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Combating Economic Crimes

Balancing Competing Rights and Interests in Prosecuting the Crime of Illicit Enrichment

Ndiva Kofele-Kale

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Combating Economic Crimes

In the last decade a new tool has been developed in the global war against official corruption through the introduction of the offense of "illicit enrichment" in almost every multilateral anti-corruption convention. Illicit enrichment is defined in these conventions to include a reverse burden clause, which triggers an automatic presumption that any public official found in "possession of inexplicable wealth" must have acquired it illicitly. However, the reversal of the burden of proof clauses raises an important human rights issue because it conflicts with the accused individual's right to be presumed innocent. Unfortunately, the recent spate of international legislation against official corruption provides no clear guidelines on how to proceed in balancing the right of the accused to be presumed innocent against the competing right of society to trace and recapture illicitly acquired national wealth.

Combating Economic Crimes therefore sets out to address what has been left unanswered by these multilateral conventions, to wit, the level of burden of proof that should be placed on a public official who is accused of illicitly enriching himself from the resources of the state, balanced against the protection of legitimate community interests and expectations for a corruption-free society. The book explores the doctrinal foundations of the right to a presumption of innocence and reviews the basic due process protections afforded to all accused persons in criminal trials by treaty, customary international law and municipal law. The book then goes on to propose a framework for balancing and "situationalizing" competing human rights and public interests in situations involving possible official corruption.

Ndiva Kofele-Kale is a University Distinguished Professor of Law at the Southern Methodist University Dedman School of Law, Dallas, Texas and has written extensively in the areas of corruption and human rights.

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This book is dedicated to my grandson, Motande.

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Ndiva Kofele-Kale
Dallas, Texas, USA
March 2011

Preface

The last two decades have witnessed a paradigmatic shift in criminal law, more particularly in the area of acquisitive crimes, i.e. crimes that generate profit, from the traditional restriction of personal freedom paradigm towards a strategy of confiscating ill-gotten gains. This new "profit-oriented" paradigm—a term whose paternity can be traced to Guy Stessens' groundbreaking study: *Money Laundering: A New International Law Enforcement Model*—is premised on the belief that increasing the effectiveness of legal instruments to detect, seize and confiscate illicitly acquired wealth will cause a decline in the motivation for engaging in criminal activities. *Combating Economic Crimes* is conceived in this vein but with a heavy, albeit, narrow focus on one aspect of recovering the proceeds of corruption, i.e. criminal as opposed to civil proceedings. The latter approach avoids the criminal standards of proof that must be met in criminal prosecutions and raises no compelling constitutional issues. Illicit enrichment being principally a penal offense that entails individual criminal responsibility and for which some form of punishment is warranted, quite naturally fits in the alternative social control paradigm with its primacy on depriving officials found to have unjustly enriched themselves of their fundamental right of personal freedom.

Combating Economic Crimes builds on my previous writings advocating the recognition of the right to a corruption-free society as a fundamental human right. And, as a corollary, recognizing that the systematic plunder of a nation's wealth by constitutionally responsible officials is a crime of universal interest, breach of which entails individual criminal responsibility and punishment. My writings also acknowledge the fact that although all human rights are by definition equal, some rights are considered more equal than others. As a result, in the process of asserting these fundamental rights, conflicts inevitably arise between competing rights. One such unavoidable conflict arises when the *individual* right to be presumed innocent is pitted against the *collective* right to a corruption-free society. It is this doctrinal clash implicit in the crime of illicit enrichment that is the focus of this study. Recent developments in the global war against official corruption have inadvertently set the stage for this clash by providing for the controversial criminal offense of *illicit enrichment* in almost every multilateral anti-corruption convention. Illicit

enrichment is defined in each of these conventions as "a significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income." Built into this definition is a reverse burden clause which triggers an automatic presumption that any public official found in "possession of inexplicable wealth" must have acquired it illicitly. It is then up to that official to explain how he acquired such wealth, and failing to "reasonably explain" the sudden increase in his wealth, in relation to his lawful earnings during the performance of his functions, the official could be found guilty of the offense of illicit enrichment. This has become a very powerful weapon in the global war against official corruption because, by design, reversing the onus helps in easing the prosecution's burden by placing it on the accused on the assumption that the facts to be proved are peculiarly within the knowledge of the accused.

Of course, reversal of the burden of proof clauses raises important human rights issues with respect to the right to fair trial, which implies the right of the accused to be presumed innocent and the right against self-incrimination. It should, however, be pointed out that the international and domestic legal guarantees referred to with respect to an accused's right to the presumption of innocence until proven guilty apply only in criminal cases and do not extend to civil cases. To the extent, therefore, that illicit enrichment is treated as a penal offense, as is the intent in this study, then it can be observed that the three recent international conventions that specifically establish this offense provide no clear guidelines on how to proceed in balancing the right of the accused to be presumed innocent against the competing right of society to appropriately punish corrupt public officials while stripping them of their illicitly acquired national wealth. *Combating Economic Crimes* therefore sets out to address what has been left unanswered by these multilateral conventions, to wit, (1) the type of burden of proof that should be placed on a public official who is accused of illicitly enriching himself from the resources of the State and (2) the right balance to be struck between the accused individual's procedural fair trial rights and the protection of legitimate community interests and expectations of a corruption-free society. The book explores, from a *comparative* perspective, the different factors that courts consider as they try to balance the competing rights and interests that come into play in illicit enrichment proceedings: the collective right to a corruption-free society (or as an anonymous reviewer put it "the communal rights to public goods (officials enrich themselves by feeding on resources that would otherwise be widely distributed—through tax, social services or otherwise—amongst the wider populous") versus the individual right to presumption of innocence and the right to silence.

This study is important for a couple of reasons. First, three multilateral anti-corruption conventions (African Union, Organization of American States and the United Nations) contain provisions for the offense of illicit enrichment and quite a number of countries have enacted legislation criminalizing this conduct. As social pressures to curb ostentatious impunity build up

around the globe more countries will respond by adopting illicit enrichment statutes to punish significant increases in public officials' wealth that cannot be reasonably explained in relation to their lawful income. Faced with the reversal/sharing of burden issues inherent in the crime of illicit enrichment, courts in these jurisdictions will have to address "criminal standards of proof" *not* "evade" them. They will need to come up with a legal framework that will reconcile the burden of proof requirement for illicit enrichment with traditional interpretations of the presumption of innocence and the right not to self-incriminate. A study such as this one, which seeks to elaborate a legal framework for reconciling the competing human rights claims implicit in the crime of illicit enrichment, will prove useful and helpful to law-makers as well as those who interpret and practice the law.

Second, this book is not intended as a primer for prosecutors trying to go around *criminal standards of proof* in favor of *civil proceedings for asset recovery* in corruption-related cases. Instead, it sets out to explore the inherent tension between legitimate community expectations that public officials in positions of trust should be held accountable and responsible for acts of unjust enrichment, on the one hand, and individual rights, as encompassed in the human rights safeguards of presumption of innocence and the right to silence, on the other. Finally, the focus on criminal proceedings is driven by the fact that illicit enrichment is principally a penal offense that entails individual criminal responsibility and for which some form of punishment is called. While there are several strategies in criminal law aimed at curbing acquisitive crimes, the strategy of assets recovery through civil proceedings, favored by several commentators, is one but by no means the only, or most effective, one. The crime of illicit enrichment, as an alternative social control policy, would deprive officials found to have unjustly enriched themselves of their fundamental right of personal freedom. However, these two strategies are not mutually exclusive in the context of illicit enrichment proceedings, though this book advocates the latter.

Needless to say, the views expressed in the book are the author's own unless otherwise stated. And responsibility for errors and omissions rests solely with him.

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TREATIES

1 Criminal law enforcement strategies for combating economic crimes

1.1 REDEFINING THE SCOPE OF HARM REDRESSED BY CRIMINAL LAW

Many writers speak of a quiet revolution taking place in criminal law and law enforcement theory that dates back to the decade of the nineties.[1] As new crimes sprung up, traditional law enforcement instruments were found wanting. The revolution in criminal law sought, therefore, to replace the reigning paradigm in criminal law where policy justifications for depriving "a human being of his fundamental right of personal freedom" were based on "[a]bsolute (retribution) and relative (general prevention, social re-integration, norm stabilization) theories of punishment justification."[2] This traditional approach to criminal law owes its philosophical paternity to the harm principle first articulated by English philosopher and political theorist John Stuart Mill in the nineteenth century. Mill argued that the only time government should interfere with people's liberty is when it is necessary to prevent harm to others. In his groundbreaking book, *On Liberty*, Mill asserts the:

> [v]ery simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That *the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others*.[3]
>
> (John Stuart Mill, *On Liberty*, 21–22 (4th ed. 1869)

The philosopher D. Lyons interprets Mill's harm principle to mean that the state may interfere with individual liberty in one of two situations: to prevent conduct that causes or threatens harm to others or to prevent harm to others.[4]

The nature of the criminal acts for which the criminal justice system prescribed punishment invariably placed some constraints on the reach and

scope of the traditional paradigm of criminal law.[5] Consistent with the harm principle, the state unleashed its most coercive instrument, i.e. interference with individual liberty, only for those crimes which caused a direct harm to an identifiable victim. Furthermore, when such crimes prompted damages of any kind, the criminal justice system had at its disposal a range of legal instruments that it could use to deprive offenders of their illegal profits. A victim "of the offence would most probably institute civil proceedings which would normally result in the restitution of any ill-gotten gains."[6] Finally, since direct harm to an "identifiable victim" was the cornerstone of punishment under the old paradigm, the absence of an injured victim usually meant that offenders were allowed to enjoy the fruits of their crimes.[7]

1.1.1 The new paradigm to combat profit-oriented crimes

Fidelity to Mill's harm principle changed in the post-Second World War era with the rise of new types of crime of an economic nature such as commercial, fiscal or environmental-related crimes.[8] These new economic crimes proved to be quite different in four respects from the ones the criminal justice system was accustomed to addressing. First, they are acquisitive crimes that tend to generate huge profits, hence their description as "profit-oriented" crimes.[9] Second, unlike the old ones these new crimes do not appear to cause any direct harm to any identifiable victim though, as Guy Stessens points out, offenders may reap benefits from them.[10] Third, given the absence of identifiable victims, traditional legal instruments, designed to punish crimes that cause direct harm to an identifiable victim, proved to be of limited utility in judicial attempts to confiscate the proceeds of economic crime:

> Whereas the majority of criminal justice systems were familiar with the more traditional forms of confiscation, namely, the confiscation—often known as forfeiture—of the instruments (*instrumentatum sceleris*), most of these systems did not provide for the confiscation of proceeds from crime (*product/fructa sceleris*).[11]

Lastly, because of the infinite means available for disguising the proceeds of economic crimes, it is extraordinarily difficult to trace and directly link them to their original source: "criminals who, through their criminal activities, dispose of huge amounts of money, need to give this money a legitimate appearance: they need to 'launder' it."[12] Laundering of dirty money helps in covering its tracks thus making it immensely difficult for law enforcement to link it to its criminal origins.

It is against this backdrop that the international community found it necessary to design new legal instruments that can adequately tackle the problem

posed by profit-oriented economic crimes of which illicit enrichment appears to be the newest:[13]

> Attacking criminal profits after they have been earned . . . [has become] a central objective of many criminal law systems aiming at reducing any type of acquisitive crime. The underlying theory is quite straightforward: increasing the effectiveness of legal instruments to detect, seize, and confiscate ill-gotten gains will reduce the motivation for engaging in these criminal activities.[14]
>
> (Jorge, *supra* note 1, at 14)

1.1.2 Illicit enrichment as a profit-oriented economic crime

Illicit enrichment is one of the predicate offenses of corruption,[15] which results from the embezzlement of public funds by high-ranking public servants. It is now part of the criminal law of numerous countries and can be found in the three multilateral conventions that make up the global anti-corruption regime. Illicit enrichment, like much of official corruption, is a stealth activity[16] where direct evidence of its commission is hard to come by,[17] though it can be manifested by the lifestyle and the extraordinarily substantial assets of a public official when compared to his relatively modest salary.[18] Because it is an offense against transparency, the national laws and conventions which establish the crime of illicit enrichment define it as a significant increase in the assets of a public official, which he/she cannot reasonably explain in relation to his lawful income during the performance of his official functions.[19] A "significant increase" in an official's assets has been interpreted to mean not just any increase in wealth in excess of an official's lawful earnings but a significant excess, large and demonstrable, bordering on gross.[20] The assets in question include all earnings the official received for his duties or outside them, provided these outside earnings are not incompatible with his position. The operative word here is *during* the official's performance of his functions as opposed to *based* on the performance of the official's functions.[21] Illicit enrichment is not a random act but one intentionally committed by public officials, usually high-ranking.

1.1.2.1 Targeting the public sector's upper echelon

The crime of illicit enrichment specifically targets public officials[22] and for good reason.[23] We have argued elsewhere[24] that those most implicated in the systematic plunder of national wealth are a particular group of people who hold public trust: heads of state and government as well as other high-ranking constitutionally elected and appointed leaders, their families and closest friends.[25] For example, Chile's former military strongman General Augusto Pinochet, who during his 25 years as head of state earned a modest annual salary that never went above $40,000, is alleged to have hidden $27 million in overseas accounts

under false names. His financial adviser would explain this immense fortune as the product of shrewd and prudent investing![26] Not to be outdone, Nigeria's military strongman Sani Abacha, upon his death in 1998, left behind a fortune estimated anywhere between $2 and $5 billion, all of which he fleeced from the Nigerian people! It is alleged that Abacha used four methods for plundering public assets: outright theft from the public treasury through the central bank; inflation of the value of public contracts; extortion of bribes from contractors; and fraudulent transactions.[27] The corruptly acquired proceeds were laundered through a complex web of banks and front companies in several countries and localities, but principally Nigeria, the United Kingdom, Switzerland, Luxembourg, Liechtenstein, Channel Islands and the Bahamas.

As incredulous as this may sound, the recently ousted Egyptian dictator, Hosni Mubarak, may be richer than Bill Gates, founder of Microsoft! Middle Eastern sources place the wealth of Mubarak and his family at somewhere between $40 billion and $70 billion.[28] By comparison, the world's richest man, Mexican business tycoon Carlos Slim, is worth about $54 billion while Bill Gates' net worth is about $53 billion.[29] How did a former military officer, turned civilian president, whose official monthly salary as president, counting benefits, came to 4,750 Egyptian pounds ($808) in 2007 and 2008, according to a Cairo think-tank,[30] amass so much wealth? Running a country with a suspended constitution for 30 years, Mubarak "was in a position to take a slice of virtually every significant business deal in the country, from development projects throughout the Nile basin to transit projects on the Suez Canal, which is a conduit for about four percent of the world's oil shipment." In a country with no credible system of accountability and transparency, Mubarak "was able to reach into the economic sphere and benefit from monopolies, bribery fees, red-tape fees, and nepotism," according to Professor Amaney Jamal of Princeton University.[31]

Take the case of another dictator, Alberto Fujimori, who in the ten years he was President of Peru (1990–2000) is alleged to have stolen more than $2 billion from the state.[32] His intelligence police chief, Vladimiro Montesinos, was the architect of this vast network of illegal enrichment:

> The main source of theft by Montesinos and his cronies was through the extortion of bribes in awarding national defense procurement contracts. These bribes were hidden from the public based on a legal provision that allowed the executive to deny disclosure of the bidding process on the grounds of "national security." For laundering their proceeds, Montesinos and his cronies used shell companies based in tax haven jurisdictions that were managed by trustees.[33]
>
> (Dumas StAR Report, *supra* note 32, at ¶5.1)

There are other examples of illegal enrichment by high-ranking public servants that give reason for the creation of this new crime. Investigations conducted by the United States Senate on the role U.S. banks have played in protecting the assets of questionable origins revealed that Riggs Bank, one of

Washington D.C.'s most venerable banks, managed more than 60 accounts and Certificates of Deposits (CDs) for the Equato-Guinean government, its officials and their family members with balances and outstanding loans that together approached $700 million in 2003.[34] These investigations also revealed the *unemployed* playboy son of President Teodoro Obiang Nguema of Equatorial Guinea owns a $7.5 million (an amount that was only $300,000 less than his country's external debt in 2001) penthouse apartment in Southern California; that the President himself has a $2.6 million mansion and a $1.5 million second residence for one of his several wives who, for good measure, was allowed to use a bank charge card with a *daily* limit of $10,000. This same president owns a $30 million presidential jet while the son has to make do with a fleet of Ferraris, Lamborghinis and Bentleys.[35]

1.1.2.2 The staggering national toll of illicit enrichment

It is not only the sheer volume of assets looted by high-ranking public officials that has shocked the conscience of the community of nations, but the effect such financial hemorrhaging has had on the political and economic foundation of victim states.[36] Speaking of India, Professor C. Raj Kumar points out that "[t]he appropriation of public assets for private use and the embezzlement of public funds by politicians and bureaucrats have such clear and direct adverse impact on India's economic development that their costs do not warrant any complex economic analysis."[37] He could very well have been speaking of Nigeria where Abacha stole between 1.5 and 3.7 percent of that country's GDP or Peru where the Fujimori/Montesinos tandem succeeded in stealing about 0.1 percent of Peru's GDP for every year in power.[38]According to the UNODC StAR Report:

> [I]t is worth stressing that the true cost of corruption far exceeds the value of assets stolen by the leaders of countries. This would include the degradation of public institutions, especially those involved in public financial management and financial sector governance, the weakening if not destruction of the private investment climate, and the corruption of social service delivery mechanisms for basic health and education programs with a particularly adverse impact on the poor. This "collateral damage" in terms of growth and poverty alleviation will be proportional to the duration of the tenure of the corrupt leader.[39]
>
> (United Nations Office on Drugs and Crime (UNODC), The Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan 11, 23 (2007). [Hereinafter "UNODC StAR Report"] at 8–9)

Assets theft has been made possible because of the complete lack of transparency and established processes of open and accountable government in impacted countries. Add to this the absence of a system of checks and balances, public accountability and strong institutional capacity to keep corrupt public

officials in check.[40] But such is not the only problem common to assets derived through illegal corrupt means. There is also the difficulty in tracing and recapturing them since these assets are usually well concealed, making it almost impossible to follow the paper trail.

1.1.2.3 Future attempts to recoup the spoils of illicit enrichment

Recovery efforts by successor governments in Nigeria and the Philippines in detecting and tracing assets held by General Abacha and President Ferdinand Marcos demonstrate how these can become a *"game of hide-and-seek."*[41] And where they can be traced, the sheer volume of transactions can seriously impede the degree to which a poor country can aggressively mount a successful recovery effort. To track down national wealth stolen by the late Sani Abacha, deposited in over 100 banks spread out across the globe (France, USA, Australia, Germany, Brazil, Monaco, U.K., Liechenstein, Luxembourg, Switzerland, Singapore, Dubai, Hong Kong, Channel Islands, Bahamas, Canada, Lebanon, Italy, Kenya, Sweden, Saudi Arabia and Austria),[42] the Nigerian government retained 70 lawyers for six years at a cost of $14 million.[43] Ferdinand Marcos is reputed to have maintained about 7,270 gold accounts in several Swiss banks, many of them under different names.[44] Given this sheer number of accounts, not surprisingly it has taken over 14 years after Marcos' death, and 17 years of law suits filed by successive Philippines governments before the Swiss government finally repatriated to the Philippines $356 million of the $685 million of Marcos' assets seized from Swiss banks.[45] This is but an insignificant fraction of Marcos' estimated wealth; the bulk of his fortune, estimated at between $5 and $10 billion, remains beyond reach of the Philippines government.[46]

The paper trail problem aside, the presence of *opaque laws* in many "safe haven" states further complicates efforts to recover stolen wealth.[47] The lack of transparency in the banking laws of countries where these funds are located has become a major factor standing in the way of search and seizure efforts. It is against this background that the international community saw the necessity of establishing the crime of illicit enrichment,[48] as a deterrent to corruption among public officials, but also to address "the difficulty faced by the prosecution when it must prove that a public official solicited or accepted bribes in cases where his or her enrichment is disproportionate to his or her lawful income. Once that has been shown, a *prima facie* case of corruption can be made."[49] The obligation of states to consider creating such an offense is left to each state's constitution and fundamental principles of their legal system.

1.1.2.4 Academia and government weigh in on the criminalization of illicit enrichment

The new crime of illicit enrichment has come under strong academic criticism. Some scholars question the need for yet another crime on corruption given that the current anti-corruption legal regime is already saturated. The

introduction of the crime of illicit enrichment into domestic legislation, according to one scholar, raises the problem of "added value,"[50] a sort of overkill. The new crime is uncalled for, moreover, inasmuch as "the central issue in criminal law prevention and suppression of corruption is how to optimize the existing legal framework rather than substituting it with the new one."[51] Rather than encouraging the proliferation of new anti-corruption crimes, the focus ought to be on improving the current system for recapturing illicitly acquired wealth:

> *{i}nstead of introducing a new criminal offence into an anti-corruption legislation, due attention must be paid on how to improve the system of confiscations of illegal proceeds acquired by corruption criminal offences. So, the accent should not be on new criminalization but on improving the already existing system set up to demotivate potential perpetrators from engaging in different forms of illegal exchange*.[52]
>
> (Derencinovic, *supra* note 15)

This criticism fails to take into account the failure of the current assets confiscation regime. The authors of *Biens Mal Acquis* point out: "Ce qui heurte, c'est qu'en dépit des promesses répétées de guerre à la corruption, *seul 1 % à 4 % des avoirs détournés ont été restitués aux populations volées.*"[53] With the plethora of an enhanced assets recovery arsenal in the United Nations Convention against Corruption, less than 4 percent of looted assets have been restituted to the victim populations. Clearly this calls for a re-evaluation of current methods of recapture and repatriation of purloined national wealth and a willingness to explore other methods including illicit enrichment with its built-in reverse onus provision.

With so much at stake, the singular reliance on one method of combating high level corruption to the exclusion of others is dangerous. There are many ways of combating this scourge, as the Commentary to the Inter-American Convention against Corruption acknowledges:

> [s]ome aim at its sources, and involve administrative systems and prevention. These are undoubtedly the best, but we *see no reason why any remedy must be rejected*. Others aim at individuals and involve criminal sanctions. This is not the best solution, but it is a necessary path, without which prevention itself is lacking in basis. The concept of illicit enrichment belongs to the second category of methods, but may be easily linked to a preventive measure, the property declaration by officials. This is the classification of crimes that most completely corresponds to *the effects of the offense*, as it is *aimed directly at the purpose that the corrupt official pursued, the acquisition and display of property*.[54]
>
> (Manfroni Commentary, *supra* note 13 at 69)

Aside from this wrong-headed approach on new criminalization, the criminalization of illicit enrichment in domestic penal codes, as the various multilateral anti-corruption conventions demand, risks transforming this new

crime into an instrument that can be manipulated by the government for political ends.[55] This fear is real, especially in countries where the judiciary is dominated by the executive branch and where the choice of which criminal cases to prosecute is not left entirely to an impartial prosecutorial team. In such countries, and there are many, powerful ruling elites can declare open season against political opponents, in government as well as outside, and use the crime of illicit enrichment to settle political scores. Additionally, because the crime, as defined in international conventions and domestic penal laws, operates on a presumption that a public official's wealthy lifestyle must be the result of wealth that was acquired through illicit means, this could provide an opportunity for "false accusations and similar crime reports not supported by tangible pieces of evidence."[56] Even when these accusations are later proved to be false, the damage to the official's reputation would already have been done.

One of the principal reasons for establishing the crime of illicit enrichment is the need to respond to the "notorious evidential difficulty" of proving bribery:

> For instance, when the accused in an official corruption proceeding is a high-ranking official, like a former head of State, the prosecution's efforts can be seriously hampered because of the official's clout. Thus, rather than requiring the prosecution to initially prove the illicit nature of the official's assets, these multilateral conventions have in their infinite wisdom opted for reversing the onus on the accused official to explain how he came about to possess such sudden wealth. The offense of illicit enrichment therefore aims at curtailing official corruption, and it does so under the assumption that easing the burden on the prosecution will lead to an increase in the number of cases brought against suspected high-ranking State officials.[57]
>
> (Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis,* 40 Cornell Int'l L.J. 691, 728–729 (2007)

The Commentary to the Inter-American Convention, the first of such multilateral treaties to address the problem of illicit enrichment, gives a taste of what was in the minds of its drafters in these terms:

> During the general discussions, we noted that the concept of illicit enrichment is particularly useful for the people of Latin America, whose states frequently *lack the effective high-technology resources to detect offenses at the precise moment they occur.* We also noted that *this weakness is combined with mockery of the law* in the form of the material ostentation demonstrated by their officials, with the people having no means of determining on what particular occasion, out of the thousands available to public agents, an offense was committed, or even the innumerable offenses that gave rise to the enrichment.[58]
>
> (Manfroni Commentary, *supra* note 13, at 69)

Illicit enrichment addresses the legal need to circumvent the hurdles of meeting the burden of proof in corruption cases, and the problem of gathering evidence.[59] This, however, raises a two-fold problem. First, the risk of transforming illicit enrichment into a "sexy crime" and second, the likelihood that the burden-shifting built into the crime could dampen the ardor of prosecutors to diligently search for hard evidence to convict. Professor Derencinovic fears that prosecutors could rely on this new crime as a "magic bullet" granting it "absolute precedence over all the other corruption criminal offences as well as other offences in which perpetrators go for the acquisition of pecuniary gain."[60] Furthermore, rather than engaging in the often "very difficult searches for evidence with usually unpredictable outcomes," prosecutors would rather rely on an illegal enrichment statute which shifts the burden of proof to the accused public official.[61]

The utilitarian value of illicit enrichment as a tool to combat corruption has also come under attack. As a crime, illicit enrichment, it is believed, only adds marginally to the global war against grand corruption and nothing more. Since the crime targets only public officials, other forms of corruption, particularly private sector corruption, are excluded from its scope. As a consequence, its potential as a normative anti-corruption tool is very limited.[62] Some legal scholars have warned against the rush to legislate this offense in national penal codes because it might mean "prescribing a remedy that is worse than the ailment" given the far more superior alternative means available, such as the assets-disclosure requirement, of achieving the objective of this provision.[63]

Perhaps the one aspect of the crime of illicit enrichment that has raised the most objections, from governments as well as legal scholars, is its reverse onus provision. For this reason one scholar believes that the offense, as currently defined in treaty law, is "fundamentally flawed as a matter of recognized principles of criminal justice."[64] In reviewing the proposal for this book, an anonymous reader observed that with the exception of the 1996 Inter-American Convention against Corruption:

> [A]ll the other international instruments only "recommend" criminalization of illicit enrichment or "unexplained wealth." In other words, these treaties do not provide for reversing the burden of proof. As a consequence, most OECD countries, including the US, Canada, EU members—except for France—and Switzerland have not criminalized illicit enrichment. Moreover, the USA and Canada, as signatories of the OAS Convention, have signed specific reservations on the provision of illicit enrichment. This does not mean that those countries are not facing questions with regard to the presumption of innocence when fighting economic crimes. Questions usually arise from new anti-money laundering statutes and ancillary provisions for confiscating and forfeiting proceeds of any economic crime—not only corruption. Those procedures touch on the presumption of innocence in a slightly different way from the one proposed by the author. In most instances, they only share (it is

> not even a reversal) the burden of proof after conviction, for separate confiscation procedures.[65]
>
> (Anonymous reviewer of book proposal: Combating Economic Crimes)

While acknowledging the merit of this objection, the Commentary to the Inter-American Convention, nonetheless, dismisses the attempt to raise the issue of the constitutionality of the crime of illicit enrichment as a red herring: "If the state stipulates a penalty for those officials whose property does not correspond to their lawful earnings, it violates no constitutional principle. This legislative policy is no threat against equality, because such a constitutional guarantee only imposes consistent treatment in similar situations."[66] From the point of view of the drafters of the Inter-American Convention, the crime of illicit enrichment is nothing more than a reflection of legislative policy aimed at instilling transparency and accountability in governance. Like all policies, this one is subject to different opinions and interpretations without necessarily impeaching its constitutional legitimacy.

The drafters of the Inter-American Convention are also categorical on the fact that the offense of illicit enrichment, as defined in the convention, does not include a reverse onus. All that the offense requires is for a public servant to demonstrate that he did not commit an offense:

> Simply stated, a failure to demonstrate this constitutes a classification of crimes. Demonstration is not subsequent to the offense. If it can be demonstrated, the employee cannot even be accused. There are countries in which the possession of weapons without a permit from specific authorities is an offense. It would not occur to anyone that the need to show such a permit would be a reversal of the burden of proof. The same applies to tax regulations in many states.[67]
>
> (Manfroni Commentary, *supra* note 13, at 71)

In other words, there are situations where it is sensible and reasonable to allow departures from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Possession of a firearm without a permit is one such obvious case. In cases similar to this, common sense dictates that the prosecution should not be required to shoulder the "virtually impossible task of establishing that a defendant" does not have a permit to bear arms when it is so much simpler for the defendant to establish that he has a permit![68]

Legislative policy or not, it is, however, true that of the three multilateral anti-corruption treaties, only the Inter-American Convention against Corruption mandates states who are parties to criminalize the offense of illicit enrichment in their domestic penal codes. The other two—the African Union Convention on Preventing and Combating Corruption and the United Nations Convention against Corruption—merely recommend its criminalization. That notwithstanding, quite a number of countries have enacted legislation crimi-

nalizing this conduct, among which are a majority of Latin American states that already had, or have subsequently adopted, domestic legislation criminalizing illicit enrichment (Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Panama, Paraguay, Uruguay, Venezuela, to mention but a few). Equally important, public officials in some of these countries (Argentina, Ecuador and Mexico) have been prosecuted under illicit enrichment statutes. As social pressures to curb ostentatious impunity build up around the globe, more and more countries will respond by adopting illicit enrichment statutes to punish significant increases in public officials' wealth that cannot be reasonably explained in relation to their lawful income.

1.1.2.5 Reconciling illicit enrichment with due process safeguards

Some countries, notably those within the common law orbit, consider the crime of illicit enrichment as inconsistent with constitutional provisions relating to due process safeguards. It is on this basis that Canada and the United States entered reservations in their instruments of ratification to the 1996 Inter-American Convention against Corruption. Both countries chose to opt out of the convention's obligation to establish illicit enrichment as a crime in implementing these instruments in their domestic law. But it is worth noting that only Canada and the United States elected to opt out of the illicit enrichment provision while the overwhelming majority of the signatories, including several common law jurisdictions in the Caribbean, saw no inherent conflict between that provision and their constitutional safeguards with respect to presumption of innocence and the privilege against self-incrimination, i.e. the right to silence and the right not to produce evidence. Equally of some interest is the more recent United Nations Convention against Corruption, which came almost a decade after the Inter-American Convention was adopted, provides for the offense of illicit enrichment, included at the insistence of a number of the developing nations![69] It should be noted that the U.N. Convention together with the two regional anti-corruption conventions offer a powerful incentive to states that criminalize illicit enrichment by promising them mutual legal assistance from other states parties when prosecuting this offense.

Understandably the reverse onus built into the crime of illicit enrichment poses a serious problem with respect to the due process right to fair trial, specifically, the presumption of innocence and the privilege against self-incrimination. Compromising this fundamental principle in the interest of combating unexplained material gains by public officials strikes some as a "highly doubtful" and undesirable course.[70] The right to fair trial, as will be discussed in detail in Chapter 3, is guaranteed in the International Covenant on Civil and Political Rights (ICCPR). Article 14(2) provides: "*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*" This fundamental principle of the criminal

law has a distinguished and ancient pedigree in legal systems around the world and is one of the most important guarantees of a fair trial provided by international human rights law.[71] A statement of its meaning has been given by the European Court of Human Rights when interpreting the equivalent article in the European Convention on Human Rights and Fundamental Freedoms (Article 6(2)): "*It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.*"[72] Under international law, the right to be presumed innocent may not be derogated from except in a time of officially proclaimed state of emergency and then only "to the extent strictly required by the exigencies of the situation."[73] International law is so protective of this right that even during a state of emergency, fundamental judicial guarantees, including the right to be presumed innocent, should not be so limited as to undermine their fundamental purpose to protect the individual from arbitrary exercise of power.[74]

A reverse onus by definition shifts the burden onto the accused to prove some matter the effect of which is that he is not guilty of the offence charged. The onus might relate to criminal activity in one of three ways: (a) by requiring the accused to prove the absence of one of the elements of the *actus reus* of the offense or (b) prove the absence of a specified *mens rea* or (c) prove the existence of a defense.[75] It is argued that the crime of illicit enrichment imposes a mandatory presumption that the unexplainable increase in assets (*actus reus*) during an official's tenure in public service suggests intentional participation in corrupt activities (*mens rea*). The onus is then placed on the accused public official to prove the absence of the *actus reus* or the absence of a *mens rea.* Critics see in this arrangement a challenge to the presumption of innocence recognized in international treaty law.[76] This view treats the presumption of innocence as something so sacrosanct that derogations from it cannot be justified. That, however, is not the case, as we shall demonstrate in greater detail in a subsequent chapter.

1.1.2.5.1 The palatability of reverse onus provisions

Reverse onus exists in common law jurisdictions beginning with the general defense of insanity. This aside, criminal law is replete with reverse onuses. In the criminal law of England, for instance, reverse onuses are found in 40 percent of all indictable statutory offenses,[77] "extend[ing] across the entire range of seriousness, up to and including murder, where the defendant bears the burden of proving the statutory partial defence of diminished responsibility."[78] That these reverse onuses are statutorily imposed by express words or by necessary implication clearly suggests that the legislator intended the defendant to bear the burden of proof of the statutory defense.[79] To the extent that criticism of the crime of illicit enrichment is reduced to the incompatibility of its reverse onus to the presumption of innocence then it is well

founded. But after having recognized this incompatibility, it would be disingenuous not to acknowledge also that circumstances exist where a reverse onus does not automatically offend the presumption of innocence.

It is along these lines that the view that the illicit enrichment provision in anti-corruption conventions appear to require a *mandatory* presumption of guilt has not gone unchallenged. It has been urged in some circles that the provision is not *per se* contrary to the presumption of innocence because it does not presume guilt,[80] but rather a permissive inference. In this respect, it is consistent with the due process guarantees found in treaty law as well as many national laws including U.S. law.[81] Were the situation to be reversed, that would clearly offend the fundamental principle of criminal law where the prosecution carries the burden of proving the guilt of an accused on a beyond a reasonable doubt standard. The reverse burden provision in illicit enrichment statutes clearly does not disturb this arrangement. All that it does is to provide a rebuttable presumption allowing the defense to show that the origins of the accused's assets are legal and were not obtained through corruption. This is the view taken by the authoritative legislative guide for the implementation of the United Nations anti-corruption convention:

> [T]he illicit enrichment offense, in which the defendant has to provide a reasonable explanation for the significant increase in his or her assets, *may in some jurisdictions be considered as contrary to the right to be presumed innocent until proven guilty under the law.* However, the point has been clearly made that *there is no presumption of guilt and that the burden remains on the prosecution,* as it has to demonstrate that the enrichment is beyond one's lawful income. It may thus be viewed as *a rebuttable presumption.* Once such a case is made, the defendant can then offer a reasonable or credible explanation.[82]
>
> (United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the United Nations Convention against Corruption, 1, 103–4 (2005))

The objection to reverse onus on the grounds that it derogates from the presumption of innocence or the right to fair trial by requiring that a defendant be convicted unless he can prove certain facts as part of his defense begs the question: in the first place, whether or not a reverse onus is repugnant to the presumption of innocence depends on the nature of the burden placed on the defendant. Students of evidence distinguish between "legal" burden, which is sometimes called the "persuasive" burden, of proof and the "evidential" burden.[83] A defendant who bears a legal burden will lose if he fails to persuade the fact-finder of the matter in question on the balance of probabilities. An evidential burden in relation to a matter is a burden adducing sufficient evidence to raise an issue regarding the existence of the matter. The burden of disproof will then fall on the prosecution in accordance with the normal rule. The significance of this distinction, as Ian Dennis points out, is that evidential burdens are regarded as compatible with the presumption of

innocence[84] since they do not require the accused to assume the risk of being convicted because he fails to prove some matter relating to his innocence. Thus if a legal burden imposed by a reverse onus provision is found to be incompatible with the presumption of innocence, courts can "read down" the legal burden to an evidential burden.[85] The crucial question, therefore, remains, whether the crime of illicit enrichment places a legal burden or an evidential burden on the accused public official. Courts should not make this determination in the abstract but on a case-by-case basis.

The reluctance to accept the reverse onus in the crime of illicit enrichment also fails to take into account the fact that the presumption of innocence is not absolute and that interference with it may be justified.[86] The question then is when will such interference be justified? It should be understood that when a treaty or a domestic statute places a burden of proof on a defendant, whether expressly or by implication, it is because the draftsman or the legislator intended the defendant to bear that burden. Rather than an *a priori* rejection of the reverse onus, the focus should be on a review of the jurisprudence on the presumption of innocence with a view of identifying the tests—reasonableness and proportionality—that have developed to reconcile two competing legal and policy objectives. The focus should be on establishing whether the reversal of the ordinary burden of proof is fair and reasonable in resolving the particular social problem that the crime of illicit enrichment has been enacted to address and whether *a fortiori* the state can deprive a defendant of the protection normally guaranteed by the presumption of innocence, i.e. where the burden of proof is traditionally placed upon the prosecution to prove beyond reasonable doubt all the matters in issue. Second, whether the exception is proportionate, that is to say, whether it goes no further than is reasonably necessary to achieve that objective? These issues will be taken up in Chapter 6.

Finally in reviewing the compatibility of reverse onus with the presumption innocence and other fair trial rights, it is important to keep in mind that rules regulating the burden of proof seek only to ascertain the acceptable level of risk and who should bear it in each case. These rules "exist because fact-finding by a court can never be without the risk of error and because, at times, courts cannot determine the facts at all."[87] The deference accorded these procedural fair trial rights is aimed at minimizing as much as reasonably possible the risk of error in the proceedings that determine whether a person is to be punished by the state for criminal conduct and to ensure that an accused is reasonably protected from the risk of error."[88] It follows, therefore, that where a reverse onus is not likely on its face to create an *unacceptable* risk of convicting an innocent public official, the *mechanistic* deference placed on the presumption of innocence can be relaxed.

1.1.2.5.2 Contending with self-incrimination

A second major objection to the crime of illicit enrichment is its effect on the constitutional guarantee against self-incrimination. Because a reverse onus

requires the accused to provide, under pain of conviction, oral or written evidence to exculpate him or herself, it is argued that this demand undermines the immunities that go with the right to fair trial. But the constitutional guarantee against self-incrimination is not absolute. It follows, therefore, that courts are at liberty to draw inferences from the silence of a defendant. In the important case of *John Murray v. United Kingdom,* the European Court of Human Rights ruled that a court may draw common sense inferences from the silence of the accused when it evaluates the evidence, provided the prosecution has made out a *prima facie* case.[89] If the prosecution's evidence is sufficiently strong that it is reasonable to ask an official to explain how he or she acquired disproportionate assets, failure of the accused to speak "may as a matter of common sense allow the drawing of an inference that there is no explanation and the accused is guilty."[90] In situations where an accused official is prosecuted for illicit enrichment on weak evidence and the court's judgment depends mostly on the accused to explain his or her wealth, it may be said that the burden of proof has shifted and that the accused has not been considered innocent as required by law. Courts have read into the illicit enrichment statute acceptable presumptions that must, however, be shown to be reasonable by the prosecution and may subsequently be rebutted by the accused by means of reasonable explanation. The willingness of courts to allow limitations on the right to silence and the privilege against self-incrimination defangs the objection to illicit enrichment as an infringement on the right to fair trial.

2 Criminalization of illicit enrichment in domestic law

Although the offense of "illicit enrichment" is established in the three most important multilateral anti-corruption conventions, only the Inter-American Convention uses mandatory language in proscribing it. Article IX states:

> Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.
>
> (1996 Inter-American Convention against Corruption, Art. IX)

The other two conventions, the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption, use non-mandatory language, such as the language used in Article 8 (1) of the A.U. Convention: "subject to the provisions of their domestic law, State Parties undertake to adopt necessary measures to establish under their laws an offence of illicit enrichment." Unlike the Inter-American Convention, both the U.N. and A.U. Conventions leave it up to the states parties to adopt legislation criminalizing illicit enrichment.[1] As a consequence, some states parties with a long and sordid history of high-level official corruption have elected not to criminalize the offense of illicit enrichment. Such is the case with Nigeria, which recently overhauled its anti-corruption regime but chose not include the offense of illicit enrichment in the definition of acts of corruption.[2]

The use of non-mandatory language in two conventions coupled with the example of the reservations and understandings attached to the United States' and Canada's ratifications to the Inter-American Convention have lead to speculations that only a few states parties to these instruments will be predisposed to adopt domestic legislation criminalizing the offense of illicit enrichment. Since these doubts continue to be raised about the scope of criminalization of this offense in national legal systems, this chapter will canvass the practice of a representative sample of national laws in an effort to demonstrate that the process of criminalizing the offense of illicit enrichment

is far more widespread than previously believed. This survey of national penal codes will show that the roll-call of states that have criminalized illicit enrichment in their domestic law is both broad and fairly representative of the universe of legal systems; it includes states drawn from all the world's major legal systems, continental civil law and Anglo-Commonwealth common law, in Europe as well as in the Third World. It is safe to assume that long before the publication of this study many more countries around the globe will have jumped on the bandwagon by making illicit enrichment a criminal offense.

2.1 ILLICIT ENRICHMENT IN DOMESTIC EUROPEAN LAW

Croatia: under article 338 of the Penal Law of Croatia, any official or responsible person in bodies of state government and units of local self-government and bodies that performed public services, who used his or her position or authority by giving preference in public tenders, or by giving, taking over or agreeing business, in order to obtain proprietary profit for his or her private activity or for private activity of a family member, is punishable by imprisonment of not less than six months and not more than five years.

Cyprus: The Confiscation of Proceeds of Trafficking of Narcotic Drugs and Psychotropic Substances Law of 1992[3] codifies the offense of unjust enrichment. Article 4 (1) of the law provides: (1) For the purposes of this Law: (a) All payments which have been made to the accused or to any other person at any time whether before or after the commencement of this Law in connection with drug trafficking carried on by him or another person *are deemed to be proceeds of drug trafficking*; and (2) The court may for the purpose of determining whether the accused has benefited from drug trafficking and of assessing the value of his proceeds of such trafficking *make the following assumptions unless the contrary is proved in the circumstances of the case of the accused*: (a) That any property acquired by the accused after his conviction or transferred to him at any time during the last six years prior to the commencement of criminal proceeding against him was acquired by him as a payment or reward in connection with drug trafficking carried on by him, at the earliest time at which he appears to the court to have acquired it. (b) that any expenditure of his since the beginning of that period was met out of payments or rewards received by him in connection with drug trafficking carried on by him; (c) that, for the purpose of valuing such property he received the property free of any charge and interests of other person in it.

In Iceland, the crime of illicit enrichment is regulated by section 14 of the Criminal Code, which deals with offences committed in public positions, and by articles 128, 129, 136 and 138 of the Criminal Code.

Lithuania: the offence of illicit enrichment by public officials, including elected officials, is regulated by article 285 on office abuse; article 282 on accepting a bribe; article 283 on undue remuneration; article 284 on

suborning; article 319 on commercial subornation; and article 320 on accepting an illicit payment.

Luxembourg: the relevant articles of the Penal Code covering this offence are those dealing with embezzlement, extortion and corruption (arts. 240, 241, 243, 251 and 256).

In New Zealand, the Crime Act of 1961 covered both active and passive corruption of judicial officers, Members of the Executive Council, Ministers of the Crown, Members of Parliament, law enforcement officers and other officials. In addition, the Income Tax Act of 1994 provided various offences related to tax evasion.

Romania:[4] Law 115/1996 was enacted in Romania to abrogate Law 18/1968 and control illicit wealth of certain public officials by requiring them to submit financial disclosure forms, thereby creating a financial disclosure system that was intended to help track illicit enrichment.[5] And Law 144/2007 was enacted to establish the National Integrity Agency, the purpose of which is to organize a system to examine asset disclosure declarations in order to help in the investigation of unexplained wealth of public officials, among other objectives.[6]

Sweden: the crime of illicit enrichment is covered in part by the provisions on bribery. Furthermore, the origin of the enrichment has to be disclosed, according to the taxation law. If the enrichment is illicit, action could normally be taken on the basis of the legal provisions on bribery. This also applies to elected representatives.

United Kingdom: the United Kingdom has not yet explicitly established an offense of illicit enrichment but has a range of statutes that address various aspects of acquisition of inexplicable wealth by public servants. For instance, the Prevention of Corruption Act, 1991; Chapter 64, s. 2[7] provides "Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from His Majesty or any Government Department or public body, the money, gift, or consideration *shall be deemed* to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved."

The Road Traffic Act 1988[8] is another anti-corruption statute. Section 5 provides "If a person drives or attempts to drive a motor vehicle on a road or other public place, or is in charge of a motor vehicle on a road or other public place, after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is *guilty of an offence*. It is a *defence* for a person charged with an offence under subsection 1(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit."

Section 11 of the Terrorism Act of 2000[9] provides "A person *commits an offence* if he belongs or professes to belong to a proscribed organisation. It is a *defence* for a person charged with an offence under subsection 1 to prove that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and that he has not taken part in the activities of the organisation at any time while it was proscribed."

2.2 ILLICIT ENRICHMENT IN THE DOMESTIC LAW OF LATIN AMERICAN AND CARIBBEAN STATES

Argentina: the crime of illicit enrichment is codified in article 268 of the Penal Code of the Argentinean Nation [Código Penal de la Nación Argentina],[10] as modified by articles 38 and 39 of Law No. 25.188 Ethics in the Exercise of Civil Service Duties [Ética en el Ejercicio de la Función Pública] of 1999.[11] Article 268(1) proscribes public officials from utilizing, with intention to profit, secret information obtained by reason of their office. Article 268(2) punishes public officials who do not justify an appreciable increase in their assets with imprisonment of two to six years, a fine of 50 to 100 percent of the value of the enrichment, and absolute perpetual incapacitation. Article 268(3) provides for imprisonment of 15 days to 2 years and special perpetual incapacitation for those public officials who are required to present a sworn declaration of assets and maliciously omit to do so.

In 2007, Maria Julia Alsogaray appealed her conviction for illicit enrichment to the Supreme Court of Justice arguing that article 268(2) of the Penal Code was invalid.[12] More specifically, she argued that the indeterminate structure of the crime of illicit enrichment affected the principle of legality; that, by starting from a presumption of culpability, the crime of illicit enrichment violated the presumption of innocence and affected the constitutional right against self-incrimination; that it discriminated against public officials by providing them less protection than the rest of society; and that the crime of illicit enrichment established a kind of "covert and unacceptable imprescriptibility."[13] The Supreme Court of Justice, however, rejected these arguments and dismissed the appeal.

The Bahamas: illicit enrichment has not yet been established as a criminal offense in the Bahamas. The Proceeds of Crime Act, however, assists in the prosecution of illicit enrichment.[14] Under article 46, a police officer may seize any cash for up to 96 hours (or up to three months by order of a Stipendary and Circuit Magistrate) if he has reasonable grounds for suspecting that the cash will be used for, or represents direct or indirect proceeds of, criminal conduct.[15] Article 6 further clarifies that the gifts caught by the Act include those derived from drug trafficking and other relevant offences, whether the gifts are direct or indirect transfers of property.[16] And article 59 establishes that a civil standard of proof shall be used in any proceeding under the Act,

under which any question of fact—except those that are for the prosecution to prove—shall be decided on a balance of probabilities.[17]

The Bahamian penal code also provides for the prosecution of public officers for the withholding of public money under article 235, which establishes a penalty of three months imprisonment and discharge from office.[18]

Bolivia: article 22 of Bill No. 510/2007 Of the Battle against Corruption, Illicit Enrichment and Fortune Investigation [Proyecto de Ley de Lucha contra la Corrupción, Enriquecimiento Ilícito e Investigaciones de Fortunas],[19] approved on February 21, 2008, attempts to codify and incorporate article 149 bis, titled "Illicit Enrichment" [Enriquecimiento Ilícito], into the Bolivian Penal Code. If promulgated, article 149 bis would punish those who, in the exercise of civil service duties, increase their assets without justifying the legal source of the increase, with loss of freedom of 8 to 12 years, incapacitation in the exercise of civil service duties and/or elected office, imprisonment for up to 500 days, and the confiscation of the illegally obtained goods.

Chile: article 241 bis of the Penal Code of the Republic of Chile [Código Penal de la República de Chile],[20] which was incorporated into the Penal Code by article 12 of Law No. 20.088 Establishing as Obligatory the Sworn Declaration of Assets by Authorities Exercising Civil Service Duties [Establece como Obligatoria la Declaración Jurada Patrimonial de Bienes a las Autoridades que Ejercen una Función Pública],[21] criminalizes unjustified enrichment. Under article 241 bis, public employees who obtain a significant and unjustified increase in assets are punished with a fine equivalent to the amount of the unlawful increase in assets and with the penalty of temporary absolute incapacitation. An individual who is wrongfully accused of acts of illicit enrichment has recourse to the civil courts for indemnification for damages for the material and moral harm suffered. The right to civil damages for a wrongfully accused public servant is without prejudice to any criminal responsibility his accuser bears.

Colombia: the crime of illicit enrichment is codified in article 412 of the Penal Code of Colombia,[22] as modified by article 14 of Law No. 890,[23] which increases the maximum and minimum penalties. Under article 412, public servants who, during their involvement with the administration, or who have ceased to function as civil servants two years after their public service, obtain an unjustified increase in assets, incur imprisonment and incapacitation in the exercise of their civil service rights and duties for 96 to 180 months, and a fine equivalent to double the value of the enrichment without exceeding the equivalent to 50,000 legal minimum monthly salaries in force.

Costa Rica: article 45 of Law No. 8422 Against Corruption and Illicit Enrichment in the Civil Service [Ley contra la Corrupción y el Enriquecimiento Ilícito en la Función Pública][24] codifies the crime of illicit enrichment, while article 69 of the aforementioned law derogates subsection 4) of article 346 of the Penal Code, which previously dealt with illicit enrichment. Article 45 punishes with imprisonment of three to six years those who increase their assets by illegitimately taking advantage of the exercise of civil service duties.

A public servant is subject to the sanctions of this statute if he takes into "custody, the exploitation, the use or administration of public funds, services or goods, under any title or manner of management, by himself or through an intermediary person, natural or juridical." Under article 45, a public official commits an act of illicit enrichment if he uses his office to acquire goods, enjoy rights, cancel debts or extinguish obligations that affect his assets or those of juridical persons in which he is a shareholder either directly or through other natural or juridical persons.

Dominican Republic: although issues of corruption in the Dominican Republic have generally been addressed through articles 174 to 183 of the Penal Code of the Dominican Republic [Código Penal de la República Dominicana],[25] the National Congress was attempting to explicitly criminalize illicit enrichment through the Bill That Sanctions Illicit Enrichment and Influence Peddling [Proyecto de Ley que Sanciona el Enriquecimiento Ilícito y el Tráfico de Influencia].[26] Article 1 provides that any public officer or employee who, taking advantage of his duties, obtains economic benefits that are not expressly authorized by the law, commits the crime of illicit enrichment and will be punished with the penalty of imprisonment of five to ten years, a fine of 100,000 to 2 million pesos, and the confiscation of the economic benefits obtained. Article 6 further provides the penalty of civic degradation for those found guilty of illicit enrichment and/or influence peddling.

An abuse of public office also occurs when a civil servant provides or tries to provide economic advantages to family members, close friends, associates or relatives. Bail is denied anyone charged with the crime of illicit enrichment and eligibility for parole is unavailable to those convicted of the crime.

Ecuador: illicit enrichment is criminalized under Chapter VIII, of Title III, of Book 2 of the Penal Code,[27] which was incorporated by article 2 of Law No. 6, published in the Official Registry Supplement 260 of August 29, 1985, and amended by Law No. 47, published in the Official Registry Supplement 422 of September 28, 2001.[28] Chapter VIII, titled "On Illicit Enrichment" [Del Enriquecimiento Ilícito], provides that the unjustified increase of the assets of a person, produced by reason or consequence of the holding of a public office or the exercise of civil service duties, that is not the result of his legally received income, constitutes illicit enrichment, which may be punishable with two to five years of imprisonment and the restitution of double the amount of the enrichment. Article 296-C of the law on illicit enrichment enumerates the persons who fall under it: public servants or state employees who manage funds of the Central Bank, the Credit System of Promotion and Commerce, and the Ecuadorian Institute of Social Security.

El Salvador: illicit enrichment is addressed in article 240 of the Constitution of the Republic of El Salvador [Constitución de la República de El Salvador][29] and is criminalized by article 333 of the Penal Code of the Republic of El Salvador [Código Penal de la República de El Salvador].[30] Under article 333, the public official, public authority, or public employee who, by reason of his

office or his duties, obtains an unjustified increase in assets, is penalized with imprisonment of three to ten years and special incapacitation for the exercise of that office or employment. The same penalties are provided for the person used as intermediary to dissimulate the unjustified increase in assets. A public official is presumed to have committed the crime of illicit enrichment "when the increase in capital of the public official . . . from the date in which he assumed office until that in which he ceased his duties, is notably superior to that which he normally would have been able to obtain, by virtue of the salaries and emoluments that he has legally received and of the increases of his capital or his income by any other just cause." The public servant's assets for purposes of this law include those of his spouse and children.

The period for calculating any unjustified increase of a public servant's assets is determined by his declared assets before the Supreme Court of Justice, 60 days following the date in which he assumed public office, and at the time he resigns from office or is terminated. A ten-year statute of limitations is prescribed, during which actions for unjustified enrichment can be initiated.

Guatemala: on November 17, 2008, the Legislation and Constitutional Issues Commission of the Congress of the Republic of Guatemala [Comisión de Legislación y Puntos Constitucionales del Congreso de la República de Guatemala] gave a favorable ruling to the Law Against Illicit Enrichment [Ley Contra el Enriquecimiento Ilícito],[31] which codifies Bill 3894, Bill 3919 and Bill 3963. Article 15 of the Law Against Illicit Enrichment attempts to incorporate article 448 bis, titled "Illicit Enrichment" [Enriquecimiento Ilícito], into the Penal Code of Guatemala. Article 448 bis provides that public officials or employees who, during the holding of their office or the exercise of their civil service duties, and up to five years after having ceased their duties, increase their assets or personal expenses in a manner that is notoriously superior and disproportionate to that which they normally would have been able to obtain, commit the crime of illicit enrichment. Those found guilty of illicit enrichment are penalized with imprisonment of five to ten years, a fine of 50,000 to 500,000 quetzals, the confiscation of the unlawfully obtained assets, and special incapacitation for double the time of imprisonment imposed.

Before recommending passage of the Law Against Illicit Enrichment, the Employment Commission examined the low percentage of convictions for crimes involving corruption by public officials and employees, noting that "impunity and corruption are phenomena that constantly interrelate in Guatemala, to such a degree that they have become structural problems that cut across society, going beyond ideological, religious and economic boundaries."[32] Moreover, in the Exposition of Motives of Bill 3894 That Sets Out to Approve the Law Against Illicit Enrichment, the Congress of the Republic of Guatemala further provides its motivation to criminalize illicit enrichment, explaining:

> [T]he antisocial behaviors, in which those who perform civil service duties prioritize their spurious interests over the collective interest to enrich

> themselves with money that does not belong to them, have been evolving into forms that are more difficult and complex to categorize, and thus it is necessary to legislate on the product of such behavior, which consists in an excessive increase in assets that they are unable to reasonably justify.[33]
>
> (Bill No. 3894 That Sets Out to Approve the Law Against Illicit Enrichment], September 1, 2008 (Guat.)

Thus, as noted by the Congress of the Republic of Guatemala, the Law Against Illicit Enrichment seeks to protect the assets of the state while also preventing, detecting and sanctioning the crime of illicit enrichment in Guatemala.[34]

Guyana: the criminalization of illicit enrichment by public officials and by elected representatives is regulated by paragraph (a) of the Code of Conduct of the Integrity Commission Act of 1997 and section 27 of the Integrity Commission Act of 1997, respectively. Furthermore, article 41 of the Integrity Commission Act provides for the possession of unaccounted property or pecuniary resources by public figures.[35] Under article 41, if a person who is or was in public life is found to possess property or pecuniary resources disproportionate to their known source of income, the person may be liable to a fine and imprisonment for a term not less than six months nor more than three years, unless that person provides adequate evidence that the property or pecuniary resource was acquired by lawful means. In addition to the Code of Conduct and the Integrity Commission, the Criminal Law (Offences) Act, under the bribery and corruption title, also penalizes gratification through illicit means.[36] Under article 334, any public servants (including those expecting to become public servants) who receive any gratification other than legal remuneration for doing or forbearing from doing any official act may be guilty of a misdemeanor and liable to up to three years of imprisonment.[37] Article 335, on the other hand, prohibits any person from taking a gratification in order to influence a public servant by corrupt or illegal means.[38] Similarly, article 336 prohibits any person from taking a gratification in order to induce, by the exercise of personal influence, a public servant to do or forbear from doing any official act.[39] And article 337 provides for punishment of up to three years of imprisonment for those public servants who abet either of the two previous offences.[40]

Honduras: illicit enrichment is addressed in article 233 of the Political Constitution of the Republic of Honduras [Constitución Política de la República de Honduras][41] and is criminalized under articles 7 through 10 of Decree No. 301 Law Against Illicit Enrichment of Public Servants [Ley Contra el Enriquecimiento Ilícito de Servidores Públicos],[42] while article 32 of the aforementioned decree addresses the penalties.[43] Similar language from both article 233 of the Constitution and article 8 of Decree No. 301 provides that illicit enrichment is presumed when the increase in capital of the public officer or employee, from the date in which he assumed his office until that in which he ceased his duties, is notably superior to that which he normally would have been able to obtain by virtue of the salaries and emoluments that

he legally received and of the increases of his capital or his income by any other cause. Article 7 addresses other situations in which illicit enrichment may occur, while article 9 provides that the burden of proof over the circumstances indicated in articles 7 and 8, the burden of proof relative to the amount of income and ordinary expenses and that which tends to prove the legality of the increase in capital, rests on the public servant. Article 10 further provides that the assets constituting the judicially proven illicit enrichment will become the property of the state, and article 32 provides various degrees and lengths of imprisonment depending on the amount of the enrichment.

Jamaica: the Jamaican parliament has criminalized illicit enrichment through section 14 of the Corruption Prevention Act of 2000.[44] Under section 14(1)(b), an act of corruption is committed when a public servant "in the performance of his public functions does any act or omits to do any act for the purpose of obtaining any illicit benefit for himself or any other person."[45] More specifically, under section 14(5), a public servant shall be liable for illicit enrichment where the assets he owns are disproportionate to his lawful earnings and the public servant fails to give a satisfactory explanation as to how he came by such assets.[46] A person convicted of illicit enrichment, in the case of a first offence, may be liable to a fine not to exceed five million dollars, or imprisonment for up to five years, or both; and in the case of a second offence, to a fine not to exceed ten million dollars, or imprisonment for up to ten years, or both.[47] But, under section 14(5A), it shall be a defense for a public servant accused of illicit enrichment to prove that he acquired the assets by lawful means.[48]

Mexico: article 224 of the Federal Criminal Code [Código Penal Federal][49] codifies the crime of illicit enrichment, which it defines as existing when a public servant is unable to verify the legitimate increase of his assets or the legitimate source of the goods under his name. Those who beneficially commit illicit enrichment are punished with the confiscation of the illicit goods, a term of imprisonment, a fine, and/or destitution and incapacitation, the severity of the penalties depending on whether the amount to which the illicit enrichment ascends does or does not exceed the equivalent to five thousand times the minimum daily salary in force in the Federal District of Mexico.

Most importantly for the purposes of this study, the Supreme Court of Justice of the Nation has held that, although article 224 recognizes the existence of a presumption of the illicitness of the enrichment, it does not violate the principle of the presumption of innocence because it is the Attorney General's duty to present incriminating evidence and the defendant to provide evidence in his defense that "tends to destroy or dispel the evidence adduced by the prosecution."[50] Moreover, in an *Amparo* action, the Supreme Court of Justice of the Nation upheld the constitutionality of article 224, rejecting the argument that it contravened the principles of presumption of innocence and of not reversing the burden of proof.[51]

Nicaragua: the Bill Against Corruption Exercised by Public Servants [Iniciativa de Ley Contra la Corrupción Ejercida por Servidores Públicos],[52]

which was introduced on September 10, 2007 and is currently under review by the Probity and Transparency Commission {Comisión de Probidad y Transparencia}, attempts to criminalize unjustified enrichment in Nicaragua. Articles 19 through 24 address the procedures to determine whether there has been an unjustified enrichment and, once established, the steps to be taken. The penalties are explained by article 22, which provides that the assets constituting the unjustified enrichment will become property of the state once there is a final ruling, and article 39, which provides that public officials or public employees who, in the exercise of their duties, obtain an increase in assets in disproportionate relation to their income and which they are unable to justify, will be penalized with imprisonment of three to ten years and absolute incapacitation to hold public office.

The National Assembly explains, in the bill's exposition of motives, that the proposed law is intended to "serve the Comptroller General of the Republic as a swift tool to combat corruption and reduce its harmful effects on public morale and ethics."[53] The bill was proposed after a detailed study of doctrine, jurisprudence and comparative law, and its main objective is to bring about more transparency in the civil service and to detect the behaviors that produce an illicit enrichment.

Panama: article 335-A of the Penal Code of Panama {Código Penal de Panamá}[54] criminalizes illicit enrichment, while articles 5 through 9 of Law 59 of 1999 That Enforces Article 299 of the Political Constitution and Dictates Other Dispositions Against Administrative Corruption {Ley Que Reglamenta el Artículo 299 de la Constitución Política y Dicta Otras Disposiciones Contra la Corrupción Administrativa}[55] proscribe unjustified enrichment. Article 335-A provides that a person who, when properly required, does not justify the source of an asset enrichment acquired from the time the public office or employment was assumed and until one year after cessation, will be penalized with imprisonment of two to five years, a 100 to 365-day fine, and incapacitation for the holding of public office for a period equal to the time of imprisonment. The imprisonment will be augmented to four to ten years, however, if the amount of the enrichment exceeds the sum of 100,000 balboas. Similarly, article 5 of Law 59 proscribes unjustified enrichment, defined as existing when a public servant or ex public servant, during the holding of his office or within the year after the end of his duties, finds himself in possession of goods, either by himself or through an intermediary person, natural or juridical, that exceed those declared or that are proven to surpass his economic means, and is unable to justify their origin.

Paraguay: the proscription against illicit enrichment is found in articles 1 through 6 of Law No. 2.523/04 That Prevents, Typifies, and Sanctions Illicit Enrichment in the Civil Service and Influence Peddling {Ley Que Previene, Tipifica, y Sanciona el Enriquecimiento Ilícito en la Función Pública y el Tráfico de Influencias}.[56] Article 3 provides that public officials commit the crime of illicit enrichment when they either obtain goods, rights or services, the value of which surpass their legitimate economic means, or cancel debts or

extinguish obligations that affect their assets, those of their spouse or partner and their relatives, under conditions that surpass their legitimate economic means. Illicit enrichment is penalized with a prison sentence of one to ten years, special incapacitation for one to ten years,[57] and special confiscation of the illegitimately obtained assets.[58]

Peru: illicit enrichment is codified in article 401 of the Penal Code,[59] which provides that a public official or public servant who, on account of his office, illicitly enriches himself, will be penalized with a term of imprisonment of five to ten years. Illicit enrichment is evinced when, taking into account the public official's sworn declaration of assets and income, his personal assets and/or personal expenditures are notably superior to that which he normally would have been able to obtain by virtue of his wages and emoluments or any other legal source of income.

In *State v. Novoa Robles*, the Supreme Court of Justice of the Republic explained that, in cases of illicit enrichment, "the evidence presented during the criminal proceeding must undeniably prove the disparity or the notable contrast between the assets acquired and their economic value held unlawfully by the public official or public servant during or after assuming public office in relation with what they would have had prior to the assumption of office."[60] Because the state was unable to categorically prove that Jorge Ricardo Novoa Robles, the Attorney General of the city of Cajamarca, had illicitly enriched himself, the presumption of innocence was not defeated and the accused was acquitted.

Trinidad and Tobago: illicit enrichment is not yet a crime under the law of Trinidad and Tobago although valiant attempts have been made in the past to introduce such legislation. The Prevention of Corruption Amendment Bill of 2001 was introduced to the House of Representatives with the intention of creating an offence of illicit enrichment in Trinidad and Tobago, but the bill lapsed and was never passed.[61] Section 8 of the Prevention of Corruption Amendment Bill attempted to introduce the offence of illicit enrichment. The new section 5A would have read:

> 1 The Chief Commissioner or any officer of the Commission, authorized in writing, by the Chief Commissioner may investigate any person holding public office where there are reasonable grounds to suspect that that person—
>
> a maintains a standard of living above that which is commensurate with his present or past known sources of income or assets; or
> b is in control or possession of pecuniary resources or property disproportionate to his present or past known sources of income or assets.
>
> 2 Where a person fails to give a satisfactory explanation to the Chief Commissioner or the officer conducting an investigation under subsection (1), as to how he was able to maintain such a standard of

> living or how such pecuniary resources or property came under his control or possession, the significant increase in pecuniary or other resources shall be deemed to be illicit enrichment for the purposes of this section and that person shall be guilty of an offence.
>
> 3 Where a court is satisfied in proceedings for an offence under subsection (2), having regard to the closeness of the relationship of the accused to any other person and to other relevant circumstances, there is reason to believe that that person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift or loan without adequate consideration from the accused, such resources or property shall, until the contrary is proved, be deemed to have been under the control or in the possession of the accused.[62]
>
> (Prevention of Corruption Amendment Bill, 2001, No. 152, Vol. 40 (Trin. & Tobago), s. 8)

The parliament has yet to take a stand on the question of illicit enrichment; however, sections 76 and 78 of the Constitution of Trinidad and Tobago include the following provisions, respectively, which apply to all public officials: "Except with the permission of the Commission, an officer shall not accept any gifts from any member of the public or from any organization for services rendered in the course of his official duties" and "An officer who is offered a bribe shall immediately inform the Permanent Secretary or Head of Department who shall report the matter to the Police and advise the Commission." As for elected representatives, the Integrity in Public Life Act No. 8 of 1987 establishes that every person in public life, including members of the House of Representatives, ministers, parliamentary secretaries, permanent secretaries and chief technical officers, are required to file an annual declaration of income, assets and liabilities with the Integrity Commission. A person who fails to file a declaration or makes a false declaration is guilty of an offence and is liable on summary conviction to a fine and imprisonment of two years.

Uruguay: although the Oriental Republic of Uruguay has not explicitly criminalized illicit enrichment, it has attempted to criminalize the illicit increase in assets of public officials through article 9 of the Anti-Corruption Law No. 17.060 Dictating Rules Regarding Abuse of Public Power (Corruption) [Ley Anticorrupción: Dictanse Normas Referidas al Uso Indebido del Poder Público (Corrupción)],[63] which incorporates articles 163 ter and 163 quater into the Penal Code. Under article 163 ter, those authorities and public officials who are required to provide a sworn declaration of assets and income that obtain an increase in assets as a consequence of the perpetration of any of a number of listed economic crimes will be considered to have committed those crimes under "special aggravating circumstances." Article 163 quater further provides for the confiscation of the goods or assets obtained as a direct or indirect result of any of the listed economic crimes.[64]

Venezuela: articles 46 through 51 of the Law Against Corruption [Ley Contra la Corrupción][65] proscribe the crime of illicit enrichment in Venezuela, while article 73 provides for imprisonment for those public officials who incur an unjustified increase in assets. Article 46 provides that public officials engage in the crime of illicit enrichment when, in the exercise of their duties, they obtain an increase in assets disproportionate to their income, that they are unable to justify and that does not constitute another crime. Public servants who come under the ambit of this law include those who by law are required to submit a sworn declaration of their assets before taking office as well as those who illegally obtain a profit from the execution of contracts entered into with any state-run entities. A number of factors are taken into account in determining whether a crime of illicit enrichment has occurred such as (a) the net worth of the person under investigation; (b) the value of the assets which were the object of the illicit enrichment in relation to the amount of the accused person's ordinary income and expenses; (c) the exercise of acts that reveal a lack of probity in the holding of the public office and that are causally related to the alleged enrichment; and (d) the advantages derived from the execution of contracts with any of the entities indicated in article 4 of the law.

Article 48 further provides that the goods and assets that constitute the illicit enrichment, by mere fact of the final ruling of the court, will become the property of either the affected entity or the National Public Treasury. And article 73 provides that the public official who, in the exercise of his duties, obtains an increase in assets disproportionate in relation to his income, that he is unable to justify, that was properly required to do so and that does not constitute another crime, will be penalized with imprisonment of three to ten years. The same penalties are provided for the person used as intermediary to dissimulate the unjustified increase in assets.

2.2.1 Summary of Latin American and Caribbean legislation on the crime of illicit enrichment

The foregoing analysis shows that most Latin American and Caribbean countries have codified the crime of illicit enrichment in their Penal Codes, for instance, Argentina, Chile, Colombia, Costa Rica, Panama and Peru. A few of them have elected to address the crime directly through their constitution. Such is the case with El Salvador and Honduras, while others are still discussing the law of illicit enrichment through legislative bills (e.g. Bolivia, Dominican Republic, Guatemala, Nicaragua and Trinidad and Tobago). Regarding the nature of the crime, these Latin American/Caribbean statutes do not necessarily identify the elements of the crime by separating the *actus reus* from the *mens rea*. Rather, there seems to be a trend towards making the crime of illicit enrichment a kind of strict liability offense (the only requirements generally being the holding of public office and the unjustified increase in assets). Nonetheless, some countries do explicitly include a *mens rea* requirement (e.g.

Argentina requires "intention to profit" and, in Mexico, those who represent as belonging to them goods acquired in contravention with the law against illicit enrichment, "with knowledge of this circumstance," incur criminal responsibility).

2.3 ILLICIT ENRICHMENT IN THE DOMESTIC LAW OF AFRICAN, ASIAN AND MIDDLE EASTERN STATES

Building on the Latin American and Caribbean foundation, a representative sample of statutes from common law jurisdictions as well as non-European civil law jurisdictions that criminalize the offense of unjust enrichment demonstrates just how widespread state practice on this issue has become. Even though a number of these countries have objected, on due process grounds, to the reverse burden clauses implied or expressed in the three international conventions that have addressed the issue of illicit enrichment, they have not let this principle stand in the way of the war against official corruption.

Algeria: pursuant to Order No. 156-66 of 8 June 1996, acts of illicit enrichment by public officials, including by elected representatives, is punishable under various forms of criminal offences, in particular treachery, transfer of public funds, abuse of power, bribery, acceptance of commissions from contracts, auctions or tenders committed at the time when the defendant was in office.

Ghana: Chapter 24, Section 286 of the 1992 Constitution of Ghana[66] provides "A person who holds a public office mentioned in clause (5) of this article shall submit to the Auditor-General a written declaration of all property or assets owned by, or liabilities owed by, him whether directly or indirectly, within three months after the coming into force of this Constitution or before taking office, as the case may be, at the end of every four years; and at the end of his term of office. Failure to declare or knowingly making false declaration shall be a contravention of this Constitution and shall be dealt with in accordance with article 287 of this Constitution . . . Any property or assets acquired by a public officer after the initial declaration required by clause (1) of this article and which is not reasonably attributable to income, gift, loan, inheritance or any other reasonable source *shall be deemed* to have been acquired in contravention of this Constitution."

India: under section 20(1) of the Prevention of Corruption Act:[67] "Where, in any trial an offence punishable under s 7 or s 11 or cl (a) or cl (b) of sub-s (1) of s 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it *shall be presumed, unless the contrary is proved*, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned

in s 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate."

In Iraq, the issue was covered by the Penal Code, the Civil Service Law and the Code of Conduct of State and Socialist Sector Officials.

Kenya: Kenya's 2003 Anti-Corruption and Economic Crimes Act[68] provides in its section 2 (2) that a person is guilty of an offense if the person: a) receives or solicits, or agrees to receive or solicit, a benefit to which this section applies if the person intends the benefit to be a secret from the person being advised; or:

> (3) gives or offers, or agrees to give or offer, a benefit to which this section applies if the person intends the benefit to be a secret from the person being advised c) bribery; d) fraud; e) embezzlement or misappropriation of public funds; f) abuse of office; g) breach of trust; h) an offense involving dishonesty – in connection with any tax, rate or impost levied under any Act; or under any written law relating to the elections of person to public office.
>
> (Kenya: Anti-Corruption and Economic Crimes Act, No. 3, §40(2))

Nigeria: section 8 of Nigeria's Corrupt Practices and Other Related Offenses Act[69] provides "If in any proceedings for an offence under this section it is proved that any property or benefit of any kind, or any promise thereof, was received by a public officer, or by some other person at the instance of a public officer from a person-holding or seeking to obtain a contract, license, permit, employment or anything whatsoever from a Government department, public body or other organisation or institution in which that public officer is serving as such; concerned, or likely to be concerned, in any proceeding or business transacted, pending or likely to be transacted before or by that public officer or a government department, public body or other organisation or institution in which that public officer is serving as such; and acting on behalf of or related to such a person; the property, benefit or promise shall, unless the contrary is proved, be *presumed* to have been received corruptly on account of such a past or future act, omission, favor or disfavor as is mentioned in subsection (1)(a) or (b)."

Hong Kong: Hong Kong was among the first countries to criminalize illicit enrichment through the offence of possession of inexplicable wealth. Under section 10 of the Prevention of Bribery Ordinance, the possession of unexplained property by a public officer, either by maintaining a living standard above that which is commensurate with his present or past official emoluments or by being in control of property or resources disproportionate to his present or past official emoluments, is considered a punishable offence, unless the public officer provides a satisfactory explanation.[70] Section 12 provides that a public officer convicted under section 10 may be liable to a fine of up to one million dollars and a prison term of up to ten years.[71] And section 12AA further provides that, where a person is convicted on indictment under section 10(1)(b), the court may also order the confiscation of the unexplained assets.[72]

Several issues have been litigated since the Prevention of Bribery Ordinance was first adopted in 1971. In *Attorney General v. Cheung Chee-kwong*, for example, the Privy Council held that the word "or" in section 12(3)—which provides that a court may require the defendant to pay a penalty of a sum not exceeding the amount of unexplained pecuniary resources "or" the value of the unexplained property—should be read conjunctively, as it is read in section 10(1)(b).[73] In so finding, the Privy Council noted that:

> [The provisions dealing with the offence of possession of inexplicable wealth] were manifestly designed to meet cases where, while it might be difficult or even impossible for the prosecution to establish that a particular Crown servant had received any bribe or bribes, nevertheless his material possessions were of an amount or value so disproportionate to his official emoluments as to create a prima facie case that he had been corrupted.[74]
>
> (Attorney General v. Cheung Chee-kwong, [1979] 1 W.L.R. 1454, 1462 (P.C.) at 1457)

And, more recently, in *Attorney General v. Hui Kin-hong*, the Court of Appeal of Hong Kong found that the reverse onus provision under section 10(1)(a) was justifiable in light of the nature of the offence and the inherent difficulty of obtaining adequate evidence, and thus was consistent with the Bill of Rights of Hong Kong.[75]

Singapore: Singapore has not explicitly criminalized illicit enrichment, but has established several corruption prevention measures.[76] Under section 5 of the Prevention of Corruption Act, any person who corruptly solicits or receives any gratification for doing or forbearing from doing any action in which a public body is concerned shall be liable to a fine of up to 100,000 dollars, or imprisonment for a term of up to five years, or both.[77] Similarly, under section 6, both the agent (which includes "a person serving the Government or under any corporation or public body"[78]) that corruptly receives any gratification and the person that corruptly offers any gratification, shall be guilty of an offence and be liable to a fine of up to one hundred thousand dollars, or imprisonment for a term of up to five years, or both.[79] And, under section 8 of the Act, a presumption of corruption exists in those cases where it has been proven that the gratification was paid to a member of the government or a public body, or was given by a person seeking to have any dealing with the government or a public body.[80]

Moreover, Singapore's Penal Code also provides for corruption offenses by or relating to public servants. Under article 161, for example, any public servants (including those expecting to become public servants) who receive any gratification other than legal remuneration as a motive or reward for doing or forbearing from doing any official act may be liable to up to three years of imprisonment, or a fine, or both.[81] And article 165 provides for punishment of up to two years of imprisonment, or a fine, or both for any public servant who accepts any valuable thing for no consideration, or inadequate consideration,

from a person concerned in any proceeding or business transacted by such public servant.[82] Article 162 further provides for punishment of up to three years of imprisonment, or a fine, or both, for any person who accepts a gratification in order to influence a public servant by corrupt or illegal means.[83] Similarly, under article 163, any person who accepts a gratification as a motive to exercise personal influence with a public servant may be liable to up to one year of imprisonment, or a fine, or both.[84] And article 165 provides for punishment of up to three years of imprisonment, or a fine, or both for those public servants who abet either of the two previous offences.[85]

Worth mentioning is the Misuse of Drugs Act,[86] which has a built-in reverse burden provision. Section 17 of the Misuse of Drugs Act provides that "[a]ny person who is proved to have had in his possession more than— . . . whether or not contained in any substance, extract, preparation or mixture *shall be presumed* to have had that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose." Section 18 of the Act states: (1) Any person who is proved to have had in his possession or custody or under his control—anything containing a controlled drug; the keys of anything containing a controlled drug; the keys of any place or premises or any part thereof in which a controlled drug is found; or a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug, shall, *until the contrary is proved, be presumed to have had that drug in his possession*. (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug. (3) The presumptions provided for in this section shall not be rebutted by proof that the accused never had physical possession of the controlled drug.

South Africa: illicit enrichment *per se* is not an offense in South Africa, but it could be regarded as corruption, which is regulated by section 1, paragraph 1, of the Corruption Act of 1992 (Act No. 94 of 1992). As far as elected representatives were concerned, the Executive Members' Ethics Act of 1998 (Act No. 82 of 1998) introduced a code of ethics governing the conduct of members of the Cabinet, deputy ministers and members of provincial executive councils. The Act required that Cabinet members, deputy ministers and members of executive councils disclosed their financial interests, as well as gifts and benefits of a material nature received by them after the assumption of the office. South Africa's Public Protector was obliged to investigate any alleged breach of the code of ethics on receipt of a complaint.

This brief survey of the criminal law of a representative sample of states confirms that the process of criminalizing the offense of illicit enrichment is well underway and is far more widespread than many believe. These sampled national penal codes show that the number of states that have criminalized illicit enrichment in their domestic law is not only broad but representative of the world's major legal systems.

3 Reversing the burden of proof in international and domestic law

3.1 THE SCOPE AND RATIONALE FOR REVERSE BURDEN CLAUSES

This chapter explores the concept of burden reversal, the rationale for having it and its evolution in criminal prosecution. Legislative response (at both the international and domestic levels) to the problem of unexplained wealth, in the hands of constitutionally responsible leaders, has been in the form of provisions in a number of multilateral anti-corruption conventions and municipal criminal statutes that penalize the possession of inexplicable wealth. These conventions and criminal statutes define the crime of "illicit enrichment" as "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions."[1] The intent behind the offense of "illicit enrichment" is to allow the prosecution to prove corruption much more easily by removing any requirement to demonstrate a nexus between a benefit gained by an official and a particular governmental action rendered by the official in exchange for the benefit. A relaxation of the state's burden is deemed necessary because proving that a public servant's unexplained accumulated wealth is the product of corruption presents serious evidential problems for the state. Public officials who engage in corruption often use their exalted position and the clout that goes with it to impede investigations and destroy or conceal evidence. Besides, pervasive corruption "weakens investigative and prosecutorial agencies to the point where gathering evidence and establishing its validity and probative value" can be problematic. For this and other reasons three major international anti-corruption conventions as well as numerous national constitutions and municipal criminal statutes now include reverse onus provisions that relieve the prosecution of the high burden of proof required to establish that a senior official's wealth was acquired through illicit means.

It has been suggested that because reverse onuses offend fundamental due process rights guaranteed to accused persons, specifically the right to fair trial which includes the presumption of innocence and the right to silence and privilege against self-incrimination, few states would rush to criminalize the offense

of illicit enrichment. However, a survey of state practice on this issue reveals quite the contrary. The sections that follow provide a brief *tour d'horizon* on the practice of states with respect to reverse burden provisions, a trace of the evolution of reverse onuses in international treaties, and the exploration, in some detail, of reverse burden provisions in domestic criminal law across civil law as well as common law jurisdictions. Finally the chapter ends with a discussion on the policy justifications for including reverse onus provisions in criminal statutes.

3.2 REVERSE ONUS IN THE SPECIFIC CONTEXT OF CRIMINAL LAW

Much has been made of the reverse onus provision in the offense of illicit enrichment, how it upsets a well-known principle in criminal law that the accused party's innocence is presumed with the prosecution bearing the burden of proving his guilt beyond reasonable doubt. Reversing the onus, it is argued, violates the principle of presumption of innocence. The objection to the burden reversal in illicit enrichment may leave the impression that conceptually criminal law and reverse onus provisions are opposite sides of the proverbial coin. That is really not the case. Ian Dennis has demonstrated that English criminal law makes room for numerous reverse onuses in the criminal offenses, many of which are imposed expressly by the legislature. A study by two leading British legal scholars conducted a few years ago concluded that express reverse onuses are to be found in around 40 percent of all indictable statutory offenses in Britain:[2]

> [t]hey extend across the entire range of seriousness, up to and including murder, where the defendant bears the burden of proving the statutory partial defence of diminished responsibility. They can also be imposed by necessary implication from the statutory language. . . . A court which interprets a provision as falling within one of these categories must therefore hold that Parliament intended the defendant to bear the burden of proof of the statutory defence.[3]

The findings by Ashworth and Blake strongly suggest that it is by no means unprecedented in criminal law to shift the burden of proof on to a defendant requiring him to prove his innocence. It is done routinely in criminal defamation laws,[4] including those that require penal sentences where the defendant is required to prove the truth of his or her statement, the "reasonableness" of his or her opinion or that the publication was for the public benefit.[5] It is also found in tax fraud cases.

As we discuss in more detail in the next chapter, American jurisprudence already incorporates permissive inferences as well as a concept comparable to illicit enrichment into its tax and money-laundering laws. A rebuttable presumption (i.e. permissive inference) of guilt, the authors point out, is:

> permitted in U.S. tax fraud and money laundering prosecutions where the courts have recognized that proof by direct means is very difficult to secure since the defendant generally will destroy such records and obscure any trace of their existence. Accordingly, the government is permitted to rely on indirect circumstantial evidence to disclose taxable income or illicit proceeds. In effect, unexplainable increases in net worth during a given period (e.g. period of public service) form the basis for a legitimate presumption and prosecution.

In these cases, the net worth method of proof is often used, which allows the government to meet its burden of proving that net worth increases are attributable to taxable income when it investigates reasonably possible sources of nontaxable income and explores whatever leads the taxpayer or others may proffer. By showing that nontaxable income did not derive from those sources the government negates all reasonable explanations by the taxpayer inconsistent with guilt. "In the context of curbing corruption, disclosure requirements for federal government officials, coupled with the net worth method of proof may provide legitimate tools for addressing the problem of illicit enrichment by public officials."

A review of the practice in a number of common law jurisdictions will show that there are at least three instances when the burden of proof is allowed to shift to the accused party in criminal law: first, in strict liability offenses where traditional proof requirements are suspended; second, in confiscation of pecuniary gain acquired by a criminal offense. Finally, in criminal offenses in which there is a statutory shift in the burden of proof, express or implied, to the defendant, such as criminal defamation where there is a presumption that the defamatory statement is not true.

3.3 EVOLUTION OF REVERSE BURDEN CLAUSES IN INTERNATIONAL AND DOMESTIC LAW

3.3.1 The influence of international law

The influence of international soft law on the evolution of this new law enforcement strategy for combating acquisitive crimes has been immense. In this section we examine a number of international instruments that have addressed the reversal of burden question. Of particular interest in this review are: the 1988 United Nations Convention Against Illicit Traffic of Narcotic Drugs and Psychotropic Substances and the 2000 United Nations Convention Against Transnational Organized Crimes. The chapter will also review the reverse burden provisions found in recently adopted anti-corruption conventions such as the 1996 Inter-American Convention against Corruption (Art. IX), the 2003 African Union Convention on Preventing and Combating Corruption (Art. 8) and the 2004 United Nations Convention

Against Corruption (Art. 22). Their respective *travaux préparatoires* and legislative histories will shed light on why the legislative draftsman found it necessary to shift the burden of proof onto the accused as opposed to placing it on the prosecution as is the custom in criminal prosecutions.

3.3.1.1 1988 United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances

Article 5 of the United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances provides to the signing parties the option of reversing the burden of proof regarding the confiscation of proceeds from illicit trafficking of drugs. Under paragraph 7 of article 5, each party may consider reversing the onus of proof regarding the lawful origin of property allegedly liable to confiscation, "to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings."[6] For example, among the many reservations Colombia formulated upon signing the United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances, is one where Colombia expressly declared that it did not consider itself bound to the provision to reverse the onus of proof. Among its declarations, Colombia stated:

> No provision of the Convention may be interpreted as obliging Colombia to adopt legislative, judicial, administrative or other measures that might impair or restrict its constitutional or legal system or that go beyond the terms of the treaties to which the Colombian State is a contracting party.[7]
>
> (U.N. Treaty Collection, U.N. Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances, Declarations and Reservations)

3.3.1.2 1996 Inter-American Convention against Corruption

Under article IX, the Inter-American Convention against Corruption requests the contracting parties to take the necessary measures to establish illicit enrichment as an offense under their domestic laws and, for those that have already done so, article IX further notes that the offense of illicit enrichment shall be considered an act of corruption under the Convention.[8]

During the ratification process, however, the United States and Canada refused to implement article IX of the Inter-American Convention against Corruption. Canada explained that criminalizing illicit enrichment, as provided for by article IX, would contravene the presumption of innocence guaranteed by the Canadian Constitution. And the United States similarly declined, explaining:

> The United States recognizes the importance of combating improper financial gains by public officials, and has criminal statutes to deter or

> punish such conduct. These statutes obligate senior-level officials in the federal government to file truthful financial disclosure statements, subject to criminal penalties. They also permit prosecution of federal public officials who evade taxes on wealth that is acquired illicitly. The offense of illicit enrichment as set forth in Article IX of the Convention, however, places the burden of proof on the defendant, which is inconsistent with the United States constitution and fundamental principles of the United States legal system. Therefore, the United States understands that it is not obligated to establish a new criminal offense of illicit enrichment under Article IX of the Convention.[9]
>
> (Inter-American Convention against Corruption, Signatories and Ratifications)

3.3.1.3 2000 United Nations Convention against Transnational Organized Crime

Article 12 of the United Nations Convention against Transnational Organized Crime allows State Parties to reverse the burden of proof to enable the confiscation and seizure of proceeds of transnational crime. More specifically, paragraph 7 of article 12 provides that "State Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings."[10]

The inclusion of a reverse burden provision was discussed in several sessions of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. The *travaux préparatoires* of the negotiations indicate that, during the 1998 informal preparatory meeting held in Buenos Aires, while discussing the legislative measures to be taken against money-laundering, "some delegations expressed reservations stemming from difficulties of a constitutional nature regarding reversal of the burden of proof."[11] Among some of the proposals and contributions received by governments, Spain proposed a solution to the reverse burden dilemma. Discussing paragraph 4 of the money-laundering article of the Revised Draft Convention against Transnational Organized Crime, Spain noted that, even though reversal of the burden of proof may not be possible due to the fundamental right to the presumption of innocence constitutionally guaranteed by many countries, "that does not rule out the possibility of this presumption being essentially nullified by the presence of other means of proof, not only direct but also indirect, or based on presumptions, the latter being termed 'circumstantial evidence.' "[12]

By the middle of the discussion period, however, the Ad Hoc Committee decided to eliminate the reverse burden provision as a basis for conviction for money-laundering. Nonetheless, as discussed above, the reverse burden provision still made its way into article 12, which deals with confiscation of criminal proceeds:

> Option 2 of [the subparagraph of article 4 implementing legislative measures to combat money-laundering] was deleted. This option contained wording regarding the reversal of the burden of proof. Many delegations at the third session of the Ad Hoc Committee suggested that the reversal of the burden of proof, while unacceptable in respect of the presumption of innocence and thus as a basis for conviction, could be used after the offender had been convicted, in considering the question of confiscation of proceeds.[13]
>
> (Ad Hoc Comm. on the Elaboration of a Convention against Transnat. Organized Crime, *Consideration of the Draft United Nations Convention against Transnational Organized Crime, with Particular Emphasis on Articles 4* ter, *5, 6, 9, 10 and 14* 9, U.N. Doc. A/AC.254/4/Rev.3 (May 19, 1999))

But even after the modification of the revised draft, at least one country, Azerbaijan, still considered that article 4 violated basic principles of justice. Among its proposals to the Ad Hoc Committee, Azerbaijan complained that article 4, entitled "Money-laundering," conflicts with some basic principles of justice "since it shifts the burden of proof onto the defendant and predetermines the action to be taken by the judicial authorities, thus compromising their independence."[14]

3.3.1.4 2003 African Union Convention on Preventing and Combating Corruption[15]

Article 8 of the African Union Convention on Preventing and Combating Corruption is a mirror image of article IX of the Inter-American Convention against Corruption in that it places the burden on state parties to adopt legislation establishing illicit enrichment as a crime under their domestic laws.[16]

3.3.1.5 2003 United Nations Convention against Corruption

Article 20 of the United Nations Convention against Corruption requests state parties to consider criminalizing intentional illicit enrichment, defined as "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."[17] But the reverse burden provision does not appear until article 31, entitled "Freezing, seizure, and confiscation." Under paragraph 8 of article 31, each signing party "may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation," as long as such requirement stays consistent with the fundamental principles of the country's domestic laws.[18]

The Secretary-General provided a report to the Commission on Crime Prevention and Criminal Justice analyzing existing international legal

documents to provide recommendations and guidance in drafting the Convention against Corruption. Among the legal issues involving repatriation of illegally exported funds, the report focused on the presence of corrupt leaders that can legalize their exploitative practices, the inability of some governments to support their legal claims to recover funds, and the difficulties of meeting the burden of proof in secrecy jurisdictions.[19] Also, at the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption, several delegations voiced their opinions regarding the reversal of the burden of proof. The representative of Egypt, speaking on behalf of China and Group 77, first discussed the possibility of shifting the onus of proof:[20]

> Some delegations stressed the importance of including civil and administrative law measures in addition to criminal provisions. They considered that such an approach would provide a higher probability of efficiency and effectiveness, because of the multifaceted nature of corruption and the need to address those issues under diverse legal systems. In that connection, some delegations made reference to the need to include in the new convention civil and criminal liability, remedies and sanctions, in addition to relevant preventive measures. In the view of some delegations, criminal law measures against corruption would need to include the reversal of the burden of proof and the lifting of bank secrecy. According to other delegations, criminalization of illicit enrichment was also necessary. Other delegations voiced concern regarding the reversal of the onus of proof, as that would run contrary to constitutional principles or international obligations and would thus be difficult to envisage.[21]
>
> (Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption, ¶14, U.N. Doc. A/AC.260/2 (August 8, 2001) 28)

The *travaux préparatoires* of the negotiations further indicate that there were differing points of view regarding the inclusion of the reverse burden provision in the United Nations Convention against Corruption. Switzerland, for example, strongly believed that the Convention against Corruption should not reverse the burden of proof, but rather "should reflect the general principles of law and other fundamental rules of democratic legal systems, in particular the presumption of innocence."[22] Indonesia, on the other hand, argued for the inclusion of the reverse burden provision: "the concept of shifting burden of proof also merits consideration in order to find a way to employ this concept in corruption proceedings with a view to recovering funds of illegal origin without compromising fundamental legal protection such as the presumption of innocence."[23] A footnote to the Revised Draft Convention against Corruption provides further insight:

> During the first reading of the draft text at the first session of the Ad Hoc Committee, many delegations indicated that they faced serious difficulties, often of a constitutional nature, with the inclusion of the concept of the reversal of the burden of proof. Some delegations expressed understanding for the desire to include the concept in the array of measures against corruption, but, in view of the difficulties related to the reversal of the burden of proof in criminal law, suggested that the article be modified, made less binding and moved to the chapter on preventive measures in order to allow States to adopt administrative measures embodying the concept contained in the article. Another possible solution offered was to base such an article on the comparable article of the Inter-American Convention against Corruption of the Organization of American States (see E/1996/99). Many other delegations wished to retain this article in this chapter, in view of the potential efficiency of criminal measures in this area. One delegation clarified that the concept reflected in this article actually referred to the rules on evaluation of evidence and not necessarily to the shifting of the burden of proof, proof being the result of evidence and evidence being the medium of proof. The Vice-Chairman with responsibility for this chapter encouraged delegations to conduct informal consultations in order to find appropriate and acceptable solutions to this problem.[24]
>
> (Ad Hoc Comm. for the Negotiation of a Convention against Corruption, *Considerations of the Draft United Nations Convention against Corruption, with Particular Emphasis on arts. 40–50 and chapters IV–VIII* 33 n.182, U.N. Doc. A/AC.261/3/Rev.1 (March 1, 2002))

The result of these discussions was the inclusion of the reverse burden provision in paragraph 8 of article 31 of the United Nations Convention against Corruption.

The Technical Guide to the United Nations Convention against Corruption also provides a helpful and detailed discussion on the shifting of the burden of proof. It bears quoting in full:

> Paragraph 8 recommends that States Parties consider the possibility of shifting the burden of proof in regard to the origin of the alleged proceeds of crime.
>
> This recommendation should be distinguished from a reversal of the burden of proof with respect to the constituent elements of an offence. Jurisdictions that have successfully adopted such a special technique have usually embedded it in specific confiscation procedures which take place after the conviction.
>
> When considering this recommendation, States Parties may wish to take into account the following:
>
> Some countries have enacted legislation of this type, shifting the burden of proof with respect to proceeds derived from drug offences, organized crime, and money-laundering by stating that when a person is

convicted of any of these offences, the confiscation of properties held by the person is mandatory if the offender cannot explain the source of the assets and the assets are not commensurate with his/her income or economic activity. In this case, it is not necessary to prove that the assets are derived, directly or indirectly from an offence; assets indirectly derived from such illicit proceeds or even other kinds of assets (except when they belong to third parties) could be forfeited if the convicted person cannot justify their origin.

Other countries foresee automatic forfeiture, which can take place in cases where a person has been convicted of drug crimes, money-laundering, terrorism, trafficking in persons and fraud. The relevant provisions create a refutable presumption that any property subjected to a restraining order—any property the convicted person owns or controls—is the proceeds of crime. Upon conviction, to exclude such property from forfeiture, the defence is required to demonstrate the lawful origin of the property. If no evidence is given to prove that the property was not used in, or in connection with, the commission of the offence, the court must presume that the property was used in, or in connection with, the commission of the offence and forfeiture occurs.

A variation of this approach is taken by some countries. Though they do not allow a reversal of the burden of proof, once the prosecution has proved the defendant's guilt beyond a reasonable doubt, the extent of the forfeiture can be established by a preponderance of the evidence standard. Case law has intermittently admitted "net worth" evidence as an indirect method of proving the origin of the proceeds. In practice, the net worth method implies the establishment of a difference between the lawful income and the value of the property owned by the offender, excluding all reasonable explanations, such as inheritance, gifts etc.

In other countries, the penal code establishes a presumption according to which all assets belonging to a person convicted under an organized crime offence are presumed to be under the control of the criminal organization. The prosecution then does not have to prove the origin of the assets. The fact that the property is assumed to be under the control of a criminal organization is sufficient for it to be tainted by association, even if it has been obtained legally. The owner can rebut the presumption, but he/she bears the burden of proof.

An "all crimes" system of predicate offences for the purposes of money-laundering should facilitate the implementation of the recommendation of the article.

Finally, in addition to the sui generis procedures that accept non-criminal standards of evidence after the conviction is reached, a number of jurisdictions have also adopted civil procedures of confiscation that operate in rem and are governed by a standard of the preponderance of evidence.[25]

(U.N. Office on Drugs and Crime, Technical Guide to the United Nations Conventions against Corruption 98–99 (2009))

Nonetheless, upon ratification of the United Nations Convention against Corruption, both the United States and Canada refused to adopt illicit enrichment as a criminal offense. Canada specifically noted that it would not create the offense of illicit enrichment because an offense of illicit enrichment would contravene its Constitution, "more specifically with the Canadian Charter of Rights and Freedoms, and the fundamental principles of the Canadian legal system."[26] Similarly, the United States, although not specifically rejecting articles 20 or 31, reserved the right to adopt any legislation recommended by the United Nations Convention against Corruption, explaining that it reserved "the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention."[27]

3.3.2 Domestic penal laws and jurisprudence

Even in common law jurisdictions where the presumption of innocence and the prohibition against self-incrimination have long been established as an essential part of the right to a fair trial, reverse burden of proof statutes are nevertheless common. For instance, U.S. law requires taxpayers who challenge their cases in court to show that their tax return was accurate or their refund was justly claimed. The taxpayer's burden in these instances requires him to go forward not only with the evidence, but also with persuasion. This section reviews reverse burden statutes from different legal systems, common law as well as civil law, and the case law of national courts in interpreting these statutes. In addition, the chapter will explore the various burdens and standards of proof recognized in domestic law in order to provide a context for assessing which party in an illicit enrichment case should bear what burden of proof.

3.3.2.1 Canada[28]

In Canada, the presumption of innocence is guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms (Canadian Charter), which states that "[a]ny person charged with an offense has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[29] However, as provided by section 1, "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[30] Thus, any possible infringements of section 11(d) caused by statutory reverse burden provisions must still be scrutinized to determine whether they may nonetheless be justified under section 1.

In the seminal case of *R v. Oakes*, the Canadian Supreme Court invalidated a statutory reverse burden provision that required a person accused of possession of narcotics to establish that his possession was not for the purpose of

trafficking.[31] The court observed that the mandatory presumption in the Narcotics Control Act (NCA) created a legal burden on the accused to disprove trafficking. Because the defendant could possibly be convicted despite establishing a reasonable doubt that the presumption was false, the court found that the presumption of innocence was directly violated. Nonetheless, the court was still required to inquire whether the violation of section 11(d) was justified by section 1 of the Canadian Charter. The justifiability test employed required that (1) the objective the provision was designed to serve be important to a free and democratic society, and that (2) the means utilized be proportional, reasonable and rationally connected to the objective. Under this test, the court held that the reverse burden provision of the NCA was not justified under section 1 because it found that it was not rational to automatically infer intent to traffic from mere possession of narcotics.

In *R. v. Vaillancourt*, the Canadian Supreme Court similarly invalidated a criminal provision that provided for constructive liability for murder where the accused used or was in possession of a weapon at the time of the offense or during flight afterwards.[32] The court found that the presumption of innocence was violated because of the possibility of convicting a defendant even though a reasonable doubt existed as to whether the defendant knew death was likely to ensue from his actions. Furthermore, the court held that this violation was not justified under section 1 of the Canadian Charter, and thus the Code provision was invalidated.

The Canadian Supreme Court, however, has also upheld various statutory reverse burden provisions that contravened the presumption of innocence because the court was able to find a proper justification under section 1 of the Canadian Charter. In *R. v. Whyte*, the Supreme Court of Canada examined a statutory reverse burden provision involving road traffic legislation, which provided that anyone occupying the driver's seat of a motor vehicle would be presumed to have care or control of the vehicle, unless the accused established that he did not enter the vehicle with the purpose of setting it in motion.[33] After finding that the provision effectively violated the presumption of innocence by placing on the accused the legal burden of disproving the statutory presumption, the court nonetheless found that the provision was justified under section 1 of the Canadian Charter because it constituted a reasonable limit on the presumption of innocence. Similarly, in *R. v. Chaulk*, following the same reasoning as *Vaillancourt*, the court held that the presumption of sanity in a criminal case violated the presumption of innocence because it permitted conviction even where reasonable doubt as to the guilt of the accused existed. However, the court also found that violation was justified under section 1 of the Canadian Charter because the objective of the presumption of sanity—to avoid placing on the prosecution the onerous burden of disproving insanity—was found to be sufficiently important to limit a constitutional right.[34]

The Supreme Court of Canada reached the same result in two separate cases analyzing the defense to the criminal prohibition of hate propaganda, which

allows an accused to avoid liability if he proves that the statements made were true. In *R. v. Keegstra*, the Supreme Court held that although section 319(3)(a) of the Criminal Code infringed the presumption of innocence by shifting the onus of proof to the accused, the provision was nonetheless justified by section 1 of the Canadian Charter.[35] Applying the *Oakes* Test, the court found that the reverse burden provision was justified because, by requiring the accused to prove truthfulness on the balance of probabilities to avoid conviction, the Parliament of Canada met the pressing and substantial objective of preventing the promotion of hatred. This reasoning was also followed in *R. v. Andrews*, in which the Canadian Supreme Court held that the reversal of the burden of proof in the defense of truth violated the presumption of innocence, yet the provision was a demonstrably justified reasonable limit prescribed by law, as provided by section 1 of the Canadian Charter.[36]

Following this same trend, the Canadian Supreme Court in *R. v. Downey* held that section 195(1)(j) of the Criminal Code, which makes it a crime to live on the avails of prostitution, was justified under section 1 of the Canadian Charter even though it infringed the presumption of innocence.[37] The reverse burden provision of the anti-prostitution law violated section 11(d) of the Canadian Charter by providing that evidence that a person lived with or was habitually in the company of prostitutes would constitute proof that he was living on the avails of prostitution, absent proof of the contrary. Nonetheless, the court found that the goal of combating the "cruel and pervasive social evil of pimping" was significant enough to justify the violation, especially since prostitutes would seldom cooperate by testifying against their pimps.

The last Canadian Supreme Court case addressing the infringement of the presumption of innocence by a statutory reverse burden provision appears to be *R. v. Laba*.[38] The court found that section 394(1)(b) of the Criminal Code, which made it a crime to buy or sell any substance containing precious metals, violated the presumption of innocence by placing a legal burden of proof on the accused, since the section required the accused to establish that he was the owner or was acting under legal authority as a defense. Moreover, the court held that the provision was not justified under section 1 of the Canadian Charter because, although reversing the onus of proof was a rational response to the problem, the Parliament failed to consider alternative means and the provision lacked any inherent rationality. Nonetheless, instead of invalidating section 394(1)(b), the court modified the language of the section to turn the legal burden into an evidentiary burden of proof, thereby avoiding a conflict with the Canadian Charter.

More recently, Canadian cases dealing with statutory reverse burden provisions and the presumption of innocence have been resolved at the superior and appellate level courts, without reaching the highest court in Canada. In *R. v. Pratt*, for example, the British Columbia Supreme Court held that the reverse burden provision of section 88(2) of the Motor Vehicle Act, which required the accused to disprove knowledge of the prohibition or suspension, was not justified under section 1 of the Canadian Charter because "the Crown had not

established that it restricted as little as possible."[39] Thus, the violation of the presumption of innocence was not saved by section 1, but the court recommended following the approach in *Laba* of modifying the language to conform to the Canadian Charter. In *R. v. G. (T.)*, on the other hand, the Nova Scotia Court of Appeal found that, although the provisions reversing the burden of proof of the Liquor Control Act infringed on section 11(d) of the Canadian Charter, they were saved by section 1.[40] By placing on the accused the onus of proving that his possession of liquor was authorized by the Act, the provisions violated the presumption of innocence, but the danger posed by alcohol to society justified reversing the burden, especially since only the accused possessed the required information.

3.3.2.2 Ireland

In Ireland, the presumption of innocence is embodied in the constitutional guarantee of trial in due course of law under article 38.1 of the Irish Constitution, which provides that "[n]o person shall be tried on any criminal charge save in due course of law."[41] As noted by the High Court of Ireland in *O'Leary v. The Attorney General*,[42] and later affirmed by the Supreme Court,[43] the right to the presumption of innocence must be conferred on every person accused in a criminal trial, and thus rules that shift the legal burden of proof may involve a breach of the accused's constitutional rights.

The High Court in *O'Leary* examined two separate statutory provisions that allegedly infringed on the presumption of innocence by reversing the burden of proof: section 3(2) of the 1972 Offences against the State Act, which provided that statements by certain Garda officers that the accused was a member of an unlawful organization would constitute evidence of membership, and section 24 of the 1934 Offenses against the State Act, which provided that possession of an incriminating document would constitute evidence of membership in an unlawful organization. The court explained that a criminal statute that placed on the accused the legal burden of adducing exculpatory evidence may involve a breach of the presumption of innocence, while a shift in the evidential burden of proof would not result in a violation of the accused's constitutional rights. The High Court then held that section 3(2) did not actually involve a burden shift because it merely allowed certain statements of belief to be admissible and did not require the accused to provide any evidence, and that section 24 only reversed the evidential burden of proof. Thus, after examining the provisions in question, the court upheld both.

While *O'Leary* was being appealed, the Supreme Court in *Hardy v. Ireland* examined section 4(1) of the Explosive Substances Act, which made it an offense for any person to make or knowingly have in his possession any explosive substance under circumstances that gave rise to a reasonable suspicion that he did not have the substance in his possession for a lawful object, unless he established that he had a lawful object for making or having the explosive substance in his possession. Unlike in *O'Leary*, however, the court found that

the provision reversed the legal burden of proof, but nonetheless held that the presumption of innocence was not violated because section 38.1 of the Irish Constitution "does not prohibit that, in the course of the case, once certain facts are established, inferences may not be drawn from those facts . . . by way even of documentary evidence."[44]

Therefore, under both *O'Leary* and *Hardy*, the Supreme Court has established that reversing the burden of proof in criminal cases is not absolutely prohibited by the Irish Constitution, but reverse burden provisions that infringe on the constitutionally protected presumption of innocence may nonetheless be invalidated.[45]

3.3.2.3 England

Although considered of fundamental importance, the presumption of innocence does not have constitutional status in England. In *Woolmington v. Director of Public Prosecutions*, the House of Lords recognized the centrality of the presumption of innocence—namely, that it is for the prosecution to prove every element of the offense charged, including the accused's state of mind, and that the accused does not have the burden of establishing his innocence—but also accepted that express statutory reverse burden provisions may be legitimate, as was the case with the defense of insanity.[46] Thus, under English criminal law, statutory provisions reversing the onus of proof were considered valid exceptions to the rule because the English Parliament had the power to limit the presumption of innocence in deciding particular policy issues without reference to constitutional norms.

Subsequently, English courts provided more guidance on how to interpret criminal provisions shifting the burden of proof through two principal general authorities. In *R. v. Edwards*, the Queen's Bench found another exception to the fundamental rule embodied by the presumption of innocence where the statutory offense arises "under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities."[47] Thus, the court held that the way in which a statute was drafted determined where the onus of proof would lay. And, in *R. v. Hunt*, the House of Lords further broadened Parliament's power to limit the presumption of innocence by finding that implied statutory reversals of the burden of proof were also valid, but explained that courts should focus more on matters of substance in determining whether a burden shift was implied rather than focusing on linguistic construction.[48]

In October 2000, however, the Human Rights Act of 1998 (Human Rights Act) came into effect as an Act of Parliament to give effect to the rights and freedoms guaranteed by the European Convention on Human Rights. Pursuant to section 3(1) of the Human Rights Act, so far as possible, all English legislation "must be read and given effect in a way which is compatible with the Convention Rights."[49] And the presumption of innocence is

protected under article 6(2), which provides that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."[50] Thus, although parliamentary sovereignty is preserved, English courts must now comply with the Human Rights Act and the European Convention on Human Rights in determining whether a reverse burden provision infringes the presumption of innocence. As noted by Lord Hope of Craighead in *R. v. Director of Public Prosecutions, ex parte Kebilene* while invalidating a reverse onus provision of the Terrorism Act of 2000:

> [I]t is clear that until now, under the doctrine of sovereignty, the only check on Parliament's freedom to legislate in this area has been political. All that will now change with the coming into force of the Human Rights Act 1998. But the change will affect the past as well as the future. Unlike the constitutions of many of the countries within the Commonwealth which protect pre-existing legislation from challenge under their human rights provisions, the 1998 Act will apply to all le[g]islation, whatever its date, in the past as well as in the future.[51]
>
> (R. v. DPP *ex parte* Kebilene, [2000] 2 A.C. 326 (U.K.))

Several cases have since arisen dealing with the presumption of innocence and reverse burden provisions in England. In *R. v. Lambert*, for example, the House of Lords invalidated certain reverse burden provisions from the Misuse of Drugs Act of 1971 because they were incompatible with the presumption of innocence embodied in article 6(2) of the Human Rights Act. The court held that the presumption of innocence was not absolute, but any departures from the presumption would have to be justifiable, reasonable and proportional:

> It is now well settled that the principle which is to be applied requires a balance to be struck between the general interests of the community and the protection of the fundamental rights of the individual. This will not be achieved if the reverse onus provision goes beyond what is necessary to accomplish the objective of the statute.[52]
>
> (R. v. Lambert, [2002] 2 A.C. 545 (U.K.))

In *R. v. Johnstone*, however, the House of Lords found that the reverse burden provision of article 9(2) of the Trade Marks Act of 1994 was compatible with the presumption of innocence because the prejudice that would have been suffered by the public interest justified placing a persuasive burden on the accused.[53] The court emphasized that any limit imposed upon the presumption of innocence required justification and explained that the reasons given must be more compelling the more serious the punishment which may flow from the conviction. And, in *Sheldrake v. Director of Public Prosecutions*, Lord Bingham clarified the issue by explaining that the court's task "is never to decide whether a reverse burden should be placed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the

presumption of innocence."[54] The court also noted, however, that a reverse burden provision would not necessarily preclude the holding of a fair trial.

The U.K. Court of Appeal, in *Keogh v. R.*, recently examined sections 2 and 3 of the Official Secrets Act of 1989, which made it an offense to unlawfully make damaging disclosures of information relating to national defense or international relations, and found that the statutory defense of proving lack of knowledge of the damaging nature of the disclosure unjustifiably reversed the burden of proof. The court held that, if the legislation shifting the onus of proof was incompatible with the presumption of innocence, it should be "read down" and interpreted in such a way that "if the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not."[55] Thus, the court concluded that, under the Human Rights Act, only when necessary should an evidential burden rather than a persuasive burden be imposed upon the accused by implication.

3.3.2.4 South Africa

Reverse onus provisions are found in a number of regulatory statutes that deal with licensed activity in the public domain,[56] the handling of hazardous products, or the supervision of dangerous activities. Examples of these can be found in the Road Traffic Act 29 of 1989,[57] the Drugs and Drug Trafficking Act 140 of 1992,[58] the Arms and Ammunition Act 75 of 1969, or the Gambling Act 51 of 1965. The South African Constitutional Court has reviewed challenges to the constitutionality of these reverse onus provisions in light of the rights included in the Bill of Rights in the 1996 South African Constitution. These are the right to fair trial including the presumption of innocence found in sections 35 and 37. Section 35(3) provides:

> 35. Arrested, detained and accused persons
>
> 3 Every accused person has a right to a fair trial, which includes the right
>
> h to be presumed innocent, to remain silent, and not to testify during the proceedings;
> i to adduce and challenge evidence;
> j not to be compelled to give self-incriminating evidence; [59]
>
> (S. Afr. Const., 1996)

And section 36(1) states:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

a the nature of the right;
b the importance of the purpose of the limitation;
c the nature and extent of the limitation;
d the relation between the limitation and its purpose; and
e less restrictive means to achieve the purpose.[60]

(S. Afr. Const., 1996)

Because the Constitution permits limitations on the rights contained in the Bill of Rights, the Constitutional Court has recognized situations where reverse burden statutes might be justified. A cursory survey of the case law shows that constitutionality of statutory reverse onus provisions and presumptions have been weighed in the context of an open and democratic society.[61]

(S v. Zuma and Others, [1995] (2) SA 642 (CC))

3.3.2.5 United States of America

In spite of the disfavor with which reverse onus provisions are regarded by some American writers,[62] U.S. laws and practice demonstrate the contrary. For instance, U.S. law requires taxpayers who challenge their cases in court to show that their tax return was accurate or their refund was justly claimed. The taxpayer's burden in these instances requires him to go forward not only with the evidence, but also with persuasion. While American courts exalt the presumption of innocence principle, this has not stopped them from embracing strict liability according to one commentator. It is argued that in the standard historical interpretation of American tort law:

[T]he era of laissez-faire and pro-industry fault liability dominated the nineteenth and early twentieth centuries, and the mid-twentieth century marked the gradual rise of strict liability. Scholars and judges presenting this narrative have focused on the reception of *Fletcher v. Rylands*, an English case from the 1860s in which a reservoir used for supplying water power to a textile mill burst into a neighbor's underground mine shafts. In one of the most significant and controversial precedents in the strict liability canon, the English courts held that proof of negligence was not required for "nonnatural" or potentially "mischievous" activities. Scholars point to a series of decisions rejecting *Rylands* to conclude that American courts adhered to the fault doctrine and repudiated strict liability in the late nineteenth century, and the consensus has been that *Rylands* was not accepted until the mid-twentieth century. Many prominent works on American legal history feature this supposed rejection of *Rylands* as a centerpiece for their historical claims about the dominance of the fault doctrine as a subsidy for emerging industry.[63]

(Jed Handelsman Shugerman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110, Yale L. J. 333, 333–35 (2000))

Shugerman argues that a significant majority of the states actually followed *Rylands* in the late nineteenth and early twentieth centuries, at the height of the "era of fault":

> While New York's highest court famously declared, in *Ives v. South Buffalo Railway* in 1911, that due process of law categorically required proof of fault, courts around the country had been applying *Rylands* over the previous three decades. A few states split on the validity of *Rylands* in the 1870s, but a wave of states from the mid-1880s to the early 1910s adopted *Rylands*, with fifteen states and the District of Columbia solidly accepting *Rylands*, nine more leaning toward *Rylands* or its rule, five states wavering, and only three states consistently rejecting it. Just after the turn of the century, the California Supreme Court declared, more correctly than not, that "[t]he American authorities, with hardly an exception, follow the doctrine laid down in the courts of England [in *Rylands*]." In the following years, some states shifted against *Rylands*, but an equivalent number of new states also adopted *Rylands*. Accordingly, a strong majority of states has consistently recognized this precedent for strict liability from about 1890 to the present.[64]
>
> (Jed Handelsman Shugerman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110, Yale L. J. 333, 333–35 (2000))

An American scholar, Stuart P. Green, concludes there are six (6) senses of strict liability in American criminal law.[65] They are listed with contemporary examples. First, offenses that contain at least one material element for which there is no corresponding *mens rea* (criminal state of mind) element, characterized as formal strict liability. Claims brought under the Securities Act of 1933[66] fall in this category. In reviewing pleading under section 11 of this Act, Turnquist observes how Congress made it easy for buyers to bring a claim under this section. All that a buyer is required to allege is that he purchased a security from a seller pursuant to a registration statement containing material misstatement or omission:

> A buyer does not have to establish reliance, which means that the buyer need not have relied upon the registration statement or even have seen the registration statement to collect damages. Because section 11 does not include a scienter requirement, a buyer may recover damages for an innocent misstatement or omission. Representative Sam Rayburn emphasized the importance of the absence of a scienter requirement in the legislative history of the Securities Act when he stated that, "[e]very lawyer knows that with all the facts in the control of the [seller] it is practically impossible for a buyer to prove a state of knowledge or a failure to exercise due care on the part of the [seller]."[67]
>
> (Krista L. Turnquist, *Pleading Under Section 11 of the Securities Act of 1933*, 98 Mich L. Rev. 2395, 2401–02 (June 2000))

Also coming under this first sense of strict liability is the sexual exploitation of children statute.[68] As Professor Green points out, the commission of the completed offense under § 2251(a) of this statute, "which can be paraphrased for our purposes as the actual manufacture of child pornography, contains no requirement that the defendant know that the performer is a minor."[69] The lack of a *scienter* requirement is also the case with the Regulation of Traffic in Containers of Distilled Spirits Act.[70] Section 5301(c) of the Act imposes criminal liability on "[any] person who sells, or offers for sale, distilled spirits, or agent or employee of such person, if that person violates any of the four enumerated subsections." The provision does not include a *scienter* requirement, but imposes strict liability.[71] There are also a number of offenses with federal nexus requirement that also come under this first sense of strict liability such as the conspiracy to obstruct justice statute[72]and the computer fraud statute.[73]

The lack of *scienter* requirement in the conspiracy to obstruct statute was addressed by the United States Court of Appeals for the Second Circuit in *U.S. v. Ardito*.[74] Appealing his conviction under this statute, the defendant argued that section 1503 of the obstruction of justice statute requires proof that defendants knew the proceeding they obstructed was a federal proceeding. The Court of Appeals disagreed ruling that Sec. 1503 does not require the government to prove that the proceeding which appellants were charged with having obstructed was known by defendants to be federal in nature:

> Our refusal to add to the statute a scienter requirement, in the absence of congressional intent to the contrary, is consistent with the Supreme Court's analyses of other statutes in *United States v. Feola*, 420 U.S. 671, 43 L. Ed. 2d 541, 95 S. Ct. 1255 (1975), and *United States v. Yermian*, 468 U.S. 63, 104 S. Ct. 2936, 82 L. Ed. 2d 53 (1984). In a prosecution under the federal assault statute, 18 U.S.C. § 111, the *Feola* Court held that the statute does not require proof that the defendant knew the victim was a federal officer. "The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum." 420 U.S. at 685. *Feola* also made clear that the conspiracy statute, 18 U.S.C. § 371, does not require a showing that the defendant knew his conduct violated federal law. *Id. at* 687. And in *Yermian*, in holding that the federal false statements statute, 18 U.S.C. § 1001, does not include a scienter requirement with respect to the federal nexus, the Court concluded that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." 104 S. Ct. at 2940 (quoting *Feola*, 420 U.S. at 676–77 n.9). Indeed, the case for not requiring knowledge of the federal nexus is easier here than in *Feola* or *Yermian*, since the omnibus clause of (18 U.S.C. § 1503), under which appellants were convicted, does not even mention federal jurisdiction.[75]
>
> (U.S. v. Ardito, *et al.*, 782 F.2d 358 (2nd Cir. 1986) at 361–63)

The Court of Appeals went on to hold that, while:

> "[T]he existence of an ongoing proceeding is an element of a § 1503 violation", *United States v. Reed*, 773 F.2d 477, 485 (2 Cir. 1985), as is an intent to impede the administration of justice, *United States v. Buffalano*, 727 F.2d 50, 54 (2 Cir. 1984) (citing *United States v. Moon*, 718 F.2d 1210 (2 Cir. 1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2344, 80 L. Ed. 2d 818 (1984)), the statute does not require a specific intent to interfere with a proceeding known by the defendant to be federal in nature. *United States v. Jennings, supra*.[76]
>
> (U.S. v. Ardito, *et al*., 782 F.2d 358 (2nd Cir. 1986) at 361–63)

Finally, the computer fraud statute, another contemporary example of Green's first sense of strict liability, came under review in *U.S. v. Sablan*.[77] The case arose from an appeal by Bernadette H. Sablan of her conviction for computer fraud under §1030(a)(5) of the computer fraud statute which states:

> (a) Whoever —
>
> . . .
>
> (5) intentionally accesses a Federal interest computer without authorization, and by means of one or more instances of such conduct alters, damages, or destroys information in any such Federal interest computer . . . and thereby —
>
> (A) causes loss to one or more others of a value aggregating $1,000 or more during any one year period;
>
> . . .
>
> shall be punished as provided.
>
> (U.S. v. Ardito, *et al*., 782 F.2d 358 (2nd Cir. 1986))

In order to have violated the statute, a defendant must have (1) accessed (2) a federal interest computer (3) without authorization and (4) have altered, damaged, or destroyed information (5) resulting in the loss to one or more others (6) of at least one thousand dollars. The district court held that the statute's *mens rea* requirement, "intentionally," applied only to the access element of the crime and, accordingly, found Sablan to have violated the statute. On appeal Sablan argued that the district court wrongly interpreted the elements of the crime and that the statute is unconstitutional. Her principal contention was that the computer fraud statute must have a *mens rea* requirement for all elements of the crime and that the indictment was defective because it did not allege the appropriate *mens rea* required by the statute. In the alternative, Sablan asserted that a jury instruction was required to inform the jurors that the state had to prove intent for every element of the crime.

While noting that the statute is ambiguous as to its *mens rea* requirement, the Court of Appeals went on to hold that:

> Despite some isolated language in the legislative history that arguably suggests a scienter component for the "damages" phrase of section 1030(a)(5)(A), the wording, structure, and purpose of the subsection, examined in comparison with its departure from the format of its predecessor provision persuade us that the "intentionally" standard applies only to the "accesses" phrase of section 1030(a)(5)(A), and not to its "damages" phrase.
>
> We adopt the reasoning of the *Morris* court and hold that the computer fraud statute does not require the Government to prove that the defendant intentionally damaged computer files.[78]
>
> (U.S. v. Sablan, 92 F.3d 865, 868 (1996))

Green's second sense of strict liability includes statutory schemes that bar the use of one or more *mens-rea*-negating defenses, characterized as substantive strict liability. A good example of this would be Texas' treatment of voluntary intoxication. Under Texas law, voluntary intoxication does not constitute a defense to the commission of a crime.[79] Neither does evidence of voluntary intoxication negate the element of specific intent required for capital murder.[80] As the Court of Appeals for the Fifth Circuit concluded in the case of *Hernandez v. Johnson*:

> Although involuntary intoxication may absolve one of criminal culpability, *see Torres v. State*, 585 S.W.2d 746, 749 (Tex.Crim.App.1979), Texas courts have consistently ruled that alcoholism may not be the basis for an involuntary intoxication defense, *see Shurbet v. State*, 652 S.W.2d 425, 428 (Tex.App.-Austin 1982, no pet.); *Heard v. State*, 887 S.W.2d 94, 98 (Tex.App.-Texarkana 1994, pet. ref'd) (referring to Shurbet for support); cf. *Martinez v. State*, No. 04-95-00032-CR, 1996 WL 134969, at *3 (Tex. App.-San Antonio March 27, 1996, no pet.) (unpublished disposition) (holding that evidence of an addiction does not warrant an instruction on involuntary intoxication).[81]
>
> (Hernandez v. Johnson, 213 F.3d 243, 250 (5th Cir. 2000))

Green's third sense of strict liability includes procedural devices that require a defendant's intent to be presumed from other facts, characterized as substantive strict liability. A good example would be a New York statute that provides, with certain exceptions, the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle:

> As applied to the facts of this case, the presumption of possession is entirely rational. Notwithstanding the Court of Appeals' analysis, respondents were not "hitchhikers or other casual passengers," and the guns were neither "a few inches in length" nor "out of [respondents'] sight." The argument against possession by any of the respondents was

> predicated solely on the fact that the guns were in Jane Doe's pocketbook. But several circumstances—which, not surprisingly, her counsel repeatedly emphasized in his questions and his argument, *e.g.*, Tr. 282–283, 294–297, 306—made it highly improbable that she was the sole custodian of those weapons.[82]
>
> (County Court of Ulster Cnty. v. Allen, 442 US 140, 163 (1979))

Green's last three senses of strict liability are: (1) offenses that require a less serious form of *mens rea* than has traditionally been required by the criminal law; (2) offenses that require a less serious form of harmfulness than has traditionally been required by the criminal law; and (3) offenses that require a less serious form of wrongfulness than has traditionally been required by the criminal law. All of these offenses are characterized as substantive strict liability. The Water Pollution Prevention and Control (Standards and Enforcement) Act[83] is a good example of all three senses where criminal penalty is imposed for negligence:

> (c) Criminal penalties
>
> (1) Negligent violations
>
> Any person who—
>
> (A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321 (b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342 (a)(3) or 1342 (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or
>
> (B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;
>
> . . .
>
> shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.[84]
>
> (Title 33 U.S.C. §1319(c)(1))

Of course strict liability is an imposition of liability in the absence of privity and negligence. Unlike strict liability provisions, reverse burden clauses do

not entail a suspension of proof. Instead, as in the case of illicit enrichment, criminal activity and corresponding guilt are initially presumed. So the paradigm shift from strict liability to a rebuttable presumption of guilt is not dramatic. Nor is it as foreign to American jurisprudence as many may think.

Aside from these examples of strict liability offenses, U.S. courts have not hesitated to suspend due process safeguards in contending with wartime and other military exigencies. *Ex parte Quirin, Korematsu* and *In re Yamashita* capture moments in U.S. history when wartime considerations prompted categorical presumptions of guilt among other due process suspensions. In *Ex parte Quirin*,[85] an unstated presumption of espionage arose primarily from the following facts:

> After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.
>
> The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States.[86]
>
> (*ex parte* Quirin, 317 U.S. 1, 21 (1942))

The second case is *Korematsu v. U.S.*[87] For a limited time, Korematsu's heritage as a second-generation Japanese American triggered an irrefutable presumption of disloyalty justifying his internment with masses of American citizens of Japanese ancestry. Then Yamashita in *In Re Yamashita*[88] was convicted of permitting troops under his command to commit specific atrocities against civilians and prisoners of war. Commentators suggest the case is premised on a latent presumption that army commanders always have the wherewithal to control troops under their command.

The recent construct of "unlawful enemy combatants" arguably stems from reverse burden considerations:

> [T]he United States Supreme Court, while admitting the uncertain contours and origin of the term, accepted the President's invocation of it in the *Hamdi* case. Indeed, the Court held only that Hamdi, a "citizen-detainee" seeking to challenge his classification as an enemy combatant could receive notice of the basis for his classification, and an opportunity to rebut the Government's factual assertions. Only Scalia and Stevens squarely addressed the question of Hamdi's status, finding that "absent suspension [of the writ of habeas corpus] the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge." The same is true of the Supreme Court's opinion in *Boumediene*, which although striking down the suspension of habeas corpus in the Military Commission's Act of 2006, did not question the legitimacy of the classification scheme in the first place. Indeed, like the plurality's view in *Hamdi*, Justice Kennedy's opinion only permits the detainee to have a meaningful right to *rebut the Pentagon's evidence*.[89]
>
> (Leila Sadat, *A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror*, 37 Denv. J. Int'l Law & Policy 539, 540 (2009))

It is clear from these cases that America's commitment to the principle that in criminal proceedings an accused's innocence, which is presumed until proved by the prosecution beyond reasonable doubt, has not always been unwavering. There have been instances where the actual or *de facto* legislator has relaxed without necessarily compromising the safeguards built into an accused's right to fair trial. The essential elements of this right are taken up in the next chapter.

4 The right to a fair trial in international and domestic law

What does the right to a fair trial entail and where do the presumption of innocence, the right to silence and the privilege against self-incrimination fit in? Lord Diplock answered the first part of this question in his now famous *dictum*, "[t]he fundamental human right is not to a legal system that is infallible, but to one that is fair."[1] Fairness in a trial boils down to the question whether the accused has had a fair chance of dealing with the allegations against him.[2] Judge Patrick Robinson, President of the United Nations International Tribunal for the Former Yugoslavia, describes the right to a fair trial as an ancient right whose roots can be traced all the way back to the *Lex Duodecim Tabularum*—the Law of the Twelve Tables—which, as he points out, "was the first written code in the Roman Republic."[3] The principles of law codified in the Law of the Twelve Tables—the right to have all parties present at a hearing, the equality of all before the law, and the impartiality of the courts—are echoed in modern jurisprudence as essential elements to the conduct of a fair trial.[4] The scope of the right to a fair trial has been the subject of sustained and progressive development from the *Magna Carta* and the French Declaration of the Rights of Man to the constitution of the first "new nation."[5] Its content has also been shaped by the doctrines and institutions established during the Age of Enlightenment as well as in the numerous post-Second World War international and regional human rights treaties such as the American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights.[6]

The right to a fair trial is a cluster of rights which are usually classified into three categories.[7] The first category consists of the basic rules of a fair trial such as the right to be equal before the courts, the right to a fair public hearing by a competent, independent and impartial tribunal established by law, and the right to be presumed innocent. The second category includes the minimum guarantees of a fair trial which would include inter alia the right to be informed of the charge, the right to prepare a defense and to communicate

with counsel, and the privilege against self-incrimination. Finally, the right to a fair trial also includes the right to appeal, to compensation for wrongful conviction and the principle of *ne bis in idem*.

There are reams of literature in this area of the law and this chapter will not go over this well-trodden ground but will merely focus on due process rights in general and, in particular, the right to be presumed innocent, the right of silence and the privilege against self-incrimination in both international law and domestic legislation. Attention will be paid to those instances where international law has sanctioned the waiver of these rights in response to exigent circumstances. The central questions to be explored here are: how treaty law has handled the right of an accused to be presumed innocent until proved guilty beyond some defined legal standard and under what conditions has this right been relaxed and why.

4.1 THE RIGHT TO A FAIR TRIAL IN TREATY LAW

4.1.1 The presumption of innocence

The right to judicial protection or the right to due process is one of the essential rights guaranteed in virtually every international human rights treaty.[8] Treaty law guarantees everyone the right to a fair trial.[9] Article 14 of the International Covenant on Civil and Political Rights (ICCPR) sets forth the international legal standards for a fair trial. These "minimum guarantees"[10] of fairness include, among others,[11] the right to the presumption of innocence.[12] The presumption of innocence is a fundamental right to which every person accused of a crime is entitled. The fundamental nature of this right is supported by Article 14(2) of the ICCPR which provides that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The Human Rights Committee (HRC or Committee)[13] has defined the presumption of innocence to mean that the "burden of proof is on the prosecution and the accused has the benefit of doubt."[14] The HRC has underscored the importance of the presumption by stating that "[n]o guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is . . . a duty for all public authorities to refrain from prejudging the outcome of a trial."[15] Although Article 14 of the Covenant is not listed as non-derogable under Article 4, the HRC (in General Comment No. 29) has concluded that certain aspects of Article 14 are obligatory, even in states of emergency:

> [T]he category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law,

> for instance by . . . deviating from fundamental principles of fair trial, including the presumption of innocence.
>
> . . .
>
> Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected.[16]
>
> (General Comment No. 29, CCPR/C/21/Rev.1/Add.11, ¶¶11, 16 (2001))

The right to be presumed innocent requires judges and juries as well as all other public officials to refrain from prejudging any case. The jurisprudence of a number of international human rights tribunals have interpreted this to mean that public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial.[17] The conduct of the trial must be based on the presumption of innocence. Judges must conduct trials without previously having formed an opinion on the guilt or innocence of the accused and must ensure that the conduct of the trial conforms to this. It follows that no attributes of guilt are borne by the accused during the trial which might impact on the presumption of their innocence.[18]

Treaty law and the jurisprudence of international tribunals have interpreted the presumption of innocence as not limited solely to the treatment the accused gets in court or the evaluation of evidence, but extends to treatment before and throughout trial. The right to be presumed innocent applies to suspects, before criminal charges are filed prior to trial, and carries through until a conviction is confirmed following a final appeal.[19]

The specific rights, as those under Article 14 of the ICCPR, are derived from the general rights under the Universal Declaration of Human Rights, the "yardstick" by which to measure human rights standards. These rights have been incorporated into other multilateral human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the more recently concluded Rome Statute of the International Criminal Court. Treaty law aside, the right to a fair trial, which includes the right of an accused person to be presumed innocent, is also guaranteed under customary international law.[20] A canvass of state practice will show just how well entrenched these rights are in the municipal law of states representing the world's major legal traditions.

4.1.2 Right to silence and privilege against self-incrimination

The right to silence and the privilege against self-incrimination are usually included as part of the presumption of innocence even though they are distinct autonomous rights in themselves. The privilege against self-incrimination is included in the 1978 American Convention on Human Rights in its Article 8(2)(g) Right to a Fair Trial, which states: "Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not be proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:- (g) the *right not to be compelled to be a witness against himself or to plead guilty*." In the same vein, the privilege is also recognized in the International Covenant on Civil and Political Rights whose Article 14(3)(g) provides: "In the determination of any criminal charge against him, everyone shall be entitled to the minimum guarantee, in full equality, *not to be compelled to testify against himself or to confess guilt*." The European Convention on Human Rights is perhaps the only international human rights instrument that contains no express guarantee of a privilege against self-incrimination even though the jurisprudence of the European Court of Human Rights recognizes this right as implicit in the general right to a fair trial contained in Article 6 of the European Convention.[21]

In *John Murray v. United Kingdom*, the European Court of Human Rights described the privilege against self-incrimination as a recognized international standard which lies "at the heart of our notion of a fair procedure."[22] Much like the presumption of innocence, the right to remain silent protects the "accused against improper compulsion by the authorities, reducing the risk of miscarriages of justice and to securing the aims of Article 6 (art. 6)."[23] This requires the prosecution to prove its case "without resort to evidence obtained through coercion or oppression" as any attempt at compelling the accused to produce incriminating evidence is treated as an infringement of this privilege.[24]

The right to silence is also recognized in virtually all democratic countries, protecting an accused person throughout the entirety of the criminal proceedings. This means that the accused has the right to refuse to answer questions and may not, as a consequence, be exposed to criminal sanctions for exercising this right. These essential ingredients of the right to silence were driven home by the United States Supreme Court in the now famous case of *Miranda v. Arizona*,[25] which recognized the privilege against self-incrimination with regard to pre-trial procedures. The Court said: "The privilege against self-incrimination, which has a long and expansive historical development, is the essential mainstay of our adversarial system and guarantees to the individual 'the right to remain silent unless he chooses to speak in the unfettered exercise of his own free will', during a period of custodial interrogation as well as in the courts or during the course of other official investigations."

None of these jurisdictions where the privilege against self-incrimination is recognized view it as an absolute right. For instance, the jurisprudence of the European Court of Human Rights does establish that while the overall fairness of a criminal trial should not be compromised, the constituent rights entrenched within Article 6 of the European Convention on Human Rights are not themselves absolute. These immunities are: (a) a general immunity, possessed by all, from being compelled on pain of punishment to answer to questions posed by others; (b) a general immunity, possessed by all, from being compelled to provide answers to questions which may incriminate them; (c) a specific immunity, possessed by all criminal suspects being interviewed by police and others in authority, from being compelled to answer questions; (d) a specific immunity, possessed by accused persons at trial, from being compelled to give evidence or answer questions; and (e) a specific immunity, possessed by all accused persons at trial, from having adverse comment made on any failure to answer questions before trial or to give evidence at trial.[26]

4.2 THE RIGHT TO FAIR TRIAL IN THE JURISPRUDENCE OF INTERNATIONAL TRIBUNALS

Of interest here are the guideposts from the jurisprudence of international tribunals on the presumption of innocence as a fundamental right. How have international tribunals interpreted this right? What limits, if any, have they placed on it, for what reasons and under what circumstances? Have international courts treated the due process right of an accused to be presumed innocent as an absolute right not subject to derogation under any circumstance or have they handled it as a right subject to a balancing test when other equally fundamental rights are implicated? If the latter, how will the balancing proceed?

4.2.1 The European Court of Human Rights

Article 6 of the European Convention on Human Rights provides for a right to a fair trial. In a number of cases the European Court of Human Rights has recognized that though not specifically mentioned in the language of Article 6, implicit in the right to a fair trial is the right of silence and the privilege against self-incrimination.[27] These immunities together with the presumption of innocence—*presumptio innocentiae*—constitute a fundamental principle which protects everybody against being treated by public officials as if they were guilty of an offense even before such guilt is established by a competent court.[28] The Court has interpreted this provision broadly, on the grounds that it is of fundamental importance to the operation of democracy. In the case of *Delcourt v Belgium*, the Court stated that: "In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds

such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision."[29]

The jurisprudence of the Court with respect to two of the tributaries of the fairness doctrine—the right to silence and the privilege against self-criticism—has been criticized for its failure to chart a clear and consistent position.[30] Professor Ashworth has observed that while some of the Court's judgments have been helpful in clearing this legal fog, others "seemed to muddy the waters rather than to clarify a proper approach."[31] These judgments, going back to one of its earliest cases, *Funke v France,*[32] have been characterized by mixed signals particularly on the issue of the absoluteness or immutability of the right to remain silent and the right not to incriminate oneself. The waffling on this question suggests some ambivalence on the part of the Court. However, its more recent judgments appear to have resolved some of these issues,[33] enough to detect a clear trend in favor of placing some qualified limitations on due process rights. This section will briefly review the key decisions on these rights in an effort to extract from them some bright-line principles that can serve as guide-posts for tackling the reverse onus provision in the crime of illicit enrichment. The European Court has always considered the right to silence and the privilege against self-incrimination as guaranteed by Article 6(1) and the presumption of innocence enshrined in Article 6(2) as closely linked, and has accordingly examined both aspects together.[34] This discussion of the Court's jurisprudence on Article 6 will respect this unity, but for analytical neatness, and at the risk of being repetitious, the review will be divided into two parts: the first will review the case law on the presumption of innocence while the second part will explore the Court's analysis of the right to silence and the privilege against self-incrimination.

4.2.1.1 The presumption of innocence

In a constitutional democracy limited inroads on presumption of innocence may be justified.[35] The approach to be adopted was stated by the European Court of Human Rights in *Salabiaku v France* as follows:

> Presumptions of fact or of law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. This test depends upon the circumstances of the individual case.[36]
>
> (Salabiaku v. France, (1988) 13 Eur. H.R. Rep. 379, 388 ¶28)

The defendant in *Salabiaku* was a Zairean national living in Paris. He went to the airport to collect, as he said, a parcel of foodstuffs sent from Africa. He

could not find this, but was shown a locked trunk, which he was advised not to tamper with. However, he took possession of it and going through the green customs channel he was detained. The trunk was opened and found to contain drugs. He was then charged with the criminal offense of illegally importing narcotics and with the customs offense, also criminal, of smuggling prohibited goods. At trial Salabiaku was convicted of both charges: on the first he received a prison sentence and was prohibited from residing in France; on the second he was fined. On appeal, his conviction of the first offense was set aside on the grounds that the facts were not sufficiently proved, and he was therefore given the benefit of the doubt. However, his conviction of the second offense was upheld pursuant to article 392(1) of the French Customs Code:

> any person *in possession (détention)* of goods which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of *force majeure* exculpating him; such *force majeure* may arise only as a result of an event beyond human control which could be neither foreseen nor averted.[37]
>
> (Salabiaku v. France, (1988) 13 Eur. H.R. Rep. 379, 388 ¶28 at 382)

Rejecting the defendant's complaint that article 392(1) infringed the presumption of innocence, the Court noted that the French courts had been careful to avoid resorting automatically to the presumption laid down in article 392(1), and had exercised their power of assessment on the basis of the evidence adduced by the parties before them. Thus the French courts had not applied article 392(1) in a way which conflicted with the presumption of innocence.

It has been noted that *Salabiaku* is important less for what it decided than for the indications it gives of the correct approach in examining alleged infringements of the right to presumption of innocence.[38] First, the Court's recognition that member states may attach criminal consequences to defined facts:

> 27. As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States.[39]
>
> (Salabiaku, *supra* note 36)

Second, the Court's treatment of the distinction between factual and legal presumptions:

> 28. Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider, paragraph 2 of article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. The Court proposes to consider whether such limits were exceeded to the detriment of Mr. Salabiaku.[40]
>
> (Salabiaku, *supra* note 36)

Thus the determination of whether the reasonable limits to which a presumption must be subject have been exceeded must be based on the facts of the case.

In *Falk v. the Netherlands*[41] the European Court found that the registered owner's liability for minor traffic offenses was not incompatible with Article 6 §2 of the Convention. In reaching that conclusion it took into consideration its case law concerning the use of presumptions in criminal law, and also noted that the person concerned could challenge the fine before a trial court with full competence in the matter and was not left without any means of defense. *Falk* traced the outlines of a test that courts may use in determining when infringements on the presumption of innocence can be justified. A legislative interference with the presumption of innocence requires justification and must not be greater than is necessary. In other words, the interference must be proportional.

The case law of the Court on limiting Article 6 fair trial rights proposes a two-step test on when such restrictions are permissible. A limitation will only be compatible with the presumption of innocence if (a) it pursues a legitimate aim; and (b) there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[42]

As early as the 1995 case of *Allenet de Ribemont v. France*,[43] the European Court took a clear and principled position on the status of the fair trial rights in the European Convention. The presumption of innocence, the Court noted, embodies a guarantee to everyone that agents of the state are not at liberty to

treat an accused person as being guilty of an offense before this is established according to law by a competent court. The defendant in this case, Allenet de Ribemont, was arrested after the murder of Jean de Broglie, a Member of the French Parliament and former minister, murdered in 1976 in front of Ribemont's home. Immediately following Ribemont's arrest, the Minister of the Interior and senior police officers held a press conference where they identified Ribemont as one of the instigators of the murder of the French parliamentarian.[44] Their statements were widely reported in France and abroad. Ribemont objected to these remarks, which he found to be prejudicial and which cast a stain on his honor. The Government countered that the declarations by the Minister of the Interior involved "normal information about criminal investigations" and did not constitute a violation of Article 6(2) of the Convention, since at no time was the accused presented as guilty.

The Court, however, found these pre-trial statements as clearly prejudicial since they referred to the accused, without any qualification or reservation, as one of the instigators of a murder and thus as an accomplice in that murder. This was clearly a declaration of the applicant's guilt for two reasons: first, because it encouraged the public to believe him guilty and, second, it prejudged the assessment of the facts by the competent judicial authority. Accordingly, the Court ruled that there had therefore been a breach of Article 6(2). It then went one to introduce a balancing test for determining when a breach of the Convention's fair trial rights has occurred.

Taking into account all the various relevant factors, when a criminal proceeding is pending, a court must first draw a distinction between statements which reflect an opinion that the person concerned is guilty and statements which merely describe a state of suspicion. The former infringe the presumption of innocence while the latter may not necessarily do so.[45] The Court described this balancing test in the following terms:

> [A]ccount must be taken of the specific circumstances of the case and a balance struck between the conflicting interests involved, namely the legitimate interest of the public and the press in being informed and the interest of the person suspected of an offence in safeguarding the presumption of innocence.[46]
>
> (Allenet de Ribemont v. France, App. No. 15175/89, 20 Eur. H.R. Rep. 557 (1995) at 67–68, 70)

The defendant in *Sekanina v. Austria*,[47] an Austrian national, Karl Sekanina, was charged with the murder of his wife after she fell from a window and died. Sekanina was detained on remand for a little over a year. At his trial, the defendant was acquitted by a jury which found that the evidence proffered by the prosecution was inconclusive to prove that he intentionally murdered his wife. After his acquittal Sekanina applied for reimbursement of costs and compensation for his detention on remand from the state. The public prosecutor's office expressed the opinion that the costs sought were excessive and also

opposed the claim for compensation, and dismissed Sekanina's application at first instance. On appeal, the European Commission[48] held that a claim to compensation under section 2(1)(b) of the [1969] Act of Criminal Procedure is conditional on the applicant's being cleared of the suspicion of which he was the object in the criminal proceedings. Sekanina's application was dismissed on the basis that there was still considerable suspicion surrounding his responsibility for the murder. Sekanina alleged that in the compensation proceedings, the Austrian courts had disregarded the presumption of innocence laid down in Article 6(2) of the Convention and despite his acquittal, the courts assumed a continuing suspicion against him when rejecting his claim to be compensated for his detention on remand.

The case is important for the position the Commission took in expanding the presumption of innocence to cases concerning compensation claims. As the Commission noted a violation of the presumption can be found to have occurred even in these kinds of actions:

> [L]ike any other judicial decisions taken after an acquittal, those concerning compensation claims must not violate the presumption of innocence enshrined in Article 6(2). They are required to "presume" that the person concerned is "innocent" as he has not been "proved guilty according to law."
>
> The references to "suspicion" against the applicant made by the Austrian courts did not relate to the issue of the justification of the pre-trial suspicion. The impugned remarks of the courts referred to a suspicion which they believed continued to exist against the applicant even after his acquittal by the Court of Assizes, because in their view that court's judgment had not dissipated the said suspicion.[49]
>
> (Sekanina v. Austria, App. No. 13126/87, 17 Eur. H.R. Rep. 221, (1994))

The Commission took the view that a criminal court's judicial authority would be severely undermined "if, after an acquittal, a suspicion could be maintained that the accused had committed the offences dealt with at the trial." The role of the courts, as conceived in Article 6 in general and which also finds its expression in the principle of the presumption of innocence laid down in Article 6(2), the Commission pointed out, excludes such a suspicion in the case of a person whose record has been cleared by a final acquittal. In holding that the statements made by the Austrian courts in the decisions to refuse the applicant compensation for unjustified detention were incompatible with the presumption of innocence, the Commission focused on two troubling aspects of the case. First, the fact that the Austrian courts did not limit their findings to the assumption of a suspicion continuing after the applicant's acquittal but also suggested that such a suspicion could continue to provide an argument for the "guilt" of the suspect. This decision further relied on facts in respect of which the defendant had been acquitted (admissions made to a

fellow prisoner). Second, the posture adopted by the Austrian Court of Appeal which expressly stated that it did not consider itself bound by the defendant's acquittal.[50]

Lord Bingham in *DPP v. Sheldrake* succinctly summed up the jurisprudence of the European Court on Human Rights on the presumption of innocence:

> The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of *mens rea*. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.[51]
>
> (Director of Public Prosecutions v. Sheldrake, [2004] H.L. 43 at 21 (U.K.))

4.2.1.2 The right to silence in the jurisprudence of the European Court

The right to silence and the privilege against self-incrimination are rights that, according to the European Court, are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 of the European Human Rights Convention. These rights, inter alia, protect the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfillment of the aims of Article 6. The privilege against self-incrimination, in particular, presupposes that the prosecution in a criminal case carries the burden of proving its case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.[52]

One of the first cases decided by the Court on this subject was *Funke v France*.[53] Although the Court's decision is noteworthy for associating the entitlement to a fair trial with the privilege against self-incrimination,[54] it did, however, fail to fully explore the nature of these immunities.[55] It would take

two subsequent cases, *John Murray v. the United Kingdom*[56] and *Saunders v. United Kingdom*[57] before the Court had another opportunity to address the scope and rationale of the privilege against self-incrimination. The *Funke* case was concerned with a failure to provide customs officers with documentary records that could help in uncovering other documents relating to another offense. The applicant, a German living in France with his French wife, was visited by the French customs authorities as a result of a tip they received from the tax authorities in Metz. The French customs officials entered the applicant's house without a warrant and proceeded to search the house for four hours. In the course of the search they seized certain documents that were not enough to convict him of any wrongdoing. They also ordered him to produce certain bank statements as well as other financial documents. When Funke refused to produce the required documents, he was prosecuted for and convicted of the offense of failing to produce the documents. He was also ordered to pay a fine that increased for each day that he continued to refuse to produce the required documentation. Funke unsuccessfully appealed the orders in the French courts before seising the European Court of Human Rights. In his application, Funke alleged that his right to remain silent and not say anything that may incriminate him was violated.

The Court was asked to determine whether the use by customs authorities of their "police power" of search and seizure to engage in a fishing expedition to obtain documents which they suspect but do not know to exist and which if found might provide evidence for a prosecution and, not finding any, subject the suspect to daily penalties and fines in order to force him to surrender such documents, infringed on the suspect's right to a fair trial under Article 6(1) of the Convention, which guarantees anyone "charged with a criminal offence" the right to remain silent and not to incriminate himself? While finding a breach of Article 6(1) of the Convention in this case, the Court also held that the customs official had not compelled the defendant to confess to an offense or to provide evidence that would incriminate him. All that he did was to ask the defendant to give him particulars of evidence found by customs officers and to which the defendant had admitted, namely the bank statements and check-books discovered during the house search. In any event, these documents could have been obtained by other means and the customs officials did not have to use the offense to compel their production. In finding that there had been a violation of Article 6(1) the Court said: "[t]he special features of French customs law cannot justify such an infringement of the right of anyone 'charged with a criminal offence,' within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself." One writer has described this holding as a "brief and Delphic statement"[58] that stopped short of defining the scope and reach of the constituent elements of the right to a fair trial.[59]

John Murray v. the United Kingdom[60] answered the question whether the right to silence is absolute in the negative. The question put to the Court was whether the immunities provided by Article 6 of the Convention are absolute

"in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be used, is always to be regarded as 'improper compulsion'."[61] The defendant, John Murray, argued that permitting inferences to be drawn from his failure to answer police questions or to give evidence and its use in determining applicant's guilt violated Article 6(1) and 6(2) of the Convention. In invoking his right to silence, the applicant ran the risk of exposure to negative consequences as the court could draw an inference that he was guilty of the offense of which he was charged. Holding that John Murray's right to silence and the right not to incriminate himself had not been violated, the Court went on to spell out the circumstances under which limitations can be placed on these rights. First, appropriate warnings must be given to the accused as to the legal effects of maintaining silence.[62] Second, in order to benefit from such inferences, the prosecutor must first establish a *prima facie* case against the accused, that is a case "consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be satisfied beyond reasonable doubt that each of the essential elements of the offense is proved."[63] The drawing of inferences from the silence of an accused does not, the Court stressed, change the burden or the standard of proof. The prosecution still has the burden of proving the accused's guilt beyond reasonable doubt. Lastly, the inferences can be drawn only from information that is peculiarly within the knowledge of the accused: "it is only if the evidence against the accused 'calls' for an explanation which the accused ought to be in a position to give that a failure to give an explanation 'may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty'."[64] However, this discretionary power only allows a court to draw inferences as from the silence of an accused *as common sense* dictates and only in carefully defined circumstances.[65]

In *Saunders*[66] the European Court was asked to decide whether the use made by prosecutors of the statements obtained from an accused by state-appointed inspectors amounted to an unjustifiable infringement of the right against self-incrimination. *Saunders* set out to address the propriety of using at a criminal trial statements by the accused obtained under legal compulsion under the U.K. Companies Act 1985. The Act required company officers to produce books and documents, to attend before inspectors and to assist inspectors in their investigation on pain of a fine or a prison sentence. The defendant in this case was subjected to questioning by state inspectors in the course of nine lengthy interviews of which seven were admitted into evidence at his trial, leading to his conviction. Saunders challenged the conviction on the grounds that he was not afforded a fair trial because his right to silence was violated because statements he made under compulsion to state officials during an investigation were admitted as evidence against him at his subsequent criminal trial.[67] Additionally, he argued that the use of the transcripts of his answers was particularly unfair in his case since they "formed a significant part

of the prosecution's case."[68] Saunders also complained that the use against him of his silence under police questioning and his refusal to testify during trial amounted to subverting the presumption of innocence to the onus of proof resulting from the presumption.[69] In this wise, the defendant advanced two points in support of his interpretation of the right to silence. First, that the most obvious element of the right to silence is the right to remain silent in the face of police questioning and not to have to testify against oneself at trial. Second, that an equally essential element of the right to silence is that the exercise of the right by an accused would not be used as evidence against him at his trial.

The respondent state countered with two powerful arguments. First, that the privilege against self-incrimination is not absolute or immutable such that "any use of statements obtained under compulsion automatically rendered criminal proceedings unfair."[70] Infringements on this right, the government explained, may be justified in particular circumstances especially where public interests are concerned (in this case, "the honest conduct of companies and the effective prosecution of those involved in complex corporate fraud").[71] In support for this proposition, the respondent state cited other jurisdictions such as Norway, Canada, Australia, New Zealand and the United States of America that permit the compulsory taking of statements during investigation into corporate and financial frauds and their subsequent use in a criminal trial in order to confront the accused's and witnesses' oral testimony. The respondent state's second argument was that "exculpatory answers or answers which, if true, are consistent with or would serve to confirm the defence of an accused" are not protected by the privilege against self-incrimination.[72] Put differently, "[t]here cannot be derived from the privilege against self-incrimination a further right not to be confronted with evidence that requires the accused, in order successfully to rebut it, to give evidence himself."[73]

Relying on its previous decisions in *John Murray* and *Funke*, the Court found that the right against self-incrimination was primarily concerned with respecting the will of an accused person to remain silent. It did not, however, extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which had an existence independent of the will of the suspect, such as breath, blood and urine samples. The test for determining whether the use made by the prosecution of the statements obtained from the defendant by the inspectors under compulsion amounted to an unjustifiable infringement of the right would require examining the evidence "in the light of all the circumstances of the case" with particular attention on whether the defendant had been subjected to compulsion to give evidence and whether the use made of the resulting testimony offended the basic principles of a fair procedure under Article 6(1).[74]

It would be a fair statement to make that the majority in *Saunders* sidestepped the question whether the right against self-incrimination is absolute or whether infringements of it may be justified in particular circumstances: "the complexity of corporate fraud and the vital public interest in the investi-

gation of such fraud and the punishment of those responsible could justify such a marked departure from one of the basic principles of a fair procedure."[75] However, Judge Walsh's concurring opinion accepts the possibility that limitations against the privilege are permissible. For him, the privilege against self-incrimination protects a right against *compulsory* self-incrimination. Where a conviction is based on evidence obtained by self-incrimination on the part of the accused and that self-incrimination was not the result of the *unfettered* exercise of his own will, then it offends the privilege against self-incrimination. But where the evidence is the product of the accused exercising his own will, then such testimony does not offend the privilege. But in this case because the statements were obtained from the accused by "inspectors who were exercising inquisitorial powers given them by law" their use threatened the privilege. For Judge Walsh the issue of the privilege boils down to whether the self-incriminating statements were obtained under compulsion. Implicit in his analysis is an acknowledgment that the privilege is not absolute and can be waived by an accused who, in the exercise of his "own will," agrees to provide statements of an incriminating nature to the prosecution.

The *Saunders* case is of interest because it has some bearing on the relationship between the reverse onus in the offense of illicit enrichment and its compatibility with the presumption of innocence. Of significance is the position taken by the respondent state. Reading through the government's arguments leads one to believe that the government was proposing a test that would require a balancing of the privilege against public interest considerations. That is, in particular circumstances infringements on the privilege against self-incrimination can be justified. To arrive at this test the respondent state did three things. First, it drew a sharp distinction between corporate fraud and other types of crime, arguing that "devices such as complex corporate structures, nominee companies, complicated financial transactions and false accounting records could be used to conceal fraudulent misappropriation of corporate funds or personal responsibility for such misconduct."[76] Second, it pointed out that the documentary evidence relating to such transactions would be insufficient for a prosecution or incomprehensible without the explanations of the individuals concerned. Finally, it reminded the Court that "the kind of person questioned by the inspectors was likely to be a sophisticated businessman with access to expert legal advice, who had moreover chosen to take advantage of the benefits afforded by limited liability and separate corporate personality."[77] The Court rejected the government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify "such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure."[78] The general requirements of fairness contained in Article 6, including the right against self-incrimination, apply *pari passu* to criminal proceedings in respect of all types of criminal offenses without distinction from the most simple to the most complex.[79] The Court also rejected the government's legitimate public interest

argument by noting that the public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.[80]

The defendant in *Serves* was called as a witness in proceedings in which he had initially been charged as an accused, although at the date of the witness summons and the subsequent proceedings the relevant steps of the investigation had been declared void. He declined to take the oath as a witness under the Code of Criminal Procedure on the ground that evidence he might be called to give before the investigating judge would have been self-incriminating. The Court accepted that it would have been admissible for the applicant to refuse to answer questions from the judge that were likely to steer him in the direction of self-incriminating evidence, but found on the facts that the fine in the case was imposed in order to ensure that statements were truthful, rather than to force the witness to give evidence. Accordingly, the fines were imposed before a risk of self-incrimination ever arose.

In the case of *Heaney and McGuinness*,[81] the defendants, who had been arrested in connection with a bombing, declined to answer questions under special legislation requiring an individual to provide a full account of his movements and actions during a specified period. They were acquitted of the substantive offence, and imprisoned for failing to give an account of their movements. After reviewing the case law and finding Article 6 §§ 1 and 2 to be applicable, the Court accepted that the right to remain silent and the right not to incriminate oneself were not absolute rights. It then found, after considering the various procedural protections available, that the "degree of compulsion" imposed on the applicants, namely, a conviction and imprisonment for failing to give "a full account of [their] movements and actions during any specified period and all information in [their] possession in relation to the commission or intended commission . . . [of specified offences], in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent". Thereafter, the Court considered that the security and public order concerns relied on by the government could not justify the provision.[82]

The defendant in the case of *Weh v. Austria*[83] was fined for giving inaccurate information in reply to a request from the District Authority under the Motor Vehicles Act to disclose the name and address of the driver of his car on a particular date. Proceedings had already been opened against unknown offenders. The Court declined to rely on the earlier cases of *P., R. and H. v. Austria*[84] and it noted that the applicant had been required to do no more than state a simple fact—who had been the driver of his car—which was not in itself incriminating. The Court found that in the case before it, there was no link between the criminal proceedings which had been initiated against persons unknown and the proceedings in which the applicant was fined for giving inaccurate information.[85]

In the case of *Shannon v. United Kingdom* the defendant was required to give information to an investigation into theft and false accounting under the

Proceeds of Crime (Northern Ireland) Order 1996. He did not attend an interview to give the required information, and was fined. Although the defendant was acquitted in the underlying proceedings against him for false accounting and conspiracy to defraud arising from the same set of facts, the Court concluded that it was open to the defendant to complain of an interference with his right not to incriminate himself. As to a justification for the coercive measures, the Court recalled that not all coercive measures gave rise to a conclusion of an unjustified interference with the right against self-incrimination. The Court found that neither the security context nor the available procedural protection could justify the measures in the case.

The case of *Jalloh v. Germany*[86] concerned the use of evidence in the form of drugs swallowed by the defendant, which had been obtained by the forcible administration of emetics. The Court considered the right to remain silent and the privilege against self-incrimination in the following terms:

> While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law.[87]
>
> (Schenk v. Switzerland, App. No.10862/84, 140 Eur. Ct. H.R. (ser. A) at 29, 45–46 (1988); Teixeira de Castro v. Portugal, Eur. Ct. H.R. (1998), ¶34)

O'Halloran and Francis v the United Kingdom: in this 2007 case the Court rejected the defendants' argument that the right to remain silent and the privilege against self-incrimination were absolute rights. Cars owned by defendants, Gerard O'Halloran and Idris Richard Francis, were photographed by police speed cameras at a speed trap. The defendants were then served with a notice of intended prosecution, informing them that proceedings were to be instituted against them as actual or potential defendants in connection with the road traffic offense for which the police had technical and photographic evidence. In accordance with section 172 of the Road Traffic Act 1988 the defendants were asked in each case to disclose who had been the driver of the car on the occasion in question. Both were advised that failure to comply with this statutory request constitutes a criminal offense. Under the threat of criminal prosecution, O'Halloran accepted that he had been the driver when the car was photographed by police cameras, and attempted, unsuccessfully, to have that evidence excluded from his trial. He was then convicted of speeding. Francis, on the other hand, relying on his right to silence and the privilege against self-incrimination, refused to give the name of the driver at the time and date referred to in his Notice of Intended Prosecution, and was convicted for that refusal. Notwithstanding the different factual situations, both applicants complained that they had been compelled to give incriminating evidence in violation of the right to remain silent and the privilege against self-incrimination. O'Halloran alleged that he was convicted solely or mainly on account of the statement he was compelled to provide under threat of a

penalty similar to the offense itself. Francis, for his part, complained that being compelled to provide evidence of the offense he was suspected of committing infringed his right not to incriminate himself. Both defendants maintained that the right to remain silent and the privilege against self-incrimination are absolute rights and that to apply any form of direct compulsion to require an accused person to make incriminatory statements against his will of itself destroys the very essence of that right.

The government countered by submitting that the privilege against self-incrimination and the right to remain silent were not absolute and their application could be limited by reference to other legitimate aims in the public interest. In addition to the cases on the right to remain silent,[88] they referred to the limitations on access to court,[89] to case law showing that in certain circumstances contracting states were permitted to reverse the onus of proof of certain matters provided that this did not disturb the fair balance between the interests of the individual and the general interests of the community,[90] to acceptable limitations on the rights of the defense in cases on equality of arms[91] and the questioning of witnesses[92] and also to the general principle that it is primarily for national law to regulate the admissibility of evidence, including incriminating evidence.[93]

The government further argued that the power under section 172 to obtain an answer to the question who was driving a car when a suspected motoring offense was committed and to use that answer as evidence in a prosecution or, alternatively, to prosecute a person who failed to provide information was compatible with Article 6. There were very good reasons why the owner should be required to identify the driver: driving offenses are intended to deter dangerous conduct which causes risk to the public and deterrence depended on effective enforcement, there was no obvious generally effective alternative to the power contained in section 172 and without such a power it would be impossible to investigate and prosecute traffic offenses effectively, and the simple fact of being the driver of a motor car was not in itself incriminating. Nor did section 172 breach the presumption of innocence as the overall burden of proof remained on the prosecution. It provided for the putting of a single question in particular circumstances and all the usual protections against the use of unreliable evidence or evidence obtained by improper means remained in place, while the maximum penalty was only a fine of GBP 1,000.

4.2.2 The African Commission on Human and Peoples' Rights

Unlike the Strasbourg Court, the docket of the African Commission on Human and Peoples' Rights has been quite small with respect to communications touching on the right to remain silent and the privilege against self-incrimination. One of the first petitions to reach the Commission was *Annette Pagnoulle (on behalf of Abdoulaye Mazou)/Cameroon*.[94] Complainant, Abdoulaye

Mazou, a Cameroonian national, was imprisoned in 1984 by a military tribunal without trial. Mazou was detained for a prolonged period of time before his trial, which was conducted without any witnesses called and without affording him the right to a defense. He was subsequently sentenced to five years imprisonment for hiding his brother who was later sentenced to death for his involvement in an attempted *coup d'état*. The respondent state defended the excessively long period of administrative detention on the grounds that "[w]hen the state believes that an individual who is free can trouble public order we can take preventive measures, and this explains why he [Mazou] was detained administratively. This can be renewed at any time when the administrative authorities deem that there is a risk and therefore they deem need of preventive measures." In holding that the respondent state had violated the complainant's right to a fair trial, the Commission observed that "detention on the mere suspicion that an individual may cause problems is a violation of his right to be presumed innocent."[95]

Nigeria's protracted flirtation with military rule provided fodder for the communications that came before the Commission for alleged human rights violations, especially those dealing with free speech and fair trial. *Civil Liberties Organization, Legal Defense Centre, Legal Defense and Assistance Project v. Nigeria*[96] was an opportunity for the Commission to take a clear stand on the gross violations of the Banjul Charter that were occurring in Nigeria. The Commission used this case to trace the contours of the right to a fair trial by articulating the principle that the provisions of this right are non-derogable: "[i]t is *our view that the provisions of Article 7 should be considered non-derogable* providing as they do the minimum protection to citizens and military officers alike especially under an unaccountable, undemocratic military regime." This effectively elevated the right to a fair trial to a *jus cogens*. Second, the Commission declared that implicit in the right of an accused to be presumed innocent under Article 7(1)(b) is the privilege against self-incrimination and the right to silence, which meant that "no accused should be required to testify against himself or to incriminate himself or required to make a confession under duress." *Civil Liberties Organization* was followed by another controversial case, *International Pen and Others v. Nigeria*,[97] that once again beamed the international spotlight on gross human rights violations in Nigeria under military strongman, Sani Abacha. The detention, trial and subsequent execution of Kenule Beeson Saro-Wiwa, a respected writer, political activist and president of the Movement for the Survival of the Ogoni People, stunned Nigerians and provoked international outrage. The African Commission was thrust into the center of the unfolding drama as it battled wits with a venal and uncompromising military oligarchy.

Following the murder of an Ogoni leader, hundreds of Ogonis, including Saro-Wiwa, were arrested, tried and convicted. Non-governmental human rights organizations seised the African Commission on their behalf. Complainants in this case alleged violations of several provisions of the African Charter, among which was Article 7(1)(b): the right to be presumed innocent

until proven guilty by a competent court or tribunal. They alleged that the special military tribunals that convicted complainants were not independent; that their right to be presumed innocent was denied; that they were not given sufficient time or facilities to prepare their defense; that they were denied legal representation by a counsel of their choice; that there was no right of appeal and that following the sentencing the persons were held incommunicado. Complainants further alleged that they were tried, convicted and sentenced to death for the peaceful expression of their views and opinions in violation of their fundamental rights as Ogoni people.

In holding that the complainants' right to a presumption of innocence had been violated by respondent state, the Commission stated:

> The government has not contradicted the allegations contained in communication 154/96 that at the conviction in October 1995 the Tribunal itself admitted that there was no direct evidence linking the accused to the act of the murders, but held that they had each failed to establish that they did not commit the crime alleged. Communication 154/96 has also affirmed that prior to and during the trial, leading representatives of the government pronounced MOSOP and the accused guilty of the crimes at various press conferences and before the United Nations. As the allegations have not been contradicted, the Commission find a violation of the right to be presumed innocent, Article 7.1(b).[98]
>
> (International Pen and Others v. Nigeria, African Commission on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998), ¶96)

Complainants in *Media Rights Agenda v. Nigeria*,[99] all newsmen, were arrested but no reasons were given for their arrest. They were held without charge until their arraignment before a Special Military Tribunal for their alleged involvement in a *coup d'état*. One of the complainants, Niran Malaolu, was found guilty of concealment of treason and sentenced to life imprisonment. Throughout the period of Malaolu's incarceration he was not allowed access to his lawyer, doctor or family members. The complaint before the Commission alleged that Malaolu was denied the right to be defended by lawyers of his choice, and was instead assigned a military lawyer by the tribunal in contravention of the right to fair hearing. He further alleged that the Special Military Tribunal which tried him was neither competent nor independent nor impartial since all its members were hand-picked by the military dictator and head of the Provisional Ruling Council, General Sani Abacha. Furthermore, his right to be presumed innocent until found guilty by a competent court was violated by adverse pre-trial media publicity. The complainant alleged that prior to the setting up of the special tribunal, the Military Government of Nigeria organized intense pre-trial publicity to persuade members of the public that a coup plot had occurred and that those arrested in connection with it were guilty of treason. In this regard, the complainant

submitted that any possible claim to national security in excluding members of the public and the press from the actual trial by the tribunal cannot be justified, and therefore would be in breach of the right to fair trial and, particularly, the right to presumption of innocence.

The Commission found Nigeria in violation of the complainant's right to a presumption of innocence and reasoned that since the respondent state had not contested the veracity of the complainant's submission, the Commission was left with no other choice but to accept this as the facts of the case and therefore find the Government of Nigeria in violation of Article 7(1)(b) of the Charter.[100]

Law Office of Ghazi Suleiman v. Sudan[101] came on the heels of *Media Rights Agenda* and it too dealt with the adverse effects of pre-trial media publicity on complainants' right to a fair trial. The Commission was asked to determine whether the complainants' right to get a fair trial was not compromised after the publication of inadmissible and prejudicial material prior to the trial.

The complainants were arrested in 1998 and jailed under a 1994 law relating to national security. The accused persons were alleged to have committed acts with terrorist and propaganda objectives aimed at endangering the security and peace of Sudan and innocent civilians. They were held in detention by the Government of Sudan without charge and were refused contact with their lawyers or their families and believed to have been tortured. Even before their trial the complainants alleged that they were subjected to highly prejudicial media publicity with investigators and highly placed government officers proclaiming their guilt. The government organized wide publicity around the case, with a view to convincing the public that the complainants were involved in an attempted *coup d'etat*. The government showed open hostility towards the victims by declaring that "those responsible for the bombings" will be executed.

The Commission condemned the negative media publicity organized by state officials aimed at declaring the suspects guilty of an offense before a competent court established their guilt. Accordingly, the Commission held that the negative publicity by the government was in violation of the complainants' right to be presumed innocent, guaranteed by Article 7(1)(b) of the African Charter.[102]

In both *Law Office of Ghazi Suleiman* and *Media Rights Agenda*, the Commission reaffirmed the fundamental principle of a fair trial that the accused person's right to the presumption of innocence requires that guilt be established on the basis of admissible evidence before the court, and not on prejudicial information from outside.

As with the other communications, *Interights et al. v. Botswana*[103] also involved violations of the complainant's right to a fair trial as provided for in Article 7(1)(b) of the Banjul Charter. But this time, the focus was on the shifting the onus. The Commission was asked to determine whether the placement of the burden of proof on the complainant did not compromise his right to a fair trial. The trial judge chose to place the onus of proof on the complainant, a misdirection that according to him vitiated the holding of a fair trial. On

appeal the appellate court held that the misdirection did not result in a miscarriage of justice. The respondent state rebutted this alleged miscarriage of justice by arguing that a misdirection in regard to the burden of proof will vitiate a guilty verdict only where the misdirection either on its own or "cumulatively is or are of such a nature as to result in a failure of justice." Because the court of appeal meticulously examined the evidence adduced at trial and the effect of the reversal of the burden of proof and proceeded to uphold the conviction suggests that the "quality of the evidence was such that no miscarriage of justice" resulted. With respect to the denial of the complainant's right to a fair trial, the Commission observed that the presumption of innocence does not prohibit presumption of facts and law.

The *Interights* decision is significant because of the Commission's reluctance to pronounce a hard rule on the shifting of the burden of proof to the complainant. The Commission did not consider reversing the burden as *per se* unlawful. Rather, it saw such a reversal as significant only to the extent that the accused's guilt is established by the evidence produced by the accused himself. It is in that context that a breach of the right to a fair trial under Article 7(1) of the Banjul Charter can be found. In other words, reversing the onus does not relieve the prosecution from proving its case beyond a reasonable doubt. Second, it would require additional evidence to corroborate that presented by the accused in discharging his burden of proof, before a court can pronounce a guilty sentence on the accused.

4.2.3 The Inter-American Court of Human Rights

The Court in the *Suárez Rosero Case*[104] was asked to decide whether Ecuador had violated Articles 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection), all in conjunction with Article 1 (Obligation to Respect Rights) of the American Convention on Human Rights in the arrest and trial of the applicant. Rafael Iván Suárez-Rosero was arrested in 1992 by the National Police of Ecuador under a drug interdiction operation and was held incommunicado for 36 days. Article 22(19)(h) of the Political Constitution of Ecuador provides that the incommunicado detention of a person may not exceed 24 hours. His first judicial proceeding relating to his detention took place over a month after his arrest.

The Court unanimously found that Ecuador violated Article 7, Article 8 and Article 25 of the American Convention:

> This Court is of the view that the principle of the presumption of innocence—inasmuch as it lays down that a person is innocent until proven guilty—is founded upon the existence of judicial guarantees. Article 8(2) of the Convention establishes the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an

investigation and that he will not evade justice; preventive detention is, therefore, a precautionary rather than a punitive measure. This concept is laid down in a goodly number of instruments of international human rights law, including the International Covenant on Civil and Political Rights, which provides that preventive detention should not be the normal practice in relation to persons who are to stand trial (Art. 9(3)). This would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law.

The Court considers that Mr. Suárez-Rosero's prolonged preventive detention violated the principle of presumption of innocence, in that he was detained from June 23, 1992, to April 28, 1996, and that the order for his release issued on July 10, 1995, was only executed a year later. In view of the above, the Court rules that the State violated Article 8(2) of the American Convention.[105]

(Suárez Rosero Case, [1997] I.A.C.H.R. 8, ¶¶77–78)

4.3 RIGHT TO FAIR TRIAL IN DOMESTIC LAW

In addition to a treaty-based right to be presumed innocent, such presumption is also guaranteed under national law; this is true for common law jurisdictions as well as civil law countries. Examples of legal systems whose constitutions include the presumption of innocence are the United States where the Fifth Amendment to the Constitution provides for a due process clause which has been interpreted as meaning a fair trial, which includes the right to be presumed innocent. Similarly, the South African Constitution includes this right in its Article 35, while Kenya's entrenches this right in Article 77 of its Constitution, while in the Political Constitution of the United Mexican States presumption of innocence as a constitutional right is found in article X(B)(1). A review of these various constitutions and their drafting history will help answer the question: why such solicitous attitude toward the right of an accused to be presumed innocent and for the state to carry the burden of proving his guilt beyond a reasonable doubt?

4.3.1 The approach of common law countries

The doctrine of presumption of innocence has its roots in the common law and features prominently in the legal systems of most modern liberal democracies, as the discussion below attests. Its importance in the system of justice is evidenced by its inclusion in the constitutions of many of these countries.[106] For instance, section 35(2) of the South African Constitution guarantees to the accused the right "to be presumed innocent, to remain silent, and not to testify during the proceedings."[107] Similarly the Constitution of Kenya also includes a presumption of innocence provision in paragraph 77(2)(a): "Every person who is charged with a criminal offence . . . shall be presumed to be

innocent until he is proved or pleaded guilty."[108] It is a settled rule of criminal jurisprudence in these modern democracies that the burden of proving the guilt of an accused person and the facts that can be considered in his disfavor rests with the prosecution. The now famous dictum of Viscount Sankey LC in *Woolmington v. DPP* captures this golden rule: "[t]hroughout the web of the 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 to any statutory exception."[109] *Woolmington* looms large in the jurisprudence of almost every common law when it comes to the prosecution's burden of proof in criminal cases.

Canada: in *R. v. Noble*,[110] the leading Canadian case on the right to silence under section 11(c) of the Canadian Charter of Rights and Freedoms, the trial judge partially relied on the accused's failure to testify in reaching his belief in the accused's guilt beyond a reasonable doubt. Questioning the propriety of drawing adverse inferences from an accused's silence, the Canadian Supreme Court went on to situate the right to remain silent in the Canadian constitutional scheme. It recognized the right as one based on society's distaste for compelling a person to incriminate himself with his own words. Just as a person's words should not be conscripted and used against him by the state, it is equally inimical to the dignity of the accused to use his silence to assist in grounding a belief in guilt beyond a reasonable doubt. The presumption of innocence, enshrined at trial in the Charter supports this conclusion.[111] In order for the burden of proof to remain with the Crown, the silence of the accused should not be used against him in building the case for guilt. Two fairly recent Supreme Court cases, *R. v. François*[112] and *R. v. Lepage*,[113] confirm that silence may not be treated as a piece of inculpatory evidence by a fact-finder and some reference to the accused's silence may not offend Charter principles. Where in a bench trial the trial judge is convinced of the accused's guilt beyond a reasonable doubt, his silence may be referred to as evidence of the absence of an explanation which could raise a reasonable doubt. Because of the potential for confusion, however, trial judges should avoid referring to silence in this respect. But an accused's silence can be used by the fact-finder in two very limited senses: (1) to confirm prior findings of guilt beyond a reasonable doubt; and (2) to remind courts that they need not speculate about unstated defenses. It boils down to this: the prosecution must establish a "case to meet" before there can be any expectation that the accused should respond:

> All of these protections, which emanate from the broad principle against self-incrimination, recognize that it is up to the prosecution, with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping the state fulfil this task. Once, however, the Crown discharges its obligation to present a *prima facie* case, such that it cannot be non-suited by a motion for a directed verdict of acquittal, the accused can legitimately be expected to respond,

> whether by testifying him or herself or calling other evidence, and failure to do so *may* serve as the basis for drawing adverse inferences.[114]
>
> (Dubois v. The Queen, [1985] 2 S.C.R. 350, 357–58 (Can.))

England: parliament enacted the Human Rights Act 1998 to bring the rules and practices of the English law of criminal procedure and evidence into conformity with the European Convention on Human Rights. A good starting point for examining the jurisprudence of English courts on the presumption of innocence since the Human Rights Act is Lord Bingham's interpretation of the European Court of Human Rights' jurisprudence on this subject in *Sheldrake v. DPP*. In his Lordship's words:

> The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.[115]
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> (Sheldrake v. Director of Public Prosecutions, [2004] H.L. 43 at 21 (U.K.))

The leading English case is *R v Lambert*.[116] Here the court was considering the offense of possession of a controlled drug with intent to supply contrary to the Misuse of Drugs Act 1971. The relevant provision of the Act provides that it is a defense for the accused to prove that he neither knew nor suspected nor had any reason to suspect the existence of some fact alleged by the prosecution which it was necessary for the prosecution to prove. The House of Lords held that, applying ordinary principles of construction and without reference to the Human Rights Act, the law in question imposed a legal burden of proof on the accused to prove an absence of relevant knowledge, suspicion or reason to suspect. The House then considered whether placing a legal burden of proof on an accused derogated from Article 6(2) of the European Convention. It was held that a statute may place a legal burden of proof on a defendant,

despite Article 6(2), in pursuit of a legitimate aim so long as the nature of the burden is proportionate to the aim to be achieved.

Lord Steyn cited with approval Chief Justice Dickson's statement in the Canadian Supreme Court decision of *R. v. Whyte*[117] where he said:

> The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence . . . If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.
>
> (R. v. Whyte, [1988] 51 D.L.R. (4th) 481 (Can.))

His Lordship observed that in order to determine whether legitimate aim and proportionality are satisfied it is necessary to take account of numerous factors, including the gravity of the conduct, the seriousness of the offence, the precise justification for placing the burden on the accused, and the degree of difficulty that the accused may have in discharging that burden.

The House of Lords held that a legal burden imposed by the relevant provision of the Misuse of Drugs Act 1971 would be disproportionate and not justified. It would therefore follow that section 28 was incompatible with Article 6(2) and the presumption of innocence. However, in order to avoid this outcome, the House of Lords relied on Human Rights Act 1998 s 3(1) to 'read down' the words of section 28 and conclude that the section imposed only an evidential burden on the accused. The Human Rights Act s 3(1) provides that legislation must be read and given effect in a way which is compatible with the Convention if it is possible to do so. Lord Hope of Craighead said:

> I would therefore read the words "to prove" in section 28(2) as if the words in this subsection were "to give sufficient evidence", and would give the same meaning to the words "if he proves" in section 28(3)" . . . If sufficient evidence is adduced to raise the issue, it will be for the prosecution to show beyond reasonable doubt that the defence is not made out by the evidence.
>
> (R. v. Lambert, [2001] 2 Cr. App. R. 511, H.L. (U.K.))

United States of America: the significance of the presumption of innocence was explained by the United States Supreme Court in a case that predates *Woolmington*. In *Coffin v. United States*[118] the Supreme Court described the "presumption of innocence" as a doctrine tied to principles of due process, even though it is not derived from an independent constitutional requirement. *Coffin* established the principle that at the request of a defendant, a

court must not only instruct on the prosecution's burden of proof—that a defendant cannot be convicted unless the government has proven his guilt beyond a reasonable doubt—but also must instruct on the presumption of innocence—by informing the jury that a defendant is presumed innocent. The Court in that case stated: "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* reversed a lower court's decision because the court had refused to instruct the jury in the concept of innocent until proven guilty: "[t] he law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty."[119] In *Taylor v. Kentucky*, the Supreme Court again described the presumption of innocence as a "shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion.' "[120] This means that in the courtroom, not only does the government bear the burden of proving every element of crime beyond a reasonable doubt, but that the fact-finder—panel, jury, or judge—approaches the case without negative predisposition drawn from the accused person's presence in the courtroom. Indeed, to guard against such disposition, juries are instructed to adopt an affirmative assumption of innocence.[121] The presumption of innocence thus serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.[122]

In *Bell v. Wolfish*, the Supreme Court further clarified the parameters of the presumption of innocence by making it clear that the doctrine serves as an admonishment to the jury to establish an accused person's guilt or innocence solely on the evidence the prosecution presents and "not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial."[123] But in addition to reminding the trier of fact not to be hasty in presuming an accused person's guilt, the presumption of innocence also allocates the burden of proof in criminal trials[124] by designating the party whose duty it is to produce evidence and effect persuasion.

It should be clear though that the presumption of innocence is not evidence *per* se and involves no rule of law as to the weight of evidence necessary to meet it. As Wigmore explained it, the doctrine is merely a corollary of the rule that the prosecution must adduce evidence and produce persuasion beyond a reasonable doubt and through it all the accused "may remain inactive and secure until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e. to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it."[125] All the presumption does is to relieve the party in whose favor it operates from going forward in argument or evidence, and serves the purpose of a *prima facie* case until the other party has gone forward with his evidence.[126] There is no fixed

rule which determines how much evidence shall be required from the other party to meet, overcome or destroy the presumption.[127] As Elliott put it:

> When a presumption is called a strong one, like the presumption of legitimacy, it is meant that it is accompanied by another rule relating to the weight of evidence to be brought in by him against whom it operates. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption, being a legal rule or a legal conclusion, is not evidence. It may represent and spring from certain evidential facts, and these facts may be put in the scale; but that is not putting in the presumption itself. It may in a sense, be called "an instrument of proof" or something "in the nature of evidence", in that it determines from whom evidence shall come; or it may be called a substitute for evidence, in the sense that it counts at the outset for evidence enough to make a *prima facie* case; but it is not evidence in the true sense. It is not probative matter, which may be a basis of inference and weighed and compared with other matter of a probative nature.[128]
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> (D.W. Elliott, Phipson's Manual of the Law of Evidence §§91–93)

In *Agnew v. United States* the defendant requested the trial court to give the following instruction:

> Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as a matter of evidence to the benefit of which the party is entitled. This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy.[129]
>
> (Agnew v. United States, 165 U.S. 36, 41 L. ed. 624 (1897))

This requested instruction embodied exactly what the Supreme Court had previously held in the *Coffin* case, and a portion of it was in Justice White's exact language, wherein he said, "The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as *presumptio juris*, demonstrates that it is evidence in favor of the accused; for in all systems of law legal presumptions are *treated as evidence giving rise to resulting proof to the full extent of their legal efficacy*." But notwithstanding this, the Supreme Court held that the trial court properly refused the requested instruction, "on the ground of the tendency of its closing sentence to mislead"; and it expressly approved the following instruction which the trial court did give:

> The defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you. *This presumption remains with the defendant until such time in the progress of the case that you are satisfied of the guilt beyond a reasonable doubt*.
>
> (Coffin v. United States, 156 U.S. 432; 15 S.Ct. 394 (1895))

And in that case the Supreme Court further said:

> Undoubtedly, in criminal cases, the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial. But when a prima facie case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused.
> (Coffin v. United States, 156 U.S. 432; 15 S.Ct. 394 (1895))

4.3.2 The perspective of civil law countries: Latin American States

Argentina: the principle of presumption of innocence is codified in article 1 of the Argentine National Code of Criminal Procedure [Código Procesal Penal de la Nación Argentina].[130] Article 1 provides that no one shall be considered guilty until a final judgment rejects the presumption of innocence enjoyed by everyone charged with a criminal offense. Article 3 codifies the concept of *in dubio pro reo*.[131] Article 3 provides that, in case of doubt, one must stand for what is most favorable to the accused.

Bolivia: article 6 of Bolivia's New Code of Criminal Procedure [Nuevo Código de Procedimiento Penal] protects the presumption of innocence as a constitutional right.[132] Under article 6, everyone charged with a criminal offense shall be considered innocent and shall be treated as such at all times, as long as they are not found guilty in a final judgment. Article 6 further prohibits the reversal of the burden of proof by providing that the accusers bear the burden of proof. The statute also expressly prohibits any presumption of guilt.

Chile: Chile's Code of Criminal Procedure [Código Procesal Penal] codifies the principle of presumption of innocence under article 4, which provides that no person shall be considered guilty nor shall be treated as such as long as the person is not convicted in a final judgment.[133]

Colombia: article 7 of Colombia's Code of Criminal Procedure [Código de Procedimiento Penal] codifies the principle of presumption of innocence.[134] Article 7 provides that every person shall be presumed innocent and shall be treated as such, as long as there is not a final judgment determining their criminal responsibility. Furthermore, the article provides that in order for a judgment of conviction to be pronounced, the court must be convinced of the criminal responsibility of the accused beyond all doubt. The reversal of the burden of proof is also expressly prohibited by article 7, which provides that the burden of proof regarding the criminal responsibility rests on the agency of criminal prosecution, that any doubt that may arise shall be resolved in favor of the accused, and that the burden of proof may not be reversed under any circumstances.

Costa Rica: in Costa Rica, both the presumption of innocence and the concept of *in dubio pro reo* are addressed in article 9 of the Code of Criminal Procedure [Código Procesal Penal].[135] Under article 9, the accused must be

considered innocent at every stage of the proceedings, as long as he is not found guilty in a final judgment in accordance with the laws established in the Code of Criminal Procedure, and, in case of doubt with respect to issues of fact, one must hold in favor of the accused. Article 9 further prohibits any public official from pronouncing on the guilt of an accused person while the matter is *sub judice*.

Dominican Republic: article 14 of the Code of Criminal Procedure of the Dominican Republic [Código Procesal Penal de la República Dominicana] protects the presumption of innocence as a fundamental right.[136] Under article 14, every person shall be presumed innocent and shall be treated as such until a final judgment establishes his responsibility. Article 14 also implicitly provides against the reversal of the burden of proof by stating that it corresponds to the prosecution to rebut the presumption of innocence and that presumptions of guilt are inadmissible in the application of criminal laws.

Ecuador: Ecuador's Code of Criminal Procedure [Código de Procedimiento Penal] codifies the principle of presumption of innocence under article 4, which provides that every criminal defendant is innocent until proven guilty in a final judgment.[137]

El Salvador: the principle of presumption of innocence is codified in article 4 of El Salvador's Code of Criminal Procedure [Código Procesal Penal], which provides that every person accused of a crime will be presumed innocent and will be treated as such at all times, as long as they are not proven guilty in accordance with the law and in a public trial, in which the rights of the proper proceedings are guaranteed.[138] The reversal of the burden of proof is also implicitly prohibited by article 4, which provides that the burden of proof corresponds to the accusers.

Guatemala: article 14 of Guatemala's Code of Criminal Procedure [Código Procesal Penal] protects the presumption of innocence of criminal defendants and addresses the concept of *in dubio pro reo*.[139] Under article 14, the criminal defendant's innocence must be presumed during the proceedings, until a final judgment finds him guilty and imposes upon him a punishment or a security and correction measure. Article 14 also expressly provides that doubt favors the accused. Guatemalan courts are instructed to give it a "restrictive interpretation" and are prohibited from engaging in "extensive interpretation and analogy . . . [to the extent that] they do not favor the liberty or the use of [the defendant's] faculties."[140]

Honduras: the Honduran Code of Criminal Procedure [Código Procesal Penal] codifies the principle of presumption of innocence in article 2, which provides that everyone charged with a criminal offense shall be considered and treated as innocent as long as they are not found guilty by the appropriate judicial authority in accordance with the rules of the Code of Criminal Procedure.[141] Furthermore, article 2 prohibits a public authority from holding an accused as guilty or presenting him as such to third parties absent a finding of guilt against the accused. An accused is entitled to indemnification for any damages caused by a public official who violates this prohibition.

Indemnification is without prejudice to any other criminal or administrative responsibility the public official may entail.[142]

Mexico: the principle of presumption of innocence is addressed in Article 20 of the Political Constitution of the United States of Mexico [Constitución Política de los Estados Unidos Mexicanos] which provides that every person accused of a criminal offense has the right to be presumed innocent as long as not found responsible through a judgment rendered by the trial judge.[143] Article 20 also implicitly prohibits the reversal of the burden of proof by providing that the burden of proof of demonstrating guilt corresponds to the accusing side, in accordance with that established by the criminal offense. The Supreme Court of Justice of the Nation has also explained that the state of innocence of the accused is recognized *a priori* by the system established by the Political Constitution of the United States of Mexico, since it provides that it is the Attorney General's responsibility to prove the elements of the crime and the guilt of the accused.[144]

Case law also recognizes the constitutional imperative of the doctrine of presumption of innocence. As recently as 2007, Mexico's Supreme Court of Justice reiterated the constitutional requirement that a criminal defendant's guilt must be proven by the state. In *Presunción de Inocencia. El Principio Relativo se Contiene de Manera Implícita en la Constitución Federal {Presumption of Innocence. The Principle is Implicitly Contained in the Federal Constitution}, Isolated Thesis*,[145] the Supreme Court held that:

> [T]he constitutional principle of legal due process and the constitutional accusatory principle both implicitly protect the diverse principle of presumption of innocence, giving cause for the obligor not to be required to prove the legality of his conduct when accused of the commission of a crime, in so far as the accused does not have the burden of proving his innocence, because the system provided by the Political Constitution of the United States of Mexico recognizes, a priori, his state of innocence, by expressly providing that it is the responsibility of the Attorney General's Office to prove the elements that constitute the crime and the guilt of the accused.[146]
>
> Presumption of Innocence. The Principle is Implicitly Contained in the Federal Constitution, Isolated Thesis, Registry No. 921223 (Mex. 2007)

Nicaragua: the principle of presumption of innocence is expressly protected by article 2 of the Code of Criminal Procedure of the Republic of Nicaragua [Código Procesal Penal de la República de Nicaragua].[147] Article 2 provides that every person accused of a crime shall be presumed innocent and shall be treated as such during the entire proceedings, as long as they are not found guilty in a final judgment in accordance with the law. Article 2 also codifies the concept of *in dubio pro reo*, stating that when there is reasonable doubt as to the guilt of the accused, in passing a sentence or verdict, the accused must be absolved.

Panama: article 1942 of Book III of the Judicial Code of Panama [Código Judicial de Panamá] codifies the principle of presumption of innocence.[148] Article 1942 provides that every person has a right to personal liberty and shall be presumed innocent when faced with any accusation.

Paraguay: article 4 of the Code of Criminal Procedure of Paraguay [Código Procesal Penal de Paraguay] protects the presumption of innocence as a fundamental right.[149] Under article 4, the accused shall be presumed innocent and shall be treated as such during the proceedings, until a final judgment declares his guilt. Furthermore, article 53 implicitly provides against the reversal of the burden of proof by stating that the burden of proof rests with the Attorney General, who must prove in a public and oral trial the facts that provide support to the accusation.[150]

Peru: Peru's Code of Criminal Procedure [Código Procesal Penal] codifies the principle of presumption of innocence under article II, which provides that every person accused of the commission of a criminal offense shall be considered innocent, and shall be treated as such, until the contrary is proven and the person is found criminally responsible in a well-grounded final judgment.[151] The concept of *in dubio pro reo* is also codified under article II, which states that, if there is doubt over the criminal responsibility of the accused, it must be resolved in his favor. Furthermore, article IV implicitly prohibits the reversal of the burden of proof by providing that the Attorney General is the party entitled to bring criminal proceedings and which has the duty of the burden of proof.[152]

Uruguay: article 139 of Uruguay's General Procedure Code [Código General de Proceso] implicitly prohibits the reversal of the burden of proof by providing that it corresponds to him who makes a claim to prove the facts that constitute his claim, and that he who contradicts the claim of his adversary has the burden of proving the modifying, impeding or extinguishing facts of such claim.[153]

Venezuela: the principle of presumption of innocence is codified under article 8 of Venezuela's Organic Code of Criminal Procedure [Código Orgánico Procesal Penal], which provides that anyone accused of committing a criminal offense has the right to be presumed innocent and to be treated as such, as long as their guilt is not established through a final judgment.

4.4 RATIONALE FOR PROTECTING THE RIGHT TO FAIR TRIAL

Why this solicitous attitude toward these fair trial rights (presumption of innocence, right of silence and the privilege against self-incrimination) in the law and jurisprudence of the world's major legal traditions? What possible doctrinal and public policy reasons can explain this strong attachment to the doctrine? We can think of four good reasons why these procedural safeguards are necessary.

4.4.1 Ensuring the equality of arms between the parties

The right to a fair hearing lies at the heart of the concept of a fair trial.[154] In criminal trials this right is specified by a number of concrete rights, such as the right to be presumed innocent, the right to be tried without undue delay, the right to prepare a defense, the right to defend oneself in person or through counsel, the right to call and examine witnesses and the right to protection from retroactive criminal laws. An essential element of a fair hearing is the principle of "equality of arms" (*egalité des armes*) between the parties in a case[155] which means that both parties are to be treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case.[156] Equality of arms requires that the prosecution as well as the accused is afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party.[157] This is particularly important in criminal trials where the prosecution has all the machinery of the state behind it; the principle of equality of arms is an essential guarantee of the right to defend oneself. It ensures that the defense has a reasonable opportunity to prepare and present its case on a footing equal to that of the prosecution. Its requirements include the right to adequate time and facilities to prepare a defense, including disclosure by the prosecution of material information.[158] The presumption of innocence principle would be violated if, for example, the accused was not given access to information necessary for the preparation of the defense, if the accused was denied access to expert witnesses, or if the accused was excluded from an appeal hearing where the prosecutor was present. One would also assume that a violation of the principle occurs when the prosecution is denied access to information central to its case.

4.4.2 Public expectations

Blackstone captured the public's interest in presuming an accused person's innocence as opposed to his guilt when he said "*{b}etter that ten guilty persons escape than that one innocent suffer*."[159] Implicit in Blackstone's dictum is the belief that the harm caused by a wrongful conviction is far greater on the individual accused than it is on the rest of society. In *In Re Winship*[160] Justice Brennan touched on the moral wrong resulting from the conviction of an innocent man:

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because the certainty that he would be stigmatized by the conviction . . . Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.
>
> (In Re Winship, 397 U.S. 358, 361–64 (1970))

The need for establishing with moral certainty an accused person's guilt before punishment is inflicted is consistent with the view that the presumption of innocence is a manifestation of respect for human dignity. Respect for the dignity of the person imposes on society a duty to treat an accused as innocent until his guilt has been determined by a competent tribunal. To ensure that an innocent person's human dignity is not violated, it is incumbent on the criminal process to proceed with extreme caution when prosecuting persons accused of a crime.

The public also has an interest in ensuring that an innocent person is not sacrificed for the sake of enforcing the law. In this regard, the presumption of innocence reflects a basic principle of political morality, "emphasizing the dignity and freedom of the individual, as well as her right not to be exposed to unjustified harm by the State." Given the state's almost unlimited power to impose punishment on individuals, granting it "an unlimited authority to use this power against the individual prior to his conviction"[161] could lead to abuse. The presumption of innocence therefore serves as an express limitation on the state's power of inflicting punishment on its citizens and operates to balance that power against the freedom of the individual: "[a] conviction marks the point in time when the State is entitled to punish a person in order to enforce the law, and, until that point in time, a person is entitled to be considered innocent."[162] The ability to place limits on the state's broad powers is what transforms the presumption of innocence into a basic principle of political morality. Preserving this principle until the end of the criminal proceedings levels the playing field and reassures the defendant that his "status is equal to that of other members of the community" entitling him to the same "spectrum of rights and obligations."[163]

It is not only the individual accused who benefits from the presumption of innocence but the community as a whole. The latter has an interest to protect the system of criminal justice by maintaining the reasonable doubt standard since it serves to protect its members from activity which injures them without justifiable cause.[164] It is in the community's interest to ensure that conviction and punishment follow from evidence which leaves no reasonable doubt as to guilt without which there is a reasonable possibility that an innocent person may end up being punished for a crime he did not commit. If conviction is allowed notwithstanding reasonable doubt, "[r]ight thinking members of th[e] community would then, justifiably, withdraw their trust and confidence in the criminal law" thus undermining the moral force of the criminal law.[165]

4.4.3 A normative moral standard

A third justification for protecting the right to the presumption of innocence is based on the moral force of the presumption. Roberts and Zuckerman describe the presumption as "a normative and legal standard encapsulating a strong commitment to avoiding wrongful convictions."[166] Focus on this moral conception of presumption ensures against the risk of unfairly convicting an

innocent person for, say, an offense punishable with life imprisonment.[167] Lord Bingham captured this view in rejecting the reverse onus in *s*11 (2) of the United Kingdom Terrorism Act of 2000:

> [A] person who is innocent of any blameworthy or properly criminal conduct may fall within section 11 (1). There would be a clear breach of the presumption of innocence, and a real risk of unfair conviction, if such persons could exonerate themselves only by establishing the defence provided on the balance of probabilities. It is the clear duty of the courts, entrusted to them by Parliament, to protect defendants against such risk.[168]
>
> (Sheldrake v. Director of Public Prosecutions, [2004] H.L. 43, at 51 (1) (U.K.))

The normative moral conception of presumption of innocence emphasizes fairness in both process and outcome.[169]

In a similar vein, the rights theorist Ronald Dworkin argues that the right of an innocent person not to be convicted should be regarded as a fundamental principle,[170] grounded, as it were, on the right of the citizen to a level of human dignity and equal respect. It follows, therefore, that a breach of this principle is not just a mere harm, but a moral harm. According to Dworkin, individual rights which protect against this moral harm are to be viewed as trumps which should prevail over practical considerations. Dworkin outlines two other rights which support the right of the innocent not to be convicted.[171] These are: first, the right to procedures that place a proper valuation on moral harms and, second, the right to consistent treatment throughout the system. These two rights, considered together, point to the adoption of a policy which guarantees proper respect for various human rights, especially the fundamental right to be presumed innocent.[172]

4.4.4 A bulwark of democracy

In a liberal democratic system the presumption of innocence operates as a limitation on the state's extraordinarily broad power of control over the individual by ensuring that punishment is inflicted only when there is absolute certainty of the accused person's guilt.

4.5 SOME CONCLUDING THOUGHTS

As the preceding discussion demonstrates, powerful and compelling doctrinal and pragmatic reasons can be and have been formulated for protecting the right to fair trial. Yet, despite the time-honored custom of requiring an accused to be presumed innocent and of the prosecution to prove beyond reasonable doubt every element of an offense charged, case law from some key jurisdictions clearly suggests that legislative derogations from this principle

can be justified.[173] Courts that have evaluated these statutory exceptions to fair trial rights, i.e. presumption of innocence, the right to silence and the privilege against self-incrimination, have developed tests for determining when such exceptions are justified. Among these are the tests of proportionality and rationality. Judicial recognition of these statutory exceptions to these fair trial rights is strong endorsement for the proposition that procedural due process rights can no longer to be treated as absolute, non-derogable rights. So the question is not whether exceptions to these safeguards are permissible but rather the nature of these exceptions[174] and the extent to which they undermine the status of fundamental constitutional guarantees.[175] Answering this query would require engaging in weighing these competing rights on a balancing scale. Our canvass of the case law of the European Court of Human Rights[176] as well as that of a number of national courts,[177] shows that in balancing these conflicting claims, courts tend to favor an interpretation of the right to fair trial that strikes a fair balance between the wider community interests and the protection of the fundamental rights of the individual. This they have done by closely scrutinizing reverse onus provisions to ensure that they operate within reasonable limits and meet the test of proportionality. Consistent with these guidelines, courts have been willing to reverse the burden of proof in cases where the evidence is within the accused public official's knowledge and/or to which he readily has access.[178] The threat corruption in general and illicit enrichment in particular poses to most states provides ample justification for suspending some *individual* procedural fair trial rights in the interest of protecting a broader *collective* right to a corruption-free society. These issues are taken up in the next chapter.

5 Guidelines for assessing the compatibility of reverse onus with fair trial rights

Reversing the burden of proof in a criminal trial puts the accused in a relatively weaker position vis-à-vis the prosecution from the very beginning of the case, in terms of what legally needs to be proved and the costs in doing so. The Canadian Supreme Court alluded to this asymmetrical relationship in *Dubois v. The Queen*,[1] stating that the presumption of innocence, and the power imbalance between the state and the individual, are at the root of the principle against self-incrimination and the procedural and evidentiary protections to which it gives rise:

> All of these protections, which emanate from the broad principle against self-incrimination, recognize that it is up to the state, with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping the state fulfil this task. Once, however, the Crown discharges its obligation to present a *prima facie* case, such that it cannot be non-suited by a motion for a directed verdict of acquittal, the accused can legitimately be expected to respond, whether by testifying him or herself or calling other evidence, and failure to do so may serve as the basis for drawing adverse inferences.[2]
>
> (Dubois v. The Queen, [1985] 2 S.C.R. 350 (Can.) at 357–58)

In other words, once there is a "case to meet" which, if believed, would result in conviction, the accused can no longer remain a passive participant in the prosecutorial process and becomes—in a broad sense—an active and interested party. That is, the accused must answer the case against him or face the possibility of conviction.[3]

It is against this backdrop that case law from a number of national and international tribunals maintains that (a) a court should never start with the preconceived idea that the accused has committed the offense charged; and (b) the burden of proof is always on the prosecution, and any doubt should benefit the accused.[4] This jurisprudence has also established that the presumption of innocence as well as the right to silence and the privilege against self-incrimination are not absolute rights[5] and can be overridden by legislation where necessary or reasonable to protect important public interests. Courts

have set forth various tests for determining the circumstances under which these infringements can be justified. Tests such as proportionality and rationality which seek to balance the social cause that a certain statute aims to address are among these yardsticks. It is against these that reverse onus provisions have been weighed in an effort to ascertain whether the onus they place on an accused is proportional to the aim of the statute. Where this analysis draws forth an affirmative response then derogation from the right to fair trial could be rationalized. These proportionality and rationality tests, among others, are relevant to this inquiry and will be invoked in assessing the compatibility of the reverse onus provision in the crime of illicit enrichment with procedural fair trial rights. Central to this analysis is the question of whether these guidelines permit an argument to be made that the crime of illicit enrichment, as defined in international conventions and domestic law, do not offend an accused's right to be presumed innocent as well as the other rights associated with this presumption.

5.1 TESTS FOR ASSESSING IMPACT OF REVERSE ONUS CLAUSES ON THE PRESUMPTION OF INNOCENCE

The European Court of Human Rights was perhaps the first international human rights tribunal to argue in favor of treating reverse burden clauses as no more than "reasonable limits" on the presumption of innocence. These clauses, the Court reasoned, only place an evidential burden on the accused with respect to an element that would be otherwise difficult for the prosecution to prove given the defendant's superior access to that information. In the case of *Salabiaku v. France*, the European Court stated that "[p]resumptions of fact or of law operate in every legal system. Clearly, the Convention [European Human Rights Convention] does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law."[6] In this respect, courts will save a reverse onus clause from constitutional invalidation so long as it is "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[7] *Salabiaku* involved a national of Zaire residing in France who was tried and convicted by French courts for violating a provision of the French Customs Code which stipulates that "any person in possession of goods which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of *force majeure* exculpating him; such *force majeure* may arise only as a result of an event beyond human control which could be neither foreseen nor averted." Appealing his conviction to the European Court of Human Rights, Salabiaku argued that by placing upon him an "almost irrebutable presumption of guilt," the French courts had violated both his right to a fair trial and his right to be presumed innocent until proved guilty under the European Convention on Human Rights. The European Court of Human

Rights upheld the judgment of the French courts that there was no infringement on the presumption of innocence.

The highest courts in Canada, South Africa and Hong Kong followed the lead of the European Court in *Salabiaku* and have applied the presumption of innocence with an implicit degree of flexibility.[8] These courts have also ruled that imposing a legal or evidential burden on a defendant would not be in breach of the presumption of innocence since it is no more than "a necessary part of preserving the balance of fairness between the accused and the prosecutor in matters of evidence."[9]

5.1.1 The Hong Kong cases

In the leading Hong Kong case of *Attorney-General of Hong Kong v. Lee Kwong-kut*,[10] the Privy Council announced the connection between proportionality and rationality as the basis for restricting a fundamental human right. Any restriction on the right to presumption of innocence can be justified provided there is a rational link between the presumed fact and the proved fact and the presumption is a proportional response to the social problem being addressed. The Privy Council stated that the application of the principle of proportionality requires an examination of the decision or legislation to determine whether the limitation of the right is proportionate to the aim it is intended to achieve. Stating the principle, Lord Woolf said: "in order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime."[11] This implied degree of flexibility allows a balance to be struck between the interest of the person charged and the state:

> There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt.
>
> . . . .
>
> Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which Article 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what the essential ingredients are, the language of the relevant statutory provision will be important. However what will be decisive will

> be the substance and reality of the language creating the offence rather than its form.[12]
>
> (Attorney General of Hong Kong v. Lee Kwong-Kut, [1993] A.C. 951, 973A (P.C.))

While the primary responsibility of proving the guilt of an accused rests with the prosecution, there will, however, be occasions where reasonable deviations will be allowed from the strict application of this rule. For this to happen, there must be a *rational* link between the presumed fact and the proved fact and the presumption is a *proportional* response to the social problem being addressed such as drug trafficking,[13] corruption[14] or money-laundering.[15] *Kwong-kut* was preceded by *Attorney-General of Hong Kong v. Sin Yau Min*, a case of first impression in which Hong Kong's Court of Final Appeal was asked to review Hong Kong's Dangerous Drug Ordinance (DDO) in light of the Bill of Rights Ordinance (BOR). The appellant was challenging the presumption that anyone found in possession of a specified quantity of prohibited drugs is engaged in drug trafficking as an unjustifiable infringement of the presumption of innocence guaranteed under BOR article 11(2). The Court of Appeal held that to be consistent with the Bill of Rights' presumption of innocence by shifting the burden of proof on an accused, the government would have to show that it was rational, i.e. that the presumed fact (i.e. possession of dangerous drugs for the purpose of trafficking) would more likely than not flow from the proved fact, and that the presumption, to be valid, must be rationally capable of achieving an important social objective and be proportional to the attainment of such objective.[16] Such an objective was highlighted by Hong Kong's Court of Appeal's Justice Bokhary in the leading decision of *Attorney General v. Hui Kin-hong*:

> Nobody in Hong Kong should be in any doubt as to the deadly and insidious nature of corruption. Still fresh is the memory of the days of rampant corruption before the advent of the Independent Commission Against Corruption in early 1974. And there have been recent reminders. "Bribery is an evil practice which threatens the foundations of any civilised society." That is how the Privy Council put it in the recent case of *Attorney General v. Reid* [1994] 1 AC 324. And even more recently . . . this Court, speaking, of corruption in the same breath as drug trafficking, characterised both as cancerous activities.[17]
>
> ([1995] 1 HKCLR 227 (C.A.) at 229)

The application of the principle of proportionality to justify derogating from the presumption of innocence requires an examination of the reasons behind the global war against corruption as articulated in various multilateral conventions. A central theme running through these international instruments is a concern about the negative effects of corruption and impunity on the political, economic, social and cultural stability of the community of nations; the vast quantities of assets involved, which may constitute a substantial proportion of the resources

of states and the devastating effects on the economic and social development of peoples as a result of such financial hemorrhaging; the conviction that corruption undermines the institutions and values of democracy, ethical values, moral order and justice as well as sustainable development and the rule of law; and the troubling links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering. For all these reasons fighting corruption promotes the wider interests of society because it strengthens democratic institutions and prevents distortions in the economy, improprieties in public administration and damage to a society's moral fiber.

Restrictions on the presumption of innocence in the war on corruption will be justified provided they pursue a legitimate goal and are proportionate to that goal. This is the message of *Attorney-General of Hong Kong v. Hui Kin-hong*, a case challenging Hong Kong's anti-corruption law on human rights grounds. The case worked its way through Hong Kong's judiciary until it finally reached the Judicial Committee of the Privy Council on appeal. The accused, Harry Hui, was a former public servant and a senior estate surveyor with Hong Kong's Building and Lands Department, was charged with violating section 10(1)(a) of the Prevention and Bribery Ordinance (Cap. 210). Section 10(1)(a) provides that any person who, being or having been a public servant, maintains a standard of living above that which is commensurate with his present or past official emoluments shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living, be guilty of an offense under the bribery ordinance. Hui challenged the ordinance as an infringement of his right to be presumed innocent until proved guilty by the state as guaranteed under the Bill of Rights. The issue before the lower courts and, later, the Privy Council, was whether section 10(1)(a) of the bribery ordinance was a justifiable derogation from BOR's article 11(1). The Court of Appeal took note of the serious evidential difficulty the prosecution must overcome in proving that a public official obtained his wealth through corrupt acts and practices, especially the fact that the principal facts on which the accused person's explanation would be based, such as the existence of any capital or income that is independent of his official compensation. It went on to propose a number of requirements to be satisfied by the prosecution, which were subsequently endorsed by the Privy Council. In addition to submitting proof that the official's income was far less than his expenses, the prosecution must also establish: (1) the amount of assets in the public official's control at the charge date; (2) the official's total official compensation up to the same date; and (3) the disproportion between the first two requirements in order to show that it is sufficiently significant as to raise suspicions that call for an explanation.

5.1.2 The Canadian Supreme Court

In 1986 the Canadian Supreme Court set out what has come to be known as the "*Oakes* Test," to determine the legitimacy of restrictions placed on the right to fair trial:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom":[18] The standard must be high . . . It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial . . . Second . . . the party invoking [the limitation] must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test":[19] . . . There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations.
>
> In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".[20]
>
> (R. v. Oakes, [1986] 1 S.C.R. 103, at 138–39 (Can.))

Faced with a reverse onus clause, *Oakes* prescribes a two-step analysis. First, a determination whether there has been a contravention of a fundamental right guaranteed in the Canadian Charter of Rights and Freedoms. If there has, then the contravention must be justified under the limitation clause of the Charter. To determine whether a particular reverse onus provision is legitimate, the reverse onus clause must pass a two-prong test:[21] *the threshold test*, and *the rational connection test*.

5.1.2.1 The threshold test

The threshold test focuses on the authenticity of a particular reverse onus provision. It asks whether it is reasonable for the legislature (parliament in the case of Canada) to place the burden of proof on the accused in relation to an element of the offense. In answering the threshold question, consideration should be given to a number of factors, such as:

> a. The magnitude of the evil sought to be suppressed. This may be measured by the gravity of the harm resulting from the offense or by the frequency of the occurrence or by both criteria.
>
> The difficulty of the prosecution in proving the presumed fact, and the relative ease with which the accused may prove or disprove the presumed fact. In other words, for a reverse onus clause to be justifiable, the burden of proof placed on the accused with respect to a fact must be one that he can prove or disprove: "[m]anifestly, a reverse onus provision placing the

> burden of proof on the accused with respect to a fact which it is not rationally open to him to prove or disprove cannot be justified."[22]
>
> (R. v. Oakes, [1986] 1 S.C.R. 103, at 138–39 (Can.))

> b. In so far as the onus goes no farther than to require an accused to prove an essential fact upon a balance of probabilities, the essential fact must be one which is rationally open to the accused to prove or disprove, as the case may be. If it is one which an accused cannot reasonably be expected to prove, being beyond his knowledge or beyond what he may reasonably be expected to know, it amounts to a requirement that is impossible to meet.[23]
>
> (R. v. Oakes, [1986] 1 S.C.R. 103, at 138–39 (Can.))

In short, under the threshold test, the burden placed on the accused to prove or disprove a fact is not an onerous burden but one that is possible for him to prove or disprove. If the reverse onus fails this test, then it is not reasonable or justifiable, and therefore violates a guaranteed right.

5.1.2.2 The rational connection test

Having sailed through the threshold test, the reverse onus must now satisfy a second test, the rational connection test. For a reverse onus clause to be reasonable under this test, the proven fact must rationally tend to prove the presumed fact. In order words, the proven fact must raise a probability that the presumed fact exists. For example, a proven fact can be that drugs were found on an individual. The presumed fact might be that because drugs were found on him *a fortiori* the individual abuses drugs. The reverse onus clause must be rationally connected to both facts:

> If the reverse onus provision meets these criteria, due regard having been given to Parliament's assessment of the need for the provision, a second test must then be satisfied . . . to be reasonable, the proven fact (e.g. possession) must rationally tend to prove the presumed fact (e.g. an intention to traffic). In other words, the proven fact must raise a probability that the presumed fact exists.[24]
>
> (R. v. Oakes, [1986] 1 S.C.R. 103, at 138–39 (Can.))

So, for example, in an illicit enrichment proceeding where the burden is placed on the defendant to prove the lawful origins of his wealth, the proven fact would be possession of substantial assets by a public official which he cannot reasonably explain in relation to his lawful income during the performance of his official functions. The presumed fact would be that the official must have acquired those assets illegally or through corrupt means. In this situation, the fact of possession of substantial assets clearly raises a probability that their presumed unlawful origins exist.

Closely aligned to the rationality test is the *reasonableness test* which basically requires the prosecution to carry the burden of justifying why the reverse onus provision should be allowed to violate the presumption of innocence. The applicability of this test must be narrowly construed. It only applies to the justification of proving that the reverse onus clause is needed to promote a free and democratic society:

> The test of reasonableness should be available in considering the secondary question under s. 1[25] of the Charter. It is important that the burden of proof should be on the Crown to show that a statute which violates s. 11(d)[26] of the Charter is demonstrably justified in a free and democratic society.[27]
>
> (R. v. Oakes, [1986] 1 S.C.R. 103, at 138–39 (Can.))

To establish that a law limiting procedural fair trial rights is reasonable and demonstrably justified in a free and democratic society, two essential criteria must be satisfied. First, the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain section 1[28] protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test." Although the nature of the proportionality test will vary depending on the circumstances, courts will, in each case, be required to balance the interests of society with those of individuals and groups. In this way, there are *three* important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the legislative objective. Second, even if rationally connected to the objective in this first sense, these measures should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."[29] Each of these limbs of the proportionality test will be briefly reviewed below.

5.1.2.2.1 Rational connection

In order to pass muster, the reverse onus clause must be related to the legislature's objective. The threshold questions here are whether the reverse onus clause and the limitation on the Charter right are rationally connected to

parliament's objective and whether the means used were carefully designed to achieve the objective. "They must not be arbitrary, unfair or based on irrational considerations."[30] In order to be "valid the measures taken must be carefully designed to respond to the objective. Yet, the proportionality test can and must vary with the circumstances."[31] In *Downey*, the Court upheld a reverse onus clause that stated that if a person lives on the earnings of a prostitute wholly or partly, then in the absence of proof to the contrary, that person will be presumed to be a pimp.[32] Here, parliament sought, by the presumption, to focus on those circumstances in which maintaining close ties to prostitutes gives rise to a reasonable inference of living on the avails of prostitution.[33] The Court did not find this "an unreasonable inference for Parliament to legislatively presume, as it cannot be denied that there is often a connection between maintaining close ties to prostitutes and living on the avails of prostitution. Evidence of pimps living on avails would ordinarily be expected to come from prostitutes."[34]

5.1.2.2.2 Minimal impairment

For a reverse onus clause to survive judicial scrutiny, it must impair the right or freedom in question as "little as possible."[35] Courts must strive to resolve the following issues: whether the legislative means to achieve the objective impair the Charter-protected right in question as minimally as possible, whether there are alternative modes of furthering parliament's objective that infringe the right to a lesser extent, and whether the legislation is overbroad or unduly vague. It has been determined, however, that parliament is not required to choose the absolutely least intrusive alternative in order to satisfy this branch of the analysis.[36]

5.1.2.2.3 Proportionality

The determination as to whether the extent of the infringement is proportional to the legislative objective involves a balancing of societal and individual interests.[37] In *Downey*, the Court upheld a reverse onus clause that stated that if a person lives on the earnings of a prostitute wholly or partly, that person will be liable for imprisonment. Here, the Court reasoned that the importance of fighting the social problem of prostitution including drug abuse and violence is higher than individual interest. In this case, the reverse onus clause is aimed at those who parasitically live on the avails of prostitution.[38]

The approach of Canadian courts on the compatibility of legislative limitations on fundamental human rights can be summarized as follows: first, a determination of whether a fundamental right has been violated. If there has been a violation, then a determination of whether the violation can be justified by the limitation clause in section 1 of the Charter of Canadian Rights and Freedom. In assessing the justification of a reverse onus clause, a proportionality test is applied. The proportionality test requires that the reverse onus clause must be

rationally connected to a government objective, be minimally infringing on a charter right, and the extent of the infringement must balance both individual and societal interest. All of these three factors must be satisfied.

5.1.2.3 South African Constitutional Court

The Canadian approach has been followed in substance in a number of other jurisdictions. The same criteria emerge from the jurisprudence of the South African Constitutional Court.[39] The South African Constitution expressly identifies five *key* factors that courts should examine in determining the propriety of limiting the rights in the Bill of Rights to the extent such limitation can be reasonably justified in an open and democratic society. These are: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and the extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means available to achieve the purpose.[40] Applying these factors in *Manamela* the majority of the Court held that a reverse burden provision in respect of handling recently stolen goods was incompatible with a constitutional presumption of innocence. On the other hand, an evidential burden requiring the accused to explain his possession of the goods would not have amounted to a violation of the constitutional right of silence. The majority observed:

> [T]he state has failed, in our view, to discharge the onus of establishing that the extent of the limitation is reasonable and justifiable and that the relation between the limitation and its purpose is proportional. It equally failed to establish that no less restrictive means were available to Parliament in order to achieve the purpose. The imposition of an evidential burden on the accused would equally serve to furnish the prosecution with details of the transaction at the time of acquisition or receipt. Accordingly, there is a less invasive means of achieving the legislative purpose which serves to a significant degree to reconcile the conflicting interests present in this case.[41]
>
> (S. v. Manamela, [2000] 5 L.R.C. 65at ¶49)

The South African Constitutional Court has consistently ruled that for a reverse onus clause to survive constitutional scrutiny, it must first satisfy the limitation test. Included in this test is the proportionality test where society's interest is weighed against individual interest.[42]

5.1.2.4 The limitation test

Overcoming the limitation test is a *condition sine qua non* for a reverse clause to satisfy the prescriptions of the Bill of Rights. The test mirrors *grosso modo* section 36(1) of the South African Constitution.[43] It should be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list.[44] They

are included in the section as key factors that have to be considered in an overall assessment as to whether or not the reverse onus clause is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise to arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure, the more persuasive or compelling the justification must be.[45] Ultimately, the question is one of degree, to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available, but without losing sight of the ultimate values to be protected.[46] Again, the proportionality of a limitation must be assessed in the context of its legislative and social setting:[47]

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. The fact that different rights have different implications for democracy and, in the case of the Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.[48]
>
> (S. v. Manamela, [2000] 5 L.R.C. 65 at ¶82)

The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose. The limitation analysis that follows will therefore first consider the extent of the limitation of the right caused, and will then turn to the purpose, importance and effect.[49] These are the two issues whose relative weight determines the outcome of the limitation analysis. That analysis therefore concludes by comparing the relative weight.[50]

5.1.2.5 Proportionality analysis

After going through the limitation test, the reverse onus clause will be weighed on proportionality. It has been held that this inquiry involves a

weighing up of competing values and ultimately an assessment based on proportionality.[51] The relevant considerations in this balancing process include "the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited, and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."[52]

In sum, the limitation clause in the South African Constitution lays out the steps the courts have to follow. The list is not limited to, but includes, the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. The second analysis involves the proportionality test. Here the five limiting factors are used to balance the broader societal interest against that of the individual (just like the Canadian cases). The South African Constitutional Court has rejected any blanket test for validating a reverse onus clause, preferring instead to scrutinize these clauses on a case-by-case basis.[53]

The jurisprudence in Canada, Hong Kong and South Africa reinforces the view that a reverse burden cannot be justified when it infringes on the right to be presumed innocent, and the cluster of rights which accompany it, and where there is a risk that an accused person can be convicted despite the existence of a reasonable doubt. In *S v. Manamela* the South African Constitutional Court struck down a reverse onus that placed the burden on possessors of stolen property acquired otherwise than at a public sale to account for their possession. The clause was found to be an unjustifiable limitation on the presumption of innocence. The statute in question required the prosecution to establish beyond reasonable doubt three elements: (a) that the accused has been found in possession of goods other than stock or produce; (b) that the goods had been stolen; and (c) that the accused acquired the goods otherwise than at a public sale. The prosecution having proved these elements, the statute then shifts the burden onto the accused to establish on a balance of probabilities that he or she had reasonable grounds for believing that the goods were not stolen. The problem with this arrangement, the Court noted, was this: "[i]f the accused is unable to do so, he or she will be convicted. Even if he or she raises a reasonable possibility that such grounds existed, this will not suffice to avoid conviction. The provision may therefore result in a conviction despite the existence of reasonable doubt in the mind of the judicial officer as to whether the accused had such grounds."[54]

The case law also shows that not all reverse onus provisions infringe on the procedural rights of an accused. Regulatory offenses dealing with licensed activity in the public domain, or the handling of hazardous products, or the supervision of dangerous activities which involve the performance of some act or activity without a license do not necessarily infringe upon due process rights. A reverse onus requiring a defendant who fired on a group of people to

produce documentary evidence to show that he had a license to own a firearm was found not to offend fair trial rights.[55] Offenses of this kind merely ask whether the accused does or does not have a license and the reverse provision simply calls on the accused to reveal something peculiarly within his knowledge. Requiring the accused to produce this kind of evidence "is such a simple matter compared to the time and effort which the State would have to invest in order to prove a negative."[56] In the *Fransman* case, the South African Constitutional Court justified the "trifling inconvenience . . . [an] accused may suffer by producing his firearm licence if he has one at all"[57] weighed against the backdrop of the proliferation of unlicensed firearms and the threat this poses to society and all law-abiding citizens.

Reversals of the evidentiary burden of proof exist in cases of: (a) possession of stolen property; (b) care and control of a vehicle while intoxicated; (c) possession of a vehicle with its Vehicle Identification Number removed; (d) fighting or baiting of animals; (e) cattle theft; (f) common betting/gaming house; (g) fraud by holder of fire insurance; (h) living on the avails of prostitution, and so on. "In such cases Parliament has seen fit to require the accused to furnish some evidence to explain what would otherwise be unexplainable."[58] Explaining the unexplainable includes drawing adverse inferences from the silence of the accused consistent with the legislator's objective of ensuring that "where the accused is trapped by a host of inculpatory evidence to which only he or she can answer, the accused should offer an explanation or face the risk that there may be negative consequences from his or her silence."[59] Such inferences have been found to be consistent with procedurally fair trial rights.

Equally found to be compatible with fair trial rights are reverse onus clauses in offenses involving the existence or authenticity of public documents or licenses. In cases such as these "practicalities and common sense dictate that it would be disproportionately onerous for the State to be obliged to discharge its normal burden in order to secure a conviction."[60] Belonging to this category of offenses are traffic regulatory statutes which provide that the owner of a car is presumed to be the person who parked it illegally; in the great majority of cases, there is simply no way in which the state could prove who parked the car.

The difficulty of proof that the prosecution faces justifies, in some circumstances, the placing of a burden on an accused to produce evidence peculiarly within his knowledge. Such difficulty is exacerbated with the passage of time. Arguably the closer the proximity in time between theft and possession, the more easily the state will be able to rely upon an inference of criminal conduct on the part of the accused. So, for instance, an accused who is caught soon after the goods are stolen, a reasonable inference, and one supported by common sense, is that he stole them or participated in the theft. But if the period between theft and apprehension is longer, "in the absence of a satisfactory explanation the appropriate inference may be that the accused is guilty of the common law offence of receiving stolen property knowing it to be stolen." The problem of proof faced by the prosecution is in situations where the time lapse is so great

that an inference of theft or related criminal conduct or knowing receipt cannot be drawn at all. In these instances "the State's predicament is great . . . [as] the accused can with relative ease advance a trumped-up story relating to the acquisition of the goods with little risk that the State will be able to rebut it to the requisite degree of proof." Shifting the burden to the accused in this instance would seem reasonable. Finally, case law shows that reverse onus provisions that do not require the accused to prove an essential element of the offense, but only a collateral factor have been found not to violate fair trial rights.[61]

The similarity between these tests and the test under international law as articulated in the 1988 European Court of Human Rights case of *Salabiaku v. France*[62] may be noted. All require that any restrictions on a fundamental due process right are set out clearly in law, that they pursue objectives or aims of sufficient importance to warrant overriding that right and that they meet a test of reasonableness, necessity and proportionality. The offense of illicit enrichment, as defined in treaty law, has been read to include an express reverse onus, but even if that were not the case and the onus is read as implied, it must still be evaluated under the standards articulated in the *Salabiaku*/*Lee Kwong-kut*/*Oakes*/*Manamela* cases. Given the strong public interest in enforcing anti-corruption legislation, the crucial question is whether placing on a defendant the burden of demonstrating the legal source of his assets, and if an admission of being in possession of those assets obtained through unlawful means is relied on at trial, that burden undermines the defendant's fair trial rights.

5.2 APPLYING THE "OAKES" GUIDELINES TO THE OFFENSE OF ILLICIT ENRICHMENT

Two related objections frequently raised to placing the reverse onus on the accused are (1) that the provision presumes his guilt even before that has been proved by the prosecution beyond a reasonable doubt; and (2) as a consequence infringes on fundamental fair trial rights. These objections will stand or fall depending on (a) their conformity with the established tests for assessing the validity of reverse onus provisions, and (b) the type of burden put on the accused and the type of presumptions that can be made as to his assets.

Since fundamental rights can be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," the *Oakes* Test establishes a threshold criterion that must be satisfied before a review of the validity of a reverse onus provision commences. The prosecution must first show that the breach of a fundamental, in our case, fair trial right is "prescribed by law." This is a fairly straightforward threshold, easily satisfied by the reverse onus provision in the offense of illicit enrichment, as defined in treaties and domestic penal codes. For all intents and purposes the limit imposed on fair trial rights by this reverse onus provision has the "form of law" and satisfies the *Oakes* threshold. We shall now analyze the test along the following structure:

1 Pressing and Substantial Objective: Is the government's objective in limiting protected rights to fair trial a *pressing* and *substantial objective* viewed through the prism of a free and democratic society? If not, the law is an invalid infringement on fundamental procedural fair trial rights. If the answer is "yes," then the second branch of the test comes in play.
2 Proportionality Test: Examines the proportionality between the legislature's objective and the means used to further that objective.

    a Rational Connection: whether the illicit enrichment offense limitation on the right to presumption of innocence and other associated fair trial rights have a *rational connection* to the legislative objective. The means used must be carefully designed to achieve the objective. They must not be arbitrary, unfair or based on irrational considerations.
    b Minimal Impairment: Does the statutory (legislative) means to achieve the objective impair the protected rights in question as minimally as possible? Are there alternative means of furthering the legislature's objective that infringe the right to a lesser extent? Is the legislation overbroad or unduly vague?
    c Proportionality between effects and objective: Are the measures that are responsible for limiting the protected right proportional to the objective? Does the benefit to be derived from the legislation outweigh the seriousness of the infringement? Does the legislation produce effects of such severity as to make the impairment unjustifiable?

If the offense of illicit enrichment fails any of the above branches of the *Oakes* Test, then it should be ruled an invalid encroachment on procedural fair trial rights. If not, it can be deemed a permissible limitation on fair trial rights.

5.2.1 Pressing and substantial objective

The first part of the *Oakes* Test asks whether the objective of the statutory offense of illicit enrichment is pressing and substantial consistent with the values of a free and democratic society. We say it is. To begin with "[w]hen the Parliament or Legislature acts in derogation of individual rights, it is doing so to further values that are acceptable in a free and democratic society, to satisfy concerns that are pressing and substantial and to realize collective goals of fundamental importance." This is no less true in the offense of illicit enrichment, which serves three pressing and substantial collective goals of fundamental importance: (1) holding public officials to their fiduciary obligation, (2) protecting fundamental community interests and (3) preserving the principle of inter-generational equity.

5.2.1.1 Holding public servants to their fiduciary obligation

The public is entitled to demand the transparency of its officials' earnings. It is reasonable to expect that state agents on the public payroll should be able to demonstrate the basis of their standards of living. Such a condition forms part of the conditions for legitimacy.[63] Public servants in general, and high-ranking ones in particular, are traditionally held to the standard of fiduciaries, who are obliged to protect the resources that are entrusted to them for the benefit of the people. Public officials who are involved in illicit enrichment violate this public trust. Therefore, placing the burden of coming forward with explanations on how they came about their stupendous wealth ensures that they do not end up retaining that which belongs to the people. This procedural arrangement helps to re-equilibrate the moral scales between the accused and the public.

A number of national constitutions[64] contain language similar to that found in the Constitution of the Republic of Cameroon requiring a specified category of high-ranking state officials to "declare their assets and property at the beginning and at the end of their tenure of office."[65] It is no coincidence that the officers usually enumerated in these constitutional provisions are the ones who have been found to abuse their public office for personal gain.[66]

Under any theory of government, the wealth of a nation is traditionally placed under the guardianship of its elected and appointed officials.[67] Implicit in the acceptance of a public appointment is a commitment by the political leadership to hold and manage the nation's wealth and resources in trust for the people. In the role as a trustee the public servant is subject to the constraints imposed by the fiduciary relationship he enjoys with the public he serves. A fiduciary is under a duty to refrain from administering the trust in a manner that advances his personal interests at the expense of the beneficiaries and a duty to use reasonable care and skill to preserve the trust property. Officials who engage in illicit enrichment violate this public trust. Placing on them the burden of coming forward with evidence to explain the source of their suspicious wealth ensures that they do not end up retaining something which belongs to the people. Such a burden helps to re-balance the moral scales between the accused and the public. The burden of disclosing their wealth should not be limited only to the time these high-level public servants assume office and when they relinquish that position. It should be extended to require these officials to explain the source of their wealth whenever suspicions as to its origin are raised.[68]

5.2.1.2 Protecting fundamental community interests

In the *Nuclear Tests Case* the International Court of Justice recognized the emerging principle of intergenerational equity as an international obligation of a state to manage the environment in a way which provides sustainable use for both present and future generations.[69] This principle underscores the importance of protecting community interests by prosecuting public servants

who divert the nation's resources for their personal use. In the interest of promoting the greater good for the greatest number of people, which is what the global war against official corruption seeks to achieve, the accused public servant in a corruption proceeding should be required to disclose the source of his suspicious wealth.

A United Nations study has identified the source of the assets stolen by high-ranking public officials and politicians as "deriv[ing] from outright theft, bribes, kickbacks, extortion and protection money, the systematic looting of the state treasury, illegal selling of national resources, diversion of loans granted by regional and international lending institutions and project funding contributed from bi- and multinational donor agencies."[70] The concerted global movement to trace, capture and repatriate these funds of illicit origin most certainly qualifies as the pursuit of a legitimate goal, justifying derogation from the procedural fair trial rights of public officials suspected of having obtained their wealth through acts of corruption. While only an insignificant number of people plunder the resources of their country, it is the millions of poor people who are ground down by corruption.[71] A striking feature of contemporary acts of illicit enrichment by high-ranking public officials is the amount of wealth involved, usually billions of dollars.[72] So staggering are these amounts that one commentator was moved to describe these depredations as going beyond shame and almost beyond imagination.[73] This private build-up of assets abroad have been shown to be so large, in relation to the total external debts of the countries from which the funds were stolen, that in some cases it even exceeds their total foreign debt.[74] At a meeting of the Second Committee of the General Assembly called to discuss corruption and transfers abroad of illicitly acquired national funds, the Nigerian representative described how grand corruption and the transfer of illicit funds abroad have contributed substantially to capital flight from developing countries, claiming that of the estimated $400 billion that had been looted from African countries and stashed in foreign banks, about $100 billion was from Nigeria. By his government's account, the nation's total external indebtedness stood at $28 billion, approximately 28 percent of total funds siphoned out of the country.[75] These funds have been used to buy weapons, finance terrorism and foment domestic conflict, hindering sustainable development and political stability.[76] Consider, for instance, that more than four billion dollars in state oil revenue disappeared from Angolan government coffers from 1997 to 2002, roughly equal to the entire sum the government spent on all social programs in the same period.[77] Empirical research has detailed the undeniably negative effects of official corruption on victim states and their populations. Corruption, it has been established, reduces economic growth and discourages foreign direct investments because it undermines the performance, integrity and effectiveness of the private sector; it decreases and diverts government revenues by plundering revenue-generating agencies such as tax collection and customs and excise; corruption misallocates scarce national resources by concentrating wealth among a small bureaucratic and

political elite; and corruption undermines democratic institutions by undermining the rule of law among other things.[78] It is against this background that the principle of intergenerational equity should be invoked to protect the ordinary people of Angola and Nigeria from the plague of corrupt public servants who have successfully plundered their national wealth.

5.2.1.3 Preserving the principle of intergenerational equity

The emerging principle of intergenerational equity[79] applies in the illicit enrichment context. Consistent with this principle, all states are under an international obligation to manage national resources in a way which preserves their use for both present and future generations.[80] In the interest of promoting the greater good for the greatest number of people, which is what the global war against official corruption seeks to achieve, requiring an accused public official to disclose the source of his suspicious wealth furthers that objective. That objective is advanced by a rule that in corruption proceedings where the evidence required to establish a crime is within the control of the accused, courts should require that the public official bear the initial burden of production.

There is a rational connection between the basic fact of "a significant increase in the property of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions" and the presumed fact that such assets were acquired by corrupt means. The offense of illicit enrichment sets out to curb the ostentatious display of wealth by high-ranking public officials who use their office to enrich themselves. It has as objectives: (a) catching and punishing public officials who abuse their public trust by confounding national wealth with their personal resources; (b) to serve as a deterrent to others who may be tempted to follow suit; and (c) to seize and re-invest ill-gotten wealth for the social and economic development of victim societies. The havoc wrought on victim states by acts of illicit enrichment by public servants is well documented and adequately discussed in the introductory chapter. The objective of discouraging and reining in official corruption is of sufficient importance to justify placing some limitations on fair trial rights. There could be no reason why these objectives cannot survive scrutiny under the *Oakes* Test.

Having demonstrated that the objective of the illicit enrichment offense is sufficiently significant, attention will now turn on inquiring whether the means chosen are reasonable and demonstrably justified. This will involve a form of proportionality test.

5.2.2 Proportionality

5.2.2.1 Rational connection test

The second part of the *Oakes* guidelines require that there be proportionality between the effects of the measures which are responsible for limiting the

rights to fair trial and the objective which has been identified as of sufficient importance. It asks whether there is a rational connection between the legislative objective and means used to further that objective. We say there is. And then there is the question whether the means used have been carefully designed to achieve the objective. We say they have because they are not arbitrary, unfair or based on irrational considerations. Any limitation on fair trial rights as contained in the reverse onus provision in the offense of illicit enrichment, as defined in treaty law and domestic statutes, is reasonable and demonstrably justified. The noose is carefully placed around the necks of a small and easily identifiable group of citizens. These are, in the main, high-ranking officials who occupy positions of public trust.

5.2.2.1.1 Carefully tailored limits

The reverse onus provision in the offense of illicit enrichment speaks to the lack of effective high-technology resources for detecting the precise moment such raids on the national treasury occur. As the Commentary to the Inter-American Convention against Corruption, notes: countries that have been victims to acts of illicit enrichment have "no means of determining on what particular occasion, out of the thousands available to public agents, an offense was committed, or even the innumerable offenses that gave rise to the enrichment."[81] These victim states are left with little choice but to rely on unorthodox investigative techniques for detecting, tracing and recapturing national wealth stolen by public officials.

The legislation criminalizing illicit enrichment cannot be said to be so sweeping or vague[82] that *any* public servant with significant assets runs the risk of getting caught in its dragnet.[83] The offense targets only those officials whose assets do not correspond to their lawful earnings: "it is possible for a corrupt official to derive a good part of the ill-gotten money from secret accounts, but it is highly unlikely that he will content himself with spending so little of that money as not to be noticed."[84] A public servant whose annual salary never went above $40,000 who, after two decades of public service, ends up with personal assets valued at $27 million, can hardly pass unnoticed in any society. It is to officials like this, whose wealth increased exponentially during their years in public service, that the presumption of unlawful corrupt origins applies. It is important to keep in mind that the offense does not declare open season on every wealthy citizen let alone public servants. None of these individuals could reasonably be expected to be found guilty of illicit enrichment because of the reverse onus provision. The way the reverse onus is framed reduces the possibility that innocent law-abiding citizens would be convicted since the crime targets only those public officials whose assets do not correspond to their lawful earnings: "the personality of a temperate, austere man who lives moderately while saving for future generations is not exactly that of a corrupt official. *If a corrupt official had such discipline and virtues, he would very probably not be corrupt*."[85] Because the offense targets only a small

discrete group of public servants, it is neither arbitrary nor unfair. More importantly, the offense serves two core judicial values.

5.2.2.1.2 Ensuring the equality of arms between the parties

The principle of equality of arms is applicable also to the prosecution of officials accused of illicitly enriching themselves at the nation's expense. Its goal is to reduce to a minimum any procedural imbalance between the parties by compensating for the disparity. In illicit enrichment prosecutions the accused public servant more often than not is the one with superior knowledge about the origin and location of assets that have been illicitly acquired. The prosecution, however, does not have at its command the necessary financial resources to assist it in tracing the movement of these illicit funds. The state's lack of access to such crucial evidence is likely to create a clear inequality of arms between the parties as well as an imbalance of powers. Applying the equality-of-arms principle to compensate for this imbalance would require that the burden be placed on the accused official to explain how he came in possession of such wealth.

The right to a fair hearing lies at the heart of the concept of a fair trial.[86] In criminal trials this right is specified by a number of concrete rights, such as the right to be presumed innocent, the right to be tried without undue delay, the right to prepare a defense, the right to defend oneself in person or through counsel, the right to call and examine witnesses and the right to protection from retroactive criminal laws. An essential element of a fair hearing is the principle of "equality of arms" (*egalité des armes*) between the parties in a case,[87] which means that both parties are to be treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case.[88] Equality of arms requires that the prosecution as well as the accused is afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party.[89] This is particularly important in criminal trials where the prosecution has all the machinery of the state behind it; the principle of equality of arms is an essential guarantee of the right to defend oneself. It ensures that the defense has a reasonable opportunity to prepare and present its case on a footing equal to that of the prosecution. Its requirements include the right to adequate time and facilities to prepare a defense, including disclosure by the prosecution of material information.[90] The presumption of innocence principle would be violated if, for example, the accused were not given access to information necessary for the preparation of the defense, if the accused were denied access to expert witnesses, or if the accused were excluded from an appeal hearing where the prosecutor was present. One would also assume that a violation of the principle occurs when the prosecution is denied access to information central to its case.

Some limitations on the rights of an accused in the war against illicit enrichment are called to protect the wider needs of society. The principle of

equality of arms is meant to ensure that both parties have a procedurally equal position during the course of the trial, and are in an equal position to make their case. The efficacy of the adversarial system is predicated on this principle since its goal is to do justice as between the prosecution and the accused. Courts tend to view the equality-of-arms principle as applying only to the accused,[91] which is not the case since the principle is a double-edged sword that cuts both ways. It is designed to protect the accused but without hobbling the prosecution in the preparation and presentation of its case. It follows, therefore, that where there is a glaring disparity in the equality of arms between the parties, it would be necessary to introduce some form of compensation to make up for that disparity. Evidence in grand corruption cases is generally more accessible to the accused and the state's lack of access to this evidence is likely to create a clear inequality of arms between the parties as well as an imbalance of powers. Reversing the burden of proof to compel the accused to come forward with evidence to raise reasonable doubt as to his guilt would re-establish parity of conditions for both parties in the course of the trial.[92]

One thing that separates the old from this new generation of illicit enrichment by high-level public servants is that the purloined wealth does not remain in the country of origin for reinvestment; rather it is transferred to foreign safe havens. It is this mobility and "the capacity to hide and disguise"[93] funds of illicit origin that make detecting and tracing them a monumental task, a veritable "game of hide-and-seek," to use the words of the Ombudsman of the Republic of the Philippines.[94] And where they can be traced, the prosecution must contend with the sheer volume of transactions and the enormous amount of paperwork involved.[95]

Mechanisms to move funds of illicit origin through formal and informal financial systems have become increasingly sophisticated by taking advantage of the lack of transparency in many of the world's financial systems.[96] Studies have shown that extraordinary sums of money are now passing through correspondent accounts established for foreign banks,[97] trusts,[98] offshore accounts, personal investment companies and private banking.[99] The latter seems to be the investment instrument of choice for the most senior public officials, including heads of state, to conceal unlawfully obtained national assets. All these instruments provide havens and opportunities for the laundering of funds derived from corruption. Add to these the use of shell corporations and shell banks to disguise the illicit nature of these assets through use of fictitious names or nominee names on documents of incorporation, the interlocking of perfectly legal shell corporations with other shell corporations located all over the world and the use of shell corporations established in a jurisdiction with strict secrecy laws. Such subterfuge makes it almost impossible to identify the owners or directors of a corporation and therefore nearly impossible to trace illicit funds back to the true owners.

These innovative mechanisms have become an effective means of interrupting the paper trail used by investigators. As a consequence, investigators must wade through a thicket of conflicting substantive and procedural laws to

get to assets. For instance, official misconduct that is designated as a crime in the state where the action is pending may not be viewed the same way in a different jurisdiction because the alleged predicate activity may not violate the laws of the state where the illicit funds are banked. Furthermore, as the U.N. study noted, "[s]ignificant discrepancies exist among legal systems relating to the substantive and procedural safeguards in place to ensure fundamental principles of civil liberty. A practical complication of such variation is that even though evidence was obtained in a lawful manner in one State, the search and seizure may be against the law in another."[100]

Requests for foreign judicial cooperation in the gathering of evidence are not automatically granted in the absence of binding mutual legal assistance treaties (MLAT).[101] Almost all MLATs contain a provision obligating the requested state to take measures in tracing, freezing, seizing and forfeiting the proceeds of any criminal activity, including corruption, that may be found in the requested state.[102] Even with a MLAT, the requesting state is never sure that her request will be granted because these treaties are also laden with all types of threshold requirements that must be satisfied by the requesting state such as the evidence establishing that an offense has been committed and that the assets are the proceeds of that crime.

Ideally, on an "equality of arms" theory, the rights of prosecution and defense throughout the course of a trial would be equal. Both parties would be operating on a level playing field, so to speak. The trial judge would strive to create equal powers, privileges and immunities for the accused with those of prosecutors and prosecutorial staff. Any asymmetries that favor either the prosecution or the accused must be corrected. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has, in a number of judgments, taken the position that equality of arms does not necessarily require the equality of means and resources between the prosecution and the defense.[103] Rather, the principle, according to this point of view, only means that both parties are entitled to full equality of treatment, so that the conditions of trial do not "put the accused unfairly at a disadvantage."[104] In *Prosecutor v. Milutinovic*[105] the Appeals Chamber relied on its findings in the *Kayishema and Ruzindana* case that "equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources."[106] It also referred to the *Tadic* case where the Appeals Chamber took the view that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case."[107] The Appeals Chamber found that the Appellant had "not shown how the Trial Chamber [had] failed to address the imbalance of resources between the Prosecution and the Defence and in that way violated the principle of equality of arms."[108] It declared that the principle of equality of arms would be violated "only if either party [was] put at a disadvantage when presenting its case."[109] In the circumstances of this case, the Appeals Chamber ruled that the appellant could not rely on the alleged inadequacy of funds during the pre-trial stage to establish such a disadvantage.

The position of the Appeals Chamber, notwithstanding, all trials involve an outlay of *resources* (financial, material and human) and where these are unequally distributed between the party litigants, one party is bound to be at a serious disadvantage.[110] A point not lost on Mr. Justice Lightman in his Edward Bramley Memorial Lecture at the University of Sheffield: "[A] party's performance at the trial very much turns on the investment made by the respective parties in the litigation: *at all stages in the litigation money talks loud and clear*. The human right to equality of arms has little, if any, meaning or practical effect in this context and the judge, however fair minded and interventionist, has limited scope to redress the balance. . . . Tell it not in Gath but *the scales of justice favor those who can afford to buy it.*"[111]

Efforts to recover assets of illicit origin have proved to be extremely complex, requiring the kind of technical expertise that few victim countries can summon:

> Tasks necessary to successfully mount a repatriation effort include the conduct of financial investigations, forensic accounting, requests for mutual legal assistance and a solid understanding of the legal requirements of the States where the assets have been located. There are few practitioners in either public or private practice with experience in this type of work, and in many jurisdictions there are none at all. In states where corruption is rampant, these capacities are often not available and it is probable that a lack of state capacity helped create the conditions that facilitated the corruption in the first place.[112]
>
> (Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived from Acts of Corruption, Doc. A/AC.261/10)

Aside from shortcomings in legal and technical capacity that seriously impede the degree to which a poor state can aggressively undertake to mount a successful corruption case, recovery efforts are also quite costly. Success depends on the availability of resources to fund the case, to pay for investigators, retain local counsel, movement of witnesses, etc. While the typical offenders who have been looting their national treasuries "over a long period of time are not likely to face the same resource problems"[113] as victim states since they are able to "employ armies of lawyers ready to jeopardize and delay the successful recovery with all legal means available . . . countries that have been looted by their former leaders," on the other hand, "are typically finding themselves in substantial budgetary crisis. Spending money on private lawyers based on the uncertain hope of actually being able to recover these costs may often not be an option."[114] In these circumstances, "the issue of justice being done becomes a question of how long offenders and victims are able to sustain the battle."[115]

In illicit enrichment cases, the accused is likely to enjoy considerable advantages in terms of access to relevant information which creates an imbalance to the detriment of the prosecution, in breach of the equality-of-arms

principle. Something needs to be done to compensate for this inequality of arms between the parties. Part of the solution lies in making some adjustments on how the burden of proof and the requisite standard of proof are allocated between the prosecution and the accused. The accused public official should be made to assume some burden in going forward with evidence without necessarily relaxing the prosecution's ultimate burden of proving its case of illicit enrichment beyond a reasonable doubt standard.

5.2.2.1.3 Promoting judicial efficiency

The slow pace of recovery efforts caused in part by procedural obstacles is additional justification for derogating from the procedural fair trial rights as this will help speed up the prosecution of accused officials. It took years before the Philippines government could recover a small part of the stupendous fortune former President Marcos and his wife, Imelda, hid abroad. The same is true for many other former public officials from other countries who have engaged in acts of illicit accumulation of national wealth. Judicial proceedings engaged for the purpose of locating these stolen funds would proceed so much faster if the onus of proof is shifted to the accused person who, presumably, has better access to the information on the whereabouts of his fortune.

Derogating from some procedural due process rights is necessary to improve trial efficiency. Because illicit wealth is shrouded in anonymity and a veil of secrecy, placing the burden on the accused to come forward with evidence of the source and whereabouts of his assets can aid in the disposal of the trial in the most expeditious and cost-effective manner. It took almost 15 years—and this with the judicial cooperation of several foreign governments—for successive Philippine governments to bring partial closure to the Marcos litigation and then only $600 million of an estimated $5 to $30 billion of Filipino assets that the Marcoses were alleged to have transferred abroad were recovered.[116] The Nigerian government's stolen assets recovery effort presents another excellent case study of the long and winding road governments must traverse before arriving at their destination and even then the results are far from heartening. While the Nigerian government's efforts to recover the estimated $3 billion allegedly stolen by former military leader Sani Abacha met with some success, the government was only able to recover $700 million.[117] To get this far, "it took Nigeria five years to obtain a repatriation decision from the Swiss authorities due to numerous appeals brought by the Abachas, who employed large numbers of lawyers to block or slow down the case."[118] The unusually long time it takes to resolve these illicit enrichment cases explains the need for placing some reasonable limits on procedural fair trial rights in prosecuting these cases.

5.2.2.2 Minimal impairment test

The reverse onus in the offense of illicit enrichment impairs procedural rights as little as possible. It will be argued that there are no alternative means of

furthering the statutory objective that infringe the right to a lesser extent and that the legislation is not overbroad or unduly vague. The offense of illicit enrichment as defined in international conventions and domestic penal codes focuses on a public official found to have assets that are significantly greater than would be expected, given his lawful earnings. The presumption of unlawful origins of these assets apply only when the official who, given the opportunity, cannot *reasonably* explain the significant increase in his assets in relation to his lawful earnings during his tenure in office. It is the *failure to explain* the lawful origins of an official's wealth *not* the mere fact of possession that triggers a presumption of guilt. As the Commentary to the Inter-American Convention against Corruption explains "demonstration is not subsequent to the offense. *If it can be demonstrated, the employee cannot even be accused*."[119] More importantly, no one is in a better position than the official to explain how he came about his enormous wealth.

The minimal impairment test is met if the law in question impairs the infringed right as little as possible. To reach this conclusion a court must determine whether a less intrusive means would achieve the same objective or would achieve it as effectively. Two methods are frequently mentioned as suitable alternatives to the war on official corruption, superior to the burden-shifting arrangement in the offense of illicit enrichment. These are the net worth method of proof which is often used in tax and money-laundering cases and an assets declaration regime as is found in the constitutions of many countries. The two methods, it has been urged, must be used in tandem for maximum impact.[120]

5.2.2.2.1 Net worth method of proof

Under the net worth method as applied to tax cases, the government meets its burden to prove that a taxpayer's net worth increases are attributable to taxable income when it investigates reasonably possible sources of nontaxable income and explores whatever leads the taxpayer or others may proffer. "By showing that nontaxable income did not derive from those sources the government negates all reasonable explanations by the taxpayer inconsistent with guilt."[121] The net worth method of proof is one of the government's most powerful weapons to prove unreported income. It is an indirect method of proof regularly used in establishing taxable income in criminal tax cases where it would be difficult or impossible to establish that by direct evidence.[122] The method presumes that if a taxpayer has more wealth at the end of a given year than at the beginning of that year, and the increase does not result from nontaxable sources such as gifts, loans and inheritances, then the increase is a measure of taxable income for that year.

Although much favored by civil law countries[123] and endorsed by some commentators,[124] the net worth method is no less intrusive of the taxpayer's procedural fair trial rights than the reverse onus in the offense of illicit enrichment. The method allocates burdens of proof much like illicit enrichment. To

begin with, the taxpayer must come forward with leads or explanations indicating the specific sources from which claimed cash on hand was derived, such as prior earnings, stock transactions, real estate profits, inheritances or gifts.[125] These leads must be (1) relevant and reasonable; and (2) reasonably susceptible to being checked.[126] The government is under a duty to investigate these leads. It is also required to present a *prima facie* case which consists of establishing the defendant's opening net worth with reasonable certainty. It meets its burden when it "investigates reasonably possible sources of non-taxable income, and explores whatever leads the taxpayers or others may proffer."[127] Once the government establishes a *prima facie* case, the taxpayer "remains quiet at his peril."[128] Although the burden of proof never shifts from the government, the defendant has the *burden of production* regarding any reasonable leads.[129]

The U.S. Supreme Court, in the leading case of *Holland v. United States*, called attention to the risk an innocent taxpayer may face from the government's use of the net worth method of proof:

> The method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans, and the like account for the newly acquired wealth. There is great danger that the jury may assume that, once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.[130]
>
> (Holland v. United States, 348 U.S. at 128)

Advocates of this method may want to pause and take note of this warning from the *Holland* Court on "the pitfalls inherent in the net worth method . . . require the exercise of great care and restraint."[131] Despite the support it has received from legal circles, the net worth method of proof may not be the least intrusive means of furthering the legislative objective in the offense of illicit enrichment.

5.2.2.2.2 Assets disclosure regime

In the context of curbing corruption, mandatory financial disclosure requirements for senior government officials have often been touted as a legitimate tool for addressing the problem of illicit enrichment. There are three problems with this alternative means of achieving the legislative objective implied in the offense of illicit enrichment.[132] First, although entrenched in many national constitutions,[133] many of these assets disclosure regimes are in various stages of desuetude. It should be noted that almost all the countries that have been victims of some of the most outrageous pillaging of national wealth by

high-ranking public officials have financial disclosure requirements for senior government officials.[134] Yet, these did not stop acts of illicit enrichment from occurring. It is precisely because these disclosure requirements are hardly ever followed that the statutory imposition of a reverse onus in illicit enrichment comes in to operate as the functional equivalent of a more effective disclosure regime. Since public officials are not likely to *voluntarily* disclose their assets, the reverse onus compels them, on pain of imprisonment, to provide reasonable explanations on the source of their wealth. Second, the typical disclosure regime contains no mechanism for verifying the truthfulness or falsity of the public official's disclosures. Some simply require the official to declare his assets before an *ad hoc* committee but the committee is not required to verify these declarations. In the absence of an independent third party verification system, it is difficult to establish with any degree of accuracy the extent of an official's declared assets. What would prevent an official to over-declare his assets in anticipation that he would during his tenure in office acquire, through corrupt activities, assets the equivalent of what has been declared? Finally, a system of assets disclosure can be administratively difficult to manage while unwittingly creating unintended collateral damage for some public officials. The Commentary to the Inter-American Convention against Corruption recognized these possibilities:

> If officials are required to demonstrate their earnings with complete accuracy, this would be an excessively burdensome load, an obsessive preoccupation that would conspire against the peace of mind and balance they require to perform their functions effectively. At the same time, a requirement of such a nature would become a political weapon through which adversaries would mutually accuse one another, in the hopes of finding in each other some minimum difference in property that, perhaps because of carelessness or negligence, they were unable to justify.[135]
>
> (Carlos A. Manfroni, Richard S. Werksman & Michael Ford (translator), Inter-American Convention against Corruption: Annotated with Commentary 71 (2003), at 72)

An assets disclosure regime can be equated to a weight-loss program prescribed for a potentially obese person. Since the idea is to monitor any weight gain during the course of the program, one of the first things that his doctor or dietician would do is to weigh the patient. This would provide the doctor with a starting point from which to ascertain whether the patient has gained or lost weight. The patient is thereafter weighed at intervals, and comparisons are made with the weight at the previous weighing to determine whether or not the program is working. The same process should be followed in assets disclosures, except that the "weighing" is of the public official's assets at fixed points in time. A good disclosure system should be able to monitor the financial trajectory of the public official from the date he assumes his official functions, at intervals while in office, and when he ceases to be a public

servant. This sort of tracking will reveal any increases in his assets that would ordinarily go undetected. Few disclosure systems operate this way.

Under the minimal impairment test, the means of furthering the legislative objective does not necessarily have to be the absolute least intrusive. The test does not even bar the state from employing more impairing means than strictly necessary, provided these means are more efficacious in the attainment of a pressing and substantial objective. As Chief Justice Dickson reasoned in *Oakes*, courts in assessing the proportionality of a legislative enactment to a legitimate governmental objective:

> should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a Charter right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure . . . furthering the objective in ways that alternative responses could not.[136]
>
> (R. v. Oakes, [1986] 1 S.C.R. 103, at 139 (Can.))

All that the minimal impairment test requires is for the limitation on the fundamental right to be "as little as is reasonably possible."[137] On balance, the reverse onus in illicit enrichment when weighed against the other alternative means of establishing a public official's unexplained wealth, impairs procedural fair trial rights no more than necessary.

5.2.2.3 Proportionate effects test[138]

This part of the *Oakes* Test has been rephrased to mean that there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.[139] It is submitted that the benefit society derives from the prohibition against illicit enrichment outweighs the seriousness of any infringement on procedural fair trial rights. The subsequent development of the *Oakes* Test ensures that the rational connection and the minimal impairment tests are sufficient to determine whether there is proportionality between the deleterious effects of a measure, and its objective.

5.3 ALLOCATION OF BURDENS AND PRESUMPTIONS

5.3.1 Burdens and standards of proof

Of interest in this analysis is whether the crime of illicit enrichment can be read to place a legal burden or an evidential burden on the accused public official.

Second, assuming that the burden placed is a legal one, can it be compatible with procedural fair trial rights? Would the severity of the crime be a factor in determining compatibility? And does the offense of illicit enrichment qualify as a serious crime that justifies placing the legal burden on the defendant?

Common law as well as civil law systems[140] distinguish between "legal" burden, which is sometimes called the "persuasive" burden,[141] of proof and the "evidential" or provisional or tactical burden,[142] that is, "the burden of introducing enough evidence to be placed before the jury or other tribunal of fact."[143] A defendant who bears a legal burden will lose if he fails to persuade the fact-finder of the matter in question on the balance of probabilities. An evidential burden in relation to a matter is a burden adducing sufficient evidence to raise an issue regarding the existence of the matter. The burden of disproof will then fall on the prosecution in accordance with the normal rule. The significance of this distinction is that evidential burdens are regarded as compatible with the presumption of innocence[144] since they do not require the accused to assume the risk of being convicted because he fails to prove some matter relating to his innocence. As a general rule, therefore, the legal burden in criminal cases is always on the prosecution. However, statutory exceptions to this rule place the legal burden of proof on the accused,[145] for example, a statutorily imposed legal burden on the defendant by a reverse onus provision.[146] If a statutory legal burden is found to be incompatible with any the procedural fair trial rights, courts have the discretion, in the public interest or because it is necessary in a democratic society, to "read it down"[147] to an evidential burden.[148]

5.3.2 On presumptions and inferences

The United States Supreme Court has consistently held that "inferences and presumptions are a staple of [the] adversary system of fact-finding." It is often necessary for the fact-finder to determine the existence of an element of the crime that is an "ultimate" or "elemental" fact from the existence of one or more "evidentiary" or "basic" facts.[149] The value of these evidentiary devices, and "their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finder's freedom to assess the evidence independently."[150] A "presumption" is an evidentiary device that allows the trier of fact to find one fact (the "presumed" fact) from proof of another fact (the "basic" fact). It is (a) a rebuttable assumption of fact, (b) legally required to be made, and (c) from another fact or group of facts found or otherwise established in the action.[151] These requirements are treated as conjunctive; in the absence of any one of them, no presumption results.[152]

Presumptions are generally classified into two categories: presumptions *without* basic facts and presumptions *with* basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. In contrast, a basic fact presumption entails a conclusion to be drawn upon proof of the basic fact. When the prosecution proves the basic fact

(usually a component of the *actus reus*) another fact can be presumed (usually some aspect of the *mens rea*) which may be expressly stated in the statutory offense.[153] Presumptions of basic facts often involve elements of the crime that are difficult for the prosecution to prove, requiring it to speculate on the accused party's ulterior motive for committing the crime. For this reason, the defendant is usually in a better position to raise evidence to refute the presumed fact. So, for example, in a drug possession case, the defendant can lead evidence to show that the drugs in his possession were for some other purpose and *not intended* for trafficking.

Basic fact presumptions can be further categorized into:

a Permissive presumptions which allow, but do not require, the fact-finder to infer the presumed fact from proof by the prosecution of the basic one and which places no burden of any kind on the accused, or
b Mandatory presumptions which require that (in the absence of other evidence to displace the presumption) the fact-finder infer a presumed fact if the basic fact is proved.[154]

Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted:

I The accused may be required merely to raise a reasonable doubt as to its existence.
II The accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact.
III The accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

Finally, presumptions are often referred to as either presumptions of law or presumptions of fact. Presumptions of fact usually entail "frequently recurring examples of circumstantial evidence," while presumptions of law involve actual legal rules. Of relevance to this analysis is how these presumptions operate against the accused in illicit enrichment cases.

Charging and convicting a public official for being in possession of illicitly acquired assets (an objective state of fact) does not violate the presumption of innocence in favor of the accused. It is the presumption of guilt that flows from the official's failure to reasonably explain the origins of his excessive wealth that gives rise to a presumption of law by virtue of which a court could find him guilty of illicit enrichment.

5.4 JUDICIAL GUIDELINES FOR ASSESSING THE EFFECT OF REVERSE ONUS ON THE RIGHT TO SILENCE

The act of drawing adverse inferences from the silence of an accused is not contrary to the accused's right of non-compellability or the presumption of

innocence. It bears emphasizing that the rule against commenting on a defendant's failure to testify was originally created to ensure that neither the court nor the prosecution would draw unfair attention to the silence of the accused. But the rule was never intended to preclude courts from drawing natural and reasonable inferences from an accused person's silence.[155] In other words, an accused person's silence can give rise to inferences so long as they are reasonable and are not drawn until well after a case to meet has been made out by the prosecution.

The view that drawing adverse inferences from an accused party's silence does not alter the traditional notions of the burden of proof and the right to silence finds strong support in the jurisprudence of several other jurisdictions. In *Murray v. Director of Public Prosecutions*,[156] the House of Lords (Northern Ireland) held that, where there was no innocent explanation offered by the accused in circumstances that called out for one, the trial judge was entitled to infer that the accused was guilty. *Murray* involved a prosecution for attempted murder and possession of a firearm. In discussing the presumption of innocence, Lord Mustill said the following:

> This is not of course because a silent defendant is presumed to be guilty, or because silence converts a case which is too weak to call for an answer into one which justifies a conviction. Rather, the fact-finder is entitled as a matter of common sense to draw his own conclusions if a defendant who is faced with evidence which does call for an answer fails to come forward and provide it.
>
> . . .
>
> It is however equally a matter of common sense that even where the prosecution has established a prima facie case in the sense indicated above it is not in every situation that an adverse inference can be drawn from silence. . . . *Everything depends on the nature of the issue, the weight of the evidence adduced by the prosecution upon it . . . and the extent to which the defendant should in the nature of things be able to give his own account of the particular matter in question*. It is impossible to generalise, for dependent upon circumstances the failure of the defendant to give evidence may found no inference at all, or one which is for all practical purposes fatal.[157]
>
> (Murray v. Director of Public Prosecutions (1992), 97 Cr. App. R. 151, at 155)

Worthy of note is Lord Mustill's observation that the propriety of an adverse inference depends upon the nature of the case and the extent to which the defendant should "be able to give his own account."[158] In *R. v. Cowan*,[159] the Court of Appeal also endorsed the notion that adverse inferences do not automatically affect the burden traditionally carried by the prosecution in criminal cases. The accused in *Cowan* was charged with causing grievous bodily harm and unlawful wounding. In the face of strong but conflicting evidence, the accused chose not to testify. Reflecting on the accused's silence, Lord Taylor C.J. had this to say:

> It is further argued that the section alters the burden of proof or "waters it down" to use Mr. Mansfield's phrase. The requirement that the defendant give evidence on pain of an adverse inference being drawn is said to put a burden on him to testify if he wishes to avoid conviction.
>
> In our view that argument is misconceived. First, the prosecution have to establish a prima facie case before any question of the defendant testifying is raised. Secondly, section 38(3) of the Act of 1994 is in the following terms: "A person shall not . . . be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in . . . section 35(3). . . ." Thus the court or jury is prohibited from convicting solely because of an inference drawn from the defendant's silence. Thirdly, the burden of proving guilt to the required standard remains on the prosecution throughout. The effect of section 35 is that the court or jury may regard the inference from failure to testify as, in effect, a further evidential factor in support of the prosecution case. It cannot be the only factor to justify a conviction and the totality of the evidence must prove guilt beyond reasonable doubt.[160]
>
> (R. v. Cowan, [1995] 3 W.L.R., at 822)

The two English cases, *Murray* and *Cowan*, it has been pointed out,[161] were based upon legislative provisions which expressly permit the use of adverse inferences under certain circumstances in the United Kingdom.[162] This fact which does not scuttle their intrinsic merit, as Lamar C.J. observed in his dissent in *R v. Noble:* "these cases discuss the rationale for making use of the silence of the accused and both . . . serve to highlight the conventional legal wisdom that adverse inferences, when drawn in appropriate circumstances, in no way undermine the right to silence or the presumption of innocence."[163] The courts in New Zealand, another common law jurisdiction, have not equivocated on the propriety of drawing adverse inferences from an accused's silence. Their approach is captured in *Trompert v. Police*.[164] The accused in this case was charged with cultivating cannabis contrary to the Misuse of Drugs Act 1975. After the Crown had established a "case to meet," the accused chose not to testify or give evidence in his defense. The Court of Appeal held that where a *prima facie* case is established, the judge is entitled to take the accused's silence into account in determining what weight should be given to the evidence against him. In reaching this conclusion, Richardson J. quoted the following excerpt from *Hall v. Dunlop*[165] in support of his reasons:

> I have never previously come across the suggestion that an accused person has a general privilege of silence which protects him from such inferences as will naturally be drawn from his silence in the face of proved facts which call for explanation on his part. In the face of such facts, an accused person preserves silence at his peril, except where some particular rule of law protects him. In my experience, but subject always to those particular rules, the silence of an accused person has always been regarded as a major

> indication of guilt in cases where he might be expected to speak if he were innocent. Even where a statute prohibits comment on failure to testify, there is no privilege of silence, as no law has ever purported to prohibit the tribunal of fact, be it jury, Judge or Magistrate, from drawing such inferences as must inevitably be drawn from silence on the part of the accused.[166]
>
> ([1959] N.Z.L.R. 1031 (S.C.) at 358)

This brief overview of case law from three common law jurisdictions, Canada, England and New Zealand, shows a strong endorsement of the view that courts are entitled to consider the silence of the accused in making findings of guilt. However, as a precondition to drawing adverse inferences from an accused's silence, the prosecution must first present a *prima facie* case or a "case to meet," i.e. a case in which the evidence presented is sufficient enough to reasonably support a guilty verdict. It is only where a case to meet has been put forth and the accused is, in Irving J.A.'s colorful language, "enveloped . . . in a cogent network of inculpatory facts"[167] that the fact-finder may draw inferences from an accused's silence.

5.4.1 Applying the judicial guidelines to the offense of illicit enrichment

In the context of illicit enrichment proceedings, the privilege against self-incrimination raises the issue of the status of improperly obtained evidence in a criminal trial. The problem is two-fold. The first relates to the representations a public official makes to justify the origins of his presumably illicitly acquired assets. The question this poses is whether it would be permissible for a court to use such compulsorily made statements against the accused public official. Would not the use in evidence of statements obtained from the accused under these circumstances be in breach of his right to silence? The second problem concerns the situation of an accused public official who chooses to exercise his right to silence. Does the fact of not giving explanations in situations where there is reason to suppose that an innocent person would have jumped at the chance to explain himself raise any suspicions as to the accused official's guilt? And could or should those suspicions be used in evidence against him? To it put differently, does the exercise of the right to remain silent in these circumstances rise to the level of circumstantial evidence in the hands of the prosecution? What inferences from silence are permissible without violating the accused's due process right to silence?

The following summarizes the guidelines from case law on the relationship between illicit enrichment and the right to silence. First, a public official who is alleged to have illegally acquired his extraordinarily substantial assets by corrupt means does not enjoy a general privilege of silence. This means that his right to silence does not automatically protect him from adverse inferences that can logically and reasonably be drawn from his failure to answer

questions put to him by the prosecution before and during trial. Second, there is no general rule on when an adverse inference can be drawn from a defendant's silence. Much depends on the nature of the case before the court, the weight of the evidence presented by the prosecution, and the extent to which the defendant is able to give his own account of the situation. Third, the prosecution must always present a *prima facie* case; the defendant can legitimately be expected to respond by testifying himself or calling other evidence. His failure to do either may serve as the basis for drawing adverse inferences. But courts can draw such inferences only after the *prima facie* case has been laid out.

Fourth, inferences drawn from the defendant's failure to testify are not dispositive of the matter. Standing alone, such adverse inferences cannot justify a conviction. They constitute just one evidential factor in support of the prosecution case. In other words, a defendant cannot be convicted solely on adverse inferences drawn from his silence without more evidence. The accused's silence can only be probative, forming the basis for natural, reasonable and fair inferences. Finally, conclusions about the accused's silence cannot be drawn until well after a "case to meet" has been made out by the prosecution,[168] usually at the time of charging the jury.

5.4.2 A framework for allocating burdens of proof in illicit enrichment cases

The offense of illicit enrichment is defined as a significant increase in the assets of a public servant which cannot be reasonably explained in relation to his lawful earnings during the performance of his functions. Implicit in this definition is a reverse onus which triggers an automatic, but rebuttable, presumption that an official found in "possession of inexplicable wealth" must have acquired it through some corrupt activity. The gravamen of the crime is the onus placed on the accused official to explain the sudden increase in his wealth, and his failure to "reasonably explain" how it was acquired could give rise to a presumption of guilt. This onus implicates fair trial rights in two aspects: first, the presumption of innocence is implicated because the reverse onus presumes that the official's assets could not have been acquired other than by corrupt unlawful means. Second, the right to silence is also affected, more specifically the right not to produce evidence or the right not to self-incriminate and, as a corollary, that no negative consequences should result from the official's silence. In working out a framework for resolving corruption allegations against high-ranking government officials which attempts to balance the competing community interests or conflicting public and individual interests, the question arises: what should be the appropriate standard of proof? The view taken here is that such allegations should be proven to the criminal standard of proof beyond a reasonable doubt.

The problem of unexplained wealth of public officials when viewed essentially as a corruption crime consists of two elements: first, knowingly acquiring public assets through corrupt acts (*mens rea*); and second, being in possession

of substantial assets that cannot be explained in relation to his official salary (*actus reus*). The way the offense is defined in treaty law and domestic statutes makes the possession of unexplained substantial assets by a public official presumptive evidence of acquisition through corrupt activities. The former constitutes the *basic fact* while the latter the *presumed fact.* In *County Court of Ulster County v. Allen*,[169] the U.S. Supreme Court noted that*:* "[t]here has to be a 'rational connection' between the basic facts that the prosecution must prove and the ultimate fact presumed, and the latter must 'more likely than not to flow from' the former."[170] It is submitted that the connection between basic and presumed facts be proved beyond reasonable doubt. A court is free to infer guilty knowledge from the basic fact of possession of excessive assets, but the basic fact must be established beyond a reasonable doubt for the presumption to be operative. If the prosecution can present other evidence of the presumed fact in addition to the basic fact or facts, then the presumed fact must satisfy the more-likely-than-not standard and not the more stringent reasonable doubt standard.[171] But if the presumed fact establishes an element of the offense or negatives a defense, then its existence must be proved beyond a reasonable doubt.

5.4.2.1 The prosecution case

In a criminal trial it is usually the prosecution that makes the first move by presenting a *prima facie* case. What must the prosecution do in an illicit enrichment action to establish a *prima facie* case against the accused public official? Because the accused official is in a superior position of knowledge with respect to the origins of his wealth, the prosecution must rely initially on a basic fact presumption. This will require the prosecution, in presenting its *prima facie* case, to prove the basic facts (public official and ownership of substantial assets) to permit a presumption that the sudden and significant increase in the official's assets is the result of unlawful corrupt activities. The presumed facts remain unless and until the accused official proves otherwise. Therefore, in order for the prosecution to establish a *prima facie* case,[172] it must lead in evidence facts that prove the following: (1) the accused is a public official (basic fact); (2) is in possession of assets/property (*actus reus*) that are not commensurate with his income or economic resources (basic fact); (3) therefore these assets must *knowingly* have been acquired through acts of corruption or represent the fruits of corruption (*mens rea*) (presumed fact). The prosecution must also be able to indicate: (a) the amount of pecuniary resources and other assets in the accused official's control at the charge date; (b) the accused official's total official emoluments up to the same date; and (c) a disproportion between the official's total assets and his lawful salary, i.e. the acquisition of the total assets under the accused official's control could not reasonably, in all the circumstances, have been afforded out of the total official emoluments up to that date. In other words, the disproportion must be sufficiently significant as to call out for an explanation.[173]

5.4.2.2 The defense

Once the prosecution has discharged its obligation of presenting a *prima facie* case, that is, proved the basic fact(s)—a noticeably significant increase in an official's wealth—it is at this point that the defense starts to meet the case against it.[174] In other words, the onus shifts to the accused public official to prove the contrary, i.e. refute the basic fact *presumption* by factual evidence. He can, if he so chooses, present facts to persuade the trier of fact that the presumption is not true: (a) that he came into his wealth long before he became a public servant or (b) that the assets belong to his wife or close relative(s) or (c) that the assets are not his but held in trust for others. Successfully proving (a) or (b) or (c) overcomes this presumption. If, however, the accused official is unable to lead evidence to rebut the presumption, the trier of fact may or may not infer the existence of the presumed fact (illegal origins of official's assets) from proof by the prosecutor of the basic fact of ownership of these assets. This is the case because the presumption is a permissive one. It is important to stress that at this stage of the proceedings the basic fact presumption imposes on the accused public official nothing more than a burden of production, i.e. an evidentiary burden:[175] "such evidence as, if believed and if left un-contradicted and unexplained, could be accepted by the jury as proof."[176] The presumption does *not* impose a burden of persuasion or a legal burden of the nonexistence of an essential element of the crime of illicit enrichment on the accused official. The effect of imposing the burden of producing evidence is to (a) require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence; and (b) shift the tactical burden[177] to the defense. The accused official must now estimate the likelihood of losing if he does not provide strong evidence supporting his defense. It would not be prudent for the accused official to hide behind the right to silence or invoke the privilege against self-incrimination to avoid coming forward with evidence that would explain his side of the story. Doing so, of course, begs the question: if he is innocent of illicitly enriching himself why would he choose to remain silent rather than do everything within his power to exonerate himself? The case law is clear on this point, that the official's failure to testify or to adduce evidence to refute the prosecution's *prima facie* case may serve as grounds for drawing adverse inferences. While the accused cannot be convicted solely on the inferences drawn from his silence, they add up to support the prosecution's case.

Article IX of the Inter-American Convention against Corruption specifically places on the public official the obligation to "reasonably explain" any "significant increase" in his wealth "in relation to his lawful earnings during the performance of his functions." The Commentary to this provision justifies shifting this burden onto the accused public servant to demonstrate the source of his wealth on two grounds: First, because no one is in a better position than public officials to demonstrate the basis of their standards of living,[178] and second, the prosecution must rely on these property disclosures because many of these Latin American states lack the "effective high-technology resources to

detect offenses at the precise moment they occur."[179] If an accused is required by statute to "prove" anything then, as Professor Elliott argues, the burden on the accused is one of persuasion. As a consequence, if the fact-finder is in any doubt about the evidence adduced by the accused, he must enter a finding against the accused.[180] In these circumstances, the accused would have failed to discharge his burden if all he did was to "raise a reasonable doubt in the minds of the jury; he must persuade the jury that his story is more probably true than false."[181] Applying this reasoning to a charge of illicit enrichment under Article IX, any significant increase in the wealth of the accused must be deemed to be the product of corrupt enrichment unless the contrary is proved. And any doubt as to the lawful origins of this wealth should be held against the accused, and be ground for a conviction.

Therefore, to avoid a guilty verdict the accused official must prove on *a balance of probability*[182] (not merely raise a reasonable doubt) that the wealth in question was acquired through lawful activities such as prudent investments, stock transactions, real estate profits, inheritances, gambling winnings, savings, lottery, and so on. The accused is not required to disprove anything but only to provide some evidence that is not disbelieved. If he fails to overcome the presumption of unlawful origins of his wealth, a fact-finder may infer the presumed fact from proof of the basic fact by the prosecution. This has the effect of creating a mandatory presumption because the burden is now shifted to the accused official to rebut or explain the presumed fact. The trier of fact can, however, read down this impermissible burden-shifting presumption to an evidentiary burden. If, on the other hand, the accused official succeeds in carrying his burden of raising reasonable doubt as to the alleged unlawful origins of his assets, that effectively displaces the presumption and the regular rules apply. This of course means that the prosecution must either disprove the accused official's evidence *beyond a reasonable doubt* or build its case *beyond a reasonable doubt*. This standard of proof stays with the prosecution throughout the trial and never shifts. Retaining this standard ensures that an accused cannot be convicted based on flimsy evidence presented by the prosecution, i.e. that possession of substantial assets is presumptive evidence that these assets were acquired through corrupt criminal activity.

The framework just outlined does not impose a burden of persuasion on the accused official. This burden is always upon the prosecution to establish every element of the crime of illicit enrichment by proof beyond a reasonable doubt, never upon the accused to disprove the existence of any necessary element. The accused may, if he chooses, introduce evidence to rebut the presumption but the ultimate burden always rests with the prosecution.

5.5 CONCLUSION

The reproach usually made against the offense of illicit enrichment is that its built-in reverse onus puts the accused party in a "no win" situation where he

is damned for doing and damned for not doing. The reverse onus, it is argued, compels the accused to produce evidence that may very well incriminate him and aid in his conviction. Should he choose not to cooperate by invoking his right to remain silent, adverse inferences may be drawn from this failure to testify and these may be used to convict him. This arrangement effectively alters the traditional approach to burden of proof in criminal cases where it is always the prosecution's duty to prove the guilt of an accused beyond reasonable doubt. Consistent with this principle an accused "should not be conscripted into helping the state fulfil this task."[183] The proposed division of the burden of proof between the government—standing in for the community-at-large—and the accused person strives to strike a careful balance between these two competing interests. The analysis respects and preserves the traditional rule in criminal cases where the state carries the burden of proving guilt beyond reasonable doubt. Since the allocation of burdens of proof is usually affected by issues of fairness and public policy considerations,[184] and given the clandestine nature of illicit enrichment, fairness and public policy demand that a significantly heavy burden be placed on the accused. This should be the case given the accused public official's superior resources which place him in a considerably better position than the prosecution to determine whether or not statements regarding the origins of his wealth are true or false. Instead of a "no win" situation, the proposed framework provides a "win win" situation for both the state and the accused public official.

6 A framework for balancing competing rights and interests

The preceding discussion has centered on the validity of the reverse onus provision in the offense of illicit enrichment when tested against due process guarantees to fair trial such as the presumption of innocence, the right to silence and the privilege against self-incrimination. The analysis has tended to be technical as the focus has been on a mechanical application of judge-made tests aimed at striking a proper balance between burden-shifting and fair trial rights. But there is more to the crime of illicit enrichment that transcends the procedural safeguards contained in these rights. It is submitted that the prohibition against illicit enrichment is an essential ingredient in the global anti-corruption regime that also includes prohibitions against bribery, embezzlement, misappropriation, money-laundering, abuse of power, influence-peddling, abuse of office, and so on. This international anti-corruption regime, it will be argued, is an integral part of the right of a people to exercise permanent sovereignty over their national wealth. As has been argued in previous chapters, treaty law as well as domestic penal statutes have, in including a reverse burden provision in the crime of illicit enrichment, unwittingly set up a potential conflict between two competing sets of universal values: on the one hand, the values that prop up *individual* due process rights and, on the other, those that undergird the *collective* right of a people to exercise permanent sovereignty over their national resources without having these pillaged by their leaders.

Since there is no internationally agreed normative hierarchy of rights, how then should one proceed to rank these rights? In the event of an inevitable clash between these two fundamental rights, it is important to ask which one should yield to the other or can the two be reconciled in such a way that the broader societal interests both seek to promote and protect are achieved?

While the jurisprudence on the right to fair trial was examined in detail in Chapter 4, very little has been said about the concept of a corruption-free society. Chapter 6 closes this lacuna with a discussion of the scope and content of this emerging right.

The notion of human rights is derived from the belief that all human beings are born equal in dignity and rights, and that these moral claims are inalienable and inherent in all human individuals by virtue of their humanity.

Having been transformed into justiciable legal rights through the international law-creating process, these erstwhile moral claims now constitute the *corpus* of fundamental human rights protected under international law. Consistent with the Lockean vision of rights,[1] the owners of these evidently basic rights of humankind—life, liberty and property—have never surrendered them to the state. Rather, all that the individual surrenders to the state upon entering civil society is the right to have these rights enforced by the state. The expectation that the state is under a duty to promote and protect all human rights is central to this analysis.

6.1 THE RIGHT TO A CORRUPTION-FREE SOCIETY AS A FUNDAMENTAL HUMAN RIGHT[2]

The right to a society free of corruption is inherently a basic human right because life, dignity and other important human values depend on this right.[3] That is, it is a right without which these essential values lose their meaning. As a fundamental right, the right to a corruption-free society cannot be easily discarded "even for the good of the greatest number, even for the greatest good of all."[4] The right to a corruption-free society flows from the right of a people to exercise permanent sovereignty over their natural resources and wealth, that is, their right to economic self-determination, recognized in common in article 1 of the International Covenant on Civil and Political Rights[5] and the International Covenant on Economic, Social and Cultural Rights,[6] which reads:

1 All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2 All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The antecedents of the principle of permanent sovereignty can be traced to the demarche by Third World nations in the early formative years of the United Nations for a reappraisal with a view toward altering the " 'inequitable' legal arrangements, in the form of concessions, inherited from the colonial period, under which foreign investors (mostly transnational corporations with their headquarters in the metropolitan country) were exploiting their natural resources."[7] The global debate that ensued between capital-importing Third World countries, the owners of the natural resources and the capital-exporting developed countries where the majority of the foreign investors' concessionaires are based, finally led to the adoption in 1962 in the General Assembly of

Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources.[8] This resolution, together with subsequent U.N. resolutions and declarations,[9] have expanded the meaning of the people's patrimony over which permanent sovereignty is to be exercised to include not just wealth derived from natural resources but all the wealth-generating activities in the society. With respect to this expanded definition of the people's patrimony, the right to the exercise of sovereignty over a nation's natural wealth and resources means two things.[10] First, the right of states to exercise control over their natural wealth and resources, and second, the right of all peoples within the state to freely use, exploit and dispose of their natural wealth and resources in the supreme interest of their national development. In both instances, economic self-determination is the ultimate objective. In this respect, a state can violate the right to economic self-determination in one of two ways. A violation occurs when the state alienates the people's patrimony in its resources by corrupt or unwise concessions to foreign companies.[11] The state is also in violation of the right to economic self-determination when it engages in the corrupt transfer of ownership of national wealth to those select nationals who occupy positions of power or influence in the society. The violation by the state also operates to deny the people, individually and collectively, their right to freely use, exploit and dispose of their national wealth in a manner that advances their development.

The right to a corruption-free society also implicates the collective right to development. Louis Henkin has defined this right as the "sum, or the aim, of all the rights in the [Universal] Declaration, especially the right to an education and of other economic and social rights, but also civil and political rights."[12] In Professor Henkin's view, the importance of development in the human rights context rests on the predicate that, without development, it would not be possible to respect and insure individual rights:

> Political development is essential to assure the human right to participate in self-government in one's own country. Economic development will better enable a country to guarantee the economic and social rights of its inhabitants, will increase the resources available for that purpose and help achieve it more expeditiously. Societal development is essential for individual development which is necessary to enable individuals to know their rights, to claim them, to realize and to enjoy them and the human dignity they promise.[13]
>
> (Louis Henkin, The Age of Rights (1990) at 1–5)

In 1986, the United Nations General Assembly took a major step in the direction of elevating this right to the level of a principle of customary law when it adopted the Declaration to the Right to Development.[14] The Declaration proclaims the right to development as an inalienable human right of every human being and all people to participate in, contribute to, and enjoy economic, social, cultural and political development. Corruption by public

servants undermines all of these laudable goals. Studies after studies have shown that the economic costs of corruption are intrinsically linked to the overall enjoyment of the right to development. Hess and Dunfree cite a 1997 World Bank estimate that placed the total corruption involved in international trade at a staggering $80 billion per year.[15] They also report that in countries like Ecuador, for example:

> [E]stimates indicate that the government could pay off its foreign debt in five years if corruption was brought under control. In Argentina, corruption in the customs department defrauded the government out of $3 billion in revenues. Officials estimated that 30% of all imports were under-billed and approximately $10 billion of goods over a four-year period were brought into the country under the guise of being labeled 'in transit' to another country, thus illegally avoiding import taxes altogether. Corruption also influences government spending, moving it out of vital functions, such as education and public health, and into projects where public officials can more easily extract bribes.[16]
>
> (Hess & Dunfee, at 596–97 *reprinted in* Anti-Corruption & Human Rights, at 8)

It goes without saying that the right to development is a right to a particular process of development in which all human rights and fundamental freedoms can be fully realized.[17] Not only does corruption impair the right to development, it also poses a severe threat to the "broader normative framework of democratic governance and the rule of law," both of which are the *condition sine qua* for the effective implementation of *all* human rights.[18] The Preamble to the United Nations Convention against Corruption highlights "the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law." It further expresses the conviction of its drafters that "the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law."

6.1.1 State obligation to protect fundamental rights

The right to a corruption-free society also imposes a corresponding obligation on states to fight corruption in all its manifestations in order to ensure for everyone the enjoyment of all other basic human rights. States have a duty to protect individuals against violations of their human right to a corruption-free society by state agents, but also against acts committed by private persons or entities. To meet this obligation states must take positive measures to ensure that public officials and private persons or entities do not impinge on the human rights of individuals. States would be in breach of their obligations where they fail to take appropriate measures or to exercise due diligence to

prevent, punish, investigate or redress the harm caused by such acts. In this regard, states have three levels of obligation in relation to human rights: an obligation "to respect," "to protect" and "to fulfill."[19]

The obligation to respect requires the state to refrain from any action that may deprive individuals of the enjoyment of their rights or their ability to satisfy those rights by their efforts. This type of obligation is often associated with civil and political rights (e.g. refraining from committing torture), but it applies to economic, social and cultural rights too. So for example, with regard to the right to adequate housing, states have a duty to refrain from forced or arbitrary eviction.

The obligation to protect requires the state to prevent violations of human rights by third parties. The obligation to protect is normally taken to be a central function of states, which have to prevent irreparable harm from being inflicted upon members of society. This requires states: (a) to prevent violations of rights by individuals or other non-state actors; (b) to avoid and eliminate incentives to violate rights by third parties; and (c) to provide access to legal remedies when violations have occurred, in order to prevent further harm:

> Non-compliance with this level of obligation may be a vital determinant of state responsibility in corruption cases. By failing to act, states may infringe rights. If they do not criminalize particular practices or fail to enforce certain criminal provisions, for example, they may not prevent, suppress or punish forms of corruption that cause or lead to violations of rights. The obligation to protect may also provide the link required to show that corrupt behavior by a private actor triggers state responsibility. Although it might be difficult to establish, a state might be held responsible for violating a right, for example, if it failed to enact appropriate legislation to prevent or punish corruption committed by private corporations. Or a state might be judged negligent if employers breached labor laws (minimum wage requirements, health and safety regulations) and systematically bribed government labor inspectors to overlook this behavior. In the case of transnational corporations, the home and host states might both have responsibilities, although the former are often better equipped to ensure that companies comply with human rights.[20]
>
> (International Council on Human Rights Policy, Corruption and Human Rights: Making the Connection 1, 25–26 (2009))

The obligation to protect is relevant to the privatization of public services (such as health, transport or telecommunications). Privatization tends to bring together all the ingredients for multiplying opportunities for corruption that may end up having adverse effects on the enjoyment of particular rights (access to clean water, for example). In some instances of privatization, direct responsibility for the service in question (for example, when state companies retain certain public functions after privatization) remains with the state. In others, the state devolves authority to private companies; but in

these cases too it is still responsible for violations of rights that they commit, and will be liable if it fails to prevent corruption (or exposure to it) as privatization occurs, or does not protect the rights of vulnerable groups who depend on the services in question.

The obligation to fulfill requires the state to take affirmative steps to ensure that people under its jurisdiction can satisfy those basic needs guaranteed in human rights instruments that they cannot secure by their own efforts. This key state obligation relates not only to economic, social and cultural rights but to civil and political rights as well:

> So, for instance, enforcing the prohibition of torture (which requires states to investigate and prosecute perpetrators, pass laws to punish them and take preventive measures such as police training), or providing the rights to a fair trial (which requires investment in courts and judges), to free and fair elections, and to legal assistance, all require considerable costs and investments. A violation of a human right therefore occurs when a state's acts, or omissions, do not conform with its obligation to respect, protect or fulfill recognized human rights of persons under its jurisdiction. To assess a given state's behavior in practice, however, it is necessary to determine in addition what specific conduct is required of the state in relation to each right. This will depend on the terms of the state's human rights obligations, as well as their interpretation and application; and this in turn should take into account the object and purpose of each obligation and the facts of each case. The term "violation" should only be used formally when a legal obligation exists.[21]
>
> (International Council on Human Rights Policy, Corruption and Human Rights: Making the Connection 1, 25–26 (2009))

It has been argued that this tripartite typology contains:

> [G]uidelines that assist us to approach the complex interconnections and interdependencies of the duties that must be complied with in order to achieve protection of human rights. In this regard, it is crucial to keep in mind that other obligations must be considered as well, at all three levels, such as the duty to establish norms, procedures and institutional machinery essential to the realization of rights; and the duty to comply with human rights principles such as non-discrimination, transparency, participation and accountability.[22]
>
> (International Council on Human Rights Policy, Corruption and Human Rights: Making the Connection 1, 25–26 (2009))

These guidelines should inform on the state's responsibility to recognize the interconnection and interdependency between individual due process rights and the collective right to economic autonomy. Therefore, protection of one set of rights should not be pursued at the expense of the other.

6.2 INDIVIDUAL FAIR TRIAL RIGHTS VERSUS THE COLLECTIVE RIGHT TO A CORRUPTION-FREE SOCIETY

Acts of illicit enrichment by a few public officials deny the rest of society access to food, medical care, education, pre- and post-natal care and employment opportunities. In this sense, therefore, corruption infringes on other basic human rights such as the right to an adequate standard of living,[23] the right to health,[24] the right to education,[25] the rights of the child,[26] the right to work,[27] and so on. As against the *individual* right to procedural fairness and the *collective* rights to social, political and economic fairness, which should assume primacy? Is the former entitled to unbridled protection at the expense of other fundamental social or political or economic interests that society at large is entitled to enjoy? If not, how then should courts proceed to balance the *concrete* right asserted by an *individual* accused and the *abstract collective* rights of parties, i.e. society as a whole, that are not necessarily before the court during a corruption proceeding?

There is widespread recognition among legal scholars that the absence of international consensus as to the standing of a particular right within a normative hierarchy that attempts to resolve conflicts between competing human rights values will present serious philosophical, legal and political difficulties.[28] The lack of a general consensus on a normative hierarchy of human rights, except with respect to a small number of peremptory norms (*jus cogens*),[29] suggests that there is no definable legal distinction between those human rights that are "fundamental" and those that are not.[30]

Two legal scholars, Donna Sullivan[31] and Eva Brems,[32] have separately attempted to explore this dilemma. Each has, in so doing, proposed a framework for resolving conflicts between competing rights. Sullivan's focus is on systemic gender inequality in human rights law and practice while Brems' interest is more in the direction of the various sub-rights contained in the right to fair trial. Because their analyses have particular relevance to this study, an attempt will be made to examine them in some detail.

6.2.1 Scholarly approaches to reconciling conflicting human rights

6.2.1.1 Gender equality and religious freedom

Central to Sullivan's framework is the observation that many gender-specific human rights violations are grounded in cultural and religious practices spawned from potentially conflicting provisions in various human rights instruments, such as the Convention on the Elimination of All Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Declaration on the Elimination of All Forms of Religious Intolerance. These instruments appear to work at cross-purposes barring gender discrimination, on the one hand,

while safeguarding gender-insensitive religious laws and practices on the other. The potential for conflict, Sullivan argues, is especially apparent in the provisions of CEDAW that address social and cultural practices and equality in marriage and family matters. For example, she points to articles 5 and 10 (c) of CEDAW. The former requires states parties to take appropriate measures to modify social and cultural patterns and practices based on stereotyped roles for men and women while the latter advocates the elimination of any stereotypical roles of men and women at all levels and in all forms of education through coeducational policies as well as the revision of textbooks and school programs."[33] But, as Sullivan points out, "if stereotyped gender roles are a feature of the belief system in which parents wish their children to be educated, parents might argue that teaching intended to modify such roles violates article 18(4) of ICCPR and article 5(2) of the Declaration on Religious Intolerance."[34] Many of the conflicts between women's rights and religious freedom involve norms that have not as yet been accorded overriding significance by the international community; i.e. have not been assigned an agreed-upon rank in a normative hierarchy.[35] These situations of conflict nonetheless underscore the need to transform religious law and practice, not only as a means of ending gender-based restrictions on specific human rights, but also as an essential step toward dismantling systemic gender inequality. Toward this end, Sullivan sets out to construct a framework for balancing competing rights "that takes into account particularized facts concerning the impact of the rights involved on one another, and on the underlying principles of gender equality and religious freedom."[36]

Six factors must be taken into consideration in Sullivan's proposed balancing framework. The first is the relationship between the specific equality right at issue and the overarching goal of gender equality.[37] Second, the importance of the religious law or practice to the right of religious freedom upon which it is grounded. Third, the degree to which each practice impinges upon the other rights and interests; whether the infringement is only to a slight degree or is so extensive as to completely eclipse the other rights.[38] A fourth factor to be considered is whether other human rights are implicated.[39] Fifth, in situations where religious law imposes a series of limitations on women's rights, their cumulative effect on women's status should be weighed, as should the effect of multiple restrictions of religious practice on the religion itself. Finally, where the state has determined that restriction of a religious law or practice is necessary for the purpose of ensuring women's rights under CEDAW or general guarantees of gender equality, the proportionality of the restriction must be assessed.[40]

6.2.1.2 Procedural rights and sub-rights under the European Convention

Where Sullivan's focus is on the potential for conflict between gender-specific rights and freedom of religion, Brems for her part tackles potential conflicts[41]

between sub-rights that make up the right to fair trial in the European Convention. Because the European Convention does not use a "fixed or explicit method" to deal with conflicts between human rights and because scholarly writings on the subject of conflicting human rights are scarce, Brems proposes a three-step approach for addressing conflicts[42] between human rights in general.[43] First, when a decision-maker is confronted with a claim to restrict one human right in the name of protecting another human right, the possibility of *avoiding* the conflict between those two must be examined.[44] Rather than privileging one right over the other, the optimal solution is the one that leaves both rights intact. Second, if it is not possible to fully protect both rights, efforts should be made to find a compromise:

> It is important to attempt to avoid having to sacrifice one right for the sake of the other . . . A solution that completely forsakes the protection of one of those rights is undesirable. When both rights are put in the balance, the challenge is to find equilibrium rather than making the balance tilt to one side or the other. Preference has to be given to a solution that does not subordinate one right to the other, but rather *finds a compromise with concessions from both sides for the purpose of guaranteeing maximum protection of both rights.*[45]
>
> (Brems, Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms, 27 Hum. Rts. Q. 294 (2005), at 303)

For this second step analysis, Brems recommends reliance on the German principle of "practical concordance" to seek equilibrium among conflicting rights which should allow one to restrict both competing rights in order to avoid violating the other.[46]

Finally, when a compromise cannot be found, a choice must be made between the conflicting rights according to some priority rules. But Brems is the first to caution that it is not possible always to determine priority rules for conflicting human rights "in the abstract, i.e. absent a specific situation in which a conflict occurs."[47] She has in mind a balancing mechanism that takes into consideration what Robert Lee refers to as "the *situational status or value of each right.*"[48] It is here that Brems' and Sullivan's analyses converge, i.e. on the criteria that can be used to decide in a specific case which of the conflicting rights should get priority. Much like Lee, Sullivan also argues in favor of a balancing exercise that treats rights in conflict not in isolation but as part of a whole: the fact that "The process of balancing the competing interests involved must take into account the fact that neither gender nor religion operates in isolation from class, ethnicity, or the other factors" is central to Sullivan's approach. Of particular interest is how the impact of religious law on women's *de facto* rights is shaped by the exercise of state power to define and enforce religious orthodoxy, class distinctions among women within the same religious community, and the

disparate impact of economic change and reform initiatives on urban and rural women.[49]

In her proposed framework for reconciling conflicts between and among sub-rights[50] that are included in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Brems borrows from Sullivan's analysis. However, unlike the human rights instruments under analysis in Sullivan's framework where the possibility of conflict between gender rights and religious freedom was not anticipated, such is not the case with the sub-rights to fair trial in the European Convention. The possibility of conflict between some sub-rights and other rights was "explicitly foreseen by the drafters of the Convention with regard to the right to a public hearing . . . the only sub-right for which a limitation clause is provided in Article 6:[51]

> [T]he 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.[52]
>
> (Brems, Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms, 27 Hum. Rts. Q. 294 (2005), at 299)

Focusing on the right to a public hearing, Brems argues that where it creates a conflict with a general interest, such as the parties' right to privacy, determining which of these interests should yield to the other should be done on the basis of "the requirement of proportionality between the measure restricting the public character of the hearing and the aim of that measure."[53] Likewise, where the conflict is between the right to a public hearing and the interests of justice then a more stringent test of strict necessity should be applied:[54]

> Human rights . . . stand on the top of the hierarchy of legal sources. . . [but] this does not mean that human rights are absolute. Their exercise can be subjected to restrictions that are imposed for the protection of other general or individual interests . . . A special situation occurs when the right or interest colliding with a certain human right is itself a human right.[55]
>
> (Brems, Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms, 27 Hum. Rts. Q. 294 (2005), at 301)

Brems' guideline test of proportionality and strict necessity is a familiar echo of Sullivan's proportionality test for assessing proposed religious limitations

on women's rights as well as restrictions placed on religious law or practice for the purpose of ensuring women's rights under CEDAW.[56]

6.2.2 Making some difficult normative choices

Previous chapters reviewed how judges grapple with conflicting human rights claims. The focus was on the right of an accused to his due process safeguards when faced with an offense that seemingly infringes on this right. Various tests for assessing the circumstances under which restrictions on fundamental rights are permissible in a democratic society were examined. Also explored in some detail are the responsibilities the state, as well as the accused, respectively, bear in ensuring that the pursuit of justice does not compromise competing fundamental rights. Having now examined how judges analyze human rights conflicts, attention will now shift to finding out how such conflicts arise in the first place. Conflicts between and among rights are the by-product of legislative decisions; of policy choices the legislator makes. When parliament adopts a law to protect a fundamental human right, say, the right to a corruption-free society, that potentially derogates from an existing constitutionally guaranteed right, say, the privilege against self-incrimination, without indicating where these rights stand on a normative hierarchy, this poses a serious problem when these rights collide.

The absence of such a legislatively imposed normative structure underscores the need for a mechanism for resolving the tensions that inevitably arise between conflicting rights. Brems and Sullivan have come up with such a system: the former with respect to conflicts among sub-rights under the right to fair trial in the European Human Rights convention, and the latter in the context of gender rights and religious freedom under international human rights law. Harking back to their analyses, three rules for reconciling conflicting rights and interests stand out: when conflicts arise between fundamental rights, the first consideration is to do everything possible so that both rights remain intact; if that is not possible, then search for a compromise in line with the so-called principle of practical concordance (*Das Prinzip der praktischen Konkordanz*);[57] and finally, where no compromise is feasible, establish a priority rule that ranks the colliding rights in order of their importance.

6.2.2.1 Leaving conflicting rights intact

The solution of leaving conflicting rights intact depends on the overriding goals these rights seek to achieve on the one hand and their relative importance on the other. The right to the presumption of innocence and the right to a corruption-free society are rights that are equally important in the pantheon of human rights. Because both advance significant societal values they are worth preserving in a democratic society. The presumption of innocence is an established right with a long history in the development of the rule of law and is a standard entitlement in the world's major legal systems. It is

also one of the principal rights guaranteed in every international human rights instrument.[58] So important is this right that derogations are limited only to the extent that they are reasonable and justifiable in a democratic society.[59] A fundamental tenet of the right to be presumed innocent is that an accused's guilt cannot be presumed until the state has proved it beyond a reasonable doubt.[60] As Blackstone so succinctly put it, "It is better that ten guilty persons escape, than that one innocent suffer."[61] For this reason alone the procedural safeguards available to an accused in a criminal trial deserve to be preserved.

In contrast to the presumption of innocence and the other fair trial rights it subsumes, the international prohibition against corruption of which illicit enrichment is an essential part is a relatively new right or an emerging right at best. It does not have the distinguished pedigree of due process rights but it more than makes up for this shortcoming by the recognition it has received in several multilateral anti-corruption instruments as well as numerous national penal codes. The criminalization of illicit enrichment in national legal systems is in recognition of the staggering toll this activity exacts on victim states.[62] The concerted global war against corruption stems from a real fear that if left unchecked, this activity will eventually lead to the destruction of the essential foundations of modern society. This argues strongly in favor of preserving this interest. But leaving both rights intact poses a serious problem in prosecuting cases of unlawful enrichment involving high-ranking public officials. Difficulties of proof the prosecution will encounter are likely to scuttle any efforts to make these public servants accountable.

6.2.2.2 Striking a compromise

In German constitutional law, a conflict between two constitutional principles is usually resolved according to the principle of practical concordance. According to one commentator, the aim of concordance is to ensure that "constitutionally protected legal values . . . [are] harmonized with one another when such values conflict. One constitutional value may not be realized at the expense of a competing constitutional value. In short: constitutional interpretation is not a zero-sum game"[63] but more like Pareto optimality.[64] In other words, the principle of practical concordance "optimizes the values and principles in conflict in such a way that the Constitution always wins."[65] Consistent with this principle, no one human right should be accorded protection at the expense of the other.

In order to reconcile fair trial rights and the right to a corruption-free society in the spirit of practical concordance, it would be desirable to resist the urge of establishing a formal hierarchy between these rights. This would make it much easier to strike a compromise that preserves the "unity of the Constitution." It has been explained that the concept of the unity of the Constitution requires restricting both rights within certain limits in order to preserve their effectiveness.[66] Such is the case with the statutory limitations placed on fair trial rights on the one hand and judicial "gerrymandering" on

the other, that permits reading down reverse onuses; that is, interpreting any express legal burden placed on the accused, by reverse onus provisions in the crime of illicit enrichment, as an implied evidential burden. The latter can be discharged on a much lower balance of probability standard and not the more demanding reasonable doubt standard of proof as is the case with a legal burden.

6.2.2.3 Priority rule

When a compromise cannot be arranged, the alternative is to establish a priority rule that ranks conflicting rights in order of importance. By definition, a priority rule accords one right absolute primacy over the other. But before settling on such a rule an effort should first be made to assess the effect each right has on other human rights as well as their impact on society as a whole. An assessment of the importance of these colliding values should not be carried out in a vacuum but in the context of their concrete relationship to other societal rights and how they cumulatively affect these other rights. Following this evaluation the right that minimally affects other societal rights should be allotted a lower priority over the other conflicting right. Human rights are about human dignity, the respect for it and commitment to its protection. Dignity of human life depends on such crucial basics as food, shelter, health, education, security, and so on. It is submitted that procedural rights to fair trial and the right to a corruption-free society should be weighed in terms of their relationship to human dignity. Viewed in this sense, the central interest should be in identifying which of these two rights advance the dignified survival of a society. A priority rule should therefore privilege the right that impacts other human rights and that directly affects the lives of the greatest number of people in any given society.

In this respect, the collective right to a corruption-free society, more so than the individual right to fair trial, has far-reaching effects on other guaranteed human rights. This point has been made in previous chapters. As Louis Sohn recognized a long time ago, effective exercise of collective rights is a precondition to the exercise of other political and economic rights.[67] Priority should therefore be given to the right to a corruption-free society because it represents a group or collective right,[68] that is, a right that vests in a community and is exercised jointly by *all* individuals in that collectivity. This contrasts with the right to be presumed innocent, which is fundamentally an individual right intended solely for the protection of the individual who invokes it. While society benefits indirectly from having a legal system that does not *a priori* prejudge an accused's guilt, the *direct* and ultimate beneficiary of this presumption is the individual *qua* individual.

Ronald Dworkin's metaphor of an orchestra brilliantly captures the distinction between private individual rights and communal rights. The orchestra is the community *writ* large and Dworkin uses its performance to show how individual members can be uplifted "in the way personal triumph exhilarates,

not by the quality and brilliance of their individual contributions, but by the performance of the orchestra as a whole. It is the orchestra that succeeds or fails, and the success or failure of that community is the success or failure of each of its members."[69] Dworkin's metaphor of the orchestra speaks to how we view the individual's place in the community, whether he exists only for his own sake or for the sake of the whole society.[70] If the "supreme intrinsic value or dignity of the individual human being"[71] is inseparable from that of the other members of the community, then if his society succeeds in ridding itself of the scourge of corruption, that success reflects the degree of moral probity of each of its members. Equally important, the benefits that flow from a corruption-free society redound to the community as a whole. Conversely, the destructive effects of corruption are felt equally by all the individual members of the community. It is true that these harmful consequences are caused by a few individuals who engage in acts of unlawful enrichment. In the context of this study, it is this small, easily identifiable class, who when in difficulty claim the right to invoke the protections contained in procedural rights to fair trial. But this cluster of private rights available to accused public officials—to be presumed innocent until proved guilty, to remain silent and not to self-incriminate—are not guaranteed without limits as we have shown in Chapters 4 and 5; treaty and statutory law limit them. It is submitted that they cannot be interpreted to displace the collective right to a corruption-free society.

Mindful of the destruction wrought on victim states by the unconscionable acts of unlawful enrichment by high-ranking public officials, it does not require much of an effort to make a value choice between the communal interests reflected in the global war against corruption and the private rights of an accused public official. This book comes down squarely in favor of the former.

Appendices

APPENDIX 1: ILLICIT ENRICHMENT PROVISIONS IN MULTILATERAL TREATIES

1. African Union Convention on Preventing and Combating Corruption

Article 8
Illicit Enrichment

1 Subject to the provisions of their domestic law, State Parties undertake to adopt necessary measures to establish under their laws an offence of illicit enrichment.
2 For State Parties that have established illicit enrichment as an offence under their domestic law, such offence shall be considered an act of corruption or a related offence for the purposes of this Convention.
3 Any State Party that has not established illicit enrichment as an offence shall, in so far as its laws permit, provide assistance and cooperation to the requesting State with respect to the offence as provided in this Convention.

2. Inter-American Convention against Corruption

Article IX
Illicit Enrichment

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

Among those States Parties that have established illicit enrichment as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.

Any State Party that has not established illicit enrichment as an offense shall, insofar as its laws permit, provide assistance and cooperation with respect to this offense as provided in this Convention.

3. United Nations Convention against Corruption

Chapter III
Criminalization and law enforcement

Article 20
Illicit enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

APPENDIX 2: SELECTED CASES ON ILLICIT ENRICHMENT FROM LATIN AMERICA[1]

Corte Suprema de Justicia [CSJN], 3/10/2007, "Alsogaray, María Julia s/ recurso de casación e inconstitucionalidad," S.C. A 1846; L. XLI (Arg.), available at www.cipce.org.ar/mjalsogaray.pdf.

Office of the Attorney General of the Nation

Supreme Court:

I

The Oral Federal Criminal Tribunal no. 4, by majority, sentenced María Julia Alsogaray to three years in prison and absolute incapacitation for six years because they found her to be a perpetrator of the crime of illicit enrichment provided in article 268(2) of the Penal Code – Law 16.64 –. They also ordered the confiscation of the assets resulting from the crime, in the amount of five-hundred thousand dollars and six-hundred twenty-two thousand pesos (pp. 6727–93). Against that ruling, the public defender of the accused gave notice of appeal for unconstitutionality in the highest court, which was granted (pp. 6823–46 and 6861–63).

When Court VI of the National Chamber of Criminal Appeals intervened, after the trial court had delivered a sentence, it decided to reject the challenge and declare the constitutionality of article 268(2) of the Penal Code – Law 16.64 – (pp. 6967–7012).

Given that decision, the accused plead *in {forma} pauperis* for the federal relief provided in article 14 of Law 48 (p. 7014), and her official legal aid provided it with grounds in the brief in pages 7018–82. The lower tribunal granted the appeal but only with respect to the grievance regarding the constitutionality of the aforementioned article of the Penal Code, since the lower tribunal declared the appeal inadmissible as to the grounds of arbitrariness (see pp. 7086–88).

It is pertinent to add that, under this last challenge, the restricted discretion of the lower tribunal to address the grievances regarding questions of fact and proof that were analyzed in the judgment of the oral tribunal, whose assessment should have determined—according to the petitioner—the application of the principle of *in dubio pro reo*, and the interpretation of article 23 of the Penal Code, were both objected to. In like manner, the decision reached regarding the appeal for unconstitutionality of Law "S" 18.302, the regime of which was invoked by the accused to justify her income, was also criticized.

In her subsequent presentation of pages 7103–05, the defense declared before the lower tribunal that, by having awarded the only appeal filed against a single final judgment, the partial inadmissibility and the division of the grievances do not prevent that V.E.[2] know and decide as to the totality of the objection. In this way, she considered unnecessary the mere formality of complaining about the "appellate arguments" that were rejected, since it is an "absurd sacramental requirement" that is not only contrary to article 2 of the Criminal Procedure Code of the Nation, but would also improperly waste jurisdictional resources by requiring the opening of a "parallel" file with the same content. Therefore, she argued for consideration of the entire appeal and requested that the Court address the totality of the grievances in its decision.

II

. . .

Therefore, one must adhere to the objection regarding the constitutional validity of article 268(2) of the Penal Code.

III

Upon tackling this task, I warn that various circumstances obstruct the objection of the defense.

In the first place, because the grievances of the petitioner are a reiteration of those expressed against the judgment of the trial court, which were sufficiently analyzed by the lower tribunal, which ultimately concluded that the law was constitutional. It is pertinent to remember that the mere reissuing of the objections introduced in the previous petitions does not supply the concrete and reasoned review required by the federal relief (Judgments: 315:59; 317:373 and 442; 318:2266, among others).

In fact, just as she did in the respective motion, like in the debate and in the appeal to the judgment on the merits, the defense once more challenges before V.E. the validity of article 268(2) of the Penal Code, synthetically supported on the following:

A That the indetermination of its objective structure affects the principle of legality, because not defining the verb that characterizes the crime has caused contradictory interpretations of the prohibited conduct, with the purpose of legitimizing the legal precept: illicitly enriching oneself to the detriment of the civil service (crime of commission), or not justifying the source of an appreciable asset increase (crime of omission).

That circumstance, she affirmed, affected the adequate exercise of the right to a defense on trial, given that it required double argumentation, because while the district attorney in his statement understood that the crime was of commission, the tribunal concluded that it was a crime of omission, which also compromised the principle of congruence. She even argued that, applying the "Quiroga" precedent (Judgments 327:5863), the judges were prevented from moving away from the criteria of the accusing side.

In like manner, she added that the expressions "properly summoned" and "does not justify the source of an appreciable asset enrichment" make more difficult the determination of the type of crime, since there are no guidelines on how to summon, or regarding what must be evaluated to determine whether the increase is appreciable or not, or whether the justification is effective.

B On the other hand, she indicated that the law violates the presumption of innocence, since it starts out from a presumption of culpability, the "appreciable asset enrichment" of the public official or an intermediary not being, *per se*, susceptible to criminal sanction, and reverses the burden of proof by penalizing the lack of justification. In this manner, it also affects the constitutional right against self-incrimination.

C As a consequence of that described so far, the defense argued that the precept establishes inequality by submitting the public official, merely because of his position, to a system of lesser protection than the rest of individuals. She added that the commendable purpose of transparency in the civil service cannot put aside a set of inalienable rights, since that would bring about a kind of "inverse personal privilege."

D Lastly, taking into account that, in her opinion, the crime consummates only when, after being properly summoned, the public official does not justify the source of the enrichment, she argued that, applying articles 18 and 19 of the National Constitution, the investigation of an alleged crime must be after the fact. Because of this, the petitioner affirmed that, because of the defining character of the consummation of the crime, the summoning cannot operate within the criminal proceedings, since it would require the starting of proceedings even before the alleged crime exists.

Thereto, she added that, by not envisaging a temporal limit to condition the possibility of executing that summoning, it appears as if the perpetrator, merely because of his exercise of civil service duties, is left permanently and indefinitely exposed to being summoned or investigated during his service and up to two years after having ceased his duties, which establishes a kind of "covert and unacceptable imprescriptibility."

IV

. . . [I]t appears that by upholding the constitutional validity of article 268(2) of the Penal Code, the lower tribunal decided, in the first place, that a declaration like the one offered by the defense must agree with the exceptional criteria that governs that matter, just as was indicated by the doctrine of V.E. on which she based her adverse position. In that sense, the lower tribunal reminded that a declaration of unconstitutionality is appropriate only when no possibility exists of giving the law an interpretation that conforms to the principles and guarantees of the National Constitution.

Even though it recognized that the text of the law is defective, from that premise the lower tribunal found, in summary, that the legally protected good is the public interest in transparency and probity in the performance by the public officials, and that it is harmed by the appreciable and unjustified enrichment of the government official while the relationship is in effect, which constitutes the action that characterizes the crime.

With that understanding, it affirmed that . . . the essence of the criminal offense lies in the appreciable and unjustified asset enrichment. With respect to the adjective "appreciable," the lower tribunal said, supported by the Project of 1941, that it must be understood as that which "results considerable in relation with the economic means of the official at the moment he assumes the office and that is not in accord with the possibilities of normal development of the office during the time of exercise of duties." Similarly, it invoked article IX of the Inter-American Convention against Corruption, which, in describing the criminally relevant enrichment, refers to "a significant increase . . . in relation to his lawful earnings." The lower tribunal also added that it must lack justification, that is, that it cannot originate from a legitimate source compatible with the holding of the office.

The lower tribunal explained that that lack of justification referred to is not the one that arises when the public official is summoned, but rather the one that results from the verification, supported by the evidence collected during the trial, that no objective support may be found in the registered income of the official. Therefore, one does not punish by virtue of a presumption, but by the certain and confirmed fact that the public official enriched himself, during the exercise of civil service duties, in an appreciable and unjustified manner, a task that relates to crimes of action. With that understanding, it follows that the State, prior to the summoning, must verify that end of the charge, that is, that the increase cannot originate from assets or other legal sources of income.

As a result of the above, the lower tribunal dismissed the argument that it is a crime of omission since, even when the public official fails to respond when summoned, if the appreciable asset increase is justified by other means, whether through third parties or through evidence gathered, the legal good would not be impaired.

Contrary to the petitioner's position, the lower tribunal elucidated that the provisions of proper summoning and no justification can only be understood as requirements established for the exclusive protection of the right of defense on trial and have as their objective guaranteeing that the public official have knowledge of the charge and of the possibility of verifying the legal source of the appreciable and unjustified increase in assets for which, in principle, he is being reproached. In that manner, the right to due process, guaranteed by article 18 of the National Constitution and the instruments of human rights incorporated within, is observed.

In virtue of that put forward, the lower tribunal explained that those precautions can neither be interpreted as a requirement of presentation of evidence directed towards the perpetrator nor as elements of the crime, since the lack of justification imputed to the public official as inherent in the increase in assets precedes both the summoning and the beginning of the criminal proceedings, the beginning of which does not seek to cause the commission of the crime.

Similarly, the lower tribunal ruled out that it constitutes a "breach of duty," since that would fail to explain the sanction imposed on the intermediary used to "simulate the enrichment,"[3] and thus also reinforced that interpretation of the crime in that what is punished is not that breach, because if who must breach the duty is exclusively the perpetrator, it is not understood how the third party can participate in that omission.

Given the objection regarding the "proper summoning," the lower tribunal noted—beyond considering that the defense failed to demonstrate that that done in this matter caused her any harm—that it must be presented after proving the *prima facie* enrichment that contains the characteristics previously alluded to, and with regards to the manner, the lower tribunal said that it must consist of an act of public authority by which the public official or ex-public official is made aware of that situation in greater detail, so that he may explain, if he so desires, its legitimate source, offer evidence, and exercise his right to a defense.

With respect to who must exercise it, besides considering the grievance unfounded, the lower tribunal coincided with the trial court in that the objection that it should not be the judicial authority was inadmissible, since the Attorney General's Office [Ministerio Público Fiscal] had been summoned by the matter *sub judice* and the defense did not set forth the legal rule that would prevent it. Without detriment to that explained above, the lower tribunal added that, besides being the jurisdictional organ which must provide a final judgment regarding the matter, by having different representatives of the Attorney General's Office intervening in the stage of preliminary investigation

and the stage of debate, the value judgment of the first does not influence the second; while, by virtue of the duties that article 120 of the National Constitution entrusts to that institution, that procedure complied with the adverb "properly" provided in the criminal offense.

With regards to the time during which the summons must be issued, after interpreting the criminal offense as a crime of commission, the lower tribunal dismissed the view that it constituted an imprescriptible type of crime, as the defense had alleged, but rather that it must be issued once the appreciable and unjustified enrichment is noticed and proven *prima facie* and within the period of prescription of the criminal action, just as the trial court had found and before the defense, in the opinion of the lower tribunal, has opportunity to refute it. The lower tribunal added that it was also not apparent from that presented in the proceedings and from the proposed grievances that the defendant had suffered any harm related to the validity of the action.

With regards to the alleged reversal of the burden of proof, the lower tribunal concluded that, since the preliminary demonstration of the characteristic increase in assets corresponds to the jurisdictional organ and the Attorney General's Office, the opportunity to explain provided by the summons creates a guaranty in favor of the public official; and the lack of justification or its insufficiency do not provide support for the existence of presumption of guilt, since that is not weighed negatively by the mandate of article 18 of the Fundamental Law, which guarantees not only the right to refuse to testify, but also the right to defense on trial, under which the accused may choose to either prove or not prove the legality of his enrichment.

To those considerations, the lower tribunal added that their interpretation harmonizes with article 36 of the National Constitution, in so far as it advocates the eradication of corruption in the civil service, and with article IX of the Inter-American Convention against Corruption, since that reasonable understanding of that type of crime guarantees the validity of the constitutional principles of criminal law.

In due time, the other two magistrates of the lower tribunal adhered to the described opinion and added similar arguments. Besides referring to the United Nations Convention against Corruption, article 20 of which also envisages the adoption of measures to typify the crime of illicit enrichment, on the second vote (p. 6999 vta./7009) it was held that, with respect to the restrictive control of constitutionality, "the State has the right—in order to achieve administrative, political, and criminal transparency, and even to adapt to international rules—to try to make sure that its governmental officials possess only the assets that are justified by legal activities, envisaging a criminal sentence for those whose assets do not correspond to their legitimate income, in the context of a fair process." Invoking precedent of V.E., the lower tribunal added that "this legislative policy does not threaten the principle of equality, because such constitutional right requires only a homogeneous treatment of similar situations and the legislator can contemplate in a different way situations that he considers different as long as the discrimination is

neither arbitrary, nor brings about persecution or improper privilege to persons or groups of persons even if the rationale is debatable."

In like manner, the lower tribunal made reference to interpretations in the scope of the European Convention on Human Rights that, in principle, accept the presumptions if the accused is allowed the possibility to challenge them; and that they recognize that the evidence of the charge requires an explanation that the accused is obligated to provide, the lack of which "may, from common sense, generate an inference that there are no explanations and the accused is guilty."

Lastly, the lower tribunal invoked in analogous manner the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, approved by Law 24.072, article 5.7 of which establishes the reversibility of the *onus probandi*.

V

I have believed it necessary, even to the detriment of brevity, to provide the above detail, since it allows one to notice the insufficient legal basis mentioned at the beginning of section III.

. . .

. . . [T]he criminal offense [illicit enrichment] has not only maintained its validity and has been applied ever since, but rather, through the Law of Ethics in the Civil Service no. 25.188 (year 1999), modifications were introduced that did not alter its structure, and even its actual wording—reformed only with respect to the penalty of incapacitation—has been reproduced in article 311 (paragraphs 2°, 3°, and 4°) of the final version of the bill presented on May 18, 2006, by the "Commission for the elaboration of the bill of integral reform and actualization of the Penal Code," set up under the scope of the Ministry of Justice and Human Rights of the Nation (resolutions no. 303/4 and 136/05).

VI

. . .

Although since the first attempt at introducing a crime like the one now examined—in 1936, Coromina Segura project—the discussion is well known, current even today, with regard to whether an implicit renunciation of certain constitutional rights may be imposed on a public official because of his entrance into the civil service (*conf.* Marcelo Sancineti, "The crime of illicit enrichment of public officials" Editorial Ad Hoc, 2d Ed., Buenos Aires, 2000, pp. 23–24, where the author refutes that said by Rafael Bielsa regarding that matter), it is not necessary to enter into such analysis in the case under dispute, taking into consideration that during the legal proceedings there were numerous interventions by the accused and her defense, which allow one to conclude that the objections presented afterwards are not eligible to be

protected by article 14 of Law 48, since they have been affected by the consequences of her previous discretionary conduct (Judgments:307:635 and its citations; 308:1175; 310:884 and 2435, dissent by doctors Caballero and Belluscio and its citations, among others).

In fact, this may be appreciated from the following evidence:

1 At page 553, she presented herself in her own right after taking notice of the existence of this case, established her domicile, designated trusted lawyers to assist her, and asked to have access to her file and make photocopies in order to exercise the rights granted by articles 73 and 279 of the Criminal Procedure Code, to "clarify the facts and suggest the proceedings that would be useful" to that end. That petition was properly granted (p. 554).
2 At pages 589–97, together with her attorneys, she formalized her presentation in those terms. After pointing out that article 268 refers to the public official who, "when properly summoned, is unable to justify," she argued that the criminal hypothesis comes into existence after the summons and the absence of justification, which is why she said that the investigation should not be performed *inaudita parte*, but rather, on the contrary, as "a procedural condition and in order to determine whether an investigation can be carried forward, the public official must be required to explain the alleged enrichment that may exist. Without that prior step, only one part of the act that allegedly characterizes the crime may be verified, but that is insufficient to authorize an investigation. Because the subjective criminal offense, which is the object of the criminal action, is not the increase in assets, but the justification of that alleged enrichment." After noting some considerations regarding the precedents of the case, her tax situation, and the history of her assets, María Julia Alsogaray requested that it be taken into account that she was "at the disposition of the tribunal for any particular requests that it could make," which the judge took into account (p. 598).
3 At page 950, in an opportunity to ask for an extension to answer the summons that, at the request of the Attorney General's Office, was ordered by the tribunal (*see* pp. 901–39 and 940), her attorney expressed that "this side will satisfactorily answer the questions posed by the representatives of the Attorney General's Office."
4 At pages 959–67, the accused presented herself in her own right with the support of her attorneys, answered the summons without making constitutional objections, and requested that the expert opinion of an accountant be presented as "the only way to determine whether the justification . . . specified is correct," since "only an expert in the matter can establish if the accounting history expounded is correct and, essentially, whether an unjustified enrichment exists on my part." She expressly asked that "the summons issued by the Attorney General's Office be taken as answered, under the terms of article 268 of the Penal Code."

. . .

7 At pages 1835–38 . . . attorneys [for the defense] noted that in order to give proper form to the type of criminal offense under discussion, reversal of the burden of proof was imperious, and that the results of the criminal investigation were possible "because of the subjugation and disposition of the accused." Nonetheless, invoking competent doctrine, they protected their "dogmatic position" against the constitutional validity of article 268(2) of the Penal Code. That remissive request was based on the fact that the expert examination allowed the increase in assets of the accused to be considered as "totally justified."

8 At pages 2411–16, the defense answered the second summons for justification of assets that was requested of their client. After complying with this specific task, in questioning the "course" of the indictment because of the new evidentiary measures ordered, the defense added that "taking into account the particularities—and doubtful constitutionality—that characterize the type of criminal offense applicable in this case, any new information that V.S. believes relevant to the investigation will necessarily be required to this part" (*see* p. 2415 vta.). Notwithstanding this new caveat, the defense also requested that the summons for justification issued by the Attorney General's Office be taken as answered, under the terms of article 268 of the Penal Code, and repeated its request for the stay of proceedings.

9 At pages 3451–63 and 3469–76, during the preliminary examination in court, María Julia Alsogaray, with the assistance of her attorneys, also failed to present any objections to the type of criminal offense imputed upon her. It is pertinent to note that once informed of the action attributed to her, she was informed that it consisted of "having verified an appreciable asset increase from year 1991 and throughout the exercise of her civil service duties, and that when summoned to explain the origin of said increase (*see* pp. 901–39 and 1691–95), she attempted to justify it, in some cases, with presumably false supporting documents or by generating documents that did not reflect the truth. That, in like manner, from the evidence gathered in this case, *prima facie*, the income declared to justify the asset increase does not have the origin described by the accused in the different presentations made before the tribunal." She was also informed that her refusal to testify, or her silence, did not entail any presumption against her.

Before ending the hearing, the accused expressed her desire that "the Tribunal utilize this opportunity, in the framework of what constitutes her main argument for defense, to not abstain from asking any questions that would allow her to properly exercise that defense," and she reiterated that, in her opinion, the increase in her assets was reasonably justified and no proof existed of its illicit origin.

10 At pages 3488–90, her attorneys presented themselves once more and, notwithstanding their belief that, with their answers to the summons,

the accountant expert testimonies, and the other evidence collected, the state of suspicion had ended, they proposed proceedings in exercise of their right to defense on trial, "all the more in a trial with the characteristics of this one, in which, in order to justify an alleged appreciable asset increase, the burden of proof is reversed."

11 At pages 3828–31, upon challenging the bill of indictment of pages 3775–3821, the defense presented its grievances and indicated "all that without highlighting a subject matter totally absent from the trial appealed from: the crime attributed to the accused offends concrete constitutional rights like the principle of legality, the presumption of innocence, and the legal protection against self-incrimination."

15 It is pertinent to note, lastly, that the crime of illicit enrichment was also not objected to in the other writings and presentations before the tribunal during the proceedings.

. . .

VII

The above summary allows the reaching of two conclusions. In the first place, that—contrary to that affirmed by the appellant at page 7019—the constitutional issue was not "introduced and maintained uninterruptedly from the early stages of the proceedings." In second place, that throughout the proceedings in this case the accused and her defense held two attitudes, which relevantly affected what here has been discussed.

That relating to the opportunity in which the federal issue was effectively introduced and beyond the inaccuracy just mentioned, it is pertinent to note that the objection that I will make is not related to the absence of the temporal requirement, since the treatment given to the unconstitutionality of article 268(2) of the Penal Code by the judges in this case and, moreover, the lack of exhaustion of all legal remedies that V.E. noted upon issuing file A 542/40 on August 24, 2004, cited *supra*, have mended any possible deficiencies to that effect. Once more, then, it is appropriate to express that what I understand to be relevant regarding the actual admissibility of the objection strictly bears relation to the existing requirement of an effective encumbrance on the part of the appellant.

With respect to the two attitudes of the appellant during the proceedings, I noticed that initially (points 1 through 10 of the summary provided in section VI), she spontaneously appeared in court and requested that, as required by article 268(2) of the Penal Code, a summons for justification be formulated, she responded in those terms in two opportunities despite it having been requested by the Attorney General's Office, provided documentation (for, it was ascertained, this is a case where "the burden of proof is reverted"), requested measures, called forth a party-appointed expert witness, rendered a preliminary examination in court (where the appearing party requested that the judge "not abstain from asking any questions"), considered the asset increase sufficiently

justified, and twice requested the stay of proceedings. At this time, discussing for the first time the end of the trial, the defense limited itself to securing their "dogmatic position" against the constitutional validity of that criminal offense.

The second stage starts from the motion against the bill of indictment, where the issue began to gain more weight, such as was described in points 11 through 14. Essentially, the objection that since then was introduced with regard to this matter, reiterated at the hearing and at the challenge to the judgment on the merits, is identical—as was mentioned before—to what constitutes a matter of federal appeal.

The previous considerations, however, permit the affirmation that beyond the discussion reigning since the incorporation of the crime of illicit enrichment into the Penal Code, in no way may it be argued that the constitutional rights invoked by the appellant in her challenge have been affected in the matter *sub judice*.

In fact, her indisputable, spontaneous, and repeated cooperation with the investigation, her request to be summoned to justify the asset increase, her detailed responses to those solicitations by the Attorney General's Office, the intervention in the accounting research by her trusted expert witness, and her comprehensiveness in rendering the preliminary examination in court, constitute elements that without doubt rule out any possibility that María Julia Alsogaray felt under the obligation to self-incriminate; or that the structure of the criminal offense had prevented her from understanding the act imputed, had affected the presumption of innocence or the validity of the penal action; or that her right to a defense in trial or to equality under the law had been harmed (*conf.* grievances summarized in section III). Much to the contrary, her intense participation—like that of her attorneys—from the dawn of the proceedings, helps to reject the argument put forward by the appellant.

Because of its link with one of the substantial aspects of her grievances, it is pertinent to remember that it is the doctrine of V.E. that the prohibition of self-incrimination of article 18 of the National Constitution prevents from physically or morally compelling a person with the purpose of obtaining communications or expressions that should stem from their free will (*conf.* Judgments: 326:3758, partial dissent of doctor Maqueda, considering 15, and its citations on p. 3829), a hypothesis that contrasts with that of the matter *sub judice*, where no nullity in the will of the accused is noticed—nor has been invoked—either in rendering the preliminary examination in court or in any of her other interventions in the process.

Similarly, upon interpreting article 8.3 of the Pact of San Jose, Costa Rica, which establishes that "a confession of guilt by the accused shall be valid only if it is made without coercion of any kind," the Inter-American Court of Human Rights has held that even when the accused has been exhorted to tell the truth when testifying in front of a judge, the rule should not be considered to have been violated if there is no proof that that exhortation involves a threat of punishment or other legal consequence adverse to the case in which the person exhorted fails to tell the truth, or that the person had been required to swear or

promise to tell the truth, since what that precept favors is the principle of liberty to testify or abstain from testifying ("Castillo Petruzzi and others v. Peru" case, sentence of May 30, 1999, Series C No. 52, paragraphs 167 and 168).

In accordance with the above, the High Tribunal has found that the procedure followed under those conditions is not susceptible to constitutional objections (*conf.* Judgments: 281:177 and 306:1752 –concurring vote of doctor Petracchi—*a contrario sensu*, 310:2384, vote of doctors Petracchi and Bacqué; 311:340 and 345; 313:1305; 315:1505; 316:2464; 318:1476; 324:3764 and its citations) and, therefore, they turn out to be useful evidence to establish a judgment.

In like manner, it is appropriate to note that even when they plead, like they had already done at the proceedings, the defense validly weighed the justifications presented by their client and insisted that the justifications, the result of the accountants' expert opinions, and the evidence produced during the debate, allowed the conclusion that "everything is justified" (*see* p. 6715 vta.). This attitude also helps to reject the argument, more so if one takes into account that, in accordance with this petition, both the prosecutor and the trial court evaluated that evidence to consider the enrichment justified with respect to some of the "factual grounds" charged (*see* p. 6765 vta./66, 6770 and 6780 vta./82).

. . .

X

Therefore, I opine that V.E. must declare the post-judgment appeal presented to be inadmissible.

Buenos Aires, October 3, 2007.

COPY ESTEBAN RIGHI

MEXICO

Jurisprudence and Isolated Theses

Supreme Court of Justice of the Nation

Federal Judiciary

Mexico 2007

Registry No. 921160

Illicit Enrichment. The Circumstantial Proof of the Illicitness of the Increase in Assets Recognized by Article 224 of the Federal Penal Code does not Violate the Principle of Presumption of Innocence.

Article 224 of the Federal Penal Code, in stating that "Illicit enrichment exists when the public servant is unable to verify the legitimate increase of his assets,"

recognizes the existence of a presumption of the illicitness of the enrichment, supported by facts that must be entirely proven, that show that a public servant substantially increased his assets in a manner that is disproportionate to his income. This indirect form of proving one of the elements of the crime does not violate the principle of the presumption of innocence that aids the accused, however much it binds the accused to demonstrate the legitimate source of his assets in order to be able to nullify the presumptive proof that weighs against him, because it is inherent in the criminal process that it correspond to the Attorney General's Office to allege incriminating evidence and to the defendant to allege evidence in his defense, which should include evidence that tends to destroy or dispel the evidence provided by the opposing side.

Press Release, General Management of Media Relations, SCJN Resolves Amparo on Revision 1293/2000 (Aug.15, 2002) (Mex.), *available at* http://www2.scjn.gob.mx/consultas/Comunicados/Comunicado.asp?Pagina=listado.asp…Numero=546 (Ernesto Gomez-Cornejo's translation).

General Management of Media Relations

Press Release

Mexico, D.F., August 15, 2002

SCJN Resolves Amparo on Revision 1293/2000

The plenary session of the Supreme Court of Justice of the Nation (SCJN), by unanimity of 11 votes, declared constitutional article 224 of the Federal Criminal Code, which categorizes and sanctions the crime of illicit enrichment, and which was incorporated by decree promulgated on December 30, 1982. In the amparo on revision 1293/2000, Raul Salinas de Gortari alleged, essentially, that said article violated the principle of legality since the elements of the crime were not indicated within it. Likewise, he explained that it was contrary to article 109 of the Federal Constitution, because it contravened the principles of presumption of innocence and of not reversing the burden of proof, both of which operate in favor of the accused. The High Tribunal rejected these arguments, since it considered that the precept alluded to does encompass the elements that constitute the criminal conduct, which are described in constitutional article 109 part III, third paragraph. The plenary session emphasized that the crime of illicit enrichment does not constitute an open type of crime, which permits the judge to freely and arbitrarily decide in which cases the crime must or must not be sanctioned, because the presumptions of individualization of the conduct—namely, that it deal with a public servant and that he have illicitly enriched himself—are established in a detailed and precise manner in the criminal law. With respect to the challenge that the crime reverts the principle of the burden of proof, the High Tribunal rejected it, since it considered that it is the Public Prosecutor's Office [Ministerio Público] who must prove the capacity as public servant of the accused, the assets that he declared at the beginning of his duties,

the income and expenses that he reported in accordance with his declaration of assets during the time in which he performed his duties, and that his net worth from the enrichment does not correspond with his income and expenses, so that the accused may challenge said elements. The Highest Tribunal, in accordance with its jurisdictional authority to examine constitutionality, decided to reserve jurisdiction for the multi-judge court [tribunal colegiado] of criminal matters on duty, so it may recognize and resolve the legal aspects. As a result of this sentence, the plenary session of Ministers approved eight theses.

Jurisprudence and Isolated Theses

Supreme Court of Justice of the Nation

Federal Judiciary

Mexico 2007

Registry No. 921223

Presumption of Innocence. The Principle is Implicitly Contained in the Federal Constitution.
From the harmonious and systematic interpretation of articles 14, paragraph two, 16, paragraph one, 19, paragraph one, 21, paragraph one, and 102, section A, paragraph two, of the Federal Constitution of the United States of Mexico, one may infer, on the one hand, the principle of legal due process, which entails that the accused's right to liberty must be recognized and that the State may only deprive him of this right when, with sufficient incriminating elements in existence and followed by a criminal trial against him in which the essential formalities of the process—the rights to a hearing and to provide evidence to nullify the corresponding accusation—are respected, the Judge pronounces a final judgment declaring his culpability; and, on the other hand, the accusatory principle, under which the prosecution of the crimes and the duty (burden) of finding and presenting the evidence to support the existence of these crimes corresponds to the Attorney General's Office, such as may be inferred from that provided in article 19, paragraph one, particularly when it provides that the formal writ of imprisonment must show "the facts exposed in the preliminary investigation, those which must be sufficient to confirm the body of the crime and make provable the criminal responsibility of the accused"; in article 21, in determining that "the investigation and prosecution of the crimes is the responsibility of the Attorney General's Office"; as well as in article 102, in providing that the prosecution of all federal crimes corresponds to the Federal Attorney General's Office, which has the obligation of "finding and presenting the evidence to support the existence of these crimes." In similar manner, one must take into consideration that the constitutional principle of legal due process and the constitutional accusatory principle both implicitly protect the diverse principle of presumption of innocence, giving cause for the obligor not to be

required to prove the legality of his conduct when accused of the commission of a crime, in so far as the accused does not have the burden of proving his innocence, because the system provided by the Political Constitution of the United States of Mexico recognizes, *a priori*, his state of innocence, by expressly providing that it is the responsibility of the Attorney General's Office to prove the elements that constitute the crime and the guilt of the accused.

PERU

Corte Suprema de Justicia de la República, 10/07/2008, "El Estado v. Jorge Ricardo Novoa Robles, enriquecimiento ilícito," Expediente 22-2003 (Peru), *available at* http://www.pj.gob.pe/CorteSuprema/spe/index.asp?opcion=listar…codigo=391.

Supreme Court of Justice of the Republic

Permanent Criminal Court

Special Criminal Court

Proceeding No. 22-03

Defendant: Jorge Ricardo Novoa Robles

Crime: Illicit Enrichment

Plaintiff: The State

3.3. *Legal Criminal Analysis*

3.3.1. Article four hundred and one of the Penal Code mentions a particular form of illicit enrichment based on the individual who enriches himself and the way in which it occurs; thus, the crime is only attributable to public individuals (public officials and/or servants), without covering either the private individual who enriches himself or the public individual who enriches himself by reasons outside the scope of his office. The crime, which is of commissive, active, outcome, and conditioned nature, consummates when an unjustified, significant, and contrasting increase in assets exists, inasmuch as the increase is the product of illegal activities, in the context of the temporal or ultra-temporal development of the office or public employment; the imputable causal nexus to the enrichment being the period of exercise of public duties under the presupposition that every public official and public employee is at the service of the Nation; public office and employment not being a source of economic enrichment or profit, the use of the office or duties to accumulate wealth or illicitly produces results that are intolerable for the legal system and collective morale, and having as its generating source a diversity of actions, obligations, and behaviors that are contrary to legal and/or social norms.

3.3.2. What is harmed by the crime of Illicit Enrichment is the legal criminal good of "Civil Service," which means: exercise of civil service duties,

adherence to the duties of the office or employment, continuity and normal development of said exercise, prestige and dignity of the duty, probity and honesty of its agents, and protection of public assets.

3.3.3. The notable and ostensible contrast between what was owned prior to the assumption of office and what is owned during or after it, is the material content of the crime subject to the proceedings; on the other hand, the illegality is the formal component that makes up the crime. The illegality of the enrichment, by verifying its illegal or socially valueless source, must show the judge that the increase significantly exceeds the estimated average economic resources of the active individual and that its obtainment has been illegitimate, a situation which becomes incompatible with a position of guarantor and/or of service to the nation assumed by every public individual.

3.3.4. It must be understood that when our Penal Code utilizes the expression "enriches," it is emphasizing a real and pronounced state of economic prosperity incompatible with insignificant increases.

3.3.5. In fact, our Penal Code of nineteen ninety-one provides for the crime of Illicit Enrichment under article four hundred and one (Original Text), which describes the following legal hypothesis: "The public official or public servant who, on account of his office, illicitly enriches himself, will be reprimanded with a term of imprisonment of no less than five and no more than ten years."

3.3.6. Therefore, the evidence presented during the criminal proceeding must undeniably prove the disparity or the notable contrast between the assets acquired and their economic value held unlawfully by the public official or public servant during or after assuming public office in relation with what they would have had prior to the assumption of office. In like manner, it must be evaluated that in cases in which the increase in assets becomes ulteriorly evident at the end of the exercise of civil service duties or the holding of public office, the enrichment must be causally linked with the period of exercise of duties.

3.3.7. From this perspective, since it has not been categorically proven that the accused, Jorge Ricardo Novoa Robles, illicitly enriched himself by reason of the office he held as Attorney General of the city of Cajamarca, his conduct may not be subsumed under the normative hypothesis described by the original text of article four hundred and one of the Penal Code; thus, a verdict of acquittal is delivered, since the presumption of innocence that he was constitutionally granted was not defeated.

Notes

1 Criminal law enforcement strategies for combating economic crimes

1 *See* Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (2000) [hereinafter "Stessens"]; *see also* Guillermo Jorge, *The Romanian Legal Framework on Illicit Enrichment,* ABA/CEELI, (July 2007), www.guillermojorge.com.ar/wp-content/uploads/2007/10/the-romanian-legal-framework-for-illicit-enrichment.pdf (last accessed August 2, 2010) [hereinafter "Jorge"].
2 Jorge, *id.* at 13.
3 *See* John Stuart Mill, *On Liberty* 21–22 (4th ed. 1869) [emphasis added].
4 *See* D. Lyons, "Liberty and Harm to Others" in *Mill's On Liberty*, 115–136 (G. Dworkin, ed. 1997). Some writers, like Donald Dripps, take the position that the harm principle is fundamentally flawed "as an expression of the limits that should restrict society's resort to its most coercive instrument. . . [that the] principle's institutional deficiencies derive directly from describing the criminal law's proper limits in terms of the consequences of individual conduct which is to be immunized against punishment. Serious protection of individual liberty depends, I suggest, on limiting resort to the criminal sanction along procedural or jurisdictional lines, rather than according to the substance of private conduct." *See generally* Donald A. Dripps, *The Liberal Critique of the Harm Principle*, 17 Crim. Justice Ethics (1998).
5 Stessens, *supra* note 1, at 3–4.
6 *Id.*
7 *Id*. at 3.
8 *Id.* at 4.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.* at 5.
13 It is not entirely true that illicit enrichment is a new crime. It is new only in the sense that it did not exist in the tradition of the common law but it has long been a recognized crime in many states that follow the Latin American legal tradition. It is not surprising, therefore, that the first international convention to establish the offense of illicit enrichment was the 1996 Inter-American Convention against Corruption [hereinafter "Inter-American Convention"]. The wording of Art. IX of this convention is borrowed from the Argentine Criminal Code which has included a crime of illicit enrichment for decades. The proposal was supported by a number of Latin American countries, notably Colombia, Mexico, Peru, and Venezuela, but strenuously objected to by the Anglo-Saxon countries in the Organization of American States such as the United States and Jamaica.

See Carlos A. Manfroni, The Inter-American Convention Against Corruption: Annotated with Commentary 68 (1997) [hereinafter "Manfroni Commentary"]. Perhaps it is this difference in legal cultures that accounts for the tepid response to this crime from some common law countries. *See also* Luis F. Jimenez, *New Players to Combat Transnational Bribery: The Inter-American Convention Against Corruption*, 92 Proceedings of the Annual Meeting of the American Society of International Law, 157, 160 (April 1–4, 1998).

14 Jorge, *supra* note 1, at 14.

15 *See* Inter-American Convention against Corruption, arts VI and X. For a contrary view, *see* Davor Derencinovic, *Criminalization of Illicit Enrichment*, Freedom from Fear, January 27, 2011 [hereinafter Derencinovic].

16 *See* Derencinovic. ("Unlike hardcore bribery offences (in which the substance of a crime is an illicit quid pro quo exchange), illegal enrichment means the accumulation of wealth in the hands of public officials who cannot reasonably explain or justify the background or origin of these funds.")

17 *See* Dan Wilsher, *Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft that Respects Human Rights in Corruption Cases*, 45 Crime, Law and Social Change 27, 28 (2006).

18 During 25 years as head of state, General Augusto Pinochet's annual salary never went above $40,000, yet he wound up amassing a fortune estimated at $27 billion. *See* Timothy L. O'Brien & Larry Rohter, *The Pinochet Money*, N.Y. Times, December 12, 2004 [hereinafter "Pinochet Money"].

19 The Inter-American Convention requires that the time period during which this measurement is determined should begin, at least, when the official has been "selected, appointed or elected." *See* Manfroni Commentary, *supra* note 13, at 71. The convention defines "public official" to mean "any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or in the service of the State or its institutions, at any level of its hierarchy." Art. 1.

20 *Id.* at 72.

21 *Id.* at 71.

22 The United Nations Convention against Corruption defines a public official as "(i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a 'public official' in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, 'public official' may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party." Art. 2(a).

23 The Commentary to the Inter-American Convention indicates that the drafters see public officials as persons occupying "special positions, which are more demanding than those applying to other citizens." Therefore, the state has the right to require that its public servants only "own property they can justify through their legal activities, for reasons of administrative transparency, public trust and criminal policy," so notes the Commentary to the Inter-American Convention. The Commentary goes on to state: "if the state stipulates a penalty for those officials whose property does not correspond to their lawful earnings, it violates no constitutional principle. This legislative policy is no threat against equality, because such a constitutional guarantee only imposes consistent treatment on similar occasions." *See* Manfroni Commentary, *supra* note 13, at 70–71.

24 *See generally*, Ndiva Kofele-Kale, *The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment* (Aldershot: Ashgate, 2nd ed. 2006). pp. xi and 411; Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28:1 Vanderbilt Journal of Transnational Law 45–118 (January 1995); Ndiva Kofele-Kale, *Corruption and Indigenous Spoliation*, Vol. 12, No. 4 Law & Business Review of the Americas, 459–71 (Fall 2006); and Ndiva Kofele-Kale, *Guarding the Guardians: A Festchrift for Roberto MacLean*, in Law, Culture and Economic Development: A Liber Amicorum for Professor Roberto MacLean, CBE, 8 Stud. Int'l Fin. Econ. & Tech. L. 173–79 (2007).

25 Professor C. Raj Kumar has shown how in India the persons most frequently accused of corruption were former Prime Ministers, Chief Ministers, Governors and even members of the judiciary. *See* C. Raj Kumar, *Corruption and Human Rights: The Human Right to Corruption-Free Service—Some Considerations and International Perspectives*, 19 Frontline, September 2002, at 2 [hereinafter "Kumar"].

26 *See* Pinochet Money, *supra* note 18.

27 *See* Ngozi Okonjo-Iweala, *Nigeria*, in United Nations Office on Drugs and Crime (UNODOC), The Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan ¶5.1a (2007) [hereinafter "Iweala StAR Report"]. *See also* Transparency International, *Where Did the Money Go?—The Top 10*, www.transparency.org/pressreleases archive/20004 (last accessed June 13, 2009).

28 *See* Rick Newman, *How Hosni Mubarak Got So Rich*, U.S. News and World Report (February 11, 2011), http://finance.yahoo.com/news/How-Hosni-Mubarak-Got-So-usnews-3723955512.html?x=0 (last accessed February 12, 2011).

29 *Id.*

30 *See* Karim Lamb and Tarek El-Tablawny, *Probe sought of Mubarak's purported fortune*, Associated Press (February 13, 2011), http://finance.yahoo.com/news/Probe-sought-of-Mubarak-apf-1406627810.html?x=0&sec=topStories&pos=1&asset=&ccode= (last accessed February 13, 2011).

31 *Cited in How Hosni Mubarak Got So Rich, supra* note 28.

32 *See* Victor A. Dumas, *Peru*, in United Nations Office on Drugs and Crime (UNODOC), The Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan ¶5.1b (2007) [hereinafter "Dumas StAR Report"]. Table 1, based on Transparency International (TI) (2004), suggests $600 million as being looted by Fujimori, citing as its source the Office of the Special State Attorney for the Montesinos/Fujimori case, Peru.

33 Dumas StAR Report, *supra* note 32, at ¶5.1

34 *See* Norm Coleman & Carl Levin, United States Senate, Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act: Case Study Involving Riggs Bank, (July 14, 2004), http://hsgac.senate.gov/public/_files/ACF5F8.pdf (last accessed August 2, 2010) [hereinafter, "Senate Investigation"].

35 *See* Peter Maass, *A Touch of Crude*, Mother Jones, January 2005, available at www.motherjones.com (last accessed June 20, 2005). This obscene flaunting of ill-gotten wealth contrasts sharply with the harsh realities of the lives of the poor people: Surveys show that in Bangladesh, for example, nearly one-third of girls trying to enroll in a government stipend scheme for extremely poor students had to pay a bribe, while half had to make a "payment" before collecting their awarded scholarship. In Madagascar, one-quarter of all households are forced to cover school "enrollment" fees although all primary education is "free." *See International Council on Human Rights Policy*, Corruption and Human Rights: Making the Connection i, v (2009).

36 The negative impact of corruption on development is no longer questioned: "[e]vidence from across the globe confirms that corruption impacts the poor

disproportionately. Corruption hinders economic development, reduces social services, and diverts investments in infrastructure, institutions and social services. It also undermines efforts to achieve the MDGs [Millennium Development Goals]. Corruption therefore reflects a democracy, human rights and governance deficit that negatively impacts poverty and human security." *See* Case Study on "Strengthening of the commission to Investigate Allegations of Bribery or Corruption," Sri Lanka, *commissioned by* United Nations Development Program [undated, author unknown] *cited in* Lyal S. Sunga & Ilaria Bottigliero, In-Depth Study on the Linkages Between Anti-Corruption and Human Rights 24 (2007). Grand corruption also attacks the fundamental values of human dignity and political equality of the people. Kumar, *supra* note 25, at 1. There is widespread agreement that the consequences of corrupt practices are widespread and negative for all societies. Evidently, corruption has the potential of undermining the enjoyment of human rights in all areas, be they economic, social, cultural, civil or political. *See also* Julio Bacio Terracino, Corruption as a Violation of Human Rights 1, 6 (2008).

37 Kumar, *supra* note 25, at 2. According to C. Raj Kumar "a substantial portion of India's food grains, sugar and kerosene meant for the public distribution system and for welfare schemes for the poor, including the Scheduled Castes (S.C.s) and the Scheduled Tribes (S.T.s) goes into the black market," and as incredulous as it may sound "hardly 16 per cent of the funds meant for the S.T.s and the S.C.s reach them. . .. The rest are *misappropriated by members of the political and official classes* and unscrupulous dealers and businessmen" [emphasis added].

38 *See* United Nations Office on Drugs and Crime (UNODC), The Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan 11, 23 (2007) [hereinafter "UNODC StAR Report"].

39 *Id.* at 8–9.

40 *Id.* at 22–23.

41 *See* Simeon Marcelo, *Denying Safe Havens through Regional and Worldwide Judicial Cooperation: The Philippine Perspective*, Paper presented at the 5th Regional Anti-Corruption Conference, September 28–30, 2005, Beijing, PRC [hereinafter "Denying Safe Havens"].

42 *See* Antoine Dulin and Jean Merckaert, *Biens Mal Acquis: A qui profite le crime* 34 (2009) [hereinafter "Biens Mal Acquis"].

43 *Id.* at 40.

44 Senate Investigation, *supra* note 34.

45 Biens Mal Acquis, *supra* note 42, at 28–30.

46 *Id.; see also* Leonor Briones, *Philippines* in UNODC StAR Report, *supra* note 38, at 21.

47 *Id.* at 134

48 Latin American states were among the first to establish the crime of illicit enrichment in a multilateral convention, the 1996 Inter-American Convention against Corruption. The idea for this offense was inspired by Latin American criminal law where the crime of illicit enrichment is established in the domestic penal codes of many countries in the region. The drafters saw this crime as a useful weapon to check rampant money-laundering. It was subsequently internationalized through the 1988 United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances and subsequently adopted by the United Nations Convention against Transnational Organized Crime and then incorporated into the African Union Convention on Preventing and Combating Corruption and the United Nations Convention against Corruption. *See generally* Guillermo Jorge, *The Romanian Legal Framework on Illicit Enrichment*, ABA CEELI (July 2007).

49 *See* United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the United Nations Convention against Corruption, 1, 103 (2005).

50 Derencinovic, *supra* note 15.
51 *Id.*
52 *Id.*
53 *See* Biens Mal Acquis, *supra* note 42 at 8 [emphasis added].
54 Manfroni Commentary, *supra* note 13 at 69 [emphasis added].
55 Interestingly, the drafters of the Inter-American Convention see things differently, fearful that a statute requiring public officials to demonstrate their earnings with complete accuracy [would prove to be] excessively burdensome and may likely lead to an "obsessive preoccupation that would conspire against the peace of mind and balance they require to perform their functions effectively." More importantly, such a requirement could "become a political weapon through which adversaries would mutually accuse one other, in the hopes of finding in each other some minimum difference in property that, perhaps because of carelessness or negligence, they were unable to justify." *Id.* at 72.
56 *Id.*
57 *See* Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 Cornell Int'l L.J. 691, 728–29 (2007).
58 Manfroni Commentary, *supra* note 13, at 69 [emphasis added].
59 *See* Nelly Gacheri Kamunde, *The Crime of Illicit Enrichment Under International Anti-Corruption Legal Regime*, Kenya Law Report, www.kenyalaw.org/klr/index.php?id=426 (last accessed August 2, 2010).
60 Derencinovic, *supra* note 15.
61 *Id.*
62 *Id.*
63 *See* Snider & Kidane, *supra* note 57, at 728–29.
64 *Id.*
65 Anonymous reviewer of book proposal: Combating Economic Crimes.
66 Manfroni Commentary, *supra* note 13, at 70.
67 *Id.* at 71.
68 S v. Coetzee and Others, 1997 (1) SACR 379 (CC) (Langa J).
69 *See* Dan Wilsher, *Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft that Respects Human Rights in Corruption Cases*, 45 Crime, Law and Social Change 27–53 (2006).
70 *See* Snider & Kidane, *supra* note 57, at 728–29.
71 Despite its almost universal acceptance as a key ingredient in the protection of due process rights, the presumption of innocence has in recent years come under heavy attack from a minority of jurists. Professor Rinat Kitai, who has exhaustively researched this subject, identifies four principal grounds on which opposition to the presumption of innocence is based: (1) its incompatibility with other reigning legal presumptions; (2) logical reasoning concerning the status of the accused; (3) policy grounds relating to the state's duty to fight crime; (4) the relationship between the state and the individual. With respect to the first, some jurists consider the presumption of innocence as incompatible with the reigning framework of legal presumptions. *See* Rinat Kitai, *Presuming Innocence*, 55 Okla. L. Rev. 257, 281 (2002) [hereinafter "Presuming Innocence"]. A frequently stated critique of the presumption of innocence is its alleged incompatibility with the reigning paradigm of legal presumptions which recognize the need for this principle in the interest of promoting specific public policies or where a clear connection can be established between two facts, "one of which constitutes the basic fact from which the second fact may be inferred." At issue is the division between those who view the presumption of innocence as a rebuttable presumption based on factual grounds, i.e. as an evidentiary presumption stemming from a certain fact, or those who consider it as a normative presumption, i.e. a rule of

substantive law that is based on considerations of public policy and not actually reflective of actual circumstances, or those who tie the presumption of innocence as an essential attribute of the innate goodness of human beings which makes them "generally law-abiding members of the community with a tendency to perform good deeds." *Id.* at 266. The presumption of innocence is also rejected on logical grounds. According to proponents of this view, the assumption of a person's innocence vitiates the need for an investigation to be conducted and charges filed since. In preparing and presenting a criminal case against an accused whose innocence is already assumed leads to the "absurd conclusion that all accused persons are prosecuted by law enforcement agencies without basis." Following this scenario there would be no point in bringing charges against an innocent person. A third ground for objecting to the presumption of innocence is that it hampers law enforcement by "preventing necessary steps regarding the accused, such as pre-trial detention." The presumption weakens efforts to bring crime under control and poses serious risks to public security because it benefits criminals. It would be so much easier to control crime, according to this argument, if guilt as opposed to the innocence of an accused is presumed. A final ground for opposing the presumption of innocence is that it is incompatible with the overriding aim of the criminal justice system, which is to enforce the law by bringing offenders to justice and imposing punishment following conviction. Viewed from this perspective, the criminal justice system is not designed to grant "moral absolution" or to proclaim innocence, especially on the mistaken notion that the freedom of the individual is the overriding element in this system. Individual liberty, with all its importance, is "not the reason for the operation of the criminal justice system." Rather the primary purpose of this system is the enforcement of laws on the book and not the exoneration of the innocent *per se*. Underlying all these criticisms is the belief that the presumption of innocence draws its inspiration from a liberal agenda that puts individual liberty over the wider public interest in fighting crime. *Id.* at 264–71.

Opposition to the presumption of innocence on this ground has traditionally come from jurists who tend to support a strong and authoritarian state. Not too long ago, Russia's top law enforcement official, Deputy Prosecutor General Vladimir Kolesnikov, told the lower house of parliament that efforts to eradicate corruption in Russia are being thwarted by what can be described as a "liberal interpretation of the presumption of innocence." A former interior minister, State Duma Deputy Anatoly Kulikov, agreed, adding that the presumption of innocence should be abolished in cases involving state officials and their relatives. "A civil servant with a salary of 6,000 rubles should be able to prove how he has come into possession of a countryside mansion worth hundreds of thousands of dollars. Otherwise, he will fall under suspicion." He asked lawmakers to pass legislation lifting the immunity against criminal persecution enjoyed by State Duma deputies and judges which prevents law enforcers from combating corruption, and abolishing the presumption of innocence by requiring government officials to declare their incomes in full and prove their legality. Given the enormous difficulties in tracing and detecting funds of illicit origin, it will take the prosecution years to gather enough evidence to put together a credible case that it can bring before a judge.

72 *See* Barbera, Messegue and Jabardo v. Spain, (1989) Series A, 146, ¶77.

73 *See* Art. 4 of the ICCPR.

74 *See Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/97 of October 6, 1987, Inter-American Commission of Human Rights, Series A, No.9, (1987).

75 *See* Ian Dennis, *Reverse Onuses and the Presumption of Innocence: In Search of Principle*, Crim. L. Rev. 902 (2005)

76 *See* Michael F. Zeldin & Carlo V. di Florio, *Global Risk Management under International Laws To Curb Corrupt Business Practices*, Paper presented at The 9th International Anti-Corruption Conference (IACC): Global Integrity: 2000 and Beyond—Developing Anti-Corruption Strategies in a Changing World, October 9–15, 1999, Durban, South Africa.
77 *See* Andrew Ashworth & Meredith Blake, *The Presumption of Innocence in English Criminal Law*, Crim L. Rev. 306 (1996) *cited in* Dennis, *supra* note 75, at 906.
78 *See* Dennis, *supra* note 75, at 906–7
79 *Id.* at 902
80 Derencinovic, *supra* note 15.
81 Zeldin & di Florio, *supra* note 76, who point out that American jurisprudence already incorporates permissive inferences as well as a concept comparable to illicit enrichment into its tax and money-laundering laws. A rebuttable presumption (i.e. permissive inference) of guilt, the authors point out, is "permitted in U.S. tax fraud and money-laundering prosecutions where the courts have recognized that proof by direct means is very difficult to secure since the defendant generally will destroy such records and obscure any trace of their existence. Accordingly, the government is permitted to rely on indirect circumstantial evidence to disclose taxable income or illicit proceeds. In effect, unexplainable increases in net worth during a given period (e.g. period of public service) form the basis for a legitimate presumption and prosecution."
82 *See* United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the United Nations Convention against Corruption, 1, 103–4 (2005) [emphasis added].
83 Lord Bingham gives a very clear exposition of this distinction in DPP v. Sheldrake, [2004] UKHL 43 at 1. *See also* Cross & Tapper, Evidence 132–35 (10th ed. 2004); Dennis, *The Law of Evidence* 371–73 (2nd ed. 2002).
84 R. v. DPP *ex parte* Kebilene, [2000] 1 Cr.App.R. 275 at [324] (Lord Hope); DPP v. Lambert, [2002] 2 A.C. 545.
85 *See* Dennis, *supra* note 75, at 904.
86 A number of modern constitutions place limitations on the presumption of innocence. For instance, Section 11(d) of the Canadian Charter of Rights and Freedom guarantees anyone charged with offense the right to be presumed innocent until proven guilty according to law. That same section of the Canadian Constitution also allows "reasonable limits" to be placed on this right so long as they can be "demonstrably justified in a free and democratic society." *See Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canadian Act, 1982, c. 11 (U.K.). available at http://laws.justice.gc.ca/en/charter (last accessed August 2, 2010). In a similar vein, the Bill of Rights in the 1996 South African Constitution also contains restrictive provisions on the right to the presumption of innocence to the extent that the "limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. . . ." *See* S. Afr. Const., 1996, section 36 (1). Available at www.info.gov.za/documents/constitution (Constitution of the Republic of South Africa, 1996) (last accessed August 2, 2010). The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society underscores the fact that different rights have different implications for democracy, and in the case of the South African Constitution, for "an open and democratic society based on freedom and equality." It further means that there is no absolute standard which can be laid down for determining reasonableness and necessity. To some, however, such as the distinguished English scholar Andrew Ashworth, the presumption of innocence is under siege and needs to be defended from threats to it from four sources: "*confinement*, by defining offences so as to reduce the impact of the presumption; *erosion*, by

recognizing more exceptions; *evasion*, by introducing civil law procedures in order to circumvent the rights conferred on accused persons; and *side-stepping*, by imposing restrictions on the liberty of unconvicted persons but not depriving them of their liberty." *See* Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 123 S. Afr. L. J. 63 (2006).

87 S. v. Manamela and Another (Director-General of Justice Intervening), 2000 (5) BCLR 491 (CC).

88 *Id.*

89 John Murray v. U.K., Application no. 18731/91, Judgment of 8 February 2006, ¶¶47 and 51.

90 *Id.* at ¶51.

2 Criminalization of illicit enrichment in domestic law

1 The non-mandatory language used in the United Nations Convention has been explained as follows: "[t]he obligation for the parties to consider creating such an offence is however subject to each State party's constitution and the fundamental principles of its legal system . . . This effectively recognizes that the illicit enrichment offence, in which the defendant has to provide 3 reasonable explanations for the significant increase in his or her assets, may in some jurisdictions be considered as contrary to the right to be presumed innocent until proven guilty under the law. However, the point has also been clearly made that there is no presumption of guilt and that the burden of proof remains on the prosecution, as it has to demonstrate that the enrichment is beyond one's lawful income. It may thus be viewed as a rebuttable presumption. Once such a case has been made, the defendant can then offer a reasonable or credible explanation." *See* U.N. Office on Drugs and Crimes, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, ¶297 (2006).

2 *See* Corrupt Practices and Other Related Offenses Act, 2000, No. 5 (Nigeria) and Economic and Financial Crimes Commission (Establishment) Act, 2004, s. 46 (Nigeria). *See also* Cyprian O. Okonkwo, *Legal and Institutional Mechanisms Against Corruption in Nigeria*, Justice in the Judicial Process, 288–90 (Centus Chima Nweze ed., 2002) (criticizing the failure to criminalize the offense of illicit enrichment in the anti-corruption regime).

3 *See* Cyprus: The Confiscation of Proceeds of Trafficking of Narcotic Drugs and Psychotropic Substances Law of 1992; art. 4 (1).

4 Unfortunately, I was unable to find the most recent text of these laws, but attached is a comprehensive study of illicit enrichment in Romania. *See* Guillermo Jorge, *The Romanian Legal Framework on Illicit Enrichment*, American Bar Association European and Eurasian Law Initiative (July 2007), www.guillermojorge.com.ar/wp-content/uploads/2007/10/the-romanian-legal-framework-for-illicit-enrichment.pdf (last accessed August 2, 2010).

5 Law No. 115/1996 on the Statement and Control of Property of Dignitaries, Magistrates, Public Servants and of Persons in Leadership Positions, No. 263/28 (Rom.).

6 Law No. 144/2007 regarding the Setting Up, the Organization and the Operation of the National Integrity Agency, No. 359 (Rom.).

7 *See* United Kingdom Prevention of Corruption Act, 1991; c. 64, §2 (U.K.).

8 *See* Road Traffic Act, 1988, c. 2, §5 (U.K.). [Emphasis added.]

9 *See* Terrorism Act, 2000, c. 11, §11 (U.K.). [Emphasis added.]

10 Código Penal de la Nación Argentina [Cód. Pen.] [Penal Code] art. 268 (Arg.), www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16546/texact.htm (last accessed August 2, 2010).

11 Ley No. 25.188, Oct. 26, 1999, [29262] B.O. 1, http://infoleg.mecon.gov.ar/infolegInternet/anexos/60000-64999/60847/texact.htm (last accessed August 2, 2010).
12 Corte Suprema de Justicia [CSJN], 3/10/2007, "Alsogaray, María Julia s/ recurso de casación e inconstitucionalidad," S.C. A 1846; L. XLI (Arg.), www.cipce.org.ar/mjalsogaray.pdf (last accessed August 2, 2010).
13 *Id.*
14 Proceeds of Crime Act, 2000, chap. 93 (Bah.), http://laws.bahamas.gov.bs/statutes/statute_CHAPTER_93.html (last accessed August 2, 2010).
15 *Id.* art. 46.
16 *Id.* art. 6.
17 *Id.* art. 59.
18 Penal Code, chap. 84, art. 235 (Bah.), http://laws.bahamas.gov.bs/statutes/statute_CHAPTER_84.html (last accessed August 2, 2010).
19 Proyecto de Ley No. 510/2007 (Bol.), www.bolpress.com/art.php?Cod=2009011311 (last accessed August 2, 2010).
20 Código Penal de la República de Chile [Penal Code] art. 241 bis (Chile), www.bcn.cl/leyes/1984 (last accessed August 2, 2010).
21 Ley No. 20.088, December 27, 2005, Diario Oficial de la República de Chile, Boletín No. 2394-07, January 5, 2006, (Chile), http://sil.senado.cl/docsil/ley1180.txt (last accessed August 2, 2010).
22 Código Penal [Penal Code] art. 412 (Colom.), www.secretariasenado.gov.co/senado/basedoc/ley/2000/ley_0599_2000_pr015.html#412 (last accessed August 2, 2010).
23 Ley No. 890, July 7, 2004, Diario Oficial 45.602 (Colom.), www.acnur.org/biblioteca/pdf/4754.pdf (last accessed August 2, 2010).
24 Ley No. 8422, October 6, 2004, Ley contra la Corrupción y el Enriquecimiento Ilícito en la Función Pública [Law Against Corruption and Illicit Enrichment in the Civil Service], La Gaceta 212, October 29, 2004 (Costa Rica), www.bccr.fi.cr/documentos/secretaria/archivos/Ley%20Contra%20la%20Corrupcion%20Enrequecimiento%20Ilicito%20N%C2%B0%208422m1.pdf (last accessed August 2, 2010).
25 Código Penal de la República Dominicana [Penal Code] arts. 274–183 (Dom. Rep.), www.oas.org/juridico/mla/sp/dom/sp_dom-int-text-cp.pdf (last accessed August 2, 2010).
26 Proyecto de Ley que Sanciona el Enriquecimiento Ilícito y el Tráfico de Influencia [Bill that Sanctions Illicit Enrichment and Influence Peddling] (Dom. Rep.), www.informejudicial.com/proyectoleyes/Anticorrupcion/Proyecto%20de%20Ley%20sanciona%20el%20enriquecimiento%20ilicito%20y%20el%20trafico%20de%20influencia.pdf (last accessed August 2, 2010).
27 Código Penal [Penal Code] bk. 2, tit. III, ch. VIII (Ecuador), www.oas.org/juridico/MLA/sp/ecu/sp_ecu-int-text-cp.pdf (last accessed August 2, 2010).
28 Although various sources explain the history of this chapter of the Ecuadorian Penal Code, neither law seems to be available online.
29 Constitución de la República de El Salvador [Constitution] art. 240 (El Sal.), www.oas.org/juridico/mla/en/slv/index.html (last accessed August 2, 2010).
30 Código Penal de la República de El Salvador [Penal Code] art. 333 (El Sal.), www.oas.org/juridico/MLA/en/slv/index.html (last accessed August 2, 2010).
31 Dictamen No. 24 Ley Contra el Enriquecimiento Ilícito [Ruling No. 24 Law Against Illicit Enrichment], November 17, 2008 (Guat.), www.congreso.gob.gt/uploadimg/archivos/dictamenes/863.pdf (last accessed August 2, 2010).
32 *Id.*
33 Iniciativa de Ley No. 3894 Que Dispone Aprobar Ley Contra el Enriquecimiento Ilícito [Bill No. 3894 That Sets Out to Approve the Law Against Illicit

Enrichment], September 1, 2008 (Guat.), www.congreso.gob.gt/archivos/iniciativas/registro3894.pdf (last accessed August 2, 2010). *See also* Appendix 1.

34 *Id.*

35 Integrity Commission Act, 1997, Cap. 19:12, art. 41 (Guy.), www.oas.org/juridico/spanish/mesicic2_guy_integrity_comm_act.pdf (last accessed August 2, 2010).

36 Criminal Law (Offences) Act, 1998, Cap. 8:01, tit. 22 (Guy.), http://prostitution.procon.org/sourcefiles/GuyanaCriminalOffencesAct.pdf (last accessed August 2, 2010).

37 *Id.* art. 334.

38 *Id.* art. 335.

39 *Id.* art. 336.

40 *Id.* art. 337.

41 Constitución Política de la República de Honduras [Constitution] art. 224 (Hond.), http://pdba.georgetown.edu/Constitutions/Honduras/hond05.html (last accessed August 2, 2010).

42 Decreto No. 301, December 30, 1975, Ley Contra el Enriquecimiento Ilícito de Servidores Públicos [Law Against Illicit Enrichment of Public Servants], Gaceta Oficial No. 21779, December 31, 1975 (Hond.), www.honduraslegal.com/legislacion/legi132.htm (last accessed August 2, 2010).

43 Decree No. 301 of December 30, 1975 is set out in its entirety in Appendix 1.

44 Corruption Prevention Act, 2000, §14 (Jam.), www.oas.org/juridico/spanish/jam_res10.pdf (last accessed August 2, 2010).

45 *Id.* §14(1)(b).

46 *Id.* §14(5).

47 *Id.* §15(1).

48 *Id.* §14(5A).

49 Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, art. 224, Diario Oficial de la Federacion [F.O.], August 1931, (Mex.) (last accessed August 2, 2010).

50 Enriquecimiento Ilícito. La Prueba Circunstancial de Licitud del Incremento Patrimonial que Reconoce el Artículo 224 del Código Penal Federal No es Atentoria del Principio de Presunción de Inocencia [Illicit Enrichment. The Circumstantial Proof of the Illicitness of the Increase in Assets Recognized by Article 224 of the Federal Penal Code does not Violate the Principle of Presumption of Innocence], Isolated Thesis, Registry No. 921160, 2007 (Mex.), www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=921160 (last accessed August 2, 2010).

51 Press Release, General Management of Media Relations, SCJN Resolves Amparo on Revision 1293/2000, August 2002 (Mex.), www2.scjn.gob.mx/consultas/Comunicados/Comunicado.asp?Pagina=listado.asp&Numero=546 (last accessed September 9, 2010) (last accesse), *see also* Appendix 2 (author's translation).

52 Iniciativa de Ley Contra la Corrupción Ejercida por Servidores Públicos [Bill Against Corruption Exercised by Public Servants] (Nicar.), www.asamblea.gob.ni/index.php?option=com_wrapper&Itemid=157 (last accessed August 2, 2010); *see also* Appendix 1.

53 *Id.*

54 Código Penal de Panamá [Penal Code] art. 335-A (Pan.), www.oas.org/juridico/mla/sp/pan/sp_pan-int-text-cp.pdf (last accessed August 2, 2010); *see also* Appendix 1.

55 Ley No. 59, December 29, 1999, Ley Que Reglamenta el Artículo 299 de la Constitución Política y Dicta Otras Disposiciones Contra la Corrupción Administrativa [Law That Enforces Article 299 of the Political Constitutión and Dictates Other Dispositions Against Administrative Corruption], Gaceta Oficial

23961, January 4, 2000 (Pan.), www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1990/1999/1999_200_0020.pdf; (last accessed August 2, 2010) *see also* Appendix 1.

56 Ley No. 2.523/04, December 13, 2004 (Para.), www.oas.org/juridico/spanish/mesicic2_pry_anexo11.pdf.

57 *Id.*, art. 5.

58 *Id.*, art. 6.

59 Código Penal [Penal Code] art. 412 (Peru), www.oas.org/juridico/MLA/sp/per/sp_per-int-text-cp.pdf (last accessed August 2, 2010).

60 Corte Suprema de Justicia de la República, 10/07/2008, "El Estado v. Jorge Ricardo Novoa Robles, enriquecimiento ilícito," Expediente 22-2003 (Peru), available at http://historico.pj.gob.pe/CorteSuprema/documentos/..%5C..%5CCorteSuprema%5Cspe%5CDocumentos%5CEXP_22-2003_SPE_170708.pdf (last accessed August 2, 2010). An English translation of the case can be found in Appendix 2.

61 Prevention of Corruption Amendment Bill, 2001, No. 152, Vol. 40 (Trin. & Tobago), www.ttparliament.org/legislations/b2001h21p.pdf (last accessed August 2, 2010).

62 *Id.* §8.

63 Ley Anticorrupción No. 17.060, December 10, 1998, Dictanse Normas Referidas al Uso Indebido del Poder Público (Corrupción) [Anti-Corruption Law], Diario Oficial de la República Oriental del Uruguay No. 25189, January 8, 1999 (Uru.), www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=17060& Anchor= (last accessed August 2, 2010).

64 The listed crimes include embezzlement, embezzlement by taking advantage of the error of another, extortion, simple bribery, aggravated bribery, influence peddling, fraud, conjunction of personal and public interests, abuse of authority in cases not specially provided for by the law, revelation of secrets, and unlawful use of privileged information.

65 Ley Contra la Corrupción [Law Against Corruption], April 7, 2003, Diario Oficial de la República Bolivariana de Venezuela No. 5.637E (Ven.), www.fiscalia.gov.ve/leyes/15-LEYCONTRALACORRUPCIÓN.pdf (last accessed August 2, 2010); *see also* Appendix 1.

66 *See* Ghana: Ghana Const. ch. 24 §286, 1992, (Ghana), www.ghanareview.con/Gconst.html (last accessed August 2, 2010).

67 *See* India: The Prevention of Corruption Act, ch. V, §201, 1988 (India), www.lexadin.nl/wlg/legis/nofr/oeur/lxweind.htm (last accessed August 2, 2010). [emphasis added].

68 *See* Kenya: Anti-Corruption and Economic Crimes Act, No. 3, §40(2), (Kenya), www.kacc.go.ke/POC.asp (last accessed August 2, 2010).

69 *See* Nigeria: Corrupt Practices and Other Related Offenses Act No. 5, §8(2)(a)–(c), 2000, (Nigeria).

70 Prevention of Bribery Ordinance, Cap. 201, §10, 2008 (H.K.), www.hklii.org/hk/legis/en/ord/201/ (last accessed August 2, 2010).

71 *Id.* §12.

72 *Id.* §12AA.

73 Attorney General v. Cheung, Chee-kwong, [1979] 1 W.L.R. 1454, 1462 (P.C.).

74 *Id.* at 1457.

75 Attorney General v. Hui Kin-hong, [1995] 1 H.K.C.L.R. 227 (C.A.).

76 Some online sources claim that Singapore has already criminalized illicit enrichment while others note that it has not, but I have been unable to find any proof of explicit criminalization of illicit enrichment.

77 Prevention of Corruption Act, 1960, Cap. 241, §5 (Sing.), www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=6ec933eb-ae 18-11dc-a8e5-3d4737e97a2c (last accessed August 2, 2010).

78 *Id.* §2.
79 *Id.* §6.
80 *Id.* §8.
81 Penal Code, 2008, Cap. 224, art. 161 (Sing.), http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-224 (last accessed August 2, 2010).
82 *Id.* art. 165.
83 *Id.* art. 162.
84 *Id.* art. 163.
85 *Id.* art. 164.
86 *See* Singapore: Misuse of Drugs Act, 1973, §17, (Sing.), http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-185 (last accessed August 2, 2010). [emphasis added]

3 Reversing the burden of proof in international and domestic law

1 *See, e.g.* Art. IX of the Inter-American Convention; the 2003 African Union Convention on Preventing and Combating Corruption (Art. 8) and the 2004 United Nations Convention against Corruption (Art. 20), contain provisions on the crime of illicit enrichment that were clearly influenced by Art. IX of the Inter-American Convention.
2 *See* Andrew Ashworth and Meredith Blake, *The Presumption of Innocence in English Criminal Law*, Crim. L. Rev. 306 (1996).
3 *See* Ian Dennis, *Reverse Onuses and the Presumption of Innocence: In Search of Principle*, Crim. L. Rev. 902, 906 (2005).
4 The criminal defamation laws in Australia and the United Kingdom (although they have not been used since 1970) reverse the burden of proof by placing it on the defendant. In a survey of 168 countries, ARTICLE 19 discovered that only ten do not have criminal defamation laws in their books. ARTICLE 19's global Criminal Defamation Map can be accessed at www.article19.org/advocacy/defamationmap/overview.html (last accessed August 2, 2010). ARTICLE 19 is an international non-governmental human rights organization (NGO) that works globally to protect and promote the right to freedom of expression. ARTICLE 19 takes its name from Article 19 of the Universal Declaration of Human Rights. Based in London, the organization has offices in different regions of the world, and has active programs in Europe (including Western Europe), Latin America, the Middle East, Asia and Africa. ARTICLE 19 cooperates with international bodies such as the United Nations Special Rapporteur on Freedom of Opinion and Expression and the Organisation for Security and Cooperation in Europe Representative on Freedom of the Media to help develop international standards on freedom of expression, and sits as an observer member on a number of Council of Europe Expert Committees. The organization is well known for its authoritative work in elaborating the implications of the guarantee of freedom of expression, including in the area of defamation. ARTICLE 19 regularly intervenes in court proceedings at national, European and other international court levels.
5 While it is true that in many parts of the world custodial sanctions for defamation have fallen into disuse, nonetheless, they continue to be imposed in a number of countries. Continental Europe: defamation has traditionally been dealt with through the criminal law in Continental Europe. Fines are generally imposed at levels significantly lower than civil damages in many common law countries, and custodial sentences remain theoretically possible in most states, but are not applied in practice. For instance, in Denmark, while criminal prosecutions are not uncommon, custodial sentences have not been ordered for some time. In Sweden,

criminal prosecutions are relatively common but there do not appear to have been any custodial sanctions, at least against newspaper editors, ordered under the present 1965 law. In Norway, criminal charges are rare. No custodial sentence has been ordered since 1933. In both Germany and the Netherlands, criminal prosecutions are employed but the jurisprudence, drawing upon principles of proportionality developed by the European Court of Human Rights, supports the conclusion that custodial sanctions could never be justified. In Spain, custodial sanctions remain but have, for all practical purposes, been replaced by a system of "daily fines." The new system was introduced specifically to reduce the impact of deprivation of liberty in this area. In France, a prison sentence of up to six months is possible, although such sentences are rarely imposed. In Hungary, custodial sanctions remain possible, but courts, referring to the necessity and proportionality principle developed by the European Court of Human Rights, are hesitant to apply them and prefer to impose fines. In Austria, journalists benefit from specific safeguards and imprisonment is virtually never ordered. Commonwealth and Common Law Countries: in Commonwealth and common law countries criminal defamation remains theoretically available but has not been applied for many years. Custodial sanctions have been virtually unknown for decades. In the United Kingdom custodial sentences for defamation remain a theoretical possibility, but no criminal case has proceeded to trial for well over 20 years and custodial sanctions are even rarer. In Australia, most jurisdictions retain the possibility of imprisonment for defamation, although no such sentence has been served for more than 50 years. In Canada, criminal prosecutions for defamation are rare and no custodial sentence has been awarded for many years. In Commonwealth countries in the Caribbean such as Guyana, Jamaica and St. Vincent and the Grenadines, criminal defamation laws and their corresponding custodial punishments have been obsolete for some time. In parts of the African Commonwealth the situation is similar. In South Africa, the existing criminal law, including custodial sentences, has fallen into desuetude. In Zimbabwe, criminal defamation is rarely resorted to. In the only recent case, the penalty was a fine. Similarly, in Nigeria criminal defamation laws are no longer resorted to. The two cases prosecuted in the last few years were not concluded. In the USA, criminal defamation laws, including their concomitant custodial penalties, fell into disuse many years ago. In Garrison v. Louisiana, 379 U.S. 64, 70, 74 (1964), the Supreme Court struck down a state criminal libel law, holding that it did not meet the Sullivan v. New York Times, 376 U.S. 254 (1964), standard that defamatory statements against "public figures" would attract liability only if made with actual malice or recklessness. It is worthy of note that while large parts of the world prefer to address the problem of defamation using the "less restrictive means" of non-custodial penalties, i.e. civil damages or criminal fines, no effort has been made to repeal these laws! *See* Toby Mendel and Evan Ruth, Written Comments Submitted by ARTICLE 19, The International Centre Against Censorship: The Legitimacy of Criminal Defamation Actions Protecting Government Officials under International Human Rights Law in the Angolan Criminal Court Case Number: 13.165/99-B between: *The Republic of Angola and Rafael Marques* (2000).

6 U.N. Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances, art. 5 (December 20, 1988), www.unodc.org/pdf/convention_1988_en.pdf (last accessed August 2, 2010).

7 U.N. Treaty Collection, U.N. Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances, Declarations and Reservations, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no= VI-19&chapter=6&lang=en (last accessed August 2, 2010).

8 Inter-American Convention against Corruption, Art. IX (March 26, 1996), www.oas.org/juridico/english/Treaties/b-58.html (last accessed August 2, 2010).

9 Inter-American Convention against Corruption, Signatories and Ratifications, www.oas.org/juridico/english/Sigs/b-58.html (last accessed August 2, 2010).
10 U.N. Convention against Transnational Organized Crime, Art. 12 (November 15, 2000), www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (last accessed August 2, 2010).
11 Ad Hoc Comm. on the Elaboration of a Convention against Transnat. Organized Crime, *Consideration of the Draft United Nations Convention against Transnational Organized Crime, with Particular Emphasis on Articles 1–3* 8 n.32, U.N. Doc. A/AC.254/4/Rev.1 (February 10, 1999); Ad Hoc Comm. on the Elaboration of a Convention against Transnat. Organized Crime, *Consideration of the Draft United Nations Convention against Transnational Organized Crime, with Particular Emphasis on Articles 4, 4* bis, 7 *and 8* 11 n.45, U.N. Doc. A/AC.254/4/Rev.2 (April 12, 1999).
12 Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Consideration of the Draft United Nations Convention against Transnational Organized Crime, with Particular Emphasis on Articles 4, 4* bis, 7 *and 8, Proposals and Contributions Received from Governments* 6, U.N. Doc. A/AC.254/5/Rev.5 (March 24, 1999).
13 Ad Hoc Comm. on the Elaboration of a Convention against Transnat. Organized Crime, *Consideration of the Draft United Nations Convention against Transnational Organized Crime, with Particular Emphasis on Articles 4* ter, *5, 6, 9, 10 and 14* 9, U.N. Doc. A/AC.254/4/Rev.3 (May 19, 1999).
14 Ad Hoc Comm. on the Elaboration of a Convention against Transnat. Organized Crime, *Consideration of the Revised Draft United Nations Convention against Transnational Organized Crime, with Particular Emphasis on Articles 1–3, 5 and 6, Proposals and Contributions Received from Governments* 4, U.N. Doc. A/AC.254/5/Add.17 (January 5, 2000).
15 Unfortunately, neither the *travaux préparatoires* nor any other legislative history was apparently available online for the African Union Convention on Preventing and Combating Corruption.
16 African Union Convention on Preventing and Combating Corruption, Art. 8 (July 11, 2003), www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf (last accessed August 2, 2010).
17 U.N. Convention against Corruption, Art. 20 (October 31, 2003), www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (last accessed August 2, 2010).
18 *Id.* Art. 31.
19 U.N. Secretary-General, *Report of the Secretary-General on Existing International Legal Instruments, Recommendations and Other Documents Addressing Corruption*, ¶201–08, *delivered to the Comm. on Crime Prevention and Crim. Justice*, U.N. Doc. E/CN.15/2001/3 (April 2, 2001).
20 Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption, ¶14, U.N. Doc. A/AC.260/2 (August 8, 2001).
21 *Id.* ¶28.
22 Ad Hoc Comm. for the Negotiation of a Convention against Corruption, *Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption, Proposals and Contributions Received from Governments*, ¶9, U.N. Doc. A/AC.261/IPM/2 (November 5, 2001).
23 Ad Hoc Comm. for the Negotiation of a Convention against Corruption, *Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption, Proposals and Contributions Received from Governments*, ¶23, U.N. Doc. A/AC.261/IPM/16 (November 28, 2001).

24 Ad Hoc Comm. for the Negotiation of a Convention against Corruption, *Considerations of the Draft United Nations Convention against Corruption, with Particular Emphasis on arts. 40–50 and chapters IV–VIII* 33 n.182, U.N. Doc. A/AC.261/3/Rev.1 (March 1, 2002).
25 U.N. Office on Drugs and Crime, Technical Guide to the United Nations Conventions against Corruption 98–99 (2009), www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf (last accessed August 2, 2010).
26 U.N. Office on Drugs and Crime, U.N. Conventions against Corruption, Declarations and Reservations, www.unodc.org/unodc/en/treaties/CAC/signatories.html (last accessed August 2, 2010).
27 *Id.*
28 The review of the state of the law on reverse burden clauses in Canada and Ireland relies heavily on Una Ní Raifeartaigh's 1995 excellent piece which has been updated to take into account recent legislation and jurisprudence in these two countries. *See* Una Ní Raifeartaigh, *Reversing the Burden of Proof in a Criminal Trial: Canadian and Irish Perspectives on the Presumption of Innocence*, 5 Irish Crim. L.J. 135 (1995) (Ir.).
29 Canadian Charter of Rights and Freedoms, s. 11(d), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, c.11 (U.K.).
30 *Id.* s. 1.
31 R. v. Oakes, [1986] 1 S.C.R. 103 (Can.).
32 R. v. Vaillancourt, [1987] 2 S.C.R. 636 (Can.).
33 R. v. Whyte, [1988] 2 S.C.R. 3 (Can.).
34 R. v. Chaulk, [1990] 3 S.C.R. 1303 (Can.).
35 R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.).
36 R. v. Andrews, [1990] 3 S.C.R. 870 (Can.).
37 R. v. Downey, [1992] 2 S.C.R. 10 (Can.).
38 R. v. Laba, [1994] 3 S.C.R. 965 (Can.).
39 R. v. Pratt, [1996] 47 C.R. (4th) 392 (Can.).
40 R. v. G. (T.), [1998] 123 C.C.C. 965 (Can.).
41 Ir. Const., 1937, art. 38.1.
42 O'Leary v. The Attorney General, [1993] 1 I.R. 102 (Ir.).
43 [1995] 1 I.R. 254 (Ir.).
44 Hardy v. Ireland, [1994] 2 I.R. 550 (Ir.).
45 *See* Gilligan v. The Criminal Assets Bureau, [1998] 3 I.R. 185 (Ir.).
46 Woolmington v. DPP, [1935] A.C. 462 (U.K.).
47 R. v. Edwards, [1975] Q.B. 27 (U.K.).
48 R. v. Hunt, [1987] A.C. 352 (U.K.).
49 Human Rights Act, 1998, §3(1) (U.K.).
50 *Id.* art. 6(1), sch. 1.
51 *See* R. v. DPP *ex parte* Kebilene, [2000] 2 A.C. 326 (U.K.).
52 R. v. Lambert, [2002] 2 A.C. 545 (U.K.).
53 R. v. Johnstone, [2003] 1 W.L.R. 1736 (U.K.).
54 Sheldrake v. DPP, [2004] UKHL 43 (U.K.).
55 Keogh v. R., [2007] EWCA Crim. 528 (U.K.).
56 Section 130 of the Road Traffic Act 29 of 1989 provides: "Where in any prosecution under the common law relating to the driving of a vehicle on a public road, or under this Act, it is material to prove who was the driver of the vehicle, it shall be presumed, until the contrary is proved, that such vehicle was driven by the owner thereof."
57 For example, s. 130 of the Road Traffic Act 29 of 1989 which provides: "Where in any prosecution under the common law relating to the driving of a vehicle on a public road, or under this Act, it is material to prove who was the driver of the

vehicle, it shall be presumed, until the contrary is proved, that such vehicle was driven by the owner thereof."

58 Section 21(1)(a)(i) of the Act provides that:
"If in the prosecution of any person for an offence referred to
(a) in section 13(f) it is proved that the accused
(i) was found in possession of dagga exceeding 115 grams;.....
it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance."

59 S. Afr. Const., 1996, www.info.gov.za/documents/constitution.

60 S. Afr. Const., 1996.

61 *See e.g.* S v. Zuma and Others, [1995] (2) SA 642 (CC) (presumption in s. 217(1)(b)(ii) of Criminal Procedure Act 51 of 1977 that confession before magistrate made in sound and sober senses and without undue influence, with reverse onus on accused to prove contrary on balance of probabilities); S v. Bhulwana, S Gwadiso, [1996] (1) SA 388 (CC) (presumption in s. 21(1)(a) of Drugs and Drug Trafficking Act 140 of 1992 that accused found in possession of dagga exceeding 115 grams was guilty of dealing in it, with reverse onus on accused); S v. Julies, [1996] (4) SA 313 (CC) (identical presumption and reverse onus in regard to possession of undesirable dependence-producing substances); S v. Ntsele, [1997] (11) BCLR 1543 (CC) (similar provision in s. 21(1)(b) of 1992 Act regarding person in charge of cultivated land on which dagga plants are found); S v. Mbatha, S v. Prinsloo, [1996] (2) SA 464 (CC) (presumption under s. 40(1) of Arms and Ammunition Act 75 of 1969 of possession of prohibited articles by any person on or in or in charge of or present at or occupying premises, together with reverse onus on accused); S v. Coetzee and Others, [1997] (1) SACR 379 (CC) (presumption and reverse onus in s. 245 of Criminal Procedure Act that accused making false representation knew that it was false; and in s. 332(5) that director or servant of corporate body guilty of offence by body with reverse onus to prove that he or she did not take part in offence and could not have prevented it); and Scagell and Others v. Attorney-General of the Western Cape and Others, [1996] (2) SACR 579 (CC) (presumption in subs. 6(4) of Gambling Act 51 of 1965 regarding permitting the playing of a gambling game when a policeman is willfully prevented from or obstructed or delayed in entering place; and evidential burden created by subs. (3) regarding presence at or being in control or in charge of place where gambling requisites found).

62 *See e.g.* Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 Cornell Int'l L.J. 691, 728–29 (2007) ("The implementation of this provision [i.e. illicit enrichment] as written in the domestic sphere should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment." There are alternative means of achieving the objective of this provision.)

63 ***See*** Jed Handelsman Shugerman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age,* 100, Yale L. J. 333, 333–335 (2000).

64 *See* Jed Handelsman Shugerman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110, Yale L. J. 333, 333–35 (2000) (internal footnotes omitted).

65 *See* Stuart P. Green, *Six Senses of Strict Liability: A Plea for Formalism in Appraising Strict Liability* in Appraising Strict Liability 2 (A. P. Simester ed. 2005).

66 §11 / Title 15 U.S.C. Chapter 2A, Subchapter I, §77k

67 *See* Krista L. Turnquist, *Pleading Under Section 11 of the Securities Act of 1933*, 98 Mich L. Rev. 2395, 2401–02 (June 2000).

68 *See* Title 18 U.S.C. Part I, Chapter 110, §2251. Sexual Exploitation of Children.
69 *See* U.S. v. Johnson, 376 F.3d 689, 693 (7th Cir. 2004).
70 Title 26 U.S.C. Subtitle e, Chapter 51, Subchapter e, Part II, §5301.
71 *See* U.S. v. Wedgewood Inc. *et al*., 457 F.2d 648, 650 (1st Cir. 1972).
72 Title 18 U.S.C. §§371, 1503 (1982) ("Whoever . . . corruptly . . . endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both").
73 Title 18 U.S.C.§1030(a)(5) 1988, amended by Pub. L. No. 103–322, Section 290001(b), 108 Stat. 2097–99 (September 13, 1994).
74 *See* U.S. v. Ardito, *et al*., 782 F.2d 358 (2nd Cir. 1986).
75 *Id.*, at 361–63
76 *Id.* (emphasis added).
77 *See* U. S. v. Sablan, 92 F.3d 865, 868 (1996) (internal citations and footnotes omitted).
78 *Id*.
79 *See* Tex. Pen.Code Ann. §8.04 (Vernon 1994).
80 *See* Raby v. State, 970 S.W.2d 1, 6 (Tex. Crim. App. 1998), *cert. denied*, 525 U.S. 1003, 119 S.Ct. 515, 142 L.Ed.2d 427 (1998).
81 Hernandez v. Johnson, 213 F.3d 243, 250 (5th Cir. 2000).
82 *See* County Court of Ulster Cnty v. Allen, 442 U.S. 140, 163 (1979).
83 Title 33 U.S.C. §1319.
84 Title 33 U.S.C. §1319(c)(1)
85 *ex parte* Quirin, 317 U.S. 1, 21 (1942)
86 *Id.*
87 Korematsu v. U.S. 323 U.S. 214 (1944).
88 In Re Yamashita, 327 U.S. 1 (1946)
89 Leila Sadat, *A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror*, 37 Denv. J. Int'l Law & Policy 539, 540 (2009) (internal footnotes omitted) (emphasis in original).

4 The right to a fair trial in international and domestic law

1 *See* Maharaj v. Attorney-General of Trinidad and Tobago, Privy Council, (1979) AZ 385: (1978) 2 All E.R. 670; (1978) 2 W.L.R. 902.
2 *See* Prosecutor v. Slobodan Milo evi , Case No. IT-02-54-AR 73.4, Separate Opinion of Judge Mohammed Shahabuddeen Appended to the Appeals Chamber Decision on Admissibility of Evidence-in-Chief in the form of Written Statements, ¶16 (September 30, 2003); *see also* Prosecutor v. Pauline Nyiramasuhuko and Others, Decision in the Matter of Proceedings under Rule 15*bis* (D), Joint Case No. ICTR-98-42-A15*bis*, Dissenting Opinion of Judge David Hunt, ¶16 (September 24, 2003) ("There may be many difficulties placed in the way of an accused in the course of applying an interests of justice test in various situations, so that the trial is not a perfect one (such as the need to protect victims and witnesses) but the absence of perfection does not mean that the trial will not be a fair one. However, the interests of justice cannot be served where the accused is denied a fair trial").
3 *See* Judge Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, 3 Berkley J. Int'l L. Publicist 1 (2009).
4 *Id.* at 2.
5 The description of the United States by a leading American political scientist, s*ee* Seymour Martin Lipset, *The First New Nation: The United States in Historical and Comparative Perspective* (1963).
6 *See* Robinson, *supra* note 3, at 3–4.
7 *See* Jixi Zhang, *Fair Trial Rights in the ICCPR*, 2 J. Politics & Law 39, 39–43 (2009) (Can.).

8 These treaty-based due process protections are enforceable in the courts of states parties to the various instruments.

9 *See e.g.* Art. 10 of the Universal Declaration; Art. 14(1) of the ICCPR; Art. 6(1) of the European Convention; Art. XXVI of the American Declaration; Art. 8 of the American Convention; Art. 20(1) of the Yugoslavia Statute; Art. 19(1)of the Rwanda Statute; and Arts. 64(2) and 67(1) of the Rome Statute of the International Criminal Court. This right to a fair hearing in criminal trials is shorthand for a bundle of rights that include the right to be presumed innocent, the right to be tried without undue delay, the right to prepare a defense, the right to defend oneself in person or through counsel, the right to call witnesses and the right to protection from retroactive criminal laws.

10 They are considered "minimum" because the observance of each of these guarantees does not, in all cases and circumstances, ensure that a hearing has been fair. The Human Rights Committee considers the right to a fair trial as broader than the sum of the individual guarantees. *See* Human Rights Committee, General Comment 13, ¶5; Advisory Opinion of the Inter-American Court of Human Rights, OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies*, August 10, 1990, Annual Report of the Inter-American Court, 1990, OAS/Ser.L./V/III.23 doc. 12, rev. 1991, at 44, ¶24.

11 The right not to be compelled to testify against oneself or confess guilt and the related right of silence are rooted in the presumption of innocence.

12 *See also* Art. 11 of the Universal Declaration of Human Rights; Art. 7(1)(b) of the African Charter on Human and Peoples' Rights; ¶2(D) of the African Commission Resolution; Art. XXVI of the American Declaration; Art. 8(2) of the American Convention on Human Rights; Art. 6(2) of the European Human Rights Convention, Art. 21(3) of the Yugoslavia Statute; Art. 20(3) of the Rwanda Statute; Art. 66 of the ICC Statute; see also Rule 84(2) of the Standard Minimum Rules, Rule 91 of the European Prison Rules.

13 The Human Rights Committee is an authoritative body. "General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR" and are "authoritative." Maria v. McElroy, 68 F. Supp.2d 206, 232 (E.D.N.Y. 1999). *See also* United States v. Bakeas, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997) ("the Human Rights Committee has the ultimate authority to decide whether parties' clarifications or reservations have any effect"); Report of the Committee, 1994 Report, vol. 1, 49 U.N. GAOR, Supp. No. 40, U.N. Doc. A/49/40, ¶5 ("General comments . . . are intended . . . [among other purposes] to clarify the requirements of the Covenant"); *see also* United States v. Duarte-Acero, 208 F.3d 1282, 1285 n.12, 1287–88 (11th Cir. 2000). General comments can be found at www1.umn.edu/humanrts/gencomm (last accessed August 2, 2010).

14 *See* General Comment 13, ¶7.

15 *Id.*

16 *See* General Comment No. 29, CCPR/C/21/Rev.1/Add.11, ¶¶11, 16 (2001). *See also* General Comment No. 13 (on art. 14 of the Covenant).

17 *See e.g.* Law Office of Ghazi Suleiman v. Sudan, African Commission on Human and Peoples' Rights, Comm. Nos. 222/98 and 229/99 (2003) (negative publicity carried by state officials presuming the guilt of petitioners violated their right to be presumed innocent, guaranteed by Art. 7(1)(b) of the African Charter); Media Rights Agenda v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 224/98 (2000) (intense negative pre-trial publicity organized by the Military Government of Nigeria to persuade the public that a coup plot had occurred and that those arrested in connection with it were guilty of treason was in breach of the right to fair trial, particularly, the right to presumption of innocence); Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria, African Commission on Human and Peoples'

Rights, Comm. No. 218/98 (1998) ("The presumption of innocence is universally recognised. With it is also the right to silence. This means that no accused should be required to testify against himself or to incriminate himself or be required to make a confession under duress (Article 6(2) and 14(3)(g) of ICCPR"); International Pen and Others v. Nigeria, African Commission on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998) (where leading members of the government pronounced the accused guilty of the crimes at various press conferences and before the United Nations and the military tribunal itself admits that there was no direct evidence linking the petitioners to the murders, but held that they had each failed to establish that they did not commit the crime alleged, a violation of the right to be presumed innocent under Art. 7.1(b) has occurred); Annette Pagnoulle (on behalf of Abdoulaye Mazou) v. Cameroon, African Commission on Human and Peoples' Rights, Comm. No. 39/90, (1997) (Detention on the mere suspicion that an individual may cause problems is a violation of his right to be presumed innocent); *see also* Allenet de Ribemont v. France, Application No. 15175/89: (1995) 20 E.H.R.R. 557 ("The presumption of innocence is binding not only on the court dealing with the case but also on other organs of the State, as the fundamental principle set forth in Article 6(2) of the Convention embodies a guarantee to everyone that the State's representatives will not be able to treat him as being guilty of an offence before this is established according to law by a competent court. Where criminal proceedings are pending the Convention institutions draw a distinction between statements which reflect an opinion that the person concerned is guilty and statements which merely describe a state of suspicion. The former infringe the presumption of innocence, whereas the latter have been considered acceptable in various cases examined by the Convention institutions"; and Sekanina v. Austria, (1994) 17 E.H.R.R. 221, Series A, No. 266-A, Application No. 13126/87 (Compensation claims, like any other judicial decisions taken after an acquittal, must not violate the presumption of innocence enshrined in Art. 6(2). They are required to "presume" that the person concerned is "innocent" as he has not been "proved guilty according to law"). The Inter-American Commission found that Special Tribunals in Nicaragua violated the presumption of innocence as they considered the fact that an accused was a member of the former National Guard or bodies linked to it to be *per se* evidence which warranted a presumption of guilt. According to the Commission, the Special Tribunals began their investigation on the basis that all such accused individuals were guilty until they proved their innocence. See Report on the Situation of Human Rights in Nicaragua, OEA/ Ser.L/V/II.53, doc. 25, 1981, at 91; *see also* Suárez Rosero Case, [1997] I.A.C.H.R. 8 (November 12, 1997) (the principle of the presumption of innocence—inasmuch as it lays down that a person is innocent until proven guilty—is founded upon the existence of judicial guarantees).

18 Such as holding the accused in a cell within the courtroom, requiring the accused to wear handcuffs, shackles or prison uniform in the courtroom, or taking the accused to trial with a shaven head in countries where convicted prisoners have their heads shaved.

19 For instance, the Inter-American Commission on Human Rights has found that the definition of a criminal offence based on mere suspicion or association violates the presumption because it shifts the burden of proof to the accused. See Annual Report of the Inter-American Commission, 1996, OEA/Ser.L/V/II.95, doc. 7, ¶4 at 745, Peru.

20 *See* Restatement (Third) of Foreign Relations Law of the United States §102(3) cmt. n.1 (1986) (customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation).

21 *See* Funke v. France, App. No. 10828/84, 16 Eur. H.R. Rep. 297 (1993).

22 John Murray v. United Kingdom, ¶45; *see also* Heaney and McGuinness v. Ireland, No. 34720/97 (December 21, 2000).
23 Murray, at ¶45; *also* Jorge, at 49 ¶146
24 *Id.*
25 Miranda v. Arizona, 384 U.S. 436 (1966).
26 R. v. Director of Serious Fraud Office *ex parte* Smith, [1992] 3 W.L.R. 66.
27 In the dissenting opinion of Judge Martens, who was joined by Judge Kuris, which treats the privilege against self-incrimination as a broader right which encompasses the right to silence, p. 48 ¶4.
28 Krause v. Switzerland, No 7986/77, 13 DR 73 (1978).
29 Delcourt v. Belgium, January 17, 1970, ¶25.
30 *See e.g.* Tim Ward & Piers Gardner, *The Privilege Against Self-Incrimination: In Search of Legal certainty*, 4 E.H.R.L.R. 388 (2003).
31 *See* Andrew Ashworth, *Self-Incrimination in European Human Rights Law—A Pregnant Pragmatism?* 30 Cardozo L. Rev. 751, 762 (2008) [hereinafter "Self-Incrimination"].
32 256 E.C.H.R. (ser. A) (1993).
33 *Id.*
34 *See e.g.* John Murray, *supra* note 22, §§57–58.
35 Such is the case with the Canadian Charter of Rights and Freedoms and the Bill of Rights of the Constitution of South Africa. *See e.g.* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canadian Act, 1982, part 1 (U.K.). Available at http://laws.justice.gc.ca/en/charter (last accessed August 2, 2010); and S. Afr. Const., 1996, art. 36(1). Available at www.info.gov.za/documents/constitution (S. Afr. Const., 1996) (last accessed August 2, 2010).
36 *See* Salabiaku v. France, (1988) 13 Eur. H.R. Rep. 379, 388 ¶28.
37 *Id.* at 382.
38 *See* Director of Public Prosecutions v. Sheldrake (L. Bingham) [2004] H.L. 43, 12 (U.K.).
39 Salabiaku, *supra* note 36.
40 *Id.*
41 Falk v. the Netherlands, App. No. 66273/01, Eur. Comm'n H.R. Dec. & Rep. (2004).
42 *See* Ashingdane v. United Kingdom, 93 Eur. Ct. H.R. (ser. A) at 57 (1985).
43 Allenet de Ribemont v. France, App. No. 15175/89, 20 Eur. H.R. Rep. 557 (1995).
44 Among the offensive statements was this one made by the director of the criminal investigation department, Mr Jean Ducret, who said: "Mr de Varga-Hirsch and his acolyte Mr Allenet de Ribemont were the instigators of the murder. There was an insurance policy on the life of Mr de Broglie naming Mr de Varga-Hirsch and Mr Allenet de Ribemont as the beneficiaries." The Court observed that "[w]hile it is true that the Minister of the Interior mentioned the applicant by name only to indicate that he and the accused had jointly taken out a bank loan for which the victim had stood surety, nevertheless, in his presence and under his authority, the director of the criminal investigation department quite unambiguously identified the applicant as one of the instigators of the murder. The applicant, who was subsequently charged with aiding and abetting murder, could legitimately have believed that he had been held up in public, by the highest authorities of the State, as a person guilty of complicity in murder." *Id.* at 76–77.
45 *Id.* at 67–68, 70.
46 *Id.*
47 Sekanina v. Austria, App. No. 13126/87, 17 Eur. H.R. Rep. 221, (1994).

48 The Commission was a first tier filter for complaints which was abolished when Protocol No. 11 to the Convention came into force in 1998. All decisions are now taken by the European Court of Human Rights.
49 Sekanina, *supra* note 47, at 46–50.
50 *Id.*
51 Director of Public Prosecutions v. Sheldrake, at 21 (U.K.).
52 *See, e.g.* Saunders v. the United Kingdom; Heaney and McGuinness; J.B. v Switzerland, no. 31827/96, §64, ECHR 2001-III; and Allan v the United Kingdom, no. 48539/99, ECHR 2002-IX.
53 (Case A/256-A) European Court of Human Rights [1993].
54 Sir Nicolas Bratza, *The Implications of the Human Rights Act 1998 for Commercial Practice*, 1 Eur. Hum. Rts. L. Rev. 10 (2000).
55 *See*, Ashworth, *supra* note 31, at 753 (in introducing the privilege against self-incrimination into its jurisprudence, the Court said nothing about the scope of the privilege, or about its origins and rationale).
56 1996-I Eur. Ct. H.R. 30 (1996).
57 1996-VI Eur. Ct. H.R. 2044 (1996).
58 Bratza, *supra* note 54.
59 Ashworth, *supra* note 31, at 753.
60 Judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I.
61 *Id.*, ¶46.
62 *Id.,* ¶51.
63 *See* R. v. Kevin Sean Murray, (sub nom Murray v Director of Public Prosecutions) (L. Mustil) quoted in John Murray, 51 (U.K.).
64 *Id.*
65 *Id.*, ¶43.
66 23 Eur. H.R. Rep. 313 (1996).
67 *Id.*, ¶23.
68 *Id.*
69 *Id.*, ¶28.
70 *Id.*, ¶63.
71 *Id.*, ¶64.
72 *Id.*, ¶62. The exculpatory defense argument was rejected by the Court: "bearing in mind the concept of fairness in Article 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature—such as exculpatory remarks or mere information on questions of fact—may later be deployed in criminal proceedings in support of other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility." *Id.*, ¶71.
73 *Id.*
74 *Id.*, ¶¶67 and 69.
75 *Id.*, ¶74. In his dissenting opinion which was joined by J. Kuris, Judge Martens is quite categorical: "the broader privilege against self-incrimination may be restricted by law in order to protect legitimate interests of the community." *Id.*, ¶10 National legislatures are "in principle free to decide that the general interest in bringing about the truth and in bringing culprits to justice shall take precedence over the privilege against self-incrimination." *Id*. J. Valticos in his dissenting opinion, joined by Judge Golcuklu, agrees with Judge Martens that the majority was trying to "elevate to the status of an absolute rule the right of persons suspected of criminal offenses, including serious crimes, not to incriminate themselves and not to answer any question which might incriminate them would mean in many cases that society was left completely defenseless in the face of ever more complex activities in a commercial and financial world that has reached an unprecedented level of sophistication. *Defense of the innocent must not result in impunity for the guilty." Id*.

76 *Id.*, ¶64.
77 *Id.*
78 *Id.*, ¶74.
79 It has been advanced that the Court's articulation of the principle that both the fairness requirements of Article 6 generally and the privilege itself should "apply to criminal proceedings in respect of all types of criminal offenses without distinction from the most simple to the most complex" when read in its proper context "makes clear that departures" from the privilege "will be rare and will call for a special justification, over and above the public interest." *See* Ashworth, *supra* note 31, at 760–61.
80 *Id.*
81 33 Eur. H.R. Rep. 264 (2000).
82 *Id.*, ¶¶47–58.
83 Weh v. Austria, App. No. 38544/97, 40 Eur. H.R. Rep. 37 (2004).
84 Nos. 15135/89, 15136/89 and 15137/89, Commission's decision of 5 September 1989, Decisions and Reports 62, at 319.
85 *Id.*, ¶¶32–56.
86 Jalloh v. Germany [GC], No. 54810/00, Eur. Comm'n H.R. 2006-.
87 *See* Schenk v. Switzerland, App. No.10862/84, 140 Eur. Ct. H.R. (ser. A) at 29, 45–46 (1988); Teixeira de Castro v. Portugal, Eur. Ct. H.R. (1998), ¶34.
88 *See* Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996), ¶62.
89 *See* Ashingdane v. United Kingdom, 93 Eur. Ct. H.R. (ser. A) at 58 (1985).
90 *See* Salabiaku v. France, 13 Eur. H.R. Rep. 379 at 28 (1988),
91 *See* Fitt v. United Kingdom [GC], 2000-II Eur. Ct. H.R. 45.
92 *See* S.N. v. Sweden, 2002-V Eur. Ct. H.R. 47.
93 *See e.g.*, Khan v. United Kingdom, 2000-V Eur. Ct. H.R. 38.
94 Pagnoulle (on behalf of Mazou) v. Cameroon, African Commission on Human and Peoples' Rights, Comm. No. 39/90 (1997).
95 *Id.*
96 Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 218/98 (1989).
97 International Pen and Others v. Nigeria, African Commission on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96, 161/97 (1998).
98 International Pen and Others v. Nigeria, African Commission on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998), ¶96.
99 African Commission on Human and Peoples' Rights, Comm. No. 224/98 (2000).
100 Media Rights Agenda, ¶¶47, 48.
101 African Commission on Human and Peoples' Rights, Comm. Nos. 222/98, 229/99 (2003).
102 Law Office of Ghazi Suleiman v. Sudan, African Commission on Human and Peoples' Rights, Comm. Nos. 222/98, 229/99 (2003), ¶¶54, 56.
103 Interights et. al. v. Botswana, African Commission on Human and Peoples' Rights, Comm. No. 240/2001 (1998).
104 Suárez Rosero Case, Inter-Am. Comm'n H.R. (ser. C) No. 35 (1997).
105 Suárez Rosero Case, ¶¶77–78; *see also* Report of expert witness Ernesto Albán-Gómez, former Dean and Professor of Criminal Law at the Pontificia Universidad Católica of Ecuador.

> "An arrest in Ecuador requires a warrant, with the sole exception of detention for investigative purposes and detention *in flagrante delicto*. Unlawful detention is an offense established as such in the Criminal Code. Ecuadorian law allows a 24-hour maximum period for holding a person incommuni-

cado. The maximum period for a detained person to make a statement to a magistrate is 24 hours, which may be extended by a further twenty-four hours only at the request of the detainee or because the magistrate deems it necessary. There is a special law that limits the period of preventive detention to a ratio of the maximum penalty to which the detainee could be sentenced but, in discriminatory manner, this law is not applicable to persons accused of trafficking in drugs or narcotics. The Law on Narcotic and Psychotropic Substances establishes the presumption of guilt instead of the presumption of innocence. A police barracks is not the appropriate place to keep someone in lawful preventive detention, since the law provides that it is in the social rehabilitation centers established in the Code of Penalties that prisoners in preventive detention or serving final sentences are to be housed. The writ of habeas corpus must be filed in writing; the decision must be taken within 48 hours and, while the law does not set out the precise deadline within which the court must call and hear the person filing the writ, that period could also be 48 hours. In no circumstances does the law permit preventive detention of an accessory, and the maximum sentence for that crime is two years in prison. The judge has the obligation to appoint defense counsel at the preliminary stage of a criminal case; while public defenders do exist, detainees cannot be said to have effective access to them. Under Ecuadorian law, the criminal proceeding must be completed within approximately 180 days. There is systematic delay in the administration of justice, one of the grave problems of the Ecuadorian judicial administrative system, and even more so in criminal matters. Over 40 percent of the persons in Ecuador's jails have been detained for drug-related offenses. Article 20 of Ecuador's Political Constitution provides that all the political, civil, social, economic and cultural rights established in the international Conventions, Covenants, or Declarations are applicable to all persons living in its territory" ¶23.

106 *See e.g.* the Constitution of the European Union, Article II-108—Presumption of innocence and right of defence: "1. Everyone who has been charged shall be presumed innocent until proved guilty according to law. 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed." While the American constitution does not include an explicit provision on the presumption of innocence, the Fifth Amendment of the U.S. Constitution, however, provides that, "No person shall be deprived of life liberty, or property without due process of law." While due process is not defined constitutionally, it is a term that is universally recognized as meaning "fair trial," which encompasses the principle that an accused is innocent until proven guilty and not suspected until proven guilty. A fair trial by a jury of one's peers would require that each juror approach the case with the principle that the prosecution must prove the defendant is guilty beyond a reasonable doubt. At the beginning of the trial, the prosecution has not presented any evidence; therefore, it follows that the accused must be innocent until he is proven guilty by the preponderance of the evidence. *See e.g.* Coffin v. United States, 156 U.S. 432; 15 S.Ct. 394 (1895).

107 *See* S. Afr. Const. §35(3)(h); *see also* section 11(d) of the Canadian Charter of Rights and Freedoms which provides in pertinent part that "[a]ny person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

108 *See* Kenya Const. §§77(2)(a).

109 Woolmington v. Director of Public Prosecutions, [1935] A.C. 462, 461 (U.K.).

110 R. v. Noble, [1997] 1 S.C.R. 874 (Can.).

111 Canadian Charter of Rights and Freedoms, s. 11(d).
112 R. v. François, [1994] 2 S.C.R. 827 (Can.).
113 R. v. Lepage, [1995] 1 S.C.R. 654 (Can.).
114 *See* Dubois v. The Queen, [1985] 2 S.C.R. 350, 357–58 (Can.).
115 Sheldrake v. Director of Public Prosecutions, [2004] H.L. 43 at 21 (U.K.).
116 R. v. Lambert, [2001] 2 Cr. App. R. 511, H.L. (U.K.).
117 R. v. Whyte, [1988] 51 D.L.R. (4th) 481 (Can.).
118 Coffin v. United States, 156 U.S. 432; 15 S.Ct. 394 (1895).
119 *Id.*
120 Taylor v. Kentucky, 436 U.S. 478, 485 n.12 (1978). Thus, in *Taylor*, the Court held that "*on the facts of this case* the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process clause of the Fourteenth Amendment" at 490 (emphasis added).
121 The presumption of innocence "cautions the jury to put away from their minds all the suspicion that arises from the arrest, indictment, and arraignment, and to reach their conclusion solely from legal evidence adduced." *See* 9 J. Wigmore, Evidence §2511 (3d ed. 1940).
122 *Id*.
123 *See* Bell v. Wolfish, 441 U.S. 520, 533 (1979) (citing Taylor v. Kentucky, 436 U.S. 78, 485 (1978)).
124 *Id.* at 553.
125 *See* 9 J. Wigmore, Evidence §2511 (3rd ed. 1940).
126 *See* D.W. Elliott, Phipson's Manual of the Law of Evidence §§91–93.
127 *Id.*
128 *Id.*
129 See Agnew v. United States, 165 U.S. 36, 41 L. ed. 624 (1897).
130 Código Procesal Penal de la Nación Argentina [Cód. Proc. Pen.] [Code of Criminal Procedure] art. 1 (Arg.) "Natural Judge, Prior Trial. Presumption of Innocence. 'Non bis in idem': *No one shall be judged by judges other than those designated in accordance with the Constitution and competent according to its regulatory laws, nor shall be punished without prior trial based on law determined prior to the offense judged and substantiated in accordance with the dispositions of this law, nor shall be considered guilty until a final judgment rejects the presumption of innocence enjoyed by everyone charged with a criminal offense, nor shall be prosecuted more than once for the same offense*", www.infoleg.gov.ar/infolegInternet/anexos/0-4999/383/texact.htm (last accessed August 2, 2010).
131 *Id.* art. 3.
132 Nuevo Código de Procedimiento Penal [Code of Criminal Procedure] art. 6 (Bol.), www.oas.org/juridico/mla/sp/bol/sp_bol-int-text-cpp.html (last accessed August 2, 2010).
133 Código Procesal Penal [Code of Criminal Procedure] art. 4 (Chile), www.oas.org/juridico/MLA/sp/chl/sp_chl-codigo_ppenal.pdf (last accessed August 2, 2010).
134 Código de Procedimiento Penal [Code of Criminal Procedure] art. 7 (Colom.), www.oas.org/juridico/MLA/sp/col/sp_col-int-text-cpp-2005.html (last accessed August 2, 2010).
135 Código Procesal Penal [Code of Criminal Procedure] art. 9 (Costa Rica), www.oas.org/juridico/mla/sp/cri/sp_cri-int-text-cpp.html (last accessed August 2, 2010).
136 Código Procesal Penal de la República Dominicana [Code of Criminal Procedure] art. 14 (Dom. Rep.), www.oas.org/juridico/MLA/sp/dom/sp_dom-int-text-cpp.pdf (last accessed August 2, 2010).
137 Código de Procedimiento Penal [Code of Criminal Procedure] art. 4 (Ecuador), www.oas.org/juridico/mla/sp/ecu/sp_ecu-int-text-cpp.pdf (last accessed August 2, 2010).

138 Código Procesal Penal [Code of Criminal Procedure] art. 4 (El Sal.), www.csj.gob.sv/leyes.nsf/0/5456de9f805990ee06256d02005a406d?OpenDocument (last accessed August 2, 2010).
139 Código Procesal Penal [Code of Criminal Procedure] art. 14 (Guat.), www.oas.org/juridico/mla/sp/gtm/sp_gtm-int-text-cpp.pdf (last accessed August 2, 2010).
140 *Id.*
141 Código Procesal Penal [Code of Criminal Procedure] art. 2 (Hond.), www.oas.org/juridico/mla/sp/hnd/sp_hnd-int-text-cpp.pdf (last accessed August 2, 2010).
142 *Id.*
143 Constitución Política de los Estados Unidos Mexicanos [Constitution], *as amended*, art. 20, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex), www.oas.org/juridico/MLA/sp/mex/sp_mex-int-text-const.pdf (last accessed August 2, 2010).
144 Presunción de Inocencia. El Principio Relativo se Contiene de Manera Implícita en la Constitución Federal [Presumption of Innocence. The Principle is Implicitly Contained in the Federal Constitution], Isolated Thesis, Registry No. 921223 (Mex. 2007), www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=921223 (last accessed August 2, 2010).
145 *See* Presunción de Inocencia. El Principio Relativo se Contiene de Manera Implícita en la Constitución Federal [Presumption of Innocence. The Principle is Implicitly Contained in the Federal Constitution], Isolated Thesis, Registry No. 921223 (Mex. 2007), www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=921223 (last accessed August 2, 2010).
146 *Id.*
147 Código Procesal Penal de la República de Nicaragua [Code of Criminal Procedure] art. 2 (Nicar.), www.oas.org/juridico/mla/sp/nic/sp_nic-int-text-cpp.pdf (last accessed August 2, 2010).
148 Código Judicial de Panamá [Judicial Code] art. 1942 (Pan.), www.oas.org/juridico/MLA/sp/pan/sp_pan-int-text-cj-lib3.pdf (last accessed August 2, 2010).
149 Código Procesal Penal de Paraguay [Code of Criminal Procedure] art. 4 (Para.), www.oas.org/juridico/mla/sp/pry/sp_pry-int-text-cpp.pdf (last accessed August 2, 2010).
150 *Id.* art. 53.
151 Código Procesal Penal [Code of Criminal Procedure] art. II (Peru), www.pj.gob.pe/CorteSuprema/ncpp/documentos/nuevo_codigo_procesal_penal.pdf (last accessed August 2, 2010).
152 *Id.* art. IV.
153 Código General de Proceso [General Procedure Code] art. 139 (Uru.), www.oas.org/juridico/mla/sp/ury/sp_ury-int-text-cgeneralp.html (last accessed August 2, 2010).
154 *See e.g.* Art. 10 of the Universal Declaration; Art. 14(1) of the ICCPR; Art. 6(1) of the European Convention; Art. XXVI of the American Declaration; Art. 8 of the American Convention; Art. 20(1) of the Yugoslavia Statute; Art. 19(1) of the Rwanda Statute; and Arts. 64(2) and 67(1) of the Rome Statute of the International Criminal Court.
155 The Human Rights Committee has stated that a fair hearing requires a number of conditions, including equality of arms, respect for the principle of adversary proceedings and expeditious procedure. *See* Morael v. France, (207/1986), 28 July 1989, Report of the HRC, (A/44/40), 1989, at 210.
156 *See* European Court judgments in the cases of Ofrer and Hopfinger, Nos. 524/59 and 617/59, December 19, 1960, Yearbook 6, pp. 680 and 696.

157 *See* Kaufman v. Belgium, 50 DR 98, Eur. Comm'n H.R. 15 (1986); see also Ofrer and Hopfinger, *supra* note 156.
158 Also included in this basket of rights is the accused person's right to legal counsel, the right to call and examine witnesses and the right to be present at the trial. *See* Foucher v. France, 25 Eur. H.R. Rep. 234, 247 (1997).
159 *See* Sir William Blackstone, Commentaries on the Laws of England, Vol. 4, ch. 27 (University of Chicago Press 1979) (1765), available at www.Ionang.com/exlibris/blackstone (last accessed February 27, 2006).
160 In Re Winship, 397 U.S. 358, 361–64 (1970).
161 *See* Rinat Kitai, *Presuming Innocence*, 55 Okla L. Rev. 257, 281 (2002).
162 *Id.*
163 *Id.*
164 *See* Michael Hor, *The Burden of Proof in Criminal Justice*, 4 S.Ac.L.J. 267, 268 (1992).
165 *Id.*
166 *See* Paul Roberts and Adrian Zuckerman, *Criminal Evidence* 372 (2004).
167 *See* Director of Public Prosecutions v. Lambert, 2 A.C. 545, 38 (U.K.).
168 Sheldrake v. Director of Public Prosecutions [2004] H.L. 43, at 51 (1) (U.K.).
169 *See* Ian Dennis, *Reverse Onuses and the Presumption of Innocence: In Search of Principle*, Crim. L. Rev. 902, 917 (2005).
170 *See* Ronald Dworkin, *Taking Rights Seriously* 13 (1977). See also Ronald Dworkin, *Principle, Policy and Procedure* in *Crime, Proof and Punishment* (Tapper ed. 1981).
171 *See* Claire Hamilton, *Presumed Guilty? The Summer Anti-Crime Package of 1996 and the Presumption of Innocence*, 10 Irish Student L. Rev. 202, 205–06 (2002).
172 *See e.g.* Ashworth, *Concepts of Criminal Justice*, Crim. L. Rev. 412, 422–25 (1979).
173 Treaty law allows for derogation of some rights in times of national emergency. For instance, Article 4 of the International Covenant on Civil and Political Rights provides member states the freedom to derogate from the Convention as long as what they derogate from is allowed under international law. The term "emergency" is used somewhat loosely to underscore the sense of urgency victim countries attach to the war against official corruption.
174 Here the question is whether some of the exceptions are more objectionable than others. *See* R. v. DPP *ex parte* Kebilene, [2000] 2 A.C. 326.
175 *See* Lacey and Wells.
176 *See* Salabiaku v. France, (1988) 13 Eur. H.R. Rep. 379, 388.
177 *See e.g.* R. v. DPP *ex parte* Kebilene, [2000] 2 A.C. 326, 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 the fundamental rights of the individual." *See also* R. v. Lambert, [2001] 3 All E.R. 577; 2001 W.L. 720273.
178 *See* Kebilene, [2000] 2 A.C. 326; Lambert, [2001] 3 All E.R. 577; R. v. Johnstone, [2003] 1 W.L.R. 1736 (H.L.); Attorney-General's Reference (No. 4 of 2002), [2003] 3 W.L.R. 153.

5 Guidelines for assessing the compatibility of reverse onus with fair trial rights

1 Dubois v. The Queen, [1985] 2 S.C.R. 350 (Can.).
2 *Id.*, at 357–58. *See also* D. M. *Paciocco, Charter Principles and Proof in Criminal Cases* 495 (1987).
3 Dubois, *supra* note 1.

4 *See* Barbera, Messegue and Jabardo v. Spain, 11 Eur. H.R. Rep. 360 (1988), Series A, 146, ¶77.
5 The leading case for this proposition is Salabiaku v. France, 13 Eur. H.R. Rep. 379 (1988) and in several of the cases the courts have taken the following statement from *Salabiaku* as a starting point: "Presumptions of fact or law operate in every legal system. Clearly, the convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law . . . [Art. 6(2)] requires states to confine [presumptions] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."
6 Salabiaku v. France, 13 Eur. H.R. Rep. 379, 388 (1988).
7 *Id.*
8 *See* Attorney-General of Hong Kong v. Lee Kwong-kut, [1993] A.C. 10 *per* Lord Woolf. Hong Kong was a British Crown Colony until 1997 when it reverted and became a special administrative region of the People's Republic of China.
9 *See* R. v. Director of Public Prosecutions *ex parte* Kebilene and Others, [2000] 2 A.C. 326 *per* Lord Hope; R. v. Downey, [1992] 2 S.C.R. 10; R. v. Laba, [1994] 3 S.C.R. 965; S v. Mbatha, [1996] 2 L.R.C. 208; S. v. Bhulwana, [1996] 1 L.R.C. 194.
10 Attorney General of Hong Kong v. Lee Kwong-kut, [1993] A.C. 951, 973A (P.C.). The Judicial Committee of the Privy Council is the court of final appeal for the U.K. territories and Crown dependencies which retained appeal to the Crown or, in the case of republics, to the Judicial Committee.
11 *Id.*
12 *Id.*
13 *See* Attorney-General of Hong Kong v. Sin Yau Min: Presumption of Innocence and Rationality/Proportionality Tests (1991) 1 H.K.P.L.R. 88 (C.A.) (accused found in possession of 0.5 gram of salts of esters of morphine, presumed to be in possession of a dangerous drug for the purpose of unlawful trafficking until the contrary is proved).
14 *See* Attorney-General of Hong Kong v. Hui Kin-hong: Presumption of Innocence versus Eradication of Corruption, [1995] 1 H.K.C.L.R. 227 (C.A.) (former civil servant charged with an offense under a section 10(1)(a) of Hong Kong's Prevention of Bribery Ordinance which provides that any public official who maintains a standard of living above that which is commensurate with his present or past emoluments shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living, be presumed guilty of an offense under the Ordinance).
15 *Id.*
16 Sin Yau Min, *supra* note 13.
17 [1995)1 H.K.C.L.R. 227 (C.A.) at 229 (*per* Bokhary JA, as he then was).
18 R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 352 (Can.).
19 *Id.*
20 R. v. Oakes, [1986] 1 S.C.R. 103, at 138–39 (Can.).
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
26 Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

27 *Id.*
28 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
29 R. v. Downey, [1992] 2 S.C.R. 10 (Can.).
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 *See e.g.* S. v. Mbatha, [1996] 2 L.R.C. 208; and S. v. Manamela, [2000] 5 L.R.C. 65.
40 "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose." *See* S. Afr. Const., 1996. Available at www.info.gov.za/documents/constitution (last accessed August 2, 2010) (Constitution of the Republic of South Africa, 1996).
41 S. v. Manamela, [2000] 5 L.R.C. 65 at ¶49.
42 *Id.*
43 "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."
44 *Id.* at 51.
45 *Id.* at 52.
46 *Id.*
47 *Id.* at 53.
48 *Id.* at 82. This quotation is from the minority opinion. The majority and minority agreed on the test used in proving the validity of a reverse onus clause. They only disagreed as to the application in the case at hand.
49 *Id.* at 84.
50 *Id.* at 84–85.
51 S. v. Coetzee and Others, 1997 (4) B.C.L.R. 437, 1997 S.A.C.L.R. LEXIS 4, 31 (CC) (S.A.).
52 *Id.* at 32.
53 S. v. Manamela, [2000] 5 L.R.C. 65 ("[e]ach particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness").
54 *Id.*
55 S. v. Fransman, 1999 (9) B.C.L.R. 981 (W).
56 *Id.*
57 *Id.*
58 *See* R. v. Noble, [1997] 1 S.C.R. 874, Lamar C.J. dissenting, at ¶30.

59 *Id.*
60 S. v. Manamela, [2000] 5 L.R.C. 65.
61 R. v. Whyte, (1988) 35 C.R.R. 1 (SCC). *Whyte* was concerned with the Canadian Criminal Code which provided that in impaired driving or care or control proceedings, the occupant of the driver's seat was "deemed to have had the care or control of the vehicle" unless it was established that he or she did not enter the vehicle for the purpose of setting it in motion. The Supreme Court of Canada unanimously held that the provision violated the presumption of innocence but that it was saved under the limitation provision. In contending that the presumption was not violated, the Crown argued that the absence of purpose the statute required the accused to prove was not an essential element of the offence, but collateral to it.
62 Salabiaku v. France, 13 Eur. H.R. Rep. 379 (1988) at ¶28. The Court observed in *Salabiaku* that:

> "Presumptions of fact or of law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. . . . Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. This test depends upon the circumstances of the individual case."

63 Carlos A. Manfroni, Richard S. Werksman & Michael Ford (translator), Inter-American Convention against Corruption: Annotated with Commentary 71 (2003) [hereinafter "Manfroni Commentary"].
64 *See e.g.* Political Constitution of Peru, Art. 62 ("Officials and public servants who adjudicate the law or administer or handle funds of the State ... must make a sworn declaration of their assets and income on taking office and on relinquishing their positions and periodically during their holding of same"); Chapter 24, s. 286 of the 1992 Constitution of Ghana; "[a] person who holds a public office mentioned in clause (5) of this article shall submit to the Auditor-General a written declaration of all property or assets owned by, or liabilities owed by, him whether directly or indirectly, within three months after the coming into force of this Constitution or before taking office, as the case may be, at the end of every four years; and at the end of his term of office. Failure to declare or knowingly making false declaration shall be a contravention of this Constitution and shall be dealt with in accordance with article 287 of this Constitution . . . Any property or assets acquired by a public officer after the initial declaration required by clause (1) of this article and which is not reasonably attributable to income, gift, loan, inheritance or any other reasonable source shall be deemed to have been acquired in contravention of this Constitution." *See also* Constitution of Colombia, art. 122; Constitution of Haiti, art. 238; Hong Kong Basic Law, art. 47; Constitution of the Federation of Nigeria, arts. 52, 94, 140(1), 149, 151, 185(1), 1nd 290(1); Constitution of Paraguay, art. 104; Constitution of Turkey, art. 71.
65 *See* Law No. 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972, art. 66.
66 *See e.g.* Republic of Ghana, Report of the Ghana Jiagge Commission (1967), para. 2. The Jiagge Commission, like the over 70 other Commissions of Inquiry that were appointed to probe high level official corruption in Ghana, were all appointed under the provisions of the Commissions of Enquiry Act, 1964 (Act 250), N.L.C. Decree No. 72 dated August 18, 1966 and as amended by N.L.C. Decrees Nos. 101 dated November 1, 1966 and 129 dated January 24, 1967. *See also* Sierra Leone Government, White Paper on the Report of the Mrs. Justice

Laura Marcus-Jones Commission of Inquiry into the Assets, Activities and Other Related Matters of Public Officers, Members of the Board and Employees of Parastatals, Ex-Ministers of State, Paramount Chiefs and on Contractors – within the Period 1st day of June, 1986 to the 22nd day of September, 1991 (1993). Sierra Leone Government, White Paper on the Report of the Justice Beccles Davies Commission of Inquiry into the Assets and Other Related Matters of all Persons who were Presidents, Vice-Presidents, Ministers, Ministers of State and Deputy Ministers within the Period from the 1st day of June, 1986, to the 22nd day of September, 1991, and to Inquire into and Investigate Whether Such Assets Were Acquired Lawfully or Unlawfully (1993); Federal Republic of Nigeria, Views and Decisions of the Federal Military Government on the Report and Recommendations of Justice Uwaifo Special Panel for the Investigation of Cases of Persons Conditionally Released from Detention and Persons Still in Detention under the State Security (Detention of Persons) Decree No. 2, 1984 and the Recovery of Public Property (Special Military Tribunals) Decree no. 3, 1984 (1986), para. 3(C) In XXI Laws of the Federation of Nigeria (Revised) ch. 389 (1990).

67 Art. XII, Sec. 2 of the Constitution of the Philippines entrenches the public trust doctrine ("All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines"); *see also* Political Constitution of Peru, Art. 118; and the Constitution of the United States of Mexico, Art. 27.

68 Assets disclosure by a public official, under Ghana's Constitution, is expected at "the end of every four years; and at the end of his term of office." *See* Chapter 24, s. 286 of the 1992 Constitution of Ghana.

69 *See* Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case, (New Zealand v. France), 1995 I.C.J. 288, 341 (December 20) (Weeraamantry, J., dissenting).

70 *See* U.N. Anti-Corruption Tool Kit: International Judicial Cooperation 8 (2002) www.undoc.org/pdf/crime/toolkit/fg.pdf (last accessed February 25, 2006) (hereinafter "Anti-Corruption Tool Kit"). *See also* U.N. Office on Drugs and Crime, The Global Programme Against Corruption: UN Anti-Corruption ToolKit, 3rd ed. (September 2006).

71 Almost half of Sub-Saharan Africa's roughly 1 billion people live on less than 65 cents a day. According to the latest projections by the OECD/African Development Bank Economic Outlook for Africa 2003/04, only six countries are on track to achieving the first goal of halving the proportion of people living below $1 dollar per day by 2015. *See* Afekhena Jerome, Senyo, Adjibolosso & Dipo Busari, *Addressing Oil Related Corruption in Africa: Is the Push for Transparency Enough*, 11 Rev. Hum. Factor Soc. Stud. Special Edition 32, 7 (2005) (hereinafter "Oil Corruption").

72 Papa Doc Duvalier and his son, Baby Doc Jean-Claude Duvalier, as presidents of Haiti from 1957 to 1986, were alleged to have fleeced the Haitian treasury of between $500 million to $2 billion, representing an estimated 87% of government expenditure paid directly or indirectly to Papa Doc Duvalier and his associates between 1960 and 1967. A court in Pakistan convicted Asif Ali Zardari, before he became president of Pakistan in 2009, of accepting $9 million in kickbacks, and he is alleged to have channelled $40 million of unexplainable origin through Citibank private bank accounts. Former Ukranian Prime Minister Pavlo Lazarenko allegedly embezzled approximately $1 billion from the state, laundering some $114 million, much of it through Switzerland. *See* Anti-Corruption

Tool Kit; *see also* Ndiva Kofele-Kale, *International Law of Responsibility for Economic Crimes*, Ch. 1 (1995).

73 *See* D. Delamaide, *Debt Shock: The Full Story of the World Credit Crisis* 60 (1984); *see also* C. Braeckman, *Le Dinosaure* (1990).

74 *See* Rimmer de Vries, *LDC Debt: Debt Relief or Market Solutions?* World Financial Markets 1, 6 (September 1986).

75 *See* Press Release GA/EF/3002, Fifty-seventh General Assembly Second Committee 10th Meeting (AM) (Statement by O.A. ASHIRU, Nigeria's Representative to the Second Committee (Economic and Financial) of the U.N. General Assembly.

76 *Id.*

77 *See* Oil Corruption, *supra* note 71.

78 *See* U.N. Development Program, U*.N.D.P Practice Note: Anti-Corruption*, 3–4 (February 2004).

79 *See* Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case, (New Zealand v. France), 1995 I.C.J. 288, 341 (December 20) (Weeraamantry, J., dissenting).

80 *See* U.N. General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources, 14 Dec 62, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15 U.N. Doc. A/5217 (1963), *reprinted in* 2 I.L.M. 223 (1963).

81 Manfroni Commentary, *supra* note 63, at 69.

82 The threshold for finding a law vague is relatively high. The factors to be considered: (a) the need for flexibility (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist. *See* R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606. (The doctrine of vagueness can be summed up in one proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate—that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria.)

83 *See e.g.* Hong Kong's illicit enrichment statute, Chapter 201, Section 10, of the Prevention of Bribery Ordinance (PBO), which provides as follows:

> (1) Any person who, being or having been a prescribed officer-
>
> a maintains a standard of living above that which is commensurate with his present or past official emoluments; or
> b is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.
>
> (2) Where a court is satisfied in proceedings for an offence under subsection (1)(b) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused.

See also Argentina's illicit enrichment statute codified in art. 268 (2) of the Criminal Code, as amended by the Law on Public Ethics n. 25.188. Art. 268 (2) provides:

> Whoever duly required, does not justify the origin of a personal appreciable patrimonial enrichment or that from a third party in order to conceal it, occurred after the appointment in a public post or a public employment, and up to two years after leaving public office, will be punished with reclusion or a prison term from two to six years, and a fine between 50% and 100% of the value of the enrichment and absolute disqualification for life to occupy public office.
>
> It would be understood that an enrichment existed, not only when the patrimony was increased with money, things or assets, but also when debts or obligations affecting it were cancelled.
>
> The person cooperating to conceal the enrichment will be punished with the same sanction as the author of the crime.

84 Manfroni Commentary, *supra* note 63, at 71.

85 *Id.*

86 *See e.g.* Art. 10 of the Universal Declaration; Art. 14(1) of the ICCPR; Art. 6(1) of the European Convention; Art. XXVI of the American Declaration; Art. 8 of the American Convention; Art. 20(1) of the Yugoslavia Statute; Art. 19(1) of the Rwanda Statute; and Arts. 64(2) and 67(1) of the Rome Statute of the International Criminal Court.

87 The Human Rights Committee has stated that a fair hearing requires a number of conditions, including equality of arms, respect for the principle of adversary proceedings and expeditious procedure. *See* Morael v. France, (207/1986), July 28, 1989, Report of the HRC, (A/44/40), 1989, at 210.

88 *See* European Court judgments in the cases of Ofrer and Hopfinger, Nos. 524/59 and 617/59, Dec. 19.12.60, Yearbook 6, pp. 680 and 696.

89 *See* Kaufman v. Belgium, (1986) 50 DR 98, Eur. Comm'n H.R. 15 (1986); *see also* Ofrer and Hopfinger, *supra* note 88.

90 Also included in this basket of rights is the accused person's right to legal counsel, the right to call and examine witnesses and the right to be present at the trial. *See* Foucher v. France, 25 Eur. H.R. Rep. 234, 247 (1997).

91 *See* Delcourt v. Belgium, 11 Eur. Ct. H.R. (ser. A) at 34 (1970); *see also* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Appeals Chamber), ¶48 (Int'l Crim. Trib. For the Former Yugoslavia July 15, 1999).

92 Preparing a case of illicit enrichment would require of the prosecution, at the very minimum, to do the following:

- Gather evidence, records or documents;
- Locate and identify witnesses and if the funds are scattered in various countries, prosecutorial staff will be required to move from one jurisdiction to the next to obtain the testimony of such key witnesses as bank officers and investigators will entail considerable expenses for the victim state;
- Take the testimonies or statements from persons with knowledge of the crime;
- Facilitate the personal appearance of witnesses;
- Effect service of judicial documents;
- Execute searches and seizures;
- Examine objects and sites;
- Provide original or certified copies of relevant documents, records and items of evidence;
- Identify or trace property derived from the funds of illicit origin;

All of this will take time and the mobilization of enormous resources only very few wealthy countries can afford.

93 *See* A.S.I.L. Proceedings, at 395; *see also* Hetzer, *The Pols & Pariahs; The Wealth That Leaves No Tracks*, Fortune, October 12, 1987, at 189; Kraar, *Where*

Do You Hide $10 Billion? Aquino Wants to Know, Fortune, September 14, 1987, at 97.

94 *See* Simeon Marcelo, *Denying Safe Havens through Regional and Worldwide Judicial Cooperation: The Philippine Perspective*, Paper presented at the 5th Regional Anti-Corruption Conference, 28–30 September 2005, Beijing, PRC [hereinafter "Denying Safe Havens"].

95 For instance, the late President Ferdinand Marcos and his wife, Imelda, maintained 7,257 gold accounts with the Union Bank of Switzerland in addition to other non-gold accounts! *See* Keith Morgan, *Estrada Embarrassed by Proof of Marcos Billions*, www.wsws.org/articles/1999/jul1999/phil-j20 prn.shtml (last accessed February 13, 2006).

96 The apparent lack of transparency in many of the world's financial systems complicates the prosecution's task of assembling the necessary evidence for presenting its case. This has led to calls for the lifting of private secrecy codes used in banking procedures. At the Second Committee meeting summoned to discuss the problem of grand corruption Pakistan's representative called for the shutting down of such safe havens as offshore financial centers, anonymous accounts and stringent secrecy laws, which had impeded global anti-corruption efforts. He also noted that cumbersome legalities in foreign states as well as the scantiness of international instruments governing the transfer of illicit funds thwarted efforts to trace and return them. Obstacles remained even where bilateral agreements existed and local laws were adhered to, he added. *See* Press Release GA/EF/3002, Fifty-seventh General Assembly Second Committee 10th Meeting (AM) (Statement by Pakistan's Representative to the 2nd Committee (Economic and Financial) of the United Nations General Assembly).

97 Correspondent banks hold deposits for other banks and perform banking services for a fee, such as check clearing for banks in other cities or countries. With these types of accounts owners and clients of a poorly regulated, and even corrupt, bank have the ability to move money freely around the world. *See* Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived from Acts of Corruption, Doc. A/AC.261/10, ¶29 [hereinafter "Global Study on Corruption"].

98 Trusts and in particular blind trusts and asset protection trusts provide the kind of anonymity that makes it easy for corrupt officials to avoid seizure orders. *Id.*

99 "Private banking" refers to the preferential services provided by some financial institutions to individuals of high net worth and is of particular relevance to the laundering of the proceeds of corruption. Private banking provides vulnerabilities to laundering activity that can be exploited by corrupt politically exposed persons who, according to the Basle Committee on Banking Supervision, are individuals who are or have been entrusted with prominent public functions, including heads of state or of government, senior government, judicial or military officials, senior executives of publicly owned corporations and important political party officials. The private banker may fail to apply thorough due diligence to such accounts because a corrupt official is a valuable client and the bank is assisting him or her in investing the deposited funds. In addition, the use of an intermediary in such a situation can enable the official to open and then operate the account virtually anonymously.

100 *See* Global Study on Corruption, *supra* note 97, at ¶29

101 According to the official charged with the recovery and repatriation of stolen assets to the Philippines "the most effective approach for the recovery of illicit wealth concealed in foreign jurisdictions is through the execution of bilateral treaties with countries in which the ill-gotten assets and/or the offenders are probably found." *See* Marcelo, *supra* note 94.

102 *See e.g.* Art. 16 of the MLAT between the Philippines and the United States which provides that "[t]he Party that has custody over proceeds or instrumen-

talities of offenses shall dispose them in accordance with its laws. Either Party may transfer all or part of such assets, or the proceeds of their sale, to the other Party, to the extent not prohibited by the transferring Party's laws and upon such terms as it deems appropriate." *See* Treaty Doc. 104-18, 102 Cong., 1st Sess., Exec. Rept. 104-26, 104th Cong., 2nd Sess., Nov. 22, 1996.

103 *See* Prosecutor v. Clement Kayishema and Obed Ruzindana, International Criminal Tribunal for Rwanda, Case No.:ICTR-95-1-A, Judgment (Appeals Chamber), June 1, 2001, ¶69.

104 *See* Delcourt v. Belgium, 11 Eur. Ct. H.R. (ser. A) at 34 (1970); *see also* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Appeals Chamber), ¶48 (Int'l Crim. Trib. for the Former Yugoslavia, July 15, 1999).

105 *See Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-AR73.2 (Decision on Interlocutory Appeal on Motion for Additional Funds) (Int'l Crim. Trib. For the Former Yogoslavia Nov. 13 2003). Appeals Chamber. Defendant Milutinovic complained that the resources provided by the Registrar of the Court to prepare his case for trial were insufficient to ensure an effective and competent defense. He therefore sought review of the Registrar's decision in the Trial Chamber which denied the motion. The defendant then appealed the Trial Chamber's decision to the Appeals Chamber.

106 *See* Kayishema and Ruzindana, Case No. ICTR-95-1-A, Judgment, ¶69 (Int'l Crim. Trib. for the Former Yugoslavia, June 1, 2001).

107 Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Appeals Chamber), ¶48 (Int'l Crim. Trib. for the Former Yugoslavia, July 15, 1999). s

108 *See* Prosecutor v. Milutinovic, Case No. IT-99-37-AR73.2, (Int'l Crim. Trib. for the Former Yugoslavia, November 13, 2003).

109 *Id.*

110 In illicit enrichment litigation, the prosecution relies heavily on skilled, experienced investigators who do not come cheap. On the problem posed by prosecutorial lack of resources and lack of technical expertise, a study by the Ad Hoc Committee for the Negotiation of a Convention against Corruption had this to say: "[i]ronically and tragically, the financial burdens imposed on an impoverished country by large-scale investigations may be too great because the country has become so impoverished by the very offenders whose assets are now being traced. Further, investigators may lack the necessary training in the fields of finance and law to build a corruption case in addition to tracing the stolen assets." *See* Global Study on Corruption, *supra* note 97.

111 *See* Mr Justice Lightman, "The Civil Justice System and Legal Profession—The Challenges Ahead," *The 6th Edward Bramley Memorial Lecture University of Sheffield*, April 4, 2003 www.dca.gov.uk/judicial/speeches (last accessed February 14, 2006) (emphasis added).

112 *See* Global Study on Corruption, *supra* note 97.

113 U.N.O.D.C., Anti-Corruption Tool Kit (2002).

114 *Id.*

115 *Id.*

116 Much of the amount recovered from the Marcos' estate is merely interest earned on the original sum which lies in escrow in the Philippines National Bank. *See* Keith Morgan, *Estrada Embarrassed by Proof of Marcos Billions*, www.wsws.org/articles/1999/jul1999/phil-j20 prn.shtml (last accessed February 13, 2006); *see also* Simeon Marcelo, *Denying Safe Havens through Regional and Worldwide Judicial Cooperation: The Philippine Perspective, Paper presented* at the 5th Regional Anti-Corruption Conference, September 28–30, 2005, Beijing, PRC.

117 The stolen asset recovery process began when Nigeria filed criminal charges against Abacha in Nigeria, which gave Nigeria the basis to seek "mutual legal assistance" (MLA) from other countries harboring Abacha's money. For a good

summary of Nigeria's efforts, *see* Jack A. Blum's congressional testimony "Recovering Dictators' Plunder" House Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services, May 9, 2002. Nigeria's requests for MLA then led to subsequent criminal complaints in various European countries (and civil orders against banks in the U.K.) and this enabled the Nigerians to get more and more information and start the asset-freezing process through the criminal process in four European countries (Switzerland, Luxembourg, Liechtenstein and Jersey). In 1999 Nigeria applied to Switzerland and the other three countries for judicial assistance in tracing stolen assets. From 2002 Switzerland released records, including bank documentation. *See* Federal Office of Justice (Switzerland), "Abacha funds to be handed over to Nigeria; Majority of assets obviously of criminal origin" Press Release, August 18, 2004, at www.bj.admin.ch/content/bj/fr/home/dokumentation/medieninformationen/2004/2004-08-18.html (last accessed August 2, 2010). Under the Swiss International Mutual Legal Assistance Act "assets may be returned on the basis of a legal enforceable seizure order from the applicant state. In exceptional cases—such as where the frozen assets are obviously of criminal origin—assets can be returned without such an order." *See* FOJ, "Abacha funds to be handed over to Nigeria." On the basis of documentation from Nigeria and criminal proceedings instituted in Geneva, the Swiss Government made a determination that the greater part of Abacha funds it was able to trace were of criminal origin. The government then waived the requirements of its MLA and agreed to repatriate $700 million of the Abacha funds to Nigeria. *See* FOJ, "Abacha funds to be handed over to Nigeria;" *see also* "NIGERIA: Switzerland hands back nearly $500 million of Abacha's loot" IRIN News, August 19, 2004 ; and "Vorzeitige Herausgabe der Abacha-Gelder durch Rekurs blockiert," in Associated Press Worldstream-German, September 21, 2004 and Oliver Bilger, "Schweizer Organisationen misstrauen Rueckzahlung," *Spiegel Online*, August 25, 2004.

118 *See* Ngozi Okonjo-Iweala, *Nigeria*, in U.N. Office on Drugs and Crime (UNODC), The Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan ¶5.1a (2007).

119 Manfroni Commentary, *supra* note 63, at 71 [emphasis added].

120 *See* Michael F. Zeldin and Carlo V. di Florio, *Global Risk Management under International Laws To Curb Corrupt Business Practices*, Paper presented at The 9th International Anti-Corruption Conference (IACC): Global Integrity: 2000 and Beyond—Developing Anti-Corruption Strategies in a Changing World, 9–15 Oct., 1999, Durban, South Africa [hereinafter "Zeldin & Florio"].

121 *Id.*

122 *See, e.g.* United States v. Johnson, 319 U.S. 503, 517 (1943) (involving gambling transactions where all records had been destroyed). The net worth method produces an approximation. Holland v. United States, 348 U.S. 121, 129 (1954); United States v. Giacalone, 574 F.2d 328, 332 (6th Cir. 1978); *See also* United States v. Gomez- Soto, 723 F.2d 649, 655 (9th Cir. 1983); United States v. Schafer, 580 F.2d 774, 777 (5th Cir. 1978); United States v. Dworkin, 644 F.2d 418, 423 (5th Cir. 1981).

123 *See also* Guillermo Jorge, *The Romanian Legal Framework on Illicit Enrichment*, 1, 16 ABA CEELI (July 2007) ¶29 (July 2007) [hereinafter "Jorge"].

124 *See e.g.* Zeldin & Florio, *supra* note 120; *see also* Jorge, *supra* note 123.

125 Holland v. United States, 348 U.S. 127.

126 Holland, 348 U.S. at 135–36; *see also* United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981) (loan from acquaintance in Nigeria not a reasonable lead and not reasonably susceptible of being checked).

127 United States v. Mastropieri, 685 F.2d 776, 785 (2d Cir. 1982).

128 Mastropieri, 685 F.2d at 785. United States v. Goldstein, 685 F.2d 179, 182 (7th Cir.1982) (information on non-taxable income should be supplied by the taxpayer).
129 United States v. Vardine, 305 F.2d 60, 63 (2d Cir. 1962).
130 Holland, 348 U.S. at 128.
131 *Id.* at 129 (emphasis added).
132 I have elaborated on the problems afflicting Cameroon's assets disclosure regime in these terms:

> Article 66 [of the Cameroon Constitution] is a toothless bull-dog . . . reliance on it is misplaced for several reasons. In the first place, the Article is silent on the scope of disclosure expected: is it only assets owned by the public official directly, or indirectly as well? Does the scope of disclosure require the official to divulge information about assets, including investments, bank accounts, pensions and other intangibles, as well as real property and major items of personal property in Cameroon and in other countries? Who or which agency should these declarations be directed at and will an oral deposition suffice? Arguably a new member of government can discharge his public disclosure burden by declaring his assets to a few journalists summoned to his parlor for a "press conference"!
>
> Article 66 also fails to spell out the penalties, if any, for false or misleading disclosures. The intent behind this type of disclosure requirements is to deter official corruption and to identify and exclude corrupt officials. This objective cannot be attained when provision is not made for penalties for failure to disclose as required, or for making false or misleading disclosure, that are severe enough to act as a significant deterrent. An example of a disclosure requirement with teeth can be found in the 1992 Constitution of Ghana which requires an identified class of public servants to submit to the *Auditor-General* a *written* declaration of all property or assets owned by, or liabilities owed by, him whether directly or indirectly, before taking office, at the end of every four years; and at the end of his term of office. The provision makes failure to declare or knowingly making false declaration a punishable offence. Finally, Article 66 provides no mechanisms for verifying these disclosures. Nothing prevents a newly-appointed government minister from declaring assets of 800 million francs CFA that he clearly does not have but which he hopes to fleece from his ministerial budget while in office and then to declare that amount when he is "called to other duties"! *See* Ndiva Kofele-Kale, *The Biya Regime Must Confront the Root Causes of Corruption*, An Interview by Dibussi Tande, March 11, 2006. www.icicemac.com/ (last accessed August 2, 2010).

133 *See e.g.* Political Constitution of Peru, art. 62 ("Officials and public servants who adjudicate the law or administer or handle funds of the State . . . must make a sworn declaration of their assets and income on taking office and on relinquishing their positions and periodically during their holding of same."); Chapter 24, s. 286 of the 1992 Constitution of Ghana; "[a] person who holds a public office mentioned in clause (5) of this article shall submit to the Auditor-General a written declaration of all property or assets owned by, or liabilities owed by, him whether directly or indirectly. within three months after the coming into force of this Constitution or before taking office, as the case may be, at the end of every four years; and at the end of his term of office. Failure to declare or knowingly making false declaration shall be a contravention of this Constitution and shall be dealt with in accordance with article 287 of this Constitution . . . Any property or assets acquired by a public officer after the initial declaration

required by clause (1) of this article and which is not reasonably attributable to income, gift, loan, inheritance or any other reasonable source shall be deemed to have been acquired in contravention of this Constitution." *See also* Constitution of Colombia, art. 122; Constitution of Haiti, art. 238; Hong Kong Basic Law, art. 47; Constitution of Paraguay, art. 104; Constitution of Turkey, art. 71.

134 Nigeria, for example, whose military ruler, Sani Abacha, his close associates and family members made away with a colossal fortune estimated at $5 billion by raiding the national treasury, includes a provision for declaration of assets of public officials in its Constitution! Every public official *immediately after taking office* must declare all his assets to the Code of Conduct Bureau and also, *at the end of every four years* he must resubmit a declaration of assets. Furthermore, *at the end of his term of office*, he must submit to the Code of Conduct Bureau a written declaration of all his properties, assets and liabilities and those of his unmarried children under the age of eighteen years. *See* Constitution of Nigeria (1999), §11 (1) & (2). "Any property or assets acquired by a public officer after any declaration which is not fairly attributable to income, gift, or loan approved by this Code shall be deemed to have been acquired in breach of this Code unless the contrary is proved." *Id.* §3.

135 *See* Manfroni Commentary, *supra* note 63, at 72.

136 *Oakes*, at 139.

137 *See* R. v. Edwards Books and Art, [1986] 2 S.C.R. 713 (Can.).

138 It has been argued that satisfying the first two parts of the proportionality test makes the proportional effects branch redundant. *See* Peter W. Hogg, *Constitutional Law of Canada* 816–17 (Student ed. 2003).

139 Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 (Can.).

140 Although the distinction between a burden of production and a burden of persuasion is recognized in civil and common law systems, it is in the former where it has taken greater significance. This difference stems from the fact that in common law jurisdictions discharging the burden of production is a precondition for moving to the trial phase, where the factual issue is decided by the jury on the basis of the latter. *See* Henry Prakken and Giovanni Sartor, *A Logical Analysis of Burdens of Proof*, Legal Evidence and Proof: Statistics, Stories, Logic 223, 225 (Hendrix Kaptein *et al.* eds. 2008). Civil law jurisdictions also recognize the distinction between production and persuasion. German legal doctrine, for example, distinguishes between a subjective burden of proof (*subjektive Beweislast*, also called burden of providing a proof, *Beweisfuhrungslast*) and objective burden of proof (*objektive Beweislast*). The former corresponds roughly to the burden of production and the latter to the burden of persuasion. *See* U. Hahn and M. Oaksford, *The Burden of Proof and its Role in Argumentation* 21 Argumentation 36–61 (2007). Standards of proof for these two burdens are also different. For the burden of persuasion in criminal cases, the fact-finder must be convinced that the statement holds "beyond reasonable doubt". The proof standard for the burden of production is much lower: at times just a "scintilla of evidence" will suffice or such evidence that "reasonable minds can disagree" or evidence "upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Id.*

141 The burden of persuasion is always constant but the burden of production shifts from time to time having regard to the evidence adduced or the presumption of fact or law raised in favor of one or the other party. "If the *prima facie* case is not rebutted by cogent evidence and remains unanswered or the answer given does not create serious doubt in the mind of the court, then the burden of proof on the pleadings should be deemed to have been discharged." *See* 2 Sarkar's Law of Evidence 1452 (15th ed. 2005).

142 In Sheldrake v. Director of Public Prosecutions [2004] H.L. 43, at (1) (U.K.), Lord Bingham gives a very clear explanation of this distinction. *See also* Cross

and Tapper, Evidence 132–35 (10th ed. 2004); Ian Dennis, *The Law of Evidence* 371–73 (2nd ed. 2002). Williams and others draw a clear distinction between the burden of production and the "tactical burden" which Williams characterizes as the situation when, if the party does not produce evidence or further evidence he runs the risk of ultimately losing in respect of that issue. *See* C.R. Williams, *Burdens and Standards in Civil Litigation*, 25 Sydney L. Rev. 165 (2003); *see also* Adrian Keane, *The Modern Law of Evidence* (1994). For some commentators the tactical burden of proof is not assigned by law but the product of the logic of the reasoning process. It is therefore a burden of "tactical evaluation" by the party that carries it to "assess the risk of losing in an issue if no further evidence concerning that issue is produced." *Id., cited in* Henry Prakken and Giovanni Sartor, *A Logical Analysis of Burdens of Proof*, Legal Evidence and Proof: Statistics, Stories, Logic 223, 225 (Hendrix Kaptein *et al.*. eds. 2008) [hereinafter "Prakken & Sartor"].

143 *See* Glanville Williams, *The Evidential Burden: Some Common Misapprehensions*, 127 N.L.J. 156 (1977) *cited in* Solomon Salako, *An Introduction to the Law of Evidence* 20 (2009). www.insitelawmagazine.com/evidencech1.htm (last viewed February 17, 2011) [hereinafter "Salako"]. Although the distinction between a burden of production and a burden of persuasion is recognized in civil and common law systems, it is in the former where it has taken greater significance. This is so because in common law jurisdictions the discharging of the burden of production is a precondition for moving to the trial phase, where the factual issue is decided by the jury on the basis of the latter. *See* Prakken & Sartor, *supra* note 142, at 227. Civil law jurisdictions also recognize the distinction between production and persuasion. *Id.* Prakken and Sartor have summarized the ABCs of burdens and standards of proof in the following terms: "The burden of persuasion specifies which party has to prove a statement to a specified degree (its proof standard) with the penalty of losing in respect of the issue. Whether the burden is met is determined in the final stage of a proceeding, after all evidence is provided. That a burden of persuasion for a statement is fulfilled means that a rational fact-finder is, to the required degree, convinced that the statement is true; so if the burden is not met, this means that such a fact-finder is not convinced to that degree that the statement is true; he need not be convinced that it is false. The burden of production specifies which party has to offer evidence on an issue at different points in a proceeding. If such evidence does not meet the (low) proof standard for this burden, the issue is decided in the final stage by the trier of fact according to the burden of persuasion. Both these burdens are assigned as a matter of law. By contrast, the *tactical burden of proof* is a matter of tactical evaluation in that a party must assess the risk of ultimately losing in respect of an issue if no further evidence concerning that issue is produced." *See* Prakken & Sartor, *supra* note 142, at 228

144 In R. v. DPP *ex parte* Kebilene, [2000] 1 Cr. App. R. 275, 324, Lord Hope of Craighead explained that "[s]tatutory presumptions which placed an 'evidential' burden on the accused, requiring the accused to do no more than raise a reasonable doubt on the matter with which they deal, do not breach the presumption of innocence." *See also* Ian Dennis, *Reverse Onuses and the Presumption of Innocence: In Search of Principle*, Crim L. Rev. 905 (20005) [hereinafter "Dennis"]. *See also* R. v. DPP *ex parte* Kebilene, [2000] 1 Cr. App. R. 275 at 324 (Lord Hope); R. v. Lambert, [2002] 2 A.C. 545.

145 An authority on evidence explains how these exceptions can be recognized: "A statutory exception to the rule that the legal burden of proof in a criminal case is upon the prosecution may be express or implied. This is so whether the offence is triable summarily or on indictment. Where a linguistic construction does not clearly indicate where the burden of proof lies, the court may look to

other factors in order to discover the intention of Parliament. These considerations include the mischief at which the provision is directed, and also practical consideration such as, in particular, the relative degrees of the likely difficulty for the respective parties in discharging the burden." *See* P. B. Carter, *Cases and Statutes on Evidence* 44 (1990).

146 *See e.g.* the United Kingdom's Prevention of Corruption Act 1916, s. 2 which provides that where in any proceedings for an offense under the Prevention of Corruption Act 1906 or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift or other consideration has been offered or received by a person in the employment of His Majesty or any Government Department or a public body such money, gift or consideration shall be deemed to have been paid or given corruptly *unless the contrary is proved.* On how U.K. courts have treated this statute, *see e.g.* R. v. Evans-Jones, (1923) 87 J.P.R. 115 and R. v. Braithwaite, [1983] 1 W.L.R. 385, [1983] 2 All E.R. 87.

147 The "reading down" of a statute is triggered "where statutory language bears two meanings such as legal and evidential burdens of proof, the narrow meaning (i.e. evidential burden) is applied in order to ensure that the legislation is valid. This must be contrasted with 'reading in' or 'reading out' words in order to uphold the validity of statutes." *See* Salako, *supra* note 143, at 32.

148 Dennis, *supra* note 144, at 904. According to Dennis when a challenge is made to the compatibility of a reverse onus under the United Kingdom Human Rights Act 1998, the court should adopt a three-stage process in reaching its decision: first, interpreting the statute, by asking whether the provision in question, interpreted in accordance with the ordinary principles of construction, place a burden on the accused. If so, is it a legal or an evidential burden? If it is evidential, no further inquiry need be made about compatibility with fair trial rights. If it is a legal burden, the court must move to the second stage to assess the question of compatibility. This stage involves an inquiry into the justification of the reverse onus whether it serves a legitimate aim and whether it is proportionate to that aim. If the answer is in the affirmative, then the provision is an acceptable qualification to the presumption of innocence. The defendant will then bear the burden of proof on the matter in question, although to a lower standard of proof than the prosecution (namely the balance of probabilities). If the answer is in the negative, the court must move to the third stage which inquires whether the court can "read down" the burden to an evidential one. If it can, it should do so. If it cannot, the court should make a declaration of incompatibility of the reverse onus provision.

149 *See e.g.* Barnes v. United States, 412 U.S. 837, 843–44; Tot v. United States, 319 U.S. 463, 467; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 42.

150 County Court of Ulster County. v. Allen, 442 U.S. 140 (1979).

151 A leading authority on evidence has described " 'presumption' as the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.' " *See* McCormick on Evidence (6th ed. 2009) at §342.

152 *Id.*

153 For example: (1) if the prosecution proves that the defendant broke and entered a dwelling, this triggers a presumption that the accused intended to commit an indictable offense; or (2) the prosecution proves that the defendant possessed a narcotic which gives rise to a presumption that the accused intended to traffic in drugs; or the prosecution is able to prove that the defendant occupied the seat of an automobile which triggers a presumption that the accused had care and control of the vehicle.

154 A mandatory presumption is a far more troublesome evidentiary device, for it may affect not only the strength of the "no reasonable doubt" burden but also

the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. *See e.g.*, Turner v. United States, 396 U.S. 398 (1970), at 401–02, and n. 1; Leary v. United States, 395 U.S. 6, 30; United States v. Romano, 382 U.S. 136, 137, and n. 4, 138, 143; Tot v. United States, *supra* note 149, at 469; and County Court of Ulster, *supra* note 150.

155 R. v. Noble, [1997] 1 S.C.R. 874, Lamar C.J. dissenting at ¶36.
156 Murray v. Director of Public Prosecutions (1992), 97 Cr. App. R. 151.
157 *Id.* at 155 [Emphasis added].
158 R. v. Noble, [1997] 1 S.C.R. 874, Lamar C.J. dissenting at ¶40.
159 R. v. Cowan, [1995] 3 W.L.R. 818.
160 *Id.* at 822.
161 R. v. Noble, [1997] 1 S.C.R. 874, Lamar C.J. dissenting at ¶42.
162 *See* Criminal Evidence (Northern Ireland) Order 1988, S.I. 1988/1987 (N.I. 20), art. 4 and Criminal Justice and Public Order Act 1994 (U.K.), 1994, c. 33, s. 35.
163 R. v. Noble, [1997] 1 S.C.R. 874, Lamar C.J. dissenting at ¶42.
164 Trompert v. Police, [1985] 1 N.Z.L.R. 357 (C.A.).
165 [1959] N.Z.L.R. 1031 (S.C.).
166 *Id.* at 358.
167 R. v. Jenkins, (1908), 14 C.C.C. 221, 230, 14 B.C.R. 61 (C.A.), *cited in* R. v. Noble, [1997] 1 S.C.R. 874, Lamar C.J. dissenting, ¶5.
168 That is to say, all of the evidence to sustain a conviction has been put forth by the prosecution consistent with its burden of proof. The threshold question here is whether the prosecution has adduced evidence which, if believed, would establish proof of guilt beyond a reasonable doubt. *See* R. J. Delisle, *Silenece at Trial: Inferences and Comments* 313, 318–19 (5th ed. 1997).
169 County Court of Ulster County v. Allen, 442 U.S. 140 (1979) (a permissive presumption read into a New York statute making the presence of a firearm in an auto presumptive evidence of illegal possession of the weapon by all occupants of the vehicle).
170 *Id.* at 165.
171 *Id.* at 167.
172 A *prima facie* case is "one in which the prosecution case is complete on all inculpatory elements of the offence and sufficient in the sense that a reasonable trier of fact could find that the evidence comes up to proof beyond reasonable doubt." The distinction between the application of the presumption of innocence at the close of the prosecution's case and at the end of the trial has been explained as follows: At the close of the state case the question to be asked, is whether the evidence, *if believed*, establishes proof beyond a reasonable doubt. At the end of the trial the presiding officer must then consider whether he believes the prosecution evidence. This approach, it was submitted, would be consistent with the presumption of innocence as a constitutional right determining the allocation and standard of proof, a logical consequence of which is that an evidential burden cannot shift to the accused until the prosecution has established a *prima facie* case. *See* R. v. P. (MB) [1994] 1 S.C.R. 555 and R v. Noble [1997] 1 S.C.R. 874.
173 *See* Attorney General v. Hui Kin-hong, [1995] 1 H.K.C.L.R. 227.
174 In *R. v. P. (M.B.)*, the accused was charged with indecent assault and with having sexual intercourse with his niece when she was under the age of 14. The primary issue on appeal was whether the trial judge erred by allowing the Crown to reopen its case after defense counsel indicated its intention to present an alibi defense and the Crown thereby realized that it had gotten the relevant dates of the assaults wrong. The Canadian Supreme Court put this burden (drawing of

adverse inferences from accused's silence) in these terms: "Once . . . the Crown discharges its obligation to present a *prima facie* case, such that it cannot be non-suited by a motion for a directed verdict of acquittal, the accused can legitimately be expected to respond, whether by testifying him or herself or calling other evidence, and failure to do so may serve as the basis for drawing adverse inferences. . . . In other words, once there is a 'case to meet' which, if believed, would result in conviction, the accused can no longer remain a passive participant in the prosecutorial process and becomes—in a broad sense—compellable. That is, the accused must answer the case against him or her, or face the possibility of conviction." [1994] 1 S.C.R. 555, 579.

175 This burden, according to Glanville Williams, is one of "introducing enough evidence to be placed before the jury or other tribunal of fact." *See* Glanville Williams, *The Evidential Burden: Some Common Misapprehensions*, 127 N.L.J. 156 (1977).

176 Jayasena v. R., [1970] 1 All E.R. 219 at 221 (Lord Devlin) *cited in* Salako, *supra* note 143, at 20.

177 *See supra* note 143 and accompanying text.

178 *See* Manfroni, *supra* note 63, at 71.

179 *Id. at* 69 (2003).

180 *See* D.W. Elliott, Phipson's Manual of the Law of Evidence 226 (2004).

181 *Id.*

182 *See e.g.*, R v. Edwards, R. v. Hunt; R v. Cinous, [2002] 2 S.C.R. 3, 2002 SCC 29; *see also* Alex Stein, *After Hunt: The Burden of Proof, Risk of Non-Persuasion and Judicial Pragmatism*, 54 Miami L. Rev. 570 (1991). For a contrary position, *see* R. v. Oakes, [1992] 2 S.C.R. 10, 13 CR (4th) 129, 72 CCC (3d) 1 (statutory provisions that shift the burden of proof onto the accused infringes on the presumption of innocence).

183 R. v. P. (M.B.), [1994] 1 S.C.R. 555, 579.

184 *See* 9 Wigmore, Evidence §2486, at 291 (3rd ed. 1940); *see also* 1 Michael H. Graham, *Handbook of Federal Evidence* §301.2, at 138 (4th ed. 1996) (cites caution and convenience, public policy, fairness, and probabilities as among the many factors that affect the allocation of the burden of persuasion between the parties); and Roger C. Park, David P. Leonard & Steven H. Goldberg, *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials* §4.05 (2nd ed. 2004).

6 A framework for balancing competing rights and interests

1 *See generally* John Locke, *Treatise (Second) of Civil Government* §§4, 14, 87–89, 95, 135–38, 228–29 (Vere Chappel ed., Cambridge Univ. Press 1994) (1690).

2 For an exhaustive treatment of this subject, *see* Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law,* 34 Int'l L. 149, 163–74 (2000). *See also* C. Raj Kumar, *Corruption and Human Rights,* Frontline, September 14, 2002 (India); and C. Raj Kumar, C*orruption and Human Rights, Part II,* Frontline, October 12, 2002 (India) [hereinafter "Kumar II"].

3 *See* Louis Henkin, The Age of Rights 1–5 (1990) [hereinafter "Age of Rights"].

4 *Id.*

5 International Covenant on Civil and Political Rights, opened for signature December 16, 1966, 993 U.N.T.S. 171, 6 I.L.M. 368 (entered into force March 23, 1976).

6 International Covenant on Economic, Social and Cultural Rights, opened for signature December 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force January 3, 1976) [hereinafter "ICESCR"].

7 *See* Kamal Hossain, *Introduction: Permanent Sovereignty Over Natural Resources, in* Legal Aspects of the New International Economic Order 33, 33–34 (Kamal Hossain ed., 1980); Hasan S. Zakariya, *Sovereignty Over Natural Resources and The Search for a New International Order, in* Legal Aspects of the New International Economic Order 208 (Kamal Hossain ed., 1980).

8 *See* G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., U.N. Doc. A/RES/1803 (December 14, 1962).

9 *See, e.g.* Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, at 52 (1973) (strongly reaffirms the inalienable rights of states to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters); Declaration on the Establishment of a New Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9559, at 3 (1974) ("art. 4: The new international economic order should be founded on full respect for the following principles: (e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer or ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right."); Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 50 (1974) ("art. 2(1): Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.").

10 This discussion draws on Chapter 3 of my book. Ndiva Kofele-Kale, *International Law of Responsibility for Economic Crimes* (1995).

11 This was Nauru's contention in its 1992 claim against Australia in the International Court of Justice. Nauru claimed that Australia, as an Administering Authority for Nauru under the United Nations Trusteeship System provided for by Chapter XII of the U.N. Charter, breached its obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources by exploiting certain phosphate lands before Nauru's independence. *See* Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 I.C.J. 240, 243 (June 26); *see also* Antony Anghie, *The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case*, 34 Harv. Int'l L.J. 445 (1993).

12 *See* Louis Henkin, *International Law: Politics and Values* 198 (1995).

13 *See* Age of Rights, *supra* note 3, at 1–5.

14 *See* Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/41/53, at 186 (1986).

15 *See* David Hess & Thomas W. Dunfree, *Fighting Corruption: A Principled Approach – The C2 Principles (Combating Corruption)* 596 (2000) [hereinafter "Hess & Dunfee"] cited in *In-Depth Study on the Linkages Between Anti-Corruption and Human Rights* 8 (Lyal S. Sunga & Ilaria Bottigliero, 2007) [hereinafter "Anti-Corruption & Human Rights"].

16 Hess & Dunfee, at 596–97 cited in Anti-Corruption & Human Rights, at 8.

17 *See* Office of the High Comm'r for Human Rights, Fourth Report of the Independent Expert on the Right to Development, U.N. Doc. E/CN.4/WG.18/2 (Dec. 2001) (by Arjun Sengupta) cited in Anti-Corruption & Human Rights, *supra* note 15, at 23.

18 Anti-Corruption & Human Rights, *supra* note 15, at 3.

19 *See International Council on Human Rights Policy, Corruption and Human Rights: Making the Connection 1*, 25–26 (2009).
20 *Id.*
21 *Id.*
22 *Id.*
23 ICESCR, Art. 11(2).
24 *Id.,* Arts. 12.
25 *Id.,* Arts. 13 and 14.
26 1989 United Nations Convention on the Rights of the Child.
27 ICESCR, Art. 6(1).
28 *See* Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution,* 23 N.Y.U. J. Int'l L. & Pol. 795, 796 (1995) [hereinafter "Sullivan"].
29 That is, rights that are central to the protection of human dignity, notably the peremptory norms prohibiting extra-legal killings, genocide, slavery, torture and systematic racial discrimination, clearly must prevail in all situations of conflict with the right to manifest religion or belief. This set of core rights cannot be derogated and must prevail over all other rights in all circumstances. *Id.* at 817.
30 *Id*. at 816.
31 *Id.*
32 *See* Eva Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms,* 27 Hum. Rts. Q. 294 (2005) [hereinafter "Brems"].
33 Sullivan, *supra* note 28, at 814–15.
34 *Id.*
35 *Id.* at 821.
36 *Id.*
37 *Id.*
38 *Id.* at 822.
39 For example, if the religion in question is one practiced by a minority group, the impact of the proposed restrictions on the rights of minorities under article 27 of ICCPR must be taken into account.
40 Sullivan, *supra* note 28, at 823.
41 Two types of conflict occur in the specific context of the right to a fair trial under Art. 6 of the European Convention. First, there may be "internal" conflicts between two aspects of the right to a fair trial, in other words between the right to a fair trial with regard to two disparate parties. The second type of conflict relates to "external" conflicts between the right to a fair trial and other human rights, such as the right to the protection of one's private life, or the right to freedom of expression. Brems, *supra* note 32, at 302.
42 Brems identifies three likely sources of human rights conflict: 1) conflicts arising at the level of standard-setting, for example, the right not to be discriminated against on the basis of race pitted against the right to freedom of expression or 2) at the level of interpretation of human rights provisions or 3) between the rights of different persons or between the different rights of one person. *Id.* at 301.
43 *Id.* at 302.
44 *Id.* at 303.
45 *Id.*
46 *Id.*
47 *Id.*
48 *See* Robert S.K. Lee, *The Application of Hong Kong Basic Law in Criminal Litigation* (Dec. 2000) (unpublished paper submitted to the 14th International

Conference of the International Society for the Return of Criminal Law in Sandton, South Africa), available at www.isrel.org (follow "Conference Papers" hyperlink) (last accessed March 13, 2011). Lee has in mind the development of a "grand theory" or what he calls a "coherent analytical framework of human rights" where rights are ranked in some kind of normative order with the more important rights occupying the summit of the hierarchy while the less important ones are relegated to the bottom of the heap.

49 Sullivan, *supra* note 28, at 823.

50 These are the right to a fair hearing which includes an appraisal of the procedure as a whole, i.e. the assessment of the evidence in light of the entire procedure; the right to a public hearing; the right to access to a court and the right to the execution of binding judgments. Brems, *supra* note 32, at 296–97.

51 *Id.* at 298.

52 *Id.* at 299.

53 *Id.*

54 *Id.*

55 *Id.* at 301.

56 Sullivan, *supra* note 28, at 823.

57 A principle of constitutional interpretation favored by several European constitutional courts, *See e.g.* Spain's Constitutional Court Judgment No. 154/2002, of July 18; German Federal Constitutional Court Judgment BVerfGE 28, 243 [260 f.]; 41, 29 [50]; 52, 223 [247, 251].

58 *See* Chapter 4 *supra* and accompanying text.

59 *See* Chapters 4 and 5 *supra* and accompanying text.

60 It is expressed according to the Roman law principle: *ei qui affirmat non ei qui negat incumbit probation* (he who asserts a matter must prove it, but he who denies it need not prove it).

61 *See* Sir William Blackstone, *Commentaries on the Laws of England*, vol. 4, ch. 27. Available at www.lonang.com/exlibris/blackstone (last accessed February 27, 2011) [emphasis added].

62 *See* Chapter 1 *supra* and accompanying text.

63 *See* Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 46 (2nd ed., 1997) cited in Geraldina González de la Vega, *Two Different Approaches in Constitutional Interpretation with Special Focus in Religious Freedom. A Comparative Study between Germany and the United* States, 795, 807 XLI Boletin Mexicano De Derecho Comparado (2008) [hereinafter "Vega"].

64 *See* R. Alexy, *Derechos, razonamiento jurídico y discurso racional,* 1 Isonomia (1994) cited in Vega, *supra* note 3, at 807.

65 Vega, *supra* note 63, at 807.

66 *See* Nikolett Hos, *The Principle of Proportionality in the Viking and Laval Cases: An Appropriate Standard of Judicial Review,* EUI Working Paper Law 2009/06.

67 *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 Am. U. L. Rev. 1 (1982).

68 Collective rights are used here not in the narrow sense of rights asserted by a group like the Francophones of Quebec, Canada or by ethnic minorities who exercise their rights as a juridical personality. *See e.g.* Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) 172 (2007) (recognizing the Saramaka people of Suriname as a juridical personality); Kevin Gumne at al v. La République du Cameroun, Afr. Comm'n Hum. Peoples R., Comm. No. 266/2003 (holding that the people of Southern Cameroon can legitimately claim to be a "people" with a distinct identity which confers certain collective rights).

69 *See* Ronald Dworkin, *Liberal Community* 77 Calif. L. Rev. 479, 493 (1989) quoted in Louis Henkin, Sarah H. Cleveland, Laurence R. Helfer, Gerald L. Neuman & Diane F. Orentlicher, *Human Rights* 324 (2nd ed., 2009).

70 *See* Steven Lukes, *Individualism* 45–51 (1973) cited in Henkin et al., *supra* note 69, at 324.
71 *Id.*

Appendices

1 Translated from the original Spanish by Diego Ernesto Gómez-Cornejo, J.D. (SMU Dedman School of Law), Attorney at Law.
2 I have been unable to determine what "V.E." stands for; it may be an Argentinean abbreviation referring to a particular judge, court or doctrine, but I have been unable to confirm its meaning.
3 The Court may have actually meant "dissimulate" (*disimular*) rather than "simulate" (*simular*), but I left the Court's language unchanged.

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