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978-1-107-05850-7 - Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys

Radha Ivory

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Introduction

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

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

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

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

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

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counterparts to adopt similar standards,⁴ supporting treaty negotiations under the auspices of the Organization of American States (OAS)⁵ and the Organisation for Economic Co-operation and Development (OECD).⁶ Following the conclusion of OAS and OECD conventions in 1996 and 1997 (respectively),⁷ members of the Council of Europe (COE) brokered their criminal law convention and its protocol⁸ with the participation of several other nations, including the US, Canada, and Mexico.⁹ Within the European Communities (EC, now the European Union or EU),¹⁰ two protocols to an earlier convention on the communities' financial interests were being agreed,¹¹ along with a treaty on the corruption of EC officials¹² and, sometime later, a framework decision on

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷ On the conclusion of the UNCAC, see Vlassis, “Challenges in International Criminal Law,” pp. 925–931.

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

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

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

²¹ Posadas, “Combating Corruption,” 348–359.

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

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

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

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

²⁴ Lash, “Corruption and Economic Development,” 87–92.

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

²⁶ Gathii, “Defining the Relationship,” 138–139.

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

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

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

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

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

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

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

³⁰ Pieth, “Recovering Stolen Assets,” p. 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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INTRODUCTION

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

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

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

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

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

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

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