

Asset Recovery and
Repurposing for Reparation
Measures for Victims of
International Crimes in Syria

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**Challenges and Potentials
Discussion Paper**

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1. INTRODUCTION

The recognition of the right to reparation in international law, especially in relation to victims of international crimes seeking effective remedies, is well-established. There is an ongoing debate among States regarding the responsibility for providing reparations, with some contending that the obligation rests with the home State of the victims. Consequently, judicial proceedings in jurisdictions outside the home State often lack provisions for reparations. However, numerous commentators and United Nations human rights bodies emphasize that the right to reparation is inherently connected to the victim rather than their location, asserting that wherever effective remedies are available, reparations should be afforded.

Victims of international crimes in Syria encounter the refusal of their home State to provide them with effective remedies, including reparations. As a result, the national jurisdictions of many States have become the sole avenue for these victims to seek accountability for violators and pursue their right to reparation using national laws. This pursuit raises two pivotal questions: the first pertains to the adequacy and validity of laws and measures offering effective remedies and enabling reparations, while the second relates to the material assets necessary for enforcing such reparations.

This paper aims to examine the limitations and opportunities within international law and their impact on national laws outside Syria regarding the potential utilization and repurposing of the financial assets of the Syrian State or other individuals and entities involved, directly or indirectly, in crimes. Recognizing the complexity and lack of flexibility in the relevant legal rules, the paper seeks to raise thought-provoking questions and discussion points derived from these legal and contextual complexities. The objective is to stimulate collaborative thinking and brainstorming among victims and other stakeholders, complementing existing or ongoing initiatives in this field.

Confiscating and repurposing assets is a highly intricate and sensitive matter at the international and national levels, subject to various legal, political, and human rights considerations. Asset recovery occurs within three primary contexts: international criminal law, the framework for organized and financial crimes, and the framework for sanctions. The paper provides examples from each of these frameworks, along with an explanation of the relevant legal framework, potential challenges, analyses, and key discussion points arising from the presented information.

It is essential to emphasize that any approach to reparation and repurposing of assets must adhere to the principles of doing no harm and non-discrimination. Consequently, this paper does not present a definitive model with consensus among stakeholders, but rather offers a series of messages, legal insights, and contextual points that can be broadly applied to the issue of repurposing assets for reparation measures, without pursuing a specific outcome.

2. MAIN DEFINITIONS

- **Asset Recovery:** The process of identifying, locating, and returning assets that have been obtained through illegal activities or corruption to their rightful owners or jurisdictions.
- **Seizure:** The act of taking possession of assets by a government or law enforcement agency based on suspicion or evidence of their involvement in criminal activities. Seized assets are typically held pending further legal proceedings.

- **Confiscation:** The legal process through which assets are permanently taken away from their owners by the government or authorized authorities due to their involvement in criminal activities. Confiscation usually follows a court order or a legal decision.
- **Freezing:** The temporary restriction or prohibition on the use, transfer, or disposal of assets. Freezing orders are typically issued by a court or regulatory body to prevent the dissipation or removal of assets during an ongoing investigation or legal proceeding.
- **Asset forfeiture,** in legal terms, refers to the seizure or confiscation of assets by the government or law enforcement authorities as a result of criminal activity or unlawful conduct. It is a legal process through which the government takes ownership and control of the assets, which may include money, property, vehicles, or other valuable items, that have been linked to or derived from illegal activities.
- **Repurposing:** The act of redirecting or utilizing frozen or confiscated assets for a different purpose or beneficiary. Repurposing typically involves the conversion of the value or proceeds of seized assets to serve a different objective, such as compensating victims, funding social programs, or supporting law enforcement efforts.

3. WHAT IS REPARATION?

Reparation is an established principle under international law and essentially contained in the actual notion of an illegal act that it – reparation – “must, as far as possible, wipe out all the consequences of that illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.¹ This requires a remedy which is the “procedural means by which [reparation] is enforced, or the means by which a violation of a right is prevented or redressed, such as the judicial, administrative, or civil procedure used to obtain compensation”, while reparation “refers to the substance of the relief afforded”² within the remedy to ‘wipe out all the consequences of the illegal act’. The right to reparations has been firmly established in international instruments and jurisprudence and reflects an enshrined norm of customary international law (*See Annex I*).

Reparations are the only measure designed to benefit victims directly. While prosecutions are in the end a struggle against perpetrators, and truth-seeking and institutional reform have as their immediate constituency society as a whole, reparations constitute an effort that is explicitly and primarily carried out on behalf of victims.³ Reparation must be adequate, effective, prompt, and should be proportional to the gravity of the violations and the harm suffered.⁴

Summary

¹ See Permanent Court of International Justice, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Merits 1986 ICJ Report, 14, 114 (June 27); *Corfu Channel Case*; (UK v. Albania); *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184 . See also Article 1 of the Draft Articles on State Responsibility adopted by the International Law Commission in 2001: “Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001” (ILC Draft Articles on State Responsibility)).

² Redress, ‘A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law’, *The Redress Trust* (2003), p. 8.

³ UNGA, ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’, A/69/518, 14 October 2014, § 10.

⁴ UNGA, ‘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’, Resolution adopted on 16 December 2005, A/RES/60/147, § 15.

The principle of reparation, rooted in international law, aims to address the consequences of illegal acts by restoring the situation that would likely have existed if the act had not occurred. Reparation encompasses both the procedural means to enforce it, such as judicial or administrative procedures, and the substance of the relief provided to eliminate the consequences of the illegal act. The right to reparations is firmly established in international instruments and jurisprudence, serving as a customary international law norm. Reparations are unique in their direct benefit to victims, with the goal of redressing the harm suffered. They must be adequate, effective, prompt, and proportionate to the gravity of the violations committed.

4. WHAT ARE INTERNATIONAL CRIMES?

International crimes are widely deemed to be serious breaches of norms of customary international law protecting fundamental values of the international community as a whole (*i.e.*, peace, security, life).⁵ The core international crimes – relevant to Syria - are genocide, crimes against humanity, and war crimes. Some States extend this concept to consider some “stand-alone” crimes without meeting the thresholds required to prove these three core international crimes, such as torture, sexual violence, and enforced disappearance. In other words, in such jurisdictions, an act of torture that was committed against one victim in any context – whether armed conflict or not – may amount to an international crime. This approach stems from the interpretation of States’ obligations under specific treaties that require the criminalisation of such violations as most serious crimes, including the CAT and the ICPPED.

4.1 International Crimes and Individual Responsibility

No one may be convicted of an offence except on the basis of individual criminal responsibility.⁶ As a norm of customary international law, no penalty can be inflicted on persons for acts for which they are not responsible. None of the national legal systems states otherwise. The individual criminal responsibility includes attempting to commit such crime, as well as assisting in, facilitating, aiding or abetting, the commission of a crime. It also includes planning or instigating the commission of a crime.⁷ It extends to cover the responsibility of commanders and other superiors as well.⁸ Therefore, in any criminal proceedings, only individuals can be tried in a court of law, and not entities.

4.2 International Crimes and State Responsibility

International crimes are usually connected to a governmental action or inaction. They are committed by virtue of their nature by State officials – notwithstanding their perpetration also by non-State actors – whether under IHL or IHRL. “They form part of a collective criminal conduct conceived and performed at the highest level of the State machinery, as they are perpetrated on a widespread or systematic scale”⁹ such as crimes against humanity, or by State officials in the context of an armed conflict, such as war crimes.

The responsibility of the perpetrator’s home State is invoked considering that their perpetration to the international crimes is a serious breach of obligations arising under peremptory norms of general

⁵ See the third and fourth preambular considerations and Art. 5 of the ICC Statute.

⁶ ICRC Customary IHL Study, Rule 102.

⁷ For example, see: Rome Statute, Article 25.

⁸ Rome Statute, Article 28.

⁹ Emanuele Cimiotta, ‘The Relevance of Erga Omnes in prosecuting International Crimes’, *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 76 (2016), 687-713, p. 692.

international law (*jus cogens*), within the meaning of Article 40 of the ILC Draft Articles. State responsibility is also invoked if the perpetrated wrongful act is a breach of obligations *erga omnes* created conventionally through multilateral treaties that create general standards of conduct in the achievement of a common purpose or derived from *jus cogens* within the meaning of Article 33(1) of ILC Draft Articles.

Consequently, international crimes are internationally wrongful acts attributable to the home State and they trigger its obligation to prosecute the alleged perpetrators as a safeguarding to its own sovereignty. When the home State fails to fulfil this obligation, all States, pursuant to their legal interest in the implementation of *erga omnes* obligations, are deemed to be “injured” since the wrongful act and the home State’s failure to prosecute affect the international community as a whole.¹⁰

While the doctrine of State responsibility has historically only applied between States, and has not recognised individual claims against States,¹¹ several *erga omnes* obligations concern human person as an international law focal point and a subject of international rights that impose on States corresponding obligations under international law for the benefit of persons under their jurisdiction, stemming from the UN Charter.¹² Therefore, the ILC Draft Articles recognize that “State responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights”.¹³

Summary

The customary principle of individual criminal responsibility states that no one can be convicted of an offense unless they are personally responsible for it, and only individuals can be tried in criminal proceedings, and not entities. Individual criminal responsibility includes not only the direct commission of a crime but also attempts, assistance, facilitation, aiding or abetting, planning, and instigating of the crime, as well as command responsibility. International crimes are often committed by State officials’ actions or inactions. The responsibility of the perpetrator’s home State is invoked when international crimes are committed, as they constitute serious breaches of peremptory norms of general international law. State responsibility is also invoked when wrongful acts constitute a breach of obligations that benefit the international community as a whole. While historically State responsibility applied only between States, certain obligations related to human rights focus on individuals as subjects of international rights. The ILC recognizes that States may be held responsible for breaches of human rights obligations towards all other parties to the treaty, with individuals being the ultimate beneficiaries and holders of relevant rights.

Points for Discussion

1. In international criminal proceedings, the doctrine of State responsibility is often excluded and courts do not address it.
2. Maintaining an argument for the invocation of State responsibility is important for the following reasons:

¹⁰ See International Court of Justice (ICJ), *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, § 33.

¹¹ M. Cherif Bassiouni, ‘International Recognition of Victims’ Rights’, *Human Rights Law Review* 6:2 (2006), Oxford University Press, 203-279, p. 211.

¹² UN Charter, Articles 55 and 56 in conjunction with Article 1(3) on the purposes of the organizations including the promotion and encouragement of respect for human rights and for fundamental freedoms for all.

¹³ International Law Commission (ILC), Draft Articles and Commentary, Article 33, p. 95.

- Reparation is the duty of States when they commit wrongful acts - or in other words when wrongful acts are attributable to them.
- States are obligated to provide effective remedies to victims, independent of individual criminal responsibility, and the doctrine of State responsibility ensures this obligation.
- State responsibility allows other States to respond to internationally wrongful acts, strengthening the argument for victims' right to reparation, regardless of where the wrongful act was committed.

5. VICTIMS OF INTERNATIONAL CRIMES AND REPARATIONS

State responsibility for international crimes is conditioned by the established individual criminal responsibility of the perpetrator for the act attributed to that State. This is established only through criminal proceedings and by a court of law and according to the internationally recognized standards of due process.

On the other hand, State responsibility entails the right of victims to claim and receive reparation, and the obligation of States thereto, which was affirmed by The Basic Principles on Reparation. Reparation cannot be ordered and/or claimed except as decided by a court of law and in accordance with the principle of proportionality of the reparation to the suffered harm. Therefore, reparations for international crimes can be provided – arguably - through or in parallel with these available avenues:

1. National judicial proceedings of the home State of which the international crime – the internationally wrongful act – is attributable to.
2. Ad hoc regional or international tribunals established, for instance, by a UNSC resolution or a regional agreement. This includes examples of the ICTR, ICTY, ECCC, and others.
3. The International Criminal Court (ICC).
4. Proceedings under the principle of universal jurisdiction (or other forms of extraterritorial jurisdiction).
5. Other non-judicial entities, such as regional human rights courts and UN mechanisms, that can order or recommend – depending on its mandate – reparations, such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACHR), and the UN Conventions Committees.

Nevertheless, the existence of any of these avenues does not automatically entail, firstly an enshrined right for the victims to seek reparations, and secondly a definite obligation for the court to order reparations. This is subject to several factors mainly the jurisdiction of the relevant court and whether it proscribes the entitlement to this right or enjoys the power to order reparations. Another factor is the discretion of the court to order reparations subject to – in addition to its established jurisdiction – the proportionality assessment of the resulting damage and the appropriate reparation measures or amounts. This can only be established according to the “beyond any reasonable doubt” criminal conviction by the court of the accused individual(s) concerning the specific conducts that established the criminal behaviour and the identified victims of those specific conducts.

In conjunction with the rationale of the doctrine of State responsibility, the legal consequences of an international crime affect primarily the interests of the international community and not the private interests of the victim. However,

*“it is submitted that responsibility for reparations should maintain an element of State responsibility as those considered to have carried the greatest responsibility for serious violations may have exercised functions of State authority. There are inherent dangers in shifting responsibility from States towards individuals as this may ultimately leave victims without redress”.*¹⁴

Summary

State responsibility for international crimes is contingent on individual criminal responsibility established through fair proceedings. Reparations for such crimes can be pursued through various avenues, but the availability of these avenues does not guarantee the right for victims to seek reparation or mandate courts to order them. Factors like jurisdiction, power, proportionality, and criminal conviction influence reparations. State responsibility should be maintained, as individuals alone may not provide adequate redress. International crimes primarily impact the international community, not just individual victims.

Points for Discussion

1. The rationale of victimhood is the harm or damage suffered by individuals due to the wrongful acts committed by other individual(s).
2. The rationale of reparation is to eliminate or address the harm or damage caused by the perpetrator's actions.
3. The rationale of proportionality of reparation involves assessing the specific damage caused by the act in a fair manner.
4. In criminal law, the principle of individual criminal responsibility focuses on the causal relationship between the specific act, the harmed individuals, and the nature and extent of the harm when considering reparation.
5. Reparation is the responsibility of the perpetrator.
6. However, victims are not always granted reparation orders by the relevant jurisdictions, and in many cases, perpetrators are found to be insolvent or unable to pay.
7. State responsibility for reparation is invoked because of the State's duty to provide effective remedies and its attribution of the wrongful act.
8. It is important to remember that reparation is not solely a duty but also a recognized right.

6. UNIVERSAL JURISDICTION AND REPARATION

States are permitted by international law to prosecute certain categories of heinous conduct, mainly those violating *erga omnes* obligations including *jus cogens* norms, even when they take place outside its territory and do not involve its nationals, by the principle of universal jurisdiction. The requirement or permission for States to exercise universal jurisdiction confirms their entitlement under the doctrine of State responsibility to respond to the home State internationally wrongful act through applying the universal jurisdiction dealing with the rising individual responsibility.¹⁵ “The rationale behind the exercise of [universal] jurisdiction is: (1) no other state can exercise jurisdiction on the basis of the

¹⁴ Christine Evans, ‘Reparations for Victims in International Criminal Law’, *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* (2011), p. 1.

¹⁵ See generally Donal Francis Donovan and Anthea Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’, *The American Journal of International Law*, Vol. 100, No. 1 (January 2006), 142-163.

traditional doctrines; (2) no other state has direct interest; and (3) there is an interest of the international community to enforce”.¹⁶

A crucial question persists: does the universal jurisdiction principle encompasses either or both adjudication¹⁷ and enforcement of reparative measures or not?

Some commentators argue that the result of the universal jurisdiction rationale “is to give each and all sovereignties, as well as international organs, the power to [...] enforce certain international proscriptions”.¹⁸ However, this “applies when the proscription originates in international criminal law and not in the national law of a given State. In other words, crimes under exclusive national law cannot give rise to universal jurisdiction”.¹⁹

The dilemma emerges when questioning whether reparation is originated in international criminal law so the forum States can proscribe it while exercising their universal jurisdiction. Some commentators argue that the proscription of reparations is not originated in international criminal law, and therefore forum States cannot adjudicate or enforce them as part of their exercise of universal criminal jurisdiction. Some commentators argue that it is unrealistic to expect universal jurisdiction not to be influenced by the forum States’ national laws. As a result, their legislatures and courts must interpret and apply these norms, effectively nationalizing international law. Furthermore, while the prohibited conduct may be defined by international law, the enforcement of such norms is inevitably influenced by national laws. For instance, in criminal cases, national penalty regimes come into play, while in civil cases, national procedural laws, such as class actions, and remedies like moral or punitive damages, may be applied. These national influences impact the enforcement and implementation of international norms at the domestic level.²⁰

Summary

While some argue that universal jurisdiction allows all sovereignties and international organs to enforce certain international proscriptions, it is limited to crimes originating in international criminal law rather than exclusive national law. There is a debate about whether reparation falls under international criminal law and can be adjudicated and enforced through universal jurisdiction. Some commentators believe that incorporating the values of concern to the international community is sufficient, while acknowledging the influence of national laws on universal jurisdiction. States exercising universal jurisdiction face challenges in applying international legal norms to specific cases, leading to the nationalization of international law. The enforcement of these norms is influenced by national laws, including penalties in criminal cases and procedural laws and remedies in civil cases. These national influences impact how international norms are implemented domestically.

It is worth highlighting that the proscription and consequently adjudicating for international crimes stem from other international principles, norms, and provisions that are not solely originated in the international criminal law, but in other frameworks and instruments including IHRL, such as the CAT and the ICPPED. For instance, the Committee against Torture considers that States obligation “to enact

¹⁶ M. Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, *Virginia Journal of International Law*, 42:1 (2001), 81-162, p. 96.

¹⁷ Adjudication refers to the formal process of resolving a legal dispute or determining the rights and obligations of parties involved in a legal case.

¹⁸ The term “proscriptions” refers to formal prohibitions or restrictions imposed by law or authority.

¹⁹ M. Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, *Virginia Journal of International Law*, 42:1 (2001), 81-162, p. 97.

²⁰ Donal Francis Donovan and Anthea Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’, *The American Journal of International Law*, Vol. 100, No. 1 (January 2006), 142-163, pp. 144-145

legislation that clearly incorporates their obligations under the Convention and criminalizes torture and ill-treatment” aims at ensuring “the victim’s capacity to access and enjoy [their] rights [to reparation] under article 14”.²¹ By virtue of this rationale, a State that decides to exercise universal jurisdiction by enforcing its legislation that criminalizes torture according to the requirements of Article 4 of CAT and prosecute alleged perpetrators,²² is expected to enact and enforce “legislation specifically providing a victim of torture and ill-treatment with an effective remedy and the right to obtain adequate and appropriate redress [including by allowing] for individuals to exercise this right and ensure their access to a judicial remedy”.²³ Most importantly,

*“the Committee considers that the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. This is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress”.*²⁴

Nevertheless, the conventional reparation-related provisions are not considered by many States as rules of international customary law or *erga omnes* obligations. For instance, the English Court of Appeal held that “Article 14(1) [of the CAT] is not designed to *require* every other State to provide redress in its civil legal system for acts of torture committed in [the territorial State],” but “under Article 14(2) it remains permissible to provide [such] redress.”²⁵ Nevertheless, many civil law countries permit their courts to entertain civil claims in criminal cases and many of these States have universal jurisdiction. For example, in Argentina, a civil claim can be raised in a criminal proceeding,²⁶ knowing that Argentine courts can exercise universal jurisdiction over international crimes.²⁷

It is crucial to realize that the rationale of universal criminal jurisdiction is based on the concept of international response to an injury that affects the international community. On the other hand, reparations – for international crimes - concern the direct victims of the wrongful act, and that explains why criminal sanctions are objectively worse than civil sanctions (e.g., compensation) since they create greater losses (e.g., imprisonment, loss of life, stigma) compared to civil sanctions usually resulting in loss of resources.²⁸

*“When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State’s benefit. For instance, a State’s responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights”.*²⁹

Therefore, in order for the universal jurisdiction to achieve its purpose to facilitate the enforcement of fundamental norms, the endeavour to end impunity for serious violations of international law requires “according those with the greatest incentive to pursue reparations – that is, the victims of the heinous

²¹ Committee against Torture, General Comment No. 3 of the Committee against Torture – Implementation of article 14 by States parties, CAT/C/GC/3, 19 November 2012, § 19.

²² CAT, Articles 5,6, and 7.

²³ Committee against Torture, General Comment No. 3 of the Committee against Torture – Implementation of article 14 by States parties, CAT/C/GC/3, 19 November 2012, § 20.

²⁴ Committee against Torture, General Comment No. 3 of the Committee against Torture – Implementation of article 14 by States parties, CAT/C/GC/3, 19 November 2012, § 22.

²⁵ *Jones v. Saudi Arabia*, [2004] EWCA (Civ) 1394, [1].

²⁶ Argentine Code of Criminal Procedures, Articles 14-17.

²⁷ Constitution of the Argentine Nation, Article 118.

²⁸ See Abhimanyu George Jain, ‘Universal civil jurisdiction in international law’, *Indian Journal of International Law* (2015), 55(2), 209-237, p. 219.

²⁹ ILC Draft Articles Commentary, Article 33, p. 95.

conduct – the right to do so [without affecting] public authorities [...] decision to seek penal sanctions”.³⁰

Summary

Reparations are not solely rooted in international criminal law, and their adjudication and enforcement may be influenced by national laws. While the proscription and adjudication of international crimes draw from international frameworks like IHL and IHRL, the right to reparations for victims is based on these frameworks. Some States permit civil claims in criminal cases under universal jurisdiction. Universal jurisdiction aims to respond to international community injuries, while reparations address direct victims. Allowing victims to pursue reparations without hindering penal sanctions is crucial to combat impunity for serious violations.

Points for Discussion

1. There is no consensus among nations that exercising universal jurisdiction includes the obligation to provide reparation.
2. Many States argue that reparation is the responsibility of the perpetrator's home State towards the victims, and universal jurisdiction is a way to address the international community's interest in combating impunity for international wrongdoing.
3. It is important to note that when a State violates the rights of a national from another State, the violating State is obligated to provide reparation. Therefore, it is logical to assume that States have the primary duty to provide reparation to their own nationals, even if the adjudication takes place in another jurisdiction.
4. This argument is especially relevant for States exercising universal jurisdiction to proscribe and adjudicate reparation because:
 - Universal jurisdiction is a response to the failure of the perpetrator's home State to address and remedy the wrongful act.
 - The obligation to provide remedy includes both procedural and substantive aspects, where criminal proceedings, including reparation orders, can be considered procedural, and the form of provided reparation is substantive.
 - When States exercise universal jurisdiction, they should consider the obligation to provide effective remedy as a proscription of international law that justifies their exercise of universal jurisdiction.
 - Therefore, universal jurisdiction mechanisms should have the power to order reparations based on the same rationale that empowers them to prosecute individuals for wrongful acts invoking State responsibility.
5. This argument is not only important for adjudication but also for enforcement. Once criminal responsibility is established and State responsibility is invoked, it could be a valid argument to enforce reparation orders not only through individual assets but also by exploring opportunities and grounds related to State assets.
6. One challenge in this regard is the differing national legislations of States exercising universal jurisdiction, which may prescribe and adjudicate reparation with different approaches, such as civil proceedings or joinder entitlement.
7. Nevertheless, other complex issues may arise, such as determining individual victimhood resulting from specific acts of the perpetrator and the entitlement to reparation for other potential victims who may not have been identified or involved in the proceedings.

³⁰ Donal Francis Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction', *The American Journal of International Law*, Vol. 100, No. 1 (January 2006), 142-163, p. 156.

8. In light of this, another aspect to consider is whether States exercising universal jurisdiction should contemplate the issuance of collective reparation orders similar to those that can be ordered by the ICC.

7. ASSET RECOVERY IN INTERNATIONAL CRIMINAL PROCEEDINGS

Asset recovery exists in international criminal proceedings, but it was traditionally a tool for fines and orders for forfeiture as penalties additional to imprisonment. International criminal tribunals were empowered to order asset recovery measures for these purposes, except for the ICC – and other mechanisms - that enjoys the power to order asset recovery for reparations (*See annex 2*).

Points for Discussion

1. The legal basis for reparation in criminal proceedings and the forfeiture of individual property is established through the empowerment to order provisional or executive forfeiture of assets by different international mechanisms.
2. The ICC model and approach aim to overcome the previous reluctance of international criminal mechanisms and strike a balance between retributive and reparative justice.
3. In these criminal mechanisms, the targeted assets are typically those directly or indirectly derived from the crime, and when used as reparation, they benefit the direct victims.
4. Asset forfeiture in this context is contingent upon a final conviction based on the high standard of proof of "beyond any reasonable doubt."
5. Collective reparation measures are the exception rather than the norm in these cases, often targeting a specific group of victims due to limited available assets.
6. Legislation establishing asset recovery and forfeiture in criminal proceedings should ensure due process and safeguard the rights of affected individuals, including the right to appeal.

8. INTER-STATE ASSET RECOVERY

Recovering the assets of another State is a complex and sensitive matter that is governed by international law. There are several legal grounds that prohibit a State from engaging in such actions. Firstly, the principle of sovereign equality enshrined in the UN Charter ensures that all states are equal in their rights and obligations. This principle establishes that one State cannot unilaterally appropriate the assets of another without due process or consent. Secondly, the principle of non-intervention prohibits States from interfering in the internal affairs of other nations, including the seizure of their assets. It emphasizes the respect for the sovereignty and territorial integrity of States. Additionally, international treaties and agreements, such as bilateral investment treaties or free trade agreements, often provide protections for the assets and investments of foreign entities, creating legal obligations for the host State to safeguard those assets. Finally, international dispute resolution mechanisms, such as the International Court of Justice (ICJ) or arbitration tribunals, provide avenues for resolving conflicts between States peacefully and fairly, ensuring that disputes related to assets are addressed through established legal processes rather than through unilateral seizures.

In the aftermath of the 1979 hostage crisis at the United States Embassy in Tehran, the United States froze Iranian assets including bank accounts and deposits, real estate holdings, and other financial holdings owned by the Iranian Government. The assets were held in escrow and remain a subject of contention between Iran and the U.S. to this day. The USA never repurposed those assets, and the Iran-United States Claims Tribunal

(IUSCT) was established to deal primarily with disputes between individuals, companies, and governments, rather than directly between the two States.

Therefore, there is almost no legal ground or precedent that supports the confiscation or repurposing of State assets by another State even when an injured State invokes the responsibility of another State for an internationally wrongful act. Although an injured State is entitled to take countermeasures against the State responsible for the internationally wrongful act, such countermeasures must not affect, among others, the obligation to refrain from the threat or use of force as embodied in the UN Charter and other obligations under peremptory norms of general international law.³¹ Additionally, a State that chooses to take countermeasures must always fulfil its obligations under any dispute settlement procedure applicable between it and the responsible State.³²

It is worth mentioning that any precedent of State confiscation of another State's assets was faced by prolonged, complex, and costly international litigation processes. For example, the case of Certain Iranian Assets between Iran and the USA at the ICJ lasted from 2016 to 2023 until the Court released its final judgment. The case concerned the USA use of nearly \$1.75 billion in Central bank of Iran assets to satisfy judgements in favour of terrorism victims under the Foreign Sovereign Immunities Act (FSIA). In addition to the legal and financial challenges of the subject matter of the issue – inter-State asset recovery – some commentators addressed the perceived political victory of Iran by conveying the wrongfulness of the USA sanctions regime with the ICJ ruling that some of USA measures are unlawful.³³

The United Nations Compensation Commission (UNCC) was not envisioned as a court or tribunal, but rather a claims resolution facility established by the UN Security Council under Chapter VII to administer compensation claims arising out of Iraq's unlawful invasion and occupation of Kuwait in 1991.³⁴ It provided individual victims with a primary role in the process of compensation. In contrast to the established practice of providing compensation only to injured States, the UNCC compensation scheme provides a pioneering procedure whereby a State is required to provide direct compensation to both individual victims and corporate entities.³⁵ The payment of compensation awards awarded by the UNCC was provided from the Compensation Fund established by the Security Council, which was principally funded by a percentage of the proceeds generated by export sales of Iraqi petroleum and petroleum products.

Summary

Recovering the assets of another State is governed by international law and is prohibited by several legal grounds. The principles of sovereign equality and non-intervention prevent unilateral appropriation of assets without due process or consent. International treaties and agreements protect foreign assets, creating legal obligations for host States. Disputes related to assets are resolved through international dispute resolution mechanisms. Confiscation or repurposing of state assets by another State is not supported by legal grounds or precedent. Countermeasures taken by an injured State must not violate obligations under international law.

³¹ ILC Draft Articles Commentary, Article 50, p. 131.

³² Ibid.

³³ For example, see: Keian Razipour, 'After ICJ's "Certain Iranian Assets" Judgment, Iran and United States Both Claim Victory', Just Security (17 April 2023) (Available at: <https://www.justsecurity.org/85982/after-icjs-certain-iranian-assets-judgment-iran-and-united-states-both-claim-victory/>).

³⁴ UNSC SC Res. 692, 20 May 1991, S/RES/692 (1991).

³⁵ M. Cherif Bassiouni, 'International Recognition of Victims' Rights', *Human Rights Law Review* 6:2 (2006), Oxford University Press, 203-279, p. 240.

Previous cases of asset confiscation have involved prolonged litigation processes. The political implications of asset recovery cases can also be significant.

Points for Discussion

1. Recovering the assets of another State is generally opposed by most, if not all, States due to the complex legal, political, and financial implications involved.
2. Attempts or measures for inter-State asset recovery often end up in lengthy and expensive proceedings at international courts.
3. International courts are highly unlikely to view another State's asset recovery as a lawful act under established principles of international law, including sovereignty, respect for integrity, and the prohibition of intervention in the affairs of other States.
4. However, by leveraging the doctrine of State responsibility, which attributes reparation to wrongful acts, along with the right of victims to reparation and the invocation of State responsibility through the exercise of universal jurisdiction, there may be a justification for State asset recovery to fulfill the obligation of providing reparation.

9. INDIVIDUAL ASSET RECOVERY

9.1 Unlawful Conduct Entailing Individual Asset Recovery

Confiscation regulations generally allow government authorities to confiscate assets where it can be proven that they are obtained through unlawful conduct.³⁶ Although the unlawful conduct is identified in some jurisdictions as including “gross human rights abuse or violation”, the property subject to recovery must always be part of the instrumentalities or proceeds of the unlawful conduct.

Part 5 of the UK Proceeds of Crime Act 2002 clearly states that “enabling the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property which is, or represents, property obtained through unlawful conduct”, and for the same property “or which is intended to be used in unlawful conduct, to be forfeited”.³⁷ Therefore, the conduct “which constitutes, or is connected with, the commission of a gross human rights abuse or violation”³⁸ does not itself trigger the application of asset recovery powers unless it entails assets that are obtained from or used in that conduct.

Similarly, under the US Federal Law, the three types (criminal, civil judicial, and administrative) of asset forfeiture – whether *in personam* or *in rem* – are “limited to the property interests of the defendant, including any proceeds earned by the defendant’s illegal activity [and] to the property involved in the particular [criminal activity]”.³⁹

The Italian Anti-Mafia Code⁴⁰ foresees the confiscation of the means used to commit the offence, and of the possessions that represent the price, the product, or the proceeds of the said offence, or that constitute its

³⁶ See, for example, Part 5 of the UK’s Proceeds of Crimes Act 2002; Section 73 et seq of the German Criminal Code allows for assets to be confiscated in certain cases even if the owner has not been convicted of an underlying offense, if there is sufficient evidence to show that the assets are connected to criminal activity. See also Title 18 U.S.C. Chapter 46 on civil forfeiture procedures in the US.

³⁷ Part 5 of the UK’s Proceeds of Crimes Act 2002, Section 240(1).

³⁸ Ibid. Section 241(2A).

³⁹ The United States Department of Justice, Asset Forfeiture Program (Available at: <https://www.justice.gov/afms/types-federal-forfeiture>).

⁴⁰ Legislative Decree No. 159 of 6 September 2011 as amended by Law No. 161 of 17 October 2017.

employment. In some cases, this confiscation can be decided as a preventive measure by the President of the competent Court even before the first judicial hearing.

The confiscation of any frozen assets pursuant to the Foreign Illicit Assets Act (FIAA) of Switzerland must be ordered by the Federal Administrative Court only if the assets are of illicit origin,⁴¹ presuming that those assets are as such if they fulfil the conditions of inordinate increase of wealth of the foreign politically exposed person by their exercise of a public function, and the notoriously high level of corruption in the country of origin or surrounding them.⁴²

A unique development in identifying gross violations of internationally recognized human rights as unlawful conducts that entail asset recovery measures is the Canadian Act respecting the repurposing of certain seized, frozen, or sequestered assets (Bill S-217), which is still pending the third reading by the Senate of Canada.⁴³ The proposed language of the Bill does not require to prove that the frozen assets that can be confiscated and repurposed to be obtained through the unlawful conduct, i.e., the gross violations of internationally recognized human rights.⁴⁴

Summary

*Confiscation regulations generally authorize government authorities to seize assets acquired through unlawful conduct. However, in most jurisdictions, the focus is on assets that are **instrumentalities or proceeds** of the unlawful conduct, rather than the conduct itself. For example, the UK Proceeds of Crime Act 2002 allows property obtained through unlawful conduct or intended for unlawful use to be forfeited in civil proceedings. Similarly, US federal law limits asset forfeiture to the defendant's property interests and assets involved in the specific criminal activity. The Italian Anti-Mafia Code allows confiscation of the means used to commit the offense and possessions representing the price or proceeds of the offense. In Switzerland, the confiscation of frozen assets under the Foreign Illicit Assets Act requires a finding of illicit origin and inordinate wealth increase through public function exercise. A pending Canadian bill, Bill S-217, introduces the concept of gross violations of internationally recognized human rights as grounds for asset recovery, without the requirement to prove the assets were obtained through unlawful conduct.*

Points for Discussion

1. Except the forthcoming Canadian Bill, any individual asset recovery regulation needs to be justified by the illegality of the assets as such or its acquisition or use.
2. Neither conviction- nor non-conviction-based asset recovery measures would be empowered to forfeit the assets of, for instance, a sanctioned individual or entity for human rights violations for their mere perpetration of these violations.
3. The Canadian Bill might be a model to advocate for with other States.

⁴¹ Foreign Illicit Assets Act (FIAA), Section 4, Article 14(2).

⁴² Foreign Illicit Assets Act (FIAA), Section 4, Article 15.

⁴³ Follow the progress at: Parliament of Canada, LEGISinfo, S-217 (Available at: <https://www.parl.ca/legisinfo/en/bill/44-1/s-217?view=progress>).

⁴⁴ Parliament of Canada, Senate of Canada, BILL S-217, An Act respecting the repurposing of certain seized, frozen or sequestered assets, Articles 5 and 6.

9.2 Nationally

Individual asset recovery involves the legal process of identifying, locating, and recovering assets that have been unlawfully obtained or wrongfully taken (ill-gotten). In many jurisdictions, civil remedies such as restitution, compensatory damages, or specific performance may be available to individuals or entities seeking to recover their assets. These remedies can be pursued through civil litigation in the respective State's courts. The laws and procedures governing asset recovery may address various forms of wrongdoing, including fraud, embezzlement, money laundering, or corruption. National legislation often empowers individuals or entities to initiate legal actions to trace and recover assets through mechanisms such as freezing injunctions.

Some States have specific legislation or legal frameworks dedicated to facilitating asset recovery. For instance, the United Kingdom has the Proceeds of Crime Act 2002, which provides authorities with powers to trace and recover assets derived from criminal activities. The United States has the Foreign Corrupt Practices Act (FCPA) and the Racketeer Influenced and Corrupt Organizations Act (RICO), among others, which allow for the recovery of assets involved in corruption or organized criminal activities.

Summary

Individual asset recovery involves the legal process of identifying and recovering unlawfully obtained or wrongfully taken assets. Procedures and legal frameworks for asset recovery vary across jurisdictions. Civil remedies such as restitution, compensatory damages, or specific performance can be pursued through civil litigation. Laws and procedures address various forms of wrongdoing like fraud, embezzlement, and corruption. National legislation may empower individuals to initiate actions through freezing injunctions to temporarily freeze assets pending legal proceedings. Some countries have specific legislation dedicated to asset recovery, such as the UK's Proceeds of Crime Act 2002 and the US's Foreign Corrupt Practices Act and Racketeer Influenced and Corrupt Organizations Act.

9.3 Internationally

One of the key legal bases for international cooperation in individual asset recovery efforts is bilateral mutual legal assistance treaties (MLATs) that are negotiated and entered into between States. MLATs typically outline the procedures and mechanisms for cooperation in criminal matters, including asset recovery. They establish the legal framework for exchanging information, providing investigative assistance, and facilitating the freezing, forfeiture, and repatriation of assets.

Additionally, the United Nations Convention against Corruption (UNCAC) is a widely recognized legal instrument that provides a comprehensive framework for combating corruption, including provisions on asset recovery. UNCAC encourages States to cooperate in tracing, freezing, and returning stolen assets covering criminal financial activities including bribery, embezzlement, money laundering, illicit enrichment, corruption in the private sector, and concealment, conversion, or transfer of proceeds of crime.

Furthermore, frameworks developed by international organizations facilitate cooperation and mutual legal assistance. Interpol, for instance, provides a platform for law enforcement agencies to exchange information, coordinate investigations, and issue international alerts for wanted individuals and assets.

Financial Action Task Force (FATF)⁴⁵ recommendations on anti-money laundering and combating the financing of terrorism establish standards for States to prevent and detect illicit financial flows, enhancing international cooperation in asset recovery efforts.

Regulation (EU) 2018/1805 of the European Parliament and of the Council, adopted on 14 November 2018, focuses on the mutual recognition of freezing orders and confiscation orders within the European Union (EU). The regulation aims to enhance the cooperation and effectiveness of asset recovery efforts among EU member States in cases involving criminal activities. It establishes a framework for the mutual recognition and enforcement of freezing and confiscation orders issued by judicial authorities in one member State, thereby facilitating the recovery of assets located in another member State. The regulation sets out criteria and procedures for the recognition and enforcement of these orders, including the protection of the rights of affected individuals. It promotes the principle of mutual trust and cooperation among member States, contributing to the fight against organized crime, money laundering, and other serious criminal offenses within the EU. By streamlining the process of freezing and confiscating assets, the regulation aims to improve the overall effectiveness of asset recovery measures and strengthen the EU's ability to combat cross-border criminal activities.

Summary

International cooperation in individual asset recovery relies on bilateral mutual legal assistance treaties (MLATs) that establish procedures for cooperation, including information exchange, investigative assistance, and asset freezing, forfeiture, and repatriation. The United Nations Convention against Corruption (UNCAC) encourages States to cooperate in tracing and returning stolen assets related to various financial crimes. International organizations like Interpol and the Financial Action Task Force (FATF) facilitate cooperation through information sharing and anti-money laundering standards. The EU's Regulation 2018/1805 promotes mutual recognition and enforcement of freezing and confiscation orders among member States to strengthen asset recovery efforts, combat organized crime, and enhance the EU's ability to address cross-border criminal activities.

Points for Discussion

1. Individual asset recovery is a well-established practice that targets financial crimes, recognizing that unlawfully obtained assets are the result of illegal acts.
2. Initially, asset recovery is a national concern, allowing each State to exercise its sovereignty in combating crime and protecting public assets, as well as the rights of individuals and entities under its jurisdiction.
3. Both national and international frameworks for individual asset recovery focus on financial crimes that transcend borders in an interconnected world.
4. The primary objective of ill-gotten asset recovery is to return the assets to their rightful owners, which could be the State in the case of public funds or private individuals or entities for their private property.
5. Repurposing ill-gotten assets for reparative measures to address victims of violations under IHL and IHRL lacks a logical justification.
6. There must be a clear connection between the perpetrator, the assets (whether instrumentalities or proceeds), and the victims to justify using the recovered assets for reparative purposes.
7. The EU Regulation 2018/1805 specifies that freezing or confiscation orders can be issued for crimes falling under the jurisdiction of the ICC.

⁴⁵ An intergovernmental organisation founded in 1989 on the initiative of the G7 to develop policies to combat money laundering, to maintain certain interest, and terrorism financing.

8. Therefore, international crimes that involve ill-gotten assets and fall within the scope of mutual recognition among EU Member States can be subject to freezing and confiscation orders.

9.4 Conviction-Based Individual Asset Recovery

9.4.1 Conviction-Based Fine or Penalty

When an individual is ordered by a court to pay fines or penalties as part of a legal judgment, and if they fail to comply with the payment, the court may enforce the judgment by seizing their property. This process is commonly referred to as a "judgment execution" or "enforcement proceedings."

The specific rules and procedures for seizing individual property vary across jurisdictions, but generally, the court will issue an order or warrant to authorize the seizure of assets. The court-appointed enforcement officers will then carry out the seizure by identifying and taking control of the individual's assets. The seized assets are typically sold or liquidated, and the proceeds are used to satisfy the outstanding fines or penalties.

It is important to note that the seizure of property to pay fines and penalties is typically a measure of last resort when other means of collection, such as wage garnishment or payment plans, have been unsuccessful. Courts generally prioritize less intrusive methods before resorting to the seizure of personal property.

Under the German Code of Civil Procedure (*Zivilprozessordnung*), if an individual fails to satisfy a court-ordered fine or penalty, the court can initiate enforcement proceedings to seize their property. The court may issue an enforcement order (*Vollstreckungsbescheid*) or a judgment (*Vollstreckungsurteil*) specifying the outstanding amount and granting authority for enforcement measures. The French Code of Civil Enforcement Procedures (*Code des procédures civiles d'exécution*) and the Civil Code (*Code civil*), when an individual fails to comply with a court-ordered fine or penalty, the court can initiate enforcement proceedings to seize their property. The enforcement measures are carried out by judicial officers (*huissiers de justice*) who have the authority to execute the court's decision. The seized property is typically sold through public auctions or private sales, and the proceeds are used to satisfy the outstanding fines or penalties.

Summary

Under certain circumstances, a court can seize an individual's property to enforce the payment of fines and penalties. This process, known as "judgment execution" or "enforcement proceedings," occurs when an individual fails to comply with a court-ordered payment. The court authorizes the seizure through an order or warrant, and enforcement officers or bailiffs carry out the seizure by taking control of assets such as real estate, bank accounts, or vehicles. These assets are then sold, and the proceeds are used to satisfy the outstanding fines or penalties. It's important to note that property seizure is typically a last resort after other collection methods have been exhausted. The laws and procedures for seizure vary between jurisdictions, but generally follow similar principles of enforcement.

9.4.2 Conviction-Based Redress

In certain cases, a court may order the seizure of individual property to redress victims. This typically occurs in situations where the court has determined that the individual's actions have caused harm or losses to another party, and it seeks to provide compensation or restitution to the victims. Some common scenarios where property seizure for victim redress may occur include:

1. **Civil Judgments:** In civil cases where a court has found the individual liable for damages or losses suffered by another party, the court may order the seizure of the individual's assets to satisfy the judgment and provide compensation to the victim.
2. **Restitution Orders:** In criminal cases, a court may issue a restitution order requiring the convicted individual to compensate the victims for the harm or losses caused. The court can authorize the seizure of the individual's property to enforce the restitution order and ensure that the victims are appropriately compensated.

Examples of Restitution Orders in some national jurisdictions

1. **United States:** Federal and state laws allow for the imposition of restitution orders in criminal cases. These orders require convicted individuals to compensate their victims for the losses they have suffered as a result of the criminal offense. The amount of restitution is typically determined by the court based on the actual harm suffered by the victims.
2. **United Kingdom:** The Proceeds of Crime Act 2002 provides for the imposition of confiscation orders in criminal cases. Confiscation orders can include a requirement for the offender to pay a sum of money as compensation to the victims. The amount is based on the court's assessment of the financial benefit obtained by the offender from the criminal conduct.
3. **Canada:** The Criminal Code allows for restitution orders in criminal cases. The court can order the offender to pay restitution to the victims to compensate for their losses or damages suffered as a result of the offense. The amount is based on the actual harm caused to the victims and may include expenses related to their recovery or financial losses.
4. **Australia:** Various State and territory legislation provides for restitution orders in criminal cases. These orders require the offender to pay compensation to the victims for the harm or losses they have incurred. The court considers factors such as the impact of the offense on the victims and their financial circumstances in determining the amount of restitution.
5. **Germany:** The Criminal Code (*Strafgesetzbuch*) includes provisions for compensation for damages (*Schadenswiedergutmachung*) in criminal cases. The court can order the convicted individual to pay restitution to the victims to compensate for their losses resulting from the offense. The amount is determined based on the actual harm suffered by the victims.

Case Study: US Civil Litigation⁴⁶

There are three U.S. primary statutes that provide civil remedies for human rights abuses occurring outside the U.S.: the Alien Tort Statute (ATS), the Torture Victim Protection Act (TVPA), and the Trafficking Victim

⁴⁶ Please note that the US judicial system is complex and multi-layered in terms of jurisdictions and statutes. The presented case study shall not be considered as a definite and comprehensive overview. Specialised US litigation experts should always be consulted.

Protection Reauthorization Act (TVPRA). Additionally, the Foreign Sovereign Immunities Act (FSIA) allows victims to sue alleged human rights violators, but only if specific statutory exceptions apply pursuant to section 1605. Otherwise, the FSIA, along with the common law governing foreign official immunity, protects state actors from prosecution in U.S. courts.

The ATS was extremely limited in practice following the US Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.* (2013) upholding a presumption against extraterritorial application of ATS over foreign companies. The FSIA lists a set of conditions that must be met before a federal district court may hear a claim: (i) the foreign country must be designated a “state sponsor of terrorism at the time [of] the act” giving rise to the claim, (ii) the “claimant or the victim” must be a “national of the United States,” a member of the armed forces, or a government employee at the time of the act, and (iii) the claimant must have afforded “the foreign state has a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration”. The TVPA is deemed to be more flexible or promising in practice since it does not list similar conditions and limitations. However, it is still challenging due to immunity grounds decided by the concerned courts.

Under any of these statutes, and whether there are asset recovery orders or not, the following main conditions persist:

1. The personal jurisdiction shall exist as to every claim for relief by the plaintiff(s). In other words, the litigation concerns the directly affected or injured individuals in relation to the defendant’s alleged perpetration.
2. The relief is ordered to the plaintiff(s) for their own economic, solatium, and punitive damages.

In the famous Marie Colvin lawsuit against the Syrian Government, the plaintiffs were Colvin’s sister, niece, and nephew. The US District Court for the District of Columbia awarded them monetary damages in the amount of over USD 300 million.

Points for Discussion

1. Some jurisdictions impose fines or penalties as part of the punishment for criminal offenses.
2. Asset recovery is aimed at enforcing court judgments to pay fines or penalties when other means of payment have been exhausted.
3. Recovered assets in these cases belong to the State and are typically liquidated and settled in the State's treasury.
4. In some legal systems, fines and penalties may be used to redress victims of criminal conduct.
5. There is no universal rule for repurposing recovered assets for reparation, and it varies on a case-by-case basis.
6. Questions and challenges arise regarding the applicability of repurposing fines in universal jurisdiction proceedings and whether it is limited to civil claims.
7. The willingness of states to repurpose fines for reparation depends on their legislation and interest in doing so.

9.4.3 Conviction-Based Asset Forfeiture

In cases involving criminal activities, such as organized crime, drug trafficking, or fraud, a court may order the forfeiture of the individual's assets as a means to both punish the offender and provide

restitution to the victims. The seized assets can be sold, and the proceeds are used to compensate the victims.

Conviction-based asset recovery operates as an *in personam* order, taking action against the individual. It necessitates a trial and conviction, typically as part of the sentencing process. In some jurisdictions, the standard of proof required for the forfeiture process may be lower (such as the balance of probabilities) compared to the criminal phase. Nevertheless, the prerequisite of a criminal conviction implies that the government must initially establish the individual's guilt "beyond a reasonable doubt" or to the extent that the judge holds an "intimate conviction" of their guilt. Criminal forfeiture systems can adopt an object-based approach, requiring the prosecuting authority to prove that the assets in question are directly derived from or used in the commission of the crime. Alternatively, they can employ value-based systems, enabling the forfeiture of the offender's benefit derived from the crime, without necessitating proof of a direct connection between the crime and the specific property object.⁴⁷

In cases of corruption convictions involving the embezzlement of State funds, the proceeds obtained through corrupt activities are repatriated to the country of origin instead of being repurposed as compensation to individual victims.⁴⁸ The process of asset repatriation can be complex, as exemplified by the situation surrounding Vice President Nguema Obiang of Equatorial Guinea. In various criminal proceedings conducted in Switzerland, the United States, and France, assets belonging to Obiang, amounting to over \$200 million, have been forfeited or confiscated. However, the respective governments are faced with the challenge of determining how to effectively return this wealth to the people of Equatorial Guinea, given that the corrupt regime responsible for the initial asset theft remains in power. The same applies to the case of Rifat Al Assad, who was convicted of money laundering by the French authorities.

It should be recalled that the UNCAC, pursuant to Article 57, obliges States to "return the confiscated property to the requesting State party in cases of embezzlement of public funds or of laundering of embezzled public funds [...] on the basis of a final judgement in the requesting State party – this is a requirement that can be waived by the requested State party".⁴⁹ This obligation applies also to confiscated property in the case of proceeds of any other Convention offences, when the requesting State party reasonably establishes its prior ownership of such confiscated property to the requested State party.⁵⁰ In other words, any State that confiscates ill-gotten assets from public funds or proceeds of other financial offences must presume the affected State as the prior legitimate owner, and the confiscating State must apply the UNCAC and any other international law obligations in this regard.⁵¹

Summary

Conviction-based asset recovery focuses on individuals and requires a trial and criminal conviction. The standard of proof may be lower than in the criminal phase, but a conviction is necessary. Asset forfeiture can be based on a direct connection between the assets and the crime or on the offender's benefit from the crime. In corruption cases involving embezzlement of State funds, the recovered proceeds are typically repatriated to the country of origin rather than compensating individual victims. Repatriation can be complex when corrupt regimes are still in power. The UNCAC requires States to return confiscated property to the requesting State

⁴⁷ See Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, and Larissa Gray, 'Stolen Asset Recovery – A Good Practices Guide for Non-Conviction Based Asset Forfeiture', *The International Bank for Reconstruction and Development / The World Bank* (2009), p. 13.

⁴⁸ Article 57 of the UNCAC.

⁴⁹ UNODC, Legislative guide for the implementation of the United Nations Convention against Corruption, Second revised edition (2012), p. 227.

⁵⁰ *Ibid.* p. 228.

⁵¹ Syria signed but has not ratified the UNCAC yet. However, due to the global ratification of the UNCAC, some commentators argue that it is part of the international customary law.

Party in cases of embezzlement or laundering of public funds, based on a final judgment. The confiscating State must presume the affected State as the **prior legitimate owner** and comply with international law obligations. Although Syria has not ratified the UNCAC, its global ratification may consider it part of international customary law.

Points for Discussion

1. Asset forfeiture in this context is specifically applicable to financial-related crimes.
2. War criminals who cannot be proven to have illegally used or profited from specific assets are not subject to conviction-based asset forfeiture proceedings.
3. Perpetrators of international crimes may often be involved in illegal financial processes or transactions, which can lead to prosecution for both the crimes themselves and their involvement in financial organized crimes.
4. A State must have a connection either with the person or the assets in order to pursue asset forfeiture, such as the perpetrator being a citizen or the assets falling under the State's jurisdiction.
5. Regional and international mutual legal assistance mechanisms and procedures can be useful in establishing the link between a war criminal in one State and their ill-gotten assets in another.
6. All asset recovery and forfeiture processes based on conviction must go through a judicial process.
7. An interesting question to explore is whether individuals or entities subject to sanctions regimes (*see more below*) should be targeted by organized crime and asset recovery regimes instead.

9.5 Non-Conviction Based Individual Asset Recovery

In addition to the conviction-based asset recovery (or forfeiture), non-conviction based (NCB) confiscation is increasingly gaining traction. NCB shares the same objective, namely the forfeiture by the state of **the proceeds and instrumentalities**⁵² of crime to deter the unlawful activities and to compensate the victim, whether it is the state or an individual.⁵³

NCB asset forfeiture, known by various terms such as "civil forfeiture," "*in rem* forfeiture," or "objective forfeiture" in certain jurisdictions, operates by targeting the asset itself rather than focusing on an individual. Unlike asset recovery and forfeiture based on criminal convictions, NCB procedure does not necessitate criminal proceedings and benefits from a lower evidentiary threshold. It requires demonstrating that the property is tainted, meaning it is either the proceeds of a crime or an instrument used in the commission of a crime.⁵⁴ This lighter burden of proof eases the government's responsibility, allowing for the possibility of obtaining forfeiture even in cases where there may be insufficient evidence to support a criminal conviction. Nevertheless, it is not available in all jurisdictions, and other civil law jurisdictions require the same higher standard of proof used for criminal conviction: "intimate conviction of the truth".⁵⁵

According to the German Criminal Code (Section 76a) and Sections 435 *et seq* of the Criminal Procedure Code, a court does not require evidence of an individually committed criminal offence to impose confiscation; instead,

⁵² "Instrumentalities" are the assets used to facilitate crime, such as a car or boat used to transport narcotics.

⁵³ See Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, and Larissa Gray, 'Stolen Asset Recovery – A Good Practices Guide for Non-Conviction Based Asset Forfeiture', *The International Bank for Reconstruction and Development / The World Bank* (2009), p. 13.

⁵⁴ OECD, Principle 4. Have effective powers to freeze, seize and confiscate assets (Available at: <https://www.oecd-ilibrary.org/sites/49967781-en/index.html?itemId=/content/component/49967781-en>).

⁵⁵ Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, and Larissa Gray, 'Stolen Asset Recovery – A Good Practices Guide for Non-Conviction Based Asset Forfeiture', *The International Bank for Reconstruction and Development / The World Bank* (2009), p. 16.

if the court is convinced that the source of the specific assets was a criminal offence, confiscation may be ordered.⁵⁶

Some jurisdictions implement NCB confiscation before criminal proceedings, while others postpone it until the conclusion of the criminal investigation. NCB confiscation is valuable in situations where criminal confiscation is not possible, such as when the offender has died, fled the jurisdiction, or enjoys immunity.⁵⁷ It is also useful when the ownership of an asset is unknown, there is insufficient evidence for a criminal conviction, or criminal proceedings result in an acquittal. NCB confiscation is advantageous in cases involving third-party ownership or complex investigations, allowing assets to be frozen and seized before formal charges are filed. While civil law jurisdictions often permit restraint orders, common law jurisdictions have varying approaches. NCB confiscation systems should be seen as a complement to criminal confiscation, not a replacement. When feasible, efforts should be made to secure a conviction and utilize efficient criminal confiscation mechanisms. However, NCB confiscation legislation can be encouraged as an additional tool, provided it aligns with the principles of the legal system in question.

Summary

*NCB confiscation is gaining popularity alongside conviction-based asset recovery. NCB aims to deter unlawful activities and compensate victims by forfeiting **the proceeds and instrumentalities** of crime. Unlike conviction-based forfeiture, NCB focuses on the asset itself rather than individual guilt, allowing for a lower evidentiary threshold and bypassing criminal proceedings. It requires demonstrating that the property is tainted, either as crime proceeds or an instrument used in a crime. This lighter burden of proof facilitates forfeiture even when there's insufficient evidence for a criminal conviction. However, NCB availability varies across jurisdictions, with some requiring a higher standard of proof. NCB is useful when criminal confiscation is not possible, such as in cases involving unknown ownership, fugitive offenders, or insufficient evidence. It can complement criminal confiscation by freezing and seizing assets before formal charges are filed. While efforts should prioritize criminal conviction and efficient confiscation mechanisms, NCB legislation can be an additional tool if aligned with the legal system's principles.*

Points for Discussion

1. NCB forfeiture is increasingly encouraged as an effective tool to address challenges in judicial processes, supported by platforms like UNCAC and the EU regulation 2018/1805.
2. NCB forfeiture operates as an *in-rem* forfeiture and it is worth exploring whether it can be applied alongside or in accordance with sanction regimes.
 - Sanctioned businesses and individuals related to Syria are targeted due to their involvement in violations of IHL and IHRL in Syria.
 - NCB forfeiture can be ordered if the relevant authorities determine that the assets of these individuals or entities are directly or indirectly linked to the instrumentalities or proceeds of those violations, as sanctions are not imposed through judicial decisions.
 - Establishing a necessary nexus between these assets and State jurisdiction remains a significant challenge.

⁵⁶ CMS Law-Now, Germany: New law makes confiscating proceeds of crimes easier (11 July 2017) (Available at: <https://cms-lawnow.com/en/ealerts/2017/07/germany-new-law-makes-confiscating-proceeds-of-crimes-easier>).

⁵⁷ See, for example, *United States v. \$506,069.09 Seized from First Merit Bank*, 664 F. App'x 422 (6th Cir. 2016).

- A crucial question is whether States would accept the application of such measures without the possibility of criminal confiscation, as NCB should be complementary rather than a replacement.
- Another challenge is the limited likelihood for affected persons or entities to enjoy their rights to due process and remedy, including the right to appeal.

10. SANCTION REGIMES AND INDIVIDUAL ASSET RECOVERY

Targeted sanctions are implemented against individuals and entities, with the purpose of freezing their assets within the jurisdiction imposing the sanctions and/or restricting their travel to that jurisdiction. Additionally, any citizen of the imposing State is forbidden from engaging in financial transactions with the sanctioned individual or entity. These limitations serve as a deterrent to individuals, discouraging them from further violations and holding them accountable for previous transgressions. Even if the sanctioned individual has no identifiable assets in the imposing jurisdiction and no intention of visiting, the international condemnation expressed through these sanctions can still influence their behavior.

At present, assets that are subject to sanctions cannot be utilized as reparations, as they are effectively inaccessible to the targeted individual unless they are unfrozen or a license is granted for their use. Any repurposing of individual frozen assets may be considered as unlawful transfer of ownership in violation of property rights as established by international law and national legislations. For instance, the US Supreme Court has held that the blocking orders under the International Emergency Economic Power Act (IEEPA) sanctions regime are not considered “uncompensated taking”,⁵⁸ since this does not constitute a violation of the US Constitution Fifth Amendment clear prohibition of uncompensated *taking* of private property for public use, i.e., the transfer of ownership. In practical terms, this can result in assets remaining frozen indefinitely. The current legislations lack provisions that would enable the transfer of ownership of frozen assets to the sanctioning government, which would allow for the liquidation of those assets and the utilization of the proceeds as reparations.

Targeted thematic sanctions are designed to combat violations of IHL and IHRL or financial crimes such as corruption. They do not serve as a form of judicial accountability, meaning they cannot be considered as punishments or penalties imposed through legal proceedings. Consequently, sanction regulations do not permit the confiscation or repurposing of frozen assets. As a result, frozen assets can remain untouched in the jurisdictions imposing the sanctions for extended periods. In the rare instances where such frozen assets are recovered, they are typically seized and returned to the original owning State for their benefit.⁵⁹

The UN sanctions Regime allows for frozen funds to be released to provide for a sanctioned person’s basic needs.⁶⁰ Interestingly, the EU Sanctions Regime adopts a broader exemption in addition to those identified by the UN Sanctions Regime, that it allows any Member State to “authorize 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 [...]

⁵⁸ *Paradissiotis v. United States*, 49 Fed. Cl. 16, 20 (2001).

⁵⁹ For instance, the Libyan government reclaimed possession from Saad Gaddafi of a London mansion worth 10 million pounds after a British court ruled in March 2012 it had been bought using stolen Libyan State funds: Estelle Shirbon, ‘Libyan govt reclaims Gaddafi mansion in London’, *Reuters* (09 March 2012) (Available at: <https://www.reuters.com/article/libya-britain-mansion-idINDEE8280DY20120309>).

⁶⁰ UN Security Council Resolution 2368 (2017), Adopted by the Security Council at its 8007th meeting, on 20 July 2017, S/RES/2368 (2017), § 81.

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”.⁶¹

Although this authorization enables the use of the frozen assets of the sanctioned person for restorative purposes, it should be understood as an assistance to those who might be affected by the freezing of the assets, and not beyond that. Asset freezing must not “translate into a transfer of ownership nor does the competent authority confiscate or take possession of the funds, the funds and resources remain at all material times within the ownership of the sanctioned individual or entity”.⁶²

Summary

Targeted sanctions are implemented to freeze assets and restrict travel of individuals and entities, serving as a deterrent and holding them accountable. Repurposing or confiscating frozen assets is generally not allowed, as it violates property rights. Current legislation lacks provisions for transferring ownership of frozen assets to the sanctioning government for utilization as reparations. Thematic sanctions do not replace judicial accountability and cannot be considered legal penalties, therefore frozen assets may remain inaccessible for extended periods. In rare cases of recovery, frozen assets are usually returned to the original owning state. The UN and EU sanctions regimes allow for limited release of frozen funds for humanitarian purposes, but it does not result in a transfer of ownership. Asset release should be seen as assistance rather than confiscation, with the funds remaining in the ownership of the sanctioned individuals or entities.

Points for Discussion

1. Sanctions are intended to exert pressure on sanctioned individuals and entities, compelling them to cease their involvement in violations.
2. The presence of victims of such behavior establishes a connection between the assets of the sanctioned individuals/entities and the State imposing sanctions.
3. NCB mechanisms could be a viable approach, provided that the sanctioned assets are proven to be instrumentalities or proceeds of the wrongful acts committed by the sanctioned individuals/entities.
4. Repurposing fines and penalties imposed on non-compliant individuals/entities under sanction regimes can also be considered as a means of addressing reparation.

II. ASSETS REPURPOSING: PROPOSED SEQUENCED LEGAL ARGUMENTS

In this section, a series of legal and logical foundations are presented to support the argument and advocacy for repurposing assets for reparative measures for victims of international crimes in Syria. It is important to note that the suggested "roadmap" should not be considered as a definitive and established legal basis due to the complexity of existing legal frameworks, which impose limitations on such arguments. The proposed roadmap primarily builds upon the contextual and legal elements discussed earlier, and each component or aspect is susceptible to counter legal arguments.

⁶¹ Council Decision 2011/782/CFSP of 01 December 2011 concerning restrictive measures against Syria and repealing Decision 2011/273/CFSP, Chapter 4, Article 19, § 3(e).

⁶² Goldsmith Chambers, Finance for Restorative Justice: Opinion (March 2021), pp. 34-35.

1. The obligation to provide effective remedy:

- a. Criminal accountability is an essential aspect of providing an effective remedy. The right to justice and the right to reparation are interconnected, with reparation being the substantive component of an effective remedy.
- b. The responsibility to provide effective remedies, including reparations, lies with the State in cases of international crimes.
- c. The right to reparation imposes an obligation on all States, including those exercising universal jurisdiction.
- d. The implementation of universal jurisdiction by States, in the absence of action by the home State, is a means to enforce the right to an effective remedy and not merely an expression of international interest in addressing the global impact of violations of peremptory norms of international law.
- e. States committed to upholding *jus cogens*, *erga omnes* obligations, and combating impunity should ensure that their legal systems offer effective remedies through both judicial and non-judicial procedures, capable of determining the appropriate form and content of reparation proportional to the harm caused by the internationally wrongful act.
- f. The Syrian State responsibility triggered by the international crimes and other serious violations committed by its agents concerns not only the direct victims that could be identified. States invoking the Syrian State responsibility should consider the systematic and widespread of these wrongful acts and its influence on the collectivist of victims.
- g. Collective reparative measures should always be considered accordingly.

2. Individual asset recovery for reparation measures:

- a. Fines and penalties are legitimate legal measures that can be prescribed by each State in its national legislation and judiciary.
- b. The recovery of individual assets by States to fulfill the punitive aspect of criminal proceedings can also be applied in cases under universal jurisdiction.
- c. States have the authority to amend their legislation to ensure that prosecution for international crimes includes financial fines and penalties, similar to crimes adjudicated within their national jurisdiction for cases with obvious nexus to their territorial or personal jurisdictions.
- d. Since fines and penalties become the property of the State, repurposing them for reparations measures does not violate the rights of any third party.
- e. This concept can also be extended to assets recovered as a result of convictions related to non-compliance with imposed sanctions on individuals and entities believed to be involved in violations of IHL and IHRL.
- f. A connection between the assets of sanctioned individuals and entities and the State imposing sanctions can be established by considering the presence of victims within their jurisdictions.
- g. Utilizing NCB mechanisms may be a valid approach, provided that the assets subject to sanctions are determined to be instrumentalities or proceeds of the wrongful acts committed by the sanctioned individuals and entities.
- h. Fines and penalties imposed on non-compliant individuals and entities within sanction regimes can also be considered for repurposing.

ANNEX 1: REPARATION IN SOME INTERNATIONAL INSTRUMENTS

- Article 8 of the Universal Declaration on Human Rights (UDHR).
- Article 2 of the International Covenant on Civil and Political Rights (ICCPR).
- Article 6 of the Convention on the Elimination of Racial Discrimination (CERD).
- Article 24 of the International Convention for the Protection of All persons from Enforced Disappearance (ICPPED).
- Article 14 of the Convention Against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment (UNCAT).
- Article 13 of the European Convention on Human Rights (ECHR).
- Article 47 of the EU Charter of Fundamental Rights.
- Article 36 of the American Convention on Human Rights.
- Article 27(1) of the African Court Protocol.
- Article 75 of the Rome Statute of the International Criminal Court (Rome Statute).
- Article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on land (Hague Convention IV).
- Article 91 of the Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflict (Additional protocol I).
- Rule 150 of the ICRC Customary International Humanitarian Law.
- The 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 (Basic Principles on Reparation).⁶³

⁶³ UNGA, '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', Resolution adopted on 16 December 2005, A/RES/60/147.

ANNEX 2: REPARATION AND ASSET RECOVERY IN INTERNATIONAL CRIMINAL MECHANISMS

Entity/Mechanism	Reparation	Asset Recovery	Purpose
<i>International Military Tribunal (Nuremberg Tribunal/IMT)</i>	No reparation measures	Empowered to forfeit property stolen by the convicted	Delivery to the Control Council for Germany
<i>The post-WWII Control Council Law No. 10</i>	No reparation measures	Pre-conviction forfeiture and restitution of property that was wrongfully acquired	Commissioned the Control Council for Germany with the decision about the recovered assets' disposal
<i>ICTY and ICTR</i>	Victims may bring actions in a national court	Forfeiture of property and proceeds acquired by criminal conduct	Return to their rightful owners
<i>ICC</i>	Reparation orders and measures	Forfeiture of property as penalty, if linked to the crime, and for reparation purposes	Return to rightful owners, and for reparation procedures.
<i>The Special Court for Sierra Leone (SCSL)</i>	Victims may attempt to seek compensation in a national court or other competent body	Forfeiture of assets that were acquired unlawfully or by criminal conduct by the convicted person	Return to their rightful owner or to the State of Sierra Leone
<i>The Special Panels for Serious Crimes in East Timor (SPSC)</i>	Trust Fund for Victims (never established)	Asset forfeiture measures against convicted persons	Penalty in addition to imprisonment
<i>The Extraordinary Chambers in the Courts of Cambodia (ECCC)</i>	Extensive civil party participation and a reparations regime	Forfeiture of assets	Penalty and return to State
<i>The Special Tribunal for Lebanon (STL)</i>	Victims' ability to apply to national courts or other competent bodies for compensation	Not permitted to order fines and forfeiture of assets.	N/A
<i>The Extraordinary African Chambers (EAC)</i>	Trust Fund for reparations	Forfeiture of assets derived directly or indirectly from crimes	Penalty and return to rightful owners
<i>The Kosovo Specialist Chambers (KSC)</i>	Reparation measures and orders	Forfeiture of assets	Penalty and reparation

