



FINANCIAL ACCOUNTABILITY FOR TORTURE AND OTHER HUMAN RIGHTS ABUSES



A Framework for Developing Case Strategies

REDRESS

Ending torture, seeking justice for survivors



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REDRESS is an international human rights organisation that represents victims of torture to obtain justice and reparations. We bring legal cases on behalf of individual survivors, and advocate for better laws to provide effective reparations. Our cases respond to torture as an individual crime in domestic and international law, as a civil wrong with individual responsibility, and as a human rights violation with state responsibility.

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Cover image: Jeroen Oerlemans/PANOS Pictures. Iraqi, Iranian and American currency depicting Saddam Hussein being changed on a street stall in Iraq.

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I. EXECUTIVE SUMMARY

Over recent decades considerable efforts have been invested in supporting victims of torture and other serious human rights abuses in obtaining justice. This work has brought significant achievements, for example through developments in domestic and international law, successful claims before regional and international tribunals, and the criminal prosecution of perpetrators. But the payment of reparations to victims, and financial accountability for perpetrators, remain areas where there are considerable gaps.

Judgments sometimes fail to include adequate reparations or damages to repair the harm caused by abuses. Even where reparations are awarded, compliance is patchy. For example, awards totalling approximately \$300 million have been issued in favour of victims of torture and other abuses perpetrated by the regime of Hissène Habré in Chad. Yet these victims have so far been paid none of this sum.



Photo credit : Radiodiffusion Télévision Sénégalais

Instead, victims are often left to rely upon the generosity of donors and states. But again, provision is erratic and incomplete. Rarely is the support framed as reparations (to which victims of gross violations of international human rights law and serious viola-

tions of international humanitarian law).¹ Rather, it is framed as development support or aid. As a result, it fails to realise the rights of victims.

Meanwhile, many perpetrators profit from the abuses of human rights they direct or carry out. They may be involved in violations that themselves generate profits (e.g., the use of forced labour or human trafficking). Or they may use torture and other violations to sustain oppressive regimes, which then creates space to facilitate bribery and corruption. Operating in the shadows (and sometimes the centre) of the global financial system, perpetrators are able to launder and hide the proceeds of their criminal conduct, using illicit assets to purchase real estate, political influence and luxury goods.

Even where perpetrators face criminal justice proceedings, rarely are they deprived of their assets. And where orders for compensation or confiscation are made, whether in criminal or civil claims, often they are not complied with. For example, an award of more than \$2 billion for 10,000 victims of the regime of former Philippine President Ferdinand Marcos has yet to be satisfied by Marcos' estate.

This situation is unacceptable. Above all, it represents a significant failure to achieve justice and reparations for victims of human rights abuses and violations. But it also serves to promote impunity. Because perpetrators are rarely made to surrender the proceeds of abuses and violations,

¹ See UN Basic Principles of the Right to a Remedy and Reparation for Serious Violations of International Human Rights Law and Gross Violations of International Humanitarian Law, Article VII (available at: <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>).



*Pictured: Ferdinand Marcos.
Photo credit: UN Photo/Yutaka Nagata*

there is little economic disincentive (and indeed a strong incentive) to carry out violations that may be economically lucrative. The lack of compliance with existing judgments undermines confidence in justice systems. And the flows of illicit funds through major financial centres harms the international finance system and developed economies, with particular effects on vulnerable sectors, such as the London real estate market.

This Framework is designed to challenge this status quo. By identifying a range of models that promote financial accountability, we hope to challenge the financial impunity that some perpetrators enjoy. A core objective is to use perpetrators' assets to fund reparations for their victims where existing legal mechanisms permit this. The models are evaluated in light of this objective. But even where this use of perpetrators' assets is not feasible, we have identified models that impose financial accountability by depriving perpetrators of assets (or at least their use and enjoyment).

The models we have identified often have complex requirements and may not be suitable for all claims. And even where multiple models may be viable for

a particular claim, the different models may lead to different outcomes. As such, we have identified key characteristics, including threshold requirements, and potential beneficial outcomes, challenges and disadvantages.

This Framework also identifies some of the key issues that are likely to arise when applying these models. Tracing and locating the assets of perpetrators is likely to be an area of significant importance, particularly where assets are located in offshore jurisdictions or held in complex holding structures using shell companies or nominees. The distribution of assets can pose challenges, particularly for mass-claimant actions. Moreover, complex funding solutions may be required to support the high costs associated with some models. We have provided practical and technical guidance on these topics in this Framework.

This programme of work seeks to build upon established practice and precedent from other sectors, particularly the anti-corruption and serious and organised crime sectors. Some of the models rely upon tools developed for use in those sectors, such as non-conviction based confiscation mechanisms, which allow authorities to seize the proceeds of criminal conduct. Others rely upon tools and techniques which are frequently used in other contexts, such a cross-border enforcement of civil judgments arising in the commercial context. The Framework identifies a number of areas for learning from best practice, and potential areas for co-ordination.

This Framework has been prepared with the generous support of the Knowledge Platform for Security & Rule of Law.

II. HOW TO USE THIS FRAMEWORK

A. Purpose and Structure of Framework

This Framework is designed to serve as a tool to help identify, develop and evaluate potential case strategies for pursuing financial accountability for torture and other serious human rights abuses.

Section III of this Framework begins by outlining the need for financial accountability for human rights abuses, and the potential role that legal and other mechanisms can play in addressing this issue.

Section IV of this Framework sets out a number of models that can promote financial accountability for perpetrators of torture and other human rights abuses, particularly through the provision of reparations to victims using the assets of perpetrators. It covers the potential beneficial outcomes and opportunities associated with these models, as well as an evaluation of resource requirements, potential disadvantages and limitations, and case studies.

Section V of this Framework provides detail on a number of tools which can assist with the development of cases, including asset tracing and funding options.

B. Intended Audience and Use

This Framework has been designed to be used by NGOs and practitioners around the world that act on behalf of victims of torture and other serious human rights abuses. It has been developed as a tool to help explore what models and strategies to promote financial accountability may be appropriate for a particu-

lar claim. To assist with this process, we have set out some of the key characteristics and threshold requirements for different models of financial accountability.

As will be seen, some of the models suggested in this document are complex and rely upon specialist and technical expertise. For example, a critical issue will often be locating a perpetrator's assets to fund the payment of reparations or compensation. For some cases, questions of funding may be critical. As such, this Framework is also designed to be used by specialists and others who may be involved in these cases. This may include, for example:

- a. Specialist asset investigators
- b. Investigative journalists
- c. Donors
- d. Litigation funders
- e. Commercial partners, such as specialist or commercial legal firms who provide pro bono support

Some of the models are also premised on action by public bodies, including law enforcement agencies, prosecuting authorities and development or aid organisations. This Framework may be of use to these public bodies.

This Framework is also designed to be used as an educational tool to explore potential models for financial accountability. It may be relevant, for example, for states transitioning from conflict or a politically repressive regime. This Framework may also

serve as a way of developing conversations about how to promote financial accountability in the human rights context. Other sectors (for example, the financial transparency and anti-corruption sectors) have considerable expertise in many of the areas relevant for building and developing claims. By developing and sharing this Framework, we hope to encourage interdisciplinary cooperation and coordination, particularly through the sharing and exchange of best practice.

C. Implementation of Framework

This Framework focusses on technical models that may achieve financial accountability for perpetrators of torture and other serious human rights violations. It does not address the conduct of litigation, and in particular, the need for a victim-centric, and holistic approach to litigation. While outside of the scope of this Framework, we consider that a victim-centric approach is critical to achieving justice for victims and survivors, as well as to prevent re-victimisation and mitigate adverse psychological impacts from participating in claims. We would encourage readers to incorporate victim oriented strategies when developing potential claims to pursue financial accountability.² Such strategies are critical for all aspects for development of a claim, from information gathering and presentation of claims,³ to the conduct of litigation, and the design and delivery of reparations.⁴

2 See, e.g., REDRESS, *A victim-centred prosecutorial strategy to respect victims' rights and enhance prosecutions*, July 2014 (available at: <https://redress.org/publication/a-victim-centred-prosecutorial-strategy-to-respect-victims-rights-and-enhance-prosecutions/>)

3 See, e.g., the draft Murad Code, a Global Code of Conduct for Documenting Conflict-Related Sexual Violence (available at: <https://www.muradcode.com/>).

4 See, e.g., REDRESS, *Reaching for Justice: The Right to Reparation in the African Human Rights System*, October 2013 (available at: <https://redress.org/wp-content/uploads/2017/12/1310reaching-for-justicefinal.pdf>).

This Framework has been designed to promote financial accountability for perpetrators of torture, including in response to the significant impunity gap in respect of the proceeds of human rights abuses. However, we note the qualified risk that the improper application of some of these models could cause an adverse human rights impact for alleged perpetrators, particularly concerning principles of due process. While certain mechanisms, particularly those that involve proceedings before courts and tribunals, provide safeguards, some do not, for example advocacy campaigns, and there are potentially heightened risks with certain mechanisms.⁵ Users of this Framework should be aware of this risk and, we recommend take steps to mitigate this risk where appropriate.

5 See, e.g., in respect of non-conviction based confiscation mechanisms, Bingham Centre for the Rule of Law, *Briefing Paper: Can Non-Conviction based (NCB) asset forfeiture be compliant with the Rule of Law?* (available at: https://binghamcentre.biicl.org/documents/24_briefing_paper.pdf), and in respect of targeted sanctions regimes (under UN Security Council-authorized regimes), United Nations University Centre for Policy Research, Conference Proceeding Paper: *Due Process in UN Targeted Sanctions: Old Challenges, New Approaches*, March 2020 (available at: https://i.unu.edu/media/cpr.unu.edu/post/3849/DueProcess_ConferenceBrief.pdf)

III. DEFINITIONS

In this document, we refer to *perpetrators*, who carry out *human rights abuses and violations* against *victims*. This section provides some background on the meaning of these terms as used in this Framework.

A. What do we mean by victims?⁶

For the purposes of the Framework, victims include those recognised as victims under Article V of the UN Basic Principles on the Right to a Remedy and Reparations following Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the “UN Basic Principles”).⁷

Within this document, therefore, references to victims should be construed broadly; for example, it should be deemed to include both those directly and indirectly impacted by violations. References to victims should be deemed to include claims

6 Note: A conscious decision has been taken to use the word “victim” rather than “survivor”. The term “survivor” is in many contexts more empowering for individuals. However, not all victims of torture and other human rights abuses survive, and “[m]any who survive in a literal sense continue to be victimised physically, psychologically, financially and socially”. While recognising that “many victims are not the passive subjects of crime”, the term “victim” has a technical legal meaning in international law and in many domestic systems, and is therefore used in this Framework. See Saumya Uma, ‘Integrating Victims’ Rights in the Indian Legal Framework’, in V Nainar and S Uma (eds), *Pursuing Elusive Justice: Mass crimes in India and the relevance of international standards*, Oxford University Press, (2013), 245-286, at 248.

7 The UN Basic Principles are available at: <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>. See further: Chapter 2 of *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners’ Guide*, The International Committee of Jurists, Revised Edition (2018) (available at: <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>), and REDRESS, *A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation* (2006) (available at: <https://redress.org/wp-content/uploads/2018/01/MAR-Reparation-Principles.pdf>)

brought on their behalf where they are unable to do so, for example due to incapacity or where victims are deceased.

B. What do we mean by perpetrators?

The nature of human rights violations is such that responsibility may attach to a wide range of individuals and entities. It is rarely the case that the types of human rights violations and abuses addressed here are carried out in isolation, by one person acting of their own accord.

As such, we consider that an expansive approach to the notion of perpetrators should be adopted when considering financial accountability for rights violations. In particular, it would include at a minimum a person’s conduct which amounts to or gives rise to:

- a. All forms of state responsibility for human rights abuses and violations, as a matter of international law and/or domestic law (including public and administrative law);
- b. Individual criminal liability arising under international and/or national criminal law;
- c. Civil liability arising under national law, both for direct perpetrators and those who may facilitate violations and abuses (e.g., the provision of material support to direct perpetrators or otherwise facilitating violations).

C. What do we mean by violations?

This Framework is primarily targeted at serious violations of fundamental legal norms. This includes gross violations of international human rights law and serious violations of international humanitarian law. However, the Framework may also apply to other violations of human rights and international humanitarian law for which victims have a right to reparations or remedy (including as a matter of applicable domestic law).

As an organisation REDRESS is particularly focussed on supporting victims of torture. However, we consider that the models and strategies set out in this Framework are of equal relevance and application to other human rights violations. Indeed, we consider that the practice and experience of other human rights violations can inform and improve the approach taken following instances of torture.

IV. THE CONTEXT TO THE FRAMEWORK

A. The Problem

Perpetrators of gross human rights violations frequently profit from the abuses that they carry out. They may be part of a ruling group which uses torture, other forms of violence, intimidation or oppression to maintain their position, which in turn allows them to profit from corruption and other unlawful behaviour. Or they may use forced labour or pillage the property of those they abuse.

Yet, despite the fact that perpetrators often enrich themselves through such abuses, they rarely face any form of financial accountability for their wrongdoing. Equally, the victims of their abuses rarely receive reparations or damages to remedy the full harm that they have suffered.

To the extent that victims are able to pursue judicial proceedings, awards are often insufficient, or remain unenforced. Victims are instead left to rely upon the largesse of states and donors. As a vulnerable group, they often struggle to compete with states' and donors' other priorities. When support is offered, it is often framed as aid, not as the rightful entitlement of victims to receive reparations.

Taken together, these measures have can adversely affect victims' confidence and trust in justice proceedings.

B. How this Framework addresses this problem

In recent years, growing attention has been paid to the position of victims, and significant progress has been made in establishing mechanisms for the distribution of reparations and financial compensation. However, a common feature of these mechanisms is that they are often underfunded.

We consider that there is therefore a pressing need, and indeed, an opportunity, to focus on using perpetrators' assets to fund reparations for victims of violations. This is the core objective of this Framework. Based on dialogue with victim groups, we understand this to align with their objectives.



Photo credit: Rappler. Museum holding the vast shoe collection of former First Lady of the Philippines, Imelda Marcos, implicated in extensive corruption involving hundreds of millions of dollars. Ferdinand Marcos, former President of the Philippines, was implicated in extensive and serious human rights abuses, resulting in a civil judgment of \$2 billion in damages.

Fulfilling this objective, through one or more of the models set out below, also carries other positive outcomes:

- a. Seizing the assets of perpetrators and applying these assets to fund reparations are both forms of accountability and can serve as an effective form of satisfaction for victims.
- b. If it can be shown that perpetrators' assets can be seized effectively, it may remove the financial incentive to commit human rights violations that generate a positive economic return (e.g., forced labour).
- c. Perpetrators of human rights violations are often party to bribery, corruption and embezzlement. Human rights violations may serve as a tool of intimidation or oppression to enable this behaviour. Pursuing financial accountability for human rights violations may therefore serve as a means of challenging these other behaviours.
- d. Perpetrators (particularly high level perpetrators) often rely upon complex money laundering techniques to hide and protect assets. In doing so they contribute to the abuse of the global financial systems, as well as other vulnerable sectors of the economy, such as the real estate market. Pursuing financial accountability has the potential to assist with anti-money laundering efforts by challenging these practices.

Where it is not possible to seize perpetrators' assets and apply them to fund reparations, we have sought to identify mechanisms that may serve to deprive perpetrators of their assets.

V. MODELS FOR FINANCIAL ACCOUNTABILITY

The purpose of this Framework is to identify models that can promote financial accountability, and, where possible, use these mechanisms to use perpetrator assets to fund reparations for victims.

This Framework considers the following models:

- a. Private law claims, in which victims bring private claims against perpetrators. This mechanism also includes the possibility of claims against those who facilitate or provide support for the commission of violations and abuses, including business enterprises.
- b. Human rights claims against states which are responsible for abuses and violations, before domestic, regional or international forums.
- c. Administrative and civil claims against states where states are responsible for abuses and violations, or have otherwise contributed to these.
- d. Non-conviction based confiscation mechanisms, which permit law enforcement agencies to seize the proceeds of criminal conduct, and in some circumstances, to apply those proceeds for the benefit of victims of that criminal conduct.
- e. Criminal confiscation and compensation mechanisms, which may be used to seize the proceeds of criminal conduct or to direct perpetrators to pay compensation to victims.
- f. Advocacy campaigns, including specific advocacy to financial institutions to restrict perpetrators' access to the global financial system.

There are, of course, other models which can promote accountability (including financial accountability) for human rights violations, for example, inter-state claims for diplomatic protection. As such, this Framework should not be seen as comprehensive. Rather, we have sought to identify models which may be accessible to practitioners in a range of settings, particularly when seeking financial accountability for a specific, or small number of perpetrators.

A. Private law claims (including ‘civil party’ mechanisms)

i. Concept

It is a general principle in most legal systems that when a person acts so as to cause harm to another, the person affected may have a right to sue the wrongdoer and seek redress for the harm that they have caused. For example, most legal systems enable those who suffer personal injury as a result of another’s negligent actions to sue the responsible person for compensation for damage that they have suffered.

The same or similar principles can be used to enable victims of serious human rights violations to bring claims against perpetrators. In addition, some legal systems have specific legislative schemes that provide mechanisms for victims of torture and other serious violations of international humanitarian and human rights law to claim compensation from perpetrators.⁸ It may also be possible to bring civil claims as part of criminal proceedings, where an appropriate ‘civil party’ mechanism exists. This allows victims to present claims for financial and other losses against a perpetrator, which are determined as part of the assessment of the defendant’s conduct.⁹

ii. Potential benefits

Private law claims by victims offer a range of potential benefits, including:

Claims can serve as a mechanism to obtain compensation: If a victim can establish that a perpetra-

tor has caused them harm, then a court will typically order relief for the victim. This may include ordering the perpetrator to pay financial compensation to address the harm they have caused.

Conduct of claim remains in victims’ control: By contrast with other mechanisms that rely upon public authorities to initiate a claim/exercise their discretion (e.g., human rights sanctions or non-conviction based confiscation mechanisms), private civil claims are conducted in accordance with the instructions of victims.

Tools to locate and freeze assets: Many jurisdictions provide mechanisms for claimants to obtain information to help locate and freeze assets in order to prevent dissipation of assets. For example, the English courts can issue freezing orders which require a defendant to identify assets, and to avoid dealing with them. Such freezing orders may be issued on a ‘worldwide’ basis, such that they have effect internationally. These tools can help prevent a perpetrator from dissipating or hiding their assets once they become aware of the potential for legal proceedings.

Disclosure and discovery tools: Many jurisdictions, particularly common law jurisdictions, require parties to litigation to disclose documents in the course of proceedings. In certain circumstances, third parties can also be ordered to produce documents for use in proceedings. Disclosure of documents can be very helpful, particularly when a perpetrator has maintained records that will substantiate victims’ claims. For example, in a claim brought in the United Kingdom by Kenyan nationals in respect of torture and ill treatment that took place during the Mau Mau Uprising in the 1950s, the United Kingdom’s Foreign and Commonwealth Office was compelled to disclose formerly secret files held in its archives (the so-called ‘Hanslope Park’ files). These documents provided evidence of the torture and ill treatment of Kenyan nationals. The existence of a comprehen-

⁸ See, e.g., the USA’s 1991 Torture Victim Protection Act and the 1789 Alien Tort Claims Act.

⁹ See, e.g., discussion of the French ‘partie civile’ system in: Open Society Justice Initiative and TRIAL International, Universal Jurisdiction Law and Practice in France, February 2019 (available at: <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-France.pdf>), sections 1.1.2 and p.38.

sive record was also critical to rebutting arguments on limitation.¹⁰

Lower evidentiary threshold: Private civil proceedings often involve a lower evidentiary threshold. For example, whereas the standard of proof in criminal proceedings may be ‘beyond reasonable doubt’, courts may adopt a ‘balance of probabilities’ standard in civil proceedings. This lower threshold makes it easier to establish a victim’s claim.

Findings of fact: Judgments in civil proceedings may make affirmative findings of fact. For example, if a victim is successful, the court will likely confirm that a perpetrator has indeed harmed them. Impartial findings of fact that confirm a victim’s experience are an important part of the justice process, particularly where perpetrators deny and seek to cover up their wrongdoing.

International enforcement: There are established mechanisms that allow private civil law judgments to be enforced against assets located in another state. This is potentially a helpful tool when the perpetrator does not have sufficient assets located in the state where the claim is heard to settle any payment the court may order.

No requirement for link between assets and wrongdoing: By contrast with other mechanisms (particularly civil or criminal confiscation proceedings), there is generally no requirement for a defendant’s assets to be connected to the wrongdoing for which they are being sued. Judgments are typically enforceable against any assets held by a perpetrator (in the event that a perpetrator fails to comply with a judgment).

Well-established precedents: Private civil claims have been used effectively in a wide range of scenarios. For example, private civil claims have been used effectively to secure redress for environmental damage, for personal injury claims following industrial exposure, and in the human rights context. In particular, there are existing mechanisms that permit actions involving large numbers of claimants, which may be relevant where violations have been widespread.

Targeting facilitators: It may be feasible to bring claims not just against the direct perpetrators of torture and other violations, but against those who are indirectly involved, or who facilitate violations. For example, a significant number of claims have been brought against multi-national corporations for harm caused by overseas subsidiaries, including as a result of the violence of security forces and environmental damage (see discussion below at p.19). It may be possible to target those who knowingly and deliberately provide material support, such as through arms and conflict mineral trafficking.

Sustainable case funding: Depending on the jurisdiction where a claim is brought, it may be possible to recover some or all of the claimant’s costs, if they are successful. This could provide a source of funding both for the successful case, but also potentially to help fund future cases involving other victims.

Civil party mechanisms may reduce resource requirements: Civil party mechanisms may allow victims to bring civil claims against perpetrators as part of criminal proceedings. This may reduce resource expenditure compared to a purely private civil claim, as civil parties may be able to ‘piggy back’ on the criminal prosecution, and avoid the need to build separate, stand-alone claims.

¹⁰ See ‘Hanslope Park disclosures’, Leigh Day (available at: <https://www.leighday.co.uk/International/Further-insights/Detailed-case-studies/The-Mau-Mau-claims/Hanslope-Park-disclosure>)

iii. Threshold requirements¹¹

For a claim to be feasible, it is important to identify:

- a. Specific victim(s), who would be the claimants in the action.
- b. Specific perpetrator(s) who have caused harm to the claimants.
- c. The existence of a suitable cause of action that make perpetrator(s) liable for the harm caused to the claimants.
- d. A basis for the intended court to assume jurisdiction over the claim (e.g., on the basis that the perpetrator(s) are present in the proposed jurisdiction).
- e. The perpetrator(s)'s assets, including their location and the risk of dissipation.
- f. The feasibility of enforcement of any judgment/award against the perpetrator(s)'s known assets.

iv. Limitations and disadvantages

Ability to communicate with victims: To bring a claim on behalf of victims, it is important that they are able to interact with their legal representatives (including, for example, to give them instructions in relation to important case developments). This can be difficult, particularly in post-conflict settings. It may also be made more difficult by professional regulations applicable to legal counsel. For example, in some jurisdictions, lawyers are prohibited from soliciting clients, which may make identifying and inviting victims to participate in a claim challenging.

¹¹ *N.b.*: These are only general, high level criteria that provide a starting point for evaluating the suitability of a model for a particular claim.

Establishing extraterritorial jurisdiction: It may not be feasible to bring a claim in the jurisdiction where the violations occurred (e.g., due to the risk of perpetrators intimidating or interfering with justice processes there). However, it can be difficult to establish the jurisdiction of another country's court to hear claims, absent some connection, such as the presence of the perpetrator or victims in that other country.

Cost and length of proceedings: Private civil claims are likely to be costly and take significant time to complete. This means that private civil claims are unlikely to provide immediate redress, which is of significant concern, particularly for victims without means or for those who may face life-limiting conditions as a result of violations.

Claims against states and state officials: We have considered claims against states (including on the basis of private law action) separately, as set out below. However, we note here that claims against states or against state officials personally in jurisdictions other than the defendant state will often have very limited prospects of success due to rules of state immunity.¹²

Requirement to prove loss: It is likely that each individual victim will need to establish that they have suffered loss as a result of the specific perpetrator's actions. This means that those who have suffered loss caused by other perpetrators may not be able to obtain compensation.

¹² See, e.g., *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, which sets out the effect of English law of state immunity in the context of claims for torture. See also the claim brought by Ismail Ziada against former Chief of Staff of the Israeli Armed Forces, Benny Gantz, and Amir Eshel, former commander of the Israeli Air Force. This claim was rejected on the basis that both defendants enjoyed functional state immunity in respect of the acts complained of. For background, see Dutch court not competent to hear war crimes case against Israel's Gantz, *Reuters*, 29 January 2020 (available at: <https://www.reuters.com/article/us-netherlands-israel-gantz/dutch-court-not-competent-to-hear-war-crimes-case-against-israels-gantz-idUSKBN1ZS13G>).

Enforcement risk: If victims are successful and the Court orders the perpetrator to pay compensation, enforcement may prove to be an obstacle. If a perpetrator fails to comply, victims can seek to enforce the order. However, this can be costly and time consuming, particularly where assets are located in a different jurisdiction, or where a perpetrator hides or dissipates assets (e.g., through the use of shell companies or complex trust arrangements).

Exposure to costs risk: In some legal systems, such as England and Wales, the legal costs of the successful party may become payable by the unsuccessful party (which of course has to bear its own costs too). There is a risk, therefore, that if victims were to bring an unsuccessful claim in such a jurisdiction, they would be ordered to pay the defendants' legal costs.¹³ Beyond the financial impact, there are also potential psychological consequences where vulnerable victims are directed to make payments to perpetrators.

v. Resource requirements

High: To bring a private civil claim requires very significant resources. It is time consuming to build claims, for example through gathering and preparing witness and expert evidence, preparation of legal submissions and the administration of claims. Hundreds or (likely) thousands of hours will be spent. The costs of legal counsel at standard rates are likely to run to the millions of pounds or euros. The duration of a case may last several years, particularly if either party seeks to appeal.

The costs of private civil claims are likely to be beyond the means of many potential claimants. However, there are ways to address this issue and to make private civil claims feasible. Litigation funders, for example, may provide funding for legal and oth-

¹³ For example, in the *Ziada* case referred to in the preceding footnote, the claimant was ordered to pay part of the costs of the defendants.

er case fees in exchange for a share of any damages awarded. Some law firms may also be willing to act on a reduced fee, or even a pro bono basis. They may also be willing to act on a conditional fee basis, where fees are only paid in the event of a successful outcome for the case. Some of these options are discussed in greater detail below at section VI.

i. Case studies:

Perpetrator’s lottery win provides funds for compensation: Colonel Dorélien was a member of the military dictatorship that ruled Haiti from 1991-1994. Following the end of that regime, he fled to the United States. Claims were brought on behalf of a victim of a massacre perpetrated by forces under his command, and on behalf of another victim who was tortured by the Haitian armed forces. In 2007, the US Federal Courts issued a judgment ordering Colonel Dorélien to pay compensation of \$4.3 million to the two victims. Some \$580,000 was recovered, drawn from Colonel Dorélien’s 1997 jackpot win in the Florida state lottery.¹⁴



Photo credit: SSGT Marvin D. Lynchard, USAF

\$2 billion award for extensive human rights violations: The regime of Ferdinand Marcos, former President of the Philippines, perpetrated extensive human rights violations. Following the end of the Marcos regime, he fled to the United States. More than 10,000 victims participated in a mass claimant action against him.

They were successful, obtaining a judgment of approximately \$2 billion against his estate. The process of enforcement was made more challenging by parallel asset recovery actions by the Philippines state, including the scuppering of a settlement agreement in respect of the \$2 billion judgment.¹⁵

vi. Future developments

There are a number of potentially helpful developments that may facilitate claims by victims of torture and other serious human rights violations.

A. International enforcement

A significant challenge is the cross-border enforcement of judgments. This arises where a perpetrator’s assets are located in a different jurisdiction to where

the victims’ claim was heard. Currently, cross-border enforcement relies on a mixture of bilateral and multilateral instruments, and national law.

In response to this issue, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the “Hague Convention”) was adopted in 2019. The Hague Convention provides for the recognition and enforcement of civil judgments between ratifying states, and is intended to make cross-border enforcement more straightforward. At present only two states have ratified the Hague Convention, and as such it is of limited application. However, as more states ratify the treaty, it will become relevant for a greater range of cases.

¹⁴ See The Center for Justice and Accountability, Crimes Against Humanity under Haitian High Command: Jean v Dorélien (available at: <https://cja.org/what-we-do/litigation/jean-v-dorelien/>)

¹⁵ Beth van Shaack, Unfulfilled Promise: The Human Rights Class Action, *University of Chicago Legal Forum*, Volume 2003, Issue 1, Article 8, at pp.284-289

B. Corporate Accountability

A number of recent developments demonstrate the growing potential for private claims against corporations for harm that they, or their overseas subsidiaries, have caused. For example:

- a. Under French law, large companies are required to consider and mitigate the human rights risk associated with their activities (*'le devoir de diligence'*). Where a company fails adequately to identify and mitigate the risk of human rights abuses, it may be possible for those harmed by that failure to sue the company.¹⁶
- b. A number of claims have been brought, including in England and Canada, against parent companies of multinational groups.¹⁷ The claims have been brought by those affected by overseas subsidiaries' operations, including on the basis (in the English claim) of the parent company owing a duty of care in respect of the acts and omissions of subsidiaries, and (in the Canadian claim) the actionability of claims based on the breach of customary international law norms by non-state actors. Both the UK Supreme Court and the Supreme Court of Canada affirmed (at least the possibility of) these theories of liability.

16 For a detailed discussion of the *'devoir de diligence'*, see Stéphane Brabant and Elsa Savourey, *La loi sur le devoir de vigilance, une perspective pratique et multidimensionnelle*, *Revue Internationale de la Copliance et de l'Éthique des Affaires*, December 2017. An English translation is available at the following link: http://www.bhrinlaw.org/frenchcorporatedutylaw_articles.pdf

17 See, e.g., *Vedanta Resources & anr v Lungowe & ors* [2019] UKSC 20 (a case in the English courts), *Evsun Resources Ltd. v. Araya*, 2020 SCC 5 (a claim in the Canadian courts).

These mechanisms for private civil claims complement existing and evolving concepts of corporate criminal liability. A number of legal systems recognise the possibility of corporate criminal liability for complicity in human rights abuses, for example in Norway.¹⁸

18 See *Universal Jurisdiction Law and Practice in Norway*, January 2019 (available at: <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-Norway.pdf>), p.17. See further the joint survey between Open Society Justice Initiative and TRIAL International investigating law and practice relating to universal jurisdiction (including in respect of corporate criminal liability) in Canada, Finland, France, Germany, The Netherlands, Norway, Sweden and Switzerland (landing page available at: <https://trialinternational.org/latest-post/prosecuting-international-crimes-a-matter-of-will-ingness/>). See further ed. S Gless and S Broniszewska-Emdin, *Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues*, *International Review of Penal Law*, June 2017, for a comprehensive multi-jurisdictional survey of jurisdictional issues associated with prosecuting corporate entities in Australia, The Netherlands, Finland, France, Germany, Italy, the Russian Federation, Switzerland and the United States of America.

B. Enforcement of existing judgments and awards

This model focuses on the enforcement of existing judgments and awards. It is not a model for new cases, where no proceedings have been initiated or judgment issued. Rather, it seeks to capitalise on existing judgments. This serves to reduce risk, because a favourable judgment has already been achieved. It also serves to promote trust and confidence in justice mechanisms, by ensuring the judgments and awards are enforced and complied with.

i. Concept

A significant number of judgments and awards concerning human rights violations are yet to be complied with or remain unenforced. For example:

- a. More than half of the judgments that the ECtHR has issued are yet to be complied with (in whole, or in part).¹⁹
- b. In proceedings against the former Chadian dictator Hissène Habré, the Extraordinary African Chambers (“EAC”) ordered Habré to pay compensation in excess of \$150 million. The Special Criminal Court of Chad has also ordered compensation of \$125 million to be paid to 7,000 victims of the Habré regime.²⁰ No part of this compensation has been paid.

These judgments and awards present an opportunity. Where enforcement is feasible, compensation may be secured for victims without the potential risk and resource expenditure associated with bringing a

claim from first principles.

The enforcement of judgments and awards is also critical to maintaining victim trust in the justice process. Where judgments and awards are not enforced, there is risk of undermining trust in the judicial process. This is in addition to the negative consequences and risk of re-victimisation for victims that flow from any delay in the payment of compensation.

These judgments include both binding judgments and awards, with which compliance is mandatory, as well as decisions which are advisory or provide recommendations, but which should be complied with in good faith.

ii. Potential benefits and opportunities

Lower risk associated with enforcement of existing awards: By their very nature, existing judgments and awards entail less risk and resources than claims where no judgment has been issued. There is no need to build and bring a claim on the substantive merits of a case, and there is no uncertainty about the outcome of the claim. While enforcing awards and judgments is not risk or resource free (there may be difficulties and issues around enforcement), it is still a much more favourable position for the claimants.

Enforcing awards can serve as a mechanism to obtain compensation: Successfully enforcing awards directing the payment of compensation will lead to victims obtaining compensation.

Potential secondary claims where a state fails to comply: For public law human rights claims, it may be possible to bring secondary or follow on claims where a state fails to comply with an award. This is on the basis that the lack of compliance with the original award itself amounts to a further breach

19 Veronika Fikfak, Changing State Behaviour: Damages before the European Court of Human Rights, *European Journal of International Law*, Volume 29, Issue 4, November 2018, at p.1091.

20 See Case summary: Clément Abaïfouta and 6, 999 Others v the Republic of Chad, REDRESS (available at: <https://redress.org/casework/clementabaifoutaand6999othersvtherepublicofchadhissene-habre-case/>)

of human rights law or other obligations.²¹ Further, recognising issues with state compliance, a number of human rights systems have introduced monitoring systems to assist with ensuring compliance with awards.²² These may serve as forums for promoting compliance and enforcement.

Enforcing awards promotes accountability: Where a judgment or award is issued against a perpetrator or a state responsible for a perpetrator's actions, and it is unenforced, it means that accountability has not been achieved. It can even serve to promote impunity if judgements and awards are repeatedly ignored or flouted. Enforcing awards is therefore an opportunity to promote and drive accountability.

Opportunities at times of regime transition: There may be opportunities to seek the enforcement of existing judgments and awards in times of regime or government transition. It may be possible to capitalise on new political will where, for example, a repressive regime falls, particularly for judgments against states.

Building and maintaining trust in justice processes: Enforcing existing awards may help to build victim trust in justice process.

Availability of specialist expertise: Where an award has not been enforced for a considerable period of time, it may well be that there are obstacles or issues

with enforcement. There exists, however, considerable expertise in the commercial sector concerning the enforcement of judgments and awards (e.g., through generating leverage to increase prospects of achieving at least a partial pay out of an unenforced award). This expertise could be deployed in the human rights context, potentially for the most complex claims.

iii. Threshold requirements²³

To determine whether the enforcement of an award is feasible, it is important to identify:

- a. The key characteristics of the judgment or award (including whether it is legally binding, characterised as a private civil claim, a criminal compensation order, etc.).
- b. Identifiable assets which can be used for enforcement.²⁴
- c. Mechanisms by which the judgment or award can be enforced. This includes mechanisms for enforcement in the jurisdiction where the judgment or award was issued, but also potentially under the domestic law of a third state where assets are situated (as well as any bilateral or multilateral instruments relevant to international enforcement). Much will depend upon the characteristics of the judgment or award (see (a) above).

21 For example, the 7,000 victims to whom the Chadian Special Criminal Court directed the payment of \$125 million brought a complaint against Chad before the African Commission on Human and Peoples' Rights, on the basis of Chad's failure to comply with that judgment. For further detail, see: <https://redress.org/casework/clementabaifoutaand6999othersvtherepublicofchadhissene-habre-case/>

22 For example, the use of Special Rapporteurs by UN Committee against Torture; monitoring and compliance powers of the Inter-American Court of Human Rights under Art. 65 of the American Convention on Human Rights. For further discussion, see Lutz Oette, Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies, *Interights Bulletin*, Vol. 16, No. 2 (2010) (available at: <https://core.ac.uk/download/pdf/2794635.pdf>).

23 N.b.: These are only general, high level criteria that provide a starting point for evaluating the suitability of a model for a particular claim.

24 N.b., this is not likely to be relevant when enforcing judgments against states in the courts of that state, or where seeking compliance by a state with a non-mandatory award, that provides advice or recommendations to states.

iv. Limitations and disadvantages

Enforcement mechanisms may not be applicable for some awards and judgments: International enforcement mechanisms (such as those that exist for private civil claims or criminal confiscation orders) may not apply to a number of awards, including public law human rights claims and non-binding, advisory awards or recommendations.

Locating suitable assets: When seeking the international enforcement of a judgment or award against a state, locating suitable assets may prove challenging. Rules of state immunity may preclude enforcement against many types of assets located in third states. Even if potentially suitable assets are located, it may involve extensive litigation to enforce against these assets.

Effect of passage of time on asset tracing: With the passage of time, it can be difficult to locate suitable assets to enforce against. This can be due to the use of those assets to support a perpetrator's lifestyle. Changes in asset holding structures (including deliberate techniques to obscure asset ownership) can also make the process of following assets (and being able to evidence that a perpetrator owns or otherwise is interested in the assets) challenging.

Limitation restrictions: The enforcement of certain judgments, such as private civil claims, may be subject to rules of limitation. For example, a limitation period of either 12 months or six years may apply when seeking to enforce private civil judgments for damages in the UK.²⁵ As such, older judgments may

no longer be capable of enforcement, if the relevant limitation period has expired. There may be exceptions to any rules that would preclude enforcement (although issues of limitation should always be approached with great care, particularly where relevant periods are close to expiry).

v. Resource requirements

Moderate/High: Because a judgment or award has already been obtained, a significant part of the work will already be complete. However, depending on the enforcement strategy, further effort is likely to be required. Cases involving advocacy-based approaches (including through supervisory mechanisms established by human rights courts and tribunals) are likely to involve a lower level of resources. However, cases involving formal enforcement proceedings (particularly on an international basis) are likely to involve significant resources, including for locating assets internationally.

²⁵ Under the UK regime, a limitation period of 12 months applies to judgments falling within the Administration of Justice Act 1920, a limitation period of six years for judgments falling within the Foreign Judgments (Reciprocal Enforcement) Act 1933 or the common law regime. Under the European regime (the Brussels (Recast) Regulation) and the 2005 Hague Convention, no UK limitation period applies; the sole requirement is that the judgment remains enforceable in the state of origin of the judgment.

vi. Case study

Claims worth in excess of \$300 million remain unenforced: Following the collapse of the regime of Hissène Habré in Chad, a number of actions have been brought by victims of human rights abuses perpetrated by that regime. These include the criminal proceedings against Hissène Habré before the Extraordinary African Chambers, and proceedings against members of the Chadian state security services before the Chadian courts.

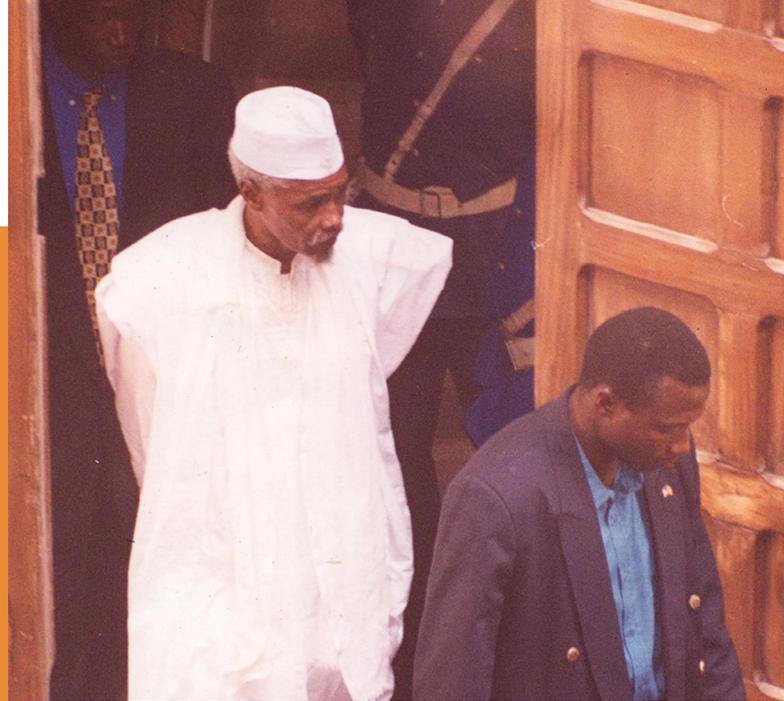


Photo credit: Doudou Sall

The EAC proceedings resulted in an award in excess of \$150 million, for which Hissène Habré is personally liable, while the domestic proceedings resulted in an award of compensation worth \$125 million, for which the named defendants and the Chadian state were found liable. Both remain unenforced, however, and no compensation has been paid to victims.

To secure enforcement of the latter judgment, the 7,000 named victims in the Chadian domestic proceedings initiated a complaint before the African Commission on Human and Peoples' Rights in 2017.²⁴

vii. Future developments

As noted above at section 0 A above, there are developments on the mutual recognition and enforcement of private civil judgments (as well as recent developments on the intra-EU recognition of criminal confiscation judgments) which may facilitate enforcing older judgments.

²⁶ For further detail, see: <https://redress.org/casework/clementabaifoutaand6999othersvtherepublicofchadhissene-habre-case/>

C. Human rights claims

i. Concept

These are what might be termed ‘traditional’ human rights claims. These are generally claims brought against the state in respect of violations carried out by state officials. They may be brought on the basis of national law and/or international law. Claims may be brought in the courts of the relevant state, but also potentially in regional or international forums, such as the African Commission on Human and Peoples’ Rights and the Inter-American Court of Human Rights.

ii. Potential benefits

Potential beneficial outcomes associated with human rights claims include:

Compensation awards: Claims can serve as a mechanism to obtain compensation. If a victim can establish that a state has caused them harm (or is otherwise responsible for harm caused), then a court or tribunal will typically order relief for the victim. This may include directing the relevant state to pay financial compensation to address the harm they have caused.

Findings of fact: Judgments or awards in human rights proceedings may make affirmative findings of fact. For example, if a victim is successful, the court or tribunal would likely confirm that the violations took place and resulted in harm. Impartial findings of fact that confirm a victim’s experience are an important part of the justice process, particularly where perpetrators deny and seek to cover up their wrongdoing.

Support for future claims: A successful human rights claim may support and strengthen future action by a victim. For example, a human rights tribunal or court may not award compensation to address all the damages suffered by a victim. In that case, a victim might seek to pursue a separate action to claim com-

pensation, for example, a private civil action. While a human rights award or claim may not be binding on a court hearing the private civil claim, it may well help to influence or persuade the court.

Claim linked to state, not specific perpetrators: Human rights claims are generally linked to states and not to specific perpetrators. This may make claims easier in certain circumstances. For example, where a number of state officials have perpetrated violations against a number of victims, it may not be necessary to disentangle exactly which official carried out a specific violation against specific victims (assuming the state is responsible for all the state officials’ actions). Other issues concerning individual responsibility, such as ‘command responsibility’, are unlikely to limit state liability in the same way as they may do for individual perpetrator liability in criminal or private civil proceedings.

No requirement for link between assets and wrongdoing: There is no need for any link between assets and either the perpetrators, or the specific wrongdoing or violations that caused harm to the victims. Orders for compensation are typically made against states and are satisfied out of state assets.

iii. Threshold requirements²⁷

For a human rights claim to be feasible as a means of providing compensation to victims, it is important to identify:

- a. The victims, who would be the claimants in the action.
- b. Evidence of the alleged violations, and the material and moral damages caused to the victims.

²⁷ *N.b.:* These are only general, high level criteria that provide a starting point for evaluating the suitability of a model for a particular claim.

- c. Specific forms of responsibility attributed to the state, either through actions or omissions of its agents, or by conduct which results in tolerance of, complicity or acquiescence in the violations.
- d. An appropriate forum (e.g., a court or tribunal) that has jurisdiction to consider the claim. This may be a national, regional or international body. It is important also that the claim satisfies any procedural requirements of the proposed forum.
- e. Whether the proposed forum has any powers to order, recommend or advise the payment of compensation.
- f. In the event that a state is expected not to comply voluntarily with an award, an evaluation of potential enforcement actions may be helpful.²⁸

iv. Limitations and disadvantages

Claims are against states, not perpetrators: Human rights claims are typically made against states, not against perpetrators directly. Likewise, any compensation is likely to be paid by a state rather than by the perpetrators themselves. As such, there may be a sense that perpetrators are not held to the same standard of accountability as, for example, criminal proceedings or a private civil claim.

Perpetrator may not be deprived of assets: Because states are typically responsible for the payment of any compensation, unless that state takes any action to recover a perpetrator's assets, the perpetrator will likely continue to have control and use of them.

²⁸ *N.b.*: These are general, high level requirements included for the purposes of this Framework, and do not reflect the procedural requirements of the various human rights courts and tribunals (e.g., the requirement to exhaust domestic remedies).

Compensation awards may not be mandatory: Depending on the forum, it may be that a tribunal or other decision-making body cannot issue an order that a state must comply with, but only a recommendation. In such circumstances, there is very little recourse if a state chooses not to comply with the tribunal's decision.

Enforcement of mandatory awards may still be challenging: Even where a court or tribunal issues a mandatory order to a state, a state may still fail to comply with the order. For example, in 2018, the Council of Europe reported that more than half of the European Court of Human Rights' decisions remained unenforced.²⁹ In those circumstances, victims may have limited recourse. Domestic courts in the state in question may offer some assistance (where the judiciary is not subject to political interference). However, attempts to enforce the judgment internationally will likely be challenging. Depending on the nature of the judgment or award, there may well be questions of whether it is capable of recognition and enforcement in a third state. Further, only limited types of state assets can be used to satisfy judgments.

Low compensation awards: Courts and tribunals considering human rights claims often order a relatively low amount of compensation for the damage a claimant suffers. There has been a marked discrepancy between damages awarded in other contexts (for example, personal injury/tort claims), and those in human rights claims. For example, the ECtHR has ordered compensation of EUR 20,000 for cases of torture and EUR 50,000 for forced disappearance, as part of an overall approach labelled "*ungenerous*" by the English courts.³⁰ As such, there is a significant

²⁹ Council of Europe, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2017: 11th Annual Report of the Committee of Ministers*, March 2018, at 7.

³⁰ Veronika Fikfak, *Changing State Behaviour: Damages before the European Court of Human Rights*, *European Journal of International Law*, Volume 29, Issue 4, November 2018, at p.1107.

risk that a human rights claim will fail to meet the full financial needs of a victim or their dependents.

Human rights claims may not provide accountability for non-state actors: Non-state actors include a wide range of organisations, including rebel and insurgent groups participating in armed conflict, but also organisations such as multinational companies and international non-governmental organisations. Traditionally, non-state actors were not seen as subject to obligations under international and national human rights law. While this position has evolved, and non-state actors are increasingly subject to human rights law, it may still be challenging to pursue claims for human rights violations in those situations, unless the state is involved by tolerating, acquiescing in or not investigating the violations.

Human rights claims can take significant time to resolve: Human rights claims may take significant time to resolve. For regional and international forums, there may be a requirement to exhaust local remedies, which can involve multiple rounds of domestic proceedings. Very significant delays are associated with some regional and international forums, including due to existing caseloads.

v. Resource requirements

High: To bring a human rights claim requires significant resources. It is time consuming to build claims, for example through gathering and preparing witness and expert evidence, preparing legal submissions and the administration of claims. Hundreds or (likely) thousands of hours will be spent. The costs of legal counsel at standard rates are likely to run from the tens of thousands to millions of pounds. The duration of a case may last several years. As noted above, claims before regional and international courts and tribunals are likely to involve significant delay, which increases the period over which resources will be required.

vi. Case study

In 1991, members of the Peruvian armed forces carried out a massacre in the Barrios Altos neighbourhood of Lima Peru, in which 15 people, including an eight-year old child were killed.



Photo credit: Mayimbú under a CC BY-SA 4.0 license

A claim was brought before the Inter-American Court of Human Rights, which in 2001 issued a judgment finding the state liable. The victims reach agreement with Peru, whereby the state agreed to pay compensation of \$175,000 to the families of each of the victims and four survivors of the massacre.²⁹ Peru has largely complied with this award.³⁰

31 See Barrios Altos Case, Judgment of November 30, 2001, Inter-Am Ct. H.R. (Ser. C) No. 87 (2001), para. 33 (available at <http://hrlibrary.umn.edu/iachr/C/87-ing.html>).

32 See Resolución De La Corte Interamericana De Derechos Humanos, 7 De Septiembre De 2012, *Caso Barrios Altos Vs. Perú*, Supervisión De Cumplimiento De Sentencia (available at: www.corteidh.or.cr/docs/supervisiones/barrios_07_09_12.pdf).

D. Administrative and civil claims against states

i. Concept

In addition to claims established directly upon violations of domestic and international human rights law, it may be possible to bring administrative and other civil claims against states. Depending on the mechanism used, these claims may incorporate elements of human rights claims, but will generally rely upon (at least in part) alternate theories of liability (such as general delict principles or tortious liability) or other mechanisms (such as judicial or administrative review) for the court or tribunal to establish liability. For example, this model would include:

- a. Claims under the civil law system (as opposed to the common law system) for state maladministration or state liability;
- b. Claims against a state or state body, relying upon negligent or other tortious conduct by the state; and
- c. Administrative review of policy or other decisions.

We would expect claims under this model would likely be brought before the civil or administrative courts of the state alleged to be responsible for wrongdoing. This is because there are very limited circumstances in which national courts will review the actions or omissions of a third state.

ii. Potential benefits and opportunities

Administrative and civil claims against states share many of the same benefits and opportunities as human rights claims and civil claims against private persons. For example:

Conduct of the claims remains in victims' control, rather than relying on a public authority to exercise its discretion.

Claims may serve as a mechanism to obtain compensation, through an award of damages or compensation.

Discovery and disclosure tools may assist with the gathering of documents and evidence in support of a claim for certain claims.

Claims may provide affirmative findings of facts, confirming that violations took place.

Successful claims may support future litigation (to the extent that a judgment does not preclude other claims).

Claims against a state do not require linking perpetrators with specific victims.

Any compensation payable is satisfied out of state assets, not perpetrators' assets (which may simplify enforcement).

Recovery of legal and case costs may be possible, depending on the jurisdiction and mechanism used.

In addition, administrative and civil claims offer specific benefits. In particular:

Broader theories of liability: Administrative and civil claims against states may allow claimants to invoke broader theories of liability than under strict human rights claims or civil claims. For example, it may be possible to rely upon tortious concepts such as whether a state owes a duty of care to victims, including on the basis of indirect involvement in viola-

tions.³³ And it may be possible to construe these obligations in light of States' human rights obligations.³⁴ This may capture a wider range of wrongdoing.

Potentially more generous measure of damages:

Due to the different potential theories of liability, the standard of reparations may be more generous than under strict human rights claims, particularly in respect of compensation awarded by regional forums. Equally, the practice of human rights courts and tribunals has helped to develop practice in administrative review. For example, Colombia's *Consejo de Estado* (Council of State) has incorporated the reparations jurisprudence of the Inter-American Court of Human Rights, with the effect of improving outcomes for claimants in some cases.³⁵

iii. Threshold requirements³⁶

The threshold requirements for a particular claim will depend on the specific mechanism used. However, at a high level, it will be necessary to establish:

- a. The victims, who would be the claimants in the action.
- b. Evidence of the alleged violations, and the harm caused to the victims.

33 See, e.g., *Mutua & ors v Foreign and Commonwealth Office*, [2011] EWHC 1913, section M: McCombe J allowed a claim to proceed to trial including on the basis that it was arguable that the British Government owed a duty of care to prevent the torture by agents of the colonial administration of Kenya of the claimants.

34 See *The State of the Netherlands v The Mothers of Srebrenica and others* (ECLI:NL:HR:2019:1284), at paras. 4.2.2 *et seq*, where the scope of the duty of care The Netherlands owed to the victims was construed in light of its human rights obligations.

35 See Cárdenas Poveda, Margarita, & Suárez Osmá, Ingrid. (2014). Aplicación de los criterios de reparación de la jurisprudencia de la Corte Interamericana de Derechos Humanos en las sentencias del Consejo de Estado colombiano. *Opinión Jurídica*, 13(26), 33-48 (available at: http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S1692-25302014000200003)

36 *N.b.*: These are only general, high level criteria that provide a starting point for evaluating the suitability of a model for a particular claim.

- c. Basis of attributing responsibility to the state (for example, through acts or omissions of its agents directly involved in violations, or through facilitating them).
- d. Basis of state liability or basis for administrative review.
- e. An appropriate forum (e.g., a court or tribunal) that has jurisdiction to consider the claim.

iv. Limitations and disadvantages

Civil and administrative claims share some of the same limitations and disadvantages as private civil claims and human rights claims, including:

Ability to communicate with victims: Large claimant cohorts can lead to complex case administration requirements.

Limited scope of review: For some mechanisms, particularly administrative or judicial review proceedings, courts and tribunals may have limited scope to review state conduct.

Cost and length of proceedings: Civil and administrative claims against states may take a significant period of time, particularly if decisions are subject to further review or appeal.

Claims against states and state officials: Claims in this category will generally be made against states, and not perpetrators directly.³⁷ This means that individual perpetrators may not be held accountable and/or may continue to own and enjoy their assets.

37 *N.b.*, it may be possible to join individuals to civil claims, on the basis that they are also liable. However, this is unlikely to be available in claims involving administrative review.

Requirement to prove loss: It may be necessary for victims to prove any loss that they have suffered, in order to obtain compensation.

v. Resource requirements

High: To bring a civil or administrative claim against a state requires significant resources, comparable to the level required for private civil claims (when pursuing a civil claim against a state) or human rights claims (when pursuing an administrative claim).

vi. Case study

Dutch state held liable for failings at Srebrenica: In 2019, The Netherlands Supreme Court found that The Netherlands was partially liable for the massacre of hundreds of Bosnian Serb men and boys. Dutch military forces (“DutchBat”) had evacuated a ‘safe zone’ compound, leaving the civilians without protection. The same forces had also helped refugee evacuation efforts, despite knowing that these efforts put refugees at risk from Serbian troops.

Liability was limited to a group of 350 refugees, who were not allowed to take shelter in the DutchBat compound, and was limited to reflect the “*slim but not negligible*” chance of survival for those refugees, had they been admitted. The court assessed the chance of survival at 10%, and ordered compensation equivalent to 10% of the financial losses of the claimants.

Civil claim against UK leads to £15 million settlement for Mau Mau victims: During the Kenya emergency in the 1950s, thousands of Kenyan nationals were subjected to torture and other serious human rights abuses by the British colonial administration. In 2009, five test claims were brought against the United Kingdom’s Foreign and Commonwealth Office (“FCO”), in the English courts. These alleged that the United Kingdom was responsible for torture and other abuses.



Photo Credit: Leigh Day

The FCO sought to strike out the claims at an interim stage, including on the basis of limitation arguments and that the claim bore no real prospects of success. However, the High Court rejected this application, directing the case to proceed to a full trial.³⁸ Soon after, the UK government settled the claim for approximately £20 million (including legal costs).³⁹

³⁸ See *Mutua & ors v Foreign and Commonwealth Office*, [2011] EWHC 1913

³⁹ UK to compensate Kenya’s Mau Mau torture victims, *The Guardian*, 6 June 2013 (available at: <https://www.theguardian.com/world/2013/jun/06/uk-compensate-kenya-mau-mau-torture>)

E. Non-conviction based confiscation mechanisms

i. Concept

A significant number of public authorities, particularly law enforcement bodies, have powers to confiscate the proceeds of crime without obtaining a formal criminal conviction (sometimes called ‘Non-Conviction Based’ mechanisms, or ‘NCB’ mechanisms).⁴⁰ These powers are generally more flexible than criminal proceedings against an individual defendant. For example, they may employ lower evidential thresholds (in common law jurisdictions, the ‘balance of probabilities’ vs. the criminal conviction standard of ‘beyond reasonable doubt’). Some mechanisms, such as the UK’s Unexplained Wealth Orders (an information gathering tool), may also involve shifting the evidential burden from the public authority proving that the assets are the proceeds of crime to the owner of the property showing that they are not.

NCB mechanisms could provide financial accountability for perpetrators and act as a source for reparations or financial support for victims of human rights violations in a number of scenarios:

- a. Certain violations, such as the use of forced labour or pillage, generate financial flows or profits. An NCB mechanism could be used to target these financial flows as the result of criminal conduct and/or human rights violations.
- b. Some violations may not give rise to direct financial benefits. For example, the targeting

⁴⁰ See, e.g., the summary of NCB mechanisms in EU Member States in Annex I to Commission Staff Working Document: Analysis of non-conviction based confiscation measures in the European Union, 12 April 2019 (available at: <https://ec.europa.eu/transparency/regdoc/rep/10102/2019/EN/SWD-2019-1050-F1-EN-MAIN-PART-1.PDF>)

of political opponents or members of specific ethnic groups as part of a general campaign of oppression may not give rise to a direct financial benefit. However, the perpetrator who carries out these violations may well be involved in other more lucrative criminal conduct, for example, corruption or misappropriation of state funds. NCB mechanisms could be used to target those fund flows, to deprive perpetrators of the proceeds of this conduct. While untested, it is possible that NGOs and CSOs could, in parallel, advocate for confiscated assets to be used to provide reparations and financial support to victims.

NGOs are not in a position to initiate NCB mechanisms to target specific perpetrators. But it may be possible for NGOs to share information on potential cases with public authorities to help identify and build potential cases.

ii. Advantages and benefits

NCB mechanisms offer a range of potential benefits, including:

Asset preservation measures: NCB mechanisms often incorporate or are used in tandem with asset preservation measures. This enables public authorities to freeze assets pending the outcome of proceedings. For example, the UK’s ‘Account Freezing Order’ regime allows certain law enforcement agencies to apply to freeze funds held in UK bank accounts on an *ex parte* basis, pending a full determination as to whether the funds are the proceeds of criminal conduct.⁴¹

⁴¹ See, e.g., Account freezing orders: why we can expect more of them, *Lexology*, 26 March 2019 (available at: <https://www.lexology.com/library/detail.aspx?g=1ad343bd-93c3-4707-abae-86ce00ffad48>)

Asset seizure: When successful, NCB mechanisms will lead to the confiscation or seizure of assets. This has the effect of depriving perpetrators of assets, and as such serves as a form of accountability.

Recognition of victims and a mechanism to fund reparations: Some NCB mechanisms make provision for recognising victims during proceedings. For example, UK law enforcement bodies are mandated to identify and take into consideration the victims of bribery, corruption and economic crime when pursuing asset confiscation and recovery actions, and to ensure that they benefit from assets that are recovered.⁴² With recent developments introducing mechanisms to confiscate the proceeds of torture and other serious human rights violations, there is an opportunity to advocate for developing similar mechanisms to recognise victims of violations.

Jurisdictional nexus: NCB mechanisms tend to operate in relation to the alleged proceeds of crime (e.g., money or property) that are within the jurisdictional scope of the NCB mechanism (e.g., funds are in a local bank account). As such, NCB mechanisms may be feasible even where the perpetrator or their victims are not in or expected to be in the relevant jurisdiction.

Specific mechanisms for the proceeds of human rights abuses: Some jurisdictions have mechanisms designed to target the proceeds of human rights abuses specifically.⁴³ These mechanisms may offer

42 See General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases, 1 June 2018 (available at <https://www.sfo.gov.uk/download/general-principles-to-compensate-overseas-victims-including-affected-states-in-bribery-corruption-and-economic-crime-cases/>)

43 Under the Criminal Finances Act 2017, the UK's primary NCB confiscation legislation was expanded to target the proceeds of "gross human rights abuse[s] or violation[s]". See s.241 of the Proceeds of Crime Act 2002 (available at: <https://www.legislation.gov.uk/ukpga/2002/29/section/241?view=plain>). See also Part V of Gibraltar's Proceeds of Crime Act 2015, which provides for similar powers (available at: <https://www.gibraltarlaws.gov.gi/legislations/proceeds-of-crime-act-2015-2348>)

greater prospects of success in promoting financial accountability following human rights abuses.

Anti-corruption mechanisms for repatriation of funds: There are specific mechanisms in the anti-corruption context to help facilitate the repatriation of assets which are the proceeds of corruption.⁴⁴ Depending on the particular claim, it is possible that such mechanisms could provide a means for tainted assets to be repatriated, and potentially for the (indirect) benefit of victims.

Existing expertise in anti-corruption sector: The use of NCB mechanisms has been notable in combatting corruption.⁴⁵ As such, there is considerable experience and technical expertise that could be deployed to support the use of NCB mechanisms to address torture and other serious human rights violations.

iii. Threshold requirements⁴⁶

The threshold requirements for a particular claim will depend on the specific mechanism used. However, at a high level, it will generally be necessary to establish:

- a. **Are there assets which can be linked to criminal conduct?** NCB mechanisms are generally only available for assets which can be shown to be the proceeds of criminal conduct.
- b. **Will the public authorities pursue the claim?** NCB mechanisms are available to public authorities, including law enforcement bodies. As such, NCB mechanisms are only a viable solution where a public authority is willing to

44 See United Nations Convention Against Corruption, Art. 51.

45 See, e.g., the United Nations Office on Drugs and Crime webpage on Asset Recovery, and its description of various inter-state bodies and working groups active in asset recovery (available at: <https://www.unodc.org/unodc/en/corruption/asset-recovery.html>)

46 N.b.: These are only general, high level criteria that provide a starting point for evaluating the suitability of a model for a particular claim.

pursue a particular case. For NGOs, it is therefore critical to understand whether a relevant public authority might pursue a particular potential claim. Factors that may shape this decision include the strategic objectives and priorities of public authorities, as well as the merits of the suggested action. An understanding of the relevant thresholds under the NCB mechanism is therefore critical. Strategic and policy objectives may be available on public authorities' websites. Some public authorities may engage with NGOs, which may be a basis for understanding policy and objectives.⁴⁷

- c. **Can NGOs refer the case to public authorities?** Where an NGO is considering developing a case for referral to a public authority, it is important to ensure that there is a suitable referral mechanism. It is important to consider what safeguarding exists for victims and witnesses prior to referring a potential case and supporting evidence / information.
- d. **Is there a mechanism to apply funds for the benefit of victims?** There should exist a mechanism for the courts and/or law enforcement authorities to apply seized assets for the benefit of victims.

iv. Limitations and disadvantages

There are a number of limitations associated with pursuing NCB mechanisms.

Reliance upon public authorities to pursue claims: Only designated public authorities (such as law enforcement authorities) can use NCB mechanisms to pursue claims.

⁴⁷ See, e.g., National Crime Agency Annual Plan 2019-2020, at p.19, which describes how it engages with NGOs and civil society (available at: <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/289-nca-annual-plan-2019-20/file>).

Assets that can be targeted are limited to proceeds of criminal conduct: NCB mechanisms are (in general) directed at the proceeds of crime. Where a perpetrator's assets cannot be shown to be the proceeds of criminal conduct, they are unlikely to be seized, even where for example, the level of harm suffered by victims outweighs funds that can be seized.

Not all perpetrators will have substantial assets: Low level perpetrators are unlikely to amass significant assets from the violations that they carry out. As such, NCB mechanisms may not have a significant effect on these perpetrators or (where possible) offer significant compensation for victims.

Reliance on public authorities to allocate seized funds to victims: The use of an NCB mechanism will very likely rely upon the public authority exercising their discretion to allocate any confiscated assets to victims. There is considerable discretion involved, and victims do not have rights to the assets. As such, there is a considerable risk that this mechanism will not lead to victims receiving funds. This mechanism is also unproven; while conceptually this seems feasible, as at the time of this Framework, we are not aware of any (successful) efforts to allocate confiscated proceeds of corruption for the benefit of survivors of human rights violations. Further, where the public authority does not have the ability in law to allocate seized assets to victims (and instead, for example, must apply the confiscated funds to the state's treasury), it will likely be difficult to apply seized assets for the benefit of victims.

Cross-border enforcement may be challenging: NCB mechanisms are generally used to target assets within the jurisdiction where the NCB mechanism is pursued. They may be difficult to enforce in other jurisdictions.⁴⁸

⁴⁸ There are some exceptions to this, for example the Regulation 2018/1805 which provides for the mutual recognition of freezing orders and confiscation orders between EU Member States for certain criminal offences

v. Resource requirements

Moderate: By comparison with other models discussed in this document, the level of resources required from an NGO over the length of a claim is relatively low, as a public authority will be responsible for building and pursuing a claim. That being said, an NGO may expend significant effort and resources carrying out preliminary investigations into:

- a. Violations and associate criminal conduct; and
- b. The presence of assets in a particular jurisdiction.

An NGO may also expend significant resources:

- a. Lobbying for a public authority to take on a particular claim;
- b. Identifying victim cohorts and ensuring their interests are considered in the process; and
- c. Advocating for seized assets to be applied to victims.

vi. Case studies:

The UK's NCA seizes assets worth £190 million:

The UK's National Crime Agency reached a settlement with Malik Riaz Hussain to surrender assets worth £190m.⁴⁹ The NCA employed 'Account Freezing Orders' to freeze funds in excess of £140m, which were suspected to be the proceeds of overseas bribery and corruption. As part of the settlement reached, real estate worth £50m located in Central London was also surrendered. All assets will be handed over to the Government of Pakistan. This case demonstrates the potential effect of NCB mechanisms to seize significant assets.

Registration of victims in NCB confiscation proceedings: In January 2020, a test group of victims located in the DRC sought to register themselves as victims of corruption in the UK Serious Fraud Office's investigation into Eurasian Natural Resources Corporation.⁵⁰ The victims have sought registration on the basis of the UK government's Compensation Principles for victims of corruption. This claim may



Photo credit: Google, Streetview, digital images

⁴⁹ 'Pakistani tycoon agrees to hand over £190m to UK authorities', *The Guardian*, 3 December 2019 (available at: <https://www.theguardian.com/uk-news/2019/dec/03/pakistani-tycoon-malik-riaz-hussain-hands-over-pounds-190m-to-uk-authorities-nca>).

⁵⁰ See *DR Congo Residents Come Forward as Potential Victims in SFO Corruption Investigation into ENRC*, Rights and Accountability in International Development, 28 January 2020 (available at: <https://www.raid-uk.org/victimsofcorruption>)



Photo credit : UN Photo/Yutaka Nagata

provide a precedent for victim engagement in corruption proceedings.

Importance of co-ordinating different claims following regime change: Following the collapse of the regime of President Ferdinand Marcos, the Republic of the Philippines successfully pursued a number of forfeiture actions against assets held by Marcos and his family, including in respect of Swiss bank accounts worth in excess of \$685 million.⁵¹ In the same period, however, some 10,000 victims of the Marcos regime who suffered torture and other serious human rights violations, successfully sued the Marcos estate in the United

States, obtaining a judgment of approximately \$2 billion.⁵² The enforcement of the human rights judgment encountered significant difficulties, some of which arose as a result of the civil forfeiture actions freezing assets that might otherwise have been used to satisfy that judgment.⁵³ This case study is an example of the significant potential for recovery using NCB mechanisms, but also the potential for conflict between competing litigation.

51 See Radha Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law*, Cambridge University Press (2014), at section 2.4.1.1.

52 See Radha Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law*, Cambridge University Press (2014), at section 2.4.1.1.

53 Beth van Shaack, Unfulfilled Promise: The Human Rights Class Action, *University of Chicago Legal Forum*, Volume 2003, Issue 1, Article 8, at pp.284-289.

F. Criminal confiscation and compensation proceedings

Non-conviction based confiscation mechanisms are, in general, civil claims brought by law enforcement bodies, which do not require a criminal conviction to proceed. Where, however, a criminal conviction is pursued or obtained, other powers may be engaged allowing for the seizure of assets, including (broadly) orders which deprive a perpetrator of assets (such as confiscation orders), punitive fines, and orders directing the payment of compensation to victims.

Criminal confiscation, forfeiture and other similar proceedings may result in orders which deprive a convicted defendant of the proceeds of their criminal conduct. Generally, forfeiture or confiscation will be relevant where a defendant has obtained a financial benefit from or in connection with their criminal conduct and has the means to pay a confiscation order. The seized assets will generally be paid, or the ownership transferred, to the state.

A compensation order, on the other hand, requires the defendant to pay compensation to the victim(s) for any personal injury, loss or damage resulting from the criminal offence.

These mechanisms for financial accountability should also be distinguished from private civil law claims that are adjunct to criminal proceedings (using a ‘civil party’ or *partie civile* mechanism).

i. Potential Benefits

Asset preservation measures: Specific mechanisms may be available to law enforcement agencies to secure assets against the risk of dissipation. For example, in the UK, there exist powers of restraint, enabling law enforcement and prosecuting authorities to freeze assets in certain circumstances, and where

there is a risk of dissipation.⁵⁴

Confiscation of perpetrators’ assets: Depriving offenders of the proceeds of their criminal conduct is a form of financial accountability. It may also deter the commission of future violations.

Possible payment of compensation to victims: Depending on the jurisdiction in question, it may be possible for the confiscated funds to be used for compensating victims. For instance, the International Criminal Court (“ICC”) has the power to pay any confiscated assets into the Trust Fund for Victims.⁵⁵ In addition, compensation orders require offenders to pay money to the victims of their crimes directly.

Various potential forums: Criminal confiscation and compensation proceedings may be pursued in national courts under domestic legal frameworks. International and *ad hoc* courts and tribunals have also been granted comparable powers. For example, the ICC has powers to confiscate assets (under Article 77 of the Rome Statute) and to order the payment of reparations to victims, while the Extraordinary African Chambers had powers to issue compensation orders under Article 27 of its foundational statute.⁵⁶

Judicial findings confirming wrongdoing: As these orders are typically available following a criminal conviction of the perpetrator, it necessarily involves a judicial determination of wrongdoing on the part of the defendant.

54 See, e.g., ss.40-41 of the Proceeds of Crime Act 2002. See further Crown Prosecution Services, Legal Guidance: Proceeds of Crime, 19 December 2019 (available at: <https://www.cps.gov.uk/legal-guidance/proceeds-crime>)

55 Art 79(2) of the Rome Statute of the International Criminal Court (ICC Statute): “The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.”

56 See Statute of the Extraordinary African Chambers (unofficial translation by Human Rights Watch), Art. 27 (available at: <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>).

ii. Threshold Requirements⁵⁷

The threshold requirements for a particular claim will depend on the specific mechanism used. However, at a high level, it will generally be necessary to establish:

- a. **Requirement for criminal conviction:** Generally, confiscation and/or compensation orders are only available once the defendant has been convicted, however this may vary in different jurisdictions. As such, this model may only be available where there are planned (or existing) criminal proceedings.
- b. **Relationship between criminal conduct and assets:** For criminal confiscation proceedings, it may be necessary to establish that the assets contain the proceeds of crime, whereas for compensation orders, it may be necessary to show that the victims suffered personal injury, loss or damage as a result of the criminal offence.

iii. Limitations and Disadvantages

Reliant upon public authorities to pursue claim: It will generally be for law enforcement and prosecuting authorities to initiate confiscation and compensation orders as part of or following a criminal conviction.⁵⁸

Reliant upon public authorities to allocate funds to victims if compensation not ordered to victims: Confiscated assets and funds may not be paid to victims

⁵⁷ *N.b.*: These are only general, high level criteria that provide a starting point for evaluating the suitability of a model for a particular claim. In particular, threshold requirements associated with a criminal prosecution and conviction for torture and/or other serious human rights abuses are not considered here.

⁵⁸ *N.b.*: In some jurisdictions, it may be possible to bring a private prosecution in respect of certain criminal conduct, including criminal confiscation actions. For example, the English Court of Appeal recently affirmed the lawfulness of confiscation actions in private prosecutions. See *Ketan Somaia v Regina (on a prosecution by Murlu Mirchandani)* [2017] EWCA Crim 741.

(unless, for example, parallel confiscation and compensation proceedings exist). Instead, it will likely be in public authorities' discretion to allocate any confiscated assets to reparations programmes for victims. This is an area that would require additional (and potentially substantial) advocacy, particularly where there are no established mechanisms to do so.

Requirement for connection between funds and wrongdoing: Assets subject to confiscation or forfeiture may need to be connected with criminal conduct in order to be subject to a confiscation order. Note that for compensation orders, there will not necessarily be a requirement for a link between the assets and the criminal conduct. Rather, it will likely be necessary to demonstrate that the criminal offence resulted in personal injury, loss or damage to the victims.

Challenges for enforcement where assets not within the court's jurisdiction: It may be more difficult to enforce a confiscation and/or compensation order when the perpetrator's assets are not located within the jurisdiction of the court. However, it may be possible to bring international enforcement proceedings in the jurisdiction in which the assets are located.

Reliant upon establishing nexus between criminal conduct for which defendant is charged and violations directed to claimants: Compensation proceedings are generally limited to the actual damage suffered by the victims as a result of the criminal conduct. It will therefore be necessary to establish that the perpetrator's criminal conduct caused the victims to suffer personal injury, loss or damage.

iv. Resource Requirements

Low/Moderate: The level of resources required for an NGO are relatively low to moderate, as the law enforcement body bears primary responsibility for the conduct of the claim. Some resources may have

to be expended lobbying the relevant authorities to initiate criminal confiscation and/or compensation proceedings. It is also important for NGOs to engage in criminal proceedings from the outset so that public authorities are paying due attention to the importance of criminal confiscation and compensation for victims throughout the process. Potentially significant resources may be required if separate advocacy is required to re-allocate confiscated assets for the benefit of victims (if such a mechanism is available).

v. Case Study

On 27 April 2017, the Appeals Chamber of the Extraordinary African Chambers issued its judgment in the case against Hissène Habré. In the appeal judgment, which confirmed his conviction for crimes against humanity, torture and war crimes, the Appeals Chamber also ordered Habré to pay compensation equivalent to more than USD 150 million to the victims of his crimes.

Pursuant to the EAC reparations framework, compensation, among other measures, may be ordered directly against convicted persons. If the compensation is (partially) financed from the assets of the convicted person, the assets seized require no link to the crime(s) for which the person has been convicted. However, only those assets derived directly or indirectly from the crime(s) of which a person is found guilty are susceptible to orders for forfeiture, thereby excluding other assets that do not have such a link to the offences.



Photo credit : Radiodiffusion Télévision Sénégalaise

G. Sanctions

i. Concept

Targeted sanctions, like those authorised under the Global Magnitsky Act and similar country-specific human rights sanctions regimes, are an effective tool for holding human rights abusers accountable. They enable states to impose travel bans, asset freezes and similar measures on individual offenders.

Targeted human rights sanctions can either be used as:

- a. **A stand-alone measure to promote behavioural change:** By placing the individuals and their crimes in the limelight, sanctions put a price on committing human rights violations, and can induce changes in behaviour and deter further violations. In addition, sanctions act as a mechanism for holding individuals accountable who might otherwise enjoy impunity.
- b. **An asset discovery or freezing measure:** Sanctions generally operate by blocking access to financial institutions in the sanctioning jurisdiction, and freezing assets located there. As such, sanctions could assist with other models of financial accountability, such as civil claims, by preserving assets.⁵⁹

At present there are a number of existing ‘human rights’ regimes, which can be used to target individual perpetrators, and to freeze their assets. These include:

59 Note, for example, that the OECD’s Financial Action Task Force has recognised the possibility of using sanctions (in the anti-terrorism context) as an asset preservation measure or in co-ordination with criminal proceedings. See Financial Action Task Force, *International Best Practices: Targeted Financial Sanctions related to Terrorism and Terrorist Financing* (Recommendation 6), June 2013 (available at: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Fin-Sanctions-TF-R6.pdf>), at para. 15(d).

- a. **The US regime:** The ‘Magnitsky Rule of Law Accountability Act’ was enacted in the US in 2012 following revelations about the torture and subsequent death in prison of Sergei Magnitsky, a tax advisor who had publicly exposed criminal tax evasion in the Russian Federation. In 2016, the Global Magnitsky Act followed, which has worldwide coverage.⁶⁰ It targets individuals who are responsible for or involved in (i) extrajudicial killings, torture, or other gross violations of internationally recognized human rights against human rights defenders; and (ii) acts of significant corruption. Individuals listed are blocked from entering the US and accessing US financial markets, while property and any other assets would be seized if they come under US jurisdiction.
- b. **The Canadian regime:** The Justice for Victims of Corrupt Foreign Officials Act came into force on 18 October 2017. The Act allows Canada to impose asset freezes and prohibitions against individuals who are responsible for or complicit in gross violations of human rights or are foreign public officials, or their associates, who are responsible for or complicit in acts of significant corruption. The law prohibits individuals in Canada and Canadian citizens outside of Canada from dealing with any assets of or providing any services to a sanctioned individual anywhere in the world. Financial institutions are also obligated to screen for designated names and freeze assets on an ongoing basis. Non-compliance with the Act and its monitoring requirements can expose Canadian individuals and businesses to significant penalties.

60 *Global Magnitsky Human Rights Accountability Act*, S284, 18 May 2016, available at: <https://www.congress.gov/bill/114th-congress/senate-bill/284/text/es>

c. **The United Kingdom regime:** On 6 July 2020, the United Kingdom introduced a sanctions regime targeting perpetrators of serious human rights abusers, as well as those who profit from those abuses.⁶¹ It aims to deter and provide accountability for serious violations of the right to life, the right not to be subjected to torture or ill-treatment, and the right to be free from slavery. The United Kingdom Government has published guidance on the operation of this new sanctions regime.⁶²

d. **The EU regime:** On 7 December 2020, the Council of the EU adopted a Decision and a Regulation establishing a global human rights sanctions regime.⁶³ The regime allows the EU to target perpetrators of serious human rights violations and abuses worldwide, including genocide, crimes against humanity, torture, slavery, extrajudicial killing, enforced disappearance, and arbitrary detention. Other human rights violations that are widespread, systematic, or otherwise of serious concern, are also included. The European Commission published a guidance on the key provisions.⁶⁴

A number of other jurisdictions have similar schemes. For example, Estonia, Lithuania and Latvia have introduced schemes to issue visa bans following human rights abuses.⁶⁵

In addition to the existing regimes, a number of jurisdictions have announced plans to introduce similar human rights regimes:

- a. Australia is considering the implementation of a Magnitsky-style law that would target individuals accused of human rights abuses as well as those who participate in significant corruption.⁶⁶ The main objective of the proposed regulations is to keep sanctioned individuals and their assets outside of Australian markets.
- b. Other states are also considering the potential of human rights sanctions regimes targeted at individuals. For example, Japan took part in the EU Global Human Rights Sanction Regime summit, which was held on 20 November 2018 in The Hague, as an interested party.⁶⁷

In addition to the above sanctions regimes, there are a range of country-specific sanctions regimes, which are often used to challenge human rights abuses. The source of these sanctions include both the domestic law of the country implementing sanctions, but also, in some cases, resolutions of the UN Security Council. For example, there are country-specific regimes concerning Syria, Iran and North Korea, based on UN Security Council Resolutions and/or national law.⁶⁸

61 See The Global Human Rights Sanctions Regulations 2020 (available at: <http://www.legislation.gov.uk/ukxi/2020/680/contents/made>).

62 Foreign and Commonwealth Office and Office of Financial Sanctions Implementation HM Treasury, Statutory Guidance: Global Human Rights Sanctions, 6 July 2020 (available at <https://www.gov.uk/government/publications/global-human-rights-sanctions-guidance/global-human-rights-sanctions-guidance>).

63 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.410.01.0001.01.ENG&toc=OJ%3AL%3A2020%3A410I%3ATOC>

64 https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2419

65 See Hermitage Capital Management, Inquiry into targeted sanctions to address human rights abuses, Submission 4, 14 January 2020 (available at: <https://www.aph.gov.au/DocumentStore.ashx?id=54b840e0-435c-4e57-97a3-e1a8ff8244fc&subId=678444>), p.3.

66 Inquiry into whether Australia should examine the use of targeted sanctions to address human rights abuses, Parliament of Australia, 3 December 2019 (available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct).

67 See Nienke van der Have, The Proposed EU Human Rights Sanctions Regime, *Security and Human Rights*, 30 (2019), section 2 (available at: <https://brill.com/view/journals/shrs/aop/article-10.1163-18750230-02901009/article-10.1163-18750230-02901009.xml?language=en&body=full-HTML-29622>).

68 See, e.g., description of sanctions regimes promulgated by the UN Security council, available at: <https://www.un.org/security-council/sanctions/information>; cf. the national legal basis for the US sanctions regime on Syria, available at: <https://www.treasury.gov/resource-center/sanctions/programs/pages/syria.aspx>

Country	US	Canada	United Kingdom
Name	Global Magnitsky Human Rights Accountability Act	Justice for Victims of Corrupt Foreign Officials Bill	Global Human Rights Sanctions Regulations
Entry into Force	December 2016	October 2017	July 2020
Designation Criteria	<p>Foreign persons:</p> <p>a) who have engaged in extrajudicial killings, torture, or other gross violations of human rights against individuals who either seek <i>“to expose illegal activity carried out by government officials”</i> or <i>“to obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections;”</i> or</p> <p>b) government officials or senior associates of such officials who are engaged in or responsible for acts of significant corruption.</p> <p>Individuals who have acted as agents of or on behalf of human rights abusers or who have materially assisted corrupt officials can also be sanctioned.</p>	<p>Foreign nationals:</p> <p>a) responsible for gross violations of internationally recognized human rights against individuals in any foreign state who seek to obtain, exercise, defend or promote internationally recognized human rights and freedoms or who seek to expose illegal activities carried out by a foreign public official; or</p> <p>b) responsible for or complicit in ordering, controlling, or otherwise directing acts of significant corruption.</p>	<p>Persons who are involved in conduct amounting to a violation of:</p> <p>a) the right to life;</p> <p>b) the right not to be subjected to torture or cruel, inhuman or degrading treatment; and/or</p> <p>c) the right to be free from slavery.</p> <p>For the purposes of the regulations, ‘involvement’ includes a wide range of potential activities, including direct involvement in violations, but also facilitation, incitement or promotion of violations, profiting from violations or concealing violations.</p>
Measures Foreseen	Visa bans, asset freezes, restrictions on their ability to access the US financial markets	Asset freezes, travel bans, restrictions on their ability to access the Canadian financial markets	Asset freezes, travel bans, restrictions on ability to access UK financial markets

ii. Potential benefits

The key benefits of targeted sanctions can be summarised as follows:

Limit access to financial systems: Sanctions can shut out the designated target from significant parts of the international banking system and disrupt business operations. For instance, US sanctions prevent US individuals or companies from dealing with targeted individuals. Given the dominance of the US financial system, this effectively shuts out targets from a significant part of the international system. Limiting access is expected to be more effective if combined in the future with new human rights sanctions regimes in the UK and Europe.

Reputational issues for perpetrators: Sanctions can stigmatise leaders and bring about a decline in the backing they enjoy among key domestic or external actors.

Support for further action: Targeted sanctions often involve the freezing of a perpetrator's assets and thereby prevent dissipation. This could prove helpful for subsequent claims for damages or enforcement of existing claims (provided it is possible to enforce against assets frozen under the sanctions regime). In addition, the designation of a perpetrator may support the employment of other mechanisms. Existing designations may be persuasive for a court hearing a related claim, for example, in the context of seeking interim relief.

A means for providing satisfaction: While sanctions do not, in and of themselves, provide complete accountability for human rights abuses, they can contribute towards financial accountability, and can provide an element of satisfaction, as a part of overall reparations. This may be relevant where in-country accountability is limited or non-existent, and other models may not be available.

Lower burden of proof: The evidential burden varies by sanctions regime, but it generally will be of a lower level than criminal and even private civil proceedings.

Mechanism for behavioural change: By placing the individuals and their crimes in the limelight, sanctions put a price on committing human rights violations, and can induce changes in behaviour and deter further violations.

Potential for follow on advocacy: Targeted sanctions can also bolster human rights advocacy by highlighting the involvement of certain people or organisations in torture and other serious human rights violations.

iii. Threshold requirements⁶⁹

The threshold requirements for a particular claim will depend on the specific mechanism used. However, at a high level, it will generally be necessary to establish:

- a. **Evidential standard:** The evidentiary threshold will ultimately depend on the particular sanctions regime. However, generally speaking the evidential standard will be lower than that required for a private civil law claim. For instance, the US Global Magnitsky Act does not specify a burden of proof, but in practice the executive mandates an evidentiary threshold akin to requiring a "*reasonable basis*" of belief based on "*credible information*". To establish such a "*reasonable basis*" of belief, each piece of evidence must be corroborated by multiple, preferably independent sources. However, it is generally not necessary to have direct evidence, such as witness statements. Instead, reports by NGOs may suffice.

⁶⁹ *N.b.:* These are only general, high level criteria that provide a starting point for evaluating the suitability of a model for a particular claim.

- b. Level of involvement in abuses:** It generally needs to be shown that the targeted individual can be tied directly or indirectly to serious human rights abuses. Under the US regime, for cases of “*status-based responsibility*”, it suffices to show that the individual was a leader or an official of an entity, including a governmental entity, engaged in, or whose members were engaged in, serious human rights abuse relating to the official’s tenure.
- c. Limitation issues:** Sanctions may not be available for historic conduct. For example, the US generally will not consider imposing sanctions on someone for a crime committed more than five years ago. This is because sanctions are considered as a tool to encourage behavioural change.⁷⁰ Consequently, sanctions may need to be administered relatively close in time to the sanctioned activity in order to have the desired effect. Furthermore, there is a preference for sanctions against targets engaged in ongoing or systemic violations, rather than in isolated behaviour.⁷¹

iv. Limitations and disadvantages

Limited scope of sanctions: Sanctions imposed may include asset freezes, which prevent the designated person from accessing or dealing with their assets. At present, however, sanctions regimes generally do not in and of themselves involve the seizure or forfeiture of assets. As such, sanctions are not a tool to

⁷⁰ See Human Rights First, *The Global Magnitsky Act: Frequently Asked Questions*, April 2019 (available at: <https://www.humanrightsfirst.org/sites/default/files/hrf-global-magnitsky-faq.pdf>), p.7.

⁷¹ N.b., it appears that the newly introduced UK sanctions regime may not include such a formal limitation period, given that among the first designations were a number related to the death of Sergei Magnitsky in 2009 (some 11 years ago) See HM Treasury and OFSI, *Financial sanctions targets: list of all asset freeze targets*, updated 14 July 2020 (available at: <https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets/consolidated-list-of-targets>).

facilitate the payment of reparations to victims using perpetrators’ assets.

Lessening effect of sanctions: The more individuals are targeted by sanctions, the more of an incentive there is to find ways to evade sanctions or to use alternative banking systems. This may erode the effectiveness of sanctions over time.

Only suitable for ongoing or recent human rights abuses: As a mechanism for behavioural change, sanctions are not generally suitable for addressing historic violations.

v. Resource requirements

Low/Moderate: The power to designate a person for sanctions rests with public authorities. However, there are often mechanisms for submitting proposed designations including supporting evidence. As such, resources will have to be expended to provide credible evidence of the involvement of the intended target in serious human rights violations. However, the level of resources required will be less than for other models.

Considerable assistance is also available from NGOs specialising in sanctions designations. For example, in the US, Human Rights First operates the **Global Magnitsky Project**.⁷² The Global Magnitsky Project provides support to a network of 200 NGOs when submitting a designation case to the US Government. It allows best practices to be shared amongst NGOs, to ensure that adequate evidence is provided to maximise the prospects of success for a designation. A range of resources are available via its website.

⁷² See <https://www.humanrightsfirst.org/topics/global-magnitsky>

vi. Case study

In December 2017, the US designated Maung Maung Soe under the US Global Magnitsky Act.⁷¹ This designation was in response to his role overseeing Myanmar's military operations in Rakhine State that led to widespread human rights abuses against Rohingya civilians, including extrajudicial killings, sexual violence, arbitrary arrest and the destruction of villages and property.⁷² As a result, any assets owned by Soe within the US's jurisdiction have been frozen. Canada subsequently issued sanctions against Maung Maung Soe under its human rights sanction regime in February 2018.⁷³

There has also been a trend towards developing mechanisms to allow frozen assets to be confiscated and applied for the benefit of survivors of abuses.⁷⁶

Hogan Lovells, an international law firm, recently published a paper in association with REDRESS suggesting that the proceeds of sanctions violations may be used to fund reparations for victims. This is modelled on the use of fines relating to the LIBOR rate fixing scandal to fund earmarked public projects. The paper advocates that where a financial penalty is imposed on a corporation or individual for a violation of a financial sanctions regime, all, or a percentage, of the money recovered should form the financial basis for a collective reparations fund for the victims of human rights violations.⁷⁷

vii. Future developments

There is a growing trend towards the adoption of targeted human rights sanctions regimes internationally. It remains to be seen when the EU and Australian regimes will be operable and to what extent other countries follow suit. The greater the geographic coverage, the more effective sanctions are likely to be.

73 See Executive Order 13818, 20 December 2019 (available at: <https://www.govinfo.gov/content/pkg/FR-2017-12-26/pdf/2017-27925.pdf>).

74 See United States Sanctions Human Rights Abuses and Corrupt Actors Across the Globe, U.S. Department of the Treasury, 21 December 2019 (available at: <https://home.treasury.gov/news/press-releases/sm0243>).

75 See Canada imposes targeted sanctions in response to human rights violations in Myanmar, Global Affairs Canada, 16 February 2018 (available at: https://www.canada.ca/en/global-affairs/news/2018/02/canada_imposes_targetedsanctionsinresponse-tohumanrightsviolation.html).

76 For example, Canada has moved to develop a mechanism to seize assets that are frozen under its 'Magnitsky' sanctions regime, and to apply seized assets for the benefit of victims. See Minister of Foreign Affairs Mandate Letter, 13 December 2019 (available at: <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-foreign-affairs-mandate-letter>).

77 Hogan Lovells, 'Finance for Restorative Justice', January 2020 (available at: https://www.hoganlovells.com/~media/hogan-lovells/pdf/2020-pdfs/2020_01_29_rethinking-reparations-report.pdf?la=en).

H. Restricting access to financial institutions

This model involves conducting advocacy to banks and other financial institutions to highlight where they may have acted for perpetrators. This model seeks to block perpetrators' access to leading financial institutions by highlighting to financial institutions the legal, regulatory and/or reputational risks of doing business with or providing financial services to these perpetrators.

i. Concept

When carrying out an investigation into the assets of a perpetrator, information on that perpetrator's relationships with financial institutions may come to light. For example, it may be possible to identify bank accounts, loans, credit cards or other financial products. Where it is not possible to build and develop further claims, it may instead be feasible to approach the relevant financial institution. By sharing with the financial institution any credible evidence that the individual in question has committed torture or other serious human rights violations, this may form the basis for the financial institution to cease doing business with the perpetrator. Points of leverage might include highlighting the legal, regulatory and/or reputational risks of providing financial services to these individuals. The effect of this model would therefore be to restrict perpetrators' access to leading financial institutions.

Advocacy efforts may be more effective where NGOs and CSOs have pre-existing relationships with relevant financial institutions. These relationships may also allow NGOs and CSOs to achieve broader systemic changes to limit access to perpetrators of serious human rights abusers. For example, wildlife and conservation NGOs have partnered with financial institutions to combat the illegal wildlife trade ("IWT"), creating a financial task force to identify specific steps that the financial sector can take to

combat IWT, including leveraging existing financial crime mechanisms. This taskforce is comprised of experts on the IWT as well as representatives of leading financial institutions.⁷⁸

ii. Potential benefits

Blocking access to financial system/key financial institutions: This model has the potential to block perpetrators from having access to financial institutions, making it more difficult for them to move assets or to conduct business. For example, the withdrawal of business may serve as a red flag to other service providers.⁷⁹

Damaging prestige: Where a perpetrator has financial products or services that may be considered 'prestigious', for example exclusive private banking facilities or credit/charge cards, the withdrawal of these products and services may be a blow to their prestige.

Potential for follow-on advocacy: Where, for instance, it is discovered that a considerable number of human rights abusers have bank accounts with particular financial institutions or in a particular jurisdiction, this opens up the possibility of conducting further advocacy. It may serve as the basis for lobbying for regulatory oversight and action. It might also provide a basis for NGOs to work together with financial institutions to deny financial services to perpetrators.

Opportunities for co-ordinated action globally: By approaching financial institutions in several jurisdictions, it will become increasingly difficult for perpetrators to access their assets or conduct business.

⁷⁸ See 'Financial Taskforce', United For Wildlife (available at: <https://unitedforwildlife.org/projects/financial-taskforce/>)

⁷⁹ See Case Study below for further detail.

iii. Threshold requirements⁸⁰

At a high level, it will generally be necessary to establish:

- a. **At which financial institutions does the perpetrator hold financial products?** It is important to identify specific bank accounts or financial products which belong to the perpetrator in question. Evidence of bank accounts and financial products may come to light as part of asset tracing activities.
- b. **Is there evidence of human rights violations?** The NGO needs to have credible evidence that the perpetrator in question has committed serious human rights violations in order to convince the financial institution to cease doing business with them. The withdrawal of banking services is a discretionary decision by a particular financial institution, so the level of evidence required will depend on the institution.
- c. **Is there a link between the financial product and the human rights violations?** If it is possible to tie the two together, such as where it can be established that the bank account holds proceeds of crimes, then that will further strengthen the advocacy campaign.

iv. Limitations and disadvantages

There are a number of limitations associated with conducting an advocacy campaign to restrict perpetrators' access to financial institutions.

Qualified impact: Restricting access to financial institutions does not achieve the key objective of fund-

⁸⁰ *N.b.:* These are only general, high level criteria that provide a starting point for evaluating the suitability of a model for a particular claim.

ing reparations for victims, since it does not involve the seizure of assets.

May make recovery more difficult: There is a risk that convincing financial institutions to block access to their financial services will alert perpetrators that someone is trying to target their assets. As a result, this may lead to perpetrators dissipating their assets or it might drive perpetrators to less responsible financial institutions or financial institutions in jurisdictions where it is more difficult to seize assets.

Use of valuable information: Asset tracing is a difficult and complex exercise, and information gained is valuable. As such, because of the qualified impact of this model, it may be preferable to preserve this information for other models of financial accountability, unless those are unavailable.

No affirmative finding of wrongdoing: While convincing financial institutions to cease doing business with known human rights abusers involves some recognition that the individuals in question have done something wrong, it does not involve a formal fact-finding process into wrongdoing.

v. Resource requirements

Low/Moderate: The level of resources required from an NGO to lobby a financial institution is relatively low (when compared with other models). That being said, an NGO may expend significant effort and resources carrying out preliminary investigations into:

- a. Violations and associated criminal conduct; and
- b. Assets, and particularly the existence of bank accounts, loans and other financial products at a particular financial institution.



Photo credit: Auburnxc under a CC BY-SA 2.0 license

vi. Case study

Following the attacks of 11 September 2001, US regulators investigated the US-headquartered Riggs Bank for lax money laundering controls with foreign embassy and diplomatic accounts, particularly those associated with Saudi Arabia and Equatorial Guinea. Riggs was fined and was forced to close a number of these problematic foreign embassy and diplomatic accounts. These clients, together with others – “often oil rich and nondemocratic” – reportedly struggled to find banks willing to offer them banking facilities.⁷³

This pattern of behaviour was to be seen in other financial institutions who were viewed as being

“willing to cut financial and commercial relations with rogue regimes, criminals and terrorists, given the right conditions. And they were willing to do it on their own”.⁷⁴ This case study demonstrates the potential for advocacy campaigns to limit access for perpetrators.

81 See Juan Zarate, *Treasury’s War: The Unleashing of a New Era of Financial Warfare*, at Part II, section 6. ‘Bad Banks’.

82 Ibid. See also Tracey Durner and Liat Shetret, *Understanding Bank De-Risking and its Effects on Financial Inclusion*, Global Center on Cooperative Security, November 2015 at pp.26-27 (available at: https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-bank-de-risking-181115-en_0.pdf).

I. Advocacy strategies

i. Concept

Advocacy strategies include where organisations and victims' groups can, by themselves or in alliance with other relevant stakeholders, address socio-political obstacles and influence human rights policies and practices to assert victims' rights.

Advocacy strategies can be deployed in a number of ways. There may be circumstances where the other models for financial accountability are not feasible, as outlined below. This may be because of legal, policy or structural issues which act as an impediment to financial accountability. For instance:

- a. Relevant law enforcement teams may not receive enough funding to take on these particular claims; or
- b. Procedural impediments, for example, strict rules on state immunity, may preclude claims.

It may also be that there is no legal mechanism to target specific behaviours, which contributes to a lack of financial accountability. For example, there may be no legal impediment to providing luxury goods and services to perpetrators of human rights abuses. However, those service providers may be susceptible to the reputational harm that comes from the provision of services.

Advocacy strategies may serve as a stand-alone measure, where other mechanisms are not available or practicable. However, advocacy strategies will often be deployed in conjunction with other models as set out in the Framework, for example, to encourage public authorities to pursue NCB confiscation against a specific perpetrator.

ii. Potential benefits

Potential beneficial outcomes include:

Advocacy strategies can strengthen other mechanisms: As noted above, advocacy strategies can be used in combination with other mechanisms for financial accountability. For example, if a limiting factor on the use of an NCB confiscation mechanism is the availability of funding, advocacy strategies could be used to earmark further funding.

Reputational issues for perpetrators: Drawing attention to the wrongdoing of perpetrators is likely to damage their reputation and may bring about a decline in the support they enjoy among key domestic or international actors.

Mechanism for behavioural change: Advocacy campaigns can be a useful tool for inducing perpetrators, those who facilitate or tolerate violations, or those who provide services to perpetrators to modify their behaviour (especially if the targets of the campaign are sensitive to public opinion). This may be particularly helpful in relation publicly traded corporations who facilitate violations, and regulated service providers such as lawyers.

Achieve legal and/or policy change: By drawing attention to the legal, policy and structural impediments to financial accountability, NGOs may be able to effect a change in the law or policy to make financial accountability more easily available in the future.⁸³

Limit accessing to goods and services funded with proceeds of abuses: Advocacy campaigns may limit perpetrator's access to services, such as elite schools,

⁸³ See, e.g., REDRESS's campaign to introduce the Torture Damages Bill in the United Kingdom, which would give victims of torture freestanding rights to claim compensation from perpetrators of torture (summary available at: <https://redress.org/news/redress-calls-for-enactment-of-new-torture-damages-bill/>).

luxury goods and services, and service providers.

Alternative to formal legal proceedings: Where formal legal proceedings are not viable, or resources are not available, advocacy campaigns can still effect change and thus have a positive outcome. They can provide a good alternative where it is not possible to initiate formal legal proceedings, such as where a claim is already time-barred.

Opportunities to co-ordinate with other sectors: Advocacy campaigns offer an opportunity to collaborate with NGOs in other sectors, and to build upon and contribute to progress. For example, there appear to be clear synergies between anti-corruption campaigns and human rights accountability in promoting transparency concerning assets (such as through public beneficial ownership registries for land and companies).

iii. Threshold requirements⁸⁴

As with any advocacy campaign, NGOs need to identify clearly:

- a. The target for advocacy efforts;
- b. The proposed change sought; and
- c. Mechanisms for generating leverage to which the target is likely to respond.

If an NGO is considering making specific (public) allegations concerning perpetrators, NGOs need to have sufficient evidence regarding the perpetrator and their involvement in human rights abuses to mitigate the risk of libel or defamation.

⁸⁴ *N.b.:* These are only general, high level criteria that provide a starting point for evaluating the suitability of a model for a particular claim.

iv. Limitations and disadvantages

Qualified impact: Advocacy campaigns are not a mechanism for direct financial accountability and do not achieve the primary objective of funding reparations, since they do not involve the seizure of assets.

May make recovery more difficult: If an NGO deploys a public advocacy campaign, NGOs may alert perpetrators to the fact that someone is looking into them. This may result in perpetrators taking steps to hide their assets or drive them to use defensive holding structures, hindering any future recovery action.

No affirmative finding of wrongdoing: Advocacy campaigns do not generally involve a formal fact-finding process and so will not result in an affirmative finding of wrongdoing.

No formal sanction against individual: Advocacy campaigns are not generally considered a form of direct accountability, since perpetrators are not sanctioned formally, such as by a judicial or governmental entity.

v. Resource requirements

Low/Moderate: The level of resources required will be low to moderate, depending on the information that is already available. If most of the information has already been collected, for instance in preparation for other models of financial accountability, then NGOs will only have to expend resources lobbying the relevant advocacy targets and conducting the campaign itself.

vi. Case study

A number of organisations worked closely with the regime of Muammar Gaddafi in Libya. These included:

- a. The Monitor Group, a US-based management consultancy firm, which entered into a multimillion-dollar contract with the Libyan regime to enhance the profile of Muammar Gaddafi and Libya.
- b. The London School of Economics, which was to receive funding of several million pounds from the Gaddafi regime.



Photo credit : BRQ Network under a CC BY-SA 2.0 license

Both the Monitor Group and the LSE came under considerable criticism as a result of their association with the Gaddafi regime, and this was followed by resignations amongst their senior leadership teams. This included:

- a. The Monitor Group: Mark Fuller, Monitor Group's founder, chairman and CEO announced his resignation shortly after the findings of an internal investigation into the firm's work for the Gaddafi regime.⁷⁷
- b. The LSE: Sir Howard Davies resigned, citing "*errors of judgment*" with respect to the arrangements with the Gaddafi regime.⁷⁸ An internal enquiry was held, led by former Lord Chief Justice Woolf, which levelled significant criticism at the LSE.⁷⁹

vii. Future developments and opportunities

Developments in the anti-corruption and money-laundering sphere: In recent years, shell companies and other beneficial ownership structures have come under greater scrutiny and are now facing increasingly strict transparency requirements. For instance, in the UK there is now a registry of persons with significant control over companies, This was introduced in response to concerns that individuals were using complex holding structures to hide their

85 See Libya Lobbyists Come Clean, *Mother Jones*, 6 May 2011 (available at: <https://www.motherjones.com/politics/2011/05/libya-lobbyists-come-clean/>)

86 See LSE accused of negligence for accepting Saif Gaddafi's £1.5m, *The Independent*, 28 November 2011 (available at: <https://www.standard.co.uk/news/lse-accused-of-negligence-for-accepting-saif-gaddafis-15m-6372646.html>)

87 LSE admits 'failings' on Libya cash, *The Independent*, 30 November 2011 (available at: <https://www.independent.co.uk/news/uk/home-news/lse-admits-failings-on-libya-cash-6270006.html>)

ownership of assets.⁸⁸ This could provide a platform for further campaigning based on the use of shell companies by perpetrators of human rights abuses.

Integrating financial accountability for human rights abuses into strategies to counter serious and organised crime:

There is a growing recognition of the role that human rights abuses play in serious and organised crime, particularly in relation to grand corruption involving repressive regimes. There may be opportunities to develop countries' policies on serious and organised crime, by highlighting how torture and other human rights violations are not stand-alone issues but part of a wider organised crime pattern.

⁸⁸ See People with significant control (PSC): who controls your company?, Companies House, 20 February 2018 (available at: <https://www.gov.uk/government/news/people-with-significant-control-psc-who-controls-your-company>)

VI. TOOLS AND TECHNIQUES TO IDENTIFY CLAIMS AND SUPPORT THE DEVELOPMENT OF CASE STRATEGIES

This section introduces a number of tools and techniques that can be used to help identify claims and to develop the case strategy for these claims.

A. Asset tracing and investigation

i. What is asset tracing and investigation?

Asset tracing is the process of locating and identifying assets associated with a particular person or entity. In the context of financial accountability, this exercise is linked to identifying perpetrator or state assets which could be used to fund reparations, damages or other financial compensation for victims of serious violations.

ii. Why is it important?

Except for a limited category of claims, locating and identifying assets is a critical step in obtaining financial redress for victims. Where a perpetrator refuses to comply with a judgment or award (as is often the case), unless assets can be located and identified, it is unlikely, if not impossible, for compensation to be paid to victims.

Asset tracing is also significant in shaping case strategy particularly when carried out at an early stage of proceedings. For example, it may shape where

or how a claim is brought (i.e., how to make use of established enforcement mechanisms). It may also shape strategy on preserving assets and preventing their dissipation. For example, it may help focus efforts to preserve assets through interim measures, by targeting key jurisdictions and taking measures over particular assets.

Understanding the level of assets likely to be available is also a key component of resourcing a claim. For example, if a perpetrator has significant assets that could be used to satisfy a claim, this could allow the use of funded litigation strategies (where litigation funders fund a claim in exchange for a share of the proceeds of litigation) or conditional fee agreements (where law firms charge reduced or no fees, in exchange for an uplift in their fees where they are successful). By contrast, where a perpetrator has limited assets that are unlikely to satisfy victims' claims, strategies like donor support or pro bono legal representation may be more appropriate.

Asset tracing may well uncover other criminal conduct or wrongdoing by a perpetrator. Often perpetrators will be involved in other unlawful conduct, including the laundering of financial flows. Through carrying out asset tracing, it may be possible to uncover evidence of other unlawful conduct, to develop and provide support for claims against perpetrators. It may also facilitate the use of other mechanisms against perpetrators.

iii. Key objectives

Key objectives and priorities associated with asset tracing include:

- a. Identifying assets associated with the relevant perpetrator(s).
- b. Identifying patterns and relationships associated with a perpetrator's business activities, as well as their asset holding structures. Establish if perpetrators use proxies to hold assets on their behalf for example, close family members or business associates. This may help to provide leads for further investigation.
- c. Identifying and prioritising key jurisdictions of interest for research. Key jurisdictions may include those which are critical to legal strategy, or which reflect a perpetrator's global footprint (e.g., family or professional links; previous residence).
- d. As part of tracing the assets of a perpetrator, it may well be important to track the location of the perpetrator. This task can be complementary to asset tracing and carried out as part of that process. Determining a perpetrator's location can be relevant for the purposes of initiating civil or criminal proceedings (e.g., to assist with establishing their presence in a particular jurisdiction).
- e. When carrying out asset tracing, it is important that the perpetrator is not 'tipped off' by these investigations. If a perpetrator becomes aware of asset tracing activities, it may well prompt efforts to shield or dissipate assets further.
- f. When carrying out asset tracing, it is important to ensure that any action taken does not

hinder future proceedings. For example, if techniques are used which are unlawful, this may cause significant difficulty when pursuing claims in the future. Any information and evidence gathered should be done so in accordance with any applicable rules or requirements. For example, if gathering information with a view to referring a case to law enforcement authorities, one should ensure that any asset tracing is carried out in compliance with any requirements they may have or be subject to, to ensure that they can use and, where relevant, rely upon the evidence gathered.

iv. Challenges

Carrying out asset tracing presents a number of challenges, including:

- a. **Techniques to obscure ownership of assets:**

There are a wide range of techniques that perpetrators may employ to obscure their ownership of assets. These include:

 - i. The use of shell companies with disguised or obscured ownership to hold assets;
 - ii. The use of nominees (e.g., family members or trusted associates) and trust structures to hold assets;
 - iii. The use of bank accounts in jurisdictions with strict banking secrecy laws;
 - iv. The use of complex and layered transactions to distribute assets; and
 - v. Changing the structures used to hold assets.

- b. **Limitations on publicly available information:** Many of the techniques used to hide assets rely upon difficulties with accessing information that identifies who the beneficial owner of an asset is. For example, in some jurisdictions, there is no requirement for companies to disclose the identity of its shareholders in any public registry.
- c. **Deconfliction:** In some cases, the claimant may be one of a number of claimants or award holders against a perpetrator and there will be other actors seeking to identify and freeze assets. It is important to ensure the assets identified are not already contested.
- d. **Cost:** Asset tracing can be extremely resource intensive. A significant amount of time may be required to search through public records and to follow up on leads.

v. Tools and Models for Asset Tracing

There are a number of tools and models that can be used for asset tracing.

A. Asset tracing by NGOs

While asset tracing benefits from specialised technical expertise and experience, it is still possible for NGOs to carry out basic asset tracing investigations. Significant progress can be made from reviewing open source information, for example:

- a. Leaked data, such as the Paradise Papers and the Panama Papers (as compiled by the International Consortium of Investigative Journalists and made available through their *Offshore Leaks Database*), Wikileaks and Aleph (a free online repository of hundreds of data sets to support investigative reporters in cross border investigations, developed by the Or-

ganized Crime and Corruption Reporting Project, a US investigative reporting platform);

- b. Open source databases, such as *Basel Open Intelligence*;
- c. Company registries (e.g., through national registries or through *OpenCorporates*);
- d. Real estate registries (e.g, the UK Land Registry. N.b., In 2015, *Private Eye* created an easily searchable online map of properties in England and Wales owned by offshore companies);
- e. Court records (e.g., in the UK, the freely available *Bailli*); and
- f. Social media profiles, including LinkedIn, Instagram, Twitter, Facebook and Skype directory. Advanced search tools (such as those on Twitter) may yield data. N.b.: Be careful not to leave a footprint when conducting social media searches. It may be helpful to use alias accounts to hide your identity.
- g. Search engines can yield useful information, particularly non-mainstream search engines. For example, *Duckduckgo* and *Dogpile* can (and indeed should) be used to avoid the issue of ‘filter bubble’. Be sure to use the search engines most common to the jurisdiction in which you are researching e.g., *Yandex* for Russia or *Baidu* for China.
- h. Internet archives, such as *Way Back Machine* which archives captured pages of a given website. This can be useful, for example, to track a real estate company’s portfolio of properties over time, or to identify a company’s shareholders/directors over time.

These can yield basic information on a perpetrator’s asset footprint and assist with location tracking. . Separately, commercial databases exist, which provide access on a paid basis. Because of the potential costs involved, this Framework does not address these. However, we note that if access to a specific commercial database is necessary, it may be possible to negotiate reduced or free membership as an NGO, by contacting sales teams.

NGOs may also have connections within diaspora communities. These communities may serve as a source of ‘human intelligence’, providing potential leads or tip offs. NGOs are also well placed to make enquiries of sources. Some sources may be more willing to provide information to an NGO, acting for the benefit of vulnerable survivors than private asset tracing firms operating in a commercial dispute, or even investigative journalists and law enforcement authorities.

There is a range of training and other resources available to NGOs. These are often focussed on public law enforcement agencies and prosecutors but can still yield useful information. Resources include:

- a. Online training programmes: Online training programmes have been published by a number of specialists including:
 - i. The Basel Institute of Governance; and
 - ii. *Exposing the Invisible* provide training on specific topics, like the use of document and image metadata to help geolocate persons of interest.
- b. In-person training programmes: There are a wide range of training providers for asset investigations. These include:

- i. The Institute for International Criminal Investigations provides a specialised course on the financial dimensions of war crimes investigations.⁸⁹
 - ii. *Finance Uncovered* provide training that is designed to support investigative journalists but is available to activists working in economic justice and campaigning.⁹⁰
 - iii. *Opsimathy*, run by Open-source intelligence expert Tony Bennet.⁹¹
- c. Written resources:
- i. The World Bank Asset Recovery Handbook provides comprehensive information on asset recovery processes and mechanisms.⁹²
 - ii. The Basel Institute’s International Centre for Asset Recovery publishes various training and guidance resources, including ‘Tracing Illegal Assets: A Practitioner’s Guide’,⁹³ and working papers, such as ‘Tracking and Tracing Stolen Assets in Foreign Jurisdictions’.⁹⁴
 - iii. *Bellingcat*, an investigative journalism organisation.⁹⁵

89 See <https://iici.global/course/financial-dimensions-of-war-crimes-investigations/>

90 See <https://www.financeuncovered.org/uncategorized/apply-now-for-our-new-finance-uncovered-training-in-london-bursaries-available/>

91 See <https://www.opsimathy.co.uk/>

92 Available at: https://star.worldbank.org/sites/star/files/asset_recovery_handbook_0.pdf

93 Available at: https://www.baselgovernance.org/sites/default/files/2019-01/tracing_illegal_assets_EN.pdf

94 Available at: https://www.baselgovernance.org/sites/default/files/2019-06/WP_15_Tracking_and_tracing.pdf

95 Available at: <https://www.bellingcat.com/category/resources/how-tos/>

- iv. The ICC note on Financial investigations and recovery of assets sets out useful information on the approach it takes, which may inform coordination with the ICC as well as other asset tracing activities.⁹⁶

B. Partnership with other specialist NGOs

Some perpetrators may be of interest to a number of NGOs, including NGOs in fields such as anti-corruption and promotion of the rule of law. Some perpetrators may also have been of historic interest to NGOs for past advocacy or legal campaigns.

Partnering with NGOs can be a very useful tool to pool resources to achieve a greater impact. By pooling resources, more information can be gathered and analysed.

Working with NGOs who have carried out historic investigations can also yield helpful information when carrying out renewed asset tracing. Asset tracing often relies upon identifying patterns in behaviour (e.g., the use of particular business advisors or associates, or asset holding structures). As such, even if the historic investigation contains information that is out of date, it will likely be valuable.

When partnering with other NGOs, it is important to give consideration to issues and risks such as:

- a. Whether sharing documents creates a risk of disclosure in subsequent legal proceedings; and
- b. Ensuring the lawfulness of the method(s) by which partners will/have obtained evidence.

⁹⁶ Available at: https://www.icc-cpi.int/iccdocs/other/Freezing_Assets_Eng_Web.pdf

C. Partnerships with investigative journalists

Investigative journalists may also have an interest in the assets of perpetrators of torture or those associated with regimes that engage in torture and other serious human rights violations. For example, the regime of President dos Santos in Angola was associated with serious human rights violations, including extrajudicial killings.⁹⁷ Journalists from Finance Uncovered (who investigate illicit financial flows) identified London real estate valued at more than £10 million associated with Isabel dos Santos, the eldest child of former President dos Santos.⁹⁸

Partnerships with investigative journalists can increase the impact of asset tracing, whether by partnering on a common investigation, or by building upon existing investigations they have already carried out.

As with all partnerships, it is important to ensure objectives are compatible and aligned. Given that the typical result of investigative journalism is the public reporting of investigations, there could be tension where, for the purposes of legal proceedings or to prevent asset dissipation, asset tracing may need to remain confidential. Careful thought should be given to this at the outset.

D. Partnerships with corporate investigation firms

One very significant area for partnerships is with corporate investigations firms. Corporate investigations firms, also known as business intelligence firms, typically gather information (including by car-

⁹⁷ See, e.g., the alleged 2015 Kalupeteka massacre as described in: *Dispatches: Was there a massacre in Huambo, Angola?*, Human Rights Watch, 19 January 2016 (available at: <https://www.hrw.org/news/2016/01/19/dispatches-was-there-massacre-huambo-angola>)

⁹⁸ *Daughter of African Kleptocrat has £13m London mansion: How we discovered it*, Finance Uncovered, 16 August 2019 (available at: <https://www.financeuncovered.org/investigations/isabel-dos-santos-angola-london-mansion-home-kleptocrat/>).

rying out asset tracing) to support civil claims. This may entail locating assets which are misappropriated or embezzled, or assets suitable for enforcement where a judgment debtor refuses to comply with a judgment or award.

Notable providers include large firms like Kroll, K2 (established by the founder of Kroll) and Control Risks. Smaller providers include firms like the Mintz Group and Raedas. Some of these firms may provide their services on a pro bono or reduced fee basis. For example, Raedas has a dedicated not-for-profit arm, 'FIND', which provides asset tracing and investigative other services to NGOs on an at cost basis.

There are considerable advantages to partnering with corporate investigations firms. They have the necessary technical expertise and experience to plan and carry out asset investigations effectively. They will be able to help identify the most promising leads to make efficient use of resources. They usually have the ability to draw upon contacts around the world to assist with enquiries in particular jurisdictions. Reputable corporate investigation firms will also be well versed in conducting enquiries using only lawful means.

The key difficulty/disadvantage with using corporate investigation firms is the potential cost. While some firms may be able to provide some or all of their services on a pro bono or reduced fee basis, the potential costs associated with asset tracing are potentially very significant. The use of such firms may consume a considerable part of any case budget.

E. Legal tools to support asset tracing

There are a range of tools that can support asset tracing by compelling the disclosure of evidence concerning assets. Understanding what tools may be available, and how/when to deploy these is an important part of developing an asset tracing strategy.

For example, there is a far-reaching power available under United States federal law, the so-called US 1782 subpoena. Under 28 U.S. Code, §1782, parties to legal proceedings taking place outside of the United States may apply to compel a person resident in the United States to give their testimony or produce documents for use in the foreign legal proceedings. Documents can include transaction data held by US correspondent banks. This is a very powerful tool and is potentially applicable both to perpetrators and third parties in the United States with pertinent information.

Equally for private civil proceedings, it may be possible to obtain information on assets through interim orders of the court hearing the claim. In claims before the English courts, it is possible to obtain what are termed 'Freezing Orders'. The effect of this order is to freeze an individual or entity's assets (generally up to a specified financial value). However, the usual terms of the order will require the respondent to disclose details of their assets.⁹⁹ A failure to comply with such an order may amount to a contempt of court. A freezing order may be made (in exceptional circumstances) on a global basis (both in terms of freezing assets globally, but also disclosing information on the existence of assets).

It is important to note that different tools will be relevant for different types of claims and proceedings. For example, law enforcement authorities have legal powers that are unavailable to private individuals and organisations. For instance, they may be able to request information on a perpetrator's assets from law enforcement agencies in a third state, using the mutual legal assistance process. They may also have powers to obtain evidence using warrants, search orders and other comparable powers.

⁹⁹ See paragraph 9 of the standard form freezing injunction order annexed to Practice Direction 25A of the Civil Procedure Rules (available at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a#Annex)

F. Co-ordination with asset tracing by law enforcement agencies

Law enforcement bodies often have extensive experience and expertise in asset tracing. Targeting the proceeds of crime has been a strategic priority of some law enforcement agencies, as a way of disrupting organised criminal networks and criminal finances.¹⁰⁰ This has been carried out on a co-ordinated basis with the support of supranational organisations such as Eurojust.¹⁰¹

Relationships have been pursued between NGOs and law enforcement agencies in a range of settings. For example, the UK's National Crime Agency has a mandate for engagement with NGOs and CSOs. The UK's Metropolitan Police conducts regular meetings with civil society on universal jurisdiction cases for war crimes, torture and other serious human rights violations.

There may be difficulties associated with close relationships with law enforcement agencies on building particular claims. For example, it may not be possible for law enforcement agencies to share information with NGOs. It is also important that any evidence gathered by NGOs is prepared in accordance with any relevant standards that a law enforcement agency may require, to minimise the risk of that evidence being inadmissible or a hindrance to a case.

100 See, e.g., HM Government's Serious and Organised Crime Strategy, October 2013, p.27 (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf).

101 See, e.g., Eurojust's Casework in Asset Recovery at a Glance, February 2019 (available at: <https://op.europa.eu/en/publication-detail/-/publication/691d5ade-33fb-11e9-8d04-01aa75ed71a1/language-en/format-PDF>).

B. Funding legal claims

i. The role of funding

Various models have been used to fund claims. Traditional donor/grant-based funding is common and a very useful tool. However, it may not be sustainable. Grants typically last for a finite period of time and may not be renewed. The availability of grants depends on donors having interests that are aligned with proposed claims. The level of funding may also not be sufficient to cover large, mass claimant actions.

Innovative funding solutions like crowdfunding for legal costs may be limited to a small number of claims, and may not cover case costs. In addition, public fundraising may not be suitable where there is a risk of asset dissipation or ‘tipping off’ a perpetrator.

The potential deficit in funding can serve to restrict the number and types of claims that can be brought on behalf of victims, affecting their ability to access justice. This is particularly so for a number of financial accountability models discussed above, where there are potentially significant or even extreme costs implications. For example, mass claimant private civil actions in England for environmental damage have generated legal fees in the millions of pounds.¹⁰² While that level of fees is very much an outlier, funding is a key issue for models including:

- a. Private civil claims;
- b. Enforcement of existing awards and judgments (particularly where steps have been taken to hide assets);
- c. Administrative claims against states; and

¹⁰² See Lawyers for claimants in Trafigura case seek £105m in costs, *The Guardian*, 10 May 2010 (available at: <https://www.theguardian.com/world/2010/may/10/trafigura-claimants-lawyers-costs-bill>)

- d. Human rights claims.

Below, we set out basic principles of cost recovery mechanisms, before looking at the characteristics of a number of specific funding models.

Whether or not a model is appropriate for a particular claim will depend upon the particular case. Some of the models involve complex ethical issues when used with vulnerable clients. For example, some of the models operate by re-allocating some of the damages payable to victims to cover the costs of litigation and to fund future claims.

Such ethical issues are not resolved lightly and require very careful consideration. We consider that this is a worthwhile process, particularly because of the potential for improving access to justice for victims. We consider that it may be possible to resolve ethical issues through the development of hybrid solutions, for example combining donor support with costs recovery that does not or has a minimal impact on victim compensation.

It may also be possible to combine (elements of) one or more funding models more generally to meet the practical needs of a case. For example, the use of pro-bono support, combined with a claim where costs recovery is available, and donor support may provide a composite funding solution that enables a claim to proceed.

ii. Costs recovery: general

Costs recovery is a tool that may assist in formal legal proceedings. Costs recovery means the ability to recover the costs of litigation from the unsuccessful party. This means that where a claim is successful, some or all of the costs of the legal practitioners, experts and others would be paid. This can serve to reduce the effective funding required to pursue that claim.

Costs recovery is particularly relevant to private civil claims where it may be possible to recover some or all of the costs of successful litigation. In some legal systems, there is a ‘costs-shifting’ principle, which means that the unsuccessful party may be directed to pay some or all of the successful party’s costs, which could greatly add to the sustainability of litigation.

The model of costs recovery may also be relevant for other types of litigation, such as public human rights or administrative claims. Here, victims may be awarded some or all of the costs of their legal representation.

Because costs recovery can reduce the effective funding required to pursue a claim, it is a very important tool in reducing the effective and overall costs of bringing claims, particularly over a portfolio of different cases. As such, costs recovery is an important tool in expanding the availability of claims for victims for a given amount of resources, and one which we would strongly advocate where appropriate and feasible.

We note that there are potential issues with costs recovery. For example, it may be that a perpetrator does not have adequate funds to satisfy both damages awarded to victims, as well as legal fees. If costs recovery were pursued in that situation, this might have the effect of depleting compensation available for victims. As such, it is important to consider the potential consequences of pursuing costs recovery (including when considering the feasibility of or strategies for particular claims).

iii. Models of case funding

In this section, we consider the models of funding that rely upon, or can be complementary to costs recovery.

A. Donor funding

This is a traditional model for funding litigation; a donor contributes to the direct case costs of a particular claim, or the general costs of the organisation (generally an NGO) bringing a claim on behalf of a victim.

There is generally no expectation of any financial return; there is, however, an expectation of social or other impact. For this reason, donor funding may be most helpful in cases where models reliant upon a return or based upon costs recovery are not feasible (e.g., where there are minimal assets).

Donor funding may also be useful in supporting the development of a portfolio of claims. By providing seed or working capital, it may enable a number of claims to be brought, where costs recovery tools could be used to replenish a proportion of the funds capital (with the shortfall being made good by donor funding).

B. Litigation funding

Litigation funders typically provide funding to support claims in exchange for a proportion of the proceeds of the litigation if it is successful. Litigation funding can be seen as an investment; in exchange for ‘investing’ funds to support a claim, litigation funders earn a return (the share of proceeds of litigation) that is calibrated to the risk associated with a claim. This return pays for the costs of the funder (including the return it pays to investors who provide it with capital) and profit.

Beyond the prospects of success of a particular claim, there are a number of financial parameters that litigation funders will take into account. Typically, they will only target claims where the expected quantum of damages is at least a minimum multiple of the expected legal fees anticipated. They will also require a certain degree of return. This will vary, but

as a rule of thumb, the return will likely be the greater of triple the invested capital or a 30-40% share of the proceeds of litigation.

These figures are applicable to commercial cases. It may be feasible for litigation funders to accept a lower rate of return for cases involving human rights violations and/or vulnerable clients. Despite the high return associated with commercial funding, it can still be an effective tool for human rights focussed claims. For example, Litigation Lending Services, a commercial litigation funder, supported the so-called 'Stolen Wages' case in Queensland Australia.¹⁰³ First Nations citizens were historically the subject of discriminatory legislation which enabled their wages to be withheld and paid over to the state. The case ultimately resulted in the payment of AU\$190 million and costs in compensation.¹⁰⁴

C. Impact litigation funders and hybrid models

Impact litigation funders operate on a similar basis to commercial litigation funders, in that they fund claims in exchange for an anticipated return. However, and unlike commercial funders, the anticipated return includes both an economic return, but also a positive social impact. Depending on the funder, this may include challenging impunity for human rights violations.

The balance between economic return and social impact is dictated by the objectives of the funder and the investor who provide the funder with capital. Some investors may place a greater premium on social impact vs. economic return (and vice versa). The range in values and objectives may create opportunities to fund cases which are likely to have a lower economic return, but a high social impact.

103 See Litigation Lending Services, *Stolen Wages (QLD) Class Action: In-Principle Settlement July 2019* (available at: <https://www.litigationlending.com.au/news/stolen-wages-qld-class-action-principle-settlement-july-2019>)

104 For further details, see <https://www.stolenwages.com.au/>

Impact litigation funding still requires an economic return, which covers the costs of the funder, and the costs of unsuccessful claims. As such, it is unlikely to be suitable for cases that are unlikely to generate a significant amount of compensation.

Impact litigation funders of note include *Aristata Capital*.

D. Law firms: Alternative fee arrangements

Law firms traditionally operate on the basis of hourly rates, or potentially fixed fees for a case as a whole. However, increasingly law firms are able to (and do) offer creative financing solutions. These include:

- a. Conditional fee agreements: This is where the payment of all or part of a law firm's fees is made conditional upon the case achieving certain success outcomes. Often the law firm's fees will be increased (a so-called 'uplift') to take into account the risk the law firm is assuming. The amount of uplift may be capped as a matter of law and regulation. For example, in the UK, the maximum uplift is 100% of the normal fees that would be charged by the firm, with a further cap of 25% of damages recovered in personal injury claims. Depending on the jurisdiction where the claim is brought, the uplift may be paid by the defendant of the claim.
- b. Damages based agreements: This is where a law firm recovers a percentage of the proceeds of litigation. In that respect it is similar to the model used for litigation funding.

Alternative fee arrangements have been used extensively in support of environmental and human rights litigation in a number of jurisdictions.

E. Pro bono support

Pro bono support from lawyers and other experts can be of great support in resourcing cases. Firms may be prepared to offer work on a pure pro bono basis (i.e., at nil cost) or on a heavily reduced basis. It may be possible for a firm to assume the conduct of a claim on a purely pro bono basis, which would obviate the need for funding, and remove (or at least mitigate) the impact on compensation payable to victims.

Pro bono or reduced fee models offer significant advantages. However, it may not be feasible to conduct the largest cases on a pure pro bono basis. It is also not necessarily a sustainable model for the long term. That being said, it is potentially a very valuable tool in building and progressing claims.

iv. Further resources

For a discussion of litigation funding, including some of the associated ethical issues, see:

Christopher Hodges, John Persner and Angus Nurse, *Litigation Funding: Status and Issues*, January 2012.¹⁰⁵

C. Building case networks

Building networks as part of case strategy development is key to the effective outcomes. Perpetrators (particularly high-profile perpetrators) are often of interest to a number of organisations and for different purposes. For example, while a perpetrator may be of interest to an NGO for a potential private civil claim, the same perpetrator may be of interest to other NGOs in the same jurisdiction for a universal jurisdiction criminal claim, and to law enforcement

for potential immigration offences. While all objectives are of course potentially positive, the effect of progress in one set of proceedings may hinder another. For example, were the immigration offences to be successful in having the perpetrator deported, that might hinder the service of a private civil claim, or the prosecution of a universal jurisdiction claim. Likewise, the initiation of a private civil claim might serve to tip off the perpetrator and cause him to leave the jurisdiction. This would serve the ultimate objective of immigration proceedings, but would very much hinder universal jurisdiction proceedings.

Building case networks can lead to a number of helpful outcomes including:

i. Deconfliction

As noted above, developments in one set of legal proceedings may have unintended consequences on others. These consequences may include:

- a. Asset dissipation as a result of tipping off (e.g., through public advocacy on a perpetrator's assets, or through closure of bank accounts).
- b. Difficulties in establishing jurisdiction or serving papers, as a result of a perpetrator changing locations.
- c. Difficulties and/or complications in enforcing against assets as a result of sanctions freezing assets.

ii. Efficiency gains

Where perpetrators are of interest to multiple NGOs or organisations, the pooling of resources can result in better and more efficient outcomes. Even where an organisation had a historic interest in a perpetrator, it may be possible to build upon their work.

¹⁰⁵ Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf

iii. Sharing experience and learning points

Case networks can be a useful tool for sharing experiences and learning points.

D. Mechanisms for allocating compensation

One of the primary objectives when pursuing financial accountability is, where possible, to use perpetrators' funds to pay compensation to victims.

While the distribution of compensation comes at the conclusion of legal proceedings, we consider that it is still an important point to take into consideration when building claims. Clear communication with victim groups from the outset is critical to avoid misunderstanding at a later point, which can serve to undermine justice processes. Further, the payment of compensation can be a significant source of risk. For example, a UK law firm successfully obtained compensation for communities impacted by environmental pollution in the Côte d'Ivoire. However, when it tried to transfer funds to its clients, corrupt and fraudulent claims were made to the local courts. This resulted in claimants being deprived of compensation, for which the law firm was subsequently held liable.¹⁰⁶ Clearly, claims involving large numbers of victims are likely to be more complex and challenging than those involving smaller number of victims.

Significant effort has been put into the development of compensation mechanisms at an international, regional and national level. For example:

- a. The ICC Trust Fund for Victims, established by state parties to the Rome Statute;

¹⁰⁶ See *Sylvie Aya Agouman v Leigh Day (a firm)* [2016] EWHC 1324 (QB).

- b. The Trust Fund for collecting and distributing reparations to victims of the former President of Chad, Hissène Habré, established by resolution of the African Union;¹⁰⁷ and
- c. Colombia's Victims' Unit, established as part of the peace accords between the Colombian state and FARC.¹⁰⁸

These mechanisms may serve as a basis for developing compensation distribution mechanisms for the application of financial accountability models.

¹⁰⁷ See *Establishing a Trust Fund for Victims in the case of Hissène Habré: options for the way forward*, REDRESS and ATPDH, April 2017 (available at: <https://redress.org/wp-content/uploads/2017/12/April-Establishing-a-Trust-Fund-for-Victims-in-the-case-of-Hissene-Habre-options-for-the-way-forward.pdf>)

¹⁰⁸ See <https://www.unidadvictimas.gov.co/en>

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