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UWOs against PEPs as a Response to Jurisdictional Limitations: Problems and Potential

Abstract:

There is a risk that politically exposed persons (PEPs) who misappropriate state assets, hide their wealth abroad, and do not face domestic criminal proceedings, may enjoy the fruits of their misconduct in peace. Jurisdictional constraints may limit the potential for criminal prosecution and confiscation outside the jurisdiction in which the crimes were committed. Concealing assets outside the territories from which assets are stolen obstructs civil recovery of those assets in any jurisdiction. Corrupt PEPs may thus avoid adverse legal consequences in both the criminal and civil spheres.

Unexplained Wealth Orders (UWOs) were introduced in the United Kingdom in 2018. Where illicitly acquired assets are laundered by foreign PEPs in the UK, UWOs offer enforcement authorities an investigative tool to facilitate civil recovery without having first to establish a link to serious crime.

This chapter argues that where property is civilly recovered by enforcement authorities using UWO processes which are publicised, corrupt PEPs are made subject to a measure that is quasi-criminal both in its process and its impact. It is therefore useful as a potential means of ensuring that corrupt foreign PEPs are held to individual account for their misconduct, even if no investigations or prosecutions are progressed in the territorial states in which the corrupt acts were committed. The chapter also notes, however, that the use of UWOs may represent a form of jurisdictional overreach given the territorial limitations on enforcement jurisdiction. It concludes that notwithstanding these jurisdictional concerns, the availability of civil recovery using UWOs against PEPs is a potentially useful means of tackling impunity.

1 Introduction

There is nothing new in public officials misappropriating the contents of state coffers and concealing the proceeds offshore.[1] Examples abound of senior public officials abusing their powers by stealing the resources of the countries in which they hold office ('states of origin') and moving those assets abroad to 'receiving states' while the populaces of the former live in poverty.[2] Notwithstanding the apparent crystallisation of individual accountability for kleptocracy into an international law norm,[3] modern

[1] See: R Kroeze, A Vitória, and G Geltner (eds), *Anti-Corruption in History: From Antiquity to the Modern Era* (Oxford, Oxford University Press, 2018).

[2] See: JC Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Ithaca, Cornell University Press, 2017); R Ivory, *Corruption, Asset Recovery and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (Cambridge, Cambridge University Press, 2014) 38–55.

[3] See: HJ Kim and JC Sharman, 'Accounts and Accountability: Corruption, Human Rights, and Individual Accountability Norms' (2014) 68 *International Organisation* 418.

kleptocrats are continuing to transform their state institutions and develop their polities in ways which allow them to loot their state resources systemically, whilst simultaneously protecting themselves and their families from criminal accountability.[4]

The strict territorial limits of enforcement jurisdiction can serve the cause of corrupt foreign senior public officials, their families and their associates (collectively, 'politically exposed persons' or PEPs) seeking to evade accountability for grand corruption offences.[5][6] Where a state of origin opts not to pursue criminal charges against a corrupt PEP, whether because of institutional capture, institutional incapacity, or because of insufficiency of evidence, the relevant offenders will avoid criminal law consequences in that state.[7] Receiving states who wish to prosecute a corrupt PEP for grand corruption offences substantially committed in a state of origin may struggle in many cases to establish a sufficiently strong territorial link on which to base an assertion of jurisdiction over those offences. Even where such states *can* establish a territorial nexus allowing them in principle to prosecute offences linked to kleptocracy as a matter of public international law,[8] such crimes are rarely prosecuted in practice owing to the evidential challenges inherent in prosecuting offences substantially committed abroad, or because geo-political considerations operate to prevent those prosecutions.[9] Nowhere is this more evident than in the United Kingdom. Even though the London property market is apparently

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[4] A Cooley, J Heathershaw and JC Sharman, 'The Rise of Kleptocracy: Laundering Cash, Whitewashing Reputations' (2011) 29 *Journal of Democracy* 39, 40–42.

[5] In this chapter, 'PEPs' is as defined in the UK's Proceeds of Crime Act 2002 (POCA), s 362B(7). A PEP is 'an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State', and any such individual's family members, close associates, or anyone 'otherwise connected' with such an individual.

[6] The terms 'grand corruption' and 'kleptocracy' are used interchangeably in this chapter. There are no treaty-based definitions of 'corruption', 'official corruption' 'kleptocracy' or 'grand corruption'. On definitional problems in anti-corruption treaties, see: J Wouters, C Ryngaert and AS Cloots, 'The International Legal Framework against Corruption: Achievements and Challenges' (2013) 14 *Melbourne Journal of International Law* 205, 235–39. In this paper, 'grand corruption' is understood in the sense of the definition developed by Transparency International (TI) and tacitly endorsed by the United Nations:

> Grand corruption means the commission of any of the offences in [the Convention against Corruption (New York, 31 October 2003) 2349 UNTS 41 (UNCAC)] Articles 15–25 as part of a scheme that:
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> (1) involves a high level public official; and
> (2) results in or is intended to result in a gross misappropriation of public funds or resources, or gross violations of the human rights of a substantial part of the population or of a vulnerable group.

See: TI 'Submission to the 8th UNCAC CoSP Grand Corruption as a Major Obstacle to Achievement of the Sustainable Development Goals' (12 December 2019) CAC/COSP/2019/NGO/1.

[7] This is not uncommon. For numerous examples, see: T Daniel and J Maton, 'Is the UNCAC an Effective Deterrent to Grand Corruption?' in J Horder and P Alldridge (eds), *Modern Bribery Law: Comparative Perspectives* (Cambridge, Cambridge University Press, 2013) 316–22.

[8] On the concepts of subjective territoriality and objective territoriality, see: C Ryngaert, *Jurisdiction in International Law*, 2nd edn (Oxford, Oxford University Press, 2015) 77–80.

[9] See: A Chehtman, 'Strategic Approaches to Extraterritorial Jurisdiction in Latin America' in A Parrish and C Ryngaert (eds), *Extraterritoriality in International Law* (Cheltenham, Edward Elgar, 2022).

viewed as a popular destination in which to launder the proceeds of kleptocracy,[10] to date, very few foreign PEPs have been prosecuted in the UK for extraterritorial theft, handling of stolen goods or fraud offences linked to acts of grand corruption.[11]

This chapter investigates whether a civil investigative tool recently introduced in the United Kingdom, the unexplained wealth order (UWO), has the potential to transcend the enforcement challenges and jurisdictional limitations faced by receiving states in responding to overseas grand corruption. Where 'unexplained wealth' held by a foreign PEP is located within the UK, the UWO enables UK enforcement authorities to civilly recover and to repatriate those assets to a country of origin without a criminal conviction first being handed down in any jurisdiction.[12] The UWO's availability holds potential as a means of tackling kleptocratic impunity because it presents a way of providing at least a quasi-criminal justice response to kleptocracy in circumstances where assets are moved to a receiving state where recovery using the measure is publicised.[13] Consequently, even if a corrupt senior public official evades prosecution in a state of origin, and a prosecution is not possible in a receiving state, corrupt PEPs may nevertheless face criminal (or at least quasi-criminal) repercussions for their wrongdoing.

This chapter argues that where civil recovery is made against the assets of PEPs using UWOs, the process and the punitive consequences are such that the process can be interpreted as a quasi-criminal measure; it inhabits a liminal space falling short of a formal criminal prosecution, but can constitute a criminal sanction in effect. This is because through its aspersive character, it publicly delivers a form of retributive justice akin to individual criminal accountability rather than merely providing a value-neutral form of dispute resolution more typical of civil procedural responses to misconduct.

However, the jurisdictional implications of using a quasi-criminal measure in this way raise some concerns. UWOs involve receiving states' courts indirectly determining that PEPs have benefitted from crimes committed in states of origin. Where asset recoveries ensue following the issue of UWOs, enforcement authorities' concerted publicising of those recoveries in support of their crime deterrence objectives,[14] coupled with a receiving state's court's determination of a respondent's benefit from criminality, risks straying into the realm of criminal law enforcement in circumstances where there may be no jurisdictional nexus with the underlying criminal conduct. In addition, receiving states' courts

[10] See, eg: TI UK and Thomson Reuters, 'London Property: A Top Destination for Money Launderers' (2 December 2016) transparency.org.uk/foreign–ownership–london–property–shrouded–secrecy.

[11] One exception is a former governor of Delta State in Nigeria, James Ibori, pleading guilty in England in 2012 to, inter alia, conspiracy to defraud.

[12] Where there is a concern that returned assets will be accessible by the same corrupt public officials who misappropriated them in the first place, receiving states can instead arrange for the assets to be returned indirectly to the state of origin via non-governmental organisations (NGOs) and/or administered by special foundations established for the benefit of that state's citizenry. See: P J Davis, 'To Return the Funds at All: Global Anticorruption, Forfeiture, and Legal Frameworks for Asset Return' (2016) 47 *University of Memphis Law Review* 291. Depending on the repatriation model used, such asset administration could be viewed as a form of neo-colonialism.

[13] For a detailed description of UWOs and their operation, see Section 3 below.

[14] See nn 66–69 below and accompanying text.

implicitly determining that the laws of the state of origin have been broken, and sanctioning PEPs for that breach, may violate the rule against enforcing foreign penal law known as the 'public law taboo'.[15] Including this introduction, this chapter is structured in seven sections. The next section provides more detail on the applicable jurisdictional principles and the obstacles to taking enforcement action against grand corruption offences from outside the territory in which those offences are committed. Section 3 describes UWOs and the conditions necessary for their use. In order to develop an argument later that civil recovery may fall foul of some jurisdictional principles, Section 4 briefly sketches out some key interpretations of the meaning and function of criminal punishment. In Section 5, the idea that civil recovery orders resulting from UWOs can be conceptualised as a form of quasi-criminal penal measure is examined. Section 6 considers the implications of this idea in the context of enforcement jurisdiction in public international law. Section 7 concludes that notwithstanding some concerns arising in terms of jurisdiction, civil recovery through UWOs represents a potentially useful means of tackling kleptocratic impunity where the proceeds are held in receiving states. UWOs are available against two categories of respondents:[16] PEPs, and persons suspected of involvement with serious crime (or those connected to such persons).[17] The focus in this chapter is on UWOs against PEPs because the frequently inter-state nature of grand corruption crimes presents an interesting lens through which to assess the implications of civil recovery using UWOs from a jurisdictional perspective.

2 Grand Corruption and Limitations on Territorial Enforcement

In the *Lotus* decision, in distinguishing between prescriptive jurisdiction and enforcement jurisdiction, the Permanent Court of International Justice made it clear that 'the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State'.[18]

The prohibition on extraterritorial enforcement of jurisdiction absent any rule to the contrary established in the *Lotus* case is grounded in the principle of sovereign equality of states, and the related principles of mutual respect between states for their respective territorial integrities, and non-intervention by states in the internal affairs of other states.[19] The imperative of states respecting each other's sovereign prerogatives to have exclusive authority over their territories means that no state may engage 'in public

[15] ibid.
[16] POCA, s 362B(4)(b).
[17] In this context, a 'person' is defined as including both natural persons and incorporated bodies. See: Interpretation Act 1978, sch 1. The Economic Crime (Transparency and Enforcement) Act 2022 (the 2022 Act), s 45 has expanded the category of those answerable to UWOs to include 'responsible officers' (as defined in the 2022 Act, s 25) of UWO respondents who are not individuals.
[18] *The case of the S.S. Lotus (France v Turkey)*, PCIJ Rep Series A No 10 [18].
[19] See: ST Bernardez, 'Territorial Sovereignty', *Encyclopaedia of Public International Law* (1987) vol 10, 487; *cf* Charter of the United Nations and Statute of the International Court of Justice (San Francisco, 26 June 1945); A Moiseienko and S Hufnagel, 'Targeted Sanctions, Crimes and State Sovereignty' (2015) 6 *New Journal of European Criminal Law* 351, fn 23.

acts on the territory of another State without the latter's permission'.[20] To do so would constitute a violation of the latter's sovereignty, in breach of international law.[21] Consequently, where a corrupt PEP commits grand corruption offences exclusively in a state of origin and subsequently moves the proceeds to a receiving state, where the state of origin declines to exercise enforcement jurisdiction for any reason, the PEP may be unlikely to face criminal prosecution or punishment in any state for the offence.

A corollary of the rule against extraterritorial enforcement in international law is a rule which mediates the use of domestic public laws outside the territory where they were created, known as the 'public law taboo'. The taboo forms part of what William Dodge describes as 'the structural rules of transnational law'.[22] It prohibits, inter alia, the application and enforcement of one state's criminal laws and civil 'penal' laws of a public nature by another state. It is historically rooted in the territorial nature of criminal law,[23] and is a rule recognised in particular in common law jurisdictions.[24] The taboo is tactically helpful as a means of avoiding 'the potential for embarrassment and straining of relations between States' because it allows states to point to a neutral reason for refusing to enforce potentially problematic judgments or laws of foreign courts.[25] However, it also means that an individual cannot be punished by state authorities in one state relying on another state's criminal laws for a crime committed on the territory of the latter.

In considering the prohibition on extraterritorial enforcement, Alejandro Chehtman provides an explanation for why imposing punishment in a state other than the state where a crime was committed should be avoided by reference to an account of sovereignty based on the collective interests of the inhabitants of the territorial state. Drawing on Wesley Hohfeld's classical analysis of legal rights,[26] Chehtman suggests that collectives of individuals within states are jointly owed collective claim-rights to prosperity and self-worth, which contribute to the (morally valuable) well-being of those individuals.[27] This collective claim-right of a state's inhabitants to self-worth imposes a duty on the state to protect that claim-right. This in turn provides a normative justification for a state's claim-rights to sovereignty; most notably, in Chehtman's analysis, a claim-right to territorial integrity, allowing that state to ensure the physical security of the collective; and a claim-right to self-government which

[20] Bernardez, 'Territorial Sovereignty' (ibid).
[21] H Steinberger, 'Sovereignty', *Encyclopaedia of Public International Law* (1987) vol 10, 397, 413.
[22] WS Dodge, 'Breaking the Public Law Taboo' (2002) 43 *Harvard International Law Journal* 161, 162.
[23] Dodge, 'Breaking' (ibid) 193, 206–08, notes that criminal cooperation treaties allowing for mutual legal assistance are one example of the erosion by treaty of certain aspects of the taboo in international law. James Crawford cites the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C197/3 as an example: J Crawford, *Brownlie's Principles of Public International Law*, 9th edn (Oxford, Oxford University Press, 2019) 464. Notably, the UNCAC includes a treaty-made exception to the taboo in an asset-recovery context. Art 54(1)(a) requires receiving states to take action to give effect to confiscation orders made by a court of a state of origin.
[24] Crawford, *Brownlie's Principles* (ibid) 465.
[25] See: U Kohl, *Jurisdiction and the Internet* (Cambridge, Cambridge University Press, 2007) 220.
[26] W Hohfeld, *Fundamental Legal Conceptions* (New Haven, Yale University Press, 1919).
[27] A Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford, Oxford University Press, 2010) 27.

accounts for the state's political sovereign power to criminalise and punish certain acts to ensure the well-being of the collective. These claim-rights, Chehtman argues, mean that a territorial state holds a prima facie immunity from other states extraterritorially applying their criminal laws on its territory.[28] Where a state purports to punish extraterritorially, he suggests it is against these claim-rights of the territorial state that the enforcement power must be justified.[29] In the context of a state suffering the effects of recent kleptocracy, having the prima facie power to punish in respect of acts occurring on its territory may serve, on Chehtman's account, to ensure the public good of having a system of criminal rules in force, and as an important component of building the state's populace's self-respect and autonomy as a sovereign collective.[30]

The territorial limits of enforcement jurisdiction can facilitate corrupt PEPs in a couple of ways. First, if a state of origin does not pursue a prosecution against its senior public officials for alleged crimes of kleptocracy, and assuming no other jurisdictional nexus is available from which other states might prosecute the underlying conduct, it is unlikely that those PEPs will face prosecution anywhere. There is no means under international law of compelling a state of origin to prosecute in such cases. The United Nations Convention Against Corruption (UNCAC) requires all States Parties to criminalise 'embezzlement, misappropriation or other diversion by a public official for his or her benefit'.[31] However, as general a rule, even if international law instruments mandate the creation of jurisdictional bases, they do not mandate their exercise.

Second, the transnational nature of modern kleptocracy means that it is possible that more than one state may be entitled to assert jurisdiction over misconduct. However, even if a state other than a state of origin *can* legitimately claim a form of prescriptive jurisdiction on the basis of a territorial nexus with the relevant offence, law enforcement agencies cannot lawfully engage in investigations within another state territory – a form of enforcement jurisdiction – without the latter's consent.[32] Evidential challenges including the high burdens of proof necessary to secure criminal convictions and the difficulties involved in accessing evidence and witnesses abroad mean that criminal prosecutions in states other than a state of origin are unlikely to ensue without a state of origin's cooperation. It is open to receiving states to seek the assistance of states of origin in gathering admissible evidence and in serving witness summonses through mutual legal assistance (MLA) processes (also known as judicial cooperation). However, this is dependent on pre-existing bilateral or multilateral MLA agreements, and success in engaging with kleptocracies through this route may not always be possible even where these do exist. Such cooperation processes are based around reciprocity – there is no general international

[28] ibid 24–28.
[29] ibid.
[30] Noting that the state as a political authority claiming 'supreme law-making and enforcement authority over certain territory' constitutes one of the key propositions within the classical doctrine of state sovereignty: ibid 20.
[31] UNCAC art 17.
[32] See: N Boister, *An Introduction to Transnational Criminal Law*, 2nd edn (Oxford, Oxford University Press, 2018) 281, where he discusses this principle being emphasised both in the *Lotus* decision and subsequently in the Convention against Transnational Organised Crime (New York, 15 November 2000) 2225 UNTS 209 art 4.

customary law obligation on states to grant judicial cooperation to other states.[33] To the extent therefore that a state of origin opts against consenting to and assisting with a receiving state's investigation, the state of origin's corrupt PEPs will likely avoid a satisfactory criminal prosecution and/or having criminal punishment and accountability imposed upon them in any jurisdiction.

In any event, it is not a foregone conclusion that receiving states *will* be in a position to assert a jurisdictional claim over foreign criminal conduct. Outside of circumstances where there is a recognised extraterritorial basis for prosecution (eg the nationality principle),[34] the most obvious route to claiming jurisdiction will be on the basis of objective territoriality and the identification of a territorial nexus with the offence.[35] Objective territoriality allows a state to assert jurisdiction where any essential constituent element of an offence is consummated on its territory, notwithstanding that the offence was commenced outside that territory.[36] It has been described as a principle of public international law which is 'generally accepted and widely applied'.[37] In many cases, however, misappropriated resources may have been washed through and/or held for significant periods in numerous jurisdictions before eventually being used to acquire assets in a receiving state, or an offence may have been committed exclusively in a state of origin. In either of those circumstances (depending on how relevant offences are defined in the former case), territoriality as a basis for jurisdiction cannot necessarily be relied upon, rendering the establishment of territorial jurisdiction in the receiving state difficult or impossible.

For completeness, it is worth noting that claims to state and diplomatic immunity can constitute further sovereignty-based obstacles to ensuring that corrupt PEPs are held accountable for grand corruption outside of the stolen assets' states of origin.[38] Wariness around offending the integrity of other states'

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[33] Boister, *An Introduction* (ibid) ch 18.

[34] Such expansive forms of jurisdiction are increasing under UK law. See, eg: Bribery Act 2010, s 12, which allows the UK to prosecute bribery offences committed overseas by, inter alia, UK residents and citizens.

[35] In England, eg, the Criminal Justice Act 1993 (CJA), s 2 specifically contemplates exercises of jurisdiction in relation to offences such as fraud and theft which have extraterritorial dimensions, provided that at least one constituent element (or 'relevant event') of the offence occurs in England, with 'relevant event' defined as 'any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence'. Therefore, if there is evidence that a corrupt PEP committed even part of a theft or fraud in England (for example, where a theft involves moving the stolen assets to England as part of the appropriation of property), this is a sufficient territorial nexus to constitute an offence under English law. *cf* J Hörnle, *Internet Jurisdiction: Law and Practice* (Oxford, Oxford University Press, 2021) ch 5. For a recent judicial discussion of the territorial ambit of criminal jurisdiction in England and Wales, see the Court of Appeal's decision in *R v Pogmore* [2017] EWCA Crim 925. Beyond the CJA offences, the English courts have recently become significantly less conservative in assuming jurisdiction, endorsing the 'substantial measures' test in accepting jurisdiction for criminal offences. Where a substantial measure of the criminality has occurred within England, this allows the English courts to 'accept jurisdiction unless it can be argued that another country is better placed to assume jurisdiction according to the principles of international comity.' See: Hörnle, *Internet Jurisdiction* 139, citing the Court of Appeal's decision in *R v Sheppard and Whittle* [2010] 1 WLR 2779 by way of illustration. For convenience and brevity, all references in this chapter to the criminal laws and the courts of England and Wales are to 'English' laws and courts respectively.

[36] See: Harvard Research in International Law, 'Draft Convention on Jurisdiction with Respect to Crime: Article 3. Territorial Jurisdiction' (1935) 29 (supp) *American Journal of International Law* 480, 488. Again, note the apparent expansion of objective territoriality observed by the English courts referenced ibid.

[37] Crawford, *Brownlie's Principles* (n 23) 442. See also the examples in n 35 above.

[38] Personal immunity from foreign criminal jurisdiction for leaders, heads of state and foreign ministers comes from the principle that states may not sit in judgment of other states. The scope of state and diplomatic immunities

leaders can also play a role in receiving states' inaction in addressing the proceeds of corruption being held on their territories. Following the Arab Spring, for example, action was swiftly taken by, inter alia, Canada,[39] Switzerland,[40] the United Kingdom,[41] the European Union,[42] and the United States,[43] to recover and repatriate assets which had been openly and suspiciously held in those countries by individuals linked to notoriously corrupt regimes. Where the relevant despots remained in office, however, similar recovery action was notably absent.[44] Such inaction might be attributed to the principle that sovereign states do not intervene in the internal or foreign affairs of other states,[45] and/or to related immunity principles.[46] Where a receiving state takes anti-corruption asset recovery action against the property of another state's politically powerful officials, such actions may raise concerns that they constitute an exercise of extraterritorial enforcement jurisdiction in contravention of public international law. Thus, corrupt PEPs are well-placed to benefit from the territorial limitations of enforcement jurisdiction. The next section considers UWOs, and how they may operate to address the impunity generated through these territorial enforcement restrictions.

3 Unexplained Wealth Orders

This section will explain why UWOs were introduced; how they work in practice; their status as a civil measure; their usefulness in circumventing territorial enforcement limitations and holding corrupt PEPs to account; and why they might be regarded as 'quasi-criminal' measures.

The introduction of UWOs against PEPs was underpinned by concerns around kleptocrats laundering the proceeds of grand corruption in the UK.[47] There has been much media and civil society interest in

is however somewhat limited, applying only for the duration of a relevant official's term or posting. Claims of functional immunity (*ratione materiae*) are unlikely to succeed because the immunity extends only to acts undertaken on behalf of the state. It is difficult to see such claims succeeding in the context of corrupt acts against a state. On state and diplomatic immunity, see: R O'Keefe, *International Criminal Law* (Oxford, Oxford University Press, 2015) ch 10.

[39] See: B Crawford, 'The Freezing Assets of Corrupt Officials Act: A Critical Analysis' (2015) 56 *Canadian Business Law Journal* 407.

[40] See: G Pavlidis 'Asset Recovery: A Swiss Leap Forward?' (2017) 20 *Journal of Money Laundering Control* 150, 153–54.

[41] Secretary of State for Foreign and Commonwealth Affairs, *British Foreign Policy and the 'Arab Spring'* (Cm 8436, 2012).

[42] eg: Council Regulation (EU) No 101/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia [2011] OJ L31/1.

[43] Exec Order No 13566 of February 25, 2011 Blocking Property and Prohibiting Certain Transactions Related to Libya 76 FR 11315.

[44] Even in the context of the recent Russian invasion of Ukraine, for example, whilst sanctions against, inter alia, senior Russian politicians and oligarchs were swiftly imposed pursuant to the 2022 Act, Pt 3 in the UK, no permanent recovery of any assets has, as of the date of writing (June 2022) occurred. The effect of the sanctions is merely to freeze assets (to prevent sanctioned parties from dealing in the assets) on an interim basis (with the result that enforcement authorities have intervened in some cases to prevent the dissipation of some non-real estate assets). There remains scope for the sanctions to be lifted. Where assets are the subject of asset recovery orders, by contrast, the assets are permanently seized.

[45] See: M Jamnejad and M Wood, 'The Principle of Non-Intervention' (2009) 22 *Leiden Journal of International Law* 345, 372.

[46] ibid 364–66.

[47] Explanatory Notes to the Financial Crimes Act 2017, para 13.

the London property market's status as a location for corrupt foreign PEPs to conceal their illicitly acquired wealth.[48] Historically, very little enforcement action of any kind was taken in respect of the proceeds of foreign corruption in the UK because of, inter alia, the investigative challenges discussed in the previous section. UWOs against PEPs were designed to address 'the concern about those involved in corruption overseas, laundering the proceeds of crime in the UK; and the fact that it may be difficult for law enforcement agencies to satisfy the evidential standard at the outset of an investigation'.[49] In applying for orders, enforcement authorities need not demonstrate a link between the assets which are the subject of an UWO and criminality of any type.[50] Instead, to obtain UWOs, enforcement authorities must simply satisfy the High Court to a civil standard that (a) a PEP or someone suspected of involvement with serious crime (or anyone connected with such a person);[51] (b) holds the property identified in the application for the order; (c) the property is worth at least £50,000; and (d) there are reasonable grounds for suspecting that the 'known sources of the respondent's lawfully obtained income' would have been insufficient to acquire the property or that the property was acquired through unlawful conduct (collectively, the statutory tests).[52] Provided that each criterion is fulfilled to the Court's satisfaction, it may issue an UWO.

UWOs require respondents to provide explanations of how they were able to acquire named assets specified in the orders, and to produce supporting documents showing the assets' provenance within the timeframes set out in the orders.[53] Placing the onus on respondents to establish that their assets are *not* the proceeds of crime overcomes some of the evidentiary difficulties usually faced by enforcement authorities in investigating transnational crimes. If a PEP cannot explain how they were able to acquire a property, or does not respond within the directed timeframe (or at all), a rebuttable presumption is raised that the relevant property constitutes 'recoverable property'[54] 'obtained through unlawful conduct'.[55] Where a presumption of 'recoverable property' is raised and unrebutted, an enforcement authority can apply to the High Court for civil recovery of property the subject of an UWO, and if the

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[48] See, eg: TI UK and Thomson Reuters, 'London Property' (n 10); S Goodrich (ed), *Faulty Towers: Understanding the Impact of Overseas Corruption on the London Property Market* (London, TI UK, 2017).

[49] Home Office, 'Impact Assessment: Criminal Finances Act – Unexplained Wealth Orders' (IA No HO0282, 20 June 2017) para 14.

[50] Save for where a presumption of 'recoverable property' is raised pursuant to an UWO against a PEP, the position in civil recovery is that unexplained wealth cannot without more raise a presumption that property is recoverable. See *R (on the application of the Director of the Assets Recovery Agency) v Green* [2005] EWHC 3168 (Admin). For UWOs against the category of eligible respondents other than PEPs (individuals suspected of benefitting from serious crime or their family members or connected persons), the court must be satisfied that there are 'reasonable grounds for suspecting' that the respondent or a person connected to the respondent is or has been involved in serious crime: POCA, s 362B(4)(b).

[51] If a 'connected person' to someone who holds or has held prominent public functions or to someone who is reasonably suspected of involvement in a serious crime is not a natural person, then a 'responsible officer' of that entity can be required to respond to an UWO: see n 17 above.

[52] POCA, s 362B.

[53] POCA, s 362A. Enforcement authorities typically seek interim freezing orders at the same time that they apply for UWOs.

[54] POCA, s 362C(2).

[55] POCA, s 274.

High Court is satisfied on the balance of probabilities that this property constitutes 'recoverable property', the Court must make a civil recovery order (CRO) in respect of the asset.[56] In this way, corrupt PEPs are permanently deprived of their misbegotten gains without a criminal conviction being first required in any jurisdiction using a form of non-conviction-based asset recovery.[57]

The UK's Parliament clearly intended for UWOs to have extraterritorial effect. The legislation expressly provides that respondents who are overseas may be made answerable to orders.[58] Criminal sanctions are not threatened against UWO respondents who are outside the jurisdiction for failure to comply with UWOs,[59] but instead a presumption of 'recoverable property' is raised. Based on the English case law on the extraterritorial effect of investigative orders to date, only *criminal* sanctions for failure to comply with investigative orders attract the opprobrium of the UK courts for breaching international law.[60] As UWOs do not purport to impose direct positive obligations on respondents in other territories with threats of criminal sanction for non-compliance,[61] it might be argued that their introduction was uncontroversial as a form of extraterritorial legislative jurisdiction.

Initial UWO applications from enforcement authorities to the High Court are typically made ex parte to prevent forewarned respondents from dissipating assets. They are held in private unless the judge hearing the application directs otherwise.[62] This is 'to protect the integrity of the [relevant enforcement authority's] investigation to which the UWO relates, as well as to protect the rights of the respondent to the UWO'.[63] The aspersive aspect of UWOs is something that was discussed in Parliament when the legislative provisions establishing UWOs were debated: 'We need to be careful that [PEPs] … are sufficiently protected from the making of an application that could trash their reputation and … leaves him or her exposed to the allegations made against them'.[64] Even after initial ex parte applications are made and orders issued, UWO respondent details are often subject to ongoing reporting restrictions (including anonymity orders) until either (i) civil recovery orders are issued; or (ii) UWOs are challenged. In UWO cases heard so far, at that point, reporting restrictions have been generally lifted.[65]

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[56] POCA, s 266.

[57] For more on non–conviction–based asset recovery, and civil recovery processes generally, see: J Hendry and C King, 'How Far Is Too Far? Theorising Non–Conviction–Based Asset Forfeiture' (2015) 11 *International Journal of Law in Context* 398.

[58] POCA, s 362A(2) provides that, 'An application for an order must … specify the person whom the enforcement authority thinks holds the property ("the respondent") (and the person specified may include a person outside the United Kingdom)'.

[59] Presumably in recognition of the non–enforceability of POCA disclosure orders served outside of the jurisdiction as established in *Serious Organised Crime Agency v Perry* [2012] UKSC 35; [2013] 1 AC 182.

[60] See: A Davidson, 'Extraterritoriality and Statutory Interpretation: The Increasing Reach of Investigative Powers' (2020) 1 *Public Law* 1, 3–4.

[61] See the decision of Lord Phillips in *Perry* (n 59) [94].

[62] CPR Practice Direction 11.1.

[63] Per Murray J in *National Crime Agency v Hussain*, [2020] EWHC 432 (Admin); [2020] 1 WLR 2145 [17].

[64] *Hansard*, HC (series 6) Vol 616, col 207 (25 October 2016) per Edward Garnier QC MP.

[65] In *Hussain* (n 63) for example, the existence of the UWO ceased to be confidential having been superseded by a property freezing order at a public hearing. In *Hajiyeva v National Crime Agency* [2020] EWCA Civ 108, [2020] 4 All ER 147, the respondent in appealing her UWOs unsuccessfully sought for anonymity orders to remain in place on the basis that attendant publicity would damage her and her husband's rights pursuant to Convention for

To the extent that a PEP complies punctually with an order and can show that their assets are of legitimate provenance, their details are unlikely to ever be publicised.

Where respondents challenge UWOs, judges must navigate between either (potentially) unfairly besmirching the reputation of respondents in making the proceedings public, or diminishing the deterrence impact sought by enforcement authorities by imposing reporting restrictions and holding the hearings in private.[66] In both UWO cases dealing with PEPs to date, *Baker* and *Hajiyeva*,[67] subsequent challenges to the orders were not only held publicly, but were very heavily publicised in the media which was permitted to report, inter alia, on the identities of the parties. Where the High Court issues civil recovery orders following presumptions of 'unlawful property' being raised pursuant to UWOs, it is enforcement authority policy to '[p]ublicise civil investigations to the maximum possible extent … [and] [i]nform the media (as we do in criminal cases) and relevant NGOs of upcoming civil investigation events such as open court hearings'.[68] This policy is informed by, among other things, enforcement authority belief that publicising civil investigation orders supports 'reducing crime by helping to deter future criminal activity'.[69] To be clear, for reasons discussed in the next section, it is only when assets are actually recovered through civil recovery orders and publicised that the impact of the measure might be said to take on the complexion of quasi-criminal punishment.

Court adjudications on UWOs and civil recovery orders are made by the civil rather than the criminal courts. CROs are based on findings made on the balance of probabilities that the *property* the subject of an order was 'obtained through unlawful conduct'.[70] To obtain UWOs, enforcement authorities must satisfy the High Court on the balance of probabilities that the statutory tests have been met. CROs are *in rem* measures, so it is the relevant assets specified in an order that are ostensibly legally tainted with an association of criminality.[71] No adjudication is formally made on the guilt or innocence of the respondent.[72] Civil recovery is regarded in theory as a restitutionary measure. On the account of some commentators, it is used as a tool to avoid unjust enrichment, rather than as a form of sanction. [73]

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the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (ECHR) arts 3 and 8. See: *National Crime Agency v Mrs A (Ruling on Anonymity)* [2018] EWHC 2603 (Admin).

[66] National Crime Agency, 'Civil Financial Investigations and Associated Publicity' (NCA, 18 February 2021) nationalcrimeagency.gov.uk/who-we-are/publications/ para 5.

[67] *National Crime Agency v Baker* [2020] EWHC 822 (Admin), [2020] Crim LR 976; *Hajiyeva* (n 65). In *Baker*, the UWOs were ultimately overturned because the applications submitted by the National Crime Agency for the orders were found to have been made on a flawed basis. As of the date of writing (June 2022) there have been only four UWO investigations involving nine UWOs: Ali Shalchi, 'Unexplained Wealth Orders' (HC Research Briefing CBP 9098, 14 April 2022). In addition to the two PEP cases, two cases have involved UWOs taken under the 'suspicion of involvement with serious crime' limb: see n 50 above.

[68] NCA, 'Civil Financial Investigations' (n 66).

[69] ibid.

[70] POCA, s 304(1).

[71] J Hendry and C King 'Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids' (2017) 11 *Criminal Law and Philosophy* 733.

[72] P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Oxford, Hart Publishing, 2003) 232–33.

[73] See: J Vogel, 'The Legal Construction that Property can do Harm' in JP Rui and U Sieber (eds), *Non–Conviction–Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Berlin, Duncker and Humblot, 2015) 225, 236.

Arguments that non-conviction-based recovery proceedings (of which civil recovery proceedings are an example) substantively comprise an exercise of criminal jurisdiction, and that civil recovery constitutes a form of criminal punishment, have been considered and rejected by both the English courts and the European Court of Human Rights (ECtHR).[74] However, a court finding that a PEP holds 'recoverable property', coupled with the publicity of the sort accompanying each of the *Baker* and *Hajiyeva* decisions and the fact that details of the impugned misconduct allegedly resulting in a UWO respondent holding 'recoverable property' are included in UWO applications, ensures that UWO-related civil recoveries convey a distinctly censorial message.

As discussed in Section 2, the likelihood of kleptocrats committing grand corruption offences being subjected to such punishment by sympathetic states of origin is low. To ensure that corrupt PEPs are individually held to account, UWOs allow receiving states to make creative use of ostensibly restitutionary or remedial measures which do not prima facie breach the prohibition on extraterritorial enforcement, but which encompass the two elements traditionally regarded as essential to criminal punishment (discussed in the next section). It is in this regard that civil recovery through UWOs holds such potential as a quasi-criminal measure and as a means of ensuring that corrupt PEPs face censorial accountability. The next two sections develop this suggestion, showing how civil recovery using UWOs imposes punishment more akin to retribution than restitution, and discussing how the process is quasi-criminal rather than a value-neutral civil procedure.

4 What is Criminal Punishment?

In contemporary criminal justice theory the meaning and purpose of punishment is contested, but there is some consensus that two of its fundamental elements are those of censure and of sanction or 'hard treatment.'[75] Hart notes that 'the judgment of community condemnation'[76] accompanying findings of criminal guilt is the only sanction which is peculiar to the criminal law. He argues that the societal censure derived from a conviction is what distinguishes criminal sanctions from civil ones. He suggests that the censorious element explains why even those who receive suspended sentences are to be regarded as having been punished by the criminal law.[77] Expanding his argument, Hart notes that in the civil sphere, damages are available for tortious and contractual disputes. He further notes that the 'insane', aliens, and recalcitrant witnesses are still imprisoned, and debtors used to be. He argues that in each of those cases, the absence of societal condemnation is the 'vital difference' between a criminal

[74] Most recently in *Gogitidze and others v Georgia* App No 36862/05 (2016) 62 EHRR 14, a case involving civil recovery from a corrupt PEP in a UWO-type context. The decision has been described as an attempt by the EctHR to 'put forward a more comprehensive vision concerning non–conviction–based confiscation regimes': M Simonato, 'Confiscation and Fundamental Rights across Criminal and Non-Criminal Domains' (2017) 18 *ERA Forum* 365, 366.

[75] L Zedner, 'Penal Subversions: When is a Punishment not Punishment, Who Decides, and on What Grounds?' (2016) 2 *Theoretical Criminology* 3, 6.

[76] HM Hart, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401, 404.

[77] ibid 405.

and civil sanction. Others similarly emphasise the symbolic significance unique to the imposition of punishment as against non-punitive sanctions. Joel Feinberg, for example, distinguishes between 'theoretical hard treatment' such as tax bills or parking fines which serve primarily to regulate activities, and measures bearing a 'punitive intent' which communicate that particular conduct is forbidden.[78] Andrew von Hirsch describes such non-punitive penalties as 'morally neutral sanctions'. The difference between these regulatory sanctions and criminal punishment, he suggests, is that *blame* for conduct is not apportioned and the offender is not treated as a moral agent for the former.[79]

Examining the communicative component of punishment for crimes further, its purpose is not limited solely to symbolic public condemnation. Feinberg lists a number of important corollary outcomes of punishment addressed not to the offender, but to the public at large. First, he identifies punishment as an opportunity for 'authoritative disavowal' of particular types of behaviour: '[i]t tells the world that [an offender] had no right to do what he did, that he was on his own in doing it, that his government does not condone that sort of thing.'[80] Second, he explains that it performs a 'symbolic non-acquiescence', where a state's imposition of punishment equates to it 'going on the record' to testify on behalf of the people it represents as to their recognition that certain types of behaviour are wrong and harmful.[81] Third, Feinberg points to the communicative aspect as performing a vindication of the law: that the law's enforcement upholds the persuasive character of the law rather than the law's existence operating as an empty rhetorical device in condemning certain actions. Finally, he points to the availability of state censure as a way in which others can be informally absolved of suspicion, for example '[w]hen something scandalous has occurred and it is clear that the offender must be one of a small number of suspects'.[82] Viewed through the lens of Feinberg's analysis, imposing criminal punishment or even quasi-criminal punishment is a potent means of expressing a state's abhorrence of particular behaviours and of communicating opprobrium for certain acts.

With regard to the 'sanction' element of punishment, there is similarly some consensus that for a measure to be truly punitive it must involve some 'hard treatment' such as imprisonment or penal fines to be endured by an offender.[83] The justification for hard treatment varies amongst theorists, with von Hirsh arguing that while censure appeals to the offender as a moral agent, hard treatment constitutes a prudential reason supplemental to censure's normative expression of wrongdoing for abstaining from certain behaviours.[84] Alternatively, Feinberg posits that hard treatment injects an essentially reprobative element into punishment.[85] Duff suggests that hard treatment functions, inter alia, as a kind of secular

[78] J Feinberg, 'The Expressive Function of Punishment' (1965) 49 *The Monist* 397, 405.
[79] A von Hirsch, *Censure and Sanctions* (Oxford, Clarendon Press, 1993) 11.
[80] Feinberg, 'The Expressive Function' (n 78) 401.
[81] ibid 402.
[82] ibid 403–04.
[83] ibid 400.
[84] von Hirsh, *Censure* (n 79) 13.
[85] He argues that without hard treatment, it is possible to conceive of ritualistic condemnation and 'of inflictions and deprivations which, because of different symbolic conventions, have no reprobative force': Feinberg, 'The Expressive Function' (n 78) 400.

penance that can provide a vehicle of moral persuasion to an otherwise unrepentant offender to express remorse, or to a repentant offender to reinforce their penance as a means of restoring his or her bonds with the community.[86] Whilst penal theorists are willing to contemplate that certain types of hard treatment are through symbolic convention capable of expressing society's condemnation for misconduct, there is relatively limited appetite amongst the leading communicative penal theorists to countenance the idea that censure by itself may constitute hard treatment. Duff and Garland argue, for example, that if criminal punishment were merely communicative, then punishment could simply be imposed by way of a formal statement of condemnation at the end of a trial.[87] This inversion of Hart's example of a suspended sentence without public condemnation would likely be a similarly unsatisfactory outcome for many in terms of retribution and deterrence.

When viewing civil recovery through UWOs which are publicised, Duff and Garland's suggestion that condemnation alone is intrinsically incapable of including an element of hard treatment might be criticised as insufficiently attuned to context. It assumes that all individuals will bear the impact of condemnation equally, and/or that the level of condemnation will be uniform. However, if the formal condemnation were to occur in respect of a public individual whose livelihood is founded on a perception of ostensible integrity, and such condemnation is widely publicised (noting that all UWOs involving PEPs to date *have* been widely publicised), the punitive impact would be different from, say, that imposed on an unremarkable petty criminal whose offence is unlikely to make the news. In this way, civil recovery using UWOs against PEPs may cross the line from a civil restitutionary or remedial process to a de facto retributive process. It cannot strictly be said to be a criminal punishment: not only is it not a formal conviction from a criminal court, but the sanction involved lacks the longer-term administrative and societal hallmarks of criminal punishment like a criminal record. Even so, because of its clearly condemnatory tenor, the publicity surrounding UWOs arguably transforms civil recovery using the measure from a civil remedy to a form of quasi-criminal punishment.

5 Civil Recovery through UWOs as a Punitive Quasi-Criminal Measure

Although it is, in theory, not necessary to establish a link with criminality in order to obtain UWOs against PEPs, in practice both enforcement authorities and the courts review and inquire into criminal conduct as part of the process. As they base their investigations and decisions respectively on those reviews and inquiries, and because the civil recovery through UWOs can result in PEPs being publicly censured and having their assets seized for their association with that misconduct, the process and punishment might be regarded as an enforcement of quasi-criminal jurisdiction.[88]

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[86] A Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996) 20 *Crime and Justice* 1, 56.

[87] A Duff and D Garland, *A Reader on Punishment* (Oxford, Oxford University Press, 1994) 71.

[88] For more on quasi–criminal jurisdiction generally, see: A Huneeus, 'International Criminal Law by Other Means: The Quasi–Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *American Journal of International Law* 1.

Moiseienko and Hufnagel observe that in imposing targeted sanctions, states are responding to forms of alleged wrongdoing that are usually treated as criminal offences in domestic legal systems. They argue that such action might be perceived as a de facto exercise of enforcement jurisdiction.[89] They reason that even though targeted sanctions do not involve punishment following a formal adjudication of guilt, the sanctioning state might be suggested as achieving 'punishment objectives by other, formally non-criminal methods'.[90] This is because that state (i) publicly accuses an individual of wrongdoing (albeit outside its territory);[91] and (ii) imposes punitive restrictive measures such as asset-freezing against the accused individual, even though it may have no competence to formally prosecute the individual under traditionally recognised bases of jurisdiction in public international law.[92] They suggest that in such circumstances 'the state applying the sanction is arguably assuming competence to punish the underlying criminal conduct',[93] and that those actions 'resemble criminal trials in their symbolic impact'.[94] In other words, they suggest that the hard treatment wrought by the sanctions, coupled with the public condemnation which the sanctions symbolise, meets the criteria typical of criminal punishment outlined in the previous section. Targeted sanctions can be relatively straightforwardly categorised as an example of executive (enforcement) jurisdiction because they involve the direct implementation of law by the state.

The symbolic condemnatory heft might be regarded as even greater where publicised civil recovery through UWOs is used. The form of public international law jurisdiction this process comprises is open to debate. The granting of UWOs and CROs involves the High Court formally adjudicating on whether property the subject of an UWO represents the proceeds of crime. On the face of it, this represents a form of judicial or adjudicative jurisdiction. However, it is difficult to distinguish between the distinct limits of judicial jurisdiction, enforcement jurisdiction, and legislative jurisdiction which overlap with each other, particularly where the distinction 'is not universally accepted as reflecting international law'.[95] Alex Mills suggests that the exercise of adjudicative jurisdiction can, depending on the circumstances, additionally be characterised as:

[89] Moiseienko and Hufnagel, 'Targeted Sanctions' (n 19).
[90] ibid 360.
[91] Either unilaterally, as part of a regional organisation, or at the behest of the UN Security Council. The legislative framework for sanctions in the UK is the Sanctions and Anti-Money Laundering Act 2018, which was recently amended by the 2022 Act to expedite the making of sanctions regulations in response to the Russian invasion of Ukraine.
[92] On the bases of jurisdiction under public international law, see generally: Crawford, *Brownlie's Principles* (n 23) ch 21.
[93] Moiseienko and Hufnagel, 'Targeted Sanctions' (n 19) 353.
[94] ibid 361.
[95] A Mills, 'Rethinking Jurisdiction in International Law' (2014) 84(1) *British Yearbook of International Law* 187, 195.

> [E]ither prescriptive (if the judge is participating in law-making, including through interpretation of the scope of application of the law or development of a common law system) or enforcement (if the judge is ordering the seizure of a person or assets).[96]

Notwithstanding targeted sanctions and UWO/CRO processes each involving an arm of the state intervening to prevent property-holders from dealing with assets, as UWOs and CROs are issued based on an exercise of adjudicative and enforcement jurisdiction, rather than merely on the making of a political judgement,[97] they are perhaps a more credible and formal means of censuring misconduct than targeted sanctions, albeit the censure is imposed in a less direct way.

Although it is an *in rem* procedure, publicised civil recovery pursuant to UWOs bears hallmarks of criminal process from the perspective both of respondents and enforcing states. Antony Duff suggests that when enforcement authorities accuse someone of a crime, the impact is so aspersive as to transform an ordinary member of society into 'someone who simply cannot be trusted', and someone who is no longer entitled to what he terms the 'civic presumption of innocence'.[98] Respondents to UWOs are subject to similar reproach – they similarly become subject to investigation by state enforcement powers, and must either assume financial and procedural burdens to protest their innocence (or technically, their property's 'innocence'), or have their properties seized by the state and have that seizure publicised as a means of criminal deterrence.

There are numerous features of UWO/CRO proceedings which are typically only found in criminal proceedings. These include, but are not limited to, the availability to the state of investigative powers typically confined to criminal proceedings; the objective of meting out punishment (rather than restitution or compensation to the wronged party) and to 'deprive criminals' of the proceeds of crime;[99] and the weightier societal condemnation implicit in a criminal conviction.[100] While categorised as a civil mechanism, UWOs against PEPs involve a claim of suspicion of criminality (or at the very least, of benefitting from criminality) by a state body against the official of another jurisdiction (or their family members or close associates). Unlike typical 'civil' interactions between a state and an individual, UWOs and civil recovery proceedings more generally involve adversarial court proceedings. Applicants are criminal law enforcement bodies who use their expertise in investigating crimes to build applications against potential respondents. Asset holders can be deprived (using civil

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[96] ibid.

[97] On the differences between 'legislative', 'judicial' and 'executive' jurisdiction, see: M Akehurst, 'Jurisdiction in International Law' (1972–73) 46 *British Yearbook of International Law* 145; *cf* Mills, 'Rethinking Jurisdiction' (n 95).

[98] A Duff, 'Who Must Presume Whom to Be Innocent of What' (2013) 42 *Netherlands Journal of Legal Philosophy* 170, 184.

[99] Home Office, 'Impact Assessment' (n 49): 'The primary objective of UWOs is to deprive criminals from benefiting from the proceeds of unlawful activities'.

[100] C King, 'Using Civil Processes in Pursuit of Criminal Law Objectives: A Case Study of Non–Conviction–Based Asset Forfeiture' (2012) 16 *International Journal of Evidence and Proof* 337, 338–39.

recovery powers) of the suspected proceeds of crime, thereby theoretically deterring other potential corrupt actors.[101]

Where CROs are made further to UWOs, the media typically uses language impugning the reputation of the PEP respondent. Orders are often referred to in news reports as 'McMafia orders' suggesting the respondents' criminal culpability,[102] even if a UWO is subsequently found to have been made on a flawed basis.[103] Each of the two PEP UWO investigations to date were the subject of such coverage.[104] It therefore exhibits characteristics more typical of criminal, rather than civil, procedure and bolsters a public perception that respondents are being held accountable for benefitting from crime, albeit without the symbolically important vindication for respondents available through a confirmation of innocence provided to criminal defendants where a prosecution fails.[105]

It might be argued that some individuals who are the subject of state claims of criminality in criminal investigations similarly do not have the opportunity to benefit from symbolically beneficial acquittals, yet still endure widely-publicised claims of their suspected criminality. Such individuals may also suffer from a punitive taint of criminality. One important difference between those cases and UWO-centred publicity is that the law recognises that for the former, putative suspects are entitled to seek recourse by way of damages for injury to reputation from those who disseminate stigmatising information (whether well-founded or not) prior to a charge or a finding of guilt being made.[106] It is unclear whether, for PEPs who have had their property recovered and have exhausted an appeals regime against UWOs and/or subsequent civil recovery orders, because they have been neither charged nor convicted, the same principles would apply. There is a possibility that a court may order an enforcement authority not to publicise the fact of a civil recovery or to impose reporting restrictions. This, however, would be contrary to current enforcement authority policy,[107] and has not happened so far for UWOs against

[101] The deterrence impact of asset recovery in the UK is contested because, inter alia, there is limited empirical evidence of it. See: Y Chistyakova, D Wall and S Bonino, 'The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK' (2021) 27 *European Journal on Criminal Policy and Research* 495.

[102] Misha Glenny's investigative account of transnational organised crimes committed by elites across Europe, Asia and the Americas is titled *McMafia: A Journey Through the Global Criminal Underworld* (New York, Knopf Books, 2008). UWOs first became available to enforcement authorities in January 2018, a period coinciding with the BBC airing an eponymous TV drama series drawing on the book's themes. Given the types of proceeds targeted by UWOs, 'McMafia orders' became a convenient sobriquet for the orders.

[103] See n 109 below.

[104] See n 67 above. The headline for the following article which discussed each of those cases is one representative example: S O'Neill, '£1.5m Legal Bill Forces Rethink over McMafia Wealth Orders' *The Times* (London, 13 July 2020) 8.

[105] L Campbell, 'Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76 *Modern Law Review* 681

[106] A recent prominent example of this is Sir Cliff Richard's successful action against the BBC: *Richard v British Broadcasting Corporation and another* [2018] EWHC 1837 (Ch) [248] (Mann J): 'As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached'. The Supreme Court has subsequently held that in general, a person under a criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation: *Bloomberg LP v ZXC* [2022] UKSC 5. It has not extended this principle to civil investigations.

[107] See text to nn 66–68.

PEPs. In such instances, the quasi-criminal impact of the measure would be radically diminished (and consequently, less likely to raise the jurisdictional problems identified in Section 6 below). If a court was to make an anonymity ruling on a civil recovery against a PEP, the decision would likely face significant opposition from enforcement authorities and from media outlets who have to date stridently and successfully argued in favour of open justice principles in making the details of PEP-related UWOs known.[108]

There are two final general observations to be made on the quasi-criminal nature of civil recovery using UWOs. First, the exercise of quasi-criminal adjudication powers by the High Court raises concerns because its mandate is expanded to adjudication on criminal matters without it having any apparent capacity or authority for that mandate. Moreover, those adjudications are based on lower burdens of proof and evidentiary standards than are required in criminal contexts. Second, one potentially positive outcome of the process is that once a corrupt PEP is exposed as holding the proceeds of corruption in the UK, the accompanying publicity may trigger (or at least exert pressure to adopt) more concerted enforcement action in respect of the alleged underlying corruption in the relevant territorial state.[109]

6 The Significance of using UWOs for Civil Recovery in the Context of Jurisdiction

Where a presumption is raised through a UWO that property is 'recoverable property' and the High Court subsequently makes an order of civil recovery against that property, it is confirming that, in its view, on the balance of probabilities, the property was 'obtained through unlawful conduct'. Section 241 of the POCA provides that 'unlawful conduct' is conduct which 'occurs in a country or territory outside the United Kingdom and is unlawful under the criminal law applying in that country or territory', or if it occurs in a part of the UK, it is unlawful under the criminal law of that part. In other words, the POCA apparently constitutes a form of prescriptive jurisdiction over crimes committed abroad, and the UWO provisions thereunder are clearly intended to have extraterritorial effect.[110] However, the legislation is framed in a way that is, by itself, unlikely to cause much consternation from an international law perspective, because the powers created only impact upon UK property, and the legislation has as its main purpose protecting the UK's economy from being flooded with 'dirty money' from abroad.[111] As UWOs are directed against UK property holders, even if those respondents are abroad, this likely satisfies the 'close connection' limitation imposed by international law on legislative jurisdiction in circumstances where that legislation has extraterritorial effect.[112] Nevertheless, assuming

[108] See, eg: *Mrs A* (n 65). On open justice, see: J Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford, Oxford University Press, 2002).

[109] A beneficial owner of the properties which were the subject of *Baker* was dismissed as leader of the Kazakh senate one month after the High Court's confirmation of the discharge of the UWOs applicable to her London property. Analysts attributed the dismissal to the publicity generated by the case: M Bennets 'Heir to Kazakh Leadership Sacked after Property Row' *The Times* (London, 5 May 2020) 29.

[110] See n 58 above.

[111] Salchi, 'Unexplained Wealth Orders' (n 67).

[112] On which, see: FA Mann, *The Doctrine of International Jurisdiction Revisited after Twenty Years*, *Recueil des cours* vol 186 (The Hague, Martinus Nijhoff, 1984) ch 2.

civil recovery pursuant to UWOs constitutes a form of quasi-criminal punishment imposed in response to conduct which occurred abroad 'and is unlawful under the criminal law applying in [a state of origin]', this potentially has jurisdictional implications.

First, when the High Court decides that property is the product of conduct 'unlawful under the criminal law' of another state and therefore should be subject to a CRO, it is not purporting to rule on the guilt or innocence of any party, nor is it applying the criminal laws of another jurisdiction. No prior criminal conviction is necessary in any jurisdiction for a CRO to be made.[113] It is, however, stating that on the balance of probabilities (i) acts contrary to the criminal laws of that other state have occurred in that state; and (ii) the proceeds of those acts are, or are represented by, assets in the UK.[114] On one (admittedly liberal) interpretation of the 'public law taboo', this risks falling foul of the taboo.

The public law taboo has been heavily criticised by commentators, not least because it leaves a 'vast area of law... in respect of which States are left entirely to their own devices',[115] and this is clear where kleptocracy is concerned. Where a state of origin fails to address those crimes, the public law taboo may frustrate the attempts of other states to take action where the proceeds of grand corruption are held on their territories. Uta Kohl notes how the taboo leaves non-territorial states with a choice of 'imperfect' unilateral measures to be adopted within their own borders. Civil recovery through UWOs is a good example of such a measure.[116] Where a state of origin will not or cannot investigate kleptocracy, civil recovery powers allow UK courts to assess UK property beneficially owned by particular PEPs as representing the proceeds of criminal acts committed in the state of origin and in contravention of the criminal laws of that state.

As the focus of civil recovery powers is on the criminal provenance of the property and the circumstances in which it is held rather than on any alleged acts of the owner, this allows the courts to elide substantive questions on who may have committed what crimes, and where. However, the upshot of issuing a CRO against a foreign PEP is that a court has concluded (albeit not expressly) that the criminal laws of the PEP's state of origin have been breached. It is highly unlikely that a breach of the taboo will ever be claimed in practice where civil recovery is involved: it typically arises where courts *refuse* to enforce or apply foreign public laws.[117] It is, however, an interesting theoretical jurisdictional problem potentially arising through the exercise of a court's adjudicative powers.

Second, on one view, imposing civil recovery measures against PEPs using UWOs is not formally an exercise of extraterritorial enforcement jurisdiction because the receiving state is not exercising 'its power in any form in the territory of another state'.[118] Moreover, as an *in rem* mechanism, where a court issues a CRO in respect of a UK-based property, it is the property's criminal provenance rather than the

[113] POCA, ss 305 and 306.
[114] P Alldridge, 'Proceeds of Crime Law Since 2003 – Two Key Areas' [2004] *Criminal Law Review* 170.
[115] Kohl, *Jurisdiction* (n 25) 220–21.
[116] ibid.
[117] Dodge, 'Breaking' (n 22).
[118] See text to nn 18, 60 and 61 above.

guilt of the property-holder on which the court is ruling. Strictly speaking, therefore, any enforcement action is confined within the borders of the UK. However, on an alternative view, the use of UWOs, when coupled with publicised CROs, arguably represents an exorbitant extraterritorial exercise of both adjudicative *and* enforcement jurisdiction. The impact of the adverse publicity accompanying the process, together with the punitive effect of the orders themselves, on respondents who are abroad goes beyond any of the civil sanctions for failure to respond to investigations hitherto determined by the UK courts as not amounting to an exercise of enforcement jurisdiction in another state.[119] It might be argued that the process's impact is sufficiently punitive in effect to be akin to a de facto criminal conviction in character. If this suggestion is accepted, then it follows that it is open for a UK court to find, as it did where criminal sanctions were threatened against individuals abroad for failure to respond to disclosure orders, that UWOs imposed on PEPs abroad potentially constitutes a breach of international law.[120]

A further observation is necessary. In the recent Supreme Court decision of *R (on the application of KBR, Inc) v Director of the Serious Fraud Office*, Lord Lloyd-Jones distinguished between powers directly exercisable by, for example, the Director of the SFO (an example of executive jurisdiction) and powers conferred by a court.[121] He seemed to suggest that in practice, the exercise of adjudicative jurisdiction by the latter (in issuing UWOs and/or CROs, for example) would typically involve the court additionally exercising its legislative jurisdiction powers to interpret the laws in a way that would safeguard against such excessive exercise.[122] James Crawford suggests that the UK's view is that a state:

> [A]cts in excess of its own jurisdiction when its measures purport to regulate acts which are done outside its territorial jurisdiction by persons who are not its own nationals and which have no, or no substantial, effect within its territorial jurisdiction.[123]

An English court issuing UWOs and CROs which, when publicised, de facto if not de jure go beyond morally neutral civil sanctions may be an example of excessive enforcement jurisdiction in circumstances where no territorial or extraterritorial nexus with the underlying offences or conduct exists, although it is difficult to make a clear case for this given that the immediate impact of the measures are on UK-based property. The UK can rely on some constructive ambiguity in the

[119] See, eg: the recent decision in *R (Jimenez) v First Tier Tribunal (Tax Chamber)* [2019] EWCA Civ 51, [2019] 1 WLR 2956 [54] (Leggatt LJ): '[A] state is not entitled to enforce its penal, revenue or other public laws in a foreign country. But that does not prevent the state from taking measures to enforce a financial penalty against assets of the debtor situated within its own territorial jurisdiction or against the debtor personally if he enters its territory'.

[120] See, eg: *Perry* (n 59) [94] (Lord Phillips).

[121] *R (on the application of KBR, Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, [2022] AC 519 [65].

[122] ibid.

[123] Crawford, *Brownlie's Principles* (n 23) 463, citing E Lauterpacht (ed), *British Practice in International Law* (London, British Institute of International and Comparative Law, 1964) 153.

international law of jurisdiction on this because it can argue that even where it holds no basis on which to assert enforcement jurisdiction over foreign criminal conduct, by using UWOs/CROs it is merely using a form of adjudicative jurisdiction to regulate property ownership in its own territory rather than regulating acts outside its territory. This is the basis on which the UWO legislation is perhaps unproblematic as a form of legislative jurisdiction.[124] However, as acts of criminality outside the English courts' adjudicative and enforcement jurisdiction form part of the basis on which that regulation was created,[125] this argument is not altogether convincing. It remains to be seen whether English courts will limit any such excess in practice, as envisaged by Lord Lloyd-Jones.

Finally, even though civil recovery using UWOs can arguably constitute an excessive exercise of adjudicative and enforcement jurisdiction, the process might be said to be justifiable in the context of kleptocracy given the gravity of the humanitarian and human rights implications involved.[126] In the ongoing skirmishes between sovereigntists and the internationalists in the debate on loosened constraints on territoriality,[127] appeals should be made to the interests of the populaces of states in the grip of corrupt regimes as a limited basis for potential extraterritorial enforcement where kleptocracy is concerned. The realities of globalisation and the relative ease and speed with which assets can be stolen from the coffers of states of origin only to arrive, often through multi-jurisdictional and circuitous routes, to receiving states create strong arguments in favour of less rigorous adherence to strict territorial enforcement principles where grand corruption is concerned.

Alejandro Chehtman has suggested that the prima facie immunity held by territorial states against extraterritorial enforcement might be overridden 'on the basis of some fundamental interest of the individuals' of those states.[128] In the case of states of origin whose governing regimes hold permissive attitudes to grand corruption, those regimes' failures to enforce anti-corruption laws domestically could be viewed as negating claims to that immunity, because the immunity is abused at the expense of the well-being of their populaces. Where a state's governing administration no longer functions in favour of (and in fact undermines) the well-being of its populace, the immunity is perhaps implicitly forfeited at what Chehtman describes as the 'bar of justice'.[129] The use by extraterritorial bodies, in limited circumstances, of quasi-criminal measures in addressing misconduct linked to grand corruption is therefore potentially justifiable. However, the fact that the forum for determining whether a sovereign state's claim-rights against extraterritorial punishment should be forfeited (at least insofar as it applies to confiscation of the UK-based proceeds of the relevant misconduct – something that is an implicit

[124] See n 112 and accompanying text.
[125] See n 49 and accompanying text.
[126] Sharman, *The Despot's Guide* (n 2); Ivory, *Corruption* (n 2).
[127] AL Parrish, 'Reclaiming International Law from Extraterritoriality' (2009) 93 *Minnesota Law Review* 815.
[128] Chehtman, *The Philosophical Foundations* (n 27) 28.
[129] ibid 10.

effect of the issuing of UWOs and CROs against foreign PEPs) is the court of another state,[130] is undoubtedly controversial and potentially of concern to jurisdictional purists.

In his contribution to this volume, Ryngaert notes that there is a dawning realisation that the strict limits of the *Lotus* enforcement prohibition fail to address serious threats posed in cyberspace in light of their global implications.[131] He notes that in an investigative context, there is perhaps an emerging case for relaxing principles of extraterritorial enforcement jurisdiction in carefully defined circumstances in order to avoid impunity.[132] Parallel arguments might be made in the context of investigating kleptocratic misconduct.

7 Conclusion

This chapter has suggested that UWOs, in circumstances where they result in CROs being made and their use is publicised, are quasi-criminal in purpose, process and punitive impact. It has considered whether the process is capable of breaching international law given its extraterritorial legislative reach, and given the potential for excessive adjudicative and enforcement jurisdiction to be exercised in applying the measures. It is not possible to make a clear argument that the process can or will breach international law, but its quasi-criminal nature raises interesting and potentially contentious jurisdictional questions.

Even if publicised civil recovery against corrupt PEPs using UWOs generates jurisdictional concern and potentially allows the High Court to make determinations impacting on international *political* matters, the process is one potentially useful means of tackling impunity by circumventing territorial enforcement limitations which can stymie the investigation of kleptocrats. Normative imperatives of ensuring that the populaces of states of origin are facilitated in having individuals who stole from them being held to individual criminal (or at least, quasi-criminal) account provide a justification for their use, at least in principle. Civil recovery using UWOs as a quasi-criminal response to kleptocracy, comprising both a 'hard treatment' element and a condemnatory element typical of criminal punishment, is one means of achieving individual accountability. To allay risks that the process may generate in terms of jurisdiction, there is scope for the reform of, or further guidance on the correct operation of, the regime. Reforms might include, for example, amending the relevant laws to expressly provide that any use of the process must factor in comity implications, or requiring broader application of reporting restrictions so that claims to the quasi-criminal impact of the measure are weakened. These are questions for another day. This chapter has also suggested that there are sufficient jurisdictional

[130] To be clear, a state of origin's claim-right to punish crimes committed on its territory will be impacted upon only to the extent that the state of origin wished to include confiscation of the UK-based assets representing the proceeds of an offender's crime which are already the subject of UK CROs as a component of the offender's punishment.

[131] Cross-ref to Ryngaert's contribution.

[132] Cross-ref to Ryngaert's contribution.

concerns with the operation of the UWO regime to take these questions seriously if the process is to become a defensible means of tackling kleptocratic impunity.