rights* (n 37) 73-74

elite such as white-collar, corporate and State offenders.[415] It is certainly easier to garner sympathy for poor, disadvantaged offenders as opposed to white-collar offenders who possess status, wealth, education, and a comparatively more advantageous treatment within the criminal justice system. Indeed, the need for social justice has been one reason offered for the reduction in the protections accorded to defendants in cases of white-collar crime.[416] However, a principled distinction between the protections offered to the powerful and powerless cannot be justified and the protections of criminal procedure and trial ought to be upheld.

The thesis will now turn to the penalisation argument. Part 5 of this chapter will argue that civil recovery should be classified as criminal since it is in substance a criminal punitive measure rather than civil preventive measure. It argues that the conceptual grounds for the criminal classification of Part 5 of POCA 2002 are found in two of the distinguishing features of criminal and civil recovery: criminal and civil law, preventive and punitive measures.[417] It then turns to the UK and Strasbourg jurisprudence to lend further support for the criminal classification of Part 5 proceedings.

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[415] Hillyard and others, 'Beyond Criminology' (n 223) Ch 16
[416] Croall, 'Understanding White Collar' (n 224) 151-2; Hillyard and others, 'Beyond Criminology' (n 223) 18-21; Slapper and Tombs, *Corporate Crime* (n 204) 9
[417] King 'Using Civil Processes' (n 5) 338-339; Smith, Owen and Bodnar (n 23) 237-242

4. Penalisation argument: distinction between a criminal and civil measure

4.1 Conceptual grounds: distinction between criminal and civil recovery

This section explores the key characteristics of asset recovery in relation to the concepts of punishment and criminal justice, and the distinction between criminal and civil law and punitive and preventive measures. Along with numerous academics, I conclude that civil recovery fails to fit neatly in the civil preventive/criminal punitive dichotomy.[418] Rather, civil recovery ought to be seen as a criminal mechanism and a hybrid system that is neither purely preventive nor punitive: it satisfies many, but not all, aspects of punishment and criminal justice, and possesses characteristics of both criminal and civil law and punitive and preventive measures.

The term 'middleground' has been used to describe the jurisprudential space situated between criminal and civil law occupied by punitive civil sanctions. Here, the paradigmatic criminal and civil processes accurately describe only part of the empirical space of sanctioning processes, but significantly fails to capture the special combination of punitive purposes and civil procedural rules that characterise hybrid sanctions. The middleground does not possess distinctive characteristics found in either of the paradigms; it does however intermingle characteristics of both paradigms in novel ways.[419]

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[418] Anthony Gray, 'Forfeiture Provisions and the Criminal/Civil Divide' (2012) *15 New Crim L Rev* 32; Campbell, 'Theorising' (n 19)

[419] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' *Symposium: Punishment* (1992) 101 8 *Yale LJ* 1797-8, 1853-5; Cheh (n 402) 1325-35; Franklin E Zimring, 'Multiple Middlegrounds between Civil and Criminal Law, The *Symposium: Punishment* (1992) *Yale LJ* 1901-9; John Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models-And What Can Be Done About It,' 101(1992) *Yale LJ* 1875-91

The increasing instability of the theoretical distinction between remedial and retributive justice, and between criminal and civil measures, ought to be set within a broader context. Two conceptual developments in particular have contributed to the instability of the criminal and civil distinction: the influence of economic analysis, which strives for a single model of optimal sanctioning and focuses on common features of civil and criminal measures,[420] and the influence of cognitive and behavioural sciences which have cast doubt on rehabilitation as an achievable goal of incarceration.[421] Concurrent to these two conceptual developments, we have witnessed parallel shifts in the structure and function of legal institutions. The growth of the administrative state in the twentieth century has created a new form of hybrid sanctioning. This hybrid sanctioning involves imposition by the State of nonremedial, deterrent sanctions in the civil or administrative realm. In the criminal realm, this has taken on important nonpunitive dimensions which were formally located in the province of civil justice (for example, strict liability criminal sanctions).[422] In addition to the conceptual developments and the legal institutional

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[420] Carole Steiker, 'The Limits of the Preventive State,' (1998) 88 *J Crim L and Criminology* 780-94, 784-87. See also Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harv L Rev* 1089; Alvin K Klevorick, 'On the Economic Theory of Crime' (1985) 27 *Criminal Justice* 289, 301-03; Richard Posner, *Economic Analysis of Law* 205 (Aspen 3d ed, 1986); Richard Epstein, 'The Tort/Crime Distinction: A Generation Later', (1996) 14 *BUL Rev* 1

[421] Steiker (n 423) 788-791. See also Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Polity 1991) 140; David J Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (2nd edn Aldine Transaction 2002)

[422] Steiker (n 423) 791-95. See also Cheh (n 402) 1325ff; Zimring (n 402) 1907; Abraham S Goldstein, 'White-Collar Crime and Civil Sanctions' (1992)101 *Yale LJ* 1895; Mann (n 294) 1795; Paul Robinson, 'Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders' 83 (1993) *J Crim L & Criminology* 693

shifts outlined, we must incorporate a further challenge to the criminal-civil distinction. This challenge emanates from the transformation of modes of punishment: from the deployment of distinctive, publicly imposed criminal penalties such as the widespread use of capital and corporal punishment, to the use of the prison and fines. This use of imprisonment and fines further challenges the criminal-civil distinction since deprivations of liberty and property are also common features of civil 'restraint' and 'regulation.'[423]

While reflections of variances between criminal and civil law appear in the differences between civil and criminal recovery, these variances also need to be understood in the particular context of criminal law and criminal justice. [424] It is difficult to reduce the complex meanings of these terms to concise definitions and we begin with the meaning of criminal law and then turn our attention to criminal justice.[425]

The parameters of the criminal law have been largely determined by exercises of political power in different time periods and so there is arguably no division between criminal and non-criminal conduct corresponding to distinctions between immoral and moral conduct.[426] The definition of crime itself is also not without its attendant problems. Take for example Glanville Williams,[427] whose efforts at supplying a set of necessary and sufficient conditions were only exasperated leading

[423] Steiker (n 423) 795-796. See also Carol Steiker and Jordan Steiker, 'Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment' (1995) 109 *Harv L Rev* 355, 375
[424] King, 'Using Civil Processes' (n 7) 338-339; Zedner, *Criminal Justice* (n 16) ch 1-3
[425] Zedner, *Criminal Justice* (n 16) 2
[426] Ashworth, *Principles of Criminal Law* (n 14) 1-2
[427] Alldridge, 'Limits of Confiscation' (n 13) 830-831

him to conclude that crimes are simply items upon which criminal courts adjudicate. The courts have reached similar conclusions. For example, in *Proprietary Articles Trade Association v Attorney General for Canada* Lord Atkin observed that the key question in the determination of 'a crime' is whether the act is prohibited by penal consequences.[428]

Notwithstanding the difficulties in determining the parameters of the criminal law, Andrew Ashworth's functional definition of the criminal law does provide useful guidance that further reinforces why civil recovery should be considered a criminal measure. Key to Ashworth's definition of the criminal law is the idea of censure: '[p]erhaps the principal function of the criminal law is to censure persons for wrongdoing.' [429] Ashworth's prescriptive definition of the criminal law connects the justification of the criminal law to the justification of punishment, where censure is defined in terms of punishment, and punishment is defined as conviction plus the sentence of the court. Censure can be understood as an appropriate response to wrongdoing and a form of condemnation that is 'desert-oriented by nature'.[430] Censure is, moreover, seen as embedded in the relational structure of moral agency:

> [I]t addresses the victim, or the person who has been wronged; the wrongdoers with an expectation of response or acknowledgement of their conduct; and the wider community providing reasons for desistance from such conduct.[431]

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[428] [1931] AC [310], [324]; Glanville Williams, 'The Definition of a Crime' (1955) 107 *CLP* 130; Emmerson and others, *Human Rights and Criminal Justice* (3rd edn, Sweet & Maxwell 2012) 209-210, 213-214

[429] Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *LQR* 225, 232; Lindsay Farmer 'The Emergence of Criminal Law' in Lindsay Farmer (ed) *Making the Modern Criminal Law: Criminalization and Civil Order* (2016 OUP) 106-120, 108

[430] Andrew von Hirsch, *Censure and Sanctions* (OUP 1993) 24; Farmer (n 432) 108

[431] Farmer (n 432) 108

The importance of censuring persons for wrongdoing requires that civil recovery be classified as a criminal measure. Such a criminal classification would address the victim of unlawful activity; ensure that the wrongdoers acknowledge their unlawful conduct; and provide the wider community with reasons for desistance from such conduct.

The analysis provided by Lucia Zedner on criminal justice can also be used as a lens through which to examine the claim that Part 5 proceedings ought to be conducted within the criminal rather than civil justice system. Under Zedner's analytic framework, criminal justice is described with reference to six 'meanings of criminal justice'; three such meanings are of especial relevance to our analysis and will now be explored in relation to Part 5 proceedings. The first meaning of criminal justice views it as a form of governance. The State, in collaboration with many other social institutions, seeks to make civil society sustainable: by imposing social order, by resolving disputes and by managing risk. The second meaning of criminal justice views it as a collection of formal responses to wrongdoing, or suspected wrongdoing, that breaches the criminal law. The third meaning of criminal justice views it as a loose amalgam of institutions, agents and practices.[432]

The purpose of Part 5 of POCA 2002 certainly corresponds with the first meaning of criminal justice since State-instituted asset recovery is a form of State governance that is attempting to impose social order and manage the risk of crime. It

[432] Zedner, *Criminal Justice* (n 16) 1-36. The remaining meanings are: 4) a complex system 5) a particular normative framework 6) academic area of study

is possible to argue that Part 5 of POCA 2002 also shares characteristics of the second meaning since Part 5 is a formal response to wrongdoing, albeit the response is under the civil law. Despite Part 5 proceedings formally being a 'civil' response it is possible to argue that Part 5 is in substance a criminal response that is pursued through the civil justice system when it should in fact be pursued through the criminal justice system.[433] This labelling point also forms the basis for the view that Part 5 proceedings could fall within the third meaning of criminal justice. Although Part 5 proceedings are formally placed within the civil justice system it is actually many of the institutions, agents and practices of the criminal justice system that are involved with civil recovery e.g. the NCA and DPP.[434]

Acknowledging the context provided by these background issues, I now turn to why Part 5 civil recovery ought to be viewed as criminal in substance. To this end, Part 5 of POCA 2002 will be assessed against the characteristics of criminal and civil law and then punitive and preventive measures.

4.1.1 Characteristics of criminal and civil law

Grounds for establishing that civil recovery is better understood as a criminal measure can be found through an examination of some of the distinguishing features of criminal and civil law.[435] In criminal law, a prosecution for alleged criminal misconduct requires certain safeguards to be in place: clear and specific allegations

[433] Campbell, *Organised Crime* (n 19) 111-113; Smith, Owen and Bodnar (n 23) 21-24
[434] King, 'Using Civil Processes' (n 7) 338
[435] ibid

proven beyond reasonable doubt; trial by jury if appropriate and where relevant; specific evidentiary rules relating to the disclosure of documents; a right against self-incrimination; and provisions relating to the protection against double jeopardy. The more stringent requirements of criminal law, its restrictive rules of evidence at the trial stage and higher burden (and standard) of proof, reflect the fact that criminal proceedings are instigated by a powerful State, on behalf of society, in order to punish a person for committing a crime.[436]

By contrast, in civil proceedings it is usually a private individual who instigates proceedings since private rights and remedies reside in the domain of civil law; moreover, the intention is regulatory in nature as opposed to punitive. Also, there are higher levels of condemnation and censure existent in criminal law compared to civil law. Hence, in criminal proceedings the State has an extensive array of powers at its disposal while typically no equivalent powers of arrest, detention, search and seizure exist in civil proceedings.[437]

The characteristics of civil and criminal recovery further supports the view that civil recovery possesses intrinsic characteristics of criminal law. It can be viewed as an instance of the State using its significant array of powers to instigate a partially punitive measure that is characterised by both condemnation and the attribution of blame. While there are no powers of arrest or prosecution, a closer examination of the power of the relevant agencies reveals that the powers are similar to those found in criminal proceedings. Under POCA 2002, the Crown and Sheriff Courts are

[436] Campbell, *Organised Crime* (n 19) 111-13; Smith, Owen and Bodnar (n 23) 21-24
[437] King, 'Using Civil Processes' (n 7) 338

empowered to grant production orders, orders to grant entry, search and seizure warrants and disclosure orders *ex parte*.[438] Furthermore, customer information orders and account monitoring orders may require financial institutions to provide a comprehensive range of information.[439] There is also a range of offences related to prejudicing investigations under Part 5 of POCA 2002 that can result in two years imprisonment and/or an unlimited fine.[440]

Yet, despite all these features, civil recovery is pursued in the civil realm with its more lenient civil rules and lower burden (and standard) of proof. Further grounds for establishing that Part 5 proceedings are better understood as a criminal measure can be found by delineating characteristics of punitive and preventive measures.

4.1.2 Characteristics of punitive and preventive measures

Civil recovery is usually characterised as a preventive measure, however it is arguably in substance also a punitive measure.[441] To help prepare the ground, the concept of punishment itself requires examination since we are centrally concerned by the punitive qualities of civil recovery. There is an extensive literature on theories of and definitions for punishment, which are beyond the scope of this inquiry. While a

[438] POCA, s 345, s 347, s 352; s 357, s 380, s 382, s 391; Campbell, *Organised Crime* (n 19) 209-210
[439] POCA, s 363, s 370, s 397, s 404; Campbell, *Organised Crime* (n 19) 209-210
[440] POCA, s 342, 359
[441] Ashworth and Zedner, *Preventive Justice* (n 7) 15-17

precise definition of punishment proves difficult, there is consensus in the literature that punishment involves an element of coercion, pain and blame.[442]

The canonical definition of legal criminal punishment advocated by HLA Hart[443] is the most relied upon definition in the literature and will be used as a lens through which to assess the punitive nature of Part 5 of POCA 2002.[444] There are five elements constituting Hart's central case for the conception of punishment. As well as a non-exhaustive list of secondary cases, the purpose of which is to prevent the 'abuse of definition'. A measure is understood by Hart as a punishment if:

i. pain or unpleasant consequences are involved,
ii. it is for an offence against legal rules,
iii. it relates to an actual or supposed offender for an offence,
iv. it is intentionally administered by human beings other than the offender, and
v. it is imposed and administered by an authority constituted by a legal system against which the offence is committed.[445]

Civil recovery should satisfy the first, fourth and fifth criteria in this list, and one might think that the 'civil' *in rem* classification of civil recovery ought to imply the second and third items not being met. However, as pointed out in Part I of this work, the *in rem* nature of civil recovery is based on a legal fiction, viz. that property is capable of 'guilt', while the classification of civil recovery as civil is based on fallacious reasoning that focuses on the form rather than substance of civil recovery.[446] So in the final

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[442] Anthony Duff, 'Legal Punishment', The Stanford Encyclopedia of Philosophy (Spring edn 2001) <http://plato.stanford.edu/entries/legal-punishment/> accessed 23 August 2014

[443] See SI Benn, 'An Approach to the Problems of Punishment' (1958) 33 *Philosophy* 325-341; Anthony Flew, 'The Justification of Punishment' (1954) 29 *Philosophy* 291-307

[444] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Herbert Lionel Adolphus 1968) 5; Ashworth and Zedner, *Preventive Justice* (n 7) 14

[445] ibid

[446] See section 3.2.2 of Chapter 2 of thesis

analysis there is scope for Part 5 proceedings satisfying all items of Hart's conception of punishment and accordingly for being conceived of as punishment. Similarly, Part 5 proceedings should also be conceived as a punitive measure; the nature of punitive and preventive measures will now be explored.

Despite clear overlaps in the nature of punitive and preventive measures, there are distinguishing elements of each worth highlighting. Punitive measures involve the following: 1) 'hard treatment' since the State deprives an individual of what are normally regarded as fundamental rights, such as the right to property, freedom of movement and liberty, and 2) 'censure' since this treatment occurs within the framework of proceedings that are public and condemnatory. The rationale for imposing punitive measures is also two-fold, one of which is located in the justifications of the criminal law itself: certain wrongs are considered so serious that they should be condemned as criminal and result in punishment through the criminal justice system. The other ground for punitive measures is found in justifications for punishment: in preventive, deterrent, incapacitative, retributive and rehabilitative rationales.[447]

By contrast, the primary purpose of preventive measures is to prevent harmful behaviour and, where relevant, enhance security and public safety. Instances of preventive measures that are considered 'coercive' occur if State imposed restrictions on liberty of action are involved and are backed up by a coercive response, or by the threat of a coercive response. The element of coercion arises when the law prescribes a sanction that is intended to impose sufficient pressure on a person to make that

[447] Ashworth and Zedner, *Preventive Justice* (n 7) 17-19

person act in a certain way. Coercive preventive measures have a higher level of public censure and punitive bite than preventive measures and thus additional safeguards ought to be attached.

Preventive measures can be further classified as either punitive-preventive or predominantly preventive measures. A punitive-preventive measure is preventive in purpose but substantially punitive in nature and effect, and a predominantly preventive measure is preventive in purpose but not significantly punitive in nature and effect.[448] The judicial reasoning of the UK and Strasbourg confiscation cases provides further useful insights into the distinction between preventive and punitive measures. The approach of the courts demonstrates that the key question the court must consider is not whether a measure is preventive but whether it is punitive. [449] The reasoning in the leading European Court criminal confiscation case of *Welch* illustrates this well. Throughout the judgment the attention of the Court is to the punitive rather than preventive elements of an order. The Court focuses on the aspects of the order that are in keeping with the 'idea of a penalty' while acknowledging that these aspects may also be considered as essential to the preventive purpose of the legislation. The significance the Court placed on the punitive nature of a measure stems from the fact that the additional safeguards of the Convention are only engaged when a measure is held to be punitive in substance. [450]

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[448] Ashworth and Zedner, *Preventive Justice* (n 7) 13-19, 20-26
[449] See e.g. *Engel* (n 380), para 82; *Guzzardi v Italy* (1980) 3 EHRR 333 para 108; *M v Italy* App no 12386/86 (ECtHR, 15 April 1994); Emmerson (n 431) 212-213; Ashworth and Zedner, *Preventive Justice* (n 7) 16
[450] *Welch v UK* (1995) 20 EHRR 247 para 30, 33; Ashworth and Zedner, *Preventive Justice* (n 7) 16

Based on these differences between the criminal and civil law and the various types of punitive and preventive measures, I conclude below that Part 5 recovery although classified in the legislature and courts as a civil preventive measure also possesses characteristics of criminal punitive measures.

4.1.3 Part 5 civil recovery: a criminal punitive measure

Based on the above examination, one could reasonably conclude that Part 5 civil recovery can legitimately be categorised as a punitive measure, as well as a preventive, coercive preventive or punitive-preventive measure. Although civil recovery has the preventive purpose of harm reduction (e.g. the prevention of grand corruption) it is arguably substantially punitive in nature and effect. Part 5 might be classified as a coercive preventive measure since proceedings involve a 'restriction of liberty' (the confiscation of assets), which is backed up by the threat of a 'coercive response' since the court-appointed 'trustee for civil recovery' can if necessary take separate proceedings to enforce a recovery order.[451] While there is no enforcement through the Magistrates' Court, as in criminal confiscation, nor physical detention, an element of coercion arguably arises since any form of legal proceedings can be interpreted to impose pressure sufficient to make a person act in a certain way.[452] Furthermore, under Part 5 of POCA 2002 the State has extensive coercive powers to

[451] POCA 2002, s 266, 267, Pt4 Sch 7; *R (on the application of the Director of the Assets Recovery Agency) (Paul) v Ashton* [2006] EWHC 1064 (Admin), [2006] ACD 78 [50]; Williams, Hopmeier and Jones (n 196) 296-97, 348-49; Andrew Bodner, 'An Overview of the Law of the UK Concerning the Proceeds of Crime', International Bar Association Conference, (Madrid 2009) 10-12

[452] Ashworth and Zedner, *Preventive Justice* (n 7) 5-6

pursue civil recovery, such as powers of entry, search and seizure to obtain evidence.[453]

Part 5 civil recovery is punitive since it involves censure and hard treatment, witnessed by the involvement of indirect fault and, whilst there is no imprisonment involved, the confiscation of property constitutes a restriction of liberty.[454] The important role that the right to property plays in autonomy, freedom and in guaranteeing individual liberty from intrusions by the State is discussed below.[455] This interference with the right to property certainly contributes to the punitive nature of Part 5 proceedings.

The view that civil recovery is a punitive measure is leant further credence by the justifications for punishment, viz. prevention, deterrence, retribution and rehabilitation. The nature of civil recovery will now be explored through this lens. As outlined, asset recovery is often justified on preventive, remedial and reparative grounds. [456] Asset recovery is preventive in the specific case of offender recidivism and the general case of deterrence by removing the profit motive.[457] Asset recovery is remedial and reparative, in the sense that it restores the status quo and deprives the acquisition of profit from acts of wrongdoing.[458] However, it can be argued that asset recovery is not truly reparative since there is little evidence to support the claim that it repairs any of the damage caused by illegal activity.[459] A key rationale for the

[453] Campbell, *Organised Crime* (n 19) 209-210, 216
[454] Ashworth and Zedner, *Preventive Justice* (n 5) 16
[455] See section 5.1.2 of chapter 3 of thesis
[456] See section 1.1 of chapter 2 of thesis
[457] King, 'Civil Forfeiture' (n 15) 374-382
[458] Stessens, *Money Laundering* (n 48) 51-54
[459] Campbell, *Organised Crime* (n 19) 217-218

asset recovery powers of UNCAC is the potential benefit of the repatriation of corrupt assets to victim countries; these reparative efforts have thus far met with limited success.[460] Furthermore, in the UK it is only under the criminal confiscation proceedings that the prosecution can apply for a compensation order on behalf of victims, no such powers exist under Part 5 of POCA 2002.[461] Additionally, civil recovery is arguably more than just a reparative measure as it is the State with its vast resources and powers, rather than a private party, which instigates the recovery proceedings.[462]

These preventive, remedial and reparative grounds, together with the overriding considerations of harm reduction and the public interest,[463] are often cited as motivations for moving away from criminal to civil procedures.[464] However, despite the indubitable preventive characteristics of asset recovery, it is inaccurate to describe it as solely a preventive measure. It almost always also has punitive overtones since it imposes censure and hard treatment, and is based on the retributive goal that no one should benefit from wrongdoing. In the context of grand corruption, this retributive element of civil recovery is closely connected to the widely accepted belief that no one should benefit from the spoils of grand corruption.[465]

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[460] See chapter 7 of thesis
[461] Nicholls (n 9) 259-260
[462] JCHR, *POCA Bill* (third report) (2001-02 HL 43, HC 405) para 32; King, 'Civil Forfeiture' (n 15) 371; Campbell, *Organised Crime* (n 19) 217-218
[463] Attorney General's Office (n 166)
[464] Stessens, *Money Laundering* (n 48) 50-57
[465] Ashworth and Zedner, *Preventive Justice* (n 7) 18-19. See also Andreas von Hirsh and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005) 17

In addition to the criminalisation and penalisation arguments, there is a powerful human rights argument for why the recovery of assets should be subsequent to a criminal conviction and classified as a criminal measure protected by the enhanced criminal safeguards. We now turn to these human rights grounds.

5. Human rights argument: conviction-based confiscation

5.1.1 Principles underpinning human rights

There are strong grounds for the argument that the core values of liberty, autonomy and freedom that underpin human rights are threatened by Part 5 proceedings since assets are recovered without any criminal conviction or any of the enhanced protections of the criminal law. The importance of respecting human rights and the normative role they hold in the contemporary globalised world is at the core of why the recovery of corrupt assets under Part 5 of POCA 2002 ought to be contingent on a criminal conviction and viewed as a criminal measure protected by the enhanced guarantees and safeguards of the criminal law. Notwithstanding the complex and contradictory discourses involved in justifying human rights,[466] human rights affirm the worth of all human beings and distribute power away from a concentrated centre to everyone.[467] Human rights have a role in underlining the worth of all human life,[468] delineating the boundaries of acceptable pluralism in international affairs and

[466] Upendra Baxi, *The Future of Human Rights* (2nd edn, OUP 2006) ch 1
[467] Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 3147
[468] ibid

supplying a standard of international legitimacy.[469] The roles that human rights perform include: their role in holding the State accountable and constraining the power of the State; [470] their role as core fundamental principles for a functioning democratic society;[471] their role as a guarantor of individualist liberty;[472] and their role as a necessary condition for the ethical growth and development of each individual.[473]

Broadly, the human rights values underpinning the concept of human rights can be summarised as follows: liberty and autonomy, personhood and agency, dignity, capabilities, community and solidarity.[474] Human rights have been grounded in legal rights, in moral rights, or in the political functions that they are said to serve. A number of commentators claim that human rights are themselves natural rights, in the sense that the individuals concerned are born with them as with the right to life and liberty; and for other rights, such as the right to property, in the sense that the force of these rights are independent of any legal provisions.[475] Joseph Raz and John Rawls respectively describe human rights as moral rights of a special kind owing to their exceptional importance and universality,[476] and as a special class of urgent rights that are plural and universal.[477] There are many issues that arise in relation to

[469] Charles Beitz, *The Idea of Human Rights* (OUP 2009)
[470] Ibid
[471] University of Oxford Comparative Human Rights lecture 1 (19 October 2013)
[472] Alan Pottage, 'Review Article Property: Re-Appropriating Hegel' (1990) 53 *The Modern Law Review* 259
[473] Jeremy Waldron, *The Right to Private Property* (Clarendon 1988)
[474] University of Oxford Comparative Human Rights lecture 1 (19 October 2013)
[475] Waldron, *The Right to Property* (n 476)
[476] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986)
[477] John Rawls, *The Law of Peoples* (Harvard University Press 1999)

claims of the universality of human rights, particularly in a global and culturally diverse world; however, it is generally agreed that there is a certain threshold of urgency and importance required to be passed to elevate rights into the realm of human rights.

Although the political idea of human rights is gaining increasing support,[478] the most common definition of human rights[479] continues to be grounded in an independent moral existence which sees human rights as entitlements that belong to people 'by nature'.[480] Within this moral conception, two particular values have long been held as the core of human rights – liberty and autonomy.

The values of liberty and autonomy are considered as two of the key human rights values, and have been at the heart of the doctrine of natural rights since even before the signing of the American Declaration of Independence and French Declaration of the Rights of Man. The best-known articulation of liberty is provided by Isaiah Berlin in his famous distinction between negative and positive liberty.[481] Negative liberty is conceived of as the absence of obstacles external to the agent, while positive liberty is rooted in self-determination.[482] This concept of liberty has been further explored by a number of philosophers. For Rawls, the 'Liberty principle' provides for basic and universal respect for persons as a minimum standard for all just institutions.[483] For Friedrich Hayek, a state of liberty or freedom is when coercion

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[478] Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' (2010) 32.1 *Human Rights Quarterly* 1-20
[479] ibid
[480] Beitz (n 472) 15-25
[481] Fredman *Human Rights Transformed* (n 20) 1ff
[482] Isaiah Berlin, *Four Essays on Liberty* (Clarendon Press Oxford 1969)
[483] John Rawls, *Justice as Fairness* (Harvard University Press 2001)

of some by others is reduced as much as possible.[484] Further elucidation on this concept of 'liberty' can be found in Wesley Hohfeld's analysis of rights and his useful distinction between a claim right and a liberty. Most human rights can be categorised as claim rights that impose duties on their duty bearers.[485] Where a claim-right is always either a right to be given something by someone else, or a right not to be interfered with; and a liberty arises when the subject matter of one's claim-right is, for example, one's own act.[486]

In recent decades there has been a focus on the role of human agency and autonomy in grounding human rights.[487] Raz argues that a concern with autonomy underlies both rights and freedom; and that autonomy requires, amongst other things, that individuals have an array of valuable options to choose from. He goes on to argue that the 'autonomy-based principle of freedom' is best regarded as providing the moral foundation for the harm principle, which asserts that the only purpose for which a law may use its coercive power is to prevent harm.[488] Autonomy is also central to the two grounds for human rights provided by James Griffen. The first ground for any human right is the protection of an essential feature of human standing, a 'worthwhile life'; a capacity which is referred to as, amongst other things, autonomy and which is considered to be the exclusive source of human dignity. This worthwhile life must be considered in conjunction with a second ground for human

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[484] Friedrich Hayek, *The Constitution of Liberty* (Routledge and Kegan Paul 1960)
[485] Beitz (n 472) 15-31
[486] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 198-223
[487] Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/rights-human/> accessed 19 January 2014
[488] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986)

rights: practical considerations of features of human nature and human society, referred to as 'practicalities'.[489] John Finnis, in his analysis of natural rights, also explores the idea of a worthwhile life, concluding that there are seven 'basic goods' that contribute to a fulfilling life. Included in these basic goods is the concept of 'practical reasonableness', which is the ability to use one's intelligence to decide how to live.[490]

It is clear that underpinning a commitment to human rights is liberty, autonomy and dignity, together with aspects of pluralism, universalism, urgency and importance.[491] The additional roles that human rights perform include their role as core fundamental principles for a functioning democratic society[492] and their role as a necessary condition for the ethical growth and development of each individual.[493] In the light of these important human rights values and roles, any recovery of corrupt assets should occur post-conviction and if civil recovery is pursued it ought to be undertaken with the benefit of the enhanced procedural protections of the criminal law. These claims are further reinforced by the core values that underpin the right to property; to which I now turn.

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[489] James Griffin, *On Human Rights* (OUP 2008)
[490] Finnis (n 489) 198-223
[491] John Rawls, *The Law of Peoples* (Harvard University Press 1999) 11-60 (urgency, pluralism); Fredman (n 20) 1-21 (liberty); Beitz (n 472) 100-101 (pluralism); Raz (n 348) (importance, universality) 31-47; Finnis (n 489) 198-223
[492] University of Oxford Comparative Human Rights lecture 1 (19 October 2013)
[493] Waldron, *The Right to Private Property* (n 476) 343-389

5.1.2 Principles underpinning the right to property

Most jurisdictions recognise to some degree the principle that government should not expropriate the private property of citizens unless it is under a limited number of strict exceptions.[494] I argue that the use of Part 5 proceedings to recover the proceeds of grand corruption should not be considered as one of these exceptions since the recovery of corrupt assets should be contingent on a criminal conviction. The grounds for this claim, and that made for the classification of Part 5 proceedings as criminal, can be brought further to the fore by undertaking a meta-analysis of the right to property.

The meta-justifications for this right are located in a background right to property that is grounded in the value of autonomous choice to all human beings and in the inherent freedom conferring qualities of property institutions.[495] It is these values underpinning the right to property that justify the claim that the recovery of corrupt assets should generally occur only subsequent to a criminal conviction and be classified as a criminal measure with the associated protections of the criminal law.

The classification of the right to property as one of the fundamental rights of man raises many questions: What is property? What does it mean to have a right to property? What are the principles operating at the meta-level that underpin this right? There is an enormous body of academic cross-disciplinary literature that attempts to answer precisely these questions - from Plato and Aristotle to Marx and

[494] Tom Allen, 'The Right to Property' in Tom Ginsburg and Rosalind Dixon, *Comparative Constitutional Law*, (Edward Elgar 2011) 504-517
[495] James Harris, *Property and Justice* (Clarendon Press 1996) 306-362

Mill.[496] Much of the legal and philosophical literature is beyond the scope of this enquiry. In the context of combatting grand corruption, I will answer these questions from a rights-based perspective with a particular focus on Article 1 of Protocol 1 of the ECHR (A1P1). At the outset, it is useful to remember that the recovery of corrupt assets is concerned with the recovery of private property where private property can be seen as 'a collection of normative relationships between people with respect to tangible and intangible things'[497] and as a 'bundle of rights' where a person is free to choose how to use the goods that are under his control.[498]

The meta-justifications for the right to property are located not just in its instrumental role in economics or theories related to social rights[499] but in a right to property that is grounded in the value of autonomous choice to all human beings and in the inherent freedom conferring qualities of property institutions.[500] The right to property must be protected due to the role it plays in autonomy, liberty and freedom and its overarching role in constraining the powers of the State.[501] The traditional lines of liberal property theory include the Lockean labor-desert theory based on historical entitlement of first occupancy, which focuses on individual autonomy; the

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[496] Jeremy Waldron, 'Property and Ownership' in Stanford Encyclopedia of Philosophy <www.science.uva.nl/~seop/entries/property/> accessed 24 May 2014
[497] Ivory (n 10) 36. Private property is a concept with many interpretations, but for the purpose of this thesis this can be taken as a definition of property
[498] Waldron, *The Right to Private Property* (n 476)
[499] Frankie McCarthy, 'Property as a Human Right: Another Casualty of the 'War on Terror'?" in Nicholas Hopkins (ed) *Modern Studies in Property Law Vol 7* (Hart Publishing 2012) 260-262
[500] Harris, Property and Justice (n 498) 306-362
[501] Margaret Radin, 'Property and Personhood' 1982 34 *Stan L Rev* 957, 958-959; Harris, Property and Justice (n 498) 230-245; James Harris, 'Is Property a Human Right?' in Janet McLean (ed) *Property and the Constitution* (Hart Publishing 1999) 64-87

personality theory of property drawn from the Hegelian 'personhood perspective', which focuses on the 'embodiment' of personality in property; and the freedom arguments for property, which focuses on the importance of property for freedom.[502] The question of property is also part of a much wider debate about justice; a debate which is itself essentially concerned with principles of liberty.[503] I will now turn in greater detail to the historical development of the right to property and the justifications available for this right.

The attachment of the 'epithet' human to the right to property is not without controversy.[504] The texts of international and regional treaties and constitutions diverge on whether property is a human right. Furthermore, there are a number of differences between the right to property and the other rights in the ECHR. Firstly, this right is the only right that applies to both natural and legal persons. Secondly, and perhaps the most significant difference for the purpose of this enquiry, is that property lacks the transparent universality of other rights. In the sense, that all persons have bodies which can, for example, be tortured or enslaved; and anyone can choose to take part in family life or adopt a religion. Whereas, the degree to which a person's possessions contribute to their well being varies greatly, with some people not even having any possessions.[505]

Nonetheless, many assert that property rights are themselves natural rights, not in the sense that the individuals concerned are born with them, as for example

[502] Radin (n 504) 958-959; Harris, *Property and Justice* (n 498) 230-245
[503] Pottage (n 475) 259-270
[504] Harris in Mclean (n 504) 64-87
[505] Ibid

with the rights to life and liberty, but rather in the sense that the force of these rights are independent of any legal provisions.[506] Others argue that property is historically situated and is not a timeless natural right, but has crystallised into a human right in the sense that there is a right to property in relation to existing property-holdings.[507] Additional reasons for the qualification of the right to property as a human right include: its role in freedom and autonomy; its role in holding the State accountable and constraining the power of the State;[508] its role as a core fundamental principle for a functioning democratic society;[509] its role as a guarantor of individualist liberty;[510] and its role as a necessary condition for the ethical growth and development of each individual.[511]

The right to property – in law

It is an ancient and familiar claim that property is one of the 'rights of man', with the French National Assembly publishing in 1789 a *Declaration of the Rights of Man and the Citizen*, in which it was asserted:

> The end in view of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

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[506] Tom Campbell, Keith Ewing, and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford OUP 2001) ch 1

[507] Tom Allen, 'Liberalism, Social Democracy and the Value of Property Under the European Convention on Human Rights' (2010) 59(4) *Int & Comp L Quarterly* 1055-78

[508] Frankie McCarthy, 'Property as a Human right: Another Casualty of the 'War on Terror'?" 7 *Modern studies in property law* Vol 7 (Hart Publishing 2012)

[509] University of Oxford Comparative Human Rights lecture 1 (19 October 2013)

[510] Pottage (n 475) 259-270

[511] Campbell, *Organised Crime* (n 19)

Most constitutions, including the United States Constitution,[512] serve to restrain the government's powers of eminent domain, the power to take private property for public use, by imposing immunities from expropriation that presuppose a right to property.[513] In general, both in law and practice, the right to private property is not a right to *have* property,[514] but rather a right to maintain existing property holdings that is backed up by freedom from arbitrary deprivation.[515]

There is no global general treaty-based human right to property; however, there are a number of regional treaties that include this right.[516] In the European context, A1P1 is a qualified general right to peaceful enjoyment of possessions, that may be interfered with in order to secure certain interests including the public interest and the general interest. It can be interpreted as representing a compromise between the liberal and social democrat visions of property and human rights. On the liberal view, it protects individual liberty from the State;[517] while on the social democratic view, the right to property includes claims to the basic goods required to live a meaningful life. It is generally agreed that A1P1 protects the rule of law,[518] by guaranteeing a lawful process, and, in conjunction with article 14, prohibiting discrimination in matters regarding expropriation and regulation.[519]

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[512] Harris in Mclean (n 504) 64-87
[513] Allen in Ginsburg and Dixon (n 497) 504-517
[514] ibid
[515] McCarthy (n 511)
[516] Ivory (n 10) 35-39
[517] Allen, 'Liberalism' (n 380) 1055-78
[518] Tom Allen, 'Restitution and Transitional Justice in the European Court of Human Rights' (2007) 13(1) *Columbia Journal of European Law* 1-46
[519] Allen, 'Liberalism' (n 380) 1055-78

The concept of 'property' and 'possessions' under A1P1 has been defined by the ECtHR as:

> [A]ll acquired rights and interests of economic value, including rights against the world at large (*in rem*) with respect to movable and immovable things and rights against particular persons or groups (*in personam*) of persons in public and private law.[520]

The right to property – the justifications

The most prevalent traditional lines of liberal property theory include the Lockean labour-desert theory based on historical entitlement of first occupancy,[521] the personality theory of property drawn from the Hegelian 'personhood perspective',[522] and the freedom arguments for property, another theme found in the social philosophy of Hegel, which focuses on the importance of property for freedom. [523] It is the property-freedom grounds that arguably provide the strongest account for the classification of the right to property as a human right.[524]

The relationship between freedom and property has been widely investigated, and there are broadly three explanations provided for this relationship: the constitutive thesis, the social stability thesis, and the developmental thesis. The constitutive thesis is based on the premise that individual freedom is characterised by the absence of interference and the presence of options, and private property is held to be instrumental to the promotion of individual freedom. The developmental thesis holds that having at least a minimal amount of private property is essential to

[520] Ivory (n 10) 220
[521] Waldron, 'Property and Ownership' (n 476)
[522] Radin (n 504) 958-959
[523] Harris in Mclean (n 504) 64-87
[524] Harris in Mclean (n 504) 64-87

the development of a free personality. Finally, the social-stability thesis posits that the institution of private property facilitates the decentralisation of power that is necessary for the maintenance of a social system that protects liberty and prevents tyranny.[525] I will explore below this notion of freedom further, as well as the other rights-based accounts of property.

The right to property – a rights-based account

In the pursuit of a rights-based account of property, Jeremy Waldron conducts a thorough analysis of the theories of property found in Locke's Second Treatise on Civil Government and Hegel's Philosophy of Right.[526] For the purposes of Waldron's rights-based analysis, rights are defined in terms of the interest theory according to which to have a right is to have an interest which is of sufficient moral import to ground some other person's duty to the right-holder. His enquiry into the justification for the right to private property employs HLA Hart's typology to distinguish between a special-rights and a general-rights based account of property where these accounts denote ideal types of argument in the sense defined by Weber.[527] It should be highlighted that neither accounts are sufficient as a justification for private property, however a detailed analysis of the weaknesses of each account are beyond the scope of the thesis.[528] Broadly the special-rights account refers to the justifications stemming from Locke and Nozick,[529] where property is an interest contingent on

[525] Allen Patten, *Hegel's Idea of Freedom* (OUP 2002)
[526] Waldron, *The Right to Private Property* (n 476)
[527] Waldron, *The Right to Private Property* (n 476)
[528] Waldron himself, and subsequent critics of Waldron's work, acknowledge the limitations of describing Hegel's argument as *right-based* argument for private property
[529] Locke's deduction from the mixing of labour and Nozick's entitlement theory

particular events and transactions, such as labour or forms of legitimate acquisition.[530] The general-rights based account refers to the justifications derived from Hegel, where property is a basic human interest that everyone has.[531] Crudely, Locke's scheme can be seen to incorporate the self into the object, whereas Hegel's scheme incorporates the object into the self.[532]

There are three strands of Hegel's work that are most relevant for this enquiry into the rights-based foundation of property. The first strand focuses on the contribution property makes to the ethical development of the self,[533] by 'maturing' and 'stabilising' the will.[534] The second strand centres on the role of property in providing a degree of external reality to the idea of individual freedom;[535] where such a freedom is rooted in a person being able to choose to embody their will in an external object.[536] The claim to have human rights over external resources can be said to derive from this autonomous choice being of value to all human beings, and from the inherent freedom conferring qualities of property institutions, such as ownership interests that confer valuable property freedoms including open-ended use-privileges and control-powers.[537] It is argued that property meets the need for abstract freedom to be concretised in an external sphere, and that property institutions have an inherent choice-facilitating role.[538] The 'embodiment' aspect of the theme of

[530] Waldron, *The Right to Private Property* (n 476)
[531] Waldron, *The Right to Private Property* (n 476)
[532] Waldron, 'Property and Ownership' (n 368)
[533] Waldron, 'Property and Ownership' (n 368)
[534] Pottage (n 475) 259-270
[535] Waldron, 'Property and Ownership' (n 368)
[536] Pottage (n 475) 259-260
[537] Harris in Mclean (n 504) 64-87
[538] Harris in Mclean (n 504) 64-87

freedom that is associated with property is related to the third strand of the Hegelian project relevant to this enquiry; that of 'reconciliation' or recognition, where the aim of the individual is unification, feeling at home in the world, and being a part of the ethical life of the community.[539] Property has a role in this process of reconciliation as it can mediate the mutual recognition necessary for persons to become and remain free.[540]

In the light of the above meta-analysis of the right to property, we can conclude that it is the values underpinning the right to property, the value of autonomous choice to all human beings and in the inherent freedom conferring qualities of property institutions, that justify the claim that the recovery of corrupt assets should generally occur only subsequent to a criminal conviction and be classified as a criminal measure with the associated protections of the criminal law.

I have determined that it is possible to classify Part 5 civil recovery as a criminal measure, I will now examine whether Part 5 civil recovery is a proportionate response, especially under the right to a fair trial and the right to property.[541]

5.1.3 Civil recovery: A proportionate response?

Here, I investigate whether Part 5 recovery is a proportionate response to the general interest in combatting grand corruption and overcoming the huge difficulties that developing countries often face in recovering stolen assets. The public interest purpose of civil recovery was highlighted in the Part 5 High Court cases of *Creaven*

[539] Pottage (n 344) 259-270
[540] Patten (n 400) (OUP 2002)
[541] King, 'Civil Forfeiture' (n 15) 386-392

and *Ashton.* In *Creaven,* Stanley Burton J held that a clear purpose of POCA 2002 was to deprive respondents of property obtained through unlawful conduct and for that property to be transferred to the benefit of the community. In *Ashton*, Newman J noted that Parliament sought to enforce a degree of recovery for the benefit of the State since the proceeds of crime should not be benefitting those who happen to be in its possession at the time.[542] The broader interests of society were also an issue in the Strasbourg case of *Air Canada* where NCB forfeiture was held to conform 'to the general interest in combatting international drug trafficking'.[543]

With 165 State parties signed up to UNCAC, clearly tackling grand corruption is to be viewed as a legitimate aim. Less clear is whether adopting civil recovery is proportionate to that aim.[544] Relevant to this assessment is the effectiveness of Part 5 proceedings in contributing to the reduction of the estimated tens of billions stolen each year through grand corruption. The ability of civil recovery to reduce grand corruption is widely agreed to be at best unprovable, and at worst fundamentally flawed.[545] Furthermore, no comprehensive empirical research has yet been undertaken to establish its impact on grand corruption.[546] Nonetheless, it is likely

[542] *Director of Asset Recovery Agency v Creaven* [2005] EWHC 2726 (Admin); [2006] 1 WLR 622; *Ashton* (n 454) [41]; Williams, Hopmeier and Jones (n 196) 342
[543] *Air Canada v UK* [1995] 20 EHRR 150, paras 41-42; King, 'Civil Forfeiture' (n 15) 387
[544] *Agosi v UK* [1987] 9 EHRR 1, para 53; *Air Canada* (n 546) paras 41-42; King, 'Civil Forfeiture' (n 15) 387
[545] Rosemary Barberet 'Measuring and Researching Transnational Crime' in Albanese (n 81) 47-61; Bullock and Lister in King and Walker, *Dirty Assets* (n 118)
[546] See section 3.1 of chapter 2 and section 1.3 of chapter 7 of thesis

that Strasbourg will find the use of Part 5 of POCA 2002 proportionate to combatting grand corruption.[547]

The courts have held civil forfeiture to be a proportionate response to the public interest in combatting corruption. For example, in the international asset recovery case of *Alamieyeisha* an action was commenced in the English courts to recover US $10 million worth of assets stolen by one of Nigeria's State Governors. In this case, the use of civil remedies along with other criminal sanctions to recover corrupt assets was seen to be a proportionate and necessary response to the evils of grand corruption.[548] In the recent Strasbourg corruption case of *Gogitidze*, the Court found civil forfeiture to be a proportionate response to 'property presumed to have been acquired either in full or in part with the proceeds of drug-trafficking offences or other illicit activities of mafia-type or criminal organisations…'[549]. Moreover, the civil proceedings for confiscation:

> [C]learly formed part of a policy aimed at the prevention and eradication of corruption in the public service, and the Court reiterates that in implementing such policies, respondent States must be given a wide margin of appreciation with regard to what constitutes the appropriate means of applying measures to control the use of property such as the confiscation of all types of proceeds of crime (see, for instance, *Yildirim v. Italy* (dec.), no. 38602/02, ECHR 2003-IV, and *Butler*).[550]

The Strasbourg jurisprudence on the Italian anti-mafia legislation is also instructive for this proportionality inquiry.[551] The European Court recognised that the

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[547] King, 'Civil Forfeiture' (n 15) 387-390
[548] Nicholls and others (n 9) 284-285
[549] *Gogitidze* (n 272) 107. See also Anna Maria Maugeri, 'Mutual Recognition and Confiscation of Assets: An EU Perspective' in King, Walker and Gurulé (n 6) 399-425
[550] *Gogitidze* (n 272) 108
[551] King, 'Using Civil Processes' (n 7) 355-356

confiscation of assets under the relevant Italian legislation was a proportionate measure in the fight against organised crime as it 'pursued an aim that was in the general interest, namely it sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisation to which he was suspected of belonging, advantages to the detriment of the community.' Furthermore, it was concluded that confiscation is 'an effective and necessary weapon' in combatting the Mafia and overcoming some of the difficulties in dealing with this menace.[552]

I now turn to the proportionality issues under Article 6 and A1P1 of the Convention.

Article 6

Article 6 has a position of pre-eminence in the Convention due to its importance to the rule of law and to a functioning democratic society. Strasbourg has emphasised that a restrictive interpretation of this right must therefore not be adopted.[553] Outside of the courts, the importance of Article 6 has been raised in the context of the threat that civil recovery poses to the presumption of innocence and the other protections of Article 6. The protections of Article 6 must not be cast aside; even in the name of combatting grand corruption.[554]

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[552] *Raimondo v Italy* (1994) 18 EHRR 237 para 43; King, 'Using Civil Processes' (n 7) 355-356

[553] UNCAC, Preamble; *Perez v France* (2004) 40 EHRR 909, para 64; David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 371-373

[554] King, 'Civil Forfeiture' (n 15) 384-387; Zedner and Ashworth, 'Defending Criminal Law' (n 38) 13

A closer look at the rationale underpinning Article 6(2) illustrates clearly the importance of the presumption of innocence to the fair administration of criminal justice and reinforces the claim that those subject to Part 5 proceedings should benefit from this presumption. The presumption of innocence helps to ensure that those who are convicted of wrongdoing are sufficiently protected by appropriate evidentiary rules. At a micro-level this helps to counteract against the fragility of the fact-finding process and at a macro-level contributes to ensuring that there is a proper relationship between the State and the citizen. Owing to the serious nature of the wrongdoing involved in serious offences such as those associated with grand corruption the presumption of innocence should certainly apply.[555]

A JCHR report on the Proceeds of Crime Bill questioned the proportionality of civil recovery being used without the full procedural safeguards of Article 6. These safeguards were argued to be required in order to: [556]

> [P]revent a breach of the principle of *nulla poena sine culpa* (nobody should suffer a penalty who is not shown to be at fault), a principle enshrined in the ECHR, EC law and European written constitutions, as well as in English criminal law, tort law, and public law.[557]

The question of proportionality is also clearly seen in the context of property rights with any interference with this right having to be balanced against the public interest.[558] In the Irish High Court case of *Gilligan,* McGuinness J noted that it is part

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[555] *Woolmington v DPP* [1935] AC 462, 481; Ashworth, 'Four Threats' (n 14) 70-76; King, 'Civil Forfeiture' (n 15) 382-383

[556] *Salabiaku v France* (1988) 13 EHRR 379, para 28; *Janosevic v Sweden* (2004) 38 EHRR 22 para 101; *McIntosh* (n 388); King, 'Civil Forfeiture' (n 15) 388-391

[557] JCHR, *POCA Bill: Further Report* (eleventh report) (2001-02 HL 75, HC 596) para 22

[558] King, 'Civil Forfeiture' (n 15) 388-390

of the common good to prevent the accumulation and use of assets directly or indirectly derived from criminal activities, but:

> The right to private ownership of property cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.[559]

Since this thesis is centrally concerned with UK civil recovery the right to property as expressed in A1P1 of the Convention will be briefly outlined. A1P1 is a qualified general right to peaceful enjoyment of possessions, which may be interfered with in order to secure certain interests, including the public and the general interest. [560] A1P1 provides for the right to property as follows:

> **Protection of property**
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In every A1P1 application, the Strasbourg Court requires that the following questions be addressed:

1. Does the applicant hold a possession that could be subject to interference?
2. Which of the three categories of interference does the State action represent: a deprivation, a control of use or a more general interference with the peaceful enjoyment of possessions?
3. Is the State action lawful, in pursuance of a legitimate aim in the public interest, and strike a fair balance between the needs of the State and the burden placed on the individual?

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[559] *Gilligan v CAB* [1998] 3 IR 185, 237; King, 'Using Civil Processes' (n 7) 357
[560] White, Wicks and Ovey, *Jacobs, White* (n 387) 492-496, 519

Part 5 recovery arguably meets the first two limbs, but it is not clear whether the third proportionality limb can be satisfied with such ease.[561] Nonetheless, Strasbourg has held numerous confiscation measures to be proportionate. In *Phillips*, the ECtHR unanimously decided that criminal confiscation orders in drug trafficking cases are proportionate,[562] while in *M* and *Air Canada* the asset recovery powers might be considered to be 'necessary and appropriate for the protection of the public interest'.[563]

In relation to the POCA Bill the JCHR highlighted how the public interest must be balanced against the rights of the property owner, and that there be 'a reasonable relationship of proportionality between the means sought to be employed and the aim sought to be achieved'.[564] Based on the asset recovery jurisprudence highlighted thus far, it is likely that Strasbourg will justify the use of civil recovery orders, although not necessarily unanimously, as a proportionate interference with property rights to prevent grand corruption.

Even the rights-focused JCHR noted in their scrutiny of the Proceeds of Crime Bill that civil recovery is likely to be proportionate owing to the various safeguards and exemptions:[565]

> In practice, the regime under Part 5 of the Bill would seem to contain extensive safeguards against a disproportionate use of the power to make an order. In particular no order would be permitted to contain any provision which would

[561] McCarthy (n 511) 250-251
[562] *Phillips* v *UK,* App No 410871/98, 12 December 2001; JCHR, *POCA Bill* (third report) (2001-02 HL 43, HC 405) para 23
[563] *M* (n 321), para 98; *Air Canada* (n 546); King, 'Civil Forfeiture' (n 15) 11
[564] *Allan Jcobsson v Sweden* (No 1) Series A no 163, para 55; *R v Dimsey* [2001] UKHL 46, [2002] 1 AC 509 [62]-[71]; JCHR, *POCA Bill* (third report) (2001-02 HL 43, HC 405) para 22
[565] Williams, Hopmeier and Jones (n 196) 352-353

> be incompatible with a Convention right…[and] the provisions for service of the claim form or application should ensure that everyone with an interest in the property has the opportunity to be heard, thereby protecting their rights under those Articles and under Article 6 of the ECHR.[566]

Furthermore, in the High Court decision of *Jia Jin He* Collins J considered A1P1 in relation to Part 5 of POCA 2002, referring to the Italian cases of *Arcuri* and *M* where it was held that as long as the measure was regarded to be proportionate then the relevant recovery provisions did not breach A1P1. Collins J held that:

> Parliament has quite clearly decided that these measures are necessary in order to fight crime, and in particular to ensure, as far as possible, that those involved in crime should be unable to enjoy the fruits of their criminal activities.[567]

Despite the judicial findings that asset recovery is proportionate in relation to A1P1, the issue of proportionality is particularly problematic when an innocent party is the subject of an asset recovery measure - as is possible under Part 5 of POCA 2002.[568] The JCHR correctly notes the importance of determining the 'severity of the impact of civil recovery on the person in possession of the property'.[569] A central argument of this thesis is that the core values underpinning the right to property - liberty, autonomy and freedom - are threatened by Part 5 civil recovery since these proceedings involve the recovery of assets without a criminal conviction.[570] I argue that even in the context of combatting the serious problem of grand corruption the value of protecting the principles of human rights requires that the recovery of assets

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[566] JCHR, *POCA Bill* (third report) (2001-02 HL 43, HC 405) para 43
[567] *Director of Asset Recovery Agency v (1) Jia Jin He (2) Dan Dan Chen* [2004] EWHC 3021 (Admin) [74]; Williams, Hopmeier and Jones (n 196) 358
[568] King, 'Using Civil Processes' (n 7) 357
[569] JCHR, *POCA Bill: Further Report* (eleventh report) (2001-02 HL 75, HC 596) para 22
[570] See chapter 3 of thesis

ought to be subsequent, except in limited number of circumstances, to a criminal conviction. However, despite the importance of protecting the right to property and the presumption of innocence, Strasbourg is likely to hold that Part 5 recovery is a justified and proportionate response to the problem of grand corruption.[571]

Below, the normative assessment of Part 5 proceedings continues via an application of the Strasbourg test for distinguishing civil from criminal measures. Despite the courts finding civil forfeiture to be civil in nature, there are strong grounds for the argument that when this test is applied to Part 5 proceedings they ought to be considered criminal in substance.

[571] King, 'Civil Forfeiture' (n 15) 387-390

Chapter 4: Case law grounds for criminal classification of Part 5 civil recovery (penalisation argument)

1. Meaning of 'criminal': *Engel* and Part 5 civil recovery cases

Over the past twenty years or so, there have been a number of human rights-related challenges pertaining to the nature of asset recovery. The European Court of Human Rights (ECtHR) and UK House of Lords have largely drawn the conclusion that confiscation measures are not criminal in nature. The analysis undertaken here is focused on the lead Strasbourg case used to determine the meaning of 'criminal', *Engel v The Netherlands*.[572]

At the outset, it is useful to note that in the Convention the concept of 'criminal charges', along with other key terms, are interpreted independently of definitions found in domestic law. [573] The ECtHR has developed its doctrine of 'autonomous meanings' as an 'anti-subversion device',[574] the aim of which is to prevent contracting States from undermining the Convention's due process guarantees by reclassifying criminal offences as disciplinary, administrative, regulatory or civil. In relation to determining whether a person has been charged with a criminal offence, Strasbourg holds that the court must look beyond national classifications and into the substance

[572] *Engel* (n 380); Emmerson (n 431) 211-214; Marija Jovanovic, Asset Recovery Case Notes (2013). Thank you also to Dr. Arhat Virdi.
[573] White, Wicks and Ovey, *Jacobs, White* (n 387) ch 12-13
[574] Ashworth, *Principles of Criminal Law* (n 14) 3

of the case at hand. The canonical articulation of whether proceedings are 'criminal' from the point of view of the Convention is found in the case of *Engel*.[575]

In *Engel*, Strasbourg adopted a purposive approach applying the following three criteria to proceedings: 1) what is the classification of the offence in national law, 2) what is the nature of the offence (objective classification) and 3) what is the nature and severity of the sanction.[576] *Engel* has generated a large jurisprudence and has been used many times in domestic courts to frame the determination of the nature of asset recovery.[577] Based on the case law, the following general conclusions can be elicited: the three criteria are to be treated separately; the second and third

[575] *Engel* (n 380) para 81-2; *Lutz v Germany* (1988) 10 EHRR 182, para 55; *Lauko v Slovakia* (1998) 33 EHRR 40, para 57; *Garyfallou AEBE v Greece* (1999) 28 EHRR 344, para 33; Emmerson (n 431) 210-11; Smith, Owen and Bodnar (n 23) 23-24

[576] *Engel* (n 380) para 82; *Benham v UK* (1996) 22 EHRR 293, para 56; *Garyfallou* (n 578) para 32; *Lauko* (n 578) para 46; Emmerson (n 431) 211

[577] Alldridge, 'Limits of Confiscation' (n 13) 831-832; Campbell, *Organised Crime* (n 19) 214-215; King, 'Civil Forfeiture' (n 15) 377. See Colin King analysis: The *Engel* criteria have been applied in relation to disciplinary proceedings within a prison (*Campbell and Fell v UK* [1985] 7 EHRR 165 (violation of Art 6)), proceedings concerned with breach of parliamentary discipline (*Demicoli v Malta* App no 13057/87 (27 August 1991) (violation of Art 6)), proceedings imposing a tax surcharge (*Bendenoun v France* [1994] 18 EHRR 54 (no violation of Art 6); *Västberga Taxi Aktiebolag and Vulic v Sweden* App no 36985/97 (23 July 2002) (violation of Art 6)), court martial proceedings (*Findlay v UK* [1997] 24 EHRR 221 App no 22107/93 (25 February 1997) (violation of Art 6)), proceedings resulting in the forfeiture of a parliamentary seat and a disqualification from standing for election for a specified period (*Pierre-Bloch v France* [1998] 26 EHRR 202 (Art 6 not applicable)), proceedings resulting in the imposition of penalty points on a driving licence (*Malige v France* [1999] 28 EHRR 578 (no violation of Art 6)), public order proceedings (*Kadubec v Slovakia* App no 27061/95 (2 September 1998) (violation of Art 6)), proceedings concerning minor offences typically regarded as administrative or regulatory (*Lutz* (n 578) (no violation of Art 6); *Garyfallou* (n 578) (violation of Art 6); *Lauko* (n 578) (violation of Art 6)

criteria are not necessarily cumulative but can be considered as alternatives;[578] the third criterion, when relied upon, carries the most weight.[579]

The facts of the case are as follows. The five applicants in *Engel* were conscript soldiers in the Netherlands armed forces and appealed to the Supreme Military Council their punishment for offences against military discipline. In the Netherlands these proceedings were classified as disciplinary rather than criminal but the actions could also be subject to criminal proceedings. The basis of the appeal was that the proceedings had been held in camera in violation of Article 6(1).

The Court held that Article 6 applied to three of the applicants and had been violated because of the secrecy of the proceedings. These three risked a penalty of between three and six months' committal to a disciplinary unit, a penalty found to involve a serious deprivation of liberty and which would be served alongside detainees sentenced in military criminal proceedings. It was also relevant that, in their cases, the offences with which they were charged were also offences under the Netherlands Military Penal Code and some of the offences carried a maximum penalty of three years' imprisonment. The Court determined that in considering the severity of the penalty, the maximum penalty which could have been inflicted upon the applicant in the disciplinary proceedings was crucial. The Convention was held to be

[578] See e.g. *Lutz* (n 578) para 55; *Garyfallou* (n 578) para 33; *Ezeh and Connors v UK* [2004] 39 EHRR 1, para 86; Emmerson (n 431) 213; Johan Boucht, 'Civil Asset Forfeiture' (n 18) 200

[579] *Engel* (n 380); *R v (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787 [57] (Lord Hope); *Mudie v Dover Magistrates' Court* [2003] EWCA Civ 237, [2003] QB 1238 [36]; Emmerson (n 431) 213; Smith, Owen and Bodnar (n 23) 237-238

not applicable to the other two applicants who had been charged with misconduct of a solely disciplinary character with much less serious penalties: four days' 'light arrest' which was found to involve no deprivation of liberty and three days' 'strict arrest' which, although found to involve some loss of liberty, was not sufficiently severe to bring it within the Convention.

I now turn to a more detailed description of the three limbs of this test before turning to the normative critique of how the courts interpret Part 5 proceedings under *Engel*.

Engel three stage test

Stage 1 - classification of the offence in national law

As opposed to viewing this stage as a 'test' it is perhaps more accurate to interpret it as an assertion that domestic law does not necessarily govern the classification of an offence.[580] Furthermore, Strasbourg has held that any domestic classification of an offence should be viewed as a starting point only.[581] If domestic law classifies the offence as civil, disciplinary or administrative then the court will look behind the national classification to examine the substantive reality of the procedure.[582]

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[580] Alldridge, 'Limits of Confiscation' (n 13) 831-832
[581] See e.g. *Ozturk v Turkey* (1984) 6 EHRR 409, para 52; Williams, Hopmeier and Jones (n 196) 296
[582] See e.g. *Campbell and Fell* (n 580) para 71; *Benham* (n 579) para 56; *Engel* (n 380) para 82; Emmerson (n 431) 211-212

Stage 2 - nature of the offence

The second criterion carries more weight than the first owing, in part, to its substantive focus on the nature of the conduct involved when compared to the purpose of the Convention.[583] As part of the court's assessment of the nature of an offence, it will consider a number of factors, ranging from who the legal rule is addressed to and who instigates the proceedings, to whether there is a punitive or deterrent element to the process or the process is contingent on culpability.[584] It should be noted that statutory regimes have been classified as non-criminal even though they deal primarily with the subject matter of criminal law, so long as they are essentially preventive as opposed to penal in nature.[585]

Stage 3 - nature and severity of the sanction

It is the third criterion that will often prove to be decisive, particularly if the potential penalties involved include imprisonment. The case law is clear: if the defendant faces a prison sentence directly as a result of proceedings then a criminal charge has been levied.[586] Large financial penalties, particularly if they are enforceable by imprisonment in default of payment, might also be found to be a criminal sanction.[587]

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[583] *Ozturk* (n 584) para 52; *Benham* (n 579) para 56; *Ezeh* (n 581) para 92; Emmerson (n 431) 212

[584] See e.g. *Bendenoun* (n 580), para 47; *Raimondo* (n 555) para 30; *Benham* (n 451) para 56; Emmerson (n 431) 212

[585] See e.g. *Guzzardi* (n 452), para 108; *Engel* (n 380) para 82; Emmerson (n 431) 212-213

[586] *Engel* (n 380); Alldridge, 'Limits of Confiscation' (n 13) 831-832

[587] *Bendenoun* (n 580) para 47; *Welch* (n 453); Emmerson (n 431) 213

Also relevant for our investigation, but not decisive, is whether imprisonment can follow a failure to pay a confiscation order.[588]

I now turn to a review of how the courts interpret Part 5 proceedings as civil under *Engel*. There are strong grounds, however, for concluding that based on the conceptual analysis and criticism of civil recovery as a legal fiction that Part 5 proceedings ought to be determined as criminal. Moreover, the procedure should be criminal owing to its important role in signalling moral censure for wrongdoing. Censure is the appropriate response to the unlawful activity at the heart of civil recovery proceedings.

2. *Engel* and Part 5 proceedings

The core authority on civil recovery is the Irish Court of Appeal case of *Walsh* that determined civil recovery not to amount to a criminal charge under the Convention.[589] The UK Supreme Court has followed the reasoning in *Walsh*, applying the *Engel* three-stage approach to Part 5 proceedings.[590] In the UKSC case of *Gale*, Part 5 civil recovery was found to not constitute a criminal charge under Article 6[591] and in the UK High Court case of *Jia Jin He* Part 5 was found to not constitute a criminal

[588] *Bendenoun* (n 580) para 47; *McIntosh* (n 388) para 14; *Dassa Foundation v Lichtenstein* App no 696/05 (ECtHR, 10 July 2007); Boucht, 'Civil Asset Forfeiture' (n 18) 209
[589] *Director ARA v Walsh* [2005] NICA 6 [23]; Alldridge, *Money Laundering* (n 13) 224; Campbell, *Organised Crime* (n 19) 201ff; King, 'Civil Forfeiture' (n 15) 383
[590] Confirmed in *R v H* [2003] UKHL 1, [2003] 1 WLR 411
[591] *R (Director of Assets Recovery Agency) v He and Chen* [2004] EWHC 3021 (Admin); *Gale v SOCA* [2011] UKSC 49, 2011 1 WLR 2760 [32]; Emmerson (n 431) 223; King, 'Civil Forfeiture' (n 15) 376-382

penalty under Article 7(1). In this latter case, it was held that there was no question that Part 5 proceedings are to be classified as civil proceedings in domestic law since the orders are preventive and there is no finding of guilt.[592] In the High Court case of *Ashton* in relation to Article 6, Newman J held that Part 5 of POCA 2002 was not punitive owing in part to '…the holder of the property to which the order relates [having] no right to hold it in the first place'.[593] Although Part 5 of POCA 2002 has been classified by the courts as civil, I argue, along with other academics,[594] that Part 5 of POCA 2002 could, however, be classified as criminal under *Engel*.

2.1 Stage 1 - classification of the offence in national law

Domestic classifications of proceedings as 'civil' are not final.[595] Therefore despite the classification of Part 5 proceedings as civil under the first limb of *Engel,* owing to Part 5 of POCA 2002 being civil in statute and governed by the Civil Procedure Rules,[596] it is possible to argue that in substance Part 5 of POCA 2002 is criminal in nature. Based on the Parliamentary debates in relation to Part 5 of POCA 2002, the intention of Parliament was indeed to create a civil measure which it repeatedly referred to as a 'civil recovery scheme.'[597] However, several reports from the Joint

[592] *Jia Jin He* (n 570) [47], [69]; Williams, Hopmeier and Jones (n 196) 296
[593] *Ashton* (n 454) [50]; Williams, Hopmeier and Jones (n 196) 358-359
[594] See for example Colin King, Liz Campbell, Peter Alldridge
[595] *Ezeh* (n 581); *McCann* (n 582) [65]; King, 'Civil Forfeiture' (n 15) 378-379
[596] PD Civil Recovery Proceedings 1.1 – 17.1; Explanatory Notes to the POCA 2002; Williams, Hopmeier and Jones (n 196) 361
[597] See e.g. HL Deb 25 March 2002 vol 633, col 28; HL Deb 13 May 2002 vol 635, cols 23-80; HL Deb 25 June 2002 col 636, col 1256-1273; HL Deb 11 July 2002 vol 637, cols 842-856; Alldridge, Money Laundering (n 13) 83-80; King, 'Using Civil Processes' (n 7) 346

Parliamentary Committee on Human Rights (JCHR) and Parliamentary debates on the Proceeds of Crime Bill reveal that there were serious questions raised as to the government's claim that Part 5 proceedings were civil. The JCHR concluded as follows:

> We consider that the Government's confidence that the civil recovery process would be treated as civil, rather than criminal, for ECHR purposes is not justified. We do not think that the matter is concluded either way by existing case law from either the European Court and Commission of Human Rights or domestic courts.[598]

In the context of grand corruption the acceptance of the classification of Part 5 of POCA 2002 as civil also raises normative concerns related to the wrongness of grand corruption. The Court in *Engel* held that the classification of an offence as criminal in domestic law is considered decisive[599] and that there is no minimal 'severity' threshold that a penalty must reach to trigger a criminal classification. In the road traffic offence case of *Öztürk v Germany*, applying the first limb of *Engel*, Strasbourg held that 'the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character'.[600] The Court in *Öztürk* held that the punitive nature of the penalty that may be imposed is 'the customary distinguishing feature of criminal penalties'.[601] The Court went on to say, 'the general nature of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in

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[598] JCHR, *POCA Bill* (third report) (2001-02 HL 43, HC 405); JCHR, *POCA Bill: Further Report* (eleventh report) (2001-02 HL 75, HC 596) para 24
[599] *Engel* (n 380) para 82; Emmerson (n 431) 211-212
[600] *Öztürk* (n 584) para 49; Emmerson (n 431) 212-213
[601] *Öztürk* (n 584), para 53; King, 'Civil Forfeiture' (n 15) 377

nature'.[602] It is difficult though to reconcile the criminalisation and punishment of conduct (e.g. road traffic offence or minor theft) that has only minimal negative consequences and a minimal penalty with the fact that proceedings that impose a significant penalty (confiscation of assets) and involve an allegation as serious as grand corruption is classified as civil.[603]

Despite these issues, Part 5 of POCA 2002 is civil in national law. There are grounds for the argument that Part 5 of POCA 2002 could, however, be classified as criminal under the second and third limbs of *Engel*. Support for this claim can be drawn from the fact that Part 5 of POCA 2002 undermines the values underpinning human rights and Part 5 proceedings possess many of the intrinsic characteristics of criminal law as well as of punitive measures. We have seen that Strasbourg will consider certain factors in its determination of each limb; these factors will briefly be explored in relation to Part 5 of POCA 2002. At the outset, it is useful to note that the *Engel*-related decisions of the Grand Chamber have found 'criminal penalties' to be

[602] [1984] 6 EHRR 409, para 53. See analysis in King 'Civil Forfeiture' (n 15) 378: In *Bendenoun* (n 580), para 47, and *Västberga Taxi Aktiebolag and Vulic v Sweden* App no 36985/97 (23 July 2002), para 79, tax surcharges had both deterrent and punitive purposes. In *Malige* (n 452), para 39, the imposition of penalty points for a driving offence was preventive in character as well as punitive and deterrent effect and thus akin to a secondary penalty. In *Lauko* (n 578) para 58, the Court rejected the contention that a minor offence was preventive and educational as it served both deterrent and punitive purposes and held to be in substance criminal in nature. In *Kadubec* (n 580) para 52, the imposition of a fine and an order to pay costs of proceedings was found to serve a deterrent and punitive purpose

[603] Campbell, *Organised Crime* (n 19) 201ff

punitive in nature[604] and oriented towards the dual aims of punishment and deterrence. [605]

2.2 Stage 2 - nature of the offence

The claim that Part 5 of POCA 2002 could be construed as criminal under the second and third limbs of *Engel* (nature of the offence) is leant support by three fundamental considerations. First, as pointed out above, Part 5 of POCA 2002 clearly has punitive, deterrent and retributive elements since, amongst other reasons, it involves censure and hard treatment.[606] Moreover, the punitive nature of Part 5 is rooted in the fact that the confiscation of property constitutes an interference with the right to property. Such an interference, without a criminal conviction and the necessary protections of the criminal law, is unjustified owing to the vital role this right plays in guaranteeing autonomy, freedom and liberty.[607] Second, although Part 5 proceedings are not formally contingent on culpability that an element of fault nonetheless remains an issue since alleged criminal activity is central to civil recovery proceedings.[608] Intent remains pivotal owing to *in rem* proceedings being a function of an indirect finding of guilt since the criminality of the origins of the property holding must still be established.[609] Furthermore, the *in rem* nature of Part 5 of POCA 2002 is based on a legal fiction. Finally, since it is usually the State who instigates Part

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[604] *Öztürk* (n 584); King, 'Civil Forfeiture' (n 15) 377
[605] *Benham* (n 579) para 56, 102; *Ezeh* (n 581) para 82; *Allen v UK* App no 25424/09 (ECtHR, 12 July 2013), para 95; King, 'Civil Forfeiture' (n 15) 378-379
[606] See section 4 of chapter 3 and chapter 4 of the thesis
[607] See section 5.1.2 of chapter 3 of thesis
[608] *Gale* (n 594) [8]; King, 'Using Civil Processes' (n 7) 350; King, 'Civil Forfeiture' (n 15) 8
[609] Campbell, *Organised Crime* (n 19) 216-218

5 proceedings, armed with extensive coercive powers, it is difficult to objectively classify these proceedings as civil. It seems therefore that Part 5 proceedings could objectively be classified as a criminal measure under this limb.

As part of the court's assessment of the nature of an offence, consideration will be given to a number of factors, including whether there is a punitive or deterrent element to the process or whether the process is contingent on culpability. I will first review how the courts have determined whether there is a punitive or deterrent element to asset recovery measures and then whether the asset recovery measures are contingent on culpability. Strasbourg has yet to comprehensively investigate civil recovery, so it is useful to look to other asset recovery cases for guidance: the criminal confiscation cases, the Customs and Excise forfeiture cases, and the Strasbourg jurisprudence on NCB confiscation and forfeiture orders that do not follow conviction and the Italian mafia prevention orders.[610]

A punitive or deterrent element

Overall, the Strasbourg jurisprudence has not found asset recovery to be criminal in nature classifying asset recovery instead as a preventive measure.[611] Some of the theoretical and conceptual reasons why this view is mistaken have been discussed,[612] and the following analysis will demonstrate why the view of the courts is also to be

[610] Smith, Owen and Bodner (n 23) 237-242
[611] See e.g. *M* (n 321), *Raimondo* (n 555) paras 18, 43, Smith, Owen and Bodnar (n 23) 21-24
[612] See section 4.1.3 of chapter 3 of thesis

questioned. At the outset, it is useful to bear in mind that the Strasbourg cases on the application of Article 6 to confiscation proceedings were found by Lord Brown, in the UKSC case of *Gale*, to be 'confusing' and in need of consideration by the Grand Chamber.[613] This work will provide some much needed clarity on the application of Article 6 to confiscation proceedings.

The usefulness of the traditional aims of punishment as a lens through which to determine the civil or criminal nature of asset recovery measures is arguably limited.[614] Criminal proceedings serve more than punitive purposes while civil proceedings serve more than preventive purposes but also promote the traditional aims of punishment.[615] Nonetheless, the ECtHR continues to approve of the distinction between preventive and penal/deterrent measures, as well as emphasising the significance of the presence of punitive purposes in distinguishing civil from criminal measures.[616]

Even though the Court endorses these distinctions, it also recognises that confiscation measures and civil sanctions can serve more than one purpose. This was recognised by Strasbourg in *Welch* with respect to criminal confiscation:

> Indeed the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment. [617]

Despite these recognitions, in relation to confiscation measures, the approach of the courts can be seen to be overly prone to deferring to the purported preventive aims

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[613] *Gale* (n 594) [32]; Emmerson (n 431) 223; King, 'Civil Forfeiture' (n 15) 383-387
[614] King, 'Using Civil Processes' (n 7) 357
[615] King, 'Using Civil Processes' (n 7) 351; Campbell, *Organised Crime* (n 19) 214-216
[616] *Engel* (n 380); *Ozturk* (n 584); *Ezeh* (n 581); King, 'Using Civil Processes' (n 7) 351
[617] *Welch* (n 453) para 30; King, 'Using Civil Processes' (n 7) 355

of the legislation.[618] The ECtHR has held various different confiscation proceedings to be preventive measures.[619] In relation to Part 5 of POCA 2002, the UK courts have held that the purpose and function of Part 5 is to recover property obtained through unlawful conduct, and not to penalise or punish any person who is proved to have engaged in such conduct.[620]

However, it is implausible to suggest that measures designed to deprive criminals of their illicit gains or restrict movement do not also impose a penal sanction.[621] Arguably, part of the punitive nature of Part 5 of POCA 2002 stems from the very fact that a judicial determination is made declaring that property represents the proceeds of unlawful conduct, and there is a subsequent recovery of criminal assets. Furthermore, there is almost always some form of stigma associated with Part 5 proceedings since it is difficult to recover assets that are the proceeds of grand corruption without its owner simultaneously being smeared with the accusation of grand corruption.[622] Moreover, while Strasbourg has found certain NCB confiscations to be civil preventive measures, Part 5 proceedings recover the proceeds of unlawful conduct and thus have aims that are different from the Customs and Excise and tax

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[618] King, 'Using Civil Processes' (n 7)
[619] *M* (n 321); *Ciulla v Italy* App no 11152/84 (ECtHR, 22 February 1989) (custodial order); *Arcuri v Italy* App no 54024/99 (ECtHR, 5 July 2001); *Guzzardi* (n 452) (compulsory residence); *Raimondo* (n 555) (special supervision), *Butler v UK* App no 41661/98 (ECtHR, 27 June 2002); Webb v UK App no 56054/00 (ECtHR 10 February 2004); Boucht, 'Civil Asset Forfeiture' (n 18) 210
[620] *Ashton* (n 454); Campbell, *Organised Crime* (n 19) 214
[621] King, 'Using Civil Processes' (n 7) 353
[622] King, 'Using Civil Processes' (n 7) 352; King, 'Civil Forfeiture' (n 15) 383. See also RT Naylor 'Wash-out: a Critique of the Follow-the-Money Methods in Crime Control Policy' (1999) *Crime L & Soc'l Change* 41; Williams, Hopmeier and Jones (n 196) 357

evasion measures.[623] A key purpose of Part 5 is to achieve justice by removing the fruits of criminality and to prevent a sense of injustice. As such, Part 5 of POCA 2002 is retributive and also focuses on the individual involved in a fashion that these other NCB confiscation measures do not.[624]

The criminal confiscation cases are also a useful reference point for our investigation since they have a significant historical presence before the courts. However, it is important to remember that there are a number of fundamental differences between criminal confiscation and civil recovery. Most notably, criminal confiscation is contingent on a conviction.[625] The recent jurisprudence in relation to criminal confiscation really begins with the 1995 case of *Welch v UK* where it was held that a retrospective application of criminal confiscation to a convicted drug offender was a breach of Article 7.

Strasbourg determined there was a breach of Article 7 since the confiscation order was held to be penal and remedial in nature. The Court reviewed all elements of the order, looking at the substance rather than the form of the measure. In its considerations, the Court examined the government's express purpose, viz. prevention, holding that despite this purpose, the effects of a measure were

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[623]Smith, Owen and Bodnar (n 23) 241-242; King, 'Civil Forfeiture' (n 15) 383. It could be argued that stigma does not apply universally, as in the case of a good faith owner of property, who is without notice that it was obtained through unlawful conduct, such as an individual who inherits property unaware of its source.

[624] See e.g. HL Deb 25 March 2002 vol 633, col 12: Lord Rooker described in the House of Lords the purpose of POCA 2002 as removing the huge criminal profits that are 'flaunted' and cause 'deep offence' to the community; HL Deb 13 May 2002 vol 635, col 54: AG expressed that part of the aim of the legislation was '…to make it clearer than ever that crime does not pay'; Smith, Owen and Bodnar (n 23) 241-242

[625] *Ashton* (n 454) [50]; Williams, Hopmeier and Jones (n 196) 297

significantly punitive and thus warranted classification as a 'criminal penalty'.[626] This classification of a criminal penalty had to do with the sweeping statutory assumptions in the Drug Trafficking Offences Act 1986 that included a reversed burden of proof, that the confiscation order was directed to the proceeds involved in drug dealing and not limited to actual enrichment or profit, that the trial judge in fixing the amount of the order had discretion to take into consideration the degree of culpability of the accused and the possibility of imprisonment in default of payment by the offender.[627] It is important to remember that in *Welch,* the court limited its decision to the question of retrospective punishment, so that it 'does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking'.[628]

Despite this early finding that criminal confiscation orders constitute a criminal penalty, the subsequent trilogy of post-Welch confiscation cases conclude that criminal confiscation is neither a criminal charge nor a criminal penalty. The UK cases of *McIntosh*[629] and *Rezvi*,[630] and Strasbourg case of *Phillips*,[631] display judicial deference to the preventive and remedial justifications provided for confiscation, as well as a judicial resistance to attaching the traditional protections of criminal proceedings to confiscation measures. In these cases, it was held that criminal

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[626] *Welch* (n 453) para 33, 46; Ashworth and Zedner, *Preventive Justice* (n 7) 15-17, 19
[627] Boucht, 'The Limits' (n 18) 1-30
[628] Welch (n 453) para 36. Cf *Phillips* (n 565); *Grayson v United Kingdom* (2009) 48 EHRR 30; King, 'Using Civil Processes' (n 7) 355
[629] *McIntosh* (n 388)
[630] *Rezvi* (n 378). See also *R v Benjafield* [2002] UKHL 2; [2003] 1 AC 1099 (HL)
[631] *Phillips* (n 565)

confiscation does not involve a criminal charge since it is post-conviction and part of sentencing, and therefore does not breach any of the rights of the Convention.[632]

A closer look at the judicial reasoning of *Phillips* is useful. The ECtHR endorsed that the criminal confiscation proceedings did not involve a criminal charge but rather involved the determination of the consequences of conviction. The Court held that Article 6(2) is not applicable to allegations made about the character and conduct of the accused as part of the sentencing process, unless they are of such a nature and degree as to amount to the bringing of a new 'charge'.[633] The confiscation procedure was held to be analogous to the procedure for determining an appropriate fine or period of imprisonment.[634] This position was upheld in both *Van Offeren v the Netherlands* and in *Geerings v the Netherlands*.[635] In the light of these criminal confiscation cases, it is likely that Strasbourg will show a similar judicial deference to the preventive and remedial justifications provided for Part 5 of POCA 2002. Moreover, in *Dassa v Liechtenstein* the Court held, distinguishing *Welch*, that a civil recovery scheme was not considered a penalty under Article 7(1).[636]

Strasbourg has also examined two types of NCB confiscation cases that are of particular relevance to Part 5 proceedings: confiscation and forfeiture orders that do not follow conviction and Italian mafia preventive orders. In both types of cases,

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[632] Gallant, *Money Laundering* (n 5) 35-36
[633] *Phillips* (n 565), para 35
[634] *Phillips* (n 565), para 34
[635] *Van Offeren v Netherlands* App no 19581/04 (ECtHR, 5 July 2005); *Geerings v Netherlands* [2007] 46 EHRR 1222; Emmerson (n 431) 221-222
[636] *Dassa* (n 591); Boucht, 'Civil Asset Forfeiture' (n 18) 209

these measures have been found not to constitute a criminal charge or penalty; on the basis of this jurisprudence, it is unlikely that Part 5 of POCA 2002 would be found to be either.[637] The reasoning underpinning the first set of cases is illustrated well in *Butler v UK*. Following the earlier cases of *Allgemeine* and *Air Canada*, the Court held that confiscation of money believed to be used in drug trafficking was not a criminal sanction since its aim was not punitive but rather to remove that money from circulation. Also of note, the Court highlighted that the confiscation did not appear as part of a criminal record, although this is not decisive in determining whether proceedings are criminal.[638]

In the second set of cases, which focus on Italian mafia preventive orders, the Court held that preventive orders aimed at neutralising the Italian mafia were not a criminal penalty since their aim was to prevent offences through the restriction of the movement of persons suspected of involvement in organised crime, as well as through supervision and confiscation.[639] In *Arcuri v Italy* and *Raimondo v Italy* confiscation of mafia-related property was considered preventive and therefore not constitutive of a criminal charge under Article 6(2).[640] Nor was the confiscation of Mafia-owned property in *M v Italy* equal to a penalty under Article 7(1) since it was considered a preventive measure not constituting a finding of guilt, but was rather

[637] Smith, Owen and Bodnar (n 23) 239-240
[638] *Allgemeine Gold-und-Silberscheideanstalt v UK* (1985) 7 EHRR 471; *Benham* (n 579) para 293; *Butler* (n 622); Smith, Owen and Bodnar (n 23) 239-40; Emmerson (n 431) 212
[639] *Guzzardi* (n 452); *M* (n 321); *Raimondo* (n 555); Smith, Owen and Bodnar (n 23) 239-240
[640] *Raimondo* (n 555); *Arcuri* (n 622); Smith, Owen and Bodnar (n 23) 239-240

conditional on a prior declaration of dangerousness based on suspected membership of a mafia-like organisation.[641]

In the light of the above, it is reasonable to conclude that Strasbourg would find Part 5 recovery to be neither a criminal charge nor penalty but rather a preventive measure that does not subserve the traditional aims of punishment. However, on examination, Part 5 of POCA 2002 can indeed be interpreted as subserving these aims for the reasons outlined in this thesis. I now turn to another important element of the second limb under *Engel*, intent and culpability.

An element of intent and culpability

The Attorney General's guidance for prosecutors in relation to asset recovery makes it clear that under Part 5 of POCA 2002 it is not necessary 'to prove the commission of a particular criminal offence by a particular person on a particular occasion.' The guidance clearly states that where appropriate, and where a conviction is not possible, civil recovery should be used.[642] Proceedings under Part 5 of POCA 2002 are not contingent on any criminal conviction: [643] the court must only be satisfied on the balance of probabilities that the property was 'obtained through unlawful conduct'.[644] The case law confirms that under Part 5 of POCA 2002 there is no culpability requirement as there is no requirement for a specific crime to be committed. In the UK High Court decision of *Director of the Assets Recovery Agency v*

[641] *M* (n 321) para 97-98; Smith, Owen and Bodnar (n 23) 239-240
[642] Attorney General's Office (n 166)
[643] See section 2 and 3 of chapter 2 of thesis
[644] POCA 2002, s 241(3); Williams, Hopmeier and Jones (n 196) 295-296

Jeffrey David Green, Sullivan J stated that in civil recovery proceedings the Director had to identify the matters alleged to constitute unlawful conduct in sufficient detail to enable the court 'not to decide whether a particular crime had been committed by a particular individual, but to decide whether the conduct so described was unlawful under the criminal law of the UK'.[645] In *Gale*, the UK Supreme Court referred to the reasoning in *Phillips* and *Van Offeren* describing how 'the ECtHR approved of the confiscation of property on the basis that it was derived from drug trafficking without treating the proof that it was so derived as involving criminal charges'.[646] In UK High Court decision of *Jia Jin He* it was held that there was no conviction or penalty involved in Part 5 of POCA 2002 and therefore Article 7 did not apply.

Nonetheless to conclude that Part 5 proceedings are not concerned with behaviour which is a crime seems unconvincing since 'unlawful conduct' is central to Part 5 proceedings. This seems to be alluded to in Collins J's description of the mechanics of Part 5 '…property cannot be recoverable unless, at the time it was acquired, it was obtained through unlawful conduct. That conduct must have been criminal at that time.'[647] In practice, there are two ways in which enforcement agencies can prove that assets derive from unlawful conduct, and both ways involve an element of intent and culpability:

> [E]ither by proving it derived from particular crimes or by evidence of the circumstances in which the property was handled, such as to give rise to the irresistible inference that it could only have been derived from the crime.[648]

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[645] *Green* (n 378) [19]; *SOCA v Hymans* [2011] EWHC 3332 (QB), [2012] Lloyd's Rep FC 199; Williams, Hopmeier and Jones (n 196) 296
[646] *Gale* (n 594) [40]; Williams, Hopmeier and Jones (n 196) 296
[647] *Jia Jin He,* (n 570) [69]; Williams, Hopmeier and Jones (n 196) 296
[648] Alldridge in King, Walker and Gurulé (n 6) 528

The *in rem* nature of Part 5 recovery ought to be interpreted as based on the legal fiction that property is capable of being 'guilty'.[649] Therefore it is implausible to claim that the *in rem* nature of Part 5 of POCA 2002 implies the irrelevance of the guilt or innocence of the property's owner, the proceedings require a finding that a person has acted contrary to the criminal law.[650] Furthermore, while the behaviour with which Part 5 proceedings is concerned is not formally 'a crime' it seems that the relevant authorities are still able essentially to target criminal behaviour by imposing a criminal punishment through civil processes.[651]

In relation to Part 5 of POCA 2002, the High Court has endorsed the view that certain fundamental distinctions exist between civil recovery and criminal confiscation proceedings, including that there is no conviction and no one stands in jeopardy in civil proceedings.[652] Part 5 of POCA 2002 simply requires that property represent the proceeds of unlawful conduct.[653] Therefore the presence of intent and culpability is not considered to be a requirement of civil recovery since the proceedings are *in rem,* there is no requirement of *mens rea* and the respondent is not found guilty of any crime. Despite these findings, as argued above,[654] notions of intent and culpability remain a concern in civil recovery since alleged criminal activity is central to civil recovery proceedings.[655]

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[649] See section 3.2.2 of chapter 2 of thesis
[650] *Walsh* (n 592); Nicholls and others (n 9) 257-258
[651] King, 'Using Civil Processes' (n 7) 354
[652] *Ashton* (n 454) [50] (Newman J); Williams, Hopmeier and Jones (n 196) 296
[653] POCA 2002, s 243
[654] See section 3.2.2 of chapter 2 of thesis
[655] King, 'Civil Forfeiture' (n 15) 378-379

As noted, Strasbourg has yet to comprehensively investigate civil recovery. Consequently, this section will turn to the other NCB cases under the UK Customs and Excise Management Act 1979 (CEMA). The CEMA powers provide for the forfeiture of illegally imported goods regardless of conviction. The courts have held the CEMA proceedings to be civil since there was no criminal court involved or determination of guilt, and there was no subsequent conviction or other penalty levied.[656]

The view of the Court in relation to whether culpability comes into play is illustrated well in the Strasbourg CEMA-case of *Air Canada.*[657] In *Air Canada*, it was held that seizure of an airplane and its return on payment of a fine was not a criminal charge. This finding was based on the following facts: the criminal courts were not involved, a failure to pay would not result in criminal proceedings, there was no requirement to establish guilt of wrongdoing and the procedures were *in rem* against the plane rather that in relation to the wrongdoing of the airline. [658] The majority therefore held that under the UK Customs legislation the innocence of the property holder does not affect the liability to forfeiture.[659]

The majority reasoning of *Air Canada* was followed by Strasbourg in *Butler* and subsequently in *Webb*. In the admissibility decision of *Butler*, a significant cash forfeiture was made pursuant to section 43(1) of DTA on the basis that the cash was presumed, on the balance of probabilities, to be directly or indirectly the proceeds of

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[656] *Goldsmith v Customs and Excise Commissioners* [2001] EWHC Admin 285, [2001] 1 WLR 1673 [25]*; Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525, [2004] QB 93 [34]-[35]; *Mudie* (n 582) [36]; Smith, Owen and Bodnar (n 23) 238-239
[657] *Air Canada v UK* [1995] 20 EHRR 150; See also *Agosi* (n 547) para 53; King, 'Civil Forfeiture' (n 15) 381-382, 390-391
[658] *Air Canada* (n 546); Smith, Owen and Bodnar (n 23) 239-240
[659] *Air Canada* (n 546) para 5 (J Walsh dissenting)

drug trafficking or intended for use in drug trafficking. Again, the question of intent was essentially held to not be relevant since the order may be made irrespective of whether there has been any conviction for an offence with which the cash in question is connected. [660]

Based on these cases, it seems that the presence of intent and culpability is not at play under these NCB proceedings. However, there are grounds to argue that these proceedings and the Part 5 proceedings do involve an indirect finding of guilt. In his dissenting judgment, Judge Walsh concluded that *Air Canada* had in fact been '…penalised to the extent of [a fine of] £50,000, in effect, for the criminal act of some person or persons unknown to them and for whose actions they bore no responsibility.'[661] According to Judge Walsh the guilt of the persons subject to the order and the 'unknown person(s)' is therefore relevant and it is inaccurate to conclude that there is no presence of intent and culpability at play.

In addition to these NCB cases the civil categorisation of forfeiture in circumstances such as tax evasion is also useful in helping to determine the role of intent and culpability in the Part 5 proceedings. In the English case of *Goldsmith v Customs and Excise Commissioners*, the tax evasion forfeiture proceedings were not deemed criminal owing to the absence of the usual consequences of a criminal conviction: there is no conviction or finding of guilt, the person condemned is not treated as having a conviction and is not subject to any other penalty.[662] This approach was subsequently followed by the Court, despite the court acknowledging

[660] *Butler v UK* App no 41661/98 (ECtHR, 27 June 2002); *Webb* (n 622)
[661] *Air Canada* (n 546) para 5 (J Walsh dissenting)
[662] [2001] EWHC Admin 285; Campbell, *Organised Crime* (n 19) 215-216

the severity of the repercussions for the individual(s) subject to the tax evasion forfeiture proceedings.[663]

The reasoning of the courts in many of these cases is circular: proceedings are not deemed to be criminal owing to the absence of the usual consequences of a criminal conviction, however, the usual consequences of a criminal conviction are not present as the proceedings are deemed to be civil.[664] There are a number of possible explanations for this circularity. The judiciary are driven by a consequentialist fear of undermining efforts to combat crime as well as an overly deferential approach to the legislature. The court's approach arguably also embodies a broader trend which involves the substance of criminal law becoming fragmented, diverse, and thus hard to rationalise in a coherent way, thereby making it tempting to regard the identity of criminal law as residing in formal features.[665]

These cases help to also demonstrate not only the Court's endorsement of the distinction between *in rem* and *in personam* proceedings, but also the Court's conclusion that *in rem* proceedings do not involve any intent and culpability. [666] Strasbourg is likely to hold Part 5 proceedings to be civil since it shares many of the characteristics identified by the courts in the NCB and tax evasion cases. Part 5 proceedings are similarly *in rem* and do not involve any criminal court, any determination of guilt or any penalty. However, the *in rem/in personam* distinction is founded on a legal fiction that it is the property itself that is guilty, and not the person

[663] *Mudie* (n 582); *Gora* (n 299) [34]-[35]; Campbell, *Organised Crime* (n 19) 215-216
[664] King 'Civil Forfeiture' (n 15) 378 in relation to for example *M* (n 321); Cheh (n 402) 1360
[665] Lacey and Zedner in Maguire (n 4) 159-182
[666] *Butler* (n 622); *Webb* (n 622); Boucht, 'Civil Asset Forfeiture' (n 18) 208

in possession of that property.[667]

In addition to the questionable character of the distinction made between *in rem* and *in personam* proceedings, there are grounds for the argument that certain *bona fide* exceptions applicable to a Part 5 of POCA 2002 order implies that a degree of intent and culpability is in fact relevant.[668] Although these exceptions should not be taken to 'import *mens rea* into the Act',[669] they do show that an inability to prove the origins of property lie in innocent or legal behaviour results in a de facto finding of guilt.[670] POCA 2002 provides that a recovery order must not be made if it is not just and equitable to do so when the property has been obtained in good faith; that as a result of receiving the property (or in anticipation of receiving it) he took steps which he would not otherwise have taken; that when he took the steps he had no notice that the property was recoverable; and that recovery would cause him to suffer detriment as a result of those steps.[671] A further exception exists in relation to a

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[667] King, 'Using Civil Processes' (n 7) 350-354. See section 3.2.2 of chapter 2 of thesis
[668] King, 'Using Civil Processes' (n 7) 349; Campbell, *Organised Crime* (n 19) 217-218
[669] *Murphy v GM, PB, PC Ltd* [1999] IEHC 5 [105]; King, 'Using Civil Processes' (n 7) 350
[670] Campbell, *Organised Crime* (n 19) 217-218
[671] POCA 2002, ss 266(3)(a) and (4); Williams, Hopmeier and Jones (n 196) 371-372. The focus of the thesis is predominantly on section 266(3)(b) of POCA 2002 but it should be noted that there is limited case law and almost no academic work focused on section 266(3)(a), (4) and (6) of POCA 2002. The Court of Appeal did hold in relation to section 266(3)(a) that it was not contrary to the right to peaceful enjoyment of possessions under A1P1 to make a civil recovery order under the Part 5 of POCA 2002 in respect of properties given to an innocent wife by her criminal husband as she did not fall within the statutory provisions under which property transferred to third parties could be excluded. The Judge found that the defence in section 266(3)(a), (4) and (6) did not apply to the wife because she 'never acted to her detriment by taking steps before or after receiving her beneficial interest in the properties which she would not have taken if she had not obtained that interest or believed she was going to obtain it.' The properties were always investment properties generating income. She had only benefited from them but never acted to

victim of theft, whereby the court may grant an order that, in instances where the property has been obtained by unlawful conduct, is not recoverable.[672] Despite the issues raised here, the Court is not likely to find a requirement of intent and culpability under Part 5 of POCA 2002. Nonetheless, such a requirement exists since intent and culpability remains operative in civil recovery proceedings.

I now turn to the third, often decisive, limb of *Engel*, the nature and severity of sanction.

2.3 Stage 3 - nature and severity of the sanction

Although Part 5 proceedings involve no imprisonment or any large financial penalty it is still possible to maintain that Part 5 proceedings are criminal under this limb. The 'nature' of the sanction under Part 5 of POCA 2002 is the recovery of property obtained through unlawful conduct. The 'severity' threshold of this limb is arguably met owing to the 'substantial impact'[673] that the recovery of property, especially without a conviction or the necessary protections of the criminal law, has on the human rights of the person concerned. The powerful human rights argument for why the recovery of assets should be subsequent to a criminal conviction and classified as a criminal measure protected by the enhanced criminal safeguards has been set out in section 5 of chapter 3. There are strong grounds for the argument that the core values of liberty, autonomy and freedom that underpin human rights are threatened

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her detriment in reliance or anticipation of her beneficial interest in them: *National Crime Agency v Azam* [2015] EWCA Civ 1234 [64]. See also *Serious Fraud Office v Saleh* [2018] EWHC 1012 (QB)

[672] POCA 2002, ss 301(4)

[673] *Welch* (n 453) para 32

by Part 5 proceedings since assets are recovered without any criminal conviction or any of the enhanced protections of the criminal law. The chief human rights issues raised by Part 5 proceedings arguably stem, in the first instance, from the fact that the recovery of property under Part 5 of POCA 2002 is not contingent on a criminal conviction. It is only the criminal law that is able to signal the appropriate level of censure for the unlawful activity at the heart of civil recovery. A criminal classification of civil recovery would address the victim, ensure that the wrongdoers acknowledge their unlawful conduct, and help to deter the wider community from such conduct. And, in the second instance, from the fact that these proceedings are not protected by the more stringent safeguards of the criminal law. I argue that the importance of respecting human rights and the principles underpinning these rights means that the third limb of *Engel* is met and that the recovery of property should occur only subsequent to a conviction and should be considered a criminal measure benefitting from the associated protections. Andrew Ashworth and Lucia Zedner capture clearly the importance of protecting human rights in criminal proceedings:

> The paradigmatic liberal account of the criminal law emphasises respect for the rights and dignity of the individual in the criminal process (Roberts 2006) which cannot be easily put aside.[674]

Based on the conceptual analysis thus far, it is possible that Part 5 proceedings can be determined as criminal according to the *Engel* criteria. First, as pointed out, Part 5 of POCA 2002 clearly has punitive, deterrent and retributive elements since, amongst other reasons, it involves censure and hard treatment.[675] Moreover, the punitive

[674] Zedner and Ashworth, 'Defending Criminal Law' (n 38) 13
[675] See section 4 of chapter 3 and chapter 4 of thesis

nature of Part 5 is rooted in the fact that the confiscation of property constitutes an interference with the right to property. Such an interference, without a criminal conviction and the necessary protections of the criminal law, is unjustified owing to the vital role this right plays in guaranteeing autonomy, freedom and liberty.[676] Second, although Part 5 proceedings are not formally contingent on culpability that an element of fault nonetheless remains an issue since alleged criminal activity is central to civil recovery proceedings.[677] Intent remains pivotal owing to *in rem* proceedings being a function of an indirect finding of guilt since the criminality of the origins of the property holding must still be established.[678] Furthermore, the *in rem* nature of Part 5 of POCA 2002 is based on a legal fiction. Finally, since it is usually the State who instigates Part 5 proceedings, armed with extensive coercive powers, it is difficult to objectively classify these proceedings as civil. Therefore Part 5 proceedings can objectively be classified as a criminal measure under *Engel*.

3. Conclusion

I have argued that under the lead Strasbourg test Part 5 proceedings should be determined as criminal since Part 5 civil recovery is a criminal punitive measure in substance.[679] However, as we have seen, in the majority of the Strasbourg and UK cases asset recovery measures have not been found to be criminal in nature. Still, it is

[676] See section 5 of chapter 3 of thesis
[677] *Gale* (n 594) [8]; King, 'Using Civil Processes' (n 7) 350; King, 'Civil Forfeiture' (n 15) 8
[678] Campbell, *Organised Crime* (n 19) 216-218
[679] See section 4 of chapter 3 and chapter 4 of thesis

reasonable to view civil recovery as not a purely preventive civil measure but rather a punitive criminal measure, or at the very least a punitive-preventive measure.[680] Part 5 recovery is a punitive-preventive measure since it is substantially punitive in nature as well as in effect. Applying the two definitional elements of punitive measures to Part 5 proceedings legitimates the view that Part 5 imposes censure and is a form of hard treatment.[681]

Based on the jurisprudence identified above, and despite the firm legal grounds for classifying Part 5 proceedings as a criminal measure, Strasbourg is likely to rely on two fundamental reasons in finding Part 5 proceedings as not constituting a criminal penalty. First, the intention of the UK Parliament was for Part 5 of POCA 2002 to be preventive and to remove the profits of unlawful activity from circulation.[682] Second, similar to the UK Supreme Court, Part 5 proceedings are likely to be held as *in rem* proceedings since the focus of the Part 5 proceedings is on property obtained through unlawful conduct, rather than on any individual involved.[683]

Ultimately though I conclude that Part 5 proceedings ought to be considered criminal in nature for the following sets of reasons; one set is intrinsic to Part 5 of POCA 2002, the other is arguably more extrinsic. The intrinsic grounds involve, firstly,

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[680] King, 'Using Civil Processes' (n 7) 358-363
[681] Ashworth and Zedner, *Preventive Justice* (n 5) 16
[682] *Butler* (n 622); HL Deb 25 March 2002 vol 633, col 12: Lord Rooker described recovering proceeds of crime vital to crime reduction; HL Deb 13 May 2002 vol 635, col 54 and 72: AG described it as 'a propriety remedy, which attaches to the property' whose purpose is to '…remove proceeds of unlawful conduct from circulation'; Smith and Owen (n 183) 240-241
[683] *Air Canada* (n 546)*; Butler* (n 622); *Mudie* (n 582) [36]; Smith, Owen and Bodnar (n 23) 240-241

that its aims are consistent with the traditional aims of punishment and, secondly, that the relevant agencies have significant powers under Part 5 of POCA 2002. The more extrinsic grounds stem from the questionable conceptual distinctions made between preventive and criminal punitive measures, and those between *in rem* and *in personam* proceedings.[684]

One intrinsic ground is based on the punitive nature of Part 5 of POCA 2002. By virtue of this nature, the aims of Part 5 are indistinguishable from those of a criminal penalty, viz. condemnation and punishment.[685] While Strasbourg has found certain NCB confiscations to be civil preventive measures, arguably Part 5 of POCA 2002 has aims that are retributive and individual-focused in a way that the other Customs and tax evasion forfeiture measures are not.[686] The second intrinsic ground is found in the significant powers available to the relevant agencies under Part 5 of POCA 2002. While there are no powers of arrest and detention under Part 5, there are comprehensive powers of search and seizure akin to those found in criminal proceedings.[687]

The extrinsic grounds come from the questionable conceptual distinctions made between preventive and criminal punitive measures, and between *in rem* and in *personam* proceedings. Firstly, the *in rem/in personam* distinction is not viable since it is based on a legal fiction[688] whereby confiscation imputes guilt of allegations of criminal wrongdoing and ought to therefore be regarded as *in personam*

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[684] King, 'Using Civil Processes' (n 7) 350-354
[685] See section 4 of chapter 3 and chapter 4 of thesis
[686] Smith, Owen and Bodnar (n 23) (n 183) 239-240
[687] Campbell, *Organised Crime* (n 19) 209-216
[688] See section 3.2.2 of chapter 2 of thesis

proceedings.[689] In the ECtHR case of *Air Canada*, it was held 5 votes to 4 that confiscation measures were *in rem* in nature and did not constitute a criminal charge. However, the minority judgment held that it was an *in rem* decision with a penalty that was 'levied *in personam*'.[690] The dissenting judges held that the particular confiscation order was not reparative and once rid of its national qualification as a civil measure it should fall within the ambit of criminal law since the order's purpose is penal in character, as well as preventive.[691] The same reasoning is arguably applicable to Part 5 of POCA 2002.

Finally, the questionable nature of the distinction made between preventive and criminal punitive measures is also relevant.[692] In *M v Italy*, in applying the *Engel* criteria to the relevant Italian legislation, Strasbourg held that no affinity exists between proceedings for a preventive measure and those for criminal matters. On this basis, if Part 5 of POCA 2002 is held to be preventive then it cannot be considered a criminal proceeding. However, based on the conceptual analysis of the various types of preventive and punitive measures[693] such measures should be viewed as existing on a spectrum as opposed to being mutually exclusive. The European Court, in *Welch*, indeed acknowledged that prevention could be viewed as a constituent of punishment.[694]

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[689] King, 'Civil Forfeiture' (n 15) 379-382
[690] *Air Canada* (n 546) para 6 dissenting (Judge Walsh); King, 'Civil Forfeiture' (n 15) 381-2
[691] *Air Canada* (n 546) para 6 dissenting (Judge Martens and Judge Russo); King, 'Civil Forfeiture' (n 15) 382
[692] Boucht, 'Civil Asset Forfeiture' (n 18) 210
[693] See section 4 of chapter 3 of thesis
[694] *Welch* (n 453)

The devastating economic and social consequences of grand corruption coupled with the significant barriers to successful asset recovery make the use of civil recovery to dispossess rulers, absolute or otherwise, of potentially illicitly obtained assets very appealing at the level of politics and policy. Nonetheless, in the final analysis grand corruption ought to be classified as one of the wrongs that is so serious that it should, except in a very limited number of exceptions, be condemned and punished in the criminal law. The threat that Part 5 of POCA 2002 poses to the values underpinning criminal justice and human rights has two normative consequences. Any interference with the right to property ought be made only after a conviction for a specific offence under criminal law and Part 5 proceedings ought to be classified as a criminal measure protected by the enhanced safeguards and procedures of the Convention. It is only the criminal law that can signal sufficient moral censure of the unlawful activity underpinning civil recovery actions.

Part 5 of POCA 2002 ought to be viewed as imposing a criminal punishment in the realm of civil law since it possesses many of the intrinsic characteristics of criminal law as well as of punitive measures. Moreover, at an even more fundamental level, the conceptual apparatus of civil recovery is flawed, viz. the conceptual distinctions made between preventive and punitive measures, and between *in rem* and *in personam* proceedings. The *in rem* nature of Part 5 of POCA 2002 is based on a legal fiction that it is the property itself that is guilty, and not the person in possession of that property. Despite these concerns, the executive and judicial branches of the UK continue to endorse the use of civil recovery in efforts to obviate concerns with the inefficiency of more traditional approaches to combatting grand

corruption. Even though it can be seen as a 'parallel system [...] of questionable justice'.[695] It is incumbent on the courts to review much more closely than hitherto undertaken the use of Part 5 of POCA 2002 in recovering the proceeds of grand corruption.

[695] Lucia Zedner, *Security* (Routeledge 2009) 81. See also Hendry and King, 'Expediency' (n 127) 733-757

Chapter 5: Civil recovery - a sufficient link to extend Article 6(2)?

1. Beyond *Engel* criteria: can civil recovery still attract the protections of Article 6(2)?

According to the ECtHR *Engel* criteria, the majority of the Strasbourg and UK cases dealing with confiscation measures have not been found to be criminal in nature. On the strength of this jurisprudence, it is unlikely that Part 5 of POCA 2002 would be considered criminal. According to the jurisprudence of the ECtHR, Article 6(2) will only apply in instances of individuals charged with a 'criminal offence'. Nonetheless, I argue Part 5 recovery could still fall within the scope of Article 6(2)[696] owing to a series of Strasbourg decisions demonstrating that if links between civil and criminal proceedings are sufficiently close then Article 6(2) may still apply.

The case law shows that there are two routes to establishing the 'sufficient link' required to warrant extending the scope of Article 6(2). One route consists of a procedural connection existing between the criminal trial and its subsequent proceedings, whereby those proceedings are considered 'a consequence [of] and…concomitant [to]' the criminal proceedings. The other route establishes a 'sufficient link' by virtue of statements made by public authorities suggesting that an acquitted person might nonetheless still have been guilty. [697]

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[696] *Gale* (n 594) [122] (Lord Dyson)

[697] *Rushiti v Austria* (2001) 56 EHRR 33 para 31; *Hammern v Norway* App no 30287/96 (11 February 2003) para 47-49; *Gale* (n 594) [128]. See also Klentiana Mahmutaj, 'Cash forfeiture following acquittal: an "affront to public perception" or a breach of a fundamental human right?' (2009) *CLR* 783-794; Johan Boucht, 'Civil Asset Forfeiture' (n 18) 200

The jurisprudence suggests that if a link can be established between criminal and Part 5 proceedings it would most likely be owing to the presence of incriminating language used in Part 5 proceedings.[698] The jurisprudence strongly suggests that the ECtHR will not see a sufficient proximity link obtaining between criminal proceedings and Part 5 proceedings since, in both legislation and procedure, Part 5 proceedings are considered independent of criminal proceedings. However, there is one ECtHR criminal confiscation case where a breach of Article 6(2) was found owing to the assets being confiscated subsequent to the acquittal of the defendant (*Geerings*). I argue that if the reasoning of this case is applied to Part 5 proceedings that follow an acquittal then there are grounds for claiming a proximity link between Part 5 proceedings and the prior criminal proceedings.[699]

Where has Strasbourg found a procedural link to prior criminal proceedings? As most recently affirmed in *Allen*, the ECtHR found that a procedural link is identifiable in subsequent proceedings which: a) require examination of the outcome of the prior criminal proceedings; b) review or evaluate the evidence in the criminal file; c) assess the applicant's participation in some or all of the events leading to the criminal charge; d) comment on the subsisting indications of the applicant's possible guilt.[700] The ECtHR has in the past been called upon to consider the application of Article 6(2) to judicial decisions which follow the conclusion of criminal proceedings, either by way of discontinuation or subsequent to an acquittal, in proceedings *inter*

[698] See section 1.2 of chapter 5 of thesis. See also Boucht 'Civil Asset Forfeiture' (n 18)
[699] The *Sekanina* and *Rushiti* principles were applied in *Geerings* (n 638) para 122. See also Mahmutaj, (n 700) 790
[700] *Allen* (n 608) para 104

alia concerning: a former accused's obligation to bear court costs and prosecution costs;[701] a former accused's request for compensation for detention on remand or other inconvenience caused by the criminal proceedings;[702] a former accused's request for defence costs;[703] a former accused's request for compensation for damage caused by an unlawful or wrongful investigation or prosecution[704] the imposition of civil liability to pay compensation to the victim;[705] and disciplinary or dismissal issues.[706]

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[701] *Allen* (n 608), para 98. See *Minelli v Switzerland* (1983) 554 EHRR 5, para 30-32; *McHugo v Switzerland* (dec.) App no 55705/00 (12 May 2005)

[702] *Allen* (n 608), para 98. See *Englert v Germany* (1991) 392 EHRR 13, para 35; *Nölkenbockhoff v Germany* (1991) 360 EHRR 13; *Sekanina v Austria* 221 (1994) EHRR 17, para 22; *Rushiti* (n 700), para 27; *Mulaj and Sallahi v Austria* (dec.) App no 48886/99 (27 June 2002); *O v Norway* App no 29327/95, ECHR 2003-II, para 33-38; *Hammern* (n 700), para 41-46; *Baars v the Netherlands* (2004) 39 EHRR 25; *Capeau v Belgium* (2008) 25 EHRR 46; *Del Latte v the Netherlands* (2005) 12 EHRR 41; *AL v Germany* (2006) 10 EHRR 42; *Puig Panella v Spain* App no 1483/02 (25 April 2006), para 50; *Tendam v Spain* App no 25720/05 (13 July 2010) para 31 and 36; *Bok v the Netherlands* App no 45482/06 (18 January 2011) para 37-48; *Lorenzetti v Italy* App no 32075/09 (10 April 2012) para 43

[703] *Allen* (n 608), para 98. See *Lutz* (n 578), para 56-57; *Leutscher v Netherlands* (1997) 181 EHRR 21, para 29; *Yasser Hussain v UK* App no 8866/04 7, ECHR 2006-III para 19; *Ashendon and Jones v UK* (2012) 13 EHRR 54, para 42, 49

[704] *Allen* (n 608), para 98. See *Panteleyenko* (n 712); *Grabchuk* (n 712)

[705] *Allen* (n 608), para 98. See *Ringvold v Norway* App no 34964/97 (11 February 2003), para 36; *Y* (n 716), para 39; *Orr v Norway* App no 31283/04 (15 May 2008), para 47-49; *Erkol v Turkey* App no 50172/06 (19 April 2011) para 33, 37; *Vulakh and Others v Russia* App no 33468/03 (10 January 2012) para 32; *Diacenco v Romania* App no 124/04 (7 February 2012) para 55; *Lagardère v France* App no 18851/07 (12 April 2012) para 73, 76; *Constantin Florea v Romania* App no 21534/05 (19 June 2012) para 50, 52

[706] *Allen* (n 608), para 98. See *Moullet v France* (dec.) App no 27521/04 (13 September 2007); *Taliadorou and Stylianou v Cyprus* App no 39627/05 and 39631/05 (16 October 2008) para 25; *Šikić v Croatia* App no 9143/08 (15 July 2010) para 42-47; *Çelik (Bozkurt) v Turkey* App no 34388/05 (12 April 2011) para 34

The Strasbourg Court has yet to examine whether there is a sufficient link to prior criminal proceedings in the context of Part 5 civil recovery. Therefore, it is useful to examine the reasoning underpinning the Strasbourg and the UK jurisprudence, with special focus on the cost and compensation cases, as well as the post-acquittal confiscation cases. In cases dealing with the application of Article 6(2) after a person has been acquitted in criminal proceedings, the UK Supreme Court (UKSC) in *Gale* observed that these cases are mutually inconsistent.[707] Nonetheless, it is clear that in cases of a link between criminal and civil proceedings having been established, it is for the ECtHR to then determine whether the presumption of innocence has been properly respected. Furthermore, there is no single approach to ascertaining the circumstances in which Article 6(2) would be considered violated[708] since much depends on the nature and context of the proceedings in which the impugned decision was adopted. However, in all cases the language deployed by the decision-maker is critical to assessing the compatibility of the decision made with Article 6(2).[709]

It emerges from the case law that 1) civil proceedings can commence in conjunction or subsequent to criminal proceedings and 2) different standards of proof apply across criminal and civil proceedings.[710] These will now be enumerated.

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[707] *Gale* (n 594) [19]
[708] *Gale* (n 594) [21]
[709] *O* (n 705), para 39-40; *Hammern* (n 700), para 47-48; *Baars* (n 705), para 29-31; *Reeves v Norway* (dec.) App no 4248/02, 8 July 2004; *Y* (2005) 7 EHRR 41, para 43-46; *Panteleyenko v Ukraine* App no 11901/02, 67 (29 June 2006) para 70; *Grabchuk v Ukraine* App no 8599/02, 42 (21 September 2006) para 45; *Konstas v Greece* App no 53466/07 34 (24 May 2011); *Allen* (n 608), para 125
[710] *Hammern* (n 700), para 25

First, concerning the nature of the relationship between civil and criminal proceedings. There is no one-to-one correspondence between civil and criminal liabilities. Hence, a civil wrong entailing an obligation to redress the damage sustained by a victim on account of the accused may exist, even if the accused has been acquitted and thus declared not guilty.[711]

In the ECtHR case of *Müller*, Judges De Gaetano and Yudkivska note that it is clear that in subsequent civil proceedings the mere finding of liability for damages despite a previous acquittal cannot *per se* give rise to an issue under Article 6(2) as otherwise one would have to abolish civil-liability actions. This point was also made in the Strasbourg case of *Vella v Malta*:[712]

> [I]f the mere finding of liability for damages despite an acquittal were to raise such an issue under this provision, one would have to abolish such civil liability actions, which are in fact present and popular in many judicial systems and which are in principle compatible with the Convention, as evidenced by case-law (see, for example, *Ringvold* and *Y*).

The ECtHR in *Müller* went on to note that it has been previously accepted that the presumption of innocence should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. However, even in such proceedings the innocence of the person in question must be respected. In the UKSC case of *Gale,* Lord Dyson provided an illustration of the distinction between civil and criminal liability by reference to the common example of the case where A is acquitted of assaulting B, but B brings a claim for damages in tort. Affirming the Strasbourg case of *Ringvold*, Lord Dyson concludes that

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[711] *Müller and others v Switzerland* App no 10737/84 (24 May 1988), para 2 (dissenting opinion of Judges De Gaetano and Yudkivska)
[712] *Vella v Malta* App no 69122/10 (11 February 2014), para 60

the acquittal ought to stand in the compensation proceedings, but it does not 'preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof.' Lord Dyson goes onto reason that the fact that the findings of fact in the compensation proceedings may implicitly cast doubt on the acquittal is not enough to import Article 6(2): 'What is required is that the decision in the compensation proceedings contains a "statement imputing criminal liability" for Article 6(2) to be imported.'[713]

In cases involving civil compensation claims submitted by victims, the ECtHR emphasised that while exoneration from criminal liability ought to be respected in civil compensation proceedings, it should not preclude the establishment of a civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof.[714] As the ECtHR pointed out in *Ringvold*:

> [I]f the position were otherwise, article 6.2 would have 'the undesirable effect of pre-empting the victim's possibilities of claiming compensation under the civil law of tort, entailing an arbitrary and disproportionate limitation on his or her right of access to a court under article 6(1) of the Convention.[715]

In cases involving disciplinary proceedings, the ECtHR similarly accepts that there is no contravention of Article 6(2) where an applicant is found guilty of a disciplinary offence arising out of the same facts as a previous criminal charge not resulting in a

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[713] *Y v Norway* [2005] 41 EHRR 7, para 42; *Gale* (n 594) [138]

[714] *Allen* (n 608), para 123. However, if the national decision on compensation were to contain a statement imputing criminal liability to the respondent party, this would raise an issue falling within the ambit of Article 6(2). See *Ringvold* (n 708), para 38; *Y* (n 716), para 41-42; *Orr* (n 708), para 49, 51; *Diacenco* (n 708), para 59-60. This approach has also been followed in cases concerning civil claims lodged by acquitted applicants against insurers. See *Lundkvist v Sweden* (dec.), App no 48518/99, ECHR 2003-XI; *Reeves* (n 712)

[715] *Ringvold* (n 708), para 38 affirmed in *Gale* (n 594) [132]. See also *Y* (n 716), para 41; *Lundkvist* (n 717) and *Reeves* (n 712)

conviction. The Court emphasised that disciplinary bodies are able to independently establish the facts of the cases within their jurisdiction and that the constitutive elements of the criminal and disciplinary offences were not identical.[716] In the UKSC decision of *Gale*, Lord Clarke noted that the principle applying in Strasbourg to subsequent civil proceedings is one according to which there should be no conflict with the presumption of innocence enshrined in Article 6(2)[717] as long as the State is not undermining the effect of an acquittal.[718]

Second, the standards of proof applying across criminal and civil proceedings are different. The Convention does not specify what the precise standard of proof is in criminal proceedings.[719] Article 6(2) simply requires that 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' To identify the precise standard of proof we must turn to each Member State. In England and Wales, the criminal standard of proof is 'beyond reasonable doubt' while civil proceedings require recourse to a lower standard of proof, namely the 'balance of probabilities'.[720] The difference between the civil and criminal standards of proof is significant because Part 5 proceedings employ the lower civil standard of proof. I argue that when assets are recovered on the balance of probabilities, allegations of a criminal nature are adjudicated in the absence of the more stringent evidentiary rules

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[716] *Allen* (n 608), para 124. See *Vanjak v Croatia*, App no 29889/04 (14 January 2010) para 69-72; *Šikić* (n 581), para 54-56

[717] *Gale* (n 594) [60] (Lord Clarke with whom Lord Phillips, Lord Mance, Lord Judge and Lord Reed Agreed)

[718] *R (Adams) v Secretary of State for Justice* (JUSTICE intervening) [2011] UKSC 18; [2011] 2 WLR 1180 111. See also *R (on the application of Nealon) v Secretary of State for Justice* [2015] EWHC 1565 (Admin)

[719] White, Wicks and Ovey, *Jacobs, White* (n 387). See section 2 of chapter 6 of thesis

[720] Emmerson (n 431) 866-867

and standard of proof of the criminal law.[721]

With these observations in mind, I will now explore the content of Article 6(2) and then examine whether there is a sufficiently close link between criminal and civil proceedings, and whether a sufficient link can be established owing to the language deployed within civil proceedings. It is important to remind ourselves that the Convention is required to have its provisions interpreted and applied in a fashion that guarantees its remaining practical and effective.[722]

The purpose of Article 6(2) is to safeguard the right to be presumed innocent until proved guilty according to the law. In the UKSC decision of *Gale*, Lord Dyson enunciates the general aim of the presumption of innocence as the protection of:

> [T]he accused against any judicial decision or other statements by state officials amounting to an assessment of the applicant's guilt without him having previously been proved guilty according to law.[723]

There are two salient aspects to Article 6(2) identified by the case law. The first aspect imposes certain procedural requirements in the context of the criminal trial itself. The presumption of innocence imposes requirements in respect of, *inter alia*, the burden

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[721] Gallant, *Money Laundering* (n 5) 20-25

[722] *Soering v UK* (1989) 439 EHRR 11; *Allenet de Ribemont v France* (1995) 20 EHRR 557; *Capeau* (n 705), para 21; *Al-Skeini and Others v the United Kingdom* (2011) 53 EHRR 18; *Allen* (n 608), para 92. As has been argued in section 4 of chapter 3 and chapter 4 of thesis, it is inaccurate to claim that the defendant is not branded a criminal and there is no criminal penalty owing to no finding of criminal guilt in civil recovery. Part 5 of POCA 2002 clearly has punitive elements owing to it involving: censure and hard treatment; interference with the right to property; an element of fault since alleged criminal activity is central to civil recovery proceedings; an indirect finding of guilt since the criminality of the origins of the property holding must still be established; *in rem* nature of Part 5 of POCA 2002 is based on a legal fiction; extensive coercive State powers

[723] *Gale* (n 594) [128] – [131]

of proof;[724] legal presumptions of fact and law;[725] the privilege against self-incrimination;[726] pre-trial publicity;[727] and premature expressions, by the trial court or by other public officials, of a defendant's guilt.[728] The second aspect of Article 6(2) is aimed at protecting individuals who have been acquitted of a criminal charge as well as those against whom criminal proceedings have been discontinued from being treated by public officials and authorities as if they were guilty.[729] Pertaining to this aspect, the ECtHR has expressed the view that, following discontinuation of criminal proceedings, the presumption of innocence requires that the absence of a criminal conviction be preserved in any other type of proceedings.[730] Also at stake subsequent to the conclusion of criminal proceedings is the reputational risk to which the individual is exposed.[731]

The case law on the second aspect of Article 6(2) starts with *Minelli*, a Strasbourg case which established a generally applicable principle.[732] The principle

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[724] *Barberà, Messegué and Jabardo v Spain* (1989) 11 EHRR 360; *Telfner v Austria* (2002) 34 EHRR 7; *Allen* (n 608), para 93
[725] *Salabiaku* (n 559), para 379; *Radio France and Others v France* (2005) 40 EHRR 29; *Allen* (n 608), para 93
[726] *Saunders v UK* (1997) 23 EHRR 313; *Heaney and McGuinness v Ireland* App no 34720/97, 40, ECHR 2000-XII; *Allen* (n 608), para 93
[727] *Akay v Turkey* (dec.) App no 34501/97 (19 February 2002); *GCP v Romania* App no 20899/03, 46 (20 December 2011); *Allen* (n 608), para 93
[728] *Allenet de Ribemont* (n 725), para 35-36; *Nešťák v Slovakia* App no 65559/01, 88 (27 February 2007); *Allen* (n 608), para 93
[729] *Allen* (n 608), para 94
[730] *Vanjak* (n 719), para 4; *Šikić* (n 719), para 47; *Allen* (n 608), para 1
[731] *Allen* (n 608), para 94
[732] *Leutscher* (n 706), para 29; *Mulaj and Sallahi* (n 705); *Baars* (n 705), para 26-27; *Capeau* (n 705), para 22; *AL* (n), para 31; *Panteleyenko* (n 712), para 67; *Grabchuk* (n 712), para 42; *Allen* (n 608), para 120. *Minelli* concerned an order requiring the applicant to pay prosecution costs following discontinuation of the criminal proceedings

consists of prohibiting the ascription of guilt in the absence of a criminal conviction. In the ECtHR's judgment, the presumption of innocence will be violated if, without the accused's having previously been proven guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.[733]

Having explored the content of Article 6(2), we will examine whether a sufficiently close link between criminal and civil proceedings can be established and whether a sufficient link can be seen in the language deployed in civil proceedings with which to engage Article 6(2). This prepares the ground for determining whether a sufficient link between criminal proceedings and Part 5 civil recovery proceedings can be established. To this end, the Strasbourg and UK case law will be explored. In instances of a court imputing criminal liability in civil proceedings, Article 6(2) applies independently of a sufficiently close link being established between criminal and civil proceedings. However, analysis undertaken by the ECtHR suggests that this matter ought to be examined on a sequential basis: first, attempt to establish a 'proximity link'; second, examine whether the language used establishes a sufficient link.[734]

[733] *Minelli* (n 704), para 37–41
[734] *Gale* (n 594) [140]

1.1 A sufficient link to prior criminal proceedings

A review of the cost, compensation and criminal confiscation cases reveals that the ECtHR distinguishes between those cases that were discontinued from acquittals based on merit,[735] and within compensation cases a distinction is drawn between those that are pursued by the victim and those by the defendant.[736] In the view of the ECtHR, the central question concerns whether the subject matter of the civil proceedings is considered proximate enough to criminal proceedings to thereby make available Convention protections normally applicable in criminal proceedings to those in civil proceedings. Naturally, a sufficiently close connection for Article 6(2) to apply occurs if the civil proceedings are contingent on the outcome of the criminal proceedings. For example, consider the case of an acquitted defendant who initiates a compensation claim for his detention on remand and those costs incurred during the criminal proceedings. It follows that the defendant would not have been detained, or incurred those costs, had it not been for the criminal proceedings.[737]

What constitutes a sufficient link? In a number of cost and compensation cases, the ECtHR found that Article 6(2) applied. The focus of these cases was on whether

[735] *Allen* (n 608), para 122. In *Sekanina* (n 705) para 30, the ECtHR drew a distinction between cases where the criminal proceedings had been discontinued and those where a final acquittal judgment had been handed down, clarifying that the voicing of suspicions regarding an accused's innocence was conceivable as long as the conclusion of criminal proceedings had not resulted in a decision on the merits of the accusation, but that it was no longer admissible to rely on such suspicions once an acquittal had become final. The distinction made in *Sekanina* between discontinuation and acquittal cases has been applied in most of the cases concerning acquittal judgments which followed. See e.g. *Rushiti* (n 700)
[736] *Gale* (n 594) [132]
[737] *Gale* (n 594) [125]

the proceedings were considered the 'direct sequel' of or 'a consequence and the concomitant' of the criminal proceedings so as to warrant application of Article 6(2).[738] The ECtHR also found that the applicants' compensation claim:

> [N]ot only followed the criminal proceedings in time, but was also tied to those proceedings in legislation and practice, with regard to both jurisdiction and subject matter.

Such a connection in 'legislation and practice' establishes a link between the two types of proceedings which result in the applicability of Article 6(2).[739] For example, a link is likely to exist in instances of the subsequent civil proceedings requiring examination of the outcome of the prior criminal proceedings. This likelihood is strengthened in cases when the court is required to analyse the criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess the applicant's participation in some or all of the events leading to the criminal charge, or to comment on the subsisting indications of the applicant's possible guilt.[740]

The Strasbourg case of *Hammern* enumerates the factors whereby the link between criminal and compensation proceedings was found to be sufficiently strong for Article 6(2) to apply. Here, an acquitted person brought proceedings for compensation for damage suffered as a result of the prosecution. The relevant legislation provided for compensation where a person had been acquitted if it was shown to be probable that he did not carry out the act that formed the basis for the charge. The ECtHR emphasised the following points:

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[738] *Allen* (n 608), para 99. See *Englert* (n 704), para 35; *Nölkenbockhoff* (n 705), para 35; *Lutz* (n 578), para 56; *Sekanina* (n 705), para 22; *Rushiti* (n 700), para 27; *Weixelbraun* (n 610), para 24; *Hammern* (n 700), para 41, 45-6
[739] *Allen* (n 608), para 100. See *O* (n 705), para 38; *Hammern* (n 700), para 46
[740] *Allen* (n 608), para 104

> (a) the decisions on compensation were taken under domestic criminal law provisions pursuant to which a person who had been charged could seek compensation with respect to matters directly linked to the criminal proceedings against him;
> (b) time limits for bringing the claim were directly linked to the conclusion of the criminal proceedings;
> (c) if possible the composition of the court had to be the same;
> (d) the damage engaged the responsibility of the state, not of a private party;
> (e) the outcome of the criminal proceedings was a 'decisive factor, it being a prerequisite that the person charged had been acquitted …'; and
> (f) there was a 'very large extent' of overlap between the issues in the criminal trial and those in the compensation proceedings, the latter being determined on the basis of the evidence from the [criminal] trial.[741]

The review of the cost and compensation cases thus far reveals that a connection between the two types of proceedings will be present if the civil proceedings are a 'direct sequel' of or 'a consequence and the concomitant' of the criminal proceedings or there is link in 'legislation and practice'. To help explore more closely which factors have led to a link between criminal and civil proceedings it is useful to examine more closely a series of ECtHR Norwegian cost and compensation cases.

1.1.1 Cost and compensation cases

This line of authority starts with *Sekanina*, where the applicant was tried and acquitted of a charge of murder prior to submitting a compensation claim. *Sekanina* was followed by a case with very similar facts, *Rushiti*.[742] In *Sekanina,* pursuant to the relevant legislation, the defendant was deemed entitled to compensation if acquitted 'and the suspicion that he committed the offence was dispelled.'[743] The Linz Regional Court (*Landesgericht*) held that his acquittal did not dispel suspicion of guilt, thus

[741] *Gale* (n 594) [129]
[742] *Rushiti* (n 700)
[743] *Sekanina* (n 705), para 6-9

compensation was refused. The subsequent claim of violation of Article 6(2) was ruled admissible by the Commission. The Commission adopted the reasoning found in *X v Austria* which held that civil responsibility for acts where no criminal responsibility was found is admissible, but that:

> No authority may treat a person as guilty of a criminal offence unless he has been convicted by the competent court and in the case of an acquittal the authorities may not continue to rely on the charges which have been raised before that court but which have been proved to be unfounded.[744]

In *Sekanina*, the ECtHR found that Article 6(2) applied since a link was deemed to exist in 'legislation and practice' between criminal and compensation proceedings. Here the link was deemed sufficient since the ECtHR relied heavily on evidence from the criminal proceedings. The ECtHR went on to hold a breach of Article 6(2) and it was held that the relevant Austrian legislation and practice linked the question of the accused's criminal responsibility to the right to compensation:

> [T]o such a degree that the decision on the latter issue can be regarded as a consequence and, to some extent, the concomitant of the decision on the former.[745]

The reasoning of *Ringvold* is also instructive in helping to determine whether there is a sufficient link between criminal and civil proceedings with which to engage Article 6(2). In this case, Strasbourg did not find a link between the criminal and civil proceedings sufficient enough to extend the scope of Article 6(2). The applicant involved (Mr. Ringvold) was acquitted of a charge of sexual assault against a young person (G), and G's subsequent compensation claim was also rejected. G appealed to the Supreme Court of Norway (*Høyesterett*) concerning this rejection, and was

[744] *X v Austria* App no 19010/07 (19 February 2013), para 277
[745] *Sekanina* (n 705), para 22

awarded the compensation sought. Mr. Ringvold complained to the ECtHR that the *Høyesterett*'s judgment entailed a violation of Article 6(2) since despite his acquittal of criminal charges he was ordered to pay compensation. In finding an insufficient link to engage Article 6(2), Strasbourg distinguished this case from *Sekanina* and *Rushiti*. In *Ringvold*, the ECtHR held that regardless of the conclusion reached in the criminal proceedings, the subsequent case for compensation was not contingent on the criminal proceedings since the victim had a right to claim damages irrespective of the existence of criminal proceedings.[746] The ECtHR held that the requisite link cannot be established owing to an act giving rise to a civil claim in damages simultaneously also constituting a crime.[747]

In the case of *Hammern*, *Sekanina* and *Rushiti* were applied while *Ringvold* was distinguished. The applicant was acquitted of charges of sexual assault and sought compensation for time spent in custody.[748] The relevant legislation permitted compensation on grounds of showing it to be probable that the defendant did not carry out the act for which he is charged.[749] The applicant was denied compensation and subsequently lodged a complaint with the ECtHR. The ECtHR held that the relationship between the compensation and criminal proceedings was such that the compensation proceedings fell within the scope of Article 6(2).[750] The rationale advanced for the applicability of Article 6(2) was essentially twofold. First, the compensation proceedings were determined on the strength of evidence heard

[746] *Ringvold* (n 708), para 41
[747] *Ringvold* (n 708), para 38
[748] *Hammern* (n 700), para 11-23
[749] *Hammern* (n 700), para 24-34
[750] *Hammern* (n 700), para 42

during the criminal trial. Second, the court involved in the compensation proceedings was comprised predominantly of the same members sitting in the criminal trial. The ECtHR held that:

> [T]he compensation claim not only followed the criminal proceedings in time but was also tied to those proceedings in legislation and practice, with regard to both jurisdiction and subject matter. Its object was, put simply, to establish whether the State should have a financial obligation to compensate the burden it had created for the acquitted person by the prosecution it had engaged against him. Although the applicant was not 'charged with a criminal offence', the court considers that, in the circumstances, the conditions for obtaining compensation were linked to the issue of criminal responsibility to such a manner as to bring the proceedings within the scope of Article 6(2).[751]

In the recent Strasbourg case of *Allen v The United Kingdom*, the Court affirmed these Strasbourg cases in relation to the applicability of Article 6(2) to subsequent civil proceedings. In this case, the applicant's conviction for the manslaughter of her baby was quashed and the applicant went onto claim compensation. Under the relevant legislation, compensation can be awarded to a person whose conviction has been reversed on grounds that a new or newly revealed fact shows beyond reasonable doubt that there has been a miscarriage of justice. Here the applicant's claim for compensation was refused since the necessary 'miscarriage of justice' test was not met, and the applicant commenced appeal proceedings against this refusal to award compensation. The Court of Appeal dismissed the appeal, holding that the acquittal decision did 'not begin to carry the implication' that there was no case to answer and that therefore the 'miscarriage of justice' test had not been met.

The applicant subsequently complained to the ECtHR that the rationale provided for the refusal to award compensation was in violation of Article 6(2). The

[751] *Hammern* (n 700), para 45-46

ECtHR held that the necessary link between the criminal and compensation proceedings existed owing to two principle factors. First, the right to commence compensation proceedings was triggered by the acquittal judgment in the criminal proceedings. Second, the courts were required to consider the judgment in the criminal proceedings when determining the compensation decision. Despite the existence of a sufficient link obtaining between the proceedings, the ECtHR nonetheless held, unanimously, that there was no violation of Article 6(2) in this case. The individual decision refusing compensation in the applicant's case, including the reasoning and the language used, was held to be compatible with the presumption of innocence.

What do the Strasbourg cases tell us about the requirements for establishing a sufficient link between criminal and subsequent civil proceedings with which to engage Article 6(2)? It has been observed by the UK Supreme Court that these Austrian and Norwegian cases lack clarity and thus require clarification from Strasbourg.[752] Despite this, it is clear that these cases establish the applicability of Article 6(2) in instances where the proceedings are the 'direct sequel' or 'a consequence and the concomitant' of the criminal proceedings.[753] Since Strasbourg has yet to examine the applicability of Article 6(2) to Part 5 civil recovery proceedings it is helpful to additionally examine how the ECtHR has interpreted Article 6(2) in relation to criminal confiscation cases. On the strength of the treatment of Article 6(2)

[752] *Gale* (n 594) [30], [60], [112-113]
[753] *Englert* (n 704), para 35; *Nölkenbockhoff* (n 705), para 35; *Lutz* (n 578), para 56; *Sekanina* (n 705), para 22; *Rushiti* (n 700), para 27; *Weixelbraun* (n 610), para 24; *Hammern* (n 700) para 41, 45-6; *Allen* (n 608), para 99

in the ECtHR criminal confiscation case of *Geerings*, I conclude that if Part 5 civil recovery were to follow an acquittal then this would breach Article 6(2).[754]

At this juncture, it is useful to first highlight the case of *Gale* in which the UK Supreme Court did consider the applicability of Article 6(2) to Part 5 civil recovery. In this case, the appellant's submissions were based on the Strasbourg criminal confiscation decision of *Geerings* and the UKSC criminal confiscation decision of *Briggs-Price*.[755] In *Gale*, it was held that the sufficient link was not present between the criminal and Part 5 proceedings since the latter were free-standing; they could be instituted irrespective of the existence of any prior criminal proceedings.[756]

In the UKSC decision of *Gale*, the appellants (Mr. and Mrs. Gale) appealed against, amongst other things, a Part 5 civil recovery order. The SOCA alleged that property held by the appellants was derived from criminal activity in the form of drug trafficking, money laundering and tax evasion in the UK, Spain and Portugal. The court awarded a civil recovery order whereby the property was considered to be derived from unlawful conduct, and this was judged to be so on the balance of probabilities. The order was made even though Mr Gale was not subject to a UK conviction (though there had been a prosecution and acquittal in Portugal). During the appeal proceedings, the appellants argued that a) determination of the criminal acquisition of property requires meeting the criminal standard of guilt beyond reasonable doubt,

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[754] The *Sekanina* and *Rushiti* principles were applied in *Geerings* (n 638) 122. See also Mahmutaj, (n 700) 790
[755] *R v* Briggs-Price [2009] UKHL 19
[756] *Gale* (n 594) [133] (Lord Dyson)

and b) an adverse finding should not be made against Mr. Gale concerning conduct for which he was already acquitted in Portugal.[757] In dismissing the appeal, it was held that there was no link obtaining between the Portuguese criminal proceedings and the Part 5 proceedings since the Part 5 proceedings were considered to be independent of any prior criminal proceedings.[758]

The case of *Gale* preceded *Allen* and appears to adopt a narrower test to the question of what constitutes a sufficient link between criminal and civil proceedings. In *Allen*, in order for there to be a link between criminal and subsequent proceedings, the subsequent proceedings would need to require, for example, an examination of the outcome of the prior criminal proceedings; a review or evaluation of the evidence in the criminal file; an assessment of the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt. Whereas in *Gale*, the emphasis was placed on the 'free-standing' nature of civil proceedings. The main judgment by Lord Phillips found no procedural link because the two proceedings took place in different countries (Portugal and England) and the evidence in the civil recovery proceedings was much wider than the evidence relied upon in the Portuguese prosecution. In relation to whether the presumption of innocence has been properly respected, the decision in *Gale* appears to be consistent with the approach set down in *Allen*.[759] Article 6(2) protects individuals who have been acquitted of a criminal charge, or in respect of

[757] *Gale* (n 594) [1-12]
[758] *Gale* (n 594) [33-35]
[759] *Gale* (n 594) [133]

whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged.[760]

In the light of the UK Supreme Court judgment of *Gale*, it is probable that the ECtHR will not see a sufficient link between the Part 5 proceedings and any prior criminal proceedings. Nonetheless, I maintain that if the reasoning of the ECtHR decision of *Geerings* is applied to Part 5 proceedings that follow an acquittal then there are grounds for claiming a proximity link with the prior criminal proceedings.[761] Unlike the UK Supreme Court, Strasbourg has not examined the applicability of Article 6(2) to Part 5 civil recovery proceedings. We will now therefore examine *Geerings* and the Strasbourg judgments made in relation to the applicability of Article 6(2) in the context of criminal confiscation cases.

1.1.2 Criminal confiscation cases

As noted above, the appellant's submissions in the UKSC case of *Gale* were based on the Strasbourg criminal confiscation decision of *Geerings* as applied by the UKSC in the criminal confiscation decision of *Briggs-Price*. In *Geerings*, the ECtHR found a breach of Article 6(2) since the assets were confiscated subsequent to the acquittal of the defendant. On the strength of the treatment of Article 6(2) in *Geerings*, I argue that if Part 5 civil recovery were to follow an acquittal for a criminal offence then this

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[760] *Allen* (n 608) [94], [103]; *Gale* (n 594) [34], [116]. See Simon NM Young 'Enforcing Criminal Law Through Civil Processes: How does Human Rights Law Treat "Civil For Criminal Processes"?', *2017) 4(2) Journal of International and Comparative Law* 133-170, 151-152

[761] Gale (n 594) 44, 114. The *Sekanina* and *Rushiti* principles were applied in *Geerings* (n 638) 122. See also Mahmutaj, (n 700) 790

would equivalently breach Article 6(2).[762] The ECtHR held that confiscation is:

> [I]nappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty.[763]

Prior to exploring the Strasbourg case of *Geerings* and the other relevant confiscation cases further, it is helpful at the outset to remind ourselves of the central principle emerging from these cases.[764] The ECtHR held that criminal confiscation proceedings do not involve a criminal charge, rather they involve the determination of the consequences of conviction. In *Philips*, the ECtHR held that Article 6(2) is not applicable to allegations made about the character and conduct of the accused as part of the sentencing process, unless they are of such a nature and degree as to amount to the bringing of a new 'charge'.[765] The confiscation procedure was held to be analogous to the procedure for determining an appropriate fine or period of imprisonment.[766] This position was upheld in both *van Offeren* and *Geerings*.[767]

The Strasbourg cases of *van Offeren* and *Geerings* are most relevant for this analysis since they consider the applicability of Article 6(2) in the context of criminal confiscation.[768] The reasoning involved in these cases is in various places incomplete and inconsistent. Such inconsistencies include: 1) *van Offeren* referred to but did not

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[762] ibid
[763] *Geerings* (n 638), para 47
[764] Chapter 4 of this thesis has already noted some of the principles that emerge from the criminal confiscation cases
[765] *Phillips* (n 565), para 35
[766] *Phillips* (n 565), para 34
[767] *Van Offeren* (n 638); *Geerings* (n 638)
[768] *Gale* (n 594) [60] (Lord Clarke) and [117] (Lord Brown). See also *Briggs-Price* (n 758) [90 and 91] (Lord Brown), [109, 125 and 134] (Lord Mance). See also Boucht, 'Civil Asset Forfeiture' (n 18).

consider *Rushiti* despite this case being relevant and the similarly constituted court in the subsequent similar case of *Geerings* relying on *Rushiti* 2) v*an Offeren was a* similar case to *Geerings* but *Geerings* was decided differently to *van Offeren* 3) *Geerings* incorrectly characterises *van Offeren* as a case where the confiscation did not relate to the crimes for which the defendant was acquitted. In *Geerings*, the ECtHR explicitly stated that *Geerings* was different to *van Offeren* since the order related to the very crimes of which the applicant has been acquitted. In light of these inconsistencies, the UK Supreme Court in *Gale* rightly describe *Geerings* as a 'difficult case' with Lord Clarke and Lord Brown arguing that it is 'highly desirable for these issues be considered by Grand Chamber to clarify and rationalise this "confusing area"'. Below sets out the pertinent facts concerning the two cases as well as the reasoning involved.

In the case of *van Offeren*, the applicant was convicted of a number of crimes and subsequently acquitted of numerous charges. A confiscation order was granted relating to illegally obtained advantage derived from the proceeds of criminal offences for which he was convicted and also acquitted. The applicant appealed the confiscation order on the grounds that no benefit was derived from his conviction and also that it was a violation of Article 6(2) to impose a confiscation order in relation to those offences for which he was acquitted. The ECtHR followed the reasoning in *Phillips*[769] holding that there was no violation of Article 6(2).[770]

[769] *Phillips* (n 565), para 32-35
[770] *Van Offeren* (n 638), para 44

The ECtHR reached a different conclusion in the case of *Geerings*.[771] Despite the similarities between *Geerings* and *van Offeren*, the ECtHR saw fit to distinguish the two cases. *Geerings* consists of the following facts. The defendant was convicted of theft, handling stolen goods and membership of a criminal gang. He was subsequently acquitted of most of these offences. However, a confiscation order was imposed on the basis that advantage had been derived from all the offences. Appeals were submitted to the Court of Appeal (*Gerechtshof's Hertogenbosch)* and subsequently to the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) on the grounds that the confiscation order violated the right to the presumption of innocence.

The confiscation legislation provides that persons convicted of a criminal offence can be ordered to make a payment to the State so as to deprive him of any illegally obtained advantage. The advantage is considered to have been appropriated:

> [B]y means of or from the proceeds of the criminal offence in question or similar offences or offences…in connection with which there exist sufficient indications that they were committed by him.

Both the *Gerechtshof's Hertogenbosch* and the *Hoge Raad der Nederlanden* held that the legislation permits confiscation based on estimated benefits deriving from offences from which he was subsequently acquitted. This was owing to meeting the necessary test that there were 'sufficient indications' of the offences being committed by him. The complainant appealed to Strasbourg. The ECtHR upheld the complaint holding that post-conviction confiscation was inappropriate for assets not known to be in the possession of the person concerned. Furthermore, it was held to be especially inappropriate when the person concerned was not found guilty of the

[771] *Geerings* (n 638), para 37

offences in question. The ECtHR maintained that if it could not be established beyond reasonable doubt that the person in question was guilty, and if additionally it could not be established that any advantage had been obtained, the confiscation could solely be based on a presumption of guilt. In *Geerings*, the confiscation order concerned those very offences for which he had been acquitted.[772]

It is useful to set out in detail the reasoning involved in *Geerings* since it supports the argument that the criminal standard of proof ought to apply to Part 5 civil recovery subsequent to an acquittal:

> 44. The Court has in a number of cases been prepared to consider confiscation proceedings following on from a conviction as part of the sentencing process and therefore beyond the scope of article 6(2) (see, in particular, Phillips 34; van Offeren). The features which these cases had in common are that the applicant was convicted of drugs offences; that the applicant continued to be suspected of additional drugs offences; that the applicant demonstrably held assets whose provenance could not be established; that these assets were reasonably presumed to have been obtained through illegal activity; and that the applicant had failed to provide a satisfactory alternative explanation.
> 45. The present case has additional features which distinguish it from Phillips and van Offeren.
> 46. First, the Court of Appeal found that the applicant had obtained unlawful benefits from the crimes in question although the applicant in the present case was never shown to hold any assets for whose provenance he could not give an adequate explanation. The Court of Appeal reached this finding by accepting a conjectural extrapolation based on a mixture of fact and estimate contained in a police report.
> 47. The Court considers that 'confiscation' following on from a conviction – or, to use the same expression as the Netherlands Criminal Code, 'deprivation of illegally obtained advantage' – is a measure (maatregel) inappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with article 6(2) (compare, mutatis mutandis, Salabiaku 28).

[772] *Geerings* (n 638), para 44-51

> 48. Secondly, unlike in the Phillips and van Offeren cases, the impugned order related to the very crimes of which the applicant had in fact been acquitted.
> 49. In the Rushiti judgment 31, the Court emphasised that article 6(2) embodies a general rule that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible.
> 50. The Court of Appeal's finding, however, goes further than the voicing of mere suspicions. It amounts to a determination of the applicant's guilt without the applicant having been 'found guilty according to law' (compare Baars v The Netherlands, (2003) 39 EHRR 538 , para 31).
> 51. There has accordingly been a violation of article 6(2).

The UKSC case of *Briggs-Price* considered these Strasbourg cases and found no breach of Article 6(2). At the outset the unusual facts of this case should be highlighted. In this case the prosecution adopted an unusual approach to proving that the defendant had benefited from drug trafficking and the extent of that benefit. They proved that the defendant had committed drug trafficking offences other than that in respect of which he was convicted and invited the court to estimate the profit that he must have derived from these offences. Based on this approach, Lord Mance therefore said that the exception in the Strasbourg case of *Geerings* is not relevant to *Briggs-Price* since the extent the appellant benefited has been established beyond doubt by the judge's own admissions adduced in evidence at trial. Under the Drug Trafficking Act 1994 (DTA) the assets of a defendant convicted of a drug trafficking offence are liable to confiscation to the extent that he has benefited from drug trafficking. The benefit in question is not restricted to the benefit derived from the offence or offences in respect of which the defendant has been convicted. In confiscation proceedings the prosecution has to satisfy the court that the defendant has benefited from drug trafficking and the extent of such benefit. The judge granted a confiscation order on the basis of matters established by evidence at trial but in relation to which the appellant had not been charged. The appellant unsuccessfully appealed against a

confiscation order imposed in the sum of £2,628,490. There was no breach of Article 6(2) since he had the opportunity many times during the proceedings to explain or dispel such admissions, but chose not even to give evidence.[773] However, *Briggs-Price* is clearly different from *Geerings* since there was no charge or acquittal in respect of any of the drug trafficking offences which led the judge to conclude that the appellant had benefited and received the proceeds in relation to which the confiscation order was made. Therefore, it was held that the potential affront to public perception involved in confiscation proceedings relating to the proceeds of offending of which the defendant has been acquitted was not present.[774]

This section examined the criteria by which a sufficient link is capable of being established between criminal and civil proceedings by exploring the jurisprudence of cost and compensation cases as well as criminal confiscation cases. A general principle emerges from this jurisprudence, namely that it is legitimate for a confiscation order to be based on offences other than those for which the defendant was convicted. Despite the continued applicability of this general principle, the Strasbourg decision in *Geerings* can however be considered a legitimate exception.[775] In *Geerings*, the ECtHR found a breach of Article 6(2) since the assets were confiscated subsequent to the acquittal of the defendant. Therefore, the reasoning in *Geerings* can be deployed in support of the argument presented here that the criminal standard of proof ought to be applied to Part 5 civil recovery occurring subsequent to an acquittal.

[773] *Briggs-Price* (n 758) [126-134] (Lord Mance)
[774] *Briggs-Price* (n 758) [36-37]
[775] *Briggs-Price* (n 758) [134] (Lord Mance)

The Strasbourg jurisprudence shows that there is another route by which Article 6(2) could apply to civil proceedings.[776] This involves determining that a sufficient link obtains between criminal and civil proceedings based on the language used in the civil proceedings. I will now consider this potential route and its relevance in the context of Part 5 proceedings.

1.2 A sufficient link owing to incriminating language

The ECtHR maintains that in determining whether a sufficient link is established by incriminating language deployed in civil proceedings, much depends on the nature and context of the proceedings involved. The ECtHR nonetheless maintains that the language used by the decision-maker is critical[777] and where the language deployed imputes criminal liability, Article 6(2) will apply to the civil proceedings. This is so irrespective of the nature and context of the proceedings, and even if the two proceedings are otherwise considered not to be sufficiently close.[778] The following are some of circumstances in which a sufficient link is considered to be established: where the reasoning employed by the official is suggestive of guilt even in the absence of a formal finding of guilt;[779] where the decision involves language casting doubt on the correctness of an acquittal;[780] where an authority refers either directly or

[776] *Gale* (n 594) [134] (Lord Dyson)
[777] *Y* (n 716), para 43-46; *O* (n 705), para 39-40; *Hammern* (n 700), para 47-48; *Baars* (n 705), para 29-31; *Reeves* (n 712); *Panteleyenko* (n 712), para 70; *Grabchuk* (n 712), para 45; and *Konstas* (n 584); *Allen* (n 608), para 126
[778] *Gale* (n 594) [134] (Lord Dyson)
[779] *Daktaras v Lithuania* (2002) 34 EHRR 60, *A.L.*; *Allen* (n 608), para 19
[780] *Ringvold* (n 708), para 38; *Gale* (n 594) [138]

indirectly to the criminal responsibility of the interested party in a manner failing to respect the operative part of an acquittal judgment.[781]

In the UKSC case of *Gale*, Lord Dyson judged that a sufficient link is established if the court treats the compensation proceedings as one in which criminal liability is determined.[782] For example, proceedings in which explicit reference is made to a failure to dispel suspicion of guilt; proceedings following an acquittal where suspicions of guilt are voiced;[783] proceedings in which the substantive reasoning employed amounts to a determination of guilt in the absence of being found guilty and without an opportunity to exercise rights of the defence.[784] However, the jurisprudence does not clearly identify a threshold for what constitutes language sufficient to establish a link between criminal and civil proceedings and this indeterminacy undermines our ability to extrapolate how the ECtHR might approach Part 5 proceedings.

With this limitation in mind, I will now examine the case law in more detail concerning whether a sufficient link is established by incriminating language

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[781] *Vassilios Stavropoulos v Greece*, App no 35522/04, 27 September 2007, para 39; *Tendam* (n 705), para 37; *Lorenzetti* (n 705), para 46; *Allen* (n 608), para 102

[782] *Gale* (n 594) [139] (Lord Dyson)

[783] *Sekanina* (n 705), para 29-30; *Rushiti* (n 700), para 30-31; Hammern (n 700), para 47-48; *Allen* (n 608), para 126; *Müller* (n 714), para 46

[784] *Englert* (n 704), para 37; *Nölkenbockhoff* (n 705), para 37; *Lutz* (n 578), para 60; *Allen* (n 608), para 121. The reasoning in *Allen* highlights that in the first cases with which it was confronted concerning applications by a former accused for compensation or for defence costs, the ECtHR drew on the principle set out in *Minelli*. These first cases concerned prior criminal proceedings which had ended in discontinuation, rather than acquittal. In these earlier cases there was no violation of Article 6(2), the ECtHR explained that the domestic courts had described a 'state of suspicion' and that their decisions did not contain any finding of guilt

deployed in civil proceedings. In *Sekanina*, the ECtHR made the following comment on the affirmations of the *Landesgericht* and the Linz Court of Appeal (*Oberlandesgericht*) that there were still grounds for suspicion of the applicant's guilt:

> The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final.[785]

In *Rushiti* the ECtHR stated:

> [F]ollowing a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible…and is incompatible with the presumption of innocence.[786]

A later series of Norwegian compensation cases heard together by the ECtHR also provide useful insights into whether a sufficient link is established through incriminating language. The principles derived from these cases confirm that Article 6(2) will be violated where the language used in the civil proceedings casts doubt on the correctness of the acquittal. In the cases of *Ringvold* and *Y*, the victims were awarded compensation subsequent to unsuccessful criminal prosecutions. Under the relevant Norwegian law a victim is entitled to claim damages for personal injury caused with intent or by gross negligence regardless of the outcome of criminal proceedings. In the Gulating High Court (*lagmannsrett*) appeal proceedings of *Y*, the applicant was acquitted and the following day the three professional judges involved in the *lagmannsrett* trial granted a compensation order on the basis of evidence that they had heard. In appealing to Strasbourg, the applicant claimed that his Article 6(2)

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[785] *Sekanina* (n 705), para 30
[786] *Rushiti* (n 700), para 31

rights had been violated. The ECtHR held that Article 6(2) was indeed violated, even though the courts acknowledged the applicant's acquittal of criminal charges, since the courts overstepped the 'bounds of the civil law' by virtue of using language which cast doubt on the correctness of the acquittal. It was held that the incriminating language used by the courts implied the applicant's guilt.[787] The ECtHR reasoned as follows:

> 44. The court notes that the High Court opened its judgment with the following finding:
>
> > 'Considering the evidence adduced in the case as a whole, the High Court finds it clearly probable that [the applicant] has committed the offences against Ms T with which he was charged and that an award of compensation to her parents should be made under article 3–5 (2) of the Damage Compensation Act ….'
>
> 45. This judgment was upheld by the majority of the Supreme Court, albeit using more careful language. However, that judgment, by not quashing the former, did not rectify the issue which in the court's opinion thereby arises.
> 46. The court is mindful of the fact that the domestic courts took note that the applicant had been acquitted of the criminal charges. However, in seeking to protect the legitimate interests of the purported victim, the court considers that the language employed by the High Court, upheld by the Supreme Court, overstepped the bounds of the civil forum, thereby casting doubt on the correctness of that acquittal. Accordingly, there was a sufficient link to the earlier criminal proceedings which was incompatible with the presumption of innocence.

In *Ringvold*, the ECtHR found that Article 6(2) had not been violated, and emphasised that the compensation decision was taken independently of the criminal case decision and, furthermore, that the language deployed did not undermine the acquittal. The ECtHR, however, affirmed that if a national decision on compensation did contain a statement imputing criminal liability then this raises an issue falling 'within the ambit'

[787] *Y* (n 716), para 44-46

of Article 6(2). The ECtHR held that the impugned national ruling awarding compensation to the alleged victim following the defendant's acquittal:

> [D]id not state, either expressly or in substance, that all the conditions were fulfilled for holding the applicant criminally liable with respect to the charges of which he had been acquitted.[788]

It is not clear why the Court adopted different approaches in *Y* and *Ringvold*. It is inconsistent to, on the one hand, find in *Y* that Article 6(2) was violated while Article 6(2) was not applicable in *Ringvold.* Colin King clearly sets out the extent of the inconsistency in the Court's approach

> In *Ringvold*, in ordering compensation to be paid by the applicant the decision of the national court does cast doubt upon the validity of the criminal acquittal. The national court's finding that the applicant committed sexual abuse, on the balance of probabilities, imputes de facto criminal liability and thus Art 6(2) should be engaged. This is reinforced by the fact that the compensation is awarded to remedy the injury and suffering *caused* to the victim. [789]

In a later Norwegian case, *Orr,* Strasbourg found a violation of Article 6(2) as a direct result of the language employed which in their view cast doubt on the correctness of

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[788] *Ringvold* (n 708), para 38; *Gale* (n 594) [138]. In *Gale*, Lord Dyson affirmed the principles enunciated in *Ringvold* reasoning that a necessary link can be created only if the court in the civil proceedings bases its decision adverse to the defendant using language which casts doubt on the correctness of an acquittal. If the decision in the civil proceedings is based on reasoning and language which goes no further than is necessary for the purpose of determining the issue before that court and without making imputations of criminal liability, then the necessary link will not have been created

[789] King 'Civil Forfeiture and Article 6' (n 15) 386

the acquittal decision. Initially, the applicant was acquitted by the Eidsivating High Court (*lagmannsrett*) and the victim subsequently claimed compensation. In the compensation proceedings the following day, the *lagmannsrett* which consisted of the same professional judges ordered the applicant to pay compensation.[790] The applicant, however, submitted to the ECtHR that the close links obtaining between the two proceedings implied the applicability of Article 6(2). In the view of the ECtHR there was an insufficient proximity link, but the Court nonetheless maintained a violation of Article 6(2) owing to the language employed.[791] The ECtHR held that the *lagmannsrett* had overstepped the bounds of the civil forum since the reasoning associated with the applicant's liability to pay compensation was deemed to be based on a description of virtually all the constitutive elements of the relevant criminal offence. The ECtHR proceeded to reason that such an 'overstep' could not be prevented either by qualified statements made by the *lagmannsrett* that there is no intention to impugn guilt or that the *lagmannsrett* dealt with the criminal charges and compensation claim in two distinct parts of its judgment.[792]

The cases considered in this section demonstrate that a sufficient link can be established in a manner engaging Article 6(2) if there are explicit statements that the defendant was incorrectly acquitted, expressions of suspicion of guilt, or some reasoning to suggest that the official regards that person as guilty.[793] The question of what precisely constitutes language sufficiently incriminating to engage Article 6(2)

[790] *Orr* (n 708), para 5-14
[791] *Orr* (n 708), para 52-53
[792] *Orr* (n 708), para 50-53. See also *Ringvold* (n 708), para 38; *Y* (n 716), para 46
[793] *Allen* (n 608), para 19. See *Daktaras* (n 783)

remains to be addressed. This lacuna was highlighted in the recent Strasbourg case of *Müller* which affirmed that the use of 'unfortunate' language may not be sufficient to constitute incriminating language. This lack of clarity is highlighted by Judge De Gaetano and Judge Yudkivska in their partly dissenting opinion in *Müller*:

> [T]o speak of 'unfortunate language used' and then to distinguish between unfortunate language that is in violation of the presumption of innocence and unfortunate language which is not merely shoves the problem into the realm of the aleatory.[794]

This concern is echoed in the separate opinion expressed by Judge De Gaetano in the Strasbourg case of *Allen*:

> To state that it all depends on whether 'the national decision on compensation [contains] a statement imputing criminal liability to the respondent party'…which in effect means 'it all depends on what you say and how you say it' – is just playing with words and most unhelpful. It is as much as saying that 'whether the reasons [given in the civil judgment] gave rise to an issue under Article 6(2) must be viewed in the context of the proceedings as a whole and their special features'.[795]

So, what constitutes incriminating language? I will examine in the following section a number of cases that provide a description of what may or may not constitute incriminating language.

1.2.1 What is incriminating language?

This section begins by exploring cases in which the language deployed is held to be incriminating prior to considering those cases in which the language is not held to be

[794] *Müller* (n 714), para 2 (Partly dissenting opinion of Judge De Gaetano joined by Judge Yudkivska)
[795] *Allen* (n 608), para 3 (Separate Opinion of Judge De Gaetano); *Reeves* (n 712)

incriminating. In *Sekanina*, the ECtHR held that the language used by the *Oberlandesgericht* in rejecting the compensation claim opened the way to doubting the correctness of the applicant's acquittal and that therefore the language used established a link between the proceedings. The ECtHR noted that the *Oberlandesgericht* rejected the applicant's claim for compensation on the grounds that the acquittal reflects the view that the suspicion of guilt was not sufficient to reach a guilty verdict. However, the ECtHR maintained that the *Oberlandesgericht*'s later use of the words '…no question of that suspicion's being dispelled' implied sufficiently strong, incriminating language.[796] In *Y v Norway*, the ECtHR held that the language employed by the Gulating High Court (*lagmannsrett*) – subsequently upheld by the Appeals Selection Committee of the Supreme Court (*Høyesteretts kjæremålsutvalg*) - had 'overstepped the bounds of the civil forum' which therefore established the necessary link between criminal and civil proceedings. The *lagmannsrett* used the following incriminating language:

> Considering the evidence adduced in the case as a whole, the High Court finds it clearly probable that [the applicant] has committed the offences against Ms T. with which he was charged and that an award of compensation to her parents should be made...[797]

In *Yasser Hussain v The United Kingdom*, the ECtHR unanimously held the comments of the Crown Court judge was incompatible with Article 6(2) since the language involved raised doubts concerning the correctness of the acquittal. In this case, the applicant was acquitted of perverting the course of justice and his subsequent claim for costs was rejected. The ECtHR noted that the prosecution case failed because a

[796] *Sekanina* (n 705), para 29-30
[797] *Y* (n 716), para 44-45

key witness declined to attend court and the prosecution decided to discontinue the case in lieu of compelling the witness. The ECtHR held that the reasoning and language employed in the judge's refusal to make a costs order both implied that the applicant's acquittal was incorrect. In refusing the costs order, the judge stated that:

> There is clear evidence on the court papers. The Crown have taken the view that they are not going to compel this witness although there is compelling evidence in respect of those matters.[798]

The ECtHR maintained that a determination of whether a statement by a public official is in breach of the principle of the presumption of innocence must be made in respect of the circumstances in which the impugned statement was articulated.[799] The ECtHR went on to maintain that in this instance the only natural interpretation of refusing the costs order was that:

> [T]he judge was refusing the order because he was of the view that, although the key witness had not given evidence and the applicant had been acquitted, the applicant was, in fact, guilty of the offence.[800]

I will now consider the cases in which the language deployed was considered insufficient to establish a link between criminal and civil proceedings.[801] In *Moullet*, the applicant was charged with accepting bribes together with aiding and abetting fraud whilst performing his duties as a manager of a government department in Marseilles. However, the proceedings were terminated on the grounds that they were time-barred. The Mayor of Marseilles ordered the applicant to take early retirement

[798] *Yasser Hussain* (n 706), para 7, 22
[799] *Yasser Hussain* (n 706), para 19
[800] *Yasser Hussain* (n 706), para 22
[801] *Gale* (n 594) [135]

since, in his view, there was evidence conclusively establishing that the applicant was indeed the recipient of these bribes. The Mayor's decision was subsequently challenged in the Marseilles Administrative Court and Marseilles Administrative Court of Appeal. Ultimately, the supreme court for administrative justice, the *Conseil d'Etat*, upheld the Mayor's decision on the grounds that the findings of the disciplinary board, as well as those in the disciplinary appeals board, were based on accurate facts and sound reasoning.

The applicant submitted a complaint to the ECtHR arguing that Article 6(2) had been breached since the *Conseil d'Etat* relied on facts which pertained to the criminal charges (a proximity link). As part of the ECtHR's deliberations, the ECtHR considered whether the *Conseil d'Etat* used language sufficient to establish a clear link between the criminal and administrative proceedings. The ECtHR concluded that the *Conseil d'Etat* had not used such language since it had determined the facts without any allusion to 'criminal characterisation(s) whatsoever' and, moreover, made no formal declaration of guilt.[802] The ECtHR held that the *Conseil d'Etat* confined itself to the assessment of:

> [T]he impact of the alleged facts on the duties and obligations of probity incumbent on all local and regional government staff…In other words, the domestic authorities managed in the instant case to keep their decision within a purely administrative sphere, where the presumption of innocence the applicant relied on did not obtain.[803]

In the UKSC decision of *Gale*, Lord Dyson considered whether during the High Court hearing the language deployed by Griffith Williams J imputed criminal liability to the

[802] *Moullet* (n 709), part B(2)(a)
[803] *Moullet* (n 709), part B(2)(a)

appellants which cast doubt on the acquittal decision. The basis for the civil recovery order was the appellant's acquisition of wealth through unlawful conduct in various jurisdictions. Griffith Willams J held that the legislation did not require consideration of the commission of specific offences alleged against Mr Gale. Rather, it was the court's task to determine whether SOCA had amassed sufficient evidence to prove that the appellant's wealth had been obtained unlawfully. Lord Dyson held that Griffith Williams J did not use incriminating language since nowhere in his judgment was the correctness of the acquittal called into question.[804]

The ECtHR case of *Müller* furnishes another example of language deemed insufficient to establish a link between proceedings. Central to the ECtHR's considerations was determining whether a link existed between criminal proceedings and collateral probation proceedings owing to reference made in the collateral proceedings to a statement contained in an expert medical report; the report stated that the applicant was guilty of a criminal offence for which he had been acquitted.

This German case consists of the following facts. In 1984, the applicant was given a life-sentence for murdering his wife with intermittent, limited scope for prison leave. In 1997, while on prison leave, it was suspected that the applicant had caused bodily harm to a female acquaintance (Ms. J), and this triggered criminal proceedings to be undertaken. In 1999, the applicant was acquitted of the charge in relation to Ms. J. In September 2007, a probation application in relation to the original

[804] *Gale* (n 594) [141-142]

murder conviction was refused partly owing to consideration being given to the alleged 1997 incident for which he had been acquitted. In refusing probation, the Kassel Regional Court, sitting as an execution of sentence chamber (*Strafvollstreckungskammer*) relied on the opinion of a new 2007 expert medical report that referred to the applicant in a fashion which presupposed his guilt in the 1999 charge. The Kassel Regional Court referred to the following expert statement:

> [T]he criminal offence that the applicant had committed to the detriment of Ms J. showed that the applicant was willing to enter into relationships with women once more and that a separation would lead to violent acts for reasons of wounded pride.[805]

With a majority of five against two, the ECtHR held that the language used in the 2007 decision to refuse probation did not breach the presumption of innocence. However, the ECtHR noted that it would have been prudent for the Kassel Regional Court to distance itself clearly from the expert's misleading statements, which implied criminal guilt. Nonetheless, the ECtHR maintained that the Kassel Regional Court was directly quoting from the expert report as a follow-up to the analysis previously given with respect to the issue of probation. In the light of this, the language used by the Kassel Regional Court did not imply that the applicant was guilty of the offence for which he had been acquitted.[806]

The difficulties associated with determining what constitutes incriminating language is revealed in the dissenting judgments of Judges De Gaetano and Yudkivska who expressed deep reservations concerning the court's language in reviewing the

[805] *Müller* (n 714), para 5-28. See also Boucht, 'Civil Asset Forfeiture' (n 18)
[806] *Müller* (n 714), para 51-52

applicant's post-conviction behaviour. The dissenting Strasbourg judges maintained that the decisions of the Kassel and Marburg Regional Court suggested that the applicant had committed an offence for which he had been acquitted. They criticised these courts for failing to exercise '…extreme caution so as not to suggest, even tangentially, that the applicant had in fact committed the offence.' According to Judge De Gaetano, the incriminating language included a statement that the applicant attacked Ms. J and reference to the applicant as a 'perpetrator'. While acknowledging that the Kassel and Marburg Regional Court explicitly concluded that the applicant was not guilty of a fresh criminal offence, in Judge De Gaetano's view the courts nonetheless 'clearly implied it by their lack of criticism of the expert's views...' and 'no amount of pedagogical finger-wagging' can resist drawing the conclusion that the courts' decisions clearly imply the applicant was guilty of the offence for which he was acquitted.[807]

What has been learnt thus far on how to determine whether the language used is sufficient to establish a link to criminal proceedings? The case law does not provide clear criteria commanding universal assent for what constitutes sufficient language to establish the requisite link. Furthermore, the rigid approach expressed in some of the older cases such as *Sekanina* and *Rushiti* seems to have been modified by *Allen*.[808] The Court made it clear that even the use of some 'unfortunate language' will not be decisive when the nature and context of the proceedings have been taken into

[807] *Müller* (n 714), para 3-4 (Partly dissenting opinion of Judge De Gaetano joined by Judge Yudkivska)
[808] *Allen* (n 608) 126

consideration. Nonetheless, the case law is instructive in the following ways. The language is sufficiently incriminating even in the absence of a formal finding of guilt as long as reasoning is implied which suggests that an official considers the person to be guilty.[809] However, if the court in question confines itself to a determination of the facts 'without suggesting any criminal characterisation whatsoever' then the language will not be deemed to be sufficiently incriminating.[810]

In the light of the preceding analysis concerning the two routes to establishing a sufficient link with which to engage Article 6(2), I will consider whether the ECtHR could find a link between criminal proceedings and Part 5 proceedings.

2. Conclusion: a sufficient link to Part 5 proceedings

A sufficient link can be established between criminal and civil proceedings by taking two routes: one involves establishing proximity to criminal proceedings, the other involves establishing a link via the language used in civil proceedings. The jurisprudence on the cost, compensation and criminal confiscation cases strongly suggests that the ECtHR will not see a sufficient proximity link obtaining between criminal proceedings and Part 5 proceedings since, in both legislation and procedure, Part 5 proceedings are considered independent of criminal proceedings. Indeed, in *Gale*, the UK Supreme Court found Part 5 proceedings to be neither a 'direct sequel' nor 'a consequence and the concomitant' of criminal proceedings; rather as free-

[809] *Daktaras* (n 783); *Allen* (n 608), para 19
[810] *Moullet* (n 709), part B(2)(a)

standing proceedings instituted independently of any criminal proceedings.[811] However, I argue that on the strength of the ECtHR's treatment of Article 6(2) in *Geerings*, there are grounds for claiming a proximity link between criminal proceedings and those Part 5 proceedings that follow an acquittal. In *Geerings*, the ECtHR found a breach of Article 6(2) since the assets were confiscated subsequent to the acquittal of the defendant. Therefore, the reasoning in *Geerings* can be deployed in support of the argument presented here that the criminal standard of proof ought to be applied to Part 5 civil recovery occurring subsequent to an acquittal. Furthermore, Part 5 proceedings have in practice followed unsuccessful criminal confiscation, and indeed this formed part of the underlying rationale for introducing Part 5 civil recovery.[812]

It appears that if a link can be established between criminal and Part 5 proceedings it would be owing to the presence of incriminating language used in Part 5 proceedings.[813] In the UKSC decision of *Gale*, Lord Brown highlights the dangers of employing such incriminating language when cautioning that:

> [I]n all proceedings following the acquittal the court should be astute to ensure that nothing it says or decides is calculated to cast the least doubt upon the correctness of the acquittal.[814]

Despite the absence of clear criteria for what qualifies as incriminating language, the case law does reveal that a link between criminal and Part 5 proceedings could be

[811] *Gale* (n 594) [133] (Lord Dyson)
[812] See section 1.1 of chapter 2 of thesis. See also Boucht, 'Civil Asset Forfeiture' (n 18)
[813] *Allen* (n 608), para 83
[814] *Gale* (n 594) [115]

established via the language used in the following types of instances: proceedings in which explicit reference is made to a failure to dispel suspicion of guilt; proceedings following an acquittal where suspicions of guilt are voiced; proceedings in which the substantive reasoning employed amounts to a determination of guilt in the absence of being found guilty and without opportunities to exercise rights of the defence.[815]

Part III of the thesis seeks to examine the relationship between Part 5 proceedings and the fundamental guarantees and protections of the Convention. Chapter 6 examines the relationship between Part 5 civil recovery and the right to a fair trial as expressed in Article 6 of the Convention. I explore the content of Article 6 with a view to determining whether Part 5 civil recovery meets the requirements laid out in Article 6. Chapter 7 moves on to examine the difficulties in framing and balancing the competing rights and duties arising in the fight against grand corruption. The key contribution of chapter 7 is the identification of criteria that must be satisfied in order to supply a sufficient justification to employ civil recovery.

[815] *Sekanina* (n 705), para 29-30; *Rushiti* (n 700), para 30-31; Hammern (n 700), para 47-48; *Allen* (n 608), para 126; *Müller* (n 714), para 46

Part III: Tensions between the collective and individual interests in combatting grand corruption

Chapter 6: Impact of Part 5 civil recovery on fundamental guarantees and protections

1. Introduction: Impact of Part 5 civil recovery on fundamental guarantees and protections

Classifying Part 5 proceedings as civil carries with it significant consequences. The classification of civil recovery as a civil measure circumvents certain key due process protections of the criminal law. I argue Part 5 of POCA 2002 creates a problematic convergence of criminal allegations adjudicated in the absence of the more stringent evidentiary rules and standard of proof of the criminal law.[816] Part 5 proceedings employ a lower civil standard of proof, one which involves the 'balance of probabilities',[817] which is a dilution of the criminal standard of proof of 'beyond a reasonable doubt'.[818] Additional consequences include the fact that in Part 5 proceedings there is no requirement to allege a specific unlawful act and evidence that is not admissible in a criminal trial is admissible in the Part 5 proceedings, such as inferences from silence and hearsay evidence.[819] I therefore argue that, at the very least, the Strasbourg Court ought to conclude that all of the procedural protections of Article 6 apply where civil recovery proceedings are instituted against a person subsequent to that person being acquitted in criminal proceedings.[820]

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[816] Gallant, *Money Laundering* (n 5) 20-25
[817] POCA, s 241(3)
[818] Gallant, *Money Laundering* (n 5) 20-25
[819] POCA, s 46; Alldridge, 'Two Key Areas' (n 13) 186-187
[820] King, 'Civil Forfeiture' (n 15) 371ff

The principal right affected by the classification of civil recovery as 'civil' is the right to a fair trial (Article 6), in particular the presumption of innocence – a protection that is only applicable to criminal proceedings.[821] Of particular concern here is whether Part 5 civil recovery is compatible with the standard of proof required by Article 6(2) since in Part 5 proceedings it is the civil standard of proof that applies. The courts have raised similar normative concerns relating to acquittal decisions followed by cost, compensation and criminal confiscation cases. In the UKSC case of *Gale*, Lord Phillips highlighted that:

> [T]here is something unattractive about a prosecuting authority, which has failed to procure a conviction, proceeding to seek a confiscation order on the basis that the defendant committed the specific crimes of which he was acquitted.[822]

In *Briggs-Price*, the UK Supreme Court acknowledged the legitimacy of a court's reluctance to endorse a confiscation order relating to the very crimes for which the defendant had been acquitted, and that such a matter represents a point of public policy or public appearance. In the ECtHR decision of *Ringvold,* the dissenting opinion of Judge Costa maintained that it is difficult to ignore in practice that a cost or compensation order following an acquittal involves questioning the very acquittal itself:

> [The applicant] was told that he had been acquitted of the offence with which he had been charged, but he was subsequently told (on the basis of the same facts) that it was clear that he had committed the offence, and ordered to pay compensation to the victim.[823]

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[821] Smith, Owen and Bodnar (n 23) 21-22; King, 'Civil Forfeiture' (n 15) 375-376, 371ff; Ashworth and Zedner, *Preventive Justice* (n 7) 16
[822] *Gale* (n 594) [42] (Lord Phillips with whom Lord Mance, Lord Judge and Lord Reed Agree). See *Geerings* (n 638), para 44-51
[823] *Ringvold* (n 708) (Judge Costa dissenting)

In this case, Judge Costa highlighted that irrespective of how circumspect the *Høyesterett* (Supreme Court of Norway) was in selecting its language, and despite its legal irrevocability, acquittal was, in reality, seriously disregarded. In the view of Judge Costa:

> Justice Gjølstad found that the evidence satisfied the standard of proof, establishing that '*sexual abuse had occurred* [emphasis added] and that, on the balance of probabilities, *it was clear that the applicant was the abuser* [*idem*].'

Judge Costa proceeded to amplify how in his view the acquittal was nonetheless undermined:

> What benefit, then, did the applicant derive from his acquittal (apart from the important fact that he was not subject to criminal penalties)? He was told that he had been acquitted of the offence with which he had been charged, but he was subsequently told (on the basis of the same facts) *that it was clear that he had committed the offence*, and ordered to pay compensation to the victim. Where is the legal certainty in all that? …I can, of course, appreciate the national courts' legitimate concern about the interests of victims (who, by definition, are innocent) and of their beneficiaries. That is why, by applying standards of proof that are, in principle, stricter in criminal cases (precisely because of the presumption of innocence) than in civil cases, those courts may seek to establish the civil liability of a person who has been acquitted in criminal proceedings, the view being that the person is essentially liable but not guilty. It is difficult, however, to assert one thing and then the opposite: it cannot simultaneously be maintained that a man has been lawfully declared innocent of an offence (in this case, sexual abuse of a minor) and that he nonetheless probably did commit the offence (even if the probability is only 51%!) and should pay for it. *A fortiori*, it cannot be asserted, as in this case, that an innocent person is clearly a criminal.

Judge Costa's opinion was endorsed in the dissenting opinion expressed by Judge De Gaetano in *Allen v The United Kingdom*:

> The reality is that in most proceedings for civil compensation following an acquittal in criminal proceedings (or, indeed, when there has been no criminal prosecution at all), for the national court to find for the plaintiff and against the defendant it must find not only that the material element (*actus reus*) of the offence was committed by the defendant, but that the intentional or moral

> element (*mens rea*) of that offence was also present. It is true that in the civil proceedings the standard of proof will be less strict than in criminal proceedings – on a balance of probabilities, and not beyond reasonable doubt – but that is not really saying much as far as popular perception of guilt or innocence, and therefore of the existence or otherwise of criminal liability, is concerned.[824]

The concerns raised by these judges reinforce the conclusion that subsequent to an acquittal the civil recovery of property on the balance of probabilities undermines the acquittal itself and thus civil recovery falls short of the aims of the outcome related aspect of the presumption of innocence.[825] This is owing to the recovery of property involving allegations of criminal activity and an indirect declaration of guilt decided on the lower civil standard. Civil recovery involves the State essentially declaring the guilt of the person whose property is the subject of a civil recovery order since the property recovered is that 'obtained through unlawful conduct'. In contrast with confiscation proceedings, in civil recovery proceedings the 'person in question' has not been convicted and punished, and yet civil recovery is a public process alleging serious wrongdoing, followed by confiscating the respondent's goods. Furthermore, the extensive investigatory powers of Part 5 of POCA means that civil recovery involves the use of State power resulting in the state appropriation of property.[826] The recovery of property therefore also falls short of the reputation-related aspect of the presumption of innocence since the person is effectively being condemned and

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[824] *Allen* (n 608), para 4 (Judge de Daetano dissenting)

[825] See section 3.2.2 of chapter 2 of thesis on the criticisms of legal fictions and the *in rem* nature of civil recovery

[826] Alldridge in King, Walker and Gurulé (n 6) 527. See also Zedner, 'Seeking Security' in Lazarus and Goold (n 22) 268. Zedner identifies the perils inherent in resorting to civil measures for convenience can be set under three headings: procedural, empirical and moral

stigmatised.[827] I argue that this condemnatory and stigmatising effect of civil recovery, especially post-acquittal, means that civil recovery ought to therefore benefit from all of the procedural protections of Article 6.

In order to assess wherein Part 5 recovery meets the requirements of Article 6, I undertake a closer examination of whether Part 5 recovery meets the requirements of Articles 6(1) and 6(3), and thereafter Article 6(2). In relation to Article 6(2), I explore the content, aspects and rationale of the presumption of innocence and whether the civil standard of proof is compatible with the requirements of the presumption of innocence. I then undertake a meta-analysis of the relationship between Part 5 recovery and the presumption of innocence by first characterising Part 5 recovery as one of a series of threats to the presumption of innocence and then comparing the characteristics of Part 5 recovery to those of actions in tort law. I conclude that Part 5 civil recovery is a modern threat to the presumption of innocence and Part 5 proceedings cannot be reconciled with Article 6(2) and the minimum rights of Articles 6(3)(a), 6(3)(b), 6(3)(d) and 6(3)(e).

2. Right to fair trial and Article 6 of ECHR

Article 6 occupies a position of pre-eminence in the Convention due to its importance to the rule of law and to a well-functioning democratic society. Strasbourg has therefore emphasised that a restrictive interpretation of Article 6 must be resisted.[828]

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[827] King 'Civil Forfeiture' (n 15); Mahmutaj (n 700) 790
[828] UNCAC, Preamble; *Perez* (n 556), para 64; Harris, O'Boyle and Warbrick (n 556) 371-373

Article 6(1) consists of a 'modified' presumption of innocence wherein the rights of defence apply to all proceedings as part of a general fair hearing. Article 6(2) provides for a presumption of innocence and Article 6(3) sets out the rights of defence. Article 6(1) applies to both civil and criminal proceedings, whereas Articles 6(2) and 6(3) only apply to criminal proceedings. Standardly, definitions of a right to a fair trial incorporate the principle of 'equality of arms' and the right to adversarial proceedings. These apply to both civil and criminal proceedings although the ECtHR has concluded that 'States have greater latitude when dealing with cases concerning civil rights and obligations than they have when dealing with criminal cases'.[829]

Under the Convention system, the principle of the 'fourth instance doctrine' applies to complaints submitted to Strasbourg. This implies that the ECtHR has no jurisdiction under Article 6 to reopen national legal proceedings, to substitute its own findings of fact, or to itself apply national law to the complaints. As part of the fourth instance doctrine, the ECtHR offers a wide margin of appreciation in relation to the operations of each national court. For example, each national court is permitted to select its own rules of evidence with the proviso that the resulting trial is fair according to Article 6.[830] According to the doctrine of fourth instance, the ECtHR's task with respect to complaints submitted under Article 6 is to examine whether the proceedings, when considered *in toto*, were fair and in compliance with the safeguards stipulated within the Convention.[831] In the light of the focus of the fourth

[829] *Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213; Stephen Treschel, *Human rights in criminal proceedings* (OUP 2005)
[830] White, Wicks and Ovey, *Jacobs, White* (n 387) Ch 13
[831] White, Wicks and Ovey, *Jacobs, White* (n 387) Ch 13

instance doctrine on procedural fairness rather than the substantive content of the law it is unlikely that the ECtHR will challenge Part 5 civil recovery on substantive grounds.[832]

In the following sections I undertake a closer examination of wherein Part 5 recovery meets the requirements of Articles 6(1) and 6(3), and thereafter Article 6(2).

2.1 Article 6(1) and (3)

According to Article 6(1), in order for a trial to be fair, proceedings must occur within a reasonable timeframe and be conducted by an independent and impartial tribunal which is established by law.[833] The caselaw in relation to Article 6(1) emphasises the importance of the following: procedural equality, a public hearing and judgment, an adversarial process involving disclosure of evidence, a reasoned decision, and effective participation.[834] Part 5 civil recovery proceedings are conducted in the High Court where the hearing is open to the public and the judgment made publicly available.[835] Therefore, insofar as Part 5 proceedings accord with the requirements specified in POCA 2002 and the Civil Procedure Rules (CPR), the proceedings should be deemed to have met the general fair hearing requirement as well as the specific requirements of Article 6(1).

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[832] Boucht, 'Civil Asset Forfeiture' (n 18) 255
[833] White, Wicks and Ovey, *Jacobs, White* (n 387) ch 12-13
[834] White, Wicks and Ovey, *Jacobs, White* (n 387) 260-266
[835] POCA 2002, pt 5 Ch 2 s 287

Article 6(3) is designed to ensure that a defendant is able to prepare his defence. The guarantees provided by Article 6(3) represent a minimum threshold of rights available to a defendant in criminal proceedings and represent specific aspects of the more general 'right to a fair trial' under Article 6(1).[836] The ECtHR is likely to evaluate Part 5 proceedings as civil in nature, and thus beyond the scope of Article 6(3).[837] However, I argue that Part 5 proceedings are criminal in nature implying that the minimum procedural protections of Article 6(3) ought to apply.

If the Part 5 proceedings are conducted according to the overall and specific requirements of Article 6(1) then it seems only the minimum right of Article 6(3)(c) (right to defence) should be met.[838] Part 5 proceedings cannot, however, be reconciled with meeting the minimum rights of Article 6(3)(a) (promptly informed of accusation), 6(3)(b) (adequate time and facilities for preparation of defence), and 6(3)(d) (right to examine witnesses) and 6(3)(e) (right to interpreter).

Article 6(3)(a) provides for the right to be promptly informed of the 'cause' of the accusation (the acts she is alleged to have committed and on which the accusation is based), and the 'nature' of the accusation against a defendant (the legal characterisation given to those acts).[839] According to the ECtHR caselaw, Article 6(3)(a) requires detailed reference to both the factual and legal bases of the charge since it is from the instance of servicing the charge that the accused is able to prepare

[836] Piero Leanza and Ondrej Pridal, *The right to a fair trial: Article 6 of the European Convention on Human Rights* (Alphen aan den Rijn 2014) 166
[837] See chapter 4 of thesis
[838] ECtHR, Guide on Article 6 (n 842) 69 - 73
[839] *Mattoccia v Italy* no 23969/94 ECHR 2000-IX 59; *Penev v Bulgaria* 20494/04 (7 January 2010) 33 and 42; ECtHR, Guide on Article 6 (n 842) 69 - 73

her defence; the indictment plays a crucial role in this regard.[840] In criminal matters, the provision of full and detailed information connected to the charges made against a defendant, and the consequent legal characterisation the court might adopt, are essential to guaranteeing fair proceedings.[841] Part 5 of POCA 2002 involves no such specification of a charge since property is recoverable when derived from unlawful conduct and does not specify the cause and nature of an 'accusation' to any one person. The case law highlights the issue with respect to this lack of specificity and, thus, the difficulty in reconciling Part 5 proceedings with Article 6(3)(a).

In the UK High Court decision of *Green*, Sullivan J noted that Part 5 proceedings require identifying those matters in sufficient detail alleged to constitute unlawful conduct to enable the court 'not to decide whether a particular crime had been committed by a particular individual, but to decide whether the conduct so described was unlawful under the criminal law of the UK'.[842] In relation to English criminal confiscation proceedings, Lord Steyn acknowledges that Article 6(3)(a) is hard to reconcile with the '…elaborate step-by-step machinery designed to obtain information to enable the court eventually to decide whether a confiscation order should be made and, if so, in what sum.'[843] The difficulty of reconciling Part 5 proceedings with Article 6(3)(a) is even more apparent since there exists no requirement to allege a specific unlawful act.[844] Article 6(3)(a) and (b) are connected

[840] *Pelisser and Sassi v France*, 25 March 1999 54; Leanza and Pridal (n 840), 167
[841] *Sejdovic v Italy* [GC] 56581/00 ECHR 2006-II 90; *Varela Geis v Spain* 61005/09 (5 March 2013) 42; ECtHR, Guide on Article 6 (n 842) 69 - 73
[842] *Green* (n 378) [17]; *Hymans* (n 648); Williams, Hopmeier and Jones (n 196) 296
[843] *Rezvi* (n 378) [12]; Emmerson (n 431) 697
[844] POCA, s 46; Alldridge, 'Two Key Areas' (n 13) 186-187

in that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare her defence.[845]

Article 6(3)(b) confers on everyone the right to have adequate time and facilities for the preparation of their defence.[846] The 'rights of defence' relate to the principle of equality of arms which aims to establish equality between the prosecution and the defence. Article 6(3)(b) concerns two elements of a proper defence namely the question of facilities and time. The accused must have the opportunity to organise her defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court.[847] The accused must have enough time to study the file and the results of investigations carried out throughout the proceedings, and not be limited in the number and duration of her meetings with lawyers.[848] While the extent of the detailed information required varies case to case, the accused must at least be provided with sufficient information to fully understand the extent of the charges, in order to prepare an adequate defence.[849] For instance, detailed information will exist when the offences of which the defendant is accused are sufficiently listed; the place and

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[845] *Dallos v Hungary* 29082/95, ECHR 2001-II 47; ECtHR, Guide on Article 6 (n 842) 69 - 73

[846] *Mattoccia* (n 843) 60; *Bäckström and Andersson v Sweden* (dec.) 67930/01 (5 September 2006); ECtHR, Guide on Article 6 (n 842) 69 - 73

[847] *Can v Austria*, Commission report 9300/81, Commission report of 12 July 1984 53; *Gregačević v Croatia* 58331/09, 10 July 2012 51

[848] *Huseyn and Others v Azerbaijan* nos. 35485/05 and 3 others (26 July 2011) 175; *OAO Neftyanaya Kompaniya Yukos v Russia* no. 14902/04, 20 September 2011 538; ECtHR, Guide on Article 6 (n 842) 69 - 73

[849] *Mattoccia* (n 843) 60; ECtHR, Guide on Article 6 (n 842) 69 - 73

the date of the offence is stated; there is a reference to the relevant Articles of the Criminal Code, and the name of the victim is mentioned. [850] Civil recovery fails to respect the minimum requirements of Article 6(3)(b) since such examples of detailed information would not be included in a civil recovery claim form. In Part 5 proceedings the court is not being asked 'to decide whether a particular crime had been committed by a particular individual, but to decide whether the conduct so described was unlawful under the criminal law of the UK.'

Article 6(3)(c) confers a right 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'. This subparagraph appears to be the only aspect that might be respected by civil recovery proceedings. Article 6(3)(c) guarantees that the proceedings against an accused person will not take place without adequate representation of the case for the defence.[851] Article 6(3)(c) comprises three separate rights: to defend oneself in person, to defend oneself through legal assistance of one's own choosing and, subject to certain conditions, to be given legal assistance free.[852] The first two rights would be respected in civil recovery proceedings but in relation to the final right to free legal assistance, legal aid is no longer available in civil recovery proceedings.[853] It should

[850] *Brozicek v Italy* 19 December 1989 Series A 167 42; ECtHR, Guide on Article 6 (n 842) 69 - 73
[851] *Lambin v Russia* 12668/08, 21 November 2017; ECtHR, Guide on Article 6 (n 842) 69 - 73
[852] *Pakelli v Germany* 25 April 1983, Series A 64 31; European Court of Human Rights, Guide on Article 6 (n 842) 76-78
[853] See Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013; Legal Aid, Sentencing and Punishment of Offenders Act 2012; Jonathan Lennon

be noted that POCA initially prohibited the use of the assets that are the subject of a civil recovery order from being used to defend a civil recovery action in order to reduce the dissipation of assets in lawyer's fees.[854] However, POCA was amended in response to a respondent with no access to (frozen) assets being left with no option other than to defend themselves to the best of their own ability.[855]

Part 5 proceedings fail to respect the minimum protections of Article 6(3)(d) which guarantee the attendance and examination of witnesses, and which also represent a specific aspect of the general principle of the equality of arms.[856] Pursuant to Article 6(3)(d) before an accused can be convicted, all evidence against her must normally be produced in her presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against her, either when that witness makes her statement or at a later stage of proceedings.[857] The legislative and judicial classification of Part 5 proceedings as

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and John Carl Townsend (February 27, 2019) 'Funding the Defence: Civil Recovery Proceedings under Part 5 of POCA' <https://pocla.org/funding-the-defence-civil-recovery-proceedings-under-part-5-of-poca/> accessed 10 October 2020

[854] POCA, s 252(4)

[855] POCA 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 SI 2005/3382; POCA 2002 (Legal Expenses in Civil Recovery Proceedings) (Amendment) Regulations SI 2008/523; *SOCA v Szepietowski* [2009] EWHC 344; *SOCA v Agidi* [2011] EWHC 175 (QB); European Court of Human Rights, Guide on Article 6 (n 842); Alldridge in King, Walker and Gurulé (n 6) 528-529

[856] Leanza and Pridal (n 840) 182

[857] *Al-Khawaja and Tahery v The UK* (2012) 54 EHRR 23, para 118; *Hümmer v Germany* 26171/07, 19 July 2012 38; *Lucà* (n 965) 39; *Solakov v the former Yugoslav Republic of Macedonia* 47023/99, ECHR 2001-X 57; European Court of Human Rights, Guide on Article 6 (n 842) 87- 88

'civil' means that evidence not admissible in a criminal trial becomes admissible; examples include inferences from silence and hearsay evidence.[858] The criminal rules of hearsay do not apply to civil recovery with the case law confirming that sections 4(1) and (2) of the Civil Evidence Act 1995 govern and that the issue is one of weight and not admissibility.[859] In the light of the admissibility of such evidence, Part 5 proceedings fail to respect the requirements of Article 6(3)(d).

Article 6(3)(e) guarantees the right to the free assistance of an interpreter for translation, or interpretation of all documents or statements in the proceedings which it is necessary for the accused to understand, or to have rendered into the court's language in order to have the benefit of a fair trial.[860] The obligation to provide free assistance is not dependent upon the accused's means; the services of an interpreter for the accused are instead a part of the facilities required of a State in organising its system of criminal justice.[861] In criminal cases, the defendant and witness are provided with an interpreter. However, the respondent is not guaranteed an interpreter in civil proceedings, and thus civil recovery does not always meet the minimum requirements of Article 6(3)(e).[862]

A potential reconciliation of Articles 6(3)(a), 6(3)(b), 6(3)(d) and 6(3)(e) with Part 5 proceedings could be found in the fact that POCA 2002 affords a protection

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[858] POCA, s 46; Alldridge, 'Two Key Areas' (n 13) 186-187
[859] *Hymans* (n 648)*; SOCA v Coghlan* [2012] EWHC 429 (QB); Alldridge in King 532
[860] *Luedicke, Belkacem and Koç v Germany* 28 November 1978, Series A no. 29 48; *Ucak v the United Kingdom* (dec.) 44234/98, 24 January 2002; *Hermi v Italy* [GC] 18114/02 ECHR 2006-XII 69; *Lagerblom v Sweden*, no. 26891/95, 14 January 2003 61; European Court of Human Rights, Guide on Article 6 (n 842) 96-97
[861] European Court of Human Rights, Guide on Article 6 (n 842) 96-97
[862] <https://www.gov.uk/get-interpreter-at-court-or-tribunal> accessed 5 August 2020

over and above the guarantees of Article 6(3). Section 266(3)(a) of POCA 2002 confers to the court the statutory power to refuse making a civil recovery order should it not prove equitable or just to do so.[863] However, the concerns with these Articles remain salient despite this additional protection.

In conclusion, Part 5 proceedings fail to respect Articles 6(2), 6(3)(a), 6(3)(b), 6(3)(d), and 6(3)(e) but should meet the general fair hearing requirement of Article 6(1), as well as the specific requirements of Articles 6(1) and 6(3)(c). In the next section I examine more closely the procedural guarantees flowing from the presumption of innocence. I will first explore the contours of the presumption of innocence, and second, whether the civil standard of proof is compatible with the requirements of the presumption of innocence as expressed by Article 6(2).[864]

3. Contours of the presumption of innocence

3.1 Part 5 civil recovery and presumption of innocence

According to the ECtHR jurisprudence, the presumption of innocence requires that the accused must be presumed innocent until proven guilty according to law[865] with the burden of proof residing with the prosecution.[866] To what extent does Part 5 of POCA 2002 meet these requirements? As noted, Part 5 of POCA 2002 authorises the recovery of 'property obtained through unlawful conduct'. Section 241(3) of POCA 2002 provides that the court must decide on a balance of probabilities the occurrence

[863] POCA 2002, s266(4). See also Campbell, 'Criminal Labels' (n 19) 681-707
[864] Gallant, *Money Laundering* (n 5)
[865] *Minelli* (n 704); *Allenet* (n 725); *Sekanina* (n 705); Emmerson (n 431), 698
[866] *Barberá* (n 727), 77; *Salabiaku* (n 559); Emmerson (n 431), 698

of matters alleged to constitute unlawful conduct.[867] It is therefore clear that Part 5 proceedings meet the requirement of the presumption of innocence that the initial burden of proof resides with the State.

However, it is less clear whether Part 5 proceedings meet the standard of proof required by Article 6(2). Based on the current Strasbourg and UK jurisprudence it is unlikely that Strasbourg will find Article 6(2) extending to Part 5 proceedings. In the UKSC decision of *Gale*, Lord Phillips notes that Part 5 of POCA 2002 specifies that the standard of proof is the balance of probabilities which 'represents a clear, advised expression of Parliamentary intent lying at the heart of the statutory scheme.'[868] While in the UKHL decision in *Rezvi*, Lord Steyn remarked that if Article 6(2) were to apply to criminal confiscation '…it will tend to undermine the effectiveness of confiscation procedures generally'.[869] This observation applies equally in assessing the effectiveness of civil recovery.

Despite judicial findings such as these, I conclude that the civil standard of proof based on the balance of probabilities is not compatible with Article 6(2) when Part 5 recovery occurs subsequent to an acquittal.[870] The grounds for this argument lie in the characteristics and rationale for the presumption of innocence. I will first therefore examine the content, aspects and rationale of the presumption of innocence. Thereafter, I present Part 5 civil recovery as a modern threat to the presumption of innocence and then compare it to actions in tort law. Finally, I will

[867] POCA 2002, s241(3)
[868] *Gale* (n 594) [5-7]. See also *Jia Jin He* (n 570) [59]
[869] *Rezvi* (n 378) [12]
[870] See section 4 of chapter 6 of thesis

explore whether the standard of proof based on the balance of probabilities is compatible with the presumption of innocence.

3.2 Presumption of innocence and Article 6(2)

Content of the presumption of innocence

Despite being entrenched in numerous international human rights documents,[871] there is considerable debate concerning precisely what consists in the presumption of innocence.[872] It is commonly held that it is centrally concerned with proof of guilt:

> No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.
> Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to **...** the defence of insanity and subject also to any statutory exception. [873]

According to ECtHR jurisprudence, the presumption of innocence also prohibits the authorities from saying or doing anything which indicates that they believe a person is guilty of an offence, unless or until guilt is proven.[874] The jurisprudence of the

[871] Universal Declaration of Human Rights (General Assembly resolution 217 A (III)), art 11, para 1; International Covenant on Civil and Political Rights (Assembly resolution 2200 A (XXI), annex), art 14, para 2; Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, *Treaty Series*, vol 213, No 2889), art 6, para 2; American Convention on Human Rights (United Nations, *Treaty Series*, vol 1144, No 17955), art 8, para 2; African Charter of Human and Peoples Rights, art 7, para 1; Leanza and Pridal (n 840) 161
[872] Ashworth, 'Four Threats' (n 14) 70-76
[873] *Woolmington* (n 558) 481; Ashworth, 'Four Threats' (n 14) 70-76
[874] *Borovsky v Slovakia* (App 24528/02) 2 June 2009; White, Wicks and Ovey, *Jacobs, White* (n 387) 289

ECtHR further prohibits expressions of suspicion by the courts after acquittal and also declarations of guilt by agents of the State prior to trial.[875]

It is also widely agreed that Article 6(2), which protects the presumption of innocence, is essentially designed to provide basic procedural protections for those charged with criminal offences, and does not govern the substantive content of domestic criminal law.[876] The ECtHR has held that it is for Member States to determine the content of criminal law unless this has an impact on substantive guarantees under the Convention.[877] Despite the latitude exercised by Strasbourg, the ECtHR recognises that States' operations are *not* unfettered in this domain.[878] In the Strasbourg case of *Salabiaku*, Article 6(2) is interpreted to require States to confine presumptions of fact or law 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence…'.[879] This position was buttressed in *Janosevic* where the court observed that when legal presumptions are being used, a balance must be struck between

[875] Campbell, 'Criminal Labels' (n 19) 682-684

[876] It should be noted that there are strong arguments against this procedural interpretation of Article 6(2) beyond the scope of this enquiry. Victor Tadros and Stephen Tierney 'The Presumption of Innocence and the Human Rights Act' (2004) 67 *Modern Law Review*, 402. Tadros endeavoured to implicitly or explicitly separate the procedural protections offered to the criminal suspect from the prerogative of the Member State to define the substantive terms of its own criminal law

[877] *Salabiaku* (n 559); Tadros and Tierney (n 725) 403-404

[878] Ashworth, 'Four Threats' (n 14), 71. In practice, the English courts have only addressed these issues since the Human Rights Act 1998 placed on them the duty to interpret statutes 'so far as possible' in a way that renders them compatible with the Convention

[879] *Salabiaku* (n 559), para 28; *Phoam Hang v France* (25 September 1992) Publ, ECHR, Series A, No. 243; *Emmerson* (n 431), 671

> [T]he importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sough to be achieved.[880]

In line with the doctrine of fourth instance and the procedural focus of Strasbourg, the wording of Article 6(2) does not set out a minimum standard in relation to the standard of proof. The requirement 'until proven guilty according to law' refers to the standard of proof in national jurisdictions.[881] The ECtHR has held that a national court can only find a person guilty 'on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish guilt'.[882] The ECtHR has also confirmed that Article 6(2) requires that 'any doubt should benefit the accused', which could be interpreted as equivalent to the English standard of 'beyond reasonable doubt'.

Having outlined the legal 'content' of the presumption, we turn to two 'aspects' of the presumption of innocence: first, the 'reputation related aspect' and then the 'outcome related aspect'.

Aspects of the presumption of innocence

The presumption of innocence is commonly framed in a narrow procedural sense.[883] Treschel refers to this procedural character as the 'outcome related aspect' which is

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[880] *Janosevic* (n 559) 101(2)
[881] Ryan Goss, Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights (Oxford: Hart Publishing 2014); Boucht, 'Civil Asset Forfeiture' (n 18) 249-250; Emmerson (n 431), 671
[882] *Austria v Italy*, 6 Yearbook of the European Convention on Human Rights (1963), 782, 784*;* Barberá (n 727) para 77; Emmerson (n 431), 698
[883] Ashworth, 'Four Threats' (n 14), 76-77

focused on the outcome of proceedings, the avoidance of unjustified convictions, and upholding fairness during trial. To this end, the outcome related aspect focuses specifically on the burden of proof and the evaluation of the evidence. An assessment of the compatibility of Part 5 proceedings with the outcome related aspect of the presumption of innocence will be explored further below.[884] I conclude that there are strong grounds for seeing Part 5 proceedings as falling short of the aims of the outcome related aspect owing to the reliance of these proceedings on the balance of probabilities. I will first examine the 'reputation related aspect' of the presumption of innocence.

Treschel identifies a 'reputation related aspect' to the presumption of innocence which deals with protecting the image of a person from acts or statements of a public authority implying guilt for an offence prior to that person's conviction.[885] It is concerned with: statements made during the pre-trial phase; measures of coercion, such as when defendants are remanded in custody; the post-acquittal treatment of persons; and proceedings that are terminated.[886] The courts also acknowledge the importance of reputation to persons involved in legal proceedings. In *Allen v The United Kingdom*, the ECtHR highlighted:

> What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.[887]

In the UK High Court case of *Jia Jin,* Morris LJ highlights the significance of reputation:

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[884] See section 4 of Chapter 6 of thesis
[885] Such acts or statements do not have to be instrumental in the determination of the eventual judgement
[886] Treschel (n 833), 164
[887] *Allen* (n 608), para 94

> In some criminal cases liberty may be involved; in some it may not. In some civil cases the issues may involve questions of reputation which can transcend in importance even questions of personal liberty. Good name in man or woman is 'the immediate jewel of their souls.'[888]

There is a strong case for arguing that Part 5 civil recovery orders, including the government's practice of publishing details of such orders, cannot be reconciled with a reputation related version of the presumption of innocence. This irreconcilability further derives from the fact that Part 5 recovery ought to be seen as criminal in nature owing to the following considerations: the aims of Part 5 of POCA 2002 are consistent with the traditional aims of punishment; the relevant agencies under Part 5 of POCA 2002 possess significant powers; and the questionable character of the conceptual distinctions made between preventive and criminal punitive measures, as well as those made between *in rem* and *in personam* proceedings.[889]

Liz Campbell sets out a typology of State practices that can usefully be deployed at this juncture[890] as a lens through which to explore further the claim that Part 5 proceedings do not satisfy a reputation related version of the presumption of innocence.[891] According to this typology, different types of State practice represent acts of official State labelling and are indicative of varying levels of suspicion. Campbell's typology consists of the following types of State practice: arrest; stigmatising expressions regarding criminal propensity such as the retention of DNA and the creation of 'watch lists'; and public labelling by agents of the State which express a view on the person's criminality in general as opposed to their

[888] *Jia Jin He,* (n 570) [62] (Morris LJ)
[889] See Chapter 3 of thesis
[890] Campbell, 'Criminal Labels' (n 19), 681-707
[891] Campbell, 'Criminal Labels' (n 19), 701

responsibility for a particular act. Part 5 civil recovery can be seen as an example of this last type of State practice, along with ASBOs and the publication of the imposition of control orders and civil recovery orders.

The recovery of property under Part 5 of POCA 2002 expresses a view about a person's criminality in general as opposed to their responsibility for a particular act since there is no specification of a criminal charge; property is recoverable when derived from unlawful conduct. In the UK High Court decision of *Green*, Sullivan J noted that Part 5 proceedings require identification of those matters alleged to constitute unlawful conduct in sufficient detail to enable the court 'not to decide whether a particular crime had been committed by a particular individual, but to decide whether the conduct so described was unlawful under the criminal law of the UK'.[892] I argue, along with other academics, argue that the presumption of innocence is therefore engaged in Part 5 recovery since the State labelling associated with civil recovery orders involves a stigmatising, communal condemnation of a wrong as well as an indirect declaration of guilt. The publicised imposition of civil recovery orders intentionally labels the property owner, so the suspicion of culpability acts as a deterrent device, and it also serves to condemn the person's pattern of behaviour or lifestyle. [893] The labelling involved in Part 5 recovery contravenes the presumption of innocence since the recovery of property obtained through unlawful conduct

[892] *Green* (n 378) [19]

[893] Campbell, 'Criminal Labels' (n 19), 701. E.g., National Crime Agency (May 1, 2015) North-west organised crime suspect loses family <www.nationalcrimeagency.gov.uk/news/613-north-west-organised- crime-suspect-loses-family-home> accessed 20 July 2017. Hendry and King, 'Expediency' (n 127). See also Anthony Duff *Punishment, Communication and Community* (Oxford: OUP 2001) 61

constitutes an indirect declaration of guilt, albeit in relation to criminality in general rather than one specific crime. Liz Campbell succinctly explains why the presumption of innocence is germane

> [A]s these state classifications entail a communicative, communal condemnation of a wrong and there is a declaration regarding guilt, the state ascribes the label of 'criminal' to a person.[894]

Colin King reinforces why the benefit of the presumption of innocence is warranted

> Given that an application for forfeiture, absent criminal conviction, will often include an allegation that the respondent has engaged in or benefitted from criminal activity, there is an intuitive appeal in the argument that the respondent ought to have the benefit of the presumption of innocence. [895]

Civil recovery orders are deemed to be *in rem*, yet these proceedings are characterised by the blame that is traditionally associated with criminal rather than civil measures. The judiciary determines that the property represents the proceeds of crime and that the label of criminal is placed on a person without due process protections, thereby bringing in moral responsibility and social blame. Furthermore, POCA refers to 'unlawful conduct' while simultaneously also describing the assets seized as the 'proceeds of crime'. In this light, in the absence of a more granulated appreciation of the standards of proof, it would be natural for the public to assign

[894] Campbell, 'Criminal Labels' (n 19), 701
[895] King 'Civil Forfeiture' (n 15) 383

culpability to the owner of the property. As Campbell puts it 'the state is depicting a member of the polity to his fellow citizens as enjoying property generated through criminal behaviour'.[896]

This process of labelling supports the argument that proof based on the balance of probabilities is insufficient in those instances where the State is in effect attaching the label of 'criminal' to a person.[897] A closer examination of the rationale underpinning the presumption of innocence, and the threats posed to it, further reinforces the claim that those subject to Part 5 proceedings subsequent to an acquittal ought to benefit from the protections of the presumption of innocence.

Rationale for the presumption of innocence

The presumption of innocence ensures that those convicted of wrongdoing are sufficiently protected by appropriate evidentiary rules. At a micro-level this helps to counteract the fragility of the fact-finding process and mitigate errors of wrongful conviction.[898] At a macro-level this contributes to crystallising a better relationship between the State and its citizens, as well as mitigating the oftentimes hugely

[896] Campbell, 'Criminal Labels' (n 19), 706. See also King 'Civil Forfeiture' (n 15) 381-383

[897] Campbell, 'Criminal Labels' (n 19), 681-682. Campbell suggests at least 'clear and convincing evidence' ought to be required when the presumption of innocence is affected in these contexts. This third burden of proof is applied in some civil law cases in the US, such as in medical lawsuits and patent disputes, and it lies between the civil and criminal standards in the UK. See *Addington v Texas* 441 US 418 (1979), *Cruzan v Director, Missouri Department of Health*, 497 US 261 (1990)

[898] Richard Lippke, 'Justifying the Proof Structure of Criminal Trials' (2013) 17 *Int'l J Evidence & Proof* 324. See also William Blackstone, *Commentaries on the Laws of England* (Beacon Press 1962); Paul Roberts, 'Double Jeopardy reform: A Criminal Justice Commentary' (2002) 65 MLR 393, 402-405

inequitable distribution of resources that the State and the defendant can call upon. In the light of this, there is a strong case to be made for placing the required standard of proof for civil recovery at the level of 'beyond reasonable doubt'. This is particularly so in cases of serious wrongdoing such as the offences associated with grand corruption.[899]

The rationale for the presumption of innocence, as well as the right to a fair trial itself, is anchored in the idea that erroneous convictions are deeply unjust and inflict considerable moral harm. The need to obviate the consequences of erroneous convictions suggests that the criminal justice system ought to adopt what Paul Roberts has termed a 'principled asymmetry' and favour the protection of the innocent. In choosing between maximising the chances of acquitting the innocent and maximising the chances of convicting the guilty, it is concern for the former that is elevated.[900]

This rationale motivating the presumption of innocence coupled with the criminal nature of Part 5 proceedings, reinforces the claim that those subject to Part 5 proceedings subsequent to an acquittal ought to benefit from the protections of the presumption of innocence. Part 5 recovery does not involve any conviction or subsequent deprivation of liberty, nonetheless the criminal labelling contravenes the presumption of innocence since the recovery of property obtained through unlawful conduct constitutes an indirect declaration of guilt. Where there is such an indirect declaration of guilt a person should benefit from the protections of the appropriate

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[899] *Woolmington* (n 558) 481; Ashworth, 'Four Threats' (n 14), 70-71; King, 'Civil Forfeiture' (n 15) 382-383

[900] Ashworth, 'Four Threats' (n 14), 73

evidentiary rules. This view is strengthened when Part 5 recovery and the presumption of innocence are located within the broader context in which they operate. The following section is designed to identify the salient features of that broader context.

3.3 The broader context of Part 5 recovery and the presumption of innocence

There are two main ways through which a meta-analysis of the relationship between Part 5 recovery and the presumption of innocence may be gainfully undertaken. The first characterises Part 5 recovery as one of a series of threats to the presumption of innocence. The second compares the characteristics of Part 5 recovery to actions in tort law.

3.3.1 Threats to the presumption of innocence

As efforts to combat terrorism, drug trafficking and organised crime have intensified, the struggle to preserve constitutional rights has concomitantly been aggravated in the face of increased demands for security and protection against risk.[901] Andrew Ashworth explains:

> Constitutional rights are not always placed on a pedestal and tend sometimes to find themselves in the swirling waters of politics, in a struggle against demands for greater security and other manifestations of what has been termed 'the risk society' – a social and political context in which both

[901] In UK terrorism-context: see for example, Terrorism Act 2000, Counter-Terrorism and Security Act 2015, and Investigatory Powers Act 2016

> govenments and individuals are constantly thinking about the risks of harm and how to minimize them.[902]

The relationship between Part 5 recovery and the presumption of innocence can usefully be examined in the context of this increased tension. In Britain, the response to this increased tension is twofold and interrelated: an increase in the severity of penalties and a greater focus on preventing risk, on the one hand, and, on the other, an increase in the number of more severe penalties directed at those persons who are thought to present a particular risk to social order and security e.g. preventive orders such as Violent Prevention Order, Serious Crime Prevention Orders, Sexual Harm Prevention Orders.[903] Andrew Ashworth identifies that a consequence of this increased tension is that the presumption of innocence can be threatened from at least four corners. One threat emanates from 'confinement' which involves offences being defined so as to mitigate the impact of the presumption. The threat of confinement brings to the fore the issue of what the true definition of the presumption of innocence might be. If framed in a narrow procedural sense rather than a more expansive, substantive sense, then the presumption is threatened when the legislature, for example, imposes liability without fault as there is no robust fundamental principle of 'no criminal liability without fault' implied by the presumption of innocence.[904]

Another threat emanates from 'erosion' which involves widening the set of exceptions to the presumption, especially in relation to serious threats such as

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[902] Ashworth, 'Four Threats' (n 14), 63-65
[903] ibid
[904] Ashworth, 'Four Threats' (n 14), 76-81

terrorism and organised crime. If the presumption is interpreted in its narrow, procedural sense then the expansion in the range of exceptions is the main threat to the presumption.[905] A further threat comes from 'side-stepping' which restricts the liberty of unconvicted persons. This threat comes at the stage of pre-trial detention and was seen in Britain's initial introduction of indefinite detention without trial for persons categorised as suspected international terrorists. The justification for this threat arises out of the government's view that it is necessary to create extraordinary powers in order to restrict the activities of individuals believed to pose a danger to national security.[906]

The final threat is of 'evasion' which consists of introducing civil law procedures as a means by which to circumvent the rights conferred on accused persons i.e. the use of civil orders to exert control over the lives of certain individuals. Part 5 recovery is an example of the threat emanating from evasion.[907] A report published by the JCHR on the Proceeds of Crime Bill echoes the concern with the evasion of the presumption of innocence in the context of Part 5 recovery. The report questioned the proportionality of Part 5 civil recovery being used without the full

[905] Ashworth, 'Four Threats' (n 14), 81-89
[906] Ashworth, 'Four Threats' (n 14), 94. See also The Anti-Terrorism, Crime and Security Act 2001 and *A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 WLR 87
[907] Ashworth, 'Four Threats' (n 14), 14-15

procedural safeguards of Article 6.[908] The necessity of these safeguards were said to be required in order to:[909]

> [P]revent a breach of the principle of *nulla poena sine culpa* (nobody should suffer a penalty who is not shown to be at fault), a principle enshrined in the ECHR, EC law and European written constitutions, as well as in English criminal law, tort law, and public law.[910]

The concerns of the JCHR dealing with the proportionality of civil recovery are founded in the belief that national governments should respect individual human rights.[911] Accordingly, individuals facing criminal charges are conferred a right to a fair trial as an essential prerequisite to any State imposed legal punishment. This right to a fair trial is derived from the requirement to protect values such as liberty and autonomy.[912] A civil recovery order effectively imposes a criminal punishment in response to criminal wrongdoing resulting in the person affected by such proceedings being labelled a criminal. The rationale for Part 5 recovery subsequent to an acquittal benefitting from the protections of the presumption of innocence is a function of the threat posed by the criminal punitive nature of Part 5 recovery to the presumption of innocence and its underlying human rights justifications.

3.3.2 Actions in tort

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[908] This JCHR line of inquiry highlights a key justification for the tripartite proof structure of trials, namely the presumption of innocence. The other two justifications are the burden of proof resting on the government and the standard of proof of 'beyond reasonable doubt'

[909] *Salabiaku* (n 559), para 28; *Janosevic* (n 559), para 101; *McIntosh* (n 388); King, 'Civil Forfeiture' (n 15) 388-392

[910] JCHR, *POCA Bill: Further Report* (eleventh report) (2001-02 HL 75, HC 596) para 22

[911] See section 5 of chapter 3 of thesis

[912] Lippke (n 746) 323-325, 328-329

I will now compare the characteristics of Part 5 recovery with actions in tort law. This comparison reinforces the claim that Part 5 civil recovery subsequent to acquittal should employ the more stringent standard of proof of beyond reasonable doubt. I will first situate this comparative exercise in the broader comparison made between crime and tort. Criminal law and tort law have evolved over time to encompass a number of distinctive and contrasting features, between compensation and punishment, with this 'divide' maintaining the operation of each in isolation from the other.[913] Despite this tort/crime divide, nonetheless there are many ways in which tort and crime interact. Indeed, hybridisation measures such as civil recovery is one way that such interactions occur.[914] Moreover, at a high level of abstraction, both areas of law can be understood as a 'cry for justice in response to a perceived wrong' with both disliking 'bad' people avoiding the consequences of their wrongdoing.[915]

If we look at some of the aspects of tort and crime we can start to better understand their characteristics. The normative theories underpinning tort law and criminal law both include varying degrees of deterrence and punishment.[916] At the level of purpose, criminal law primarily punishes and thereby expresses censure as well as retribution, deterrence, incapacitation, or rehabilitation. While tort law can demarcate and protect rights, compensate those wronged, deter wrongful conduct,

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[913] DJ Seipp, 'The Distinction between Crime and Tort in the Early Common Law' 1996 76 *BU L Rev* 59, 67-69; Kenneth W Simons, 'The Crime/Tort Distinction: legal Doctrine and Normative Perspectives', 2008 17 *WIDENER LJ* 719, 719; Matthew Dyson and John Randall, 'England's splendid isolation' in *Comparing Tort and Crime* (CUP 2015) 19

[914] Dyson and Randall (n 917) 68-70

[915] Dyson and Randall (n 917) 23

[916] Dyson and Randall (n 917) 26-27

allocate the burden of risks, hold wrongdoers to account for their actions, declare the legality of conduct, and punish.

At the level of procedure, there is a clear difference owing to the state prosecuting violations of criminal law (with or without the victim's consent) while in tort law the victim decides whether to bring or not bring a tort claim.[917] With respect to the preferred type of remedy, while there is some overlap since both can monetise remedies, but the primary focus of tort law is on the awards of damages. While fines and compensation are part of the arsenal of the criminal law, imprisonment remains the signature penalty associated with the criminal law.[918]

Prior to comparing Part 5 of POCA with tort law it is helpful to examine some of tort law's features in more detail. The law of tort is concerned with the allocation of liability and the provision of compensation for victims. A 'tort' constitutes the conduct that renders a defendant liable.[919] The employment of the lower standard of proof in tort actions is deemed appropriate owing to the compensatory, rather than censuring, purpose of these actions. A further relevant feature of tort actions is that individuals are able to indemnify themselves against tort compensation payments by purchasing insurance. Despite the compensatory character of tort actions, these actions can nonetheless significantly infringe the property rights of tortfeasors as well as cause significant reputational damage. A typical example of a tort action

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[917] Simons (n 917) 719-20
[918] Dyson and Randall (n 917) 65-66
[919] Tony Weir, *Tort Law* (OUP 2002) 1-69*;* Professor Michael Jones, Professor Anthony Dugdale, Mark Simpson, QC (eds), *Clerk & Lindsell on Tort* (21st ed, Sweet & Maxwell 2014); Ken Oliphant and Roderick Bagshaw, *The Law on Tort on Lexis*, (2nd ed, LexisNexis Butterworths 2007)

involves the court publicly requiring tortfeasors to pay substantial compensation to those they have injured.

Since tort law permits tortfeasors' rights to be infringed on the strength of a balance of probabilities, what does this tell us about the legitimacy of the standard of proof employed in Part 5 proceedings? Part 5 proceedings arguably involve greater infringements of the rights of persons affected by recovery orders than do actions in tort. There is considerable scope for arguing that the predominantly compensatory nature of tort payments, as well as the potential for indemnification against such payments, supports the idea that when Part 5 recovery occurs subsequent to an acquittal the appropriate standard ought to be that of beyond a reasonable doubt. The justification for applying this higher standard of proof to Part 5 proceedings rests on the fact that civil recovery is more punitive in nature when laid in comparison to the compensatory nature of tort liability and it is the state taking action to recover assets that are the proceeds of unlawful conduct. The punitive, criminal nature of Part 5 recovery means that the impact on the rights and reputations of individuals subject to recovery orders is more severe than the impact on those who are found liable under tort law.[920]

In this section I have explored the contours of the presumption of innocence and argued that the presumption of innocence ought to apply to Part 5 recovery subsequent to an acquittal.[921] On this basis, I will now undertake a fuller examination of whether the standard of proof of the balance of probabilities employed in Part 5

[920] Campbell, 'Criminal Labels' (n 19), 681-683
[921] King, 'Civil Forfeiture' (n 15) 381-384

proceedings is compatible with the outcome related aspect of the presumption of innocence.[922]

4. Part 5 civil recovery and balance of probabilities

The 'balance of probabilities' requires that a proposition be deemed more likely to be true than not. The higher standard of 'beyond reasonable doubt', one which is traditionally associated in the UK with the presumption of innocence, requires that the defendant's guilt be considered indubitable.[923] Lord Justice Carnwath once quipped to an English lawyer that proof based on a 'balance of probabilities' is the direct antithesis of proof based on 'beyond reasonable doubt'.[924] This quip points tellingly to the real differences between the two standards.

To enhance our understanding of the operation of the balance of probabilities within the context of Part 5 civil recovery, I will explore a line of decisions reached by English courts wherein criminal behaviour is referred to in civil proceedings. These

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[922] *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 HL [586D-H]; *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 [30-31]; *McCann* (n 582) [787]; Smith, Owen and Bodnar (n 23); HC Official Report (6th series) col 764; HC Official Report, SC B (Proceeds of Crime Bill) 15 November 2001, col 138; Committee Stage 22 April 2002 vol 634 HL Official Report (5th series) cols 48-9. It should be noted that reference to the 'balance of probabilities' in section 241(3) of POCA 2002 is a deliberate departure from the wording used in the previous civil recovery provisions provided for in section 2(8) of Drug Trafficking Act 1994 and section 71(2A) of the Criminal Justice Act 1988. The prior civil recovery provisions referred to the standard of proof as 'that applicable to civil proceedings.' However, the parliamentary debates in relation to the Proceeds of Crime Bill show that the government did not intend for this wording to challenge the common law principle that civil proceedings that have a criminal content require a higher degree of proof

[923] Greenberg (n 121), 31; Emmerson (n 431) 213-214

[924] *Gale & Ors v Serious Organised Crime Agency* High Court [2010] EWCA Civ 759, [42]

cases illustrate that the UK courts adopt a flexible approach to deploying the 'balance of probabilities' standard in civil cases involving proof of criminal behaviour. Notwithstanding, they do not dispose of the argument that the 'balance of probabilities' standard is not sufficient in the context of Part 5 recovery subsequent to an acquittal owing to the punitive and criminal nature of Part 5 recovery contravening the outcome related aspect of the presumption of innocence.

To begin our analysis here, it is useful to remind ourselves that the relevant standard for Part 5 recovery as the balance of probabilities was confirmed in the UKSC case of *Gale* as follows:

> The burden of proof is on the claimant and the standard of proof they must satisfy is the balance of probabilities. While the claimant alleged serious criminal conduct, the criminal standard of proof does not apply, although 'cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.' [925]

POCA is clear that the burden is 'on balance of probabilities' and not 'to the civil standard'; the legislation is proactively encouraging the courts to apply a standard of 51/49 per cent 'more likely than not'.[926] Deploying the standard of proof in civil cases involving the proof of criminal behaviour has long been the subject of contention.[927] Consequently, the case law reveals that the courts have adopted a flexible approach to the balance of probabilities. This flexibility is partly attributable to the fact that more serious allegations are associated with events that are less likely to have

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[925] *Serious Organised Crime Agency v Gale* [2009] EWHC 1015 (QB); [2010] Lloyd's Rep. FC 39 (Griffith Williams J). See *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 [55] (Lord Hoffmann); Alldridge, 'Two Key Areas' (n 13) 180

[926] Williams, Hopmeier and Jones (n 196) 295

[927] See *Re H* (n 926) [586–587] (Lord Nicholls); *Re B (children) (sexual abuse: standard of proof)* [2008] UKHL 35; [2008] 4 All ER 1; Alldridge, 'Two Key Areas' (n 13), 170

occurred. A lower likelihood of an event occurring thus means that stronger evidence is required to prove its occurrence.

In reference to civil cases involving criminal behaviour, Denning LJ spoke of a 'degree of probability which is commensurate with the occasion' and of 'a degree of probability which is proportionate to the subject-matter.'[928] The High Court of England and Wales has held that:

> [T]he serious nature of the allegations being made and the serious consequences of such allegations being proved mean that careful and critical consideration has to be given to the evidence for the Court to be satisfied that the allegations have been established.[929]

In the Part 5 civil recovery High Court case of *Jia Jin*, Collins J held that the balance of probabilities requires cogent evidence but no gloss should be placed on the standard of proof:

> As a general rule, no doubt, criminal conduct may be regarded as less probable than non-criminal conduct. But where there is evidence from which a court can be satisfied that it is more probable than not that criminal conduct has been involved, it does not seem to me that that is something that is so improbable as to require a gloss on the standard of proof. However, I recognise, and it is no doubt right, that since it is necessary to establish that there has been criminal conduct in the obtaining of the property, the court should look for cogent evidence before deciding that the balance of probabilities has been met. But I have no doubt that Parliament deliberately referred to the balance of probabilities, and that the court should not place a gloss upon it, so as to require that the standard approaches that appropriate in a criminal case.[930]

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[928] *Bater v Bater* [1955] 2 QB 600

[929] *SOCA v Pelekanos* [2009] EWHC 2307, referring to *Re D* [2008] 1 WLR 1499 27 and *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468; Campbell, *Organised Crime* (n 19) 205

[930] *Jia Jin He,* (n 570) [66]

The following UK cases additionally supply a useful outline of, and justification for, the balance of probabilities in civil cases involving proof of criminal behaviour.[931] In *Gough,* a case concerning football banning orders, the Court of Appeal required that an exacting standard of proof be applied, one which would thereby be hard to distinguish from the rigour of the criminal standard. Lord Phillips M.R. maintained that the civil standard of proof is flexible in nature and that therefore, in this context, an exacting standard is justified to account for the serious restraints imposed on the freedoms of citizens resulting from the orders.[932]

In the High Court case of *Hornal v Neuberger Products Ltd*, Denning LJ reasoned that while the approach to adopting the 'balance of probabilities' standard should be influenced by the nature of the allegations involved, meaning the more serious the allegation the higher the degree of probability required, the standard of proof 'need not reach the very high standard required by the criminal law'.[933] Morris LJ in this same case went onto reason that:

> Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities. [934]

In the case of *Re H (Minors)*, in the context of care proceedings, the House of Lords dealt with the standard of proof to apply to cases of allegations of sexual abuse. The leading majority speech given by Lord Nicholls highlighted that even in the context of civil proceedings a court should occupy a greater degree of certainty when finding

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[931] *Jia Jin He,* (n 570) [59-65]
[932] Gough v Chief Constable of Derbyshire Constabulary [2002] 2 All ER 985 [89-90]
[933] *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 [258]
[934] *Ibid* [266]

serious allegations to have been proved than when deciding on less serious or trivial matters.[935]

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

However, despite the flexible nature of the civil standard of proof, Lord Nicholls dismissed the idea that a possible third standard situated between 'beyond reasonable doubt' and 'balance of probabilities' could be entertained but rather there is a degree of flexibility *within* the balance of probabilities:

> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability its occurrence will be established.

The case of *Re H (Minors)* laid down a higher standard of proof (HSP) —a standard supposed to lie between the simple 'balance of probabilities' standard and the 'beyond reasonable doubt' standard.[936] Following a series of decisions dealing with proof, in civil cases, of crime,[937] the leading case on this issue is now considered to be in *Re B*, where Lord Hoffmann said quite unequivocally that there was only one civil

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[935] *Re H (Minors)* (n 926) [586 at letter D]

[936] Ennis McBride 'Is the civil 'higher standard of proof ' a coherent concept?' *Law, Probability and Risk* (2009) 8, 323–351, 323

[937] *Clingham v Royal Borough of Kensington and Chelsea* [2003] 1 AC 787; *Chief Constable of Merseyside v Harrison* [2006] EWHC 1106; *Re U (A Child) (Serious Injury: Standard of Proof)* [2004] EWCA Civ 567

standard of proof and that 'is proof that the fact in issue more probably occurred than not'.[938] In the context of civil recovery, the HSP means that:

> The burden of proof is on the claimant and the standard of proof is the balance of probabilities. However, the serious nature of the allegations being made and the serious consequences of such allegations being proved mean that careful and critical consideration has to be given to the evidence for the Court to be satisfied that the allegations have been established.[939]

It is commonly accepted that the Law Lords in *Re B* cleared up that the standard of proof must not be heightened for more serious allegations but rather be proved on cogent evidence. Their Lordships made clear that such allegations no longer have the aditional burden of 'inherent improbability' as an 'evidential load to bear'; thereby breaking the correlation between gravity and improbability.[940] Ennis McBride, however, does not accept the clarificatory status given to *Re B,* and indeed questions the very coherence of the concept of the enhanced standard of proof. McBride provides his own clarifying analysis on the case law, convincingly showing that there remains considerable confusion as to the HSP. He concludes there remains confusion, despite *Re B* being heard on the same day as a differently constituted panel of the House of Lords in the case of *Re Doherty*, with the express intention of these cases being to provide definitive rules on HSP. In the ratio of *Re Doherty*, Lord Carswell considered that (1) the seriousness of the allegation is a factor requiring the HSP but that (2) the HSP is not related to the cogency of the evidence required but to the care

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[938] *In Re B (Children)* [2008] UKHL 35 [13], [2009] 1 AC 11

[939] *SOCA v Pelakanos* [2009] EWHC 2307 (QB) (Hamblen J) [19]; Alldridge in King, Walker and Gurulé (n 6) 529-530

[940] Charlotte Bendall (2009) The demise of the enhanced standard of proof in child protection cases: re B [2008] UKHL 35, *Journal of Social Welfare and Family Law*, 31:2, 185-191, 191

with which it is scrutinised by the court. Although the majority judgements in this case agree with *Re H* in relation to the HSP being the balance of probabilities they adopt a different approach to what it is that the HSP requires, namely the 'anxious scrutiny' test as opposed to the *Re H* 'cogent evidence' test. The 'anxious scrutiny test' requires that 'The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that [a] decision is reasonable'.[941]

McBride concludes that *Re B* does not provide clarity either. Historically, the 'anxious scrutiny' standard and the *Re H* HSP developed along different lines and differ conceptually. However, following *Re B,* the distinction between the two concepts has become blurred owing to their both being deployed by different judges to underly the HSP. Indeed the judgements in *Re B* do not provide a clearer view than *Re Doherty* as the only question identified by Baroness Hale, who gave the main judgment with which all the Lordships agreed, as at issue was whether the standard of proof in care proceedings is the balance of probabilities or the beyond reasonable doubt.[942] In *Re B*, Baroness Hale judged that the standard of proof to be employed in determining the facts of a case should not be determined either by the seriousness of the allegation or that of the consequences. In the light of this, she stressed that the probability, or indeed improbability, of events should be something simply to be borne in mind when attempting to establish where the truth is situated.[943] She saw

[941] *R* v. *Smith*, *R* v. *Mercieca (Appellant)* [2005] UKHL 12; McBride (n 940) 332-334
[942] McBride (n 940) 330-34
[943] *In Re B* (n) [57]

Re H as holding that the balance of probabilities was the correct standard. She went onto identify the tension inherent in the case to be that some courts had taken Lord Nicholl's reference to 'more cogent evidence' as requiring an HSP to be 'virtually indistinguishable' from the beyond reasonable doubt standard in *care* cases as well as in the *McCann*-type cases. On this point the court thus merely confirmed its own clear precedent, as contained in *Re H*.[944]

I agree with McBride's conclusions that the fundamental problem with HSP is that judges in some civil cases have the legitimate desire to adopt a more rigorous approach prior to finding proven serious allegations. However, as opposed to classing all such cases as quasi-criminal and requiring the beyond reasonable doubt standard of proof, judges attempt to reach a reconciliation which uses the on balance of probabilities standard while at the same time requiring an enhancement of abstract elements, such as 'cogency' or 'scrutiny', which are not related to probability.[945] The foregoing cases highlight that the UK courts adopt a confusing, flexible approach to deploying the 'balance of probabilities' standard in civil cases involving proof of criminal behaviour. Despite this confusion and this flexible approach acknowledging the gravity of the allegations involved, I nevertheless maintain that the 'balance of probabilities' standard is not sufficient in the context of Part 5 recovery subsequent to an acquittal owing to the criminal, punitive nature of Part 5 recovery contravening the outcome related aspect of the presumption of innocence. Under Part 5 of POCA 2002 the recovery of property obtained through unlawful conduct involves

[944] McBride (n 940) 339
[945] McBride (n 940) 348

allegations of criminal activity and an indirect declaration of guilt. Even though there is no conviction involved in Part 5 recovery the condemnatory and stigmatising effect of civil recovery and the process of criminal labelling supports the view that proof based on the balance of probabilities is insufficient in those post-acquittal instances where the State is in effect attaching the label of 'criminal' to a person.

5. Conclusion

I have examined whether Part 5 recovery meets the requirements of Article 6. The following conclusions can be drawn. In the light of the focus of the fourth instance doctrine on procedural fairness, rather than on the substantive content of the law, it is unlikely that the ECtHR will challenge Part 5 civil recovery on substantive grounds. Insofar as Part 5 proceedings accord with the requirements specified in POCA 2002 and the CPR, the proceedings should be deemed to have met the general fair hearing requirement of Article 6(1), as well as the specific requirements of Article 6(1). If the Part 5 proceedings are conducted according to the overall and specific requirements of Article 6(1) then the minimum rights of Article 6(3)(c) (right to defence) should be met. However, Part 5 proceedings cannot be reconciled with the minimum rights of Articles 6(3)(a) (right to be promptly informed of the nature and cause of the accusation against a defendant), 6(3)(b) (adequate time and facilities for preparation of defence), 6(3)(d) (guarantee the attendance and examination of witnesses), and 6(3)(e) (right to interpreter).

Concerning Article 6(2), it is clear that Part 5 proceedings meet the requirement of the presumption of innocence that the initial burden of proof resides

with the State. In line with the procedural focus of Strasbourg, the wording of Article 6(2) does not set out a minimum standard in relation to the standard of proof. The ECtHR has confirmed that Article 6(2) requires that 'any doubt should benefit the accused', which could be interpreted as equivalent to the English standard of 'beyond reasonable doubt'. I argue here that the civil standard of proof based on the balance of probabilities is not compatible with Article 6(2), especially when Part 5 recovery occurs subsequent to an acquittal, owing to the criminal, punitive nature of Part 5 recovery as well as the characteristics and rationale for the presumption of innocence.

There is a strong case for arguing that Part 5 civil recovery orders, including the government's practice of publishing details of such orders, cannot be reconciled with a reputation related version of the presumption of innocence. This irreconcilability derives from the fact that Part 5 recovery ought to be seen as criminal in nature and that therefore Part 5 recovery ought to respect the requirements of the presumption of innocence. There is a compelling case for classifying Part 5 recovery as criminal in nature owing to the following: the aims of Part 5 of POCA 2002 are consistent with the traditional aims of punishment; the relevant agencies under Part 5 of POCA 2002 possess significant powers; the questionable character of the conceptual distinctions made between preventive and criminal punitive measures, as well as those made between *in rem* and *in personam* proceedings.

There also exist strong grounds for seeing Part 5 proceedings as falling short of the aims of the outcome related aspect of the presumption of innocence owing to its reliance on the balance of probabilities. The criminal labelling involved in Part 5

recovery contravenes the presumption of innocence since the property recovered is 'property obtained through unlawful conduct' without the enhanced protections of the criminal law, which amounts to an indirect declaration of guilt of the person whose property is the subject of a civil recovery order. This process of labelling supports the argument that proof based on the balance of probabilities is insufficient in those instances where the State is in effect attaching the label of 'criminal' to a person, even though there is no conviction involved in Part 5 recovery.

The presumption of innocence ensures that those convicted of wrongdoing are sufficiently protected by appropriate evidentiary rules. At a micro-level this helps to counteract the fragility of the fact-finding process and mitigate errors of mistaken conviction. At a macro-level this contributes to crystallising a better relationship between the State and its citizen, as well as mitigating the oftentimes hugely inequitable distribution of resources that the State and the defendant can call upon. In the light of this, and the indirect finding of criminal guilt involved with Part 5 recovery, the required standard of proof ought to be at the level of 'beyond reasonable doubt'. This is particularly so in cases of serious wrongdoing such as the offences associated with grand corruption.

By way of conclusion, in the light of the underlying human rights justification for the presumption of innocence, along with the threat posed by Part 5 recovery to the presumption of innocence and the criminal, punitive nature of Part 5 recovery, Part 5 recovery subsequent to an acquittal ought to benefit from the protections of the presumption of innocence.

Chapter 7: Tensions between civil recovery and human rights

This chapter set outs the assessment criteria for justifying the weakening of Article 6. The criteria are derived from the analytic framework developed by Ashworth to help resolve the conflicts that arise in relation to Articles 5 and 6 in the context of serious crimes (see summary table below setting out the criteria for justification of weakening of Article 6). In the Hamlyn Lectures, *Human Rights, Serious Crime and Criminal Procedure,* Ashworth proposes a framework which incorporates a modified version of Dworkin's rights theory. The use of civil recovery to combat grand corruption will be assessed against these criteria and in the light of the Strasbourg and English jurisprudence. Only in progressively meeting the criteria set out below would it be considered legitimate for the relevant authorities to employ civil recovery as an alternative to the criminal conviction and confiscation route. The significance of satisfying these criteria prior to any weakening of Article 6 is underpinned by the rationale for the right to a fair trial[946] and is further reinforced by the many examples of the misuse of anti-corruption measures.[947] Despite both the UK courts and Strasbourg finding that civil recovery is civil in nature, the criteria offered in this chapter can nonetheless be useful. As guidance to politicians, policy-makers, the Judiciary, and anti-corruption specialists on what criteria should be met before employing civil recovery as an alternative to the criminal conviction and confiscation route.

[946] See section 2 and 3 chapter 6 of the thesis

[947] Carmona, *Corruption and Human Rights* (n 85) 63-66. The misuse of anti-corruption measures is evidenced by the numerous instances where elected heads of government and other public officials have been deposed by military leaders on grounds of corruption e.g. Fiji in 2006 and in Thailand and Bangladesh in 2007

Summary: Criteria for justification of weakening of Article 6

1. ***bona fide*** **Condition**: Serious threat posed by grand corruption

2. Human Rights/Public Interest Condition: Procedural schema for balancing

2.1 **Three-step approach to tackling serious crime**

2.1.1. 'Seriousness' step: relevant authorities to determine which cases are considered the most serious

2.1.2. 'Criminalisation' step: the more serious the interests invaded by an offence then the stronger the case for criminalising the conduct

2.1.3. 'Prioritisation' step: the more serious the offence, the higher the priority ought to be given to dealing with it

2.2 **Individual Rights Route:** Clash between individual rights

2.2.1 Witness Security Collision: between the right of a defendant charged with corruption to examine witnesses and the right of a witness to security

2.2.2 Victims of Corruption Collision: between the right to a fair trial of a public official whose property is the subject of a civil recovery order and the potential direct violation of the right, for example, to health, housing and education of the victims of grand corruption

2.3 **Public Interest Route:** Clash between fundamental rights and public interest

2.3.1 Hierarchy of Rights Approach: views the architecture of the Convention as being composed of three levels of strengths of rights (non-derogable, qualified, and 'strong' rights)

2.3.2 Triangulated Strasbourg Approach: how to resolve conflicts between Article 6 and public interest arguments (three-way adjustment between the essence of the right itself, the public interest considerations and the safeguards for the respondent)

3. Effectiveness Condition: Effectiveness of civil recovery in contributing to the fulfilment of the rights of the victims of grand corruption and/or the public interest to live in a corruption-free society

If the three conditions are satisfied then it is possible to justify employing civil recovery, on a case by case basis, to combat grand corruption. Grand corruption on the scale of the Arab Spring, for example, certainly demonstrates the existence of sufficiently high levels of corruption (*bona fide* Condition). Less frequently seen are adequate attempts by the State to prosecute and convict the ruling elite for acts of grand corruption. However, it is conceivable, at least in theory, that a State can successfully complete the proposed three-step approach to tackling serious crime. Thereafter, potential justificatory grounds for the weakening of certain protections of Article 6 can be found in the following scenarios: where Article 6 collides with the rights of a witness and/or the rights of the victims of grand corruption and/or the public interest to live in a corruption-free society (Human Rights/Public Interest Condition).[948] Finally, there are a number of civil recovery cases where assets have been successfully repatriated to benefit the Victim State (Effectiveness Condition). Let's examine each of these conditions more closely in turn.

1) *bona fide* Condition: Serious threat posed by grand corruption

The first condition requires that there is a genuine threat justifying the curtailment of rights in addressing this threat. The motivation for this first condition is to help prevent the 'small and unpopular' minorities from being scapegoated by the majority; it in its absence, it would be all too easy for prejudices not posing genuine threats to be used as an excuse to curtail rights. The general threat of grand corruption must

[948] This third condition is contingent on further empirical evidence on the effectiveness of civil recovery

have a sufficiently strong empirical foundation; there must exist clear evidence for high levels of corruption. Estimates on the magnitude of corruption vary enormously and there are serious obstacles to collecting accurate data but even the most conservative estimates suggest that the scale of corruption is enormous.[949] The serious threat posed by grand corruption is clearly demonstrated in section 2.2.2 of chapter 1 of the thesis which sets out in detail the scale and serious consequences of grand corruption.

2) Human Rights/Public Interest Condition: Procedural schema

The second condition is comprised of two stages. The first stage requires the State to initially show that it has undertaken a three-step approach to tackling serious crime in order to determine which cases are considered the most serious. Only after the State completes this three-step approach can the relevant authorities then turn to the substantive second stage which sets out the criteria that must be met when there is a conflict between Article 6 and another individual right and/or the public interest. This Human Rights/Public Interest Condition sets out the two legitimate ways that the protections of Article 6 can be curtailed: when Article 6 clashes with another

[949] See section 2.2.2 of chapter 1 of thesis. Peter Reuter (ed) *Draining development? Controlling flows of illicit funds from developing countries* (World Bank 2012) <openknowledge.worldbank.org/bitstream/handle/10986/2242/668150PUB0EPI0067848B09780821388693.pdf> accessed 2 November 2018; Carr, 'Fighting Corruption' (n 74) 124-128. See also UNODC, *Strategic Programme Framework on Crime and Drugs for Southern Africa* (Vienna 2003); UNODC, *Crime and Development in Africa* (Vienna 2007); Reiner, *Crime* (n 222)

individual right (Individual Rights Route) and/or where the public interest grounds are in *extremis* (Public Interest Route).

2.1 Three-step approach to tackling serious crime

This approach complements the central argument of the thesis that due to its abhorrent consequences grand corruption ought to be seen as serious enough to be subject to condemnation and punishment in the criminal law.[950] The first step requires the relevant authorities to determine which cases are considered the most serious. This step can be completed quite straightforwardly if the authorities are willing and able to dedicate the necessary time and expertise to undertake a structured analysis of the offences on the criminal statute books. The second step requires that the more serious the interests invaded by an offence then the stronger the case for criminalising the conduct. The third step holds that the more serious the offence, the higher the priority ought to be given to dealing with it. Here, offences of grand corruption would pass the threshold of these last two steps owing to the serious threats posed by grand corruption.[951] In the light of the serious nature of these offences, the authorities would have to demonstrate that sufficiently high priority was given to combatting grand corruption, for instance in the allocation of sufficient resources.

Once these three steps have been taken, and it is still deemed necessary to employ civil recovery, only then would the authorities be permitted to move to

[950] See chapter 3 and 4 of the thesis
[951] See section 2.2.3 of chapter 1 of the thesis

consider curtailing Article 6. According to Andrew Ashworth's analysis, the structure of the Convention and normative foundations of human rights imply that there are only two legitimate ways that the protections of Article 6 could be curtailed:[952] When Article 6 clashes with another individual right (Individual Rights Route) and/or where the public interest grounds are in *extremis* (Public Interest Route). These two routes to legitimate curtailment will be used as a template to explore whether the use of civil recovery can be justified.[953]

Our template is based on Ashworth's 'hierarchy of rights' framework (which draws on Dworkinian rights theory), the triangulated approach of Strasbourg in relation to public interest considerations, and the reasoning of the Strasbourg Court in the line of cases following *Doorson v The Netherlands*.[954] *Doorson* is an organised crime case where Strasbourg held that if there were credible and specific dangers of reprisals, the protection of the witnesses' right to security of person under Article 5 should be allowed to detract from the defendant's right to confrontation under Article 6(3)(d), although only to the minimum extent feasible. The procedural schema of this case can help us to determine whether it is justifiable for certain rights of public officials protected by Article 6 to be weakened by civil recovery so as to protect another individual right.

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[952] Ashworth, *Human Rights* (n 37) 94-96. Ashworth explicitly recognises that rights theories are acutely controversial but that Ronald Dworkin's rights theory has strong attractions for his enquiry. In the context of this thesis, we will also focus on Dworkin's approach and hold on, with Ashworth, 'to the handrails that form part of the architecture of the European Convention itself'

[953] David Harris and others, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (4th edn, OUP 2018) Ch 1, 11-15

[954] *Doorson v Netherlands* (1996) 22 EHRR 330, 70; Ashworth, *Human Rights* (n 37) 43, 56–59, 77

2.2 Individual Rights Route: Clash between individual rights

There is an inevitable conflict when the criminal justice system is applied to pursue the goals of upholding victim's rights and upholding basic protections for defendants. Similarly, there is an inevitable conflict when trying to uphold both the CP and SE rights of the countrywomen of the public official whose property is the subject of a civil recovery order and the CP rights of the public official.[955] In the context of combatting grand corruption, there are two potential collisions with individual rights which are relevant to an assessment of the justifications offered for the use of civil recovery. The first potential collision is between the right of a defendant charged with corruption to examine witnesses and the right of a witness to security (Witness Security Collision). The second potential collision is between the right to a fair trial of a public official whose property is the subject of a civil recovery order and the potential direct violation of the right, for example, to health, housing and education of the victim(s) of grand corruption (Victim(s) of Corruption Collision).

2.2.1 Witness Security Collision

One potential obstacle to the paradigmatic sequence of prosecution-trial-conviction-sentence is the requirement that the witness confront the defendant.[956] The first potential collision thus arises owing to the high levels of violence and intimidation associated with grand corruption and its close ties with organised crime. This collision might occur in the following manner: when a public official is prosecuted for

[955] ibid
[956] Ashworth and Zedner, 'Defending the Criminal Law' (n 38) 21-51

acts of grand corruption, the aim is to subsequently confiscate the illicit assets under section 6 of POCA 2002. However, during the criminal trial, organised crime members could pose credible and specific dangers of reprisals to witnesses, resulting in those witnesses electing to not give evidence which could in turn contribute to a failed prosecution and criminal confiscation. Strasbourg is clear that as long as the court finds evidence to support the objective grounds for the 'fear' then this includes both fear which is directly attributable to threats/actions of the defendant or his agents, and fear which is attributable to a more general fear of what will happen if the witness gives evidence at trial.[957]

A brief review of legislation and case law on the intimidation of witnesses provides some further insights into the treatment of witness intimidation. Section 51 of the Criminal Justice and Public Order Act 1994 provides two statutory offences that specifically deal with conduct that targets witnesses by intimidating, harming or threatening them. The offence of witness intimidation requires that the defendant's conduct actually intimidates the witnesses. A narrow approach has recently been taken to the requirement of doing 'an act which intimidates'. The Court of Appeal in *R v ZN*[958] held that the offence of witness intimidation requires proof of actual intimidation i.e. that the witness was actually intimidated by the defendant's conduct.[959] In cases of serious crime, a key rationale for employing civil recovery is motivated by the problems with successful prosecution and criminal confiscation owing to, *inter alia*, the obstacle of witness intimidation. The civil classification of civil recovery circumvents this obstacle because a public official whose property is the

[957] *Al-Khawaja and Tahery v The UK* (n 861), paras 122-126. See *Dzelili v Germany* App no 15065/05 (29 September 2009); *Krasniki v the Czech Republic*, App no 51277/99, 80–83 (28 February 2006)
[958] *R v ZN* [2013] EWCA Crim 989
[959] Nicola Monaghan 'Witness Offences' 31 May 2018 Westlaw para 2-5

subject of a civil recovery order is not entitled to confront a witness under Article 6(3)(d).

Does civil recovery's circumvention of the obstacle of witness intimidation automatically justify civil recovery's weakening of certain guarantees of Article 6? Based on the statutory provisions[960] and jurisprudence following *Doorson*,[961] the answer to this question is negative. In *Doorson*, the ECtHR held that when 'life, liberty or security of person may be at stake'[962] a witnesses' right to life under Article 2 and right to security of person under Article 5 should be allowed to detract from the defendant's right to confrontation under Article 6(3)(d) as long as it is to the minimum extent feasible and the grounds provided are subject to rigorous examination.[963] In *Doorson*, the ECtHR held that there was no violation of Article 6 since the Amsterdam Regional Court (*arrondissementsrechtbank*) took the necessary

[960] The Criminal Justice Act 2003, Pt 11, Ch 2, S114, s116(e); Coroners and Justice Act 2009, Pt 3 (see also *R v Nico Brown* [2019] EWCA Crim 1143). Furthermore, Article 32 of UNCAC requires States to take appropriate measures to provide effective protection from potential retaliation or intimidation of witnesses or experts (and their relatives and other persons close to them where appropriate) who give testimony concerning offences under the UNCAC

[961] *Van Mechelen v The Netherlands* 25 EHRR 647; *Luca v Italy* (2001) 36 EHRR 807; *Visser v The Netherlands* (Application No 26668/95) given 14 February 2002*; Krasniki* (n 961); *Birutis v Lithuania* App nos 47698/99 and 48115/99 (ECtHR, 28 March 2002)

[962] *Doorson* (n 958) para 70; *Van Mechelen* (n 965) [53] and Joint Partly Dissenting and Partly Concurring Opinion of Judges Sajo and Karakas; *Al-Khawaja* (n 861). The restrictions on Article 6(3) were found to be dictated by the practical needs of an effective investigation and trial (the needs of the administration of justice) or by conflicts with the Convention rights of others (for example, where the right to life of a witness had to be protected)

[963] *Horncastle (Michael Christopher)* [2009] UKSC 14, [2010] 2 WLR 47 [69]; *Doorson* (n 958) para 71; *Visser* (n 965) para 47; *Krasniki* (n 961) para 80-81; *Luca* (n 965) para 40

steps to protect the security of witnesses while simultaneously safeguarding the rights of the defence. In this case, the anonymous witnesses were questioned at the appeals stage in the presence of counsel by an investigating judge who was aware of their identity. The investigating judge noted, in the official record of her findings, the circumstances on the basis of which the Court of Appeal was able to draw conclusions as to the reliability of their evidence. In *Doorson,* counsel was present and in a position to ask the witnesses whatever questions he considered to be in the interests of the defence except in so far as they might lead to the disclosure of their identity, and these questions were all answered.[964]

If Strasbourg has found various courts able to protect the security of witnesses while safeguarding the rights of the defence, it is certainly possible for a similar outcome to be achieved in a criminal trial for grand corruption. Although it is less clear how the security of witnesses can be protected after a trial unless a comprehensive witness protection programme is implemented.[965] Nonetheless, the courts' ability to protect witnesses during proceedings has been enhanced in the light of the statutory protections provided by the Criminal Justice Act 2003 (CJA) (for identified but absent witnesses) and the Coroners and Justice Act 2009 (for anonymous witnesses). The CJA substantially reformed the law governing the admission of hearsay evidence in criminal proceedings on the basis of proposals by

[964] *Doorson* (n 958) 72-76. For example, the anonymous witnesses were questioned at the appeals stage in the presence of defence counsel by an investigating judge who was aware of their identity and defence Counsel was in a position to ask the witnesses questions

[965] See n 976

the Law Commission.[966] The position of anonymous witnesses is governed by the Coroners and Justice Act 2009.[967]

Under the CJA, there are a limited number of 'gateways' that allow for the admission of hearsay evidence, subject to conditions, including the statement of a witness who is unavailable because she does not give evidence through fear. One such gateway is section 114(1)(d) which allows for the admission of hearsay if the court is satisfied that it is in the interests of justice for it to be admissible. Section 114(2) provides that the court must have regard to*, inter alia*, the following factors when determining if it is in the interests of justice: the probative value of the statement; the other evidence available; the importance of the evidence; the circumstances in which the statement was made; the reliability of the maker of the statement; the difficulty involved in challenging the statement; the extent to which that difficulty would be likely to prejudice the party facing it.

Section 116 of the CJA allows for another gateway via the admission of statements of absent witnesses. The unavailable witness' evidence may be admitted under a number of circumstances including if the person does not give or does not continue to give oral evidence through fear (Section 116(2)(e)). The rationale of fear cannot be used unless (i) the court considers that it is in the interests of justice to admit the statement and (ii) the fear has not been provoked by the party seeking to adduce the evidence in question. In determining whether it is in the interests of justice

[966] Pt 11, Ch 2, S114, s116(e). See also Evidence in Criminal Proceedings: hearsay and Related Topics (April 1997)
[967] Pt 3 (see also *R v Nico Brown* [2019] EWCA Crim 1143)

to admit it, the court must have regard to any relevant circumstances including the statement's contents, the risk of unfairness and the availability of special measures (section 116(4)).

The Coroners and Justice Act 2009 provides that witnesses can give evidence anonymously when, upon the application of either the prosecution or a defendant, the trial judge makes a 'witness anonymity order'. Section 87 requires that the trial judge be informed of the identity of the witness, while sections 88(2) to (6) and 89 lay down the conditions for the making of a witness anonymity order. In deciding whether those conditions are met, the court must have regard, *inter alia*, to whether evidence given by the witness might be the sole or decisive evidence implicating the defendant (section 89(2)(c)).

These two pieces of legislation have provided the courts with a variety of gateways to protect witnesses during proceedings while also offering safeguards to defendants. However, the protection of the witnesses' right to life or security of person being allowed to detract from the defendant's right to confrontation under Article 6(3)(d) raises its own host of serious normative concerns about hearsay evidence. These objections cannot be explored in detail here. However, Laura Hoyano captures, in her search for a firmer theoretical foundation for a fair trial, the difficulties and dangers of the statutory hearsay provisions and the devaluation of cross-examination to the reliability of evidence and the principle of equality of arms:

> The increasing statutory incentives for witnesses to claim intimidation so as to shield themselves from the ordeal of cross-examination or to undergo it

> anonymously, serve to enhance their sense of impregnability and the temptation to falsify or exaggerate.[968]

Hoyano's diagnosis of the potential misuse of hearsay provisions is certainly of concern. However, what about those genuine cases where the right to life of a witness is threatened? The courts have not examined in detail the implications for Article 6(3)(d) where the right to life of a witness is threatened rather the focus has been on the right to security of person. The threat to the right to life raises important considerations relevant to our analysis. For example, should the greater 'weight' of the right to life relative to the right to security of person influence the approach the courts ought to take when allowing individual rights to detract from the defendant's right to confrontation under Article 6(3)(d)? According to a 'hierarchy of rights'[969] approach the answer is potentially yes owing to the fact that the right to life is higher in the hierarchy of rights than Article 5 since it is neither qualified nor derogable in these circumstances.[970]

It would be helpful to apply a hierarchy of rights analysis to the right to life and right to security of person in the context of Article 6, but this would be a worthwhile undertaking for a separate project. However, we can briefly consider a

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[968] Laura Hoyano, 'What Is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial' [2014] 4 *Criminal Law Review* 15-17. See also *Davis* [2008] UKHL 1 AC 1128 [50] (Lord Carswell, quoting Ackermann J in *S v Leepile (No.5) (1986) 4 SA* 187). See also analysis of 'right to a verdict with integrity': 'On this analysis, there is no need to balance competing interests *within* art.6 or *between* art.6 and other Convention rights, because art.6 exists to protect the integrity of the adjudicative process and the outcome. The administration of justice, applied in individual prosecutions, has an instrumental role in protecting the maintenance of all other human and legal rights'

[969] See section 2.3.1 of this chapter

[970] Thank you Liora Lazarus for bringing this to my attention

factual scenario that demonstrates the difficult and often painful issues that arise in relation to the positive obligations under the right to life. If we imagine the following scenario. The witness in a grand corruption case receives ongoing death threats and attacks to their property that meet the stringent test of 'real and immediate risk' to life. Thus, the positive obligations of the authorities under Article 2 to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual would be engaged.[971] One can certainly imagine, from the policy perspective of the authorities and the very personal perspective of the witness, the pragmatic appeal of civil recovery when the alternative might be the complex, expensive, potentially life ruining enrolment of a witness in a programme such as the UK Protected Persons Service (UKPPS). The UKPPS usually involves removing people from the area of threat to a new, safe location.[972] The relocation of a witness and

[971] *Osman v UK* [1998] EHRR 101, para 115; *Van Colle v UK* App no 7678/09 (29 Apr 2013) para 88, 95-97, 99, 102-103; *Branko Tomašić and Others v Croatia*, App no 46598/06 (15 Apr 2009) para 50; Council of Europe Guide on Article 2 of the European Convention on Human Rights Right to Life para 14-19 (Updated 30 April) <www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf> accessed 2 August 2019. Strasbourg has considered the State to have an obligation to take preventive operational measures to protect one or more individuals identifiable in advance as the potential target of a lethal act in contexts that include the killing of a witness in criminal proceedings. However, for the Court to find a violation of that positive obligation 'it had to be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party, and that they had failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk

[972] UK Protected Persons Service (UKPPS) is a network of regional police units, led by the NCA. It provides protection to people judged to be at risk of serious harm where the protection arrangements required by the individual are not available to the local police force or referring agency <https://nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/protected-persons> accessed 5 September 2019. See difficulties for witnesses

adoption of a secret alias could certainly protect the life of the witness while the rights of the defence could be safeguarded by the statutory hearsay provisions. Nonetheless, the impact on the relocated witness and expense to the authorities make it hard not to view civil recovery as the easier, gentler option. The importance of the right to a fair trial requires that any weakening of the Article 6 protections must only be in extreme circumstances. However, the scenario of witness relocation to protect the right to life would provide the strongest normative justification for civil recovery's weakening of certain guarantees of Article 6.

It is not sufficient, however, to argue that, because a case allegedly involves grand corruption, it can be assumed that witnesses may be threatened, and that therefore civil recovery should be pursued rather than criminal prosecution and criminal confiscation. Moreover, it cannot be sufficient to regard a whole category of cases as presenting danger, in a way that fails to recognise the need for each case to be assessed individually.[973] Notwithstanding the normative concerns with hearsay evidence and also the greater 'weight' of the threats to the right to life of a witness, it is clearly possible to protect witnesses during a grand corruption trial thereby significantly undermining the legitimacy for employing civil recovery since the security of witnesses could be achieved by incorporating the relevant protections and safeguards in a criminal trial for grand corruption. As opposed to opting for civil recovery, the court ought to take the necessary action to protect the security of witnesses while also safeguarding the rights of the defence.

<www.theguardian.com/law/2018/may/11/police-ruined-life-says-woman-living-witness-protection> accessed 5 September 2019

[973] Ashworth, *Human Rights* (n 37) 79-81

Having found that the first potential collision under the Individual Rights Route does not immediately justify the weakening of certain protections of Article 6, we turn to examine the second potential collision, that between the right to a fair trial of a public official whose property is the subject of a civil recovery order and the rights of her countrywomen?

2.2.2 Victim(s) of Corruption Collision

We have seen that the Strasbourg jurisprudence permits the curtailment of individual rights when there is a collision between individual Convention rights (Witness Security Collision). Consequently, in seeking justification for the pursuit of civil recovery to combat grand corruption there is an additional, relevant collision to consider: between the right to a fair trial of a public official whose property is the subject of a civil recovery order and a direct violation of the right, for example, to health of the victim(s) of grand corruption. It is normatively legitimate to consider this potential collision between Convention rights and ICESCR rights owing to the artificial character of the distinction between CP rights on the one hand and SE rights on the other.[974]

How should one approach an examination of the collision between a respondent's Convention rights and a victim's ICESCR rights? Ashworth proposes that there are three areas to consider.[975] This thinking can also be applied to the SE and

[974] See chapter 7 of thesis. Ashworth, *Human Rights* (n 37) 81. The Charter on Fundamental Rights of the European Union is an example of a legal instrument where CP and SE rights are placed side by side

[975] Ashworth, *Human Rights* (n 37) 77-80

CP rights of victim(s) of grand corruption. The first test requires that an actual curtailment of the defendant's right be justified (Justification test). It is important to remember that there is no 'defendant' in civil recovery, only a person whose property is the subject of a civil recovery order. The second test requires that there is a high probability that the Convention right of a victim, or for the sake of this argument the ICESCR right, would be violated if the respondent's right is not curtailed and the normal criminal procedure or other State action is applied (Violation test). The third test deals with the probability of a right's infringement. In this regard, restrictions ought to be placed only on a respondent's right when 'a loss of utility of extraordinary dimensions' would occur if the right were maintained without abridgement (Loss of Utility test). How will civil recovery fare against these tests?

Justification Test

The first test requires that an actual curtailment of the respondent's right be justified. Civil recovery meets this, on a case by case basis, if criminal confiscation is not possible owing, for instance, to the death or flight of a defendant.[976] Additional justification is lent when the corrupt act of a respondent directly violates a CP and/or SE right. While it is not legitimate to undermine fair trial rights simply because there is a class of potential victims of corruption, there are numerous ways in which corruption directly violates individual rights. For example, if funds allocated for emergency healthcare are misappropriated then arguably the violation of the right to

[976] Nicolas Ryder, *Financial Crime in the 21st Century Law and Policy* (Edward Elgar 2011) 205, 214, 362. The need to confiscate the proceeds of crime was illustrated by the decision of the House of Lords in *R v Cuthbertson* [1981] AC 470

health of a person in need of emergency treatment justifies the weakening of the right to a fair trial.

Violation test

Here, if the normal criminal procedure for recovering assets obtained through grand corruption is pursued (criminal confiscation) there is potentially a high probability that the ICESCR right of a victim would be violated. The rationale for civil recovery is that it is supposed to overcome many of the barriers to, and is more effective than, 'the normal criminal procedure' of criminal confiscation. In the context of combatting grand corruption it is assumed that the assets recovered will be used to fulfil SE rights and therefore contribute to reducing the probability of violating an ICESCR right of a victim of grand corruption.[977] However, it is another question whether this is equivalent to there existing a high probability that the rights of a victim will be violated if criminal confiscation is employed and there is no weakening of certain protections of Article 6 by civil recovery. The answer is positive in cases where criminal confiscation is very clearly not possible, for instance owing to the death or flight of a defendant. Further support for the claim that there is a higher likelihood of a violation of the ICESCR rights of a victim if the normal criminal procedure is pursued is provided by the obstacles to successful criminal confiscation and the fact that corruption directly violates SE and/or CP rights. However, a firm assessment one way

[977] Alston and Robinson (n 324) 5, 27-28; Varun Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries* (World Bank Policy Research Working Paper No. 3006) Ch 5; World Bank, *The World Bank Annual Report 2001* Vol 1 Year in Review (World Bank, Washington DC 2002) 58; UNCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (Geneva 2004)

or the other when evaluating the Violation test is not possible simply because there has been no thorough, detailed empirical investigation on the relative successes of civil recovery and criminal confiscation.

Loss of Utility test

This test requires that restrictions ought to only be placed on a respondent's right where 'a loss of utility of extraordinary dimensions' would occur if the right were maintained without abridgment (the third condition in Dworkin's rights theory). Dworkin developed his own liberal theory of adjudication that is based on individual rights and which rejects the dominant philosophy of the Anglo-American models of legal positivism and utilitarianism.[978] Dworkin proposes that the rights of the individual against the State exist outside of the written law and function as 'trumps' against majoritarian wishes. He provides a compelling case that there is no place for simply balancing a constitutional right against a public interest and then curtailing the right if there seems to be a social cost in maintaining it. However, he also recognises that there might be circumstances in which it might be decided that, 'although great social cost is warranted to protect the original right, this particular cost is not necessary.'[979] Dworkin outlines three sorts of grounds that can consistently be used to limit the definition of a particular right:

> First, the Government might show that the values protected by the original right are not really at stake in the marginal case, or at stake only in some attenuated form. Second, it might show that if the right is defined to include the marginal case, then some competing right, in the strong sense described

[978] Hart HLA, *The Concept of Law* (OUP 1961)
[979] Ronald Dworkin, *Taking Rights Seriously With a New Appendix, a Response to Critics* (HUP 1978) 195-242; Ashworth, *Human Rights* (n 37) 74-75

> earlier, would be abridged. Third, it might show that if the right were so defined, then the cost to society would not simply be incremental but would be of a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved.[980]

The third ground is relevant for the Loss of Utility test. This ground holds that there might be extreme circumstances in which a limited amount of 'over-trumping' of a fundamental right by public interest considerations is rightly allowed. Ashworth is correct that any over-trumping should be decided only after a transparent analysis of the allegedly pressing public interests, with such interests being neither frequent nor normal.[981] If one applies Dworkinian analysis to civil recovery the question to ask here is: if a criminal trial and criminal confiscation is pursued, as opposed to civil recovery, would there be a 'loss of utility of extraordinary dimensions'? Would the use of civil recovery result, necessarily or even probably, in greater fulfilment of CP and SE rights and lower levels of grand corruption? Could other measures, such as criminal confiscation, be taken which, without infringing fundamental rights, would minimise or eliminate the social cost, in this case the great social cost in terms of the impact of grand corruption.[982] Again, the answer is potentially affirmative in cases

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[980] Ashworth, *Human Rights* (n 37) 74-75; Dworkin, *Taking Rights Seriously* (n 983) 241

[981] Ashworth, *Human Rights* (n 37) 86, 127-132. Ashworth notes there are plenty of 'public interest' arguments 'squatting' beside the Convention rights relating to criminal procedure which are being allowed by some courts in some circumstance to eat into those declared rights. He further highlights two obstacles to deciding whether or not to accede to arguments in favour of restricting a right: first, the element of indeterminacy in human rights declarations and, second, the absence of a 'meta-principle' to guide the courts e.g. liberty, dignity

[982] Ashworth, *Human Rights* (n 37) 132

where criminal confiscation would clearly be unsuccessful owing, for example, to the death or flight of a defendant.

However, without further empirical investigations into the relative successes of these asset recovery measures, it remains unclear whether the adoption of criminal confiscation instead of civil recovery would lead to such a loss.[983] Furthermore, this raises the ongoing concern about how to measure the effectiveness of civil recovery, and asset recovery more generally, and what outcomes are required for them to be deemed successful measures. As we saw in section 1.3 of chapter 2, on balance, it could be argued that the value of asset recovery lies more in its moral symbolism and communicative properties than in its instrumental role as an effective AC policy and vehicle for crime control. While there certainly do exist multiple examples of successful civil recovery subsequent to failed attempts to confiscate corrupt assets, this alone does not supply the necessary support to draw the strong conclusion that there has been a 'loss of utility of extraordinary dimensions'. Therefore, it is reasonable to conclude that employing criminal confiscation over civil recovery, even with its apparent lower success rates and thus more limited impact on reducing the consequences of grand corruption, cannot, without further empirical support, be considered to lead to a 'loss of utility of extraordinary dimension'.

Even if the necessary empirical questions were to receive acceptable answers, the question of principle remains. The 'ubiquity and ugliness argument' that rights should be curtailed for crimes which are prevalent or serious is often put forward to

[983] Ashworth, 'Social Control' (n 37) 14

support employing measures such as civil recovery but ought to be rejected as it embodies a rejection of the notion of fundamental rights.[984]

In conclusion, application of the three tests to civil recovery in the context of combatting grand corruption demonstrates that it is possible, on a case by case basis, for civil recovery to satisfy meeting these tests in instances where criminal confiscation is deemed to be impossible owing to the death or flight of a defendant. Additionally, the case for civil recovery is further strengthened in those circumstances where corruption directly violates CP and/or SE rights. However, without further empirical support, it is unlikely to expect on a more general basis that civil recovery will be able to satisfy meeting these tests.

Thus far, under the Individual Rights Route, we have seen that there are two potential collisions when Article 6 clashes with an individual right. The first potential collision is between the right of a defendant charged with corruption to examine witnesses and the right of a witness to security (Witness Security Collision). The second potential collision is between the right to a fair trial of a public official whose property is the subject of a civil recovery order and a direct violation, for example, of the right to the health of victim(s) of grand corruption (Victim(s) of Corruption Collision). However, there are many instances where it is not possible to view the conflict as one between the rights of individuals, but rather as a clash occurring between 'public interests' and fundamental rights. The next section will explore the potential collision between, on the one hand, the right to a fair trial of the public

[984] Ashworth, *Human Rights* (n 37) 115-117, 132. See also Judgment of Sachs J in the South African Constitutional Court *S v Coetzee and others* 1997 (3) SA 527 para 220

official whose property is subject to a civil recovery order and, on the other, a broader public interest in the suppression of grand corruption and the right to live in a corruption-free society (Public Interest Route).

2.3 Public Interest Route: Clash between fundamental rights and public interest

While it could be argued that owing to the grave nature of the consequences of grand corruption, combatting grand corruption meets Dworkin's public interest grounds in *extremis* condition;[985] situations which are by their nature 'extreme and urgent'.[986] However, this does not mean that the use of civil recovery in combatting grand corruption also meets Dworkin's condition since we lack the necessary evidential support showing civil recovery's being the most effective route to combatting grand corruption. Prior to an examination of the legitimacy of the public interest justifications offered in support of civil recovery, it is important to establish more precisely of what the concept of public interest consists. I begin by outlining some conceptual issues surrounding the idea of the 'public interest'. I then turn to dealing with how policy makers have dealt with public interest arguments before examining how the courts have also dealt with public interest arguments.

Public interest: conceptual issues

Just as in the case of there not existing a single conception of 'security',[987] the difficulties inherent in accounts of the criminal law and justifications for weakening

[985] Dworkin, *Taking Rights Seriously* (n 983) 241-250
[986] Ashworth, *Human Rights* (n 37) 69, 80, 117. See section 2.2.3 of chapter 1 of thesis
[987] Ashworth, *Human Rights* (n 37) 69-80

the protections of the criminal law mean that there is no uniform understanding of 'the public' on behalf of whom we could confidently state what is in its 'interest'. [988] The criminal law and due process rights ought to be seen as two different means of meeting the 'public interest': directly when we are personally accused of crimes and also indirectly by serving as checks on exercises of governmental power.[989]

In practice, policy makers often do not view the public interest in this way. The current policy approach to grand corruption is part of a much wider paradigm shift in criminal justice from a traditional limit on States' power to a modern approach of a 'culture of control'[990] and 'a majoritarian right to protection' against the citizen-criminal, where rights talk is used to promote public interest policies and to actually undermine human rights.[991] The works of Jeremy Waldron, Liora Lazarus, and Lucia Zedner are particularly illuminating here. These academics investigate the hazards arising from the accumulation of power by a State when the State tries to address threats emanating from those the State deems threatening.

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[988] Zedner, 'Security, the State' (n 16) 243

[989] James Nickel, 'Restraining Orders, Liberty, and Due Process' in Ashworth, Zedner and Tomlin *Prevention and the Limits of the Criminal Law* (n 378) 156

[990] Ashworth, Zedner and Tomlin in Ashworth, Zedner and Tomlin *Prevention and the Limits of the Criminal Law* (n 378) 5; David Garland, *The Culture of Control: Crime and Social Control in Contemporary Society* (Oxford OUP 2001). See also P O'Malley, 'Volatile and Contradictory Punishment' (1999) 3(2) *Theoretical Criminology* 175-96; Jonathan Simon, 'Entitlement to Cruelty: Neoliberalism and the Punitive Mentality in the United States' in Kevin Stenson and Robert Sullivan (eds) *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Portland, Willan Publishing 2001) 124-143

[991] Klaus Gunther, 'Responsibility to Protect and Preventive Justice' in Ashworth, Zedner and Tomlin *Prevention and the Limits of the Criminal Law* (n 378) 69-90; Klaus Gunther, 'World Citizens between Freedom and Security' (2005) 12 *Constellations* 385

Convincingly, Waldron, Lazarus and Zedner all argue that the hydraulic, zero sum relationship between security and liberty,[992] and idea that security and liberty can be balanced, [993] should be replaced by a recognition of the fact that there are different types of security: the security of the public from harm as well as security of the individual from unwarranted State interference.[994] Civil recovery falls into the first type of security and is an example of Waldron's 'inter-personal consequentialist trade-off' where one person's welfare or liberty is sacrificed for the sake of others. Waldron argues that such a trade-off disregards what John Rawls called 'the distinction between persons' which demands regarding human persons as agents entitled to equal respect,[995] and also that rights are supposed to set limits on the sacrifices individuals are called upon to make in the interests of others.[996]

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[992] Matt Matrevers, 'On Preventive Justice' in Ashworth, Zedner and Tomlin *Prevention and the Limits of the Criminal Law* (n 378) 235; Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992); Anthony Giddens, 'Risk and Responsibility' (1999) 62(1) MLR 1-10; Garland, *Culture of Control* (n 994)

[993] Waldron, 'Security and Liberty' (n 827) 191

[994] Markus Dubber, *The Police Power: Patriarchy and the foundations of American Government* (Columbia University Press 2005); Lindsay Farmer, 'The jurisprudence of security: The police power and the criminal law' in Markus Dubber and Mariana Valverde (eds), *The new police science: The police power in domestic and international perspective* (Stanford University Press 2006). See also Zedner, 'Security, the State' (n 16) 379–403; Susanne Krasmann, 'The Enemy on the Border: Critique of a Programme in Favour of a Preventive State' (2007) 9 Punishment & Soc'y 30i; Garland, 'Culture of Control' (n 994) 70

[995] Matravers in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law* (n 378) 237; John Rawls, *A Theory of Justice* (1971) 27

[996] Zedner, 'Terrorizing Criminal Law' (n 16) 99 -105; Jeremy Waldron, *Torture, terror and trade-offs: Philosophy for the White House* (OUP 2010) 10. A compelling example of such a 'trade off' and an instance of the court insisting on the need for a balance between the State's protective duties and the rights of the individual is found in the German Aviation case. The German Federal Constitutional Court (FCC) struck down powers under the Aviation Security Act to shoot down aircrafts which had been hijacked with the intention of using the aircraft 'as weapons in crimes against human

Employing civil recovery to combat grand corruption is predicated on the presumption that there is a unitary understanding of the public interest *viz*. the suppression of grand corruption and the promotion of the SE and CP rights of the victims of corruption. This understanding is in opposition to the public interest involved in preventing State abuse through the preservation of the CP rights of those suspected of corruption. When governments attempt to balance fundamental rights against the public interest they tend to overlook that the public interest includes protection from government threats to human rights.

A problem with the 'public interest' approach is that it contradicts the very notion of fundamental rights, for something's being called a fundamental right implies that it is something that cannot be taken away merely by showing that a majority of the people are better off. Fundamental rights are by their very nature counter-majoritarian and anti-utilitarian. Lucia Zedner's analysis in relation to security is useful in thinking about the public interest grounds for the right to live in a corruption-free society:

> [W]e ought to think of security less as a good in itself than as a pre-condition of other goods such as justice, equality, trust, social inclusion and liberty. If these ulterior goods justify its very pursuit, logically security should not trample them. [997]

Similarly, we must not permit the pursuit of the right to live in a corruption-free society to trample on justice, equality, and liberty. Let's turn now to exploring

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lives'; Lazarus *Positive Obligations* (n 273) 26-27; *BVerfGE* (2006) 1 BvR 357/05 (15 February 2006) para 120 – 121. See also Kai Moller 'The Right to Life Between Absolute and Proportional Protection' *LSE Law, Society and Economy Working Paper Series*, WPS 13-2010, February 2010

[997] Zedner, 'Terrorizing Criminal Law' (n 16) 99

treatment of the public interest by (first) policy makers and (second) the courts. The policy and judicial approach to the public interest is important since it is this interpretation of what the public interest consists of that will ultimately determine the use of civil recovery on a case by case basis.

Public interest: policy makers

According to the Attorney-General's guidance on civil recovery, civil recovery can be pursued where a conviction is feasible but use of the non-conviction based (NCB) powers might better serve the 'overall public interest'. The public interest grounds offered in support of civil recovery include: i) where the use of NCB powers better meets an urgent need to take action to prevent or stop offending which is causing immediate harm to the public; ii) where civil recovery represents a better deployment of resources to target someone with significant property which cannot be explained by legitimate income; iii) where it is not practicable to investigate all of those with a peripheral involvement in the criminality, and a strategic approach must be taken in order to achieve a manageable and successful prosecution; iv) where the offender is being prosecuted in another jurisdiction and is expected to receive a sentence that reflects the totality of the offending, so the public interest does not require a prosecution in the UK.[998]

The public interest grounds (ii) – (iv) above do not constitute 'public interest grounds in *extremis*' since they are focused on the allocation of resources and are thus essentially strategic and pragmatic in nature. Public interest ground (i) alone can be

[998] Attorney General's Office (n 166)

argued to potentially offer justification for civil recovery on public interest grounds in *extremis*. However, this justificatory ground requires qualification. Clearly identified criteria will need to be developed in order to determine on a case by case basis: a) whether civil recovery is the optimal action to adopt, b) the 'urgency' of the need, and c) the seriousness of the 'harm'. We now turn to examining how the courts have approached the restriction of individual rights on public interest grounds.

Public interest: the courts

The majority of Strasbourg cases only allow a very limited restriction of individual rights when broader public interests have been raised. However, the British courts have relied on an unrepresentative strand of Strasbourg authority, starting with *Salabaiku*, that allows certain rights to be balanced against the public interest and erroneously rely on a concept of proportionality as broad as that applied in Articles 8-11 of ECHR.[999]

Ashworth and Zedner convincingly advance the view that *Salabaiku* is an anomalous, unimpressive judgment that sets aside the express right to the presumption of innocence on public interest grounds. [1000] And yet in the literature, those academics seeking to justify the suspension of the presumption of innocence on the public interest ground of combatting grand corruption rely on precisely this

[999] Ashworth, 'Social control' (n 37) 14. See *Clingham* (n 941) and *McCann* (n 582) where Lord Hutton repeats the error of the Privy Council in *Brown v Stott,* in assuming that rights coming within Article 6 can simply be 'trumped' by public interest considerations

[1000] Ashworth, *Human Rights* (n 37) 62-64, 66, 84-86, 117. Zedner, 'Terrorizing Criminal Law' (n 16) 99

line of authorities. In the context of grand corruption, such an interpretation of the presumption of innocence considers striking 'a fair balance' between the wider community interests and the protection of fundamental rights of the individual to permit, for example, reverse onus clauses on charges of illicit enrichment as long as they operate within reasonable limits and meet the test of proportionality. [1001]

We have seen that there are a number of problems with the 'public interest'. Conceptually, the 'public interest' approach contradicts the very notion of fundamental rights and is predicated on the presumption that there is a unitary understanding of the public interest. At the level of policy, only one of the public interest grounds offered by the Attorney-General's guidance for pursuing civil recovery over conviction is not strategic and pragmatic in nature. The jurisprudence does not provide any further grounds for optimism. The British courts allow certain rights to be balanced against the public interest and rely on a concept of proportionality as broad as that applied to qualified rights. Armed with a clearer understanding of what the public interest consists of, and has been interpreted to mean, we can now turn our attention to whether employing civil recovery to suppress grand corruption constitutes a 'public interest ground in *extremis*'?

[1001] Ndiva Kofele-Kale, 'Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes' (2006) 40(4) *The International Lawyer* 909, 930-931; See Ryder analysis (n 980) 206: *Kebeline* (2000) 2 AC 326, [1999] 3 WLR 972 where Lord Hope of Craighead pointed out that '[a]s a matter of general principle, therefore, a fair balance must be struck between the demands of the general interest of the community and the protection of fundamental rights of the individual'. See also *Salabaiku* (n 429) 379, 388, *Walsh* (n 592) 21; *Attorney-General v Lee Kwong-kut* [1993] AC 951 (PC) para 972B-973A; Attorney Genera*l v Hui Kin-hong* 1 HKCLR para 229; *Attorney General v Reid* [1994] 1 AC 324 [330H]

Grand Corruption: Public interest grounds in *extremis*?

The scale of grand corruption and the gravity of its consequences requires urgent suppression, a more rigorous assessment of the public interest arguments and empirical grounds for employing civil recovery to suppress grand corruption is nonetheless still required. The applicable analytic framework has two inter-related components. The first component is provided by the 'hierarchy of rights' approach which views the architecture of the Convention as being composed of three levels of strengths of rights (Hierarchy of Rights Approach). The second component is provided by the triangulated approach adopted by Strasbourg to resolve conflicts between Article 6 and public interest arguments. This triangulated approach makes a three-way adjustment between the essence of the right itself, the public interest considerations and the safeguards for the defendant (Strasbourg Triangulated Approach).[1002]

2.3.1 Hierarchy of Rights Approach

According to the tripartite Convention hierarchy, each right has a certain 'weight' including the right to a fair trial under Article 6 which will be our focus here. The hierarchy is comprised at one end of the spectrum of strength with the non-derogable rights.[1003] At the other end of the spectrum of strength of rights are the qualified rights

[1002] Ashworth, *Human Rights* (n 37) 52, 66-68, 74-75, 117-125

[1003] Emmerson (n 431); Ashworth, *Human Rights* (n 37) 77. The non-derogable rights are the right to life (Article 2), the right not to be subjected to torture or inhuman or degrading treatment (Article 3), the right not to be subjected to forced labour (Article 4(1)), and the right not to be subjected to retrospective criminal laws or penalties (Article 7)

of Articles 8 to 11 which can be interfered with if it can be established that this is 'necessary in a democratic society' on one of the stated grounds.[1004] In between these is the intermediate category of the 'strong' rights of the right to liberty and security of persons (Article 5) and the right to a fair trial (Article 6), which are less fundamental than the non-derogable rights but ought to require that any ground for their curtailment must at least be more powerful than the grounds set by the qualified rights.

Relevant to our purposes here is that a higher standard than that of 'necessary in a democratic society' ought to be met if employing civil recovery and its weakening of the Article 6 rights is to be justified.[1005] The process for interpreting a strong right such as Article 6 in the light of public interest considerations should be more stringent and restrictive than that of deciding whether an interference with a qualified right can be justified.[1006] Article 15 of the Convention allows for measures to be taken that derogate from Article 6 obligations but only to 'the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' The Court has repeatedly held that any departures from Article 6 must: be ad hoc to meet the exigencies of a case; strictly necessary in the light of a strong countervailing public interest or the protection of

[1004] The right to respect for private life (Article 8), the right to freedom of thought and religion (Article 9), the right to freedom of expression (Article 10), and the right to freedom of assembly and association (Article 11). The Convention allows qualified rights to be curtailed either 'for the protection of the rights and freedoms of others', or by reference to public interest factors such as national security, the prevention of crime and disorder, and other stipulated heads of justification which are held to be 'necessary in a democratic society'

[1005] Ashworth, *Human Rights* (n 37) 52-54, 74-77

[1006] Ashworth, *Human Rights* (n 37) 77

the fundamental rights of another person;[1007] reasonably proportionate to the aim sought to be achieved; adequately counterbalanced to safeguard the interests of the party whose right had been curtailed; and not 'impair the very essence' of that party's right to a fair trial.[1008]

The suppression of grand corruption could be argued to be 'necessary for a democratic society' potentially falling within the 'prevention of crime and disorder' and 'the protection of the economic well-being of the country' public interest exceptions.[1009] However, the necessity of supressing grand corruption does not equate to civil recovery being necessary for a democratic society and that civil recovery's departure from Article 6 meets the 'strict necessity' test.

[1007] *Kennedy v United Kingdom* (2011) 52 EHHR 4 [184]–[186], [190]; [2011] CLR 868; *Rowe* (2000) 30 EHRR 1 [60]–[63]; *PS v Germany* (2003) 36 EHRR 61 para 23; Hoyano (n 972) 8-9

[1008] *Doorson* (n 958) 330; *Unterpertinger v Austria (1991) 13* EHRR *175*; *Windisch v Austria (1991) 13* EHRR *281*; *Othman v United Kingdom* (2012) 55 *EHRR 1; Hoyano* (n 972) 8-11

[1009] The Court and Commission have developed a framework of interpretation for the 'democratic necessity' test which consists of three principal elements: the nature of democratic necessity, the burden of proof/proportionality, and the margin of appreciation/European supervision. However, it should be noted that the content of the 'democratic necessity' test remains highly fluid and indeterminate and the application of the test by the ECtHR demonstrates an unclear, confused use of terminology and a tendency to confuse and mix distinct elements of judicial review. See *Sunday Times (I) v UK* 30 EHRR (ser A), 62; *Handyside v UK* 7 December 1976, A 24; *Silver v UK*, report of 11 October 1981, B 51 25 March 1983, A 61; *Lingens v Austria* 8 July 1986, A 103; Steven Greer, 'The exceptions to Articles 8 to 11 of the European Convention on Human Rights' *Human rights files No. 15 International Journal of Constitutional Law* 11 (2 April 2013) 466–490, 467-9; Janneke Gerards, 'Judicial Deliberations in the European Court of Human Rights, in The Legitimacy of Highest Courts' in Nick Huls, Maurice Adams and Jacco Bomhoff (eds) *Rulings, Judicial Deliberations and Beyond* (CUP 2009) 407, 422; Steven Greer, 'What's Wrong with the European Convention on Human Rights?' (2008) 30 *Hum Rts Q* 680, 696–697

In the critical evaluation of the legitimacy of civil recovery, there is a significant empirical stumbling block that must be addressed before any application of the 'democratic necessity' or 'strict necessity' tests to the suppression of grand corruption. The key empirical question yet to be answered is whether civil recovery is necessary for the suppression of grand corruption. Here, I use the adjective 'necessary' in the sense of 'strict necessity' to mean 'indispensable' and 'essential' rather than merely being 'useful' or 'reasonable'. It is not possible to draw a firm conclusion since a sufficient empirical investigation into the effectiveness of civil recovery, and more specifically whether civil recovery is necessary for the suppression of grand corruption, has yet to be undertaken. UNCAC requires States to implement civil recovery measures but there is no conclusive evidence to support civil recovery being considered an indispensable measure that must be part of the global multi-pronged anti-corruption strategy. The importance of the right to a fair trial requires that any weakening of the Article 6 protections must only be in extreme circumstances. Owing to the complex range of measures required to combat grand corruption it would be virtually impossible to categorically state which measures are essential to suppress grand corruption and thus the case for civil recovery is further weakened.

2.3.2 Strasbourg Triangulated Approach

The second component of our analytic framework to assess public interest arguments looks more closely at the approach adopted by the Strasbourg judges in those cases where they recognise the force of public interest considerations. In such cases, a

three-way adjustment is required between the essence of the right itself,[1010] the public interest considerations, and the safeguards for the suspect or defendant in the event of some restriction on the right.[1011] Ashworth highlights the strength of the Strasbourg approach,[1012] over the 'balancing' approach of the British courts,[1013] as resting in its ability to 'specify procedures for determining the difficult issues, articulating the public interest considerations, identifying the essence of the right, and looking into the provision of safeguards.'[1014] Ashworth also acknowledges the considerable indeterminacy that nonetheless remains with this approach, such as the lack of any meta-principle to determine how to make the value judgments on the sufficiency of public interest grounds to curtail a right.[1015] Some of the strengths of the triangulated approach of the ECtHR have been undermined since the 2012 Grand Chamber case of *Al-Khawaja* which has moved Strasbourg toward a 'circumscribed and contingent notion of the nature of art.6 rights'. *Al-Khawaja* makes 'balancing' an explicit factor in finding a violation and seems to make the 'essence of the right' constraint no longer exist in substance.[1016] According to the Grand Chamber, even the

[1010] *Ashingdane v UK* (1985) 7 EHRR 528 [57]; *Tinnelly & Sons Ltd v UK* (1999) 27 EHRR 249 [72]; *O'Halloran v UK* (2008) 46 EHRR 21 [62]; *Kennedy* (n 1011) 52 EHRR 4 [190]; *Rowe* (2000) 30 EHRR 1 [61]; *Jalloh v Germany* (2007) 44 EHRR 32 [71], [77], [106], [110]-[117]; Hoyano (n 972) 9
[1011] *Doorson* (n 958) para 70; *Jasper v United Kingdom* (2000) 30 EHRR 441 para 51–53; *A v United Kingdom* (2009) 49 EHRR 29; Hoyano (n 972) 9
[1012] *Rowe v United Kingdom* (2000) 30 EHRR 1 para 61; Hoyano (n 972) 4
[1013] *Brown* [2003] 1 AC *681* [693], [704] (Lord Bingham), 709 (Lord Steyn), 727–728 (Lord Clyde); Hoyano (n 972) 4
[1014] Ashworth, *Human Rights* (n 37) 131
[1015] Ashworth, *Human Rights* (n 37) 131-132
[1016] As the applicants in *Al-Khawaja* (n 861) para 106 encapsulated the 4th Section's judgment; Hoyano (n 972) 6

explicit 'minimum rights' must now be balanced against other competing interests to ascertain whether the fair trial guarantee had been violated.[1017]

Despite the current judicial approach to 'balancing' of both Strasbourg and the UK, the use of civil recovery must be structured by a framework of principle[1018] and the triangulated approach can assist in this endeavour by providing a more meaningful structure for a balancing analysis. In the context of civil recovery being utilised in the fight against grand corruption, we have seen that the 'public interest considerations' include the strong public interest in preventing corruption owing to its destructive, destabilising consequences as well as the public interest in protecting the rights of the accused perpetrators of grand corruption. We have also seen that the 'safeguards' for civil recovery orders under POCA 2002 include that a civil recovery order must not contain any provision which would be incompatible with a Convention right[1019] and a recovery order must not be made if it is not just and equitable to do so when the property has been obtained in good faith.[1020] What do we know about the 'essence' of the right to a fair trial?[1021]

For the incursion by civil recovery into the usual scope of Article 6 to not be condemned as a violation, the State must show that the defendant's essential entitlement to a fair adversarial procedure has been preserved. Neither the ECtHR nor the UK courts have defined the 'essence' concept but Laura Hoyano provides a

[1017] *Al-Khawaja* (n 861) para 145; Hoyano (n 972) 6
[1018] Paul Roberts, 'Excluding Evidence as Protecting Constitutional or Human Rights?' in Roberts and Zedner, *Principles and Values* (n 273) 174
[1019] POCA 2002, ss 266(3)(b)
[1020] POCA 2002, ss 266(4)
[1021] Hoyano (n 972) 4-29

very helpful analysis of this concept. She concludes that the 'essence of the right' means that there is an 'absolute indispensable core to the right which cannot be impaired regardless of the circumstances of any particular instance'. The ECtHR has rarely attempted to define the meaning of 'irreducible core' and a detailed examination of the judgments attempting to do so cannot be undertaken here nor can the difficult questions be explored as to what constitutes the 'very essence' of Article 6.[1022] However, what we can say is this. If there has been a violation of a specific right under Article 6 'the court should consider whether the violation is so serious as to invade the essence of that right'.[1023] Hoyano's reconfiguration of the right to a fair trial proposes that the starting point for this would be delineating the essence of the right to 'ascertain the right's underlying purpose' and then 'determine what is pragmatically necessary to secure that purpose by making the right practical and effective in the particular context'. [1024]

We have seen that Part 5 proceedings cannot be reconciled with Article 6(2) (presumption of innocence) and the minimum rights of Articles 6(3)(a) (right to be promptly informed of the nature and cause of the accusation against a defendant) and 6(3)(d) (guarantee the attendance and examination of witnesses).[1025] These specific rights are arguably part of the 'irreducible core' of the right to a fair trial owing to their breach neither being an example of 'the periphery of the right to a fair trial being infringed' nor an example of 'inadequate counterbalancing measures being taken to

[1022] Hoyano (n 972) 11-13
[1023] Hoyano (n 972) 14
[1024] Hoyano (n 972) 19
[1025] See section 2.1 of chapter 6 of thesis

respect defence rights'.[1026] The presumption of innocence, specificity of charge and the examination of evidence are central to the very meaning of Article 6. The essence of the right to a fair trial has been invaded owing to the assault to the underlying purpose of Article 6(2), 6(3)(a) and 6(3)(d).[1027]

When the three-way adjustment is made between the essence of Article 6, the public interest in the suppression of corruption and protecting the rights of 'defendants', and the safeguards provided by POCA 2002, the case for civil recovery is not made.[1028] When these three factors are considered together, the failure to respect the essence of Article 6 means that the public interest grounds for civil recovery are not justifiable even though there are powerful public interest grounds for the suppression of grand corruption as well as considerable safeguards and exemptions in POCA 2002 to protect the person whose property is the subject of a civil recovery order and to prevent the disproportionate use of the power to make a civil recovery order. Next, we consider the final condition in helping us to assess justifications for civil recovery.

3) Effectiveness Condition: Effectiveness of civil recovery

While efficacy-oriented justifications cannot 'render legitimate a measure that is in principle wrong',[1029] this condition requires that the weakening of certain protections

[1026] Hoyano (n 972) 19
[1027] ibid
[1028] *Doorson* (n 958) para 74; *Van Mechelen* (n 965) para 647; Ashworth, *Human Rights* (n 37) 30-32, 52-55, 57, 64-66
[1029] Ashworth and Zedner, *Preventive Justice* (n 7) 191

of Article 6 can only be justified if civil recovery effectively contributes to the fulfilment of the rights of the victim(s) of grand corruption and/or the public interest to live in a corruption-free society. This condition requires some unpacking. The return of assets raises policy questions and practical considerations as well as serious questions of principle. Is it the State where the assets are located (Holding State) or the State where the assets were misappropriated from (Victim State) that should determine the use of the confiscated assets?[1030] Should asset recovery be deemed to be effective if perpetrators are divested of ill-gotten gains even if confiscated proceeds of corruption are never returned to the Victim State? How should confiscated assets be managed?

This section will first outline the provisions of UNCAC that deal with the return of assets before turning to the obstacles to the appropriate allocation of repatriated assets. Despite the elevation of the 'return of assets' to a 'fundamental principle' of the UNCAC,[1031] the obligation to repatriate confiscated proceeds of corruption only

[1030] Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its Second Session, Held in Vienna from 17 to 28 June 2002 UN Doc A/AC.261/7 (5 July 2002) 8; Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its Sixth Session, Held in Vienna from 21 July to 8 August 2003 UN Doc A/AC.261/22 (22 August 2003) 6; Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' UN Doc A/58/422/Add.1 (7 October 2003) para 48

[1031] Anton Moiseienko, 'The Ownership of Confiscated Proceeds of Corruption under the UN Convention Against Corruption' (2018) 67(3) *International and Comparative Law Quarterly* 669-694, 684; Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' UN Doc A/58/422/Add.1 (7 October 2003) para 48. Article 51 elevates the return of assets to a 'fundamental principle'. However, the Interpretative Notes clarify that '[t]he expression "fundamental principle" will not have legal consequences on the other provisions of [Chapter V UNCAC]'

arises if confiscation takes place on the basis of a final judgment delivered in the Victim State and enforced in the Holding State. Article 57 of UNCAC provides that the Holding State is entitled to keep the confiscated assets subject to the stipulation that 'priority consideration' be given to returning the property to the Victim State or its legitimate owners or, alternatively, compensating the victims.[1032]

According to UNCAC, the repatriation of assets is not a corollary of the confiscation of assets. This is also the case in the UK. A 2018 agreement between the Crown Prosecution Service (CPS), the National Crime Agency (NCA) and the Serious Fraud Office (SFO) did however reaffirm the UK's commitment to returning assets to Victim States, companies or people. The 'General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases' establishes a common framework to, *inter alia*, identify cases where asset repatriation is appropriate and identify suitable means to repatriate the assets to avoid the risk of further corruption.[1033]

Between 2014-2018, the UK authorities secured £49.2 million in compensation for overseas victims in five different cases. In one case, £349,000 was paid to the Kenyan Government following the prosecution of senior executives at a printing firm; the funds paid for 11 new ambulances. In another case, £4.4 million recovered from corrupt oil deals in Chad was transferred to the Department

[1032] UNCAC, Art 57(3)(c); Moiseienko (n 1034) 672-681; Article 35 of UNCAC provides for the return of recovered proceeds to prior legitimate owners and for compensating victims, as a priority over payment to the State

[1033] CPS, 'General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crimes', Para 1 and 3 <www.cps.gov.uk/sites/default/files/documents/publications/General-Principles-to-compensate-overseas-victims-December-2017.pdf> accessed 23 August 2019

for International Development to identify key projects for investment to benefit the poorest in Chad.[1034] The UK has clearly had some success in returning assets to be used for development goals. We must remember though that this Effectiveness Condition is specifically concerned with the effectiveness of civil recovery. We have seen that there is very little empirical research on the benefits of civil recovery over other forms of asset recovery. The rationale underpinning civil recovery is that it is able to overcome the obstacles of criminal confiscation and there are numerous cases where civil recovery has achieved this goal. However, this lack of empirical research makes it difficult to arrive at a rational, evidence-based conclusion on the overall relative effectiveness of civil recovery compared to other forms of asset recovery.[1035]

Even if the empirical research did find that civil recovery is more effective than criminal confiscation this does not automatically mean that civil recovery is effectively contributing to the fulfilment of the rights of the victim(s) of grand corruption and/or the public interest to live in a corruption-free society. As we have seen, UNCAC does not require that confiscated assets must always be repatriated thus Victim States may never receive any of the proceeds of corruption. This begs the

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[1034] SFO, 'New joint principles published to compensate victims of economic crime overseas' (1 June 2018) <www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/> accessed 23 August 2019; Home Office, 'Asset Recovery Action Plan' July 2019, para 57 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815900/20190709_Asset_Recovery_Action_Plan_FINAL_Clean.pdf > accessed 23 August 2019

[1035] World Bank, 'Effectiveness Tracking Anti-Corruption and Asset Recovery Commitments A Progress Report and Recommendations for Action' (World Bank 2011); EP Baumer, 'Evaluating the Balance Sheet of Asset Forfeiture Laws: Toward Evidence-Based Policy Assessments' *Criminology and Public Policy* 245; Ashworth, 'Social Control' (n 37) 263

question: can civil recovery be deemed to be effective under the Effectiveness Condition even if the Victim State never receives any assets? If assets are not returned to the Victim State then civil recovery cannot contribute to the fulfilment of the rights of victim(s) of grand corruption e.g. the fulfilment of the right to health requires funds to provide health services. However, it is possible for the public interest to live in a corruption-free society to still be met if corrupt assets are confiscated but never returned to the Victim State. Notwithstanding the lack of firm empirical support,[1036] the confiscatory objective of asset recovery arguably can contribute to the public interest to live in a corruption-free society owing to the fact that asset confiscation can act as a deterrent to corruption.[1037] As highlighted in the UNODC/World Bank Stolen Asset Recovery Initiative (StAR) report on the management of returned assets

> Every successful recovery of stolen assets represents a victory in the battle against corruption; sending a signal that there is no safe haven for the corrupt; demonstrating that there is no impunity for those that steal from the poor; delivering much-needed resources for national development and poverty reduction.[1038]

It is certainly true that the confiscatory and restorative objectives of civil recovery should both ideally be achieved, nonetheless in practice at times they can conflict. Anton Moiseienko draws attention to the potential consequences of such a conflict

> [A]n excessive focus on the repatriation of stolen assets, as opposed to their confiscation, may be counterproductive and hinder anti-corruption efforts. By its nature, the enforcement of laws that target foreign corruption is bound to be relatively low on the scale of prosecutorial priorities. As long as a time-consuming and high-risk investigation into foreign corruption and/or money

[1036] See section 1.3 of chapter 2 of thesis
[1037] See section 1.3 and 3.1 of chapter 2 of thesis on empirical issues with deterrent effect of asset recovery
[1038] Stolen Asset Recovery (StAR) Initiative, *Management of Returned Assets: Policy Considerations* (World Bank 2009) Xii

> laundering can only result in a surrender of confiscated assets to an overseas jurisdiction, asset recovery will be a hard sell.[1039]

In the light of the realities of resource limitation, one can see how confiscation contingent on repatriation could deter confiscation efforts. If the confiscation of assets in a Host State must result in the repatriation of assets to a Victim State then the Host State might not bother to undertake confiscatory proceedings. Moiseienko therefore concludes that States should be encouraged to divest the perpetrators of their ill-gotten gains even if the confiscated proceeds of corruption are never returned to the Victim State.[1040] Rather than no assets being returned to the Victim State, it ought to be instead insisted that the preferred course of action is the simultaneous encouragement of confiscation and an asset sharing agreement between the Host and Victim State.

Even if the assets are repatriated there is a final obstacle to the return of assets being deemed a success. If there is no effective follow up mechanism then the assets are often re-lost to corruption or inappropriately allocated to sectors in the Host State that have little effect on alleviating poverty.[1041] It is therefore essential that there are appropriate follow up mechanisms in place to ensure that the assets effectively

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[1039] Moiseienko (n 1034) 688-671. Asset recovery serves two distinct objectives: it is confiscatory in the sense that it is solely concerned with depriving the criminal of what is not lawfully his, and it is restorative in that it focuses on restoring the property to the victims

[1040] Moiseienko (n 1034) 688-671

[1041] Basel use of proceeds <www.baselgovernance.org/fileadmin/docs/publications/working_papers/Managing_Prodceeds_of_AR_Final.pdf> accessed 12 July 2019; Daniel and Maton, 'Is the UNCAC?' in Horder and Alldridge, *Modern Bribery* (n 138) 301-305; Simser, 'Asset recovery and kleptocracy' (n 159) 321-332

contribute to the fulfilment of the rights of the victim(s) of grand corruption and/or the public interest to live in a corruption-free society. In practice there are four 'management arrangements' for returned assets. As the first best option, returned assets will generally be channelled through the public financial management systems. If this is not an option there are three alternative management arrangements: enhanced country systems that build on the existing country system with adjustments to improve control systems that are considered weak; autonomous funds which are public entities established through legislation with discrete governance and management arrangements; and nongovernmental organisations which are awarded grants to manage returned assets.[1042]

This last management arrangement is gaining increasing support as a monitoring mechanism to enable a Holding State to control how a Victim State uses the recovered funds. [1043] The Bota Foundation established in 2008 in Kazakstan is one example of this kind of arrangement. The BOTA Foundation, a partnership of Kazakh civil society organisations and the governments of Kazakhstan, the US, and

[1042] StAR, *Management of Returned Assets* (n 964) 11-25

[1043] 'Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases' adopted at the Global Asset Recovery Forum in December 2017 (Global Forum on Asset Recovery Communiqué, 4–6 December 2017); Moiseienko (n 1034) 693-694; Rick Messick, 'Civil Society on Returning Stolen Assets to Highly Corrupt Governments' Global Anticorruption Blog (15 February 2017) <https://globalanticorruptionblog.com/2017/02/ 15/to-experts-attending-february-14-16-meeting-on-managing-disposing-of-stolen-assets/> accessed June 26 2019. See also 'Recovery of Damages and Compensation for Victims of Corruption: UNCAC Coalition statement to the 7th Conference of States Parties in Vienna' UN Doc CAC/ COSP/2017/NGO/7 (20 October 2017); 'Towards a Comprehensive, Effective, Transparent and Accountable Implementation of UNCAC Chapter V: UNCAC Coalition statement to the 7th Conference of States Parties in Vienna' UN Doc CAC/COSP/2017/NGO/2 (20 October 2017)

Switzerland, successfully managed the return of more than US $115 million of disputed assets to improve the lives of vulnerable Kazak children and youth.[1044]

A closer look at the asset recovery cases in Nigeria and the Philippines further demonstrates that effective monitoring of returned assets is key. These countries have seen some of the most important and successful asset recovery cases in the last 20 years. The Philippines had no oversight mechanisms for the management of returned funds whereas Nigeria implemented a significant management programme. As we will see this had consequences for ensuring the poor of each country benefitted from the returned assets. The Philippines government decided that the proceeds from the US $624 million recovered from the Marcos Swiss deposits and other proceeds were to go to the government administered Agrarian Reform Fund set up to finance the Comprehensive Agrarian Reform Program. When the Philippine Commission on Audit audited the fund, it noted that a part of the recovered assets had been used to finance excessive, unnecessary expenses unlikely to benefit the intended agrarian reform beneficiaries. It also concluded that some of the procurement had

[1044] Moiseienko, (n 1034) 689-694; BOTA Foundation, 'The BOTA Foundation: Final Summative Report' (12 February 2015). The establishment of BOTA Foundation results from the prosecution of an American businessman James Giffen for alleged bribery in Kazakhstan under the Foreign Corrupt Practices Act 1977. See also *US v Giffen*, 473 F3d 30 (2nd Cir 8 December 2006); Jacinta Oduor and others, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Stolen Asset Recovery Initiative 2014) 125–128; Alexander Cooley and John Heathershaw, *Dictators without Borders: Power and Money in Central Asia* (Yale University Press 2017) 75–76. See *US v Approximately $84 Million on Deposit in Account No T-94025 in the Name of the Treasury of the Ministry of Finance of the Republic of Kazakhstan*, Case No 2:07-cv-03559 (SDNY 3 May 2007) Verified Complaint

been carried out at inflated prices and that a significant share of the spending had been on unapproved or nonpriority projects.[1045]

In Nigeria, there was comprehensive oversight of the returned funds with the World Bank acting as the neutral third party to monitor the utilisation of resources. The Federal Ministry of Finance decided that assets returned from Switzerland would be utilised to finance its comprehensive economic reform program, and would particularly target specific sectors that could move the country towards achieving the Millennium Development Goals.[1046] The process was not perfect but there were increased allocations in the pro-poor sectors in Nigeria following the repatriation of US $505 million Abacha loot.[1047] A review of 51 projects across the five priority sectors (roads, power, health, education and water) and in Nigeria's six geo-political zones found that the funds allocated to various projects increased budget spending in pro-poor development projects.[1048]

[1045] StAR, *Management of Returned Assets* (n 964) 35. See also Commission on Audits in the Philippines, *Utilization of the Forfeited Swiss Deposits for the Implementation of the Comprehensive Agrarian Reform Program (CARP)* published by the <http://www.coa.gov.ph/GWSPA/2006/CARP.asp> accessed 4 September 2019

[1046] StAR, *Management of Returned Assets* (n 964) 8

[1047] Daniel and Maton, 'Is the UNCAC?' in Horder and Alldridge, *Modern Bribery* (n 138) 301–330. The World Bank was appointed trustee to see that the returned monies were so used. The World Bank has produced a detailed report on the use to which the monies were put <http://siteresources.worldbank.org/INTNIGERIA/Resources/Abacha_Funds_Monitoring_1221.pdf> accessed 17 May 2019

[1048] ICAR, *Working Paper Series 06: Ignasio Jimu Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan* (Basel Institute on Governance 2009) 8-9 < www.baselgovernance.org/publications/working-paper-6-managing-proceeds-asset-recovery-case-nigeria-peru-philippines-and> accessed 12 September 2019

In summary, the return stage of asset recovery is not a simple matter. The threshold for meeting the Effectiveness Condition is that civil recovery contributes to the fulfilment of the rights of victim(s) of grand corruption and/or the public interest to live in a corruption-free society. We have seen that the UNCAC does not require Holding States to always return assets to Victim States, so there are cases where assets are confiscated but never contribute to the rights of victim(s) of corruption. However, even if assets are not returned the confiscation of assets could contribute to the public interest in living in a corruption-free society owing to the potential deterrent effect of confiscation. Further empirical investigation into the deterrent effect of civil recovery on corruption is needed though to draw any firm conclusions. In those cases where assets are returned to the Victim State, there is no guarantee that the returned assets will 'contribute to the fulfilment of the rights of victim(s) of grand corruption' unless there is an effective monitoring system. In the light of these considerations, it is possible for civil recovery to meet the Effectiveness Condition in the following circumstances: 1) if the empirical evidence shows that civil recovery deters corruption even if no assets are returned; and 2) if the assets are returned to the Victim State or if a fair asset sharing arrangement between the Host and Victim State is adopted, and the returned assets are subject to a rigorous monitoring mechanism to ensure that the victims of corruption are the true beneficiaries.

4. Conclusion

We have seen that there are two potential collisions when Article 6 clashes with an individual right (Individual Rights Route). The first potential collision is between the

right of a defendant charged with corruption to examine witnesses and the right of a witness to security (Witness Security Collision). It is important to remember that during a criminal trial for grand corruption, while it is possible for there to exist the threat of imminent danger to a witness this is not sufficient to justify employing civil recovery, instead of a criminal trial, in every case. The second potential collision is between the right to a fair trial of a public official whose property is the subject of a civil recovery order and a direct violation of a CP and/or SE right (Victim(s) of Corruption Collision). It is possible that, on a case by case basis, civil recovery could be justified in instances where criminal confiscation would be impossible owing to the death or flight of a defendant, and especially so when there is also a direct violation by corruption of the Covenant rights. The third potential collision occurs between the defendant's right to a fair trial and a broader public interest in the suppression of grand corruption and/or the right to live in a corruption-free society (Public Interest Route). In cases where there is a conflict between public interests and fundamental rights, only in extreme circumstances ought the public interest override human rights and these criteria should be carefully circumscribed so that the essence of the right is preserved. While combatting grand corruption does meet Dworkin's public interest grounds in *extremis* this does not equate to a justification of the use of civil recovery to combat grand corruption, as it is not the only way to combat corruption and there is not the necessary evidential support to show that civil recovery is the most effective way to combat grand corruption.

According to the Hierarchy of Rights Approach, a higher standard than that of 'necessary in a democratic society' ought to be met to legitimise the weakening of the

Article 6 rights (the 'strict necessity test'). The suppression of grand corruption is arguably necessary for a democratic society but the key empirical question, again, is whether civil recovery is necessary for the suppression of grand corruption. The answer is not yet shown to be positive, except perhaps in cases that criminal confiscation is impossible. According to the Strasbourg Triangulated Approach, the failure to respect the essence of Article 6 means that the public interest grounds for civil recovery are not justifiable despite the powerful public interest grounds for the suppression of grand corruption and safeguards and exemptions in POCA 2002.

It is clear that in order to draw firmer conclusions on the legitimacy of civil recovery, a detailed empirical investigation into the relative success of civil recovery compared to criminal confiscation is required. However, we can nonetheless conclude that if the three conditions are satisfied it is possible to justify, on a case by case basis, employing civil recovery to combat grand corruption. Grand corruption on the scale of the Arab Spring, for example, certainly demonstrates the existence of sufficiently high levels of corruption (*bona fide* Condition). It is at least in theory conceivable that if there is sufficient political will a State could successfully complete the three-step approach to tackling serious crime, and potential justificatory grounds for the weakening of certain protections of Article 6 can be found where Article 6 collides with the rights of a witness and/or the SE and CP rights of the victim(s) of grand corruption and/or the public interest *in extremis* (Human rights/Public Interest Condition). Finally, the Effectiveness Condition can be met if the assets are returned to the Victim State or if a fair asset sharing arrangement between the Host and Victim

State is adopted, and the returned assets are subject to a rigorous monitoring mechanism to ensure that the victims of corruption are the true beneficiaries.

Chapter 8: Conclusion

Asset recovery is a key feature in the re-orientation of criminal justice away from a rights-based approach to a more utilitarian and consequentialist approach focused on security and public protection. Civil recovery is part of a broader recent trend employing the civil law for crime control purposes which undermines principles of criminal justice and human rights. This work has demonstrated the following two theses. First, the grave consequences of grand corruption, coupled with the significant barriers to successful asset recovery, will continue to make the use of civil recovery appealing to politicians, policymakers and anti-corruption specialists. Second, judicial proclivities that interpret asset recovery as preventive will continue to be dominated by consequentialist modes of reasoning that defers to the legislature and invariably leads to a reluctance to scrutinise the 'civil' classification given to civil recovery.

The objections raised to the use of Part 5 proceedings in the context of grand corruption are three-fold in number and interrelated in character. First, despite the importance of effectively recovering the proceeds of grand corruption, the devastating consequences of grand corruption imply that grand corruption ought to be classified as one of the wrongs that is so serious that it should be condemned and punished in the criminal law except only in a very limited number of exceptions, for example death or flight (the criminalisation argument). Second, Part 5 proceedings should be classified as a criminal measure protected by enhanced criminal safeguards since it is in substance punitive in nature (penalisation argument). Part 5 proceedings involve many of the characteristics associated with punishment: censure, hard

treatment and culpability; as well as the relevant authorities possessing significant powers under Part 5 of POCA 2002. Third, even in the context of combatting the serious problem of grand corruption the value of protecting principles of human rights requires that the recovery of assets ought to be subsequent to a criminal conviction and classified as a criminal measure protected by the enhanced criminal safeguards (the human rights argument).

The core values of liberty, autonomy and freedom that underpin human rights are threatened by Part 5 proceedings since assets are recovered without any criminal conviction or any of the enhanced protections of the criminal law. At the same time, the recovery of corruption and repatriation of illicit assets through civil recovery can enhance human rights, in particular social and economic rights, and corrupt acts can in themselves constitute a violation of human rights. Civil recovery can be seen as an example of the dilemmas and complexity that arise where the State is under a duty to respect, protect and fulfil civil and political rights as well as social and economic rights. In the final analysis, the thesis concludes that despite the important potential human rights benefits offered by civil recovery, any weakening of the protections of Article 6 by civil recovery can only be justified in extreme cases when clear criteria are met.

Despite these normative objections to civil recovery, the Strasbourg and UK courts continue to approve of its use in the fight against grand corruption, and beyond. It therefore remains incumbent on the courts to review much more closely than hitherto the use of Part 5 of POCA 2002 in recovering the proceeds of grand

corruption. This thesis offers criteria to assist with determining, on a case by case basis, whether it is justified to employ civil recovery in cases of grand corruption.

Part I provides the necessary factual background and conceptual apparatus to come to a fuller understanding of the contemporary landscape of corruption and asset recovery. Part II undertakes a normative critique of Part 5 proceedings wherein the constitutional limits of Part 5 of POCA 2002 were examined. Part III explores the difficulties of framing and balancing competing rights and duties arising in the fight against grand corruption and provided a framework to allow a more structured analysis of these rights.

Chapter 1 explores the definition of corruption, its significant scale and consequences, together with its relationship to organised crime and money laundering, as well as exploring the main components of the global AML and AC framework. Chapter 2 examines asset recovery as a tool to combat corruption, as well as the theoretical and empirical justifications for its use. The scale of corruption indicates that the level of illicit financial flows is obscene, with incalculable detrimental social and economic consequences.[1049] However, it is only in the past two decades that the international community has begun to invest considerable resources to try to bring an end to this global phenomenon with the widespread adoption of international and regional AC treaties. To effectively combat corruption a global multi-pronged strategy aimed at both the demand and supply side of corruption is required.

[1049] Graycar (n 29) 3-12

We have seen that the international AC and asset recovery framework has been unable to keep pace with the complex global problem of corruption. For example, despite strong political impetus to repatriate corruptly stolen assets to these Victim States and the hard work of the Arab Forum on Asset Recovery (AFAR), only minimal assets have been recovered so far.[1050] The World Bank database reveals that of the asset recovery cases in the Arab Spring countries very few have been completed.[1051] The comprehensive asset recovery provisions under POCA 2002 mean that the UK has in law, at least, sufficient asset recovery powers, but there is considerable evidence to suggest that in practice the UK asset recovery regime is inadequate. There are many barriers to asset recovery. Added to this, pursuing the proceeds of corruption is complex, costly and time-consuming. Civil recovery is viewed by politicians, policymakers and anti-corruption specialists as a helpful tool in overcoming the multiple barriers to asset recovery and anti-corruption measures.

[1050] Dimitris in King, Walker and Gurulé (n 6) 607-608;The Economist 'Making a Hash of Finding the Cash' <www.economist.com/international/2013/05/11/making-a-hash-of-finding-the-cash> accessed 18 April 2019; AFAR <https://star.worldbank.org/ArabForum/About> accessed 16 April 2016 (AFAR established in 2012 and is supported by the G7, the Deauville Partnership with Arab Countries in Transition, as well as key global and regional financial centres); TI, 'New powers needed to recover assets stolen Middle Eastern dictators' (London, 24 November 2016) www.transparency.org.uk/press-releases/just-one-house-recovered-by-uk-from-arab-spring-states/ accessed 19 April 2019; TI, 'Spring Cleaning' <www.transparency.org.uk/publications/spring-cleaning/ accessed 10 April 2019 (analyses the role of the UK in providing a safe haven for corrupt wealth from Middle Eastern rulers)

[1051] Libya: 4 out of 13 asset recovery cases completed; Tunisia: 2 out of 6 asset recovery cases completed; Egypt: 0 out of 5 asset recovery cases completed; Bahrain: 2 out of 2 asset recovery cases completed; Yemen, Syria, and Algeria: no asset recovery cases commenced <https://star.worldbank.org/corruption-cases/assetrecovery/libya?term=libya> accessed 2 August 2019

Part II normatively critiques the Part 5 civil recovery provisions by first undertaking a conceptual analysis of civil recovery and criminal confiscation prior to examining the leading Strasbourg jurisprudence. In Chapter 3, a conceptual analysis of criminal and civil law measures, as well as of punitive and preventive measures, was undertaken. Contrary to judicial determination, the chapter concludes that the conceptual apparatus of civil recovery is fundamentally flawed, *viz*. the conceptual distinctions made between preventive and punitive measures, and between *in rem* and *in personam* proceedings. Furthermore, it concludes that although civil recovery is viewed by the legislature and courts as a civil preventive measure, it also possesses characteristics of criminal punitive measures. The chapter additionally draws the conclusion that the in rem nature of Part 5 of POCA 2002 and subsequent civil classification is based on the legal fiction that it is the property itself that is guilty, and not the person in possession of that property.

In Chapter 4, the leading Strasbourg test used to distinguish criminal from civil measures is applied to Part 5 of POCA 2002 (*Engel v The Netherlands*). The chapter argues that Part 5 proceedings can be determined as criminal under the three *Engel* criteria but it is unlikely that the ECtHR will determine Part 5 civil recovery to be criminal in nature. First, Part 5 of POCA 2002 clearly has punitive, deterrent and retributive elements since, amongst other reasons, it involves censure and hard treatment.[1052] Moreover, the punitive nature of Part 5 is rooted in the fact that the confiscation of property constitutes an interference with the right to

[1052] See chapter 3 and 4 of thesis

property. Such an interference, without a criminal conviction and the necessary protections of the criminal law, is unjustified owing to the vital role this right plays in guaranteeing autonomy, freedom and liberty.[1053] Second, although Part 5 proceedings are not formally contingent on culpability an element of fault nonetheless remains an issue since alleged criminal activity is central to civil recovery proceedings.[1054] Intent remains pivotal owing to *in rem* proceedings being a function of an indirect finding of guilt since the criminality of the origins of the property holding must still be established.[1055] Furthermore, the *in rem* nature of Part 5 of POCA 2002 is based on a legal fiction. Finally, since it is usually the State who instigates Part 5 proceedings, armed with extensive coercive powers, it is difficult to objectively classify these proceedings as civil.

Chapter 5 concludes that despite it being unlikely that the ECtHR will determine Part 5 civil recovery to be criminal in nature it could still fall within the scope of Article 6(2). This is owing to a series of Strasbourg decisions demonstrating that if links between civil and criminal proceedings are sufficiently close then Article 6(2) may still apply. [27] The jurisprudence suggests that if a link can be established between criminal and Part 5 proceedings it would most likely be owing to the presence of incriminating language used in Part 5 proceedings.[28] The jurisprudence strongly suggests that the EctHR will not see a sufficient proximity link obtaining between criminal proceedings and Part 5 proceedings since, in both legislation and

[1053] See section 5 of chapter 3 of thesis
[1054] *Gale* (n 594) [8]; King, 'Using Civil Processes' (n 7) 350; King, 'Civil Forfeiture' (n 15) 8
[1055] Campbell, *Organised Crime* (n 19) 216-218

procedure, Part 5 proceedings are considered independent of criminal proceedings. However, there is one EctHR criminal confiscation case where a breach of Article 6(2) was found owing to the assets being confiscated subsequent to the acquittal of the defendant (*Geerings*). The chapter argues that if the reasoning of this case is applied to Part 5 proceedings that follow an acquittal then there are grounds for claiming a proximity link between Part 5 proceedings and the prior criminal proceedings.[29]

In Part III of the thesis, the difficulties of framing and balancing competing rights and duties arising in the fight against grand corruption are explored. Chapter 6 examines more closely the consequences of civil recovery for fundamental guarantees and protections, concluding that Part 5 proceedings do not meet all of the requirements of Article 6. Chapter 7 examines whether the different interests in civil recovery can be reconciled: on the one hand, the fundamental rights of public officials whose property is the subject of a civil recovery order and on the other hand the social and economic rights of her countrywomen and the wider public interest to live in a corruption-free society. The key question asked is whether the weakening of certain protections of Article 6 by civil recovery can be justified, and if so, what criteria will need to be met to provide sufficient justification to employ civil recovery?

Chapter 6 concludes that insofar as Part 5 proceedings accord with the requirements specified in POCA 2002 and the Civil Procedure Rules that the proceedings meet the general fair hearing requirement of Article 6(1), as well as

the specific requirements of Article 6(1). I determine that if the Part 5 proceedings are conducted according to the overall and specific requirements of Article 6(1) and the minimum rights of Article 6(3)(c)[30] . However, the thesis concludes that the civil standard of proof based on the balance of probabilities is not compatible with Article 6(2) owing to the criminal, punitive nature of Part 5 recovery as well as the characteristics and rationale for the presumption of innocence. This chapter also concludes that Part 5 proceedings cannot be reconciled with the minimum rights of Article 6(3)(a), 6(3)(b), 6(3)(d), and 6(3)(e).

Chapter 7 concludes that despite the important potential human rights benefits of civil recovery, the weakening of certain protections of Article 6 can only be justified when three conditions are satisfied. First, grand corruption on the scale of the Arab Spring, for example, demonstrates the existence of sufficiently high levels of corruption (*bona fide* Condition). Second, it is at least in theory conceivable a State could successfully complete the three-step approach to tackling serious crime; thereafter potential justificatory grounds for the weakening of certain protections of Article 6 can be found where Article 6 collides with: the rights of a witness; and/or the SE and CP rights of the victim(s) of grand corruption; and/or the public interest *in extremis* (Human Rights/Public Interest Condition). Third, the Effectiveness Condition is satisfied when the assets are returned to the Victim State or a fair asset sharing arrangement between the Host and Victim State is adopted, as long as the returned assets are then subjected to a rigorous monitoring mechanism ensuring that the victims of corruption are in the end the true beneficiaries. In order to make stronger inferences, however, on the legitimacy of civil recovery, a detailed empirical

investigation into various aspects of civil recovery is still required. For instance, there is no clear research on the relative success of civil recovery compared to criminal confiscation and the deterrent effect of civil recovery.

There are a number of profound normative and empirical concerns with civil recovery. Alldridge and others elucidate the implications of civil recovery for the right to property and the right to a fair trial.[1056] Alldridge argues:

> [T]he moral claim of the respondent in civil recovery proceedings, when he/she is the alleged perpetrator of the unlawful conduct, is that they are criminal proceedings by another name. They have the effect, where the action is successful, of publicly labelling the respondent (or where the respondent has acquired the property otherwise than as a bona fide purchaser, his/her source) a criminal and, in consequence, of depriving him/her of property he/she considered his/her own.[1057]

It is nonetheless highly unlikely that the executive and judicial branches of the UK will adopt detailed criteria for critically assessing whether employing civil recovery to fight grand corruption is justified. In this prevailing climate of austerity, government resources are stretched and underlying concerns persist with respect to the inadequacies of the more traditional approaches to combatting grand corruption. This calls to mind Dworkin's observation that the institution of rights against the government is a 'complex and troublesome practice', making its job of securing 'the general benefit more difficult and more expensive'.[1058] We must follow Dworkin's call

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[1056] Alldridge (n 13); King (n 6); Gallant, *Money Laundering* (n 5); Boucht, 'The Limits' (n 18)

[1057] Alldridge in King, Walker and Gurulé (n 6) 524. See also Zedner, 'Seeking Security' in Lazarus and Goold (n 22) 268. Zedner identifies the perils inherent in resorting to civil measures for convenience can be set under three headings: procedural, empirical and moral

[1058] Dworkin, *Taking Rights Seriously* (n 983) 236-240

to insist governments 'take rights seriously, follow a coherent theory of what these rights are, and act consistently with its own professions'.[1059] In the context of civil recovery, this would require that civil recovery is consistent with the rights contained in the ECHR. Occupying the real world, however, means we must establish what Lazarus and Goold have described as 'a middle ground between the polarities of pragmatic political responses…and the idealistic preservation of legality'.[1060] The criteria proposed in this thesis can help provide such a middle ground when employing civil recovery to combat corruption. On satisfying the three conditions (*bona fide* Condition, Human Rights/Public Interest Condition, Effectiveness Condition) it becomes possible to pragmatically respect human rights principles. This provision of a structured analysis to civil recovery enables policymakers and the judiciary to incorporate many of the considerations and concerns raised by civil recovery and which have hitherto been typically omitted.

This work has explored the extent to which Article 6 ought to be affected by the seriousness of the consequences of grand corruption.[1061] The thesis concludes that the 'criminalisation' of the civil law[1062] by civil recovery is not aligned with Waldron's insistence that 'rights should have a certain resilience against campaigns

[1059] Dworkins, *Taking Rights Seriously* (n 983) Ch 7; Stephen Guest, *Ronald Dworkin* (SUP 1991) 1-25; Charles Covell, *The Defense of Natural Law* (Martin's Press 1992) 145-180

[1060] Lazarus and Goold, 'Introduction Security and Human Rights: The Search for a Language of Reconciliation' in Goold and Lazarus, *Security and Human Rights* (n 22) 13

[1061] Ashworth, *Human Rights* (n 37)

[1062] Professor Lucia Zedner used this term in Alexa Virdi Confirmation interview on 2 November 2018

for greater security'.[1063] We must heed Zedner's warning in relation to counter-terrorism measures and not allow the prevention of grand corruption to be 'so powerful an aspiration that it trumps other considerations and silences counter veiling concerns'.[1064] Zedner underlines Waldron's pronouncement on the meaning of a commitment to human rights:

> A commitment to rights means that we are willing to forego the increments in safety and convenience that might accrue from infringing certain liberties or basic guarantees.[1065]

The 'increments in safety and convenience' purportedly offered by civil recovery measures are appealing when one reflects on the potential benefits to the millions of victims of grand corruption. However, a more structured analysis of the justifications for civil recovery must be employed by policy makers and the courts. Moreover, empirical support for the 'increments in safety and convenience' offered by civil recovery is conspicuously lacking.

Civil recovery ought to carry with it a 'warning flag'[1066] since in the context of combatting grand corruption it is an example of governments imposing a burden on its 'public officials'. The attendant dangers are eloquently articulated by Lucia Zedner

> Absent the natural political resistance that arise where infringements upon civil liberties are widely shared, it falls to academics, to lobby organisations and, above all, to the courts to exercise presumptive mistrust of the legitimacy of burdens that fall only on minority groups or sub-populations.[1067]

[1063] Zedner, 'Terrorizing Criminal Law' (n 16) 109
[1064] ibid
[1065] Waldron, *Torture* (n 1000) 10; Zedner, 'Terrorizing Criminal Law' (n 16) 109
[1066] Zedner, 'Seeking Security' in Lazarus and Goold (n 22) 273; Cass Sustein, *Laws of Fear: Beyond the Precautionary Principle* (CUP 2005) 216
[1067] Zedner, 'Seeking Security' in Lazarus and Goold (n 22) 273

Central to this thesis is the design of an approach which addresses the 'complex and intractable dilemma' of how a society may best defend itself against grand corruption without incurring 'undue detriment to the security of the individual'.[1068] The principal, overarching goal of an anti-corruption strategy must be the actual *prevention* of grand corruption. However, in those instances in which an appeal is made to civil recovery, the use of civil recovery can only be justified in extreme circumstances, on a case by case basis, and when the criteria identified and argued for in this work have been satisfied.

[1068] Zedner, 'Terrorizing Criminal Law' (n 16) 99-101

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