Finance for Restorative Justice
OPINION

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Q1) Is it possible to identify a legal obligation which would require states to contribute to an international compensation fund?

Question

The obligation on the international community to contribute to the proposed fund

1. Is it possible to identify a legal obligation which would require states to contribute to an international compensation fund?

2. The key issue here is best demonstrated by an example, i.e. why should the Dutch contribute to a fund that would be used to compensate a Yazidi victim of sexual violence inflicted by an Australian foreign fighter where the Australian state refused to compensate them through their own domestic system?

3. A starting point for this (although we haven't given it any great detail) may be the International Law Commission's Guidelines on Responsibility of States for Internationally Wrongful Acts.

A. Summary

1. We are instructed to seek to identify a legal obligation which would require states to contribute to the recently launched Global Survivors Fund[1] to finance reparations for victims of sexual violence in conflict (SVIC). We are mindful that the fund's aim is to finance *restorative* and not *retributive* justice. The fund therefore seeks to be financed through automatic (involuntary) contributions from the international community, irrespective of criminal responsibility.

2. The Security Council, as long ago as November 2000, acknowledged a general trend towards recognizing an individual's right to compensation in international law. It recognized the conflicting legal and practical realities of (i) the need to finance reparations for individuals to realise victims' rights before International Tribunals whilst also (ii) acknowledging that the Tribunals would be unlikely to secure adequate resources to fund awards of reparation:

   "The emergence of human rights under international law has altered the traditional State responsibility concept, which focused on the State as the medium of compensation.

   The integration of human rights into State responsibility has removed the procedural limitation that victims of war could seek compensation only through their own Governments, and has extended the right to compensation to both nationals and aliens.

[1] The Global Survivors Fund was established in 2019 by Dr Denis Mukwege and Nadia Murad. It is an innovative survivor-centric mechanism which has been endorsed by the UN Secretary-General in his statement to the Security Council on conflict-related sexual violence in April 2019. The language referencing the Fund was included in Security Council Resolution 2467.

There is a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility."[2]

3. In our answer to Question One below, we have provided one reading of international jurisprudence to assist our instructing solicitors in advocating their proposal that all States are legally obligated to financially contribute to a global fund to finance reparations for victims of SVIC.

4. In providing a legal analysis to reach this position we are mindful that the fund is intended to be a mechanism for restorative justice. We have therefore approached this question from a victim-centric starting point, that is starting with the individual victim's right to compensation from the international community. We see this as central to the concept of restorative justice and the lynchpin in advocating that States have such a legal responsibility to contribute.

5. Our research reveals that the individual victim's right to reparations is recognised in international law. Treaties and binding Resolutions have accepted that it is every State's responsibility to *fulfil* this right. However, we should advise at the outset that we have not found any single legal text that goes so far as to expressly codify that every State has a legal obligation to *finance* this right. We nonetheless consider that the obligation to *finance* this right must be implied.

6. The Opinion set out below therefore presents one legal argument which supports the position that there is a legal obligation requiring States to contribute to an international compensation fund.

B. Introduction

7. Reparations have historically been viewed as an inter-state remedy. Through the development of multiple treaty provisions and jurisprudence in international human rights law (IHRL) and international criminal law (ICL) there has been a definitional shift which now recognises individual victim's right to reparations, as acknowledged by the Security Council.

8. The logical consequence of recognising the right for individuals to receive reparations for serious violations of human rights as *jus cogens* is that individuals appear as rights bearers or beneficiaries under international law. The first part of this Opinion will explore and substantiate arguments in favour of an emerging right of individuals to receive reparations for serious violations of human rights.

9. After exploring the legal bases (and whether they are binding or not) underpinning this right, we will consider whether breaches of this right automatically translate into a State obligation to finance reparations where there is no responsibility on the State under international criminal law.

[2] UN doc. S/2000/1063, at p. 11, [§ 20] of the Annex

10. We will contend that the jurisprudence of international human rights law, as it crosses over with international humanitarian law, can be seen to create a correlative obligation on every State to finance reparations in order to give effect to the rights of individuals. Without this obligation, we consider that the right is an empty shell.

11. As an aside, we understand that the proposed fund seeks to finance restorative justice independent of proceedings brought under ICL. Therefore, the legal mechanism must be identified outside the operational mandate of the International Criminal Court and the Rome Statute. We therefore limit the substantive scope of this Opinion to legal obligations derived from IHRL and IHL, although a section will explore analogous Trust Funds as evidence of support for our proposition.

12. First, we propose to analyse the legal concept of the 'right to reparations' as an individual right before then exploring the legal mechanisms through which this right has evolved. We question whether the legal mechanism conferring this right obligates a State to *financially* contribute in order to satisfy their responsibility to *facilitate* or *fulfil* reparations. In so doing, we will explore whether there is a legal basis to expand the following concepts under international law to justify obligating States to contribute to the Global Survivors Fund:

    a. State responsibility – can this responsibility extend to individuals where the breaches are inflicted by a non-state and non-resident actor outside the territory;
    b. Contributor – do legal instruments allow for this responsibility to expand to include every Member or contracting State, not purely the perpetrator; and
    c. Beneficiary – whether victimhood is broadly defined under IHRL, to include every determinable individual victim, not merely those who are judicially identified and assessed as a victim of a specific crime.

C. Parameters of Victimhood in International Law

13. Historically, victimhood in international law was defined only narrowly as the wounded State party to an international wrongful act. Jurisprudence has however developed to expand the parameters of victimhood to include individuals who have suffered international law breaches.

14. The recognition of individuals as beneficiaries of reparations was first referred to by the Permanent Court of International Justice in *Factory at Chorzów Case (Germany v Poland), Jurisdiction*, 1927 PCIJ, [§21] which held:

    'It is a principle of international law and even a general conception of law that any breach of an engagement involves an obligation to make reparation in an adequate form… reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.'[3]

[3] This dictum has been widely cited since by the ICJ. See: *Gabčikovo-Bagymaros Project Case (Hungary v Slovakia)*, ICJ Report 1997 [§149-52] and *Armed Activities on the Territory of the Congo Case (Democratic Republic of the Congo v Uganda)*, ICJ Report 2005 [§259]

15. A victim's right to an effective remedy is a well-established right in IHRL and international humanitarian law (IHL). However, international instruments vary widely in how they define the scope of a 'victim' and assess how and from where an 'effective remedy' may be sought. (Given the context underpinning this Opinion is to explore financing reparations for Yazidi victims of sexual violence in conflict (SVIC), both IHRL and IHL instruments are relevant).

16. It is helpful first to consider the legal definitions of victimhood in order to assess whether a hypothetical Yazidi victim, residing in a State where the international crime did not occur, and which is not home to the perpetrator, can fall to be defined as a 'victim' under international law for the purposes of reparations. If not, then no subsequent legal obligation can exist for States to finance reparations.

17. Article 8 of the Universal Declaration of Human Rights 1948[4] is the first and foundational instrument to declare rights of individual victims on a global scale. It provides a specificity of rights that goes far beyond the scope of the UN Charter. Article 8 reads:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

18. Article 8 unequivocally asserts a victim's right to an effective remedy but it must be read alongside the preamble which obligates States *'to secure'* the rights of the Declaration *'both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.'*

19. Article 2 expands Member States' obligation to '*secure*' this right further, to include '*everyone…no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'*

20. On its face, the Declaration legally obligates Member States to proactively fulfil the right to an effective remedy for everyone, without reservation on territoriality.

21. Whilst some consider the Declaration a statement of aspirational principles and therefore not a statement of law or legal obligation, the jurisprudence of the ICJ has interpreted the Declaration's provisions as obligating UN Member States under customary international law.

22. Vice-President Ammoun sitting on *Namibia (South-West Africa) Advisory Opinion*, 1971 ICJ Report 16, 55 in his concurring Opinion expressed the view that: (emboldened emphasis added)

    'The Court could not remain an unmoved witness in face of the evolution of modern international law which is taking place in the United Nations through the implementation and the extension to the whole world of the principles of equality,

[4] The 1948 UN General Assembly resolution was adopted without dissent, although five members of the Soviet bloc, plus Saudi Arabia and South Africa abstained from voting. This indicates levels of acceptance and respect for the enshrined rights.

liberty and peace in justice which are embodied in the Charter and the Universal Declaration of Human Rights…

…Although ***the affirmations of the Declaration*** *are not binding qua international convention* [that is, not in possession of legal capacity as an immediately binding treaty obligation]… ***they can bind states on the basis of custom…*** *because they have acquired the force of custom through a general practice accepted as law.'*

23. Whilst it can be argued that international customary law positively obligates each Member State to secure the right to a remedy, the rights bearer/victim is narrowly defined in this context as an individual who can seek action through domestic courts. Therefore, under the Declaration a victim must be judicially assessed, accepted and identified as having a right to remedy.

24. At this stage of the discourse, this does not assist the context of the proposed fund which would be a global administrative reparations programme. However it does demonstrate an early recognition of the individual's right to reparation under international law.

25. Unlike the legal effect of the Declaration, it is clear that States who have ratified or acceded to Treaties are legally obligated under international law to respect, protect and fulfil the rights provisions contained therein. The legal effect of treaties require States to '*fulfil*', meaning that States must take positive, proactive action to facilitate the enjoyment of the enshrined rights. This has led to the affirmation of State responsibility in relation to some fundamental human rights. We contend that this extends to fulfilling the individual's right to reparations.

26. We now know from the Human Rights Council's report on ISIS crimes against the Yazidi community that the crimes suffered by the victims were multiple and manifested in several guises, including multiple crimes against humanity, war crimes, sexual slavery, rape and torture. Given the manifold nature of the crimes, all of the following Treaties are relevant in the context of SVIC against Yazidis.

27. The binding right to a remedy appears unambiguously in the following inexhaustive international Covenants and Treaties[5]:
    a. Article 2 of the International Covenant on Civil and Political Rights;
    b. Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination;
    c. Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
    d. Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearances.

28. Taking the most relevant of those texts in turn, Articles 2 and 9 of the ICCPR read:

Article 2

[5] Regional Instruments include Article 7 of the African Charter on Human and Peoples' Rights; Article 25 of the American Convention on Human Rights; Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms

2. Where not already provided for by existing legislative or other measures, ***each State Party to the present Covenant undertakes to take the necessary steps****, in accordance with its constitutional processes and with the provisions of the present Covenant,* ***to adopt such laws or other measures as may be necessary to give effect to the rights recognized*** *in the present Covenant.*

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that ***any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State****, and to develop the possibilities of judicial remedy;*

(c) To ensure that the competent authorities shall ***enforce such remedies when granted.***

…

Article 9

5. Anyone who has been the victim of unlawful arrest or detention shall have ***an enforceable right to compensation.***

29. Adopting States are therefore legally obligated to establish effective domestic machinery to *'ensure'* any person claiming a remedy for violation of their rights shall have that claim determined by a judicial, administrative or legislative authority. (Articles 7 and 10 of the ICCPR are the most relevant in the context of Yazidi victims of ISIL). Reparations are to be determined by 'competent authorities', although the Covenant gives no precise indication of what a remedy entails other than it should 'develop the possibilities of judicial remedy.' State parties are simply obliged to ensure that the competent authorities shall enforce such remedies when granted.

30. The acknowledgment of the right to a judicial or administrative remedy is broadly construed. Arguably, one could read Article 2 as obligating ratifying States to assess an individual's right to administrative reparations i.e. an obligation to assess eligibility for administrative reparations from a Global Survivors Fund.

31. Article 9 which reflects some of the subsidiary ways in which we now understand[6] that sexual violence has been inflicted on the Yazidi population, creates an absolute right for all victims, irrespective of whether their victimhood has been judicially assessed, whether the perpetrator is identifiable, or where the crime occurred. However, compensation is only referred to in the context of unlawful arrest, detention and conviction.

32. The jurisprudence of the Human Rights Committee in its General Comment No. 31 clearly recognizes that the International Covenant on Civil and Political Rights

[6] https://reliefweb.int/report/syrian-arab-republic/they-came-destroy-isis-crimes-against-yazidis-human-rights-council

("ICCPR") creates *proactive* legal duties upon adopting States and formally links the concept of right to remedy with that of reparation (emboldened emphasis added):

'Article 2, paragraph 3 requires that States Parties make reparation to individuals whose Covenant rights have been violated. ***Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3 is not discharged****. In addition to the explicit reparation required by Articles 9, paragraph 5, and (Article 14) paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation.* ***The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction****, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.'*

33. As suggested in the introduction to this section, the Committee's Comment recognizes that the individual's right to a remedy imposes a positive legal obligation on contracting State parties in order to give effect to, or *fulfil*, the right.

34. Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination[7], which has been ratified by 27 Member States also recognizes and asserts an individual's right to remedy, including reparation (emboldened emphasis added):

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies*, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention,* ***as well as the right to seek from such tribunals just and adequate reparation*** *or satisfaction for any damage suffered as a result of such discrimination.*

35. The jurisprudence of the Committee on the Elimination of Racial Discrimination has however been limited. In *L.R. v Slovakia*[8] the Committee found that the then Slovak government had breached Article 6 by failing to provide an effective remedy for discrimination suffered by the Roma people after the cancellation of a housing project on ethnic grounds. This similarly demonstrates the Committee's recognition that the State is legally obliged to adequately fulfil an individual's right to remedy and reparation.

36. Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment unambiguously obligates adopting States to secure the right to redress and the right to fair and adequate compensation (emboldened emphasis added):

Article 14

[7] Came into force 4th January 1969
[8] Communication No. 31/2003: Slovakia 03/10/2005 CERD/C/66/D/31/2003 (https://web.archive.org/web/20100727052945/http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/3764f57be14718c6c1256fc400579258?Opendocument)

1. Each State Party shall ensure in its legal system that ***the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation****, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture,* ***his dependants shall be entitled to compensation****.*

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

37. There is significantly less jurisprudence from the Committee Against Torture than the Human Rights Committee. The Committee Against Torture have generally taken a conservative approach avoiding elaboration on the concept of rehabilitation. However, in *Kepa Ura Guridi v Spain*, No 212/2002, Final Views, 17 May 2005 [§ 6.8] the Committee confirmed that the Convention obligates States to *guarantee* compensation:

    'Article 14 of the Convention not only recognizes the right to fair and adequate compensation but also imposes on States the duty to guarantee compensation for the victim of an act of torture… compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case.'

38. Interestingly here, the jurisprudence recognizes that not only must States facilitate compensation, but they must themselves *guarantee* it, irrespective of territorial jurisdiction – where the torture was inflicted and by whom. The term 'guarantee' is not defined in the General Comment but we consider that this provides *some* scope to argue that where victims cannot avail themselves of domestic criminal regimes for compensation, the State must award it in lieu of the perpetrator. A helpful corollary can be drawn for the purposes of the proposed fund.

39. The Committee have drafted a General Comment on Article 14[9] which lays out at [§ 3] that the obligation on State parties to provide redress is twofold: procedural and substantive. The former is well understood but in order to satisfy the substantive obligation the Committee notes *'State parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.'* Whilst making express this substantive legal obligation on States, the General Comment does not limit its scope to instances of State criminal or territorial, responsibility – i.e. the State's obligation to ensure victims obtain compensation is not limited to actions which occurred on State territory or to actions committed by State actors.

40. Paragraph 44 of the General Comment expressly encourages States to make voluntary contributions to the United Nations Voluntary Fund for Victims of Torture[10] endorsing *'the possibility for States parties to make voluntary contributions to this fund, irrespective of the national measures taken or contributions made.'* The mandate of the UN Fund refers to humanitarian assistance rather than reparation and rehabilitation,

[9] General Comment NO.3 (2012) https://www.refworld.org/docid/5437cc274.html

[10] The Fund was established by GA resolution 36/151 of 16 December 1981. 'Report of the Secretary-General on the United Nations Voluntary Fund for Victims of Torture' A/63/220, 5 August 2008.

and of course operates on a voluntary basis. However, the fund was established in recognition of the importance of providing assistance to *all* victims.

41. The Fund operates independently of the Committee Against Torture and has a unique mandate in being able to provide direct assistance to victims. Yet the Committee and the Special Rapporteur on Torture consistently encourage voluntary contributions to the Fund. The UN Special Rapporteur has even suggested that a mechanism be devised where torture is systematic and widespread to require States to contribute adequate funds to the Voluntary Fund.[11]

42. Whilst the General Comment is not framed as a legal obligation to contribute to the fund, it is of note that this appears in the implementation of Article 14. This highlights the Committee's view that central global funds should be accessible to *all* victims and should be contributed to by *all* adopting States.

43. Paragraphs 11 to 15 expound on the concept of rehabilitation as intended by Article 14. This detailed substantive obligation similarly does not limit State responsibility to breaches that have occurred on State territory or by State actors. Given this and the structure of Article 14 it may be possible to draw an analogous obligation on States to compensate *all* victims of torture, in the same way that the obligation to rehabilitate exists.

44. Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearances expands and specifies that the right to remedy includes the right to reparations and compensation (emboldened emphasis added):

Article 24

1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

4. ***Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.***

5. ***The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:***

(a) Restitution;

(b) Rehabilitation;

(c) Satisfaction, including restoration of dignity and reputation;

(d) Guarantees of non-repetition.

[11] UN Special Rapporteur on Torture Manfred Nowak, Oral Statement to the 4th Session of the Human Rights Council, 26th March 2007

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

45. Victimhood under this Convention does not require judicial assessment, but merely that the beneficiary falls under the scope of Article 24(1) which is again broadly construed. Again, the Convention obligates an advantage to the beneficiary and expressly obligates States to *fulfil* the individual victim's right to reparation (Article 24(4)).

D. State Responsibility for Individual Rights

46. Whilst the above analysis takes a macro look at the international legal obligations a Member State is under to *fulfil* a victim's right to adequate remedy, and how this has in some cases expressly expanded to obligate States to *facilitate* reparations, we consider the jurisprudence has evolved and expanded through 'soft law' texts to extend to include State's responsibility to *finance* reparations.

47. The next section will look at whether this jurisprudence is indeed 'soft law' or whether the instruments have an intrinsic legal effect which obligates States to finance reparations.

Responsibility of States for Internationally Wrongful Acts

48. As suggested by those instructing us, the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) are a helpful starting point in considering the remit of State Responsibility under international law. The Articles have been widely accepted. Resolution 74/180 adopted the Articles without a vote in which (inter alia) the 'major importance' of the subject matter was affirmed. The Articles have also been referred to and applied in numerous international courts, tribunals, and other bodies (with the Secretary-General having produced a total of five compilations of such decisions).[12]

49. The relevant Articles read:

Article 1 – Responsibility of a State for its internationally wrongful acts

Every intentionally wrongful act of a State entails the international responsibility of that State

[12] A/62/62 (and A/62/62/Corr.1 and A/62/62/Add.1); A/65/76; A/68/72; A/71/80 (and A/71/80/Add.1) and A/74/83)

Article 2 – Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

> *(a) Is attributable to the State under international law; and*
> *(b) Constitutes a breach of an international obligation of the State*

[…]

Article 12 – Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13 – International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

[…]

Article 31 – Reparation

1. *The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*
2. *Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*

[…]

Article 48 – Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

> *(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or*
> *(b) the obligation breached is owed to the international community as a whole.*

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

> *(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and*
> *(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.*

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

50. The Articles establish international legal responsibility for any internationally wrongful act or omission which is attributable to the State under international law and constitutes a *'breach of international obligation of the State'* (Articles 1 and 2).

51. The consequence of an international breach creates a duty to make full reparation (Article 31 and Article 33(1)) and this secondary obligation is owed to the '*international community as a whole*':

Article 33 Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

52. The Articles are not neatly applicable to the scenario posed by the question, in that they require (i) a recognised State to be the perpetrator of 'wrongful acts' under international law and (ii) require only the 'wrongful' State to pay reparations. In the case of crimes perpetrated by ISIL, an invoking State cannot therefore rely on Article 48 to require the Caliphate, as an unrecognized State, to make reparations. Moreover, the invoking State would not be under any responsibility to finance reparations for another State's wrongdoing.

53. However, the text is helpful in its codification of State responsibility. The Articles make clear every State's legal obligation to the international community to fulfil their responsibilities under international law. In effect, the Articles codify and give bite to rights and responsibilities recognised under all forms of international law, including customary law.

54. There are two ways to apply this text to the advantage of the proposed fund. First, the simple codification of State responsibility towards fulfilment of all international legal obligations now arguably codifies the State's responsibility to fulfil a victim's right to redress / compensation / reparation. Therefore, by failing to finance, or guarantee the finance of the reparation for the victim, the State has failed to fulfil the victim's enshrined right and so committed a 'wrongful Act.'

55. Secondly, albeit more circularly, Article 33(1) can be read as requiring all Member States who are unable to adequately fulfil victims' legal right to compensation in their territory (either because the perpetrators cannot be identified or are impecunious) as 'owing' reparations to the 'international community as a whole.'

56. Further Resolutions provide neater connections in law between State responsibility and the financing of a victim's right to compensation.

Reparations Resolution

57. The Resolution adopted by the General Assembly on 16th December 2005 entitled 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' ("Reparations Resolution") is a General Assembly ("GA") Recommendation. This provides the greatest clarity and detail on States' responsibilities to provide reparations for victims under international law. The extent to which that responsibility can be interpreted as a legal obligation depends on whether the Recommendation is viewed as soft law, or as a text that identifies existing legal obligations under IHRL.

58. Whilst Recommendations are formally non-binding Decisions in that they do not create binding legal effects, some Recommendations lay out legal obligations under international law that do not stem from the Resolution themselves.[13] Therefore, whilst not having binding effect, the Resolutions may nonetheless have 'authorising effect' by implying reciprocal obligations on contracting State parties. The jurisprudence of the ICJ has endorsed the idea that GA Recommendations can have authorising effects and so legally obligate Member States.

59. The Reparations Resolution sets out in the preamble that it addresses the question of remedies and reparations for *'victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels.'* The SVIC that Yazidi victims have experienced plainly falls within the scope of the Resolution although 'gross human rights violations' and 'serious humanitarian law' are not specifically defined in the Resolution.

60. Whilst not legally binding in and of itself, the preamble to the Resolution goes to great pains to underscore that it is the international community's responsibility-and not the victim's State of residence- to honour victims' right to remedies and reparations:

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law…

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines

[13] J Castañeda, 'Legal Effects of UN Resolutions' (1969) [§ 14];
Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations'

61. Under Part II, Article 3, the Resolution powerfully and plainly obligates States to *'provide'* reparations to victims of any human rights or humanitarian law violation. Interestingly, the central focus of the Resolution is to explain in great detail the 'scope' of the legal obligation on the State in order to fulfil the right of the beneficiary:

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; *and*

(d) Provide effective remedies to victims, including reparation, as described below.

62. The scope of legal obligation clearly extends to all contracting States irrespective of who the perpetrator is and where they reside. The Resolution does not require the perpetrator(s) to be identified, identifiable, prosecuted or convicted.

63. Additionally, the Resolution is silent on territorial jurisdiction. This means that the State need not have any relationship to the victim, the crime or the perpetrator for the obligation have legal effect. Indeed, victimhood itself is broadly defined under Articles 8 and 9 including both individuals and groups.

64. This is the clearest expression under IHRL that the legal basis of the victim's right to reparations requires and translates into a State's obligation to *provide* remedy / reparation. Whilst the text does not go so far as to obligate States to *finance* the reparation, this can arguably be implied by the spirit of the Recommendation and be read into the word 'provide.' This argument is strengthened by the terms of the Recommendation which create a legal obligation upon States even where there is no State responsibility under international criminal law.

Article 8

For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim"

also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.'

Article 9

A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

65. Part IX of the Resolution expands in great detail upon how reparation is to be defined and suitable mechanisms by which it should be assessed and given:

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations…

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with ***full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.***

66. The Resolution was passed with 40 States in favour and 12 abstentions, reflecting overwhelming international support for its aims. It is the first international instrument to articulate an individual's right to remedies for human rights violations in such granular detail.

67. The importance of this Resolution, and acknowledgment that it has 'authorising effect' is reflected in the Committee Against Torture's express reference to it. The Committee has referred to the centrality of a State's obligation to guarantee reparations in its reviews and concluding observations on periodic State party reports. Subsequent to the adoption of the Reparations Resolution, the Committee made explicit reference to these in its Concluding Observations on Colombia in 2009 when it called for the Principles

to be taken into account in establishing a comprehensive national reparations programme.[14]

68. Similarly in respect of the Committee Against Torture's Concluding Observations on Sri Lanka in 2005 it noted *'with concern the absence of a reparation programme, including rehabilitation, for the many victims of torture committed in the course of armed conflict. The State Party should establish a reparation programme, including treatment of trauma and other forms of rehabilitation, and provide adequate resources to ensure its effective functioning.'*[15]

69. The Committee's comments, subsequent to the adoption of the Reparations Resolution, affirm the legal obligations on the State, including for actions not directly attributable to State agents. As above, whilst the Reparations Resolution does not expressly refer to States *financing* reparations, we consider it can surely be read as implied by the text and body of jurisprudence that has since developed.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

70. The earlier 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which does have clear binding effect, is far smaller in scope. It primarily focuses on victims of ordinary crimes (under operable criminal law) however it does contain provisions on victims who have suffered harm *'through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.'*

71. Though an earlier text within the body of IHRL jurisprudence, this Declaration also recognises a broad legal definition of victimhood in Articles 1 and 2 which does not require the perpetrator to be identified, apprehended, prosecuted or convicted.

A. Victims of crime

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

72. Article 12 goes further and requires for compensation by the State *'where compensation is not fully available.'*

[14] CAT Concluding Observations on Colombia, November 2009, CAT/C/Col/Co/4 [§ 24]
[15] CAT Concluding Observations on Sri Lanka, November 2005, CAT/C/LKA/CO/2 [§ 16]

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

> *(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;*
>
> *(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.*

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

73. The Declaration is silent on territoriality which, if read with the express provision of Article 12, can be read as an international obligation to *finance* reparations for a victim, irrespective of whether the perpetrator can be identified, prosecuted or convicted (Article 2).

74. The foregoing sections of this Opinion illustrate the development of international law from considering reparations as an inter-state measure, to a State obligation to *fulfil* and *guarantee* the rights of an individual victim. It then provides some argument in support of legal obligation on States to *finance* reparations for an individual victim.

(ii) Regional Analyses of State Responsibility for Individual Reparation

75. Whilst not international, the jurisprudence of the European and American Courts of Human Rights have also interpreted the right to reparations and explored how this right is linked to State's legal obligations. Their analyses are helpful to broadening the discourse.

European Court of Human Rights

76. Article 13 of the European Convention on Human Rights affirms the right to an effective remedy for all:

'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

77. Article 41 then provides for 'just satisfaction' as a remedial measure:

'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

78. In the context of the ECtHR victimhood is of course far more narrowly defined as someone who has brought proceedings and has been judicially assessed as a victim. However, determining what may be an effective remedy is less clear under the ECHR. Judges Matscher and Farinha of the ECtHR themselves describe Article 13 as *'one of the most obscure clauses in the Convention and its application raises extremely complicated problems of interpretation.'*[16]

79. The two noteworthy judgments in relation to reparations before the ECtHR (albeit in very different contexts to SVIC) are *Danev v Bulgaria*[17] and *Papamichalopoulos v Greece*.[18] *Danev* concerned a claim of unlawful detention against the police. The Court held that despite Bulgaria's declaratory acknowledgement that the detention was unlawful, the Claimant was nonetheless also entitled to compensation pursuant to Article 13. This upholds the legal obligation on States to provide individual reparation. However in this case the legal obligation is limited to the State responsible for the violation.

80. More applicable to our context, in *Papamichalopoulous* the ECtHR exercised its remedial jurisdiction by awarding restitution of property from the State as a measure of reparations in a land dispute. It is interesting to note that what is *'just satisfaction'* in the context of a supranational court like the ECtHR naturally differs from what would constitute an effective remedy by a domestic institution, yet this was nonetheless the remedy considered Article 41 compliant by the ECtHR. However, this judgment does appear to be exceptional in the context of ECtHR jurisprudence; restitution of property against the State has not been awarded since then.

Inter-American Court for Human Rights

81. The jurisprudence of the Inter-American Court has provided the most progressive analysis of the legal concepts of victimhood, reparations and State responsibility.

82. Article 25 of the American Convention on Human Rights affirms the right to a legal remedy (emboldened emphasis added):

Article 25. Right to Judicial Protection

*1. Everyone has the right to **simple and prompt recourse**, or any other **effective recourse**, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.*

2. The States Parties undertake:
   a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
   b. to develop the possibilities of judicial remedy; and

[16] Case of Malone v the United Kingdom, 2 August 1984 [§ 41] (https://hudoc.echr.coe.int/rus#{"itemid":["001-57533"]})
[17] ECtHR, Judgment, 2 October 2010
[18] ECtHR, Judgment, 31 October 1995

c. to ensure that the competent authorities shall enforce such remedies when granted.

83. Article 63 enshrines the specific right to reparations: (emboldened emphasis added)

63(1). If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that ***fair compensation*** *be paid to the injured party.*

84. In exploring the remit of Article 63 and the parameters of State responsibility, the IACtHR has linked remedies for violations directly to the general provision on state responsibility (Article 1). For example, in *Velasquez Rodriguez v Honduras*[19] the Court found that the State had a legal responsibility to provide reparations for international human rights breaches:

The obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognised by the Convention to every person subject to its jurisdiction…

As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognised by the Convention and, moreover, if possible attempt to restore the right violated and ***provide compensation*** *as warranted for damages resulting from the violation...*

Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.[20]

85. This judgment uniquely clarifies a State's legal responsibility to provide reparations to an individual. The judgment has to be read in context and the responsible State was here accused of failing to prevent, investigate and punish human rights violations on its territory, giving rise to reparations for harm caused by a failure to act. The principle established by this case, however, is the causal link between States' positive responsibilities to uphold the Convention which translated into an obligation to pay reparations where an individual has experienced breaches of their rights.

86. Although the IACtHR is limited in that it relies on proceedings being brought before it, the Court nonetheless adopts a broad definition of victimhood which is helpful in the context of the proposed fund.

[19] *Velasquez-Rodridguez v Honduras*, Compensatory Damages, Judgment of 21 July 1989 Series C, No.4 [§ 166-7] and No.7 [§ 26]

87. In *Plan de Sánchez Massacre v Guatemala*[21] the Court considered how to award fair reparations in the context of genocide. It recognised the community as the beneficiary of collective reparations. In doing so, the Court acknowledged that there may be many individuals who could not be judicially identified among the victims. This presents a progressive, perhaps even radical, expansion of the concept of victimhood by a Court awarding remedies to include those who are not party to proceedings.

88. In broadening the scope of victimhood, the Court acknowledged rights beyond the simple jurisdiction of proceedings brought before it. It is of note that the judgment expressly acknowledged the difficulties victims have in litigating their cases and found a way to uphold the victim's Article 63 right to reparations in as broad a manner as possible.

E. The Legal Mechanics of International Funds

89. There are national, supranational and international trust funds and compensation schemes which provide reparations to victims of national and international crime. By way of example, at national level the US Terror Fund; at supranational level the Human Rights Trust Fund established by the Council of Europe; at international level, the International Criminal Court Trust Fund for Victims and the United Nations Compensation Commission are all helpful to consider. Of these, we consider it helpful to consider the latter two for the purposes of the proposed fund.

International Criminal Court Trust Fund for Victims

90. Article 75 of the Rome Statute recognises a victim before the ICC to have the right to reparations and Article 79 gives legal effect to its establishment:

Article 75
Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

[21] Judgment of 19 November 2004 (https://iachr.lls.edu/sites/default/files/iachr/Court_and_Commission_Documents/Plan%20de%20S%2B%C3%ADnchez%20Massacre%20v.%20Guatemala.Reparations.11.19.04.pdf)

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 79 Trust Fund

1. *A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.*
2. *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.*
3. *The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.*

91. In the scope of this Trust Fund the perpetrator, the crime, the victim and the quantification of the remedy are all judicially assessed. Notwithstanding this, the Regulations for the Trust Fund lay down the means by which the fund will be financed, and this includes voluntary contributions from Member States:

    Article 21. The Trust Fund shall be funded by:

    (a) Voluntary contributions from governments, international organisations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of State Parties;
    (b) Money and other property collected through fines or forfeiture transferred to the Trust Fund if ordered by the Court pursuant to Article 79, paragraph 2 of the Rome Statute;
    (c) Resources collected through awards for reparations if ordered by the Court pursuant to rule 98 of the Rules of Procedure and Evidence;
    (d) Such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund.

92. Whilst not an automatic or involuntary mechanism, the Regulations are important in recognising that the individual victim's right to reparations is an inviolable right under international law and that in order to deliver on the Rome Statute's promise of reparative justice to victims, Member States owe a (voluntary) responsibility to finance the Fund.

93. It is not suggested that this has become an automatic obligation on States to mandatorily contribute under international law. However the establishment of the Trust Fund and its reliance on voluntary contributions goes some way in making the case for a Global Trust Fund that operates on automatic contribution.

The United Nations Compensation Commission

94. The UNCC was created in 1991 by Security Council Resolution 692[22] as a subsidiary organ of the UN Security Council to process claims and pay compensation for losses suffered by a specific unlawful invasion – Iraq's invasion and occupation of Kuwait. It is situationally specific and relates to only this one unlawful invasion.

95. The jurisdiction of the Commission is innovative in that both individuals and corporations can make claims and the type of damage covered is extensive (for example includes environmental damage). In total the Commission has awarded US$52.4billion in respect of 1.54 million claims, which gives a sense of the scale of the fund.

96. What is interesting about this Commission is the manner in which it is funded. The Commission is funded by the United Nations Compensation Fund which received a percentage of proceeds generated by the export sales of Iraqi petroleum and petroleum products (Security Council Resolution 1483[23]):

'Decides further that 5 per cent of the proceeds referred to in paragraph 20 above shall be deposited into the Compensation Fund established in accordance with resolution 687 (1991) and subsequent relevant resolutions and that, unless an internationally recognised, representative government of Iraq and the Governing Council of the United Nations Compensation Commission, in the exercise of its authority over methods of ensuring that payments are made into the Compensation Fund, decide otherwise, this requirement shall be binding on a properly constituted, internationally recognized, representative government of Iraq and any successor thereto.'

97. Whilst this Commission is situationally-specific we consider that an analogous payment mechanism could be created by General Assembly Declaration, or indeed by the Security Council, establishing the Global Survivors' Fund's mandate. This would take a percentage of sanctions derived from each Member States' national terrorist financing legislation.

F. Conclusion and recommendation

98. The willingness to provide administrative reparations to victims of SVIC has been accepted by the Secretary General in the June 2014 Guidance Note on Reparations for Conflict-Related Sexual Violence. Indeed, the very second Guiding Principle for Operational Engagement reads:

[22] http://unscr.com/en/resolutions/692
[23] http://unscr.com/en/resolutions/1483

*'Judicial and / or **administrative reparations** should be available to victims of conflict-related sexual violence as part of their right to obtain prompt, adequate and effective remedies.'*

99. While not legally binding, this Guidance Note reflects a willingness to formalise the legal obligation to finance reparations. The groundswell of soft law / guidance has helped develop an International Protocol on Documenting Sexual Violence in Conflict, a non-binding but comprehensive operational guide on SVIC. The International Protocol makes particular reference to '*administrative programmes for reparation'* which again endorses the position that there is widespread support for and belief in a formalised central fund so that victims of sexual violence in conflict can access reparations outside of judicial processes or Truth and Reconciliation Committees.

100. The UN Security Council similarly echoes and formalises this willingness in the UN Security Council Resolution 2331 (2016). The SC specifically considers victims of ISIL / Da'esh and cites Yazidis and other persons belonging to religious and ethnic minorities before affirming that victims of sexual violence committed by terrorist groups should be classified as victims of terrorism and *'have access to relief and national reparations programmes.'*

101. Acknowledging the position expressed by the international community, we consider that the above analysis of international and regional jurisprudence provides legal argument in support of the proposition that there **is** a legal obligation for Member States to *finance* reparations in order satisfy States' legal obligation to *fulfil* the individual victim's right to reparations.

Q2) Using Frozen Assets to Fund Compensation for Victims of Sexual Violence in Conflict

Question

Can frozen assets be repurposed in a human-rights compliant way?

We have received the following response to our proposal:

(a) Frozen assets remain the property of the listed person or entity. To transfer the ownership of property would constitute expropriation and would be unlawful under both international law and the European Convention of Human Rights.

(b) (At least in the UK), assets may only be transferred if there has been a final legal determination that they are the proceeds of crime (fraud / misappropriation) or if they are confiscated as a penalty for criminal activity. In these circumstances the assets may either be redistributed to the proper lawful owner (for misappropriation cases) or confiscated as proceeds of crime and then used for other purposes.

It is important to note that in the context of our proposal, the assets would not necessarily be the proceeds of crime; they would be frozen and repurposed simply by virtue of them being owned by a sanctioned individual/entity.

Is there a way to confiscate assets frozen pursuant to financial sanctions regimes that would not constitute a violation of international law/the ECHR?

A. Summary

1. We are instructed to consider whether assets frozen pursuant to a financial sanctions regime can be seized and repurposed without violating principles of international law and the ECHR.

2. From the outset we distinguish between freezing, seizing and confiscating assets. We analyse the legal impact of where on this spectrum the concept of 'repurposing' sits. Having established that 'repurposing' within the meaning of the proposal necessarily entails confiscation of assets, we go on to analyse existing models at both the national and supranational level that facilitate the restorative use of confiscated funds.

3. Our research demonstrates that legal mechanisms exist at both national and supra-national levels that allow for seized assets to be repurposed for restorative use. Moreover, these frameworks have survived rights-based challenge on the legal reasoning that the systems of designation are fair and just. It is the designation of assets which empowers, in theory, a state or body to freeze any such assets. We therefore begin our research by analysing the standards required for lawful designation at national, EU and UN level. This provides a helpful skeleton for considering the legal architecture required for the proposed global fund.

4. Of particular note is the Italian model and the challenges to which it has been subject in the ECtHR. This model demonstrates that the confiscation of frozen assets may be proportionate where it is in the public interest. However, the first step, that is, the designation of a person or entity and the targeting of an asset, must be enacted in a way which is fair and which properly reflects the qualified right to property and peaceful enjoyment of property.

5. We present the argument that as long as the designation or targeting of assets is both lawful and substantiated to the relevant standard, the seizure of assets flows and confiscation can also be effected in compliance with the ECHR. Further, we shall argue that the repurposing of assets is consistent with a Member State's obligations under international law to *fulfil* victims' rights to reparations (Q1) and to *prevent* terrorism (Q3).

B. Introduction

Terminology

6. Freezing assets entails the prevention of targeted individuals from disposing of their economic resources. It is defined as prohibiting the "transfer, conversion or movement of funds or other assets."[24] Ownership does not transfer, and the targeted owner may retain physical possession of the asset. However, there is in effect a restraint placed on the owner's disposal of their assets.

7. Seizing assets involves property being taken into the control of the State with a loss of physical possession on the part of the targeted owner. There is, again, however no transfer of ownership.[25]

8. Confiscation requires the transfer of ownership of the targeted assets. It constitutes a permanent deprivation of property. The term covers value and property based asset confiscation, referring to both conviction based and non-conviction based confiscation.[26]

9. Within the notion of confiscation there are a variety of subcategories found within different jurisdictions. 'Extended criminal confiscation' involves confiscation of assets that goes beyond those generated by a particular offence. Non-conviction based confiscation ('NCB'), as the name suggests, sits outside of the context of criminal conviction. 'Value confiscation' refers to a sum of money that the subject is liable to pay following an assessment of the value of profit from unspecified criminality.

The right to property

[24] S/RES/1267(1999) UN Security Council Resolution

[25] UNODC Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime (2012), p.55

[26] Boucht, J. (2017) *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* Bloomsbury Publishing, p.16

10. Article 17 of the United Nations Declaration on Human Rights (UNHDR) enshrines the right to property as follows:

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

11. Under international law the right to property is therefore a qualified right which one can lawfully be deprived of in certain accountable (non-arbitrary) instances. The United Nations Sanctions regime provides for financial sanctions to be imposed on certain 'designated' individuals. Those financial sanctions at present allow for the assets of designated individuals to be *frozen*, but no provision is currently made for the *confiscation* of those assets.

12. At the European level, Article 1 of Protocol I to the ECHR identifies the "right to peaceful enjoyment of possessions", where the right to protection of property is defined as follows:

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

13. Thus, interference with an individual's right to property is permissible if it is lawful, pursues a legitimate aim, and is reasonably proportionate to that aim. In European law the right to property is equally considered a qualified rather than an absolute right.

14. Any proposed scheme will inevitably involve consideration of the following three stages:

    a. Under what circumstances will a person, group or entity be lawfully placed on a sanctions list (or a national equivalent), such that their assets can be *frozen*?

    b. Under what circumstances can the assets of a sanctioned person, group or entity be lawfully *confiscated* by a State or individual?

    c. Is there a case to be made that any such assets could be *repurposed* for a victims' fund?

15. To answer these three questions, we will:

    a. Analyse the principles and process of UN Designation under the Terrorist Sanctions Regimes and its implementation at EU level, with a final focus on the success of challenges brought to designation in the EU;

    b. Analyse and assess the 'seizing' mechanisms of individual countries and consider the legality of 'confiscation' as opposed to 'freezing';

c. Consider whether, once property has been lawfully confiscated, whether it can be lawfully repurposed for a victims' fund.

16. Finally, we will propose the elements necessary for the freezing, seizing, confiscating and repurposing of the assets of sanctioned persons, entities or groups for a victims' fund.

C. Under what circumstances will a person, group or entity be lawfully placed on a sanctions list (or a national equivalent), such that their assets can be *frozen*?

17. The legality of designation is key to the legality of any wider scheme which seeks to seize and repurpose assets of designated persons. In this section, we will explore the way in which individuals or entities are sanctioned under the UN Terrorist Sanctions Regime and how this regime is implemented and interpreted at EU level in order to explore the legal mechanics underpinning repurposed assets.

18. We shall see that executive procedures for UN sanctions regimes are designed to avoid arbitrariness as a condition precedent of their legality. The procedures require detailed and specific reasons to be present. Determination by consensus imports further safeguards to the process. The existence of an independent Ombudsperson provides a safeguard for those seeking to challenge their designation. A system of exemptions exists to ensure assets can be accessed to provide for the basic needs of designated individuals alongside their reasonable legal or professional advice costs.

19. Notwithstanding these procedural safeguards, an analysis of the implementation of UN sanctions listings at EU level (as interpreted by the ECJ and ECtHR) reveals that a sanction at UN level cannot be automatically transposed – there must be a sufficient level of scrutiny by the authority at country level such that the body deciding to place an entity or person on the sanctions list is satisfied that any entity or person is not listed arbitrarily.

UN Designation under Terrorist Sanctions Regimes

(i) Principles

20. UN Security Council Resolution 1373 (2001) was adopted unanimously on 28 September 2001, in the wake of the September 11 attacks in the US. Resolution 1373 contains numerous duties and commitments, all at their core aimed at the combating of terrorism. It was adopted under Chapter VII of the UN Charter and is therefore binding on all UN member states.

21. Importantly for our purposes, it provides as follows (emboldened emphasis added):

*…all States **shall**:*

*(a) **Prevent and suppress** the financing of terrorist acts;*

(b) Criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

*(c) **Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts**; of **entities owned or controlled directly or indirectly** by such persons; and of **persons and entities acting on behalf of, or at the direction of such persons and entities**, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;*

(d) ***Prohibit*** *their nationals or any persons and entities within their territories from* ***making any funds, financial assets or economic resources or financial or other related services available,*** *directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons; […]*

22. Resolution 1373 obligates Member States to *prevent* the financing of terrorist acts, to *freeze* economic resources of terrorist persons or entities, and to *prohibit* making funds or financial assets **directly or indirectly available for the *benefit*** of such groups or individuals. The duties to prevent, freeze and prohibit are on their face broad and far-reaching. The Resolution is not designed to compel the freezing or seizure of proceeds of crime to which a person or entity is not lawfully entitled – the emphasis is explicitly on prevention of terrorism.

23. A total of 32 subsequent Resolutions in relation to ISIL (Da'esh) build on this starting point. For example, UN Resolution 2368 (2017) sets out a comprehensive approach to the ISIL(Da'esh)/Al-Qaida Sanctions regime, including a set of listing criteria. Paragraph 2 expands the remit of individuals/groups/undertakings or entities eligible for designation on the sanctions list as follows:

Acting *under Chapter VII of the Charter of the United Nations,*

[…]

Listing criteria

2. Decides *that acts or activities indicating that an individual, group, undertaking or entity is associated with ISIL or Al-Qaida and therefore eligible for inclusion in the ISIL (Da'esh) & Al-Qaida Sanctions List include:*

(a) Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;

(b) Supplying, selling or transferring arms and related material to;

(c) Recruiting for; or otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof; […]

24. It also *notes* at paragraph 3 that (emboldened emphasis added):

[…] *such means of financing or support* ***include but are not limited to the use of proceeds derived from crime****, including the illicit cultivation, production and trafficking of narcotic drugs and their precursors* […]

This Resolution thus recognises that in principle, the financing and support of terrorism is wide in scope. It follows that the power to deprive is not limited to assets found to be the proceeds of criminal activity. The *prevention* of such financing and support, or the *prohibition* of making such resources available directly or indirectly to a sanctioned person or entity, might include *depriving* a person or entity of assets which are not the proceeds of crime.

(ii) Decision-making process

25. Paragraphs 45-59 of Resolution 2368 provide detailed guidance requiring the publication of '*fair and clear procedures*', imposing time limits for decision making, encouraging the appropriate use of exemptions, providing for their publication and for the regular review of designation decisions. Of particular note is the requirement to provide '*as detailed and specific reasons as possible describing the proposed basis for the listing, and as much relevant information as possible on the proposed name*'.

26. The ISIL and Al-Qaida sanctions Committee makes decisions by consensus by a written procedure (§4(a)).[27]

27. Neither the UN Resolutions nor the Committee's Guidelines set out a specific standard of proof in relation to designation decisions. However, §64 of Resolution 2368 "*reiterates that the measures referred to … are* ***preventative*** *in nature and are not reliant upon criminal standards set out under national law*".

(iii) Challenging designation at UN level

28. Although there is no mechanism for judicial oversight of listing decisions at UN level, persons or entities who wish to challenge their designation have the right to submit delisting petitions to the Office of the Ombudsperson. Member States are *strongly urged* to encourage individuals and entities to submit delisting petitions to the Ombudsperson before challenging their listing through national and regional courts (§67 Resolution 2368). Such petitions involve three stages: information gathering, dialogue with the Committee, and comprehensive report and recommendations for Committee discussion.

29. Resolution 2368 also *encourages* member states to designate a national 'Focal Point', on issues relating to implementation of the sanctions. Requests to the national focal points can be made in respect of both designations and exemptions to the Sanctions Regime (as defined by the 2002 Resolution (1452)). For example, the Office for Financial Sanctions Implementation (OFSI): part of HM Treasury, is the designated 'competent authority' for implementing financial sanctions in the UK - the UK's 'Focal Point'.

30. As we shall see below in consideration of the ECJ and ECtHR, the procedures inherent in the UN Sanctions Regime, designed in principle to render listing '*fair'*, do not enable EU Member States and signatories to the ECHR to simply transpose the UN Sanctions List domestically.

(iv) Exemptions to the assets freeze requirements for designated individuals

31. Resolution 2368 sets out at §81 a comprehensive scheme of exemptions to asset freezing measures in order to provide for the basic needs of designated individuals, alongside their reasonable legal/professional costs. These exemptions provide a critical safeguard to the humanitarian rights of a designated individual. Crucially, they enable

[27] The Guidelines of the (Security) Committee for the Conduct of its Work (23 December 2016)

a degree of flexibility at the implementation stage which enables individual states to take 'measures' that are proportionate.

Implementation of UN Sanctions at EU Level

(i) Principles and procedure

32. At the EU level there is a procedure for identifying those involved in 'terrorist acts', set out in the EU Council Common Position 2001/931/CFSP (in response to the UN Resolution 1373 (2001)). Although sexual and gender-based violence is not listed within these 'terrorist acts', it does include 'seriously intimidating a population' and 'seriously destabilising or destroying the fundamental… social structures of a country', including attacks upon the physical integrity of a person.[28] Violence against the Yazidis in the manner now understood would fall within the scope of this definition of 'terrorist act.'

33. Following these criteria, individuals and organisations are then identified and Orders made for the freezing of their funds, financial assets and economic resources.

34. Those individuals and organisations are identified by the EU Council Common Position at §4

[…] on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the person, groups and entities concerned, irrespective of whether it concerns the instigation or investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in this list. For the purposes of this paragraph 'competent authority' shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.

35. As such, the EU is empowered to draw up a list of relevant persons, groups and entities based on 'precise information' and to include on this list (and therefore by definition be a relevant person, group or entity) anyone subject to the UN sanctions regime.

36. The names on the list have to be reviewed at regular intervals and at least every six months to ensure that there are grounds for keeping them on this list.

37. Specifically in relation to Syria the Council Decision 2011/782/CFSP (repealing 2011/273/CFSP), the Council put into place the freezing of '*all funds and economic resources belonging to, or owned, held or controlled by persons responsible for the violent repression against the civilian population in Syria, persons and entities benefiting from or supporting the regime, and persons and entities associated with them, as listed in Annexes I and II.'*

[28] Council Common Position 2001/931/CFSP [§ 2-3]

38. This was put into effect by the Council Regulation (EU) No.36/2012. As such, there is identified at a supra-national level a list of people said to be responsible for the violent repression of the civilian population in Syria.

(ii) Exemptions at EU level

39. The provisions of the UN Sanctions Regime are largely reflected in the language of the EU Council decisions. As above, the UN Sanctions Regime allows for funds to be released to provide for a sanctioned person's basic needs. However, at EU level, a broader exemption appears. Council Decision 2011/782/CFSP, concerning restrictive measures against Syria, provides at Chapter 4 Article 19 para 3 an example of a common exemption in EU restrictive measures:

(3) The competent authority of a Member State may authorise the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, under such conditions as it deems appropriate, after having determined that the funds or economic resources concerned are:

[…]

[(a) to (d) deals with basic expenses of the designated individual, legal fees, routine service charges relating to holding/maintaining the funds, and extraordinary expenses]

[…]

(e) necessary for humanitarian purposes, such as delivering or facilitating the delivery of assistance, including medical supplies, food, humanitarian workers and related assistance, or evacuations from Syria.

40. This provision is not intended to assist the designated individual or entity, but instead to benefit a wider population which might be affected by the freezing of assets. Paragraph 3(e) of the Council Decision therefore recognises that assets owned by a sanctioned person can be used for the restoration of the community that the sanctioned person or entity has adversely affected. Although the funds would continue to be owned by the sanctioned person or entity, having been released to them, they are released for a specific and restorative *purpose*.

41. This provision is demonstrative of a legal mechanism at a supra-national level for frozen assets to be released and repurposed for the restorative benefit of a specific population.

42. Most frequently this will be of relevance to NGOs and aid organisations who seek licences from the competent authority to allow them to carry out their work in a country where sanctions apply and/or in dealing with individuals in relation to whom sanctions apply. As asset freezing does not translate into a transfer of ownership (nor does the

competent authority confiscate or take possession of the funds)[29], the funds and resources remain at all material times within the ownership of the sanctioned individual or entity.

43. The Commission recently published an Opinion[30] exploring the scope of asset freezing measures, providing clarity in relation to the applicability of asset freezes to non-sanctioned entities that are owned or controlled by sanctioned individuals. The Opinion takes a broad approach, in essence finding that sanctions will bite irrespective of complex ownership structures. This makes the operation of the licensing regimes at Member State level all the more important in terms of legitimate entities ensuring compliance with the sanctions regime when conducting their business.

44. In the UK, that regime is managed by OFSI and is described as opaque: OFSI guidance does not set out the assessment criteria for granting licences, nor are there guidelines for decision-makers. There are no publicly available statistics on how many licences are sought or granted, nor are there publicly available examples of such licences.[31]

45. Where a licence is applied for under a humanitarian exemption to sanctions, the licence has the effect of permitting the entity to deal with the sanctioned individual and, by extension, their assets. This may be pertinent, for example, where the Designated Person owns Company A which in turn has 51% ownership of Company B which is involved in the production of medical supplies. Charity X which is seeking to distribute the medical supplies as part of its humanitarian work in the country wishes to purchase supplies from Company B. The sanctions in relation to the Designated Person would appear to extend to the operations of Company B (considering the Commission Opinion cited above). UK-based Charity X can apply to OFSI for an exemption licence under the humanitarian ground in order to transact with Company B. Should such a licence be granted (and subject to whatever conditions might be imposed as part of that licence) Charity X can now enter into a contract with Company B.

46. Aside from the precise mechanics of the humanitarian exemption, its purpose is to avoid the imposition of financial sanctions on individuals and entities negatively impacting the ability of NGOs and others to continue their humanitarian work. It is not, to this extent, a mechanism for the repurposing of frozen assets.

47. Whilst the EU 'boiler plate' humanitarian exemption for sanctions regulations does not represent an example of the repurposing of frozen assets, it does provide a useful framework in which any such proposal might operate. If a legal power for the repurposing of the assets were in place, the mechanism by which the destination of those assets was to be decided could fall within the current exemption licensing framework. The competent national authorities, such as OFSI in the UK, would be well placed to assess proposals from third sector applicants and to grant licences/funding in accordance with established guidance from e.g. the Foreign & Commonwealth Office/Department for International Development.

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[29] *OFSI General Guide to Financial Sanctions*, January 2020 §3.1.1 [link accessed 22/9/20]

[30] Commission Opinion of 19.6.2020 on Article 2 of Council Regulation (EU) No 269/2014, C(2020) 4117 final [link accessed 27/09/20]

[31] *Humanitarian Action and Non-state Armed Groups* International Security Department and International Law Programme February 2017 [link accessed 26/09/20]

Approach of the European Courts to UN Sanctions Listing

48. In this section, we shall undertake an analysis of the way in which sanctions at UN and EU level have been scrutinised and interpreted, firstly by the ECJ, and secondly by the ECtHR. This analysis will reveal the tension between UN listing and European implementation. The tension arises in essence due to the Member State's duty to sanction on the one hand; and the duty to respect the right to property and due process on the other.

49. In discussing this tension, we shall reveal the features necessary for any designation and freezing scheme to survive human rights challenge, before we go on to analyse and assess in **Section D** those domestic schemes which have successfully (or otherwise) seized and repurposed frozen assets.

The ECJ

(i) Due process: European Commission v Kadi

50. The ECJ has repeatedly sought to underline that the fight against terrorism cannot lead democracies to abandon or deny their founding principles, including the rule of law. The question of the review by the EU judicature of regulations giving effect to UN Security Council Resolutions was considered by the Grand Chamber in *European Commission v Kadi*, [2014] 1CMLR 24 (2013).

51. The Grand Chamber noted *inter alia* that whilst the competent European Union authority is required to give effect to the decisions to list of the UN Sanctions Committee by either listing or maintaining the listing of a person or entity,

    there is no provision in those resolutions to the effect that the Sanctions Committee is automatically to make available to, in particular, the European Union authority responsible for the adoption by the European Union of its decision to list or maintain a listing, any material other than that summary of reasons.[32]

52. At §119-120, the Court noted (emphasis added):

The effectiveness of judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing…the Courts of the EU are to ensure that the decision which affects the individual … is taken on a ***sufficiently solid factual basis.*** *This entails* ***verification*** *of the allegations factored in the summary of reasons underpinning that decision, with the consequence that judicial review* ***cannot be restricted to an assessment of the abstract cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.*** *To that end it is for the Courts of the EU to request that the EU competent authority produce information or evidence, confidential or not, relevant to such an examination.*

53. The Court summarised the necessary safeguards as follows (emphasis added):

[32] *European Commission v Kadi*, [2014] 1CMLR 24 (2013), at paragraphs 106-107.

135. […] for the rights of the defence and the right to effective judicial protection to be respected first, the competent European Union authority must (i) disclose to the person concerned the summary of reasons provided by the Sanctions Committee which is the basis for listing or maintaining the listing of that person's name in Annex I to Regulation No 881/2002, (ii) enable him effectively to make known his observations on that subject and (iii) examine, carefully and impartially, whether the reasons alleged are well founded, in the light of the observations presented by that person and any exculpatory evidence that may be produced by him.

136. Second, respect for those rights implies that, in the event of a legal challenge, the Courts of the European Union are to review, in the light of the information and evidence which have been disclosed inter alia whether the reasons relied on in the summary provided by the Sanctions Committee are sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established.

137. On the other hand, the fact that the competent European Union authority does not make accessible to the person concerned and, subsequently, to the Courts of the European Union information or evidence which is in the sole possession of the Sanctions Committee or the Member of the UN concerned and which relates to the summary of reasons underpinning the decision at issue, cannot, as such, justify a finding that those rights have been infringed. However, in such a situation, the Courts of the European Union, which are called upon to review whether the reasons contained in the summary provided by the Sanctions Committee are well founded in fact, taking into consideration any observations and exculpatory evidence produced by the person concerned and the response of the competent European Union authority to those observations, will not have available to it supplementary information or evidence. Consequently, if it is impossible for the Courts to find that those reasons are well founded, those reasons cannot be relied on as the basis for the contested listing decision.

54. While recognising that security considerations may limit the extent of the disclosure of evidence to the individual concerned, the Grand Chamber held that this was no valid objection to disclosure of the same, with special measures if necessary, to the ECJ, to ensure effective judicial protection. The Grand Chamber then described a process, similar to that of Public Interest Immunity within the UK Courts, whereby the question of disclosure or partial disclosure would be overseen by the Court enabling ongoing review of the extent to which non-disclosure might prejudice the individual's ability to submit relevant observations and the effect on the probative value of the underlying evidence.

55. The Grand Chamber further held that *it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded.*[33]

56. The case of *Kadi* helpfully establishes that for any sanctions scheme to be lawful, it must include a system inherent within it whereby a competent authority or the judiciary assess the reasons for the designation.

[33] Ibid, para 121

(ii) The central tension at the heart of the UN Sanctions Regime

57. One tension at the heart of the Sanctions Regime is that the source of much of the information put forward in support of an individual designation decision is held solely at UN level, and will not be shared with the individual concerned, nor with other foreign States: individual States will regularly consider that to do so could put ongoing national security or assets at risk. These security concerns are recognised by the UNSC: each relevant UN Resolution prohibits onward disclosure by the UNSC except with the consent of the proposing States.

58. Overriding considerations related to the security of the European Union, its Member States or with the conduct of their international relations may preclude the disclosure of some information and/or evidence to the designated person concerned. In such circumstances, it is nonetheless the task of the Courts of the European Union, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to apply techniques which accommodate, on the one hand legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other hand, the need to guarantee to an individual sufficient respect for their procedural rights, including the right to be heard and the requirement for an adversarial process (see, to that effect, *Kadi* at paragraphs §342 and §344; and by analogy, *ZZ v Secretary of State for the Home Department*, Case C-300/11 at §54, §57 and §59).

59. The ECJ has thus repeatedly emphasised its willingness to implement necessary measures to enable oversight by the Courts of confidential material without compromising national or international security concerns. We consider that with strict adherence to procedural safeguards underpinning a State's decision and decision-making processes will enable an implementing State to withstand the subsequent judicial scrutiny of a decision to designate – which is an essential prerequisite to the type of scheme proposed by those instructing.

Approach of the European Court of Human Rights

60. The question of the coexistence of Convention guarantees and the obligations placed on States by the UNSC Resolutions is a tension that has been considered on several occasions by the ECtHR.

61. *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2006) 42 E.H.R.R. 1 establishes the principle that the Convention does not prohibit contracting States from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity. States nevertheless remain responsible under the Convention for all acts and omissions of their organs stemming from domestic law or from the necessity to comply with international legal obligations. State action taken in compliance with such obligations is, however, justified where the relevant organisation protects fundamental rights in a manner which can be considered at least equivalent to that provided in the Convention. In other words, if such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not derogated from the requirements of the Convention when it does no

more than implement legal obligations flowing from its membership of the organisation.

62. In *Nada v Switzerland* (2012) 56 EHRR, the Court considered the specific question of designation and asset freezing pursuant to UNSC Resolutions, from which the following principles emerge:

(1) In the event of ambiguity, the Security Council does not intend to impose any obligation on Member States to breach human rights. In light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used where the Security Council intends States to take particular measures which would conflict with their obligations under international human rights law. An obvious example of such measures is the express reference to travel bans in the relevant Resolutions: enforcement will be capable of breaching the target's human rights, but such measures are capable of having a sufficient legal basis in pursuit of legitimate aims.

(2) Notwithstanding the binding nature of UNSC Resolutions, **competent national authorities enjoy a measure of latitude in their implementation. In particular, they must determine whether the measures are necessary and proportionate to a legitimate aim in the specific circumstances of the individual concerned.** This will depend on a number of factors including the nature of the Convention right in issue, the nature of the interference and the object pursued by that interference. Relevant and sufficient reason is needed, alongside consideration of alternative measures that would cause less damage to the right in issue whilst fulfilling the same aim.

(3) **The implementing State cannot confine itself to relying on the binding nature of UNSC Resolutions, but must demonstrate that it has attempted to take all possible measures to adapt the sanctions regime to the individual's circumstances, in order to minimize the impact on the human rights of the individual concerned, whilst fulfilling the legitimate security aims of the international community.**

(4) Article 13 guarantees the availability at national level of a remedy by which to complain about a breach of Convention rights or freedoms. There must therefore be a domestic remedy allowing a competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. The remedy must be effective in practice as well as in law. Allegations of Convention violations resulting from the implementation of sanction measures must be considered on the merits: it is no answer for the relevant implementing authority to say that they are bound by the Resolutions of the UNSC and therefore cannot lift sanctions imposed upon the individual concerned.

In *Nada v Switzerland* (2012) 56 EHRR, the ECtHR held that, the absence of an effective remedy against the Claimant's designation/listing constituted a violation of his Article 13 rights. We note that the case predated the additional measures taken to improve the executive process for challenging a listing (designation) at UN level, including the establishment of the Office of the Ombudsperson, National Focal Points etc.

63. More recently, the ECtHR considered these issues again, in *Al-Dulimi v Switzerland* [2016] 6 WLUK 508. The Court reiterated the ECtHR's settled case law that *the right to a fair hearing, as guaranteed by Article 6 §1 of the Convention, must be construed in the light of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights* and emphasised the prominent place of the right to a fair trial in a democratic society. However, they also noted that the rights laid down in the mentioned provision are not absolute and could be subject to limitations on the condition that limitations would pursue a legitimate aim and that the measures taken were proportionate.

64. In this regard, the Court agreed with the Swiss government's claim that ensuring the efficient implementation at the domestic level of the obligations stemming from a UNSC Resolution adopted under Chapter VII could be considered a legitimate aim and therefore focused mainly on the proportionality analysis. Pointing to the severe criticism levelled at the UNSC Sanctions regime and the importance of judicial review for the rule of law, the judges ultimately decided that while the Swiss Federal Court had conducted a limited review of the impugned measures (the Federal Court had verified that the Applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them) this was not sufficient to comply with Article 6, §1 ECHR. The majority stated that the Swiss courts have a duty to ensure any listing is not imposed arbitrarily.

65. Although the Court did not clearly elaborate on when the listing would be considered arbitrary or on how extensive the review of arbitrariness must be, they stated that this at least required States to obtain sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary, amongst others by allowing the Applicants to submit appropriate evidence to a Court and by pro-actively seeking such information from the Sanctions Committee (if need be, through a confidential procedure) (see paras 147 and 151). Because the Swiss Federal Court had neglected to take these steps, the majority voted in favour of a violation of Article 6, §1 ECHR.

66. In finding that the UNSC Resolutions do not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for implementation, the Grand Chamber has purposively interpreted the provisions to infer that they must be understood as authorising the Courts of the implementing State to exercise sufficient scrutiny to avoid arbitrariness.

67. In limiting the level of scrutiny required to the question of arbitrariness, the ECtHR indicated its desire to strike a balance between the nature and purpose of the measures provided for by the UNSC Resolution in question, the necessity of ensuring respect for human rights and the imperatives of ensuring the protection of international peace and security.

68. The Court then held that the domestic Courts must be able to obtain (if necessary by a procedure affording an appropriate level of confidentiality) sufficiently precise information in order to exercise the requisite scrutiny when faced with a substantiated allegation that the measure is arbitrary.

69. At §147, the Court stated:

Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny. Accordingly, any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Article 6 of the Convention.

70. In *Al-Dulimi,* the Swiss government had sought to argue that it was faced with a direct conflict in its international obligations: the requirements of the UN Sanctions Regime and its Convention obligations were diametrically opposed.

71. The UN Charter itself is clear on this point in accordance with the primacy rule at Article 103:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

72. The ECtHR found that the Swiss government was not in fact faced with a direct conflict and thus the Court declined to determine the central question of the hierarchy of the relevant international obligations.

73. In this regard, we consider the dissenting opinion of Judge Nussberger in *Al-Dulimi* to be particularly illuminating, as set out below:

In the present case the majority of the Grand Chamber have tried to resolve a conflict by denying its very existence (A). In my view this is not an acceptable approach as it does not follow the normal methods of treaty interpretation (B), it is not in line with other leading judgments on the interaction between Convention law and general international law (C), and it creates unnecessary problems and tensions both for the State concerned and the United Nations as a whole (D). Switzerland was confronted with the dilemma of being bound by contradictory treaty obligations, accepted the de lege lata existing conflict-resolution mechanism, and did its utmost to mitigate the consequences for the individual concerned (E). Therefore I cannot find any violation of the Convention. That does not mean that I would not endorse the finding of an obvious deficiency in the UN targeted-sanctions regime. To block the existing mechanism of implementing UN sanctions (only) in the bilateral relationship between the UN and the member States which are also parties to the Convention does not, however, promote the rule of law. It is a dead end, as it leaves the State concerned in a legal limbo. An effective solution must be found at UN level.

74. Whilst no effective mechanism for judicial scrutiny at UN level exists, the ECtHR has stretched the principle of purposive interpretation to find that obligations pursuant to the ECHR require meaningful judicial scrutiny at the point of implementation such that it can be concluded the measure concerned is not 'arbitrary' (akin to a judicial review test in the UK domestic courts). This is despite the wording of the Resolutions imposing absolute obligations and consequent requirements for immediate implementation by their members, in the clearest possible terms.

75. As a matter of law, Article 103 of the UN Charter provides for the primacy of a UN obligation in the event of a direct conflict with any other international agreement. The lack of judicial appetite for grappling with this central conflict is unhelpful and we have sympathy with the dissenting opinion of Judge Nussberger (in *Al-Dulimi*) in this regard. However, in the absence of a mechanism for judicial oversight of designation decisions at UN level, the ECtHR has necessarily focused on the availability of a remedy at the national level.

D. Under what circumstances can the assets of a sanctioned person, group or entity be lawfully confiscated by a State or individual?

76. It follows from our analysis of the UN Sanctions Regime and its implementation at EU level that a scheme which sought to enable the freezing (and for our purposes, thereafter the seizing and repurposing) of the assets of an entity or person designated by the UN, solely and automatically on the basis of its designation or listing by the UN, would not survive judicial scrutiny at EU or domestic level. The body seeking to implement a UN listing decision must subject that decision to a sufficient level of scrutiny such that it can be rationally satisfied the listing is not arbitrary. Any scheme which has as its ultimate aim the seizing and repurposing of assets must include such an assessment.

77. However, assuming that a State (or a competent authority thereof) has sufficiently scrutinised a UN listing so as to satisfy itself that the listing is not arbitrary, it follows that the State or competent authority has a duty under international law to *prevent* the financing of terrorist acts by the listed group or individual, and to *prohibit* making funds or financial assets directly or indirectly available for the benefit of such groups or individuals. That duty has thus far been limited to a prohibitive requirement, depriving terrorist organisations and their associates from having access to resources to fund their activities. The duty to prevent and prohibit, as long as it is not exercised arbitrarily, extends beyond assets which are the proceeds of criminal activity.

78. It is important to acknowledge that any model that seeks to move from this prohibitive approach to a restitutionary approach, by 'repurposing' assets that are frozen, will by necessity involve confiscation of those assets, transferring ownership to permit those assets to be used for the purposes of a victims' fund.

79. In assessing the legality of such a proposal, therefore, it must be viewed through the lens of confiscation. In a limited set of circumstances, legal ownership of assets can be transferred by way of confiscation in order to repurpose those assets for use in a fund.

National 'repurposing' frameworks

80. In this section, we consider the examples of the United States, Canada and Italy as case studies to explore how and in what circumstances assets have been repurposed, the procedures and standards of proof in each scenario, and analyse the benefits and issues of each approach.

81. In addition to these three case studies we analyse in detail the example of the UK domestic confiscation system and how such a system could be altered to provide the remedies sought.

The United States Victims of State Sponsored Terrorism Fund

(i) Overview

82. This US confiscation regime is in many ways similar to domestic regimes in other Western countries. It does however, have one unique mechanism: it allows confiscated monies to be paid out to victims in a way that does not require a finding against a perpetrator to the criminal standard before victims are compensated.

83. The scheme was established by the United States Victims of State Sponsored Terrorism Fund[34] and later amended by the Clarification Act, to provide compensation to certain US individuals who were injured in acts of international state-sponsored terrorism.

84. The scheme has significant limitations in terms of eligibility. One has to be either:

    a. A United States Citizen **and** hold a final judgment from a US District Court awarding compensatory damages from acts of international terrorism, to which a foreign state sponsor of terrorism was found not immune under the Foreign Sovereign Immunities Act; or

    b. Have been taken and held hostage from the US Embassy in Tehran during the period of 4th November 1979 – 20th January 1981 **or** be dependant of a victim of the hostage-taking.

85. The fund does not therefore include or compensate individuals of other nationalities who are victims of human rights abuses 'in country' - it exists purely to assist US citizens who become the victim of actions by other States.

(ii) Finance for the scheme

86. The fund is financed primarily through civil and criminal fines issued against companies and individuals for breaching sanctions. However, although the funds have been confiscated pursuant to specific civil and criminal wrongs, the proceedings need not necessarily be linked to the recipient victims.

87. The enabling legislation refers to two exceptions however, where the fund is able to pay compensation from confiscated frozen assets. Taking each in turn:

88. The first of these is described in *Re Fifth Avenue & Related Properties* 08 Civ. 10934 (KBF) (S.D.N.Y. Feb 16, 2017). In this case a claim was brought against assets held by an Iranian controlled shell company. The case dates back to 2008 and assets that were seized under the then International Emergency Economic Powers Act which allowed a President to confiscate property connected with a country, group or person that had aided an attack on the USA. This example therefore turns forfeiture into an executive

[34] 34 U.S.C. 20144

power to be used against threats to the USA. This power has since been extended by the now infamous Patriot Act[35], an Act passed shortly after the events of 9/11 which granted even wider powers to the Executive.

89. It is important to note that even after decades of litigation, there has not been any final order releasing the money.

90. The second exception can be found in the *Peterson v Islamic Republic of Iran*[36] litigation. In this case, the Claimants were able to obtain judgements against Iran for supporting specific acts of terrorism and then brought a claim against monies held in the US by the US branch of the State-owned Bank of Iran.

91. In order to prevent the case being delayed by litigation, Congress passed legislation effectively stripping the Bank of any possible defences. This landmark judgment states that if (i) the asset is held in the US, (ii) is a frozen asset and (iii) is equal in value to a financial asset of Iran, it was available for execution of judgments against Iran.

(iii) Analysis and Lessons Learnt

92. Having considered the US example with care, we do not consider it applies to this Opinion, the reasons being twofold, namely the requirements:
    a. of executive declaration;
    b. for legal proceedings to be initiated by victims.

Magnitsky Regimes and the Global Human Rights Sanctions Regulations 2020

93. By way of background, the US Magnitsky Act was named for Sergei Magnitsky, a Russian tax lawyer who uncovered vast tax fraud implicating Russian officials and subsequently died following mistreatment in custody while awaiting trial. The first Magnitsky Act was enacted by the US Obama administration, passing Congress in 2012. Within the US, it later became the Global Magnitsky Human Rights Accountability Act (with extra-territorial effect) and has since been used by the US to freeze assets and impose travel bans worldwide.

94. A number of legal challenges in the area of sanctions under the International Emergency Economic Powers Act ('IEEPA', under which the powers to designate and freeze assets under the Global Magnitsky Human Rights Accountability Act are conferred and exercisable) has shown that so far as assets frozen under the auspices of that Act are concerned, ownership is not transferred on designation. As a result, there is no uncompensated taking of property rights in violation of the Fifth Amendment[37] (right to life, liberty and property) which, in its Takings Clause, prohibits "private property [from being] taken for public use without just compensation."[38]

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[35] Just weeks after the attacks of September 11 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, commonly referred to as the USA PATRIOT Act.

[36] 515 F. Supp. 2d 25 (D.D.C. 2007)

[37] *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, (p.36), Congressional Research Service (July 14 2020) [link accessed 20/9/20]

[38] US Constitution Amendment V

95. Similarly, where individuals have challenged the loss of the use of their assets following direct blocking by the US Department of Treasury Office of Foreign Assets Control (OFAC) pursuant to IEEPA, such challenges have been unsuccessful. Essential to the analysis in such challenges has been the temporary nature of freezing assets which have been held not to constitute seizures.[39] This has been challenged successfully in at least one case considering designations through the prism of the Fourth Amendment, where an initial blocking of assets was reviewed under the Fourth Amendment standard for seizure as opposed to the higher threshold of Taking under the Fifth Amendment.[40] First Amendment challenges by a foreign national have been unsuccessful on grounds the individual did not have a sufficient connection to the US to warrant constitutional protections.[41]

The ripple effect of the Magnitsky Act

96. Since the US introduced the first iteration of its Magnitsky Act in 2012, a number of other countries have followed suit. Those countries include the UK, Canada, Estonia, Latvia, Lithuania and Kosovo, together with Gibraltar and Jersey.[42] Within the Five Eyes intelligence-sharing alliance (UK, US, Canada, Australia and New Zealand) there have been significant developments in Australia towards the adoption of Magnitsky-inspired legislation with the Joint Standing Committee on Foreign Affairs, Defence and Trade being asked in December 2019 to report on the use of targeted sanctions to address human rights abuses.[43]

97. In 2015 Switzerland introduced its Foreign Illicit Assets Act (FIAA) which provides a framework for the freezing of assets by order of the Swiss Federal Council alongside a procedure for the confiscation of those frozen assets ordered by the Federal Administrative Court. The procedure sits within a tiered approach whereby the first step is to institute criminal proceedings; where such proceedings fail to lead to forfeiture of assets within the criminal jurisdiction, recourse can be had to Article 4 of the FIAA to freeze assets and proceed to administrative confiscation. As the procedure lies within public law in the Administrative Court, the asset holder need not have been found guilty of a criminal offence.

98. Once confiscated, those assets can be returned to the country of origin. Where no agreement can be reached with the country of origin, the FIAA makes provision for restitution via national and international organisations as well as NGOs, overseen by the Federal Department of Foreign Affairs.

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[39] *Glob. Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779, 802 (N.D. Ill.) *aff'd*, 315 F.3d 748 (7th Cir. 2002), citing *Tran Qui Than v. Regan*, 658 F.2d 1296, 1304 (9th Cir.1981); *Miranda v. Secretary of Treasury*, 766 F.2d 1, 5 (1st Cir.1985)); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 78–79 (D.D.C. 2002) ("[T]he case law is clear that a blocking of this nature does not constitute a seizure." (citations omitted)), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

[40] *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 872 (N.D. Ohio 2009);

[41] *Rakhimov v. Gacki*, No. CV 19-2554 (JEB), 2020 WL 1911561, at *5 (D.D.C. Apr. 20, 2020) (citing *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999))

[42] Inquiry into targeted sanctions to address human rights abuses Submission 4, Joint Standing Committee on Foreign Affairs, Defence and Trade: *Mr William Browder, Hermitage Capital Management* (aph.gov.au link [last accessed 14th September 2020]).

[43] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct

99. The advantage of this secondary system of administrative confiscation is firstly that it is not subject to a limitation period (Article 14/3 FIAA) and secondly, where two conditions are satisfied, the burden of proof as to the illicit origin of the assets is reversed by a rebuttable presumption (Art 15 FIAA). The conditions to be satisfied are that there has been an inordinate increase in the individual's wealth and that the level of corruption in the country of origin or surrounding the foreign politically exposed-person in question was notoriously high during his or her term of office.

100. If successful, a confiscation of assets under Art 14 FIAA transfers the rights on the frozen assets to the Swiss Federal State.[44]

Italy - Non-conviction restraining orders in the context of the Mafia

(i) Outline

101. Unlike the USA model, the Italian model does rely on international designations. Indeed, being named on the freezing list of the UN Security Council or another competent international institution can properly be a starting point for this method of confiscation.

102. This example has also repeatedly survived challenge before domestic and supranational courts and been found to be compatible with ECHR rights.

(ii) Legal Parameters of the Scheme

103. The legal landscape of confiscations in Italy is a complex one. Aside from conventional confiscation post-conviction, Italy has developed a separate branch of 'preventative' seizure and confiscation measures ('*misure di prevenzione*') or "*ante delictum* confiscations". Following a considerable number of legislative changes, the current scheme sits within the *Codice Antimafia* (the 'Anti-Mafia Code').[45]

104. The substance of the preventative measures and the nature of the assessment made in imposing such measures can be traced to the law of the 13 September 1982 n. 646 regulating "Mafia-type criminal association and provisions on preventive measures concerning property" (known as the "Rognoni-La Torre Act" from the names of the parliamentarians that proposed it). The Rognoni-La Torre Act set out the criteria of assessment for preventative measures relating to property by the introduction of Article 2 *ter*, and provisions now sit within the stand-alone *Codice Antimafia*.

105. Legislative Decree 159 of 6 September 2011 (as amended by Law 161 of 17 October 2017) is known as the 'Anti-Mafia Code (hereafter "AMC") and codifies various legislative acts dating from the 1950s designed specifically to overcome the difficulties in obtaining criminal convictions in respect of individuals involved in or associated with the activity of the mafia.

[44] FF 2014 5121 (Federal Council report on the draft FIAA), p. 5179

[45] *Improving Confiscation Procedures in the European Union*, edited by Alessandro Bernardi. Italy: pp.287-369, by Dr Francesco Diamanti, Dr Eleonora Dei Cas, Dr Samuel Bolis. [link accessed 24th September 2020].

106. It was thought that the difficulties in securing convictions stemmed from the high standard of proof that criminal procedure requires. To overcome this, the Legislative Decree 159 introduced a series of 'preventative measures' which were decreed to operate outside of the criminal justice system. Preventative proceedings are also not part of general civil law; they are formally classified under Italian law as administrative proceedings. Under the Legislative Decree 'Preventative Confiscation' (hereafter "PC") of assets operate as a type of administrative fine or penalty.

107. There are two basic rules underpinning the preventative confiscation of assets:

> (i) The measures can be imposed only against one of the possible targets identified by the law;
>
> (ii) The Tribunal can then issue a confiscation order against the property of listed targets if certain further conditions are met.

(iii) 'Targets' under the Scheme

108. Article 4 of the Legislative Decree sets out the full list of persons (hereafter "targets") who can be made subject to a PC measure. They are identified broadly either for likelihood that they (i) may commit crimes in the future (having regard to a past conduct giving rise to the suspicion of having committed a serious crime or series of criminal activity); or (ii) are in the process of committing a crime. Those who are considered to aid and abet also fall under this remit.

109. Notably, for present purposes, Article 16 s.1(b) of the Legislative Decree extends the list of targets to include those who appear on the UN Security Committee Freezing List and to those designated by any other competent international institution where there is a well-founded reason to believe the funds may be dispersed, concealed or used to finance terrorist organisations or activities.

110. A notable and non-exhaustive list of examples of the type of criminal conduct covered by the broader notion of *dangerousness* is listed in Article 4(1)(d). This includes acts aimed at *subverting the democratic regime of the state*, as defined under various provisions of the Criminal Code or by reference to political crimes and acts of terrorism. Therefore, crimes of national or international terrorism, politically motivated crimes of insurgency, devastation, mass murder and kidnapping, and other similar acts fall within the scope of Article 4(1)(d).

111. It is therefore arguable that those designated for sanctions purposes at an international level, due to their involvement in human rights abuses such as those inflicted by ISIS, are likely to fulfil the requirements for being a legitimate 'target' under this system.

(iv) Preventative Confiscation

112. Once it has been established that a person falls within the prescribed list of targets, PC may be effected against property which is (i) disproportionate to the declared income, (ii) of illicit origin, *and* which (iii) the target cannot show was lawfully acquired.

113. PC is effective against property owned both directly and indirectly by a target, such as through a corporate 'alter ego.' Where, for example, a target conceals their assets, PC may be effected against property indirectly owned, but legally held by a third party (Article 25).

114. PC is based on the premise that certain assets are subject to confiscation because they are associated with a 'dangerous' individual and have not been shown to have a legitimate source. PC is neither quite '*in rem'* nor '*in personam'*; identification of an individual as a target may be considered a means to identify assets that are deemed to be dangerous, and therefore appropriate for confiscation. They do not have to be linked to specific criminal conduct.

115. Two important consequences flow from this analysis:

(i) It is not possible to forfeit assets solely on the basis of a causal connection to a crime; subject to one express exception (Article 34), an identified target is required.

(ii) The Italian case law is very clear that it is possible to forfeit assets in the absence of a direct causal link with the commission of a crime.[46]

116. PC deprives a target of ownership rights to property not shown to be legitimately obtained; the property is then transferred to the State. The fact that property is causally linked to crime does not mean that it can be confiscated, but property can be confiscated without such a causal link.

(v) Preventative Confiscation Proceedings

117. PC proceedings occur in two stages; the first of which is a mandatory precondition for the second:

(i) a preventive seizure (i.e., an order to temporarily freeze the property);
(ii) the confiscation order itself, by which the proprietary rights in the assets are forfeited.

118. PC proceedings are commenced by application to the Tribunal where the alleged target resides and may be brought by three persons: (i) the Chief of Police of the province (ii) the DPP or (iii) the Director of the Anti-Mafia Brigade. An organ of the State must bring proceedings – there is no power for a 'private' entity (like a charity or an individual) to initiate proceedings.

119. The application for preventative seizure is heard and decided by a panel of three judges. If the Order is granted, the assets are seized and the second stage commences allowing the Tribunal to determine whether the target should be deprived of his proprietary rights to the property through permanent confiscation. Both stages are judicial proceedings, neither seizure nor confiscation is possible without an order of the competent court.

[46] Court of Cassation (plenary) VI, 27 May 2003, Lo Iacono Legal Principle. 226655

120. The target has the right to be present, though preventative confiscation proceedings may be held against a target in absentia under Article 18 section 4. Such proceedings, however, are limited to assets which are reasonably believed to be proceeds of crime. This would pose a serious difficulty if looking to bring proceedings against targets living overseas where there is difficulty in proving a link between the offending and the frozen property.

121. The burden falls on the competent authority upon whose request proceedings were commenced to prove:

    a. that the person is a dangerous individual within the relevant provisions of the AMC;
    b. that the person directly or indirectly controls property that is suspicious, either (i) because it is incongruous with the person's lifestyle, or (ii) it is of illicit origin.

    If these elements are proved, the burden shifts to the defendant to show that the assets were lawfully obtained. To this end, the regime does require a finding of illicit origin of the goods.

122. As these administrative proceedings were designed to circumvent the stringent rules of criminal procedure, the Legislative Decree contains its own set of procedural rules. Nevertheless, pursuant to Article 7(9) of the Code, for all matters not expressly regulated by the Decree itself, the rules concerning the execution of judgments in criminal matters should apply. Witness and other kinds of evidence are thereby admissible. The rules of criminal procedure also apply insofar as they are compatible.

123. The decisions of the Tribunal can be appealed both on procedural grounds and on the merits before the Court of Appeal. A second appeal to the Supreme Court is permitted, however, only points of law alone.

(vi) Standards of Proof in Preventative Confiscation Proceedings

124. The case law of the Italian courts does not provide full clarity on the issue of standard of proof. The courts consistently emphasise the autonomy of PC proceedings as distinct from criminal proceedings; hence, it is clear that the standard of proof is below that of the criminal '*beyond reasonable doubt'* standard. The courts, however, have also refrained from references to the civil burden of '*balance of probabilities'*.

125. In 1969, the Court of Cassation held that preventative measures may be imposed against individuals on the basis of evidence that offers a '*reasonable and objective basis'* to argue that the individual committed the crime.[47] This test appears to be comparable to the test in PACE in the UK, namely "*reasonable grounds to suspect that [x] committed the crime.*"

126. The courts also have stated, in effect, that there must be enough evidence that the individual committed a crime or that the commission of a crime must be ascertained

[47] Court of Cassation Cass., sez. I, 29 October 1969, Tempra, Cassazione penale, 1971, 1419

with some degree of probability, though certainty is not required, neither is high probability.[48]

127. Another principle that may be derived from the cases is that there need not be a direct link between the assets and the alleged crime.

(vii) Compatibility with constitutional protections and the ECHR

a) Italian Constitutional Court

128. The earliest preventative measures of 1956 (requiring that targets be identified by reference to the circumstances of the case) survived several challenges before the Constitutional Court. In particular, the Court considered that the 1956 Act did not violate constitutional rights because it required that the measures be imposed by a judge and that the categories of individuals potentially affected be sufficiently determined.[49]

129. The Italian Supreme Court has also ruled that, notwithstanding the nomenclature used, PC constitutes an administrative penalty effectively equivalent to criminal confiscation.[50]

b) European Court of Human Rights

Article 1 Protocol 1

130. It is trite law that:

(i) Interference with an individual's right to peaceful enjoyment to property is permissible; however, must fulfil criteria set out in *Beyeler v. Italy* [GC], [§ 108-114]: it must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised.

(ii) Confiscation measures generally fall within the wide margin of appreciation accorded to States to enact and enforce laws 'necessary to control the use of property' [§ 2].

131. In *Arcuri v Italy*,[51] the ECtHR examined the preventative regime, and expressly held that, notwithstanding that the measure in question led to a deprivation of property, this amounted to control of the use of property within the meaning of Article 1 Protocol 1 paragraph 2. This has been upheld in subsequent case law of the ECtHR.[52]

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[48] Cass., sez. VI, 19 June 1997, Di Giovanni, rv. 208310; Cass., sez. I, 20 February 1992, Barbaro, rv. 189334

[49] Constitutional Court 27/1959, 73/1963, 23/1964, 45/19600

[50] (Court of Cassation (plenary) 3 July 1996, Simonelli and others, Cassazione penale, 1996, 3609. See also Cass., sez. V, 20 January 2010, De Carlo, rv. 246863; Cass., sez. I, 15 June 2005, Libri, rv. 231755

[51] Application No. 52024/99

[52] Pozzi c. Italie, 26 July 2011, appl. no. 55743/08, §§ 27–30; ECtHR, Capitani et Campanella c. Italie, 17 May 2011, appl. no. 24920/07, §§ 33–35; ECtHR, Leone c. Italie, 2 February 2010, appl. no. 30506/07, § 36–37; ECtHR, Paleari c. Italie, 26 July 2011, appl. no. 55772/08, § 37

132. In respect of the 'fair balance' to be struck between the 'general interest' and an individual's rights under Article 1 Protocol 1, in *Raimondo v. Italy*, the ECtHR held that both the seizure and the confiscation aspect of the Italian system (under the 1965 legislative provisions) was proportionate to its aim.

133. In respect of preventative seizure, the ECtHR held at §27 that seizure under section 2 of the 1865 Act

> *…is clearly a provisional measure intended to ensure that property* ***which appears to be the fruit of unlawful activities*** *carried out to the detriment of the community can subsequently be confiscated if necessary. The measure as such was therefore justified by the general interest and, in view of the extremely dangerous economic power of an 'organisation' like the Mafia, it cannot be said that taking it at this stage of the proceedings was disproportionate to the aim pursued.*

134. In respect of confiscation, the ECtHR held at §30 (emphasis added):

> *The Court is fully aware of the difficulties encountered by the Italian State in the fight against the Mafia. As a result of its unlawful activities, in particular drug-trafficking, and its international connections, this "organisation" has an enormous turnover that is subsequently invested, inter alia, in the real property sector. Confiscation, which is designed to block these movements of suspect capital, is* ***an effective and necessary weapon in the combat against this cancer.*** *It therefore appears proportionate to the aim pursued, all the more so because it in fact entails* ***no additional restriction in relation to seizure.***

135. The challenge here is that the Strasbourg proportionality analysis in respect of the Italian regime would not be directly applicable to the proposal. The Italian regime relies on the illicit origin of goods as the basis for subjecting assets to freezing and seizure, with a view to confiscation. The proposal does not seek to limit confiscation to goods that are either shown to be of illicit origin or where the respondent fails to demonstrate their lawful origin following the operation of some rebuttable presumption.

136. Where the Italian model is of interest is in how it identifies, at the first stage, 'dangerous' individuals. The 1956 Act sets out that preventative measures apply to[53]:

    i. individuals who, on the basis of factual evidence, may be regarded as habitual offenders;
    ii. individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence, may be regarded as habitually living, even in part, on the proceeds of crime; and
    iii. individuals who, on the basis of factual evidence, may be regarded as having committed offences endangering the physical or mental integrity of minors or posing a threat to health, security or public order.

137. The Court of Appeal at the national level in *De Tommasso* had noted that:

[53] *De Tommasso v Italy* (Application No 43395/09), §34

i. *for a preventive measure to be imposed it was necessary to establish that the individual posed a "current danger", which was not necessarily linked to the commission of a specific offence, but rather to the existence of a complex situation of a certain duration indicating that the individual had a particular lifestyle that prompted alarm for public safety*[54]

138. The ECtHR has criticised the Italian provisions for their lack of clarity in establishing with sufficient precision how courts were to exercise their discretion in identifying an individual as 'dangerous' for the purposes of the regime.[55] Any proposal which sought to identify targeted human rights abusers as being eligible to be the subject of PC measures would be informed by the case law in this area to ensure sufficient clarity on this point.

139. To return to our basic terminology: the court in *Raimondo* distinguishes in its judgment between seizure and confiscation. Confiscation *stricto sensu* is distinguished from seizure by the fact that there is a transfer of ownership of the assets. In *Raimondo* the court held that neither the seizure nor the confiscation of the assets in question constituted a violation of the applicant's A1P1 rights. However, it is important to note that the confiscation in question (a further reflection of the complexity of the Italian regime) was in fact revoked i.e. it had not become final or 'irrevocable'. The Court went on to find at §36 that the failure to regularise the status of the assets (there was a delay of between seven months and over four years in relation to the various assets) *did* constitute a violation of A1P1.

140. The distinction lies in the fact that the violation found at §36 was based on there being no justification for the delay in regularising the status. As a matter of principle, however, §30 indicates that confiscation of assets under the Italian regime (i.e. non-conviction based confiscation) is A1P1 compliant to the extent that it is proportionate as a response to the "cancerous" effect of the movement of suspected Mafia capital.

141. It is instructive that the Court seemed to accept a number of points put forward by the Italian government: firstly that previous involvement in criminal activity for 'mafia type organisations' is sufficient to establish the risk of criminal activity in the future and secondly that confiscating proceeds of crime is likely to frustrate future criminal activity. Similarly in the admissibility decision in *Butler v United Kingdom*[56] it was the *future* use of the assets that was a concern and featured in the proportionality assessment. In respect of Article 6 the Court held that "*the forfeiture order was a preventive measure and cannot be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs.*"

142. Whilst the Court in *Butler* did not examine in detail the distinction between preventative and punitive forfeiture, it seems from the decision that preventative forfeiture need not

[54] *De Tommasso v Italy*, §21

[55] *De Tommasso*, §118

[56] *Butler v United Kingdom* (Application No 41661/98)

be linked to blame: it is the probability of use in serious crime that will be enough to justify confiscation.[57]

143. Similar outcomes of proportionality analysis have been reached in relation to the seizure and forfeiture of gold coins[58]: this was clearly a deprivation of property, but was "a constituent element of the procedure for the control of the use in the United Kingdom of gold coins" (§51) and therefore placed within the ambit of the second paragraph of A1P1. It was found to be a necessary and proportionate control. The same was said of the destruction of copies of the "Little Red Schoolbook" in *Handyside*[59]: the permanent deprivation of property rights in the books was authorised by the second paragraph of A1P1 "*interpreted in the light of the principle of law, common to the Contracting States, where under items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction.*"

144. Given the context in which these anti-mafia provisions have developed, it is clear that the concern of the preventative regime has been to freeze and confiscate assets belonging to those deemed to represent a danger to society through association with organised crime. The illicit origin of the assets goes to the danger presented by the individual who has them at their disposal. In terms of constitutional and Convention compliance, the focus has been on the particular danger posed by the Mafia in Italy as a justification for the preventative (as opposed to penal) approach of the regime, thus ensuring compliance with A1P1 as non-penal measures that legitimately control the use of property.

Article 6

145. The ECtHR has held on several occasions that the formal qualification of a punishment as criminal or administrative is not binding, and that the assessment of the criminal or administrative nature of a charge must also be made in light of the nature of the offence and the nature and degree of severity of the penalty.

146. As noted, the preventative system is formally classified as administrative under domestic Italian law and PCs considered an administrative penalty. These classifications have been accepted by the ECtHR on several occasions, which has ruled that preventative seizure and confiscation is not a criminal measure and therefore does not require the full protections afforded by under Article 6(2).

Article 6(1)

147. In respect of procedure and the presumptions applied, the applicant in *Licata v. Italy*, 27 May 2004, appl. no. 32221/02 (inadmissibility decision) brought a direct challenge against the procedure. The court declared the complaint inadmissible. It observed that the Italian prevention proceedings involve an adversarial procedure before three different courts (Tribunal, Court of Appeal, and Supreme Court) where the individual has the right to intervene and the possibility to raise objections and produce evidence to refute the allegations against them. The judges cannot base the decision on a mere

[57] See *Property and the Human Rights Act 1998*, Tom Allen (Bloomsbury, 2005)

[58] *Agosi v United Kingdom* (Application No 9118/80)

[59] *Handyside v United Kingdom* (Application No 5493/72)

suspicion, but they have to take a decision on the basis of objective facts that are grounded on evidence. The Court expressly held that:

les juridictions italiennes ne pouvaient pas se fonder sur de simples soupçons. Elles devaient établir et évaluer objectivement les faits exposés par les parties et rien dans le dossier ne permet de croire qu'elles aient apprécié de façon arbitraire les éléments qui leur ont été soumis;

This loosely translates to:

The Italian courts cannot base a decision on mere suspicion alone. They must establish and objectively assess the facts presented by the parties and there is nothing in this case to suggest that they have arbitrarily assessed the elements submitted to them.

Article 6(2)

148. The classification of the proceedings (administrative under the domestic Italian legal landscape) was directly addressed in *Arcuri*. Here, the Court recognised that preventive measures "*do not involve a finding of guilt, but are designed to prevent the commission of offences*;" hence, they are "*not comparable to a criminal sanction*" and "*the proceedings under these provisions did not involve the determination ... of a criminal charge.*"

149. Similarly, the ECtHR in *Riela v Italy* (4 Septembre 2001, appl. no. 52439/99) found:

les mesures de prévention prévues par les lois italiennes de 1956, 1965 et 1982 n'impliquent pas un jugement de culpabilité, mais visent à empêcher l'accomplissement d'actes criminels. En outre, leur imposition n'est pas tributaire du prononcé préalable d'une condamnation pour une infraction pénale. Dès lors, elles ne sauraient se comparer à une peine.

This loosely translates to:

The preventative measures provided for in the Italian laws of 1956, 1965 and 1982 do not imply a conviction, but are intended to prevent the commission of criminal acts. Furthermore, their imposition is not dependent on the prior pronouncement of a conviction for a criminal offence. Therefore, they cannot be compared to a punitive sentence.

(viii) Analysis and Lessons Learnt

150. The proposed Global Survivors Fund seeks to be an example of restorative justice, not preventative justice. Therefore, whilst the Italian example is helpful to demonstrate means of confiscation, the underlying ideology is distinct for reasons we set out below.

151. The Italian example demonstrates that any successful confiscation and repurposing scheme without criminal conviction as its basis, may have the following characteristics:

a. The scheme is preventative as opposed to penal;
b. 'International level designation' (namely the UN Security Committee or other international bodies) can form a starting point for a confiscation and repurposing scheme. However, the State has to go on to prove 'reasonable grounds to suspect' an international crime (more than 'mere suspicion') at which point the burden shifts to the Defendant. This is likely to survive ECHR challenge provided that there is a court process where the Defendant has a right to intervene, raise objections and produce evidence to refute allegations;
c. There does not have to be a direct causal link between the reason for the designation and the assets targeted for confiscation.

152. There are limitations to this model:

a. The money must be from an illicit or 'suspicious' source, applying first the 'reasonable suspicion' standard to the seizing entity, with a subsequent burden on the targeted person or entity to demonstrate that the funds were lawfully obtained;
b. There is no power for a non-state entity or a third party to bring proceedings on the Italian model, but relies on the State being willing and able to litigate;
c. There is no specific mechanism for re-distribution for victims. The money simply goes to the State to be used for the benefit of the public, reflecting the domestic money-laundering roots of the legislation;
d. As above, interference with property cannot be arbitrary and the sanctioned individual or entity must have the opportunity to raise objections, unless the funds are reasonably believed to be proceeds of crime.

Confiscation in Canada: The Frozen Assets Repurposing Act

153. There has been a proposal in Canada to pass a bill, the Frozen Assets Repurposing Act, which received its first reading in March 2019. The proposed Bill would provide a mechanism to redistribute frozen assets for the benefit of victims of human rights abuses. Although not yet in force, it is an interesting example of how such a scheme might work.

154. The Bill has been debated on four occasions but is yet to have made it to Committee Stage. If and when the Bill is voted through in principle, it will move to Committee Stage before the Report Stage and finally its Third Reading in order to then receive Royal Assent.

155. The Special Economic Measures Act of 1992 permits the Governor in Council to, by Order, cause to be seized, frozen or sequestrated in the manner set out in the Order, any property situated in Canada that is held by or on behalf of (i) a foreign State, (ii) any person in that foreign State, or (iii) a national or that foreign State who does not ordinarily reside in Canada, where:

a. An international organisation of States or association of States, of which Canada is a member, has made a decision or a recommendation or adopted a resolution calling on its members to take economic measures against a foreign State;

b. A grave breach of international peace and security has occurred that has resulted in or is likely to result in a serious international crisis;
c. Gross and systematic human rights violations have been committed in a foreign State; or
d. A national or a foreign State who is either a foreign public official, within the meaning of section 2 of the *Corruption of Foreign Public Officials Act*, or an associate of such an individual, is responsible for or complicit in ordering, controlling or otherwise directing acts of corruption- … - which amount to acts of significant corruption when taking into consideration, among other things, their impact, the amounts involved, the foreign national's influence or position of authority or the complicity of the government of the State in question of the acts.

156. Through this Act, Canada is explicitly legislating a wide power to seize assets based upon governmental designation backed by international decisions or recommendations.

157. If brought into force, the Frozen Assets Repurposing Act would allow the Attorney General or anyone with the written consent of the Attorney General to apply to the Court for an Order that the frozen asset be paid into court. The asset would then, subsequent to section 8(1), be distributed by the court to any individual or entity, including a foreign State, in any amount or proportion that the court sees fit if it finds that the funds will be used for a purpose that the court believes is just and appropriate in the circumstances. These eligible purposes are (currently) listed as including:

a. Benefiting persons harmed or otherwise disadvantaged by
    i. The actions of the foreign national with whom the frozen asset was associated, or
    ii. Actions described in paragraphs 6(a) to (d);
b. Supporting humanitarian relief or the relief of forcibly displaced persons; or
c. Assisting a foreign State in accommodating refugees.

158. Section 6 of the proposed Bill sets out that that the assets should be paid into court should only be made if, on the balance of probabilities the court is satisfied that the frozen asset is associated with a foreign national who is responsible for, or complicit in:

a. Extrajudicial killings, torture or other gross violations of internationally recognised human rights;
b. The forced displacement of peoples;
c. Ordering, controlling or otherwise directing acts of corruption that amount to acts of significant corruption when taking into consideration, among other things, their impact, the monetary amounts involved, the foreign national's influence or position of authority or the complicity of the government of the foreign state in question; or
d. Violations of human rights standards that are based on customary international law and international human rights conventions to which Canada is a party.

159. The proposed Bill sets out notification requirements in section 7 as requiring that any person that may have an interest in the asset being notified of the proposed proceedings and that such a person may present evidence to the court.

160. The scheme in the proposed Bill would work as follows:

a. Assets are frozen under existing legislation;
b. The state, or an interested party with permission from the state, applies for such assets to be paid into court;
c. The court then gives notice to any interested parties of the proceedings;
d. The court will then hear evidence as to whether, on the balance of probabilities, the assets are associated with a foreign national complicit in the abuses set out;
e. If proven, the court will then determine the appropriate disposal of the assets paid into court.

161. This model offers some distinct advantages in the context of the Global Survivors Fund:

a. It does not require the State to be the prime party in bringing proceedings. However, the consent requirement should help to limit abuse and also provide a way for the State to avoid foreign policy conflicts;
b. The notification requirement provides a useful procedural safeguard;
c. The test of '*responsible for or complicit in'* is reasonably specific but equally not one which will be hard to meet in many cases;
d. The civil standard of proof makes it easier to prove;
e. The test of being '*associated with'* is wide and limits the scope for arguments over opaque ownership structures; and
f. The scheme for the distribution of funds is very wide and so, works very flexibly.

162. It does however pose some difficulties:

a. The scheme is unlikely to work in any country where property rights are protected in an equivalent way to the ECHR;
b. It is notable that it does not include the requirement that if the individual is '*in absentia*' there has to be a direct link between the criminality and the assets. There is a serious risk that by not requiring such a link and instead replacing it with the 'notification' requirement, this could cause problems if the individual in question was unable, for claimed financial reasons, travel restrictions, domestic arrest or the like, to present evidence to the court. The notification requirement does not clearly replace that procedural protection and so may be open to challenge on human rights grounds;
c. The standard of proof is higher than that of the Italian model. This of course provides greater protection to survive legal challenge, but also means that more substantial resources will be required to bring a claim and prove it to the required standard;
d. The consent requirement means that a state could simply block proceedings it would regard as politically inconvenient, although this would be unlikely to be a feature in many cases;

e. The width of the scheme leaves the court with a huge responsibility to allocate funds. There is a very real risk that this would translate into expensive litigation compared to a more structured distribution or a non-court system.

The UK: the existing confiscation system

(i) Unexplained Wealth Orders

163. If the aim is simply to provide a 'pot' of money from which various eligible groups can draw, then most straightforward approach would be to follow the US example and re-purpose money obtained by way of fines or proceeds of crime proceedings linked to breaches of sanctions. The hurdle posed by this method is in persuading states to ring-fence this money and then re-distribute it in this way when the money currently returns to the tax-payer who paid for the enforcement system.

164. However, by using the UK's 'Unexplained Wealth Order' (UWO) structure and civil confiscation rules as an analogy, there could be a viable route to seizing frozen assets that would preserve significant legal protections while not falling foul of the sorts of issues that would be endemic with traditional prosecution.

165. If assets are the proceeds of criminality, whatever their extent, the holder has no proper claim to them. If we look at the fact of offending only (rather than offending being a way to illegitimately obtain assets), then the link between the offending and the right to confiscate assets becomes more complicated and difficult to justify in the face of a human rights challenge.

166. Even where the burden of proof is reversed, proceeds of crime legislation operations on the basis that assets can be confiscated where they come from specified criminality (to greater or lesser degrees of specificity). The 'way in' is nearly always a finding that a criminal offence has been committed.

167. There is a substantial difference between confiscating assets identified as being the proceeds of criminality and taking assets (which have been or may have been legitimately obtained) from individuals who have committed an offence, without applying the criminal standard to that finding of guilt nor applying any consideration of proportionality.

168. At a domestic level, there is precedent for the reversal of the burden of proof when it comes to the holding of assets. The Proceeds of Crime Act 2002 introduces Unexplained Wealth Orders. The requirements for applying for an UWO are set out at s.362A. The requirements for making one are set out at s.362B:

(1) These are the requirements for the making of an unexplained wealth order in respect of any property.

(2) The High Court must be satisfied that there is reasonable cause to believe that-

a. The respondent holds the property, and

b. The value of the property is greater than £50,000.

(3) The High Court must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.

(4) The High Court must be satisfied that-

a. The respondent is a politically exposed person, or

b. That there are reasonable grounds for suspecting that-

i. The respondent is, or has been, involved in serious crime (whether in a part of the United Kingdom or elsewhere), or

ii. A person connected with the respondent is, or has been so involved

169. In order to engage the legislation in relation to UWO, the legal test to be met is '*reasonable cause to believe*.' A finding to a criminal standard (with all the difficulties that would engender when considering jurisdictional issues, collating evidence, funds to prosecute etc) is not required.

170. The value of considering this existing legislation is that it establishes the principle that once the initial evidential threshold is met, the burden of proof can legitimately be reversed. This is a significant change to the legislation and is building upon the principle that reversal can be appropriate (and compliant with property rights) in appropriate circumstances. The procedural protections remain as do the features that there is a minimum value threshold, and for a foreign national they have to be a "politically exposed person."[60]

171. If the named individual or entity was not able to defeat that presumption, then the same consequences for an UWO would apply, namely that the property is presumed to be recoverable property for proceedings, unless the contrary is shown, under Part 5 POCA 2002 (s.362C), namely the procedure for civil recovery of the proceeds of unlawful conduct.

172. UWOs have been tested in the Court of Appeal in *Hajiyeva v National Crime Agency* [2020] EWCA Civ 108 and survived challenge.

(ii) Civil Recovery Proceedings

173. The purpose of civil recovery proceedings is to recover property which is, or represents, property obtained through unlawful conduct (s.240(1) POCA 2002). Under s.241(2A) of POCA, unlawful conduct includes conduct outside of the UK which constitutes or is connected with the commission of a gross human rights abuse or violation.

174. The definition of gross human rights abuse or violation is set out in s.241A POCA. For our purposes, we would be looking to s.214A(2)(a)(ii) '*to obtain, exercise, defend or promote human rights and fundamental freedoms.'* Subsection 4 provides the protection that the conduct has to be by someone carrying out an official duty/capacity or with their consent or acquiescence, limiting those caught to those operating within the state structure.

[60] Definition in s.363B(7) POCA 2002

175. However, it is important to note:

a. Although the standard of proof is the civil standard, to bring such proceedings would require the presentation of evidence to the civil courts which would require significant resources; and

b. The power to recover would only apply to property *obtained through* unlawful conduct.

(iii) Analysis and lessons learnt

176. To summarise, the UK confiscation systems have the following features which in our view render them rights-compliant:

a. There is proven (even if to a civil standard) wrongdoing, so that confiscation can be seen to be preventative rather than punitive;
b. The assets targeted are in some way suspect (e.g. in the case of UWOs, *there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property*);
c. There are sufficient procedural protections to ensure that the holder of the assets has a reasonable opportunity to present their case;
d. There is procedural protection in the process for identification of individuals/entities who are targets for sanctions;
e. Although the burden of proof is then reversed, there is judicial determination and the ability for the respondent to challenge the assumption at a domestic level.

E. The repurposing of seized assets

177. As outlined at the outset of our response to Question 2, there are three, fundamental legal 'steps' required for the proposal of those instructing to be workable (i) Lawful designation and freezing; (ii) Lawful confiscation; (iii) Lawful repurposing.

178. It is clear from our analysis above that assets can be confiscated in a manner compatible with the ECHR. Insofar as the Italian model was concerned, this was primarily because seizure and confiscation of assets was designed to combat the 'cancer' of Mafia activity and because the confiscation of assets was aimed at curing the social ill by removing from circulation (i.e. future use) assets deemed to be of illicit origin.

179. The notion of repurposing, as seen above, necessarily entails confiscation of assets; that is to say a change of ownership and therefore permanent deprivation of property rights over those assets. As a term, it covers not only the confiscation but also the destination of funds once they have been confiscated. To that extent it is perhaps an unhelpful term in that it elides between both confiscation and redistribution. These are two legally distinct steps in the procedure with the former presenting greater challenges than the latter: once assets have been legally confiscated, the way in which the State (which assumes ownership) chooses to dispose of those assets is far less controversial than the manner in which they were obtained.

180. As above, the challenge lies in the confiscation of assets: if a human rights compliant mechanism can be established at the confiscation stage, the question of how any confiscated funds are then redistributed or 'repurposed' will likely only form a lesser part of the proportionality assessment of the confiscation regime more generally.

181. Our answer to Question 1 presents one legal argument supporting the position that there is a legal obligation *requiring* States to contribute to an international compensation fund, in line with its duty to *fulfil* victims' right to compensation, and its consequent implied obligation to *finance* that right. Combined with the duty of States to *prevent* terrorism, the *repurposing* of assets flows, assuming that the underlying confiscation is lawful.

182. It is crucial, however, that any scheme is not framed in such a way as to imply that it is punitive. As set out above, punitive schemes require more stringent standards of procedural fairness including a higher standard of proof. Our answer to Question 3 will explore the nuanced way in which a scheme must be framed so that it is viewed not as punitive, but as *preventative* at the freezing stage, and *reparatory* at the repurposing stage.

F. Conclusion

183. As indicated by those instructing in the question posed, the repurposing of assets raises human rights issues, most specifically in relation to the various permutations of the rights to property and procedural fairness. In our view, confiscated funds can be repurposed for the proposed fund in a manner compliant with human rights, if the underlying confiscation regime possess the key characteristics we have outlined above, and which we summarise here.

184. The designation of a person or entity can be a proper starting point for any asset freezing or repurposing regime, as long as a State has satisfied itself that the designation is not arbitrary.

185. Any scheme with designation as its basis must also have inherent within it, procedural safeguards enabling the person or entity to challenge or refute both its identification as a relevant person from whom assets could be lawfully seized, and the targeting of the assets themselves. We have seen this brought to bear in a domestic context in the Italian system, whereby the State was required to demonstrate 'reasonable grounds to suspect' or a 'reasonable objective basis' to the claims that the targeted individual is 'dangerous', and that the assets are suspect or of illicit origin. The burden then shifts to the targeted individual to demonstrate the targeted assets were lawfully obtained.

186. The subsequent repurposing of any frozen asset by definition involves its confiscation, with the 'repurposer' using that asset as if it was its own. In order for such confiscation/repurposing to survive human rights challenges, the property seized has to have an element of illegitimacy. With the Italian model, this took the form of the requirements that any confiscated property is (*i) disproportionate to the declared income, (ii) of illicit origin, and which (iii) the target cannot show was lawfully acquired.* In the UK, the Unexplained Wealth Orders ("UWO") regime requires that

there are *reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the person or entity to obtain the property.* So long as this is established to the relevant standard, we consider such assets can legitimately be repurposed for a victims' fund.

187. In our view, assets cannot be confiscated/repurposed by a State solely by virtue of the owner of those assets being designated. However, we do not go so far as to assert that a criminal conviction is a prerequisite to the seizing of a designated person's assets. At the very least, 'reasonable suspicion' of the assets being unlawfully obtained or proceeds of crime would be required; together with a procedure permitting the designated person or entity the opportunity of refuting such a suspicion.

Q3) The Purpose of Financial Sanctions

Question

What is the Purpose of Financial Sanctions?

We have received the following response to our proposal:

Financial sanctions regimes are intended to act as a deterrent to certain forms of behaviour / induce better behaviour – they are not intended to be punitive. Our proposal could be seen as using sanctions as a punitive measure to substitute civil claims against perpetrators.

1. Is there a way we could counter this point? Either by contending that sanctions regimes are not intended to solely act as a deterrent, or by contending that our proposal would not constitute a form of punishment and would, in fact, be in line with the aim of deterrence?

A. Financial sanctions: A Moving Target

189. Sanctions regimes are an established tool in international conflict resolution. Under the auspices of the United Nations Security Council, some 30 sanctions regimes have been established since 1966.[61] Financial sanctions form just one part of the spectrum of sanctions regimes and, taken as a whole, these regimes take a number of forms, each targeting a variety of outcomes. The overarching regime in which financial sanctions operate provides important context.

190. As a general trend there has been a shift in two dynamics of the imposition of financial sanctions: first, the target of the sanctions and secondly the nature of the sanctions. [62] Since the mid-90s, the target of sanctions has gradually shifted from State to non-State actors. UNSCR 1267 expanded the scope of sanctions to include the targeting of individuals and entities. This allowed sanctions to be more precisely targeted at proscribed organisations, such as the Taliban, rather than a State actor more generally.

191. This was followed by UNSCR 1333 which targeted the freezing of assets of Osama Bin Laden and Al-Qaida. The sanctions committee was tasked with identifying individuals and entities associated with Bin Laden or Al-Qaida.

192. As to the change in substantive nature of financial sanctions, there has been an observed shift from the use of sanctions to apply pressure on States to act or abstain in

[61] https://www.un.org/securitycouncil/sanctions/information

[62] E.g. Al-Own and Bydoon, 'Evolution of Asset-Freezing through the UN Security Council', JAH (2017), Vol. 06, No. 04: 53-59; Cian C Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing 2012).

a certain way, towards a more preventative application of the regime. The new model has been described as '*executively controlled measures intended for pre-emptive use.*[63]'

B. A Back to Basics Approach

193. Bringing the question of the purpose of financial sanctions back to basics, the context of the general sanctions regime at the UN level is informative. Article 41 of the UN Charter states:

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

194. The international sanctions regime more generally then is aimed at '*giving effect'* to UNSC decisions and doing so through alternative means to armed force. In European jurisprudence, reference is often made to '*restrictive measures'* or '*mésures negatives*'.[64] To this end the regime can be described as coercive in nature. This is a description used even by those commentators who express concern over the development of the financial sanctions regime.[65]

195. The UK's Office of Financial Sanctions Implementation identifies the following rationale behind financial sanctions[66]:

Financial sanctions are generally imposed to:

- ***coerce** a regime, or individuals within a regime, into changing their behaviour (or aspects of it) by increasing the cost on them to such an extent that they decide to cease the offending behaviour*
- ***constrain** a target by denying them access to key resources needed to continue their offending behaviour, including the financing of terrorism or nuclear proliferation;*
- ***signal disapproval**, stigmatising and potentially isolating a regime or individual, or as a way of sending broader political messages nationally or internationally; and/or*
- ***protect the value of assets** that have been misappropriated from a country until these assets can be repatriated*

196. Each of these aims is relevant to the proposal. That of protecting the value of assets notes that the ultimate objective is the repatriation of assets. We consider that it is arguable that the proposal would not go against the grain of these aims by adding

[63] Cian C Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing 2012), [p.47]

[64] C. Portela, *Targeted sanctions against individuals on grounds of grave human rights violations – impact, trends and prospects at EU level*, European Parliament Report, p.7

[65] For example Jorge Godinho describes sanctions in the following terms "sanctions are not meant to punish in a retributive manner (such as in criminal law); rather, in most cases they are intended as non-military coercive measures designed to force or persuade the target to adopt a certain behavior, which, if not forthcoming, may then lead to other measures…" (J Godinho 'When Worlds Collide: Enforcing United Nations Security Council Asset Freezes in the EU Legal Order' European Law Journal, Vol. 16, No. 1, January 2010, pp. 67–93.)

[66] Office of Financial Sanctions Implementation, HM Treasury, 'Financial Sanctions Guidance', January 2020

reparation to the framework of financial sanctions. The 'signalling effect'[67] of sanctions is also an important factor in considering the case for repurposing assets with a view to providing reparations. They reaffirm commitment to a set of values: reparation to victims is a recognisable aim of the international community (see the answer to Question 1). The EU in its policy objectives for a new EU victims' strategy[68] identified as one of its four "paradigm shifts", a shift from compensation to reparation.

197. The response to the proposal noted that *"financial sanctions regimes are intended to act as a deterrent to certain forms of behaviour/induce better behaviour – they are not intended to be punitive. Our proposal could be seen as using sanctions as a punitive measure to substitute civil claims against perpetrators."*

198. A reply to this should focus on the origins of the wider sanctions regime: these are *coercive* measures. They have, by their very nature, a negative impact on the individual or entity subject to such measures. That is not to say however that the measures are necessarily *punitive.*

199. The repurposing of frozen assets would, according to the proposal, be *preventative* at the freezing stage and *reparatory* at the repurposing stage. The extent to which the proposal would therefore also act as a deterrent should be seen as secondary in this context: the repurposing of frozen assets would, under a comprehensive framework, be preventative in the first instance and reparatory in the second.

C. Prevention and Reparation

200. The preventative nature of asset freezing is uncontroversial. Financial sanctions as a means of depriving individuals of financial resources through denying access to the international finance system is a well-established concept.[69] Blacklists against persons and entities engaging in the funding of terrorist organisations enable security interventions before any dangerous act has occurred.[70]

201. What this proposal seeks to introduce is a non-punitive, reparatory element to financial sanctions. Aside from the well-established Engel criteria, the Strasbourg case of Welch v United Kingdom (1995) 20 E.H.R.R. 247 provides a broad list by which to establish whether or not a measure is punitive, albeit in a different context: whether it was imposed after a conviction; the nature and purpose of the measure; its domestic characterisation; the procedures for making and implementing the measure; and its severity.[71]

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[67] European Parliamentary Research Service (EPRS) Briefing, 'EU Sanctions: A key foreign and security policy instrument', p.9

[68] Report of the Special Adviser, J. Milquet, to the President of the European Commission, 'Strengthening victims' rights: from compensation to reparation', March 2019.

[69] S. Eckert, 'The use of financial measures to promote security' Journal of International Affairs, Vol. 62, No. 1, Global Finance (FALL/WINTER2008), pp. 103-111.

[70] C. Portela, *Targeted sanctions against individuals on grounds of grave human rights violations – impact, trends and prospects at EU level*, European Parliament Report, p.10

[71] See R Kelly, 'Reconsidering the punishment-prevention divide' L.Q.R. 2019, 135(Jan), 12-17 for a brief discussion of *Welch* in analysing the Court of Appeal's approach to the *Engel* criteria when it considered the

202. What is proposed is a new framework under which a proportion of frozen assets is repurposed with a view to providing reparations to victims. The aim of any such framework will not be therefore to punish suspected terrorists, rather it will be a reparatory extension to an existing preventative framework that equally recognises the secondary, but non-negligible power of deterrence in such measures. It is in this context that any new framework should be assessed against existing criteria.

nature of anti-social behaviour and gang prevention injunctions in *Jones v Birmingham City Council* [2018] EWCA Civ 1189.

Summary and Conclusions

1. The concept of reparations in international law first emerged as an inter-state remedy. The development of the concept of individual human rights since the Second World War has led to the gradual recognition of a right to reparations for victims of human rights abuses, which is now enshrined in numerous international Treaties and Conventions. We have identified one reading of international law which establishes a legal obligation for Member States to finance reparations. This is reflective of the international community's move towards a victim-centred approach, with individuals being the beneficiaries of the right to reparations.

2. In order for the right to reparations to be realised, that right must be *'fulfilled'* and therefore by implication '*financed'* by the international community as a whole. Without such an approach, the United Nations Declaration of Human Rights is rendered meaningless for the vast majority of those who suffer the most extreme violations of the human rights that the Declaration was intended to protect.

3. We are instructed to identify the architecture of a scheme which repurposes assets of designated individuals for the purpose of restorative justice. As we have outlined in the body of the Opinion, the first founding step for repurposing assets is ensuring that the targeted person's or entity's designation is subject to the relevant procedural safeguards. Existing domestic examples demonstrate that confiscation requires at the very least reasonable suspicion as to the origin of assets, but can require proven illegitimacy in how they were obtained. This provides limited ground for asset repurposing. However, once lawfully confiscated, the usage of the repurposed assets is free to be determined by the relevant authority.

4. As long as the proposed fund abides by the lawful limits of confiscation, the characteristics of which we have identified above, we consider the fund would be viewed as preventative and reparatory; it is unlikely that the scheme would be perceived as punitive.

5. Should those instructing have any queries and/or wish for any further guidance on drafting an enabling legal mechanism to set up the fund, please do not hesitate to contact us at Chambers.

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Goldsmith Chambers, 17 November 2020