Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes

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"It is better that ten guilty persons escape, than that one innocent suffer."[1]

–William Blackstone.

I. Introduction

All human rights are by definition equal but, like George Orwell's warped construct of equality, some rights are considered more equal than others.[2] As a consequence, in the process of asserting these human rights, conflicts arise between an asserted right and those other competing rights (whether individual or collective) that would be affected by the asserted right. Since all competing human rights cannot be regarded as fundamentally equal, a system needs to be put in place that is capable of reconciling these rights when they collide—which they will at some point. Such a system would require a balancing of these rights while taking into consideration the situational status or value,[3] to borrow Lee's fetching terminology, of each. What Lee has in mind is the development of a "grand theory" or what he calls a "coherent analytical framework of human rights,"[4] 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.

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1. *See* SIR WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND ch. 27 (University of Chicago Press 1979) (1765) [hereinafter Blackstone's Commentaries], *available at* http://www.lonang.com/exlibris/blackstone (last visited Feb. 27, 2006).

2. *See* GEORGE ORWELL, ANIMAL FARM (1st World Library 2004) (1945) (where all animals are equal though some are more equal than others).

3. *See* Robert S.K. Lee, The Application of Hong Kong's Basic Law in Criminal Litigation (December 2000) (unpublished paper submitted to the 14th international Conference of the International Society for the Return of Criminal Law in Sandton, South Africa), *available at* http://www.isrel.org (follow "Conference Papers" hyperlink) (last visited Feb. 13, 2007).

4. *Id.*

The approach here is much more modest; it is to sketch the *outlines* of an analytical system for resolving the unavoidable conflicts between competing human rights: the individual right to be presumed innocent versus the collective right to a corruption-free society.[5] At issue is whether, in the global war against official corruption, placing a legal burden of proof on a public official accused of illicit enrichment is compatible with the accused person's right to the presumption of innocence guaranteed in numerous international human instruments, national constitutions and statutory laws. Should people who have been entrusted with high public functions, such as heads of state and government, senior government, judicial or military officials and senior executives of publicly-owned corporations who, soon after their appointment or election to office, suddenly become rich without there being any rational explanation to such accumulation of wealth, be given an opportunity to explain how they acquired their sudden prosperity? Or, should it be automatically assumed that this sudden wealth was obtained through corrupt practices? In which event, they lose all claims to the due process protections guaranteed them under treaty law and customary international law.

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[6] and municipal criminal statutes[7] that penalize the possession of inexplicable wealth. These conventions and criminal

5. *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 LAW. 149 (2000) (arguing that there is sufficient state practice to support a claim for an emerging international customary law prohibiting corruption in all societies while guaranteeing to all the right to a corruption-free society as a fundamental human right).

6. *See, e.g.*, Inter-American Convention Against Corruption, Mar. 29, 1996, 1996 U.S.T. LEXIS 60, 35 I.L.M. 724, *available at* http://www.oas.org/juridico/english/Treaties/b-58.html; *see also* African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5, *available at* http://www.africa-union.org/official_documents/treaties_%20Conventions_%20protocols/conventio%20protocols/convention%20on%20combating%20corruption.pdf; *see also* United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/58/422 (Oct. 31, 2003), *available at* http://www.unodc.org/pdf/crime/convention_corruption/signing/convention-e.pdf; *see also* United Nations Convention Against Illicit Traffic of Narcotic Drugs and Psychotropic Substances, art. 5, Dec. 20, 1988, 1988 U.S.T. LEXIS 194, 28 I.L.M. 497, *available at* http://www.unodc.org/pdf/treaty_adherence_convention_1988.pdf ("Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property 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"); *see also* United Nations Convention Against Transnational Organized Crime, art. 7, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001), *available at* http://untreaty.un.org/english/treatyevent2003/treaty_1.htm.

7. For a representative sample of such statutes, *see* Cyprus: The Confiscation of Proceeds of Trafficking of Narcotic Drugs and Psychotropic Substances Law of 1992; art. 4 (1), *available at* http://www.unodc.org/unodc/legal_library/cy/legal_library_1994-07-11_1994-9.html:

(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;

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

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see also Ghana: Ghana Const. ch. 24 § 286 (1992), *available at* http://www.ghanareview.com/Gconst.html:

(1) "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[:]
   (a) within three months after the coming into force of this Constitution or before taking office, as the case may be,
   (b) at the end of every four years; and
   (c) at the end of his term of office.
(2) 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. . . .
(4) 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 India: The Prevention of Corruption Act, ch. V, § 20(1) (1988), *available at* http://www.lexadin.nl/wlg/legis/nofr/oeur/lxweing.htm:

(1) Where, in any trial an offence punishable under Section 7 or Section 11 or Clause (a) or Clause (b) of sub-section (1) of Section 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 Section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate;

see also Kenya: Anti-Corruption and Economic Crimes Act, No. 3 (2003) § 40(2), *available at* http://www.kacc.go.ke.POC.asp:

(2) 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
   (b) 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.

(Under the Act "Corruption" means:

. . . b) bribery; c) fraud; d) embezzlement or misappropriation of public funds; e) abuse of office; f) breach of trust; or 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.)

Id. pt. I (defining the term "Corruption"); *see also* Nigeria: Corrupt Practices and Other Related Offenses Act No. 5 (2000) § 8(2)(a)-(c) (Nigeria):

(2) 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-
   (a) 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
   (b) 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
   (c) 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, favour or disfavour as is mentioned in subsection (1)(a) or (b);"

see also Singapore: Misuse of Drugs Act § 17, *available at* http://statutes.agc.gov.sg/non_version/cgi_retreive.pl?actno=reved-185&doctitle=misuse%20of%20drugs%20act%0a&date=latest&,ethod=part:

> Any 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.

the performance of his functions."[8] 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. Constitutionally responsible officials who engage in corruption often use their exalted position to impede investigations and destroy or conceal evidence. Besides, pervasive corruption "weakens in vestigative and prosecutorial agencies to the point where gathering evidence and establishing its validity and probative value" can be problematic. For this and other reasons, some international anti-corruption conventions, as well as national constitutions and municipal criminal statutes, 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.

Reverse onus clauses raise some troubling human rights issues. These clauses by definition place restrictions on individual rights that offend the principle that everyone charged with a

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(Section 18 of the Act, dealing with the presumption of possession and knowledge of controlled drugs, states in relevant part:

(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.)

Id. § 18; *see also* United Kingdom: Prevention of Corruption Act, 1991, c. 64, § 2:

> 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;

see also Road Traffic Act, 1988, c. 52, § 5:

> 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 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;

see also Terrorism Act, 2000, c. 11, § 11:

> 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 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.

8. *See, e.g.*, Inter-American Convention Against Corruption, *supra* note 6, at art. IX; African Union Convention on Preventing and Combating Corruption, art. 8, *available at* http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm; *see also* 2004 United Nations Convention Against Corruption, *supra* note 6, at art. 20. The latter two treaties contain provisions on the crime of illicit enrichment that were clearly influenced by Article IX of the Inter-American Convention Against Corruption.

criminal offense shall be presumed innocent until proved guilty according to law. Blackstone in his *Commentaries on the Laws of England* touched on the public interest behind this bedrock due process principle when he said it was "[b]etter that ten guilty persons escape than that one innocent suffer."[9] This fundamental basis of the right to a fair trial is guaranteed in virtually all international human rights instruments[10] and entrenched in most national constitutions.[11] It is also found in the criminal law statutes of both civil law and common law jurisdictions.[12]

Several multilateral treaties now include the crime of illicit enrichment, which reverses the presumption of innocence by shifting the burden of proof as to how unexplained wealth was acquired by the accused,[13] as a weapon in the global war against corruption. Following this reversal of proof, the illicit enrichment is presumed to be proved against the accused unless he disproves it on the civil standard of a balance of probabilities—that is, until the contrary is proved or unless he can point to evidence to the contrary. As already pointed out, Article IX of the Inter-American Convention, which was among the first international conventions to include the crime of illicit enrichment, defines this crime as "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."[14] This and similar provisions found in the African Union Convention and the United Nations Convention are not operative, self-executing provisions, but require positive action by individual states; i.e., to take the necessary measures to legislate into law the crime of illicit enrichment.

9. *See* Blackstone's Commentaries, *supra* note 1, at ch. 27.

10. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A, at art. 14(2), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 *entered into force* Mar. 23, 1976 [hereinafter ICCPR]; *see also* European Convention on Human Rights, Sept. 3, 1953, art. 6(2), 213 U.N.T.S. 221 [hereinafter European Convention], *available at* http://www.hri.org/docs/ECHR50.html; *see also* American Convention on Human Rights, art. 8(2), 9 I.L.M. 673 (1970); *see also* African Charter of Human and Peoples' Rights, art. 7(1)(b), 21 I.L.M. 58 (1982).

11. *See, e.g.*, S. Afr. Const. 1996, § 35(3)(h), which guarantees to the accused "the right to be presumed innocent, to remain silent, and not to testify during the proceedings;" *see also* Constitution, Art. 77(2)(a) (1992) (Kenya) ("Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or pleaded guilty."). However, it would appear that this presumption in the Kenya Constitution, which is also found in the Nigerian Constitution, is qualified with a view to saving the illicit enrichment reversal of the burden of proof. Constitution, Art. 36(5) (1999) (Nigeria). The Constitution of Kenya demonstrates this qualification with the language: "Nothing contained in or done under authority of any law shall be held to be *inconsistent* with or in contravention of subsection (2)(a) to the extent that the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts. . . . " Constitution, Art. 77 (12) (a) (1992) (Kenya).

12. For instance, the newly harmonized Cameroon Criminal Procedure Code (CCPC) provides that "[a]ny person suspected of having committed an offence shall be presumed innocent until his guilt has been legally established in the course of the trial where he shall be given all necessary guarantees for his defence. The presumption of innocent shall apply to every suspect, defendant and accused." *See* CCPC § 8(1), (2) Law No. 2005/007. Cameroon is a bi-jural country combining both English common law and French civil law in its legal system. The CPC, which took over 30 years to draft, is an attempt to harmonize these two different legal traditions in the area of criminal procedure.

13. *See* African Union Convention on Preventing and Combating Corruption, *supra* note 8, at art. 8; *see also* United Nations Convention Against Corruption *supra* note 6, at art. 20.

14. *See* Article IX of the Inter-American Convention, *available at* http://www.unodc.org/unodc/crime_cicp_committee_corruption_session_6.html, which proved to be a stumbling block in the application of this provision in the United States and Canada with both countries objecting to its inclusion on the ground that it violated their constitutional presumption of innocence. Aside from the Canadian and American reservations, there has been no other reservation or understanding to Article IX. Despite the constitutional presumption of innocence in some OAS member states, the crime of illicit enrichment has been added to the penal codes

A. Thesis Statement

This article will examine the juridical basis of the right of an accused in a corruption action to be presumed innocent until proved guilty by the requisite standard of proof by the prosecution and the rationale for relaxing this right, which is guaranteed all accused persons, by shifting the burden to the accused to disprove his guilt in order to advance an overriding public interest. The conflict between these two sets of rights, one individual and the other collective, raises a number of questions, which will be addressed in this article. More generally, it brings to the fore the weight to be given the due process protections found in all international human rights instruments, as well as whether these protections can be derogated in favor of reverse burden provisions and under what circumstances a court will justify any derogations from the right to presumption of innocence in criminal trials. Specifically, the article intends to find out whether, in official corruption proceedings, the right of an accused to be presumed innocent of the crime he is charged is an absolute right that is not subject to any derogation, or whether the presumption of innocence simply enjoys a preeminence among all other individual rights such that any derogation from it in the context of global war against corruption is permissible. Should the right of an accused to be presumed innocent be accorded special protection at the expense of other fundamental social, 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 (society as a whole) not before the court during a corruption trial? Would the process of reconciling conflicting human rights require courts to derogate from the *individual* right to presumption of innocence in favor of placing the burden on the accused to prove his innocence? Finally, what should be the nature of the burden of proof placed on the accused in a corruption action: a persuasive or legal burden requiring the defendant to disprove, on a balance of probabilities, the prosecution's presumption of his guilt, or an evidentiary burden where the defendant is only required to point to evidence that contradicts the state's presumption of his guilt? In seeking answers to these questions the article will explore international jurisprudence as well as common law and civil law precedents on the subject.

The article breaks from conventional jurisprudence on reverse onus clauses, striving to save these exceptions to the presumption of innocence from constitutional invalidation by reading them as imposing only an evidential burden on the accused. This approach leaves undisturbed the prosecution's legal burden of proving the guilt of the accused on each element of the offense under the demanding "beyond a reasonable doubt" standard. It also places the prosecution at a severe disadvantage in adducing evidence to prove every essential element of the crime of official corruption. Allocating the burden of persuasion to a party in a case where there is little or no evidence of the facts in issue is to deal a fatal blow to that party's case. This is the precise outcome to be expected in an official corruption proceeding where the accused is a high-ranking public official. Corruption by nature is a clandestine pursuit, and those who engage in corrupt activities in the course of their

of some signatories of the Inter-American Convention. Article 20 of the United Nations Convention Against Corruption drew similar objections from the delegations of the Russian Federation and the member states of the European Union who were unsuccessful in their attempts to have this provision on illicit enrichment deleted from the final text. *See* Revised Draft U.N. Convention Against Corruption, Ad Hoc Committee for the Negotiation of a Convention against Corruption, 6th Sess., agenda item 3, art. 25, note 110, U.N. Doc. A/AC. 261/3/Rev. 4.

official functions tend not to do so openly. As a result, access to essential information to build a case against such officials is difficult to reach. In order to correct this information deficit, it is necessary to place both the evidentiary and persuasive burdens on the accused while allowing him to discharge the latter on the less demanding balance of probabilities standard of proof. A public official found in possession of substantial wealth that bears little or no relation to his earnings during the performance of his functions should be required to bear the burden of producing evidence to establish the lawful origins of his wealth and to be able to persuade a fact finder that the wealth in question was more likely than not obtained through legal and legitimate means. This article therefore argues that the reverse onus clause in the offense of illicit enrichment is compatible with the presumption of innocence (i) to the extent that reasonable limits can be placed on this principle that can be justified in a free and democratic society, and (ii) so long as it is interpreted to have expressly placed an evidentiary burden on, and impliedly shifted the legal burden to, the accused to prove the lawful and legitimate origins of his wealth on the balance of probabilities standard.[15]

B. Organization of Article

Part II of this article will briefly review the basic due process protections treaty law and customary international law afford all accused persons in criminal trials in an effort to ascertain whether the right to a fair trial and the presumption of innocence that accompanies it constitute essential judicial guarantees that are not subject to derogations under any circumstances. Part III will situate the presumption of innocence doctrine in the jurisprudence of the world's major legal systems, in light of treaty law's strong commitment to judicial protections in general and the most basic and fundamental of due process guarantees as indispensable guarantees for the protection of human rights. Part IV will explore statutory and judicial derogations from these guarantees through the reverse burden clauses. The goal here is to identify the quantum of proof that an accused should be required to carry in illicit enrichment cases within the framework of balancing individual rights and community-wide interest in ridding society of the plague of official corruption. Finally, Part V will lay out a framework for balancing and "situationalizing" competing human rights or public interests. On the one hand, there is the right of a high ranking public servant accused of the crime of illicit enrichment to both a fair trial and to be presumed innocent until proved guilty beyond a reasonable doubt by the state. On the other hand, there is society's right to the enjoyment of the wealth and resources of the nation without having these diverted into the hands of a few corrupt officials and their associates and family members.

II. Presumption of Innocence in International Law

A. The Right to Due Process

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.[16] Treaty law guarantees

15. *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 Mod. 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 (a statutory provision that shifts the burden of proof on the accused and infringes on the presumption of innocence).

16. These treaty-based due process protections are enforceable in the courts of states that are parties to the various instruments.

everyone the right to a fair trial.[17] 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"[18] of fairness include, among others,[19] the right to the presumption of innocence.[20] 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."[21] The Human Rights Committee (HRC or Committee)[22] 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."[23] 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

17. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, at art. 10 [hereinafter Universal Declaration]; *see also* ICCPR, *supra* note 12, at art. 14(1); *see also* European Convention, *supra* note 12, at art. 6(1); *see also* Organization of American States, American Declaration of the Rights and Duties of Man, art. XXVI, *available at* http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm; *see also* American Convention on Human Rights, *supra* note 12, at art. 8; *see also* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/RES/827, at art. 20(1) [hereinafter Yugoslavia Statute]; *see also* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, U.N. Doc. S/RES/955 (1994), at art. 19(1) [hereinafter Rwanda Statute]; *see also* Rome Statute of the International Criminal Court, at arts. 64(2), 67(1), U.N. Doc. A/Conf. 183/9 [hereinafter ICC Statute]. 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.

18. 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, art. 14 (1984), U.N. Doc. HRI\GEN\1\Rev.1; OC-11/90, Inter-Am. C.H.R. Advisory Opinion, *Exceptions to the Exhaustion of Domestic Remedies*, OAS/Ser.L./V/III.23, doc. 12, para. 24.

19. 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.

20. *See* Universal Declaration of Human Rights, *supra* note 19, art. 11; African Charter on Human and Peoples' Rights, art. 7(1)(b), 21 I.L.M. 58; paragraph 2(D) of the African Commission Resolution; American Declaration of the Rights and Duties of Man, *supra* note 19, at art. XXVI; American Convention on Human Rights, *supra* note 12, at art. 8(2); European Human Rights Convention, art. 6(2), *available at* http://www.hri.org/docs/ECHR50.html; *see also* Yugoslavia Statute, *supra* note 19, at art. 21(3); Rwanda Statute, *supra* note 18, at art. 20(3); *see also* ICC Statute, *supra* note 19, at art. 66; *see also* Standard Minimum Rules for the Treatment of Prisoners, Rule 84(2), U.N. ECOSOC/RES/663 C (Jul. 31, 1957); *see also* European Prison Rules, Rule 91, *available at* http://www.uncjin.org/Laws/prisrul.htm.

21. European Convention, *supra* note 12, at art. 6(2).

22. 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."); Human Rights Committee Annual Report to the U.N. General Assembly, U.N.DOC. A/49/40, 50 (1994) ("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).

23. *See* General Comment 13, *supra* note 20, at para. 7, *available at* http://www1.umn.edu/humanrts/gencomm.

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."[24] 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.[25] 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 have an impact on the presumption of their innocence.[26]

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24. *Id.*

25. *See, e.g.*, Law Office of Ghazi Suleiman v. Sudan, African Commission on Human and Peoples' Rights, Comments 222/98, 229/99 (2003) (Negative publicity carried by State officials presuming the guilt of petitioners violated their right to be presumed innocent, guaranteed by Article 7(1)(b) of the African Charter); Media Rights Agenda v. Nigeria, African Commission on Human and Peoples' Rights, Comment 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, Comment 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, Comment 137/94, 139/94, 154/96, 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 Article 7.1(b) has occurred); Annette Pagnoulle v. Cameroon, African Commission on Human and Peoples' Rights, Comment 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, app. 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"); *see also* 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 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 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); *see also* Suárez Rosero Case [1997] *IACHR 8* (Nov. 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).

26. For instance, 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.

Treaty law and the jurisprudence of international tribunals have interpreted the presumption of innocence as not limited solely to the treatment the accused receives 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.[27]

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 in 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.[28]

B. Principle of "Equality of Arms" Between the Parties

The right to a fair hearing lies at the heart of the concept of a fair trial.[29] 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,[30] 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.[31] 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.[32] 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 equal footing to that of the

27. 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* Inter-Am. C.H.R., Annual Report, 1996, OEA/Ser.L/V/II.95, doc. 7, para. 4, Peru.

28. *See* Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation").

29. *See, e.g.*, Universal Declaration *supra* note 19, at art. 10; *see also* ICCPR, *supra* note 12, at art. 14(1); European Convention, *supra* note 12, at art. 6(1); *see also* American Declaration of the Rights and Duties of Man, *supra* note 19, at art. XXVI; American Convention on Human Rights, *supra* note 11, at art. 8; Yugoslavia Statute, *supra* note 19, at art. 20(1); Rwanda Statute, *supra* note 19, at art. 19(1); ICC Statute, *supra* note 19, at arts. 64(2), 67(1).

30. 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, comm.. no. 207/1986, U.N. Doc. Supp. No. A/44/40 (July 28, 1989), at 210.

31. *See* European Court judgments in the cases of Ofrer and Hopfinger, Nos. 524/59 and 617/59, Dec. 19.12.60, Y.B. 6, at 680, 696.

32. *See* Kaufman v. Belgium, 50 Eur. Ct. H.R. 98, 115 (1986); *see also* Ofrer and Hopfinger, *supra* note 33.

prosecution. Its requirements include the right to adequate time and facilities to prepare a defense, including disclosure by the prosecution of material information.[33] 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 when 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.

III. Presumption of Innocence in Municipal Law

A. A Right Grounded in Constitutional Law

There are reams of literature on this area of the law and this article will not go over this well-trodden ground but lightly. It will briefly discuss some of the most important decisions of municipal courts on the presumption of innocence. 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. Its importance in the system of justice is evidenced by its inclusion in the constitutions of many of these countries.[34] For instance, section 35(2) of the South African Constitution guarantees the accused the right "[t]o be presumed innocent, to remain silent, and not to testify during the proceedings."[35] 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."[36] 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."[37] The significance of this presumption was explained by the United States Supreme Court in a case that predates *Woolmington*. In *Coffin v. United States*,[38] the

33. 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. Ct. H.R. 234, 247 (1997).

34. *See, e.g.*, European Constitution, art. II-108: "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 provides that, "No person shall be deprived of life liberty, or property without due process of law." Due process is not defined constitutionally, but 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 innocent. 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 (1895).

35. *See* S. Afr. Const. § 35(3)(h); *see also* Canadian Charter of Rights and Freedoms § 11(d) 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."

36. *See* Constitution, § 77(2)(a) (1987) (Kenya).

37. Woolmington v. Dir. Of Pub. Prosecutions, [1935] A.C. 462 (H.L.).

38. Coffin, 156 U.S. at 432.

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 proved 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 that "[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."[39] *Coffin* reversed a lower court's decision because the court had refused to instruct the jury in the concept of innocent until proven guilty: "The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty."[40] In *Taylor v. Kentucky*, the U.S. Supreme Court again described the presumption of innocence as a "[s]horthand 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. . . . '"[41] 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—the 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.[42] 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.[43]

In *Bell v. Wolfish*, the U.S. Supreme Court further clarified the parameters of the presumption of innocence by making it clear that the doctrine "serve[s] as an admonishment to the jury" to establish an accused person's guilt or innocence solely on the evidence the prosecution presents and "[n]ot 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."[44] 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[45] 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

39. *Id.* at 453.

40. *Id.* at 452.

41. Taylor v. Kentucky, 436 U.S. 478, 485 n.12 (1978). Thus, in *Taylor* the Court held that "[O]n 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." *Id.* at 490 (emphasis added).

42. The presumption of innocence "[c]autions 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." 9 J. WIGMORE, EVIDENCE § 2511, at 407 (3rd ed. 1940).

43. *Id.*

44. *See* Bell v. Wolfish, 441 U.S. 520, 533 (1979) (citing Taylor v. Kentucky, 436 U.S. 478, 485 (1978)).

45. *Id.* at 553.

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.[46]

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.[47] There is no fixed rule that determines how much evidence shall be required from the other party to meet, overcome or destroy the presumption.[48] 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.[49]

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. This requested instruction embodied exactly what the Supreme Court had previously held in the Coffin Case [sic], 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.*" And in that case the Supreme Court further said: "Undoubtedly, in criminal cases, the burden of establishing

46. *See* 9 J. Wigmore, A Treatise on the Anglo American System of Evidence in Trials at Common Law § 2511, at 407 (3d ed. 1940).

47. *See* John Huxley Buzzard, Richard May & M. N. Howard, Phipson on Evidence, §§ 91–93, at 36–38 (12th ed. 1976).

48. *See id.*

49. *Id.*

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."[50]

B. 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.*"[51] 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*[52] 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.

The need for establishing with moral certainty an accused person's guilt before inflicting punishment 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 person 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"[53] 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."[54] 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."[55]

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50. Culpepper v. State, 111 P. 679, 682–83 (Okla. Crim. App. 1910) (emphasis added).

51. *See* Blackstone's Commentaries, *supra* note 1.

52. In Re Winship, 397 U.S. 358, 363–64 (1970).

53. *See* Rinat Kitai, *Presuming Innocence*, 55 Okla. L. Rev. 257, 281 (2002) [hereinafter Presuming Innocence].

54. *Id.* at 280–81.

55. *Id.* at 282.

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.[56] 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.[57]

1. *Opposition to the Presumption of Innocence*

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 principle 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; and (4) the relationship between the State and the individual.[58] With respect to the first, some jurists consider the presumption of innocence as incompatible with the reigning framework of legal presumptions.

A frequently stated critique of the presumption of innocence is its alleged incompatibility with the reigning paradigm of legal presumptions which recognizes 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."[59] 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), and 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). The latter 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."[60]

Legal scholars have also rejected the presumption of innocence on logical grounds. According to this view, the assumption of a person's innocence vitiates the need for an investigation to be conducted and charges filed because 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."[61] 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."[62]

56. *See* Michael Hor, *The Burden of Proof in Criminal Justice*, 4 Sing. Acad. L.J. 267, 268 (1992).
57. *Id.* at 268.
58. Kitai, *supra* note 53, at 263–64.
59. *Id.* at 264–65.
60. *Id.* at 266.
61. *Id.* at 269.
62. *Id.*

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."[63] Viewed from this perspective, the "criminal justice system is not designed to grant moral absolution"[64] 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."[65] 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.[66]

These criticisms, notwithstanding, the presumption of an accused person's innocence in criminal proceedings remains the foundation stone of the individual's right to due process of law. In addition to being guaranteed in national constitutions and international human rights treaties, this principle is also grounded on sound public policy. Under international and municipal law, refusal to apply the presumption of innocence in a criminal proceeding violates the right of the accused to a fair trial as guaranteed by due process provisions found in human rights treaties and national constitutions. 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. The question to be tackled is whether restrictions can be placed on this right in furtherance of broad community-wide goals and interests without undermining this principle? Differently put, can the individual's right to be presumed innocent until proved otherwise be reconciled with the community's interest in enforcing national and international prohibitions against unjust enrichment by high-ranking public officials? This subject will be taken up in the next section.

IV. Reversing the Burden of Proof

Significant inroads on the presumption of innocence have been made by legislators and the courts with the result that both common law and statutory law now place a burden of

63. Kitai, *supra* note 53, at 270.

64. *Id.*

65. *Id.* at 270–71.

66. 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 it can bring before a judge.

proof on the defendant either expressly or by implication.[67] Treaty law has followed suit by carving out exceptions to due process guarantees ostensibly in the interest of promoting community-wide interests in the global war against official corruption. The potential clash between these conflicting human rights values—an accused person's right to presumption of innocence on the one hand and, the right to a corruption-free society, on the other—was first signaled by the United States and Canada during negotiations on the Inter-American Convention Against Corruption, whose Article IX contains a reverse burden provision.[68] The governments of these two countries objected to this provision on the ground that it violated their constitutional presumption of innocence.[69]

Constitutional considerations aside, the burden of proof has routinely been reversed even in countries where the presumption of an accused person's innocence is held sacrosanct. The case law on reverse burden of proof clauses can be grouped into three basic categories. The first category consists of cases where courts have justified shifting the legal and/or evidential burden to the defendant in order to give effect to a statutory exception, whether expressed or implied.[70] Such statutory exceptions have been justified on two separate

67. In *Woolmington*, Viscount Sankey himself recognized one such statutory burden of proof placed on a defendant who raises the defense of insanity and who must thereafter bear the statutory burden of proof on that issue. *See* Woolmington, *supra* note 39.

68. "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 property 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." Inter-American Convention Against Corruption, *supra* note 6, at art. IX.

69. Canada attached to its ratification of the convention a "Statement of Understanding," which reads as follows:

> Article IX provides that the obligation of a State Party to establish the offence of illicit enrichment shall be "Subject to its Constitution and the fundamental principles of its legal system." As the offence contemplated by Article IX would be contrary to the presumption of innocence guaranteed by Canada's Constitution, Canada will not implement Article IX, as provided for by this provision.

Reservations to the Inter-American Convention Against Corruption, *available at* http://www.oas.org/juridico/english/sigs/b-58.html (last visited on Aug. 28, 2005). The United States also attached a reservation to Article IX by way of the following "understanding":

ILLICIT ENRICHMENT. The United States of America intends to assist and cooperate with other States Parties pursuant to paragraph 3 of Article IX of the Convention to the extent permitted by its domestic law. 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 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.

Id.

70. *See, e.g.*, Rex v. Carr-Briant [1943] K.B. 607 (U.K. Prevention of Corruption Act, 1916, § 2); Regina. v. Edwards [1975] Q.B. 27 (U.K. Licensing Act, 1964, § 160(1)(a)); Regina v. Hunt [1987] 1 Eng. Rep. 1 (U.K. Misuse of Drugs Act, 1973, § 5(2); Regina v. Lambert [2001] 3 Eng. Rep. 577 (U.K. Misuse of Drugs Act, 1971, § 5); Sheldrake v. Dir. Of Pub. Prosecutions [2005] 1 Eng. Rep. 237 (U.K. Road Traffic Act, 1988, § 5(2) &

grounds: first, that the social good of crime reduction achieved by relaxing the prosecution's burden takes precedence over the defendant's rights and, second, that such burden shifting makes it easier for the state to prosecute certain regulatory crimes, such as driving without a license.[71] In the second category of cases, burden shifting has been justified on grounds of public policy or on practical considerations that require a fair balance be struck between the demands of the general interest of the community and the protection of individual rights.[72] In such cases, whether or not the court will shift the burden to the defendant will depend on such factors as whether the offense in question is serious, whether the defendant had to prove an essential element of the offense or establish a special exception,[73] whether the state is likely to run into serious evidential difficulties,[74] or whether the parties are economically unequal or whether the primary facts on which the defendant's explanation would be based are peculiarly within his own knowledge.[75] Instances of this category of cases abound in the jurisprudence of the United States tax courts which routinely impose on the taxpayer the burden of proving the accuracy of tax return filed,[76] or in cases where the taxpayer seeks a refund from the Internal Revenue Service,[77] or where the taxpayer is

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The Prevention of Terrorism Act, 2000, § 11(2); Ex parte Kebilene [2000] 2 A.C. 326 (U.K. Prevention of Terrorism (Temporary Provisions Act, 1989, § 16A, 16B)); R. v. Sin Yau Min (1991) 1 H.K.P.L.R. 88 (Hong Kong's Dangerous Drugs Ordinance (Cap 134)); Attorney General v. Lee Kwong-kut [1993] 3 Eng. Rep. 939 (Hong Kong's Summary Offences Ordinance § 30 (Cap. 228)); Attorney General v. Hui Kin-hong [1995] 1 H.K.C.L.R. 227 (Hong Kong's Prevention of Bribery Ordinance § 10(1)(a) (Cap 201)); R. v. Oakes [1986] 1 S.C.R. 103 (Canada's Narcotic Control Act); Salabiaku v. France, (1988) 13 Eur. H.R. Reg. 379 (French Customs Code, art. 414); Pham Hoang v. France (1993) 16 E.H.R.R. 53 (Various provisions of the French Customs Code).

71. *See* R. v. Edwards [1975] Q.B. 27; R. v. Hunt [1987] A.C. 352; *see also* Andrew Ashworth & Meredith Blake, *The Presumption of Innocence in English Criminal Law*, 306 CRIM. L. REV. 281 (1996).

72. *See Kebilene*, 2 A.C. 326.

73. *Id.*

74. *See, e.g.*, Regina v. Lambert, 3 Eng. Rep. 577; Ali and Jordan, [2002] 2 A.C. 545 (Lord Hutton, dissenting); *see also* Daniel R. Fung, Anti-Corruption and Home Rights Protection: Hong Kong's Jurisprudential Experience, 8th International Anti-Corruption Forum Conference, 7–11 Sept., 1997, Lima, Peru.

75. A good example of this situation is found in cases involving infringement of patent rights where the plaintiff owning a process patent runs into difficulty trying to prove whether or not the process used by the alleged infringer to manufacture an identical product to the one resulting from the patented process infringes his exclusive right, unless the plaintiff has access to the manufacturing process used by the alleged infringer. As a result municipal and international patent laws reverse the burden of proof by placing it on the shoulders of the alleged infringer. *See* Article 34 TRIPS; Article 139 of the 1891 German Patent Law; Article 35 of the European Community (Union) Patent Convention; and Article 24 of the 1991 WIPO Treaty for Harmonization of Patent Law; *see also* Joseph Straus, *Reversal of the Burden of Proof, the Principle of "Fair and Equitable Procedures" and Preliminary Injunctions under the TRIPS Agreement*," 3 J. WORLD INTELLECTUAL PROPERTY 807 (2000).

76. *See* Cohen v. Commissioner (2003) T.C. Memo 2003-303, 86 CCH TCM 509 (Commissioner's determination of taxpayer negligence in underpaying income taxes is presumed correct and petitioner has the burden of proving lack of negligence).

77. *See* Widemon v. Commissioner (2004) T.C. Memo 2004-162 (Taxpayer petitioned for re-determination of income tax deficiencies by challenging the findings of the IRS); Sequa Corp. v. United States. 350 F. Supp. 2d 447 (S.D.N.Y. 2004) (action by corporation to receive refund from the IRS); Cook v. United States, 46 Fed. Cr. 110 (2000) (in a refund suit brought by taxpayer, the assessment of the IRS is presumed correct and the taxpayer carries the burden of coming forward with evidence to rebut the presumption); Barnes v. Comm'r of, Internal Revenue, 408 F.2d. 65, 69-USTC P 9257, 23 AFTR 2d 895 (7th Cir. 1969) (Commissioner's determination that claimed deductions were overstated can be overcome by evidence from the taxpayer to show that asserted deficiency was improperly computed); United Aniline Co. v. Comm'r of Internal Revenue, 316 F.2d 701, 63-1 USTC P 9434, 11 AFTR 2d 1366 (1st Cir. 1963) (attempt to declare the operational expense of a business property as a business expense).

charged with underpayment of income taxes.[78] The rationale behind this shift in the burden of proof is that the taxpayer will have access to the relevant information and is better placed to preserve and bring forward evidence to overcome the presumption of correctness of the Commissioner's determination.[79] The burden on the taxpayer is two-fold: of going forward with the evidence and of persuasion. A final category of reverse onus cases are those that courts prefer to examine on an individual, case-by-case basis.[80]

A. Burdens of Proof

The law of evidence recognizes several types of burden of proof that are intended to designate the party who has the responsibility or onus of proving or disproving all the essential elements of a case. Of interest in this analysis are the burden of persuasion, often referred to as the "legal burden," and the evidential or evidentiary burden, which briefly will be discussed in this section of the article to provide a context for assessing which party in an official corruption case should bear what burden of proof.

1. *Persuasive Burden*

The burden of persuasion reflects the time-worn rule that it is he who asserts and not he who denies who must prove whether the allegation is an affirmative or negative one.[81] A persuasive burden of proof imposes an obligation on a party to "convince the tribunal of fact (whether by a preponderance of evidence or beyond reasonable doubt) of the truth of some proposition of fact which is in issue and which is vital to his case."[82] The burden can be assigned to either the prosecution or the defense through the operation of substantive law or by the pleadings.[83] Once assigned, this burden never shifts at any time during the trial but remains on whom it was initially placed by law or by the pleadings.[84]

If placed on the accused, the accused must prove an ultimate fact necessary to the determination of guilt or innocence. Such a presumption may relate to an essential fact (of greater or lesser importance) making up either the actus reus or mens rea of the offense, and may be either mandatory[85] or discretionary[86] in its operation. In *County Court of Ulster County v.*

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78. *See* Widemon, T.C. Memo 2004–162; United States v. Rexach, 482 F.2d 10 (1st Cir. 1973); Geiger v. Comm'r of Internal Revenue, 440 F.2d 688 (9th Cir. 1971) (rebuttal evidence was general and of summary nature therefore taxpayer failed to sustain the burden of proof to overcome Commissioner's findings); Stiles v. Comm'r of Internal Revenue, 69 F.2d 951, 13 AFTR 901 (5th Cir. 1934) (Taxpayer's introduction of expert evidence alone not sufficient, taxpayer's burden must overcome Commissioner's presumption with credible evidence).

79. *See* Cook, 46 Fed. Cl. 110. (2000); Benitez, (1st Cir. 1973).

80. *See* Paul Roberts & Adrian Zuckerman, Criminal Evidence 383 (Oxford Univ. Press 2004).

81. *See* D.W. Elliott, Phipson's Manual of the Law of Evidence 214 (Sweet & Maxwell 10th ed. 1972).

82. *Id.* at 213.

83. *Id.* at 215.

84. *Id. at* 216.

85. In a mandatory presumption of innocence, the fact-finder has no discretion as to whether or not to apply the presumption making it possible to judge the compatibility with the presumption of innocence on the face of the statute without reference to the facts of the individual case. *See* County Court of Ulster County v. Allen, 442 U.S. 140 (1979).

86. A discretionary presumption of guilt may breach the presumption of innocence, depending upon whether or not the trier of fact relies on the presumption in order to convict the accused. The fact finder must consider the facts of the case before reaching a conclusion as to whether there has been a violation of the presumption of innocence.

Allen,[87] the U.S. Supreme Court distinguished between a mandatory and permissive or discretionary presumption of innocence:

> [B]etween a permissive presumption on which the prosecution is entitled to rely as one not necessarily sufficient part of its proof and a mandatory presumption which the jury must accept even if it is the sole evidence of an element of the offense.... In the latter situation, since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond reasonable doubt.

Where the burden of proof on the accused is mandatory, conviction can be obtained even when there is reasonable doubt as to the defendant's guilt.[88] In other words, the trier of fact must reject the presumption "unless the evidence necessary to invoke the inference is sufficient for a rational jury to find the inferred fact beyond a reasonable doubt."[89]

2. *Evidential Burden*

An evidential burden requires a party to adduce sufficient evidence to raise an issue before the trier of fact. Once that party has carried this initial burden of coming forward with evidence sufficient to raise a doubt on an essential element of the case, the burden of proving or disproving that issue then shifts to the other party. Where an evidential burden is placed on the accused, in the final assessment of guilt this burden is nothing more than a burden to raise a reasonable doubt as to guilt.[90] For this reason the imposition of an evidential burden on the accused is hardly ever viewed as a violation of the presumption of innocence,[91] but merely as an exception to the rule. Under this exception the probative burden always remains on the prosecution, whose duty it is to disprove the accused person's innocence under the more demanding beyond a reasonable doubt standard. While the legal burden of proof remains on a single party for the duration of the trial, by contrast the evidentiary burden shifts between parties over the course of the proceedings. In criminal cases, the prosecution almost always carries both the evidential burden as well as the burden of persuasion.

B. Standard of Proof

Standard of proof speaks to the quantum of proof a party is required to adduce under either a persuasive or an evidential burden of proof to satisfactorily discharge the assigned burden of proof. It exists "to instruct the factfinder concerning the degree of confidence . . . society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[92] Standards of proof vary depending on whether the matter before the fact finder is a civil claim or a criminal case. In the latter, where the accused is presumed innocent until proved guilty, the standard imposed on the prosecution is of establishing the accused person's guilt beyond all reasonable doubt. The term "beyond a reasonable doubt" has proved to be very difficult to define because of its subjective character. As a result it has been left to

87. *Id.* at 166–67.
88. *See* Ben Emmerson & Andrew Ashworth, Human Rights and Criminal Justice, 256 (1st ed. 2001).
89. *Id.*
90. *Id.*
91. *See id.*
92. *See* In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

different jurisdictions to formulate their own definition of this term,[93] which is not all that easy. It follows that after a fact finder has heard the whole of the prosecution's evidence but there remains even a scintilla of doubt in his mind, then the prosecution would have failed to discharge its burden and the fact finder is left with no other alternative than to acquit the accused. While no particular formula has been established for calibrating the beyond a reasonable doubt standard, generally juries have been instructed not to convict an accused unless the evidence "satisfies them so that they can feel sure" of the accused person's guilt[94] or unless they are "completely satisfied," or "feel sure" of his guilt.[95]

In civil cases, the standard of proof is usually the less demanding preponderance of evidence or the balance of probabilities since it "requires the fact finder's mind be tipped only slightly in favor of the party with the burden."[96] Proving a case on the balance of probabilities requires the party upon whom the burden of proof rests to persuade the fact finder that his version of the facts is more probably true than false.[97] This standard is considered met if there is a greater than 50 percent chance that the proposition is true or more probable than not.[98]

V. A Framework for Balancing Competing Rights and Interests

A. Placing Reasonable Limitations on the Presumption of Innocence

Both the common law presumption of innocence and Article 14(2) of the ICCPR place the burden on the prosecution to prove the guilt of the accused beyond reasonable doubt.[99] Should this presumption be treated as an absolute rule from which no derogation is allowed? This cannot be the case since treaty law already leaves open the possibility of derogating from some its provisions to further a compelling public interest. In the same vein, case law, as shown in Part IV, has also carved out exceptions to presumption of innocence further narrowing the scope of this rule.

All human rights instruments provide that in times of emergency that threaten the security of the state, certain fundamental rights may be abridged.[100] These instruments also recognize that, even in times of grave national emergency, certain fundamental human rights

93. *See, e.g.*, Cal. Penal Code § 1096 (West 2004) (Reasonable doubt "is not a mere possible doubt; because everything relat[ed] to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge") *quoted in* Roger C. Park, David P. Leonard & Steven H. Goldberg, Evidence Law: A Student's Guide to the Alaw of Evidence as Applied in American Trials, § 4.04 (2d ed. 2004).

94. *See* R. v. Summers, 36 Cr. App. R. 14 (1952), *cited in* Elliott, *supra* note 81, at 230.

95. *See* Regina v. Hepworth & Fearnley, [1955] 2 Q.B. 600, 603, *cited in* Elliott, *supra* note 81, at 230.

96. *See* Park et al., *supra* note 93, at 93.

97. *See* Elliott, *supra* note 81, at 231.

98. *See* Miller v. Minister of Pensions [1947] 2 All E.R. 372.

99. *See* ICCPR, *supra* note 12, art. 14(2).

100. *See, e.g.*, ICCPR, *supra* note 12, art. 4 ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided such measures are not inconsistent with their other obligations under international law."); *see also* European Human Rights Convention, *supra* note 22, at art. 15; *see also* American Convention on Human Rights, *supra* note 12, at art. 27.

may never be abrogated.[101] But does this prohibition extend also to fundamental notions of due process including the presumption of innocence? Arguably, the right to a fair trial and the right of an accused to be presumed innocent until proved guilty by the state represent the most basic and fundamental of due process guarantees. Indeed the right to a fair trial would be one of limited efficacy if it was not accompanied by a guarantee of procedural fairness. Be that as it may, neither the ICCPR nor any of the other international human rights instruments have expressly declared that these judicial guarantees are necessarily non-derogable rights.[102] However, their emphatic recognition of the importance of due process may support a view that the prohibition against non-derogation of certain rights may extend to include due process guarantees.[103]

States have often used the "threat to the security of a state," whether real or perceived, as a justification for the temporary abrogation of fundamental human rights."[104] It could be argued that the threat official corruption poses on most states serves as justification for suspending some individual rights including that of presumption of innocence. The fact that statutory exceptions to the presumption of innocence principle have been recognized would suggest that this principle is no longer to be treated as an absolute rule. So the question is not whether exceptions to presumption of innocence are permissible, but rather the nature of these exceptions[105] and at what stage they become so extensive that they undermine the status of the general principle.[106] These statutory exceptions would support

101. Non-derogable rights found in the majority of human rights instruments include the right to life, freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery or servitude, freedom from ex post facto laws, freedom of conscience and religion; inability to fulfill contractual obligation, right to privacy, African Charter, *supra* note 12; *see also* American Convention on Human Rights, *supra* note 12, listing the right to juridical personality, rights to family, right to name, rights to the child, right to nationality, and right to participate in government.

102. The Geneva Conventions, on the other hand, include due process rights among non-derogable rights even in times of armed conflicts. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, art. 3 (defining non-derogable rights in non-international or internal armed conflicts). According to one commentator: "Common Article 3 requires inter alia that even during a civil war all criminal prosecutions must be carried out by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples'. . . . It would be difficult to deny that any of the due process rights . . . are not among the 'indispensable judicial guarantees' referred to in generic terms by Common Article 3." Brief of the Lawyers Committee for Human Rights as Amicus Curiae (Req. for Advisory Op.) (ser. B, no. 9, doc 8), *available at* http://www1.umn.edu/humanrts/iachr/b/9-esp-8.html. It would appear that the Geneva Conventions which embody the principle rules of humanitarian law clearly impose an obligation on states to provide due process guarantees. Most importantly, there is a strong duty on states to not derogate from this obligation. As one commentator has noted, the instruments of humanitarian law "have been accepted far more than the human rights instruments as positive law of the international community." *Id.* It should be recalled that not only have the Geneva Conventions been ratified by almost all states, but some of their essential provisions have become part of general customary international law.

103. For instance, the Inter-American Court's advisory opinion OC-8/87 of Jan. 30, 1987, unequivocally held that the judicial protections articulated in Articles 7(6) and 25(1) of the American Convention on Human Rights—establishing the institutions of habeas corpus and *amparo* (right to judicial protection) although not expressly mentioned in Article 27—cannot be suspended under Article 27(1) even during war because they are indispensable guarantees for the protection of other non-derogable rights under the Convention. Inter-Am. Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations, (1987); Inter-Am. Ct. H.R. (Ser. A) No. 8 (Jan. 30, 1987).

104. Brief of the Lawyers Committee for Human Rights, *supra* note 102.

105. Here the question is whether some of the exceptions are more objectionable than others. *See* R. v. Dir. Of Pub. Prosecutions, [2000] 2 A.C. 326.

106. *See* Lacey and Wells.

an argument in favor of reversing the burden of proof in cases involving high-level public officials suspected of acquiring wealth through corrupt practices.

In cases requiring courts to balance competing societal interests, the jurisprudence of the European Court of Human Rights,[107] as well as that of a number of national courts,[108] favors an interpretation of the presumption of innocence that strikes a fair balance between the wider community interests and the protection of the fundamental rights of the individual. These they have done by closely scrutinizing reverse onus clauses to ensure that they operate within reasonable limits and meet the test of proportionality. To these this article will also add the test of equality-of-arms between the parties.

1. *The Principle of Proportionality and Rationality*

The European Court of Human Rights was one of the first international tribunals to argue in favor of treating reverse burden clauses as no more than reasonable limits on the presumption of innocence since they 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."[109] In other words, 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."[110] *Salabiaku* involved a national of Zaire [now the Democratic Republic of Congo] residing in France who was tried and convicted by French courts for violating Article 414 of the French Customs Code, which provides 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."[111] Appealing his conviction to the European Court of Human Rights, Salabiaku argued that by placing upon him an "almost irrebuttable 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.[112] The European Court upheld the judgment of the French courts.

The highest courts in a number of jurisdictions have followed the lead of the European Court in *Salabiaku* by applying the presumption of innocence with an implicit degree of flexibility.[113] 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

107. *See* Salabiaku v. France [1991] 13 E.H.R.R. 379, 388.

108. *See, e.g., Kebilene*, 2 A.C. 326, wherein 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 Lambert*, 3 Eng. Rep. 577.

109. *Salabiaku*, 13 E.H.R.R. at 388.

110. *Id.*

111. *Id.* at 382.

112. *Id.* at 388.

113. *See* Attorney-General for Hong Kong v. Lee Kwong-kut [1993] A.C. 10 *per* Lord Woolf.

prosecutor in matters of evidence."[114] In the leading case of *Attorney-General v. Lee Kwong-kut*,[115] 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 that "[i]n 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."[116] This implied degree of flexibility allows a balance to be drawn 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 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 are the essential ingredients, 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.[117]

While it remains the primary responsibility of the prosecution to prove the guilt of an accused, reasonable deviations will be allowed from the strict application of this principle so long as there is *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,[118] corruption,[119] or money laundering.[120] *Kwong-kut* was preceded by *Attorney-General v. Sin Yau Ming*, 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). Appellant was challenging the presumption that anyone found in possession of a specified quantity of prohibited drugs is engaged in drug trafficking

114. *See Kebilene*, 2 A.C. at 379; R. v. Downey, [1992] 2 S.C.R. 10; R. v. Laba, [1994] 3 S.C.R. 965; State v. Mbatha, [1996] 2 L.R.C. 208; State v. Bhulwana, [1996] 1 L.R.C. 194.

115. Lee Kwong-kut [1993] A.C. 951 (P.C.) at 972B-973A.

116. *Id.* at 975.

117. *Id.* at 969–70.

118. *See* Sin Yau Ming, [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).

119. *See* Attorney-General of Hong Kong v. Hui Kin-hong, [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).

120. *See Lee Kwong Kut*, 2 H.K.C.L.R. 186.

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 (e.g., 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.[121] 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 [sic] 324 at 330H. And even more recently . . . this Court, speaking, of corruption in the same breath as drug trafficking, characterised both as 'cancerous activities.'[122]

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 v. Hui Kin-hong*, a case challenging Hong Kong's anti-corruption law on human rights ground. 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, 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.[123] Hui challenged the ordinance as an infringement of his right to be

121. *See Sin Yau Ming*, 1 H.K.P.L.R. 88 (C.A.).

122. *Hui Kin-hong*, 1 H.K.C.L.R. at 229 (per Bokhary JA, as he then was).

123. *Id.*

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 that: (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.[124]

2. *Protecting Fundamental Community Interests*

A United Nations study has identified the source of the assets stolen by top-level 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."[125] 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 presumption of innocence against 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.[126] A striking feature of contemporary acts of illicit enrichment by high-ranking public officials is the amount of wealth involved, usually billions of dollars.[127] So staggering are these amounts that

124. *See id.*

125. *See* U.N., *Office on Drugs and Crime Anti-Corruption Tool Kit: International Judicial Cooperation* 8, 274 (Nov. 2002), *available at* www.undoc.org/pdf/crime/toolkit/fg.pdf. (Last viewed 25 February 2006) [hereinafter Anti-Corruption Tool Kit]; *see also* United Nations Office on Drugs and Crime, The Global Programme Against Corruption: UN Anti-Corruption Tool Kit, 3rd ed. (Sept. 2006).

126. "Almost half of Sub-Saharan Africa's 690 million 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 in achieving the first goal of halving the proportion of people living below $1 dollar per day by 2015."

See also Afeikhena Jerome, Senyo Adjiboloso & Dipo Busari, *Addressing Oil Related Corruption in Africa: Is the Push for Transparency Enough?*, 11 REV. HUM. FACTOR SOC. STUD. SPECIAL EDITION 8 (2005) [hereinafter Oil Corruption].

127. 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, the husband of former Pakistani Prime Minister Benazir Bhutto, of accepting $9 million in kickbacks, and he is alleged to have channeled $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, *supra* note 125, at 274; *see also* NDIVA KOFELE-KALE, INT'L LAW OF RESPONSIBILITY FOR ECON. CRIMES HOLDING HEADS OF STATE AND OTHER HIGH RANKING STATE OFFICIALS INDIVIDUALLY LIABLE FOR ACTS OF FRAUDULENT ENRICHMENT, 15 (1995).

one commentator was moved to describe these depredations as going "beyond shame and almost beyond imagination."[128] Indeed, this private buildup of assets abroad is usually so large in relation to the total external debts of the countries from which these funds were stolen that in some cases it even exceeds their total foreign debt.[129] 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.[130] These funds have been used to buy weapons, finance terrorism and foment domestic conflict, hindering sustainable development and political stability.[131] Consider, for instance, "that more than four billion dollars in state oil revenue disappeared from Angolan government coffers from 1997–2002, roughly equal to the entire sum the government spent on all social programs in the same period."[132] 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, customs and excise; it misallocates scarce national resources by concentrating wealth among a small bureaucratic and political elite; and it undermines democratic institutions by undermining the rule of law among other things.[133] 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.

In the *Nuclear Tests Case* the International Court of Justice (ICJ) recognized the emerging principle of intergenerational equity creating the international obligation of a state to manage the environment in a way that provides sustainable use for both present and future generations.[134] This principle applies in the illicit enrichment context in that all states are under an international obligation to manage national resources in a way which preserves their use for both present and future generations.[135]

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128. *Id.*; *see also* D. DELAMAIDE, DEBT SHOCK: THE FULL STORY OF THE WORLD CREDIT CRISIS 60 (Doubleday 1984); *see also* C. BRAECKMAN, LE DINOSAURE: ZAIRE DE MOBUTU (1990).

129. *See* Rimmer de Vries, *LDC Debt: Debt Relief or Market Solutions?* WORLD FINANCIAL MARKETS 1, 6 (Sept. 1986).

130. *See* Press Release ,GA/EF/3002, Second Comm. Speakers Link Illicit Transfer of Funds to Terrorism, Domestic Conflict and Capital Flight (Oct. 15, 2002), *available at* http://www.unis.unvienna.org/unis/pressrels/2002/gaef 3002.html.

131. *Id.*

132. *See* Oil Corruption, *supra* note 126, at 16.

133. *See* UNITED NATIONS DEVELOPMENT PROGRAM, UNDP PRACTICE NOTE: ANTI-CORRUPTION, 3–4 (Feb. 2004).

134. *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 (Dec. 20)(Weeraamantry, J., dissenting).*

135. *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).

In the interest of promoting the greater good for the greater number of people, which is what the global war against official corruption seeks to achieve, why not simply allow the accused public official to disclose the source of his suspicious wealth? In which case, the rule ought to be that in corruption proceedings where the evidence required to establish a crime is within the control of the accused, courts should require that this party bear the initial burden of production.

3. *Ensuring the Equality-of-Arms between the Parties*

Some limitations on the rights of an accused in the war against corruption are called for 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,[136] which is not the case since the principle is a double-edged sword that cuts both ways. It is designed to protect the accused 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.[137]

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"[138] 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

136. *See* Delcourt v. Belgium, European Court of Human Rights, Judgment, January 17, 1970, Series A, no. 11, para. 34; *see also* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Appeals Chamber), ¶ 48 (July 15, 1999).

137. 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 a very few wealthy countries can afford.

138. *See* ASIL PROCEEDINGS, at 395; *see also* Barbara Hetzer, *The Pols & Pariahs; The Wealth That Leaves No Tracks*, FORTUNE, Oct. 12, 1987, at 189; L. Kraar, *Where Do You Hide $10 Billion? Aquino Wants to Know*, FORTUNE, Sept. 14, 1987, at 97.

of the Republic of the Philippines.[139] And where they can be traced, the prosecution must contend with the sheer volume of transactions and the enormous amount of paper work involved.[140]

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.[141] Studies have shown that extraordinary sums of money are now passing through correspondent accounts established for foreign banks,[142] trusts,[143] offshore accounts, personal investment companies and private banking.[144] 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 the 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 make it almost impossible to identify the owners or directors of the corporation and therefore nearly impossible to trace illicit funds back to the true owners.

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139. *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 Sept. 2005, Beijing, PRC [hereinafter Denying Safe Havens].

140. 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*, July 20, 1999, *available at* www.wsws.org/articles/1999/jul1999/phil-j20prn.shtml (last visited Feb. 13, 2006).

141. 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, Fifty-seventh General Assembly Second Committee 10th Meeting (AM) (Second Committee Speakers Link Illicit Transfer of Funds to Terrorism, Domestic Conflict and Capital Flight), U.N. Doc. GA/EF/3002 (Oct. 14, 2002).

142. 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 Ad Hoc Committee for the Negotiation at a Convention Against Corruption*, Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived from Acts of Corruption, Doc. A/AC.261/12, ¶ 29 (Nov. 28, 2002) [hereinafter Global Study on Corruption].

143. 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.*

144. "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.

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 these 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."[145]

Requests for foreign judicial cooperation in the gathering of evidence are not automatically granted in the absence of binding mutual legal assistance treaties (MLAT).[146] 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.[147] Even with an MLAT, the requesting state is never sure that the request will be granted because these treaties too are laden with all types of threshold requirements that must be satisfied by the requesting state, such as the evidence establishing that an offence 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.[148] 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."[149] In *Prosecutor v. Milutinovic*[150] the Appeals Chamber relied on its findings in the *Kayishema and*

145. *See* Global Study on Corruption, *supra* note 142, at ¶ 29.

146. 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* Denying Safe Havens, *supra* note 139.

147. *See, e.g.*, Treaty with the Philippines on Mutual Legal Assistance in Criminal Matters, U.S.—Phil., Nov. 13, 1994, 1994 U.S.T. LEXIS 213, art.16. Further, "[t]he Party that has custody over proceeds or instrumentalities of offenses shall dispose the 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; *see also* 104th Cong., 2nd Sess., Nov. 22, 1996.

148. *See* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgment (Appeals Chamber), ¶ 69 (June 1, 2001).

149. *See* Delcourt v. Belgium, Eur. Ct. of H. R. 5, 18 (1970); *see also Tadic*, Case No. IT-94–1-A, Judgment (Appeals Chamber) ¶ 48.

150. *See* Prosecutor v. Milutinovic, Case No. IT-99–37-AR73.2 (Decision on Interlocutory Appeal on Motion for Additional Funds) 13 Nov. 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.

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."[151] It also referred to the *Tadic* case, wherein 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."[152] 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."[153] 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."[154] 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[155]—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 favour those who can afford to buy it.*[156]

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.[157]

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151. *See* Kayishema and Ruzindana, ICTR-95-1-A, Judgment, 1 June 2001, ¶ 69.

152. *Tadic*, Case No. IT-94-1-A, Judgment (Appeals Chamber) ¶ 48.

153. *See Milutinovic*, Case No. IT-99-37-AR73.2.

154. *Id.*

155. 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 observed that "[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 142, at ¶ 41.

156. *See* Mr. Justice Lightman, *The 6th Edward Bramley Memorial Lecture University of Sheffield*, The Civil Justice System and Legal Profession—The Challenges Ahead, 4 (Apr. 4, 2003), *available at* http://www.dca.gov.uk/judicial/speeches (last visited on Feb. 14, 2006) (emphasis added).

157. *See* Anti-Corruption Tool Kit, *supra* note 125.

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, pay for investigators, retain local counsel, move 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"[158] 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."[159] In these circumstances, "the issue of justice being done becomes a question of how long offenders and victims are able to sustain the battle."[160]

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 a significant burden in going forward with evidence while allowing the state to be able to prove its case on the less stringent balance of probabilities standard.

4. *Promoting Judicial Efficiency*

Derogating from the presumption of innocence 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 has taken almost fifteen 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 for $600 million of an estimated $5 to $30 billion of Filipino assets that the Marcoses were alleged to have transferred abroad.[161] The Nigerian 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.[162] The matter is far from being over as

158. *Id.*

159. *Id.*

160. *Id.*

161. Much of the amount recovered from the Marcoses' estate is merely interest earned on the original sum which lies in escrow in the Philippines National Bank. *See* Morgan, *supra* note 140; *see also* Denying Safe Havens, *supra* note 139.

162. 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 Recovering Dictators' Plunder*, Hearing before H. Subcomm. on Financial Institutions and Consumer Credit, Comm. on Financial Servs., Long. 26–33 (2002) (statement of Jack A. Blum, Partner, Loberl, Novins & Lamont). Nigeria's requests for MLA then led to subsequent criminal complaints in various European countries (and civil orders against banks in the UK) and this enabled the Nigerians to get more and more information and start the asset freezing process through the criminal

Abacha's family has appealed the August 2004 Swiss decision and has blocked the release of the Swiss/Abacha money pending the outcome of their appeal. The unusually long time it takes to resolve these corruption cases probably accounts for demands in some jurisdictions to do away with the presumption of innocence in these cases.

5. *Holding Public Servants to their Fiduciary Obligation*

A number of national constitutions[163] 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."[164] 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.[165]

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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* Press Release, Federal Office of Justice (Switzerland), Abacha funds to be handed over to Nigeria; Majority of assets obviously of criminal origin, (Aug. 18, 2004), *available at* http://www.ofj.admin.ch/themen/presscom/2004/20040818-1-e.htm. 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." *Id.* On the basis of documentation from Nigeria and criminal proceedings instituted in Geneva, the Swiss Government made a determination that the greater part of the 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. *Id.; see also NIGERIA: Switzerland hands back nearly $500 million of Abacha's loot*, IRIN NEWS, Aug. 19, 2004, *available at http://www.irinnews.org.; see also Vorzeitige Herausgabe der Abacha-Gelder durch Rekurs blockiert*, ASSOCIATED PRESS WORLDSTREAM-GERMAN, Sept. 21, 2004, and Oliver Bilger, *Schweizer Organisationen misstrauen Rueckzahlung*, SPIEGEL ONLINE, Aug. 25, 2004.

163. *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."); *see also* Chapter 24, Section 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, arts. 52, 94, 140(1), 149, 151, 185(1), 290(1) (1999) (Nigeria); Constitution of Paraguay, art. 104; Constitution of Turkey, art. 71.

164. *See* Cameroon Constitution Law No. 96-06 of 18 Jan. 1996 to amend the Constitution of 2 June 1972, art. 66.

165. *See, e.g.*, REPUBLIC OF GHANA, REPORT OF THE GHANA JIAGGE COMMISSION (1967), at para. 2. The Jiagge Commission like the over seventy other Commissions of Inquiry that were appointed to probe high level official corruption in Ghana, was appointed under the provisions of the Commissions of Enquiry Act, 1964 (Act 250), N.L.C. Decree No. 72 dated 18th Aug., 1966 and as amended by N.L.C. Decrees Nos. 101 dated 1st November, 1966 and 129 dated 24th January, 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

Under any theory of government, the wealth of a nation is traditionally placed under the guardianship of its elected and appointed officials.[166] 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 their 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 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 their origin are raised.[167]

B. Allocation of Burdens and Standards of Proof in Corruption Cases

Having satisfied itself that reverse onus clauses found in anti-corruption treaties and municipal statutes are not an unreasonable limitation on presumption of innocence, the fact finder must next decide how burdens of proof will be allocated and the appropriate standard of proof to be applied in proving or disproving acts of illicit enrichment on the part of high level public servants. Since the allocation of the burden of persuasion is usually affected by issues of fairness and public policy considerations,[168] this article argues that given the clandestine nature of official corruption, fairness and public policy demand that the burden of persuasion be placed on the accused. This should be the case given the accused public official's superior resources,

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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).

166. Article 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; *see also* Const., as amended 2004, art. 27, Durio Oficial de la Federacion [D.O.], Feb. 5, 1917 (Mex.).

167. 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, Section 286 of the 1992 Constitution of Ghana.

168. *See* 9 Wigmore, Evidence, § 2486, at 291; *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); Park et. al., Evidence, *supra* note 93, § 4.05 at 95.

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. Extant jurisprudence reads reverse onus clauses as casting an evidential burden on the accused. However, as a general rule, the evidential burden is borne at the outset of a trial by the party upon whom rests the burden of persuasion, which is usually the plaintiff or the prosecution. The onus is therefore on the prosecution to adduce evidence bearing on the guilt of the accused and to convince the fact finder of the truth of the essential ingredients of his case. But in exceptional cases where the essential elements of the facts at issue in the case are peculiarly within the knowledge of the accused, then the evidentiary burden, as well as the burden of persuasion, can arguably be borne by the accused. This is precisely the situation with the facts essential to proving or disproving unlawful enrichment making. Arguably this offense clearly would fall within the exception to the rule of placing the evidentiary burden on the prosecution.

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."[169] The Commentary to this provision justifies shifting this burden on 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,[170] and second, the prosecution must rely on these property disclosures because many of these Latin American countries lack the "effective high-technology resources to detect offenses at the precise moment they occur."[171] 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.[172] 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."[173] 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.

To be sure, the prosecution must first present a *prima facie* case that the accused has illicitly enriched himself while in public service. This will require a showing that the accused is a public official and his wealth far exceeds what would be expected of a public servant in his position and circumstance.[174] The making of this *prima facie* creates an evidentiary

169. Inter-Am Convention Against Corruption, *supra* note 6, at art. IX.

170. *See* Carlos A. Manfroni, Richard S. Werksman & Michael Ford (translator), Inter-American Convention Against Corruption: Annotated With Commentary 71 (2003).

171. *Id*, at 69 (2003).

172. *See* Elliot, *supra* note 81, at 226.

173. *Id.*

174. The ingredients for a *prima facie* case would include proof that the defendant is or was a public official as the term is understood in treaty and statutory law; that he shows a significantly large and demonstrably gross increase in his personal fortunes far in excess of his lawful earnings; the increase in wealth remains even when offset by reduction in liabilities; and the period of this increase in wealth is measured from the time the defendant was "selected, appointed or elected" to public office even before he assumed his duties." It would seem that the prosecution's failure to make this *prima facie* case carries the risk if not the certainty of failure in the whole or some part of the prosecution's case. Success, however, shifts the evidential burden to the accused public official.

burden upon the accused public official to prove by a preponderance of evidence that his wealth is the recompense from his official position or was acquired through other lawful and legitimate means.[175]

V. Conclusion

Where wider public interests are implicated, society should be prepared to accept some limitation on individual rights. Limitations on the latter are justified provided they pursue a legitimate goal and are proportionate to that goal. Put differently, restrictions on guaranteed individual rights must be a proportional response to the social problem being addressed, should go no further than is reasonably necessary to safeguard the targeted public interest, and should operate in re-establishing parity of arms between the state and the accused official. Corruption wreaks unspeakable havoc on victim states and their populations. Persons in positions of public trust who engage in this activity should not be allowed to take shelter behind the presumption of innocence principle. The burden of coming forward with explanations on how they came about their stupendous wealth ought to be placed on these officials and not on the state.

175. Evidence to refute the state's *prima facie* case that wealth was unlawfully acquired can be proof that the wealth in question was inherited or won through gambling, or by playing the lottery or is the product of shrewd and prudent investments.