



FINANCIAL ACCOUNTABILITY FOR PERPETRATORS OF TORTURE AND OTHER SERIOUS HUMAN RIGHTS ABUSES

Policy Briefing

EXECUTIVE SUMMARY

Perpetrators of torture and other serious human rights violations often profit financially from the abuses they carry out, whether directly (for example, through the proceeds of forced labour) or indirectly (for example, as part of a broader scheme of grand corruption). Yet, rarely are perpetrators deprived of their assets, nor do survivors receive reparations to repair adequately the harm they have suffered.

With the support of the Knowledge Platform for Security & Rule of Law, we have identified a number of models that can promote financial accountability, through seizing or confiscating perpetrators' illicit

assets, and/or using those assets to pay reparations to their victims.

As part of this project, we have identified a number of recommendations, both for practitioners, and policy and legislative changes:

Practitioners should:

- Consider a range of potential models when developing case strategy, given that not all models may be suitable for a particular claim.

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- Make use of inter-disciplinary learning and knowledge exchange to improve case outcomes.
- Be sensitive to the risks of adverse human rights impacts while pursuing financial accountability, for example, ensuring due process requirements are satisfied.

States and appropriate public authorities should (with the support of civil society organisations ('CSOs') and practitioners):

- Increase transparency in the ownership of assets, for example, through the creation of registers of beneficial ownership, to help identify ownership of illicit assets in complex holding structures.
- Improve regulation of professional advisors and service providers to limit perpetrators' ability to use and introduce the proceeds of human rights abuses into 'clean' sectors of economies.

- Develop non-conviction based mechanisms to seize the proceeds of serious human rights abuses specifically, and include provision for victims to participate in and benefit from non-conviction based confiscation mechanisms.
- In criminal prosecutions for serious human rights abuses, ensure that compensation for victims is considered from the outset of proceedings.
- Promote the introduction and use of targeted human rights sanctions regimes.
- Reduce barriers to civil claims by victims of serious human rights abuses, including protecting victims from adverse costs risks.

THE PROBLEM

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

Too often, judgments fail to include adequate reparations or damages to repair the harm caused by abuses. And even where reparations are awarded, compliance is patchy and inconsistent. For example, awards totalling nearly \$300 million have been issued in favour of victims of torture and other abuses per-

petrated by the regime of Hissène Habré in Chad. Yet these victims have so far been paid none of this sum.

Instead, victims are often left to rely upon the generosity of donors and states. Yet, again, provision is erratic and incomplete. Rarely is the support framed as reparations, to which victims of serious violations of human rights law and gross violations of international humanitarian law have a right under international

Case Study: Hissène Habré

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

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

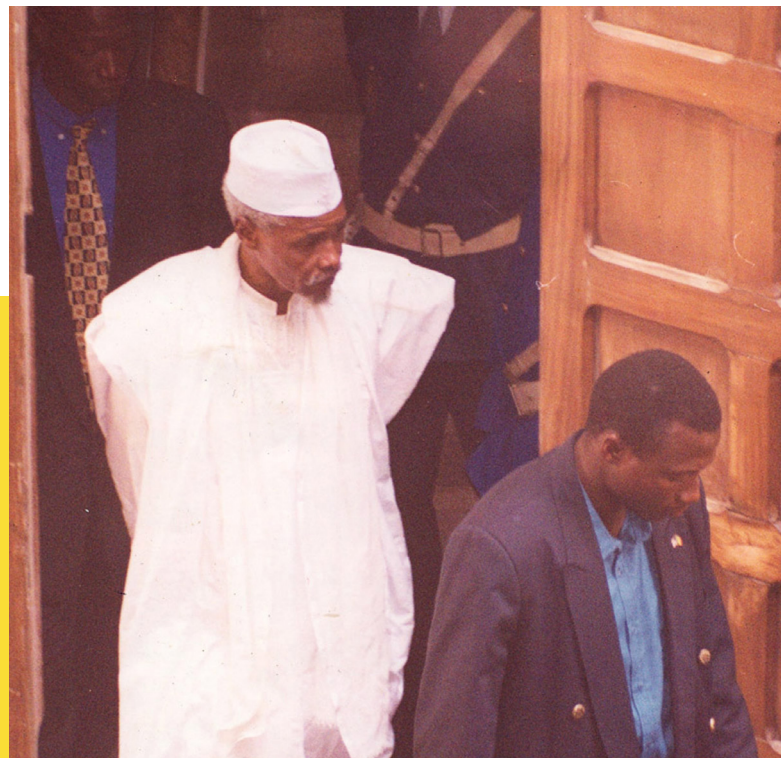


Photo credit: Doudou Sall



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

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

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

This situation is unacceptable. Above all, it represents a significant failure to achieve justice and reparations for victims of human rights abuses and violations. It also serves to promote impunity. Perpetrators are rarely made to surrender the proceeds of abuses and violations, and there therefore is little economic disincentive (and indeed a strong incentive) to carry out violations that may be economically lucrative. The lack of compliance with existing judgments undermines confidence in justice systems. And the flows of illicit funds through major financial centres harm the international finance system and developed economies, with particular sectors being vulnerable, such as the London real estate market.

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

THE SOLUTION

With the support of the Knowledge Platform for Security & Rule of Law, we have been working to change policy and practice, and to challenge this status quo. We have developed a Framework document, which identifies a range of models to promote financial accountability, and so challenge the financial impunity that some perpetrators enjoy. In developing the Framework, a key objective has been to identify models which use perpetrators' assets to fund reparations for their victims. Where this is not feasible, we have identified models that can still provide some measure of financial accountability by depriving perpetrators of assets (or at least their use and enjoyment). These models include:

- Private civil claims;
- Non-conviction based asset confiscation powers;
- Criminal confiscation and compensation orders;
- Sanctions, including human rights and other regimes; and
- Advocacy to financial institutions and other sectors to reduce perpetrator access to the global financial system.

Case Study: Colonel Dorélien

Perpetrator's lottery win provides funds for compensation: Colonel Dorélien was a member of the military dictatorship that ruled Haiti from 1991-1994. Following the end of that regime, he fled to the United States. Claims were brought on behalf of a victim of a massacre perpetrated by forces under his command, and on behalf of another victim who was tortured by the Haitian armed forces. In 2007, the US Federal Courts issued a judgment ordering Colonel Dorélien to pay compensation of \$4.3 million to the two victims. Some \$580,000 was recovered, drawn from Colonel Dorélien's 1997 jackpot win in the Florida state lottery.²

The models we have identified often involve complex issues and may not be suitable for all claims. For example, some models involve restrictive jurisdictional requirements. Some models may rely upon public authorities exercising discretion to act in a particular way. Further, even where multiple models may be viable for a specific claim, the different models may lead to different outcomes. As such, it is important to conduct a thorough evaluation of which models may be most appropriate for a particular case. We have identified key characteristics, including threshold requirements, and potential beneficial outcomes and challenges or disadvantages to aid in this evaluation process.

This Framework also identifies some of the key issues that are likely to arise when applying these models,

² See The Center for Justice and Accountability, Crimes Against Humanity under Haitian High Command: Jean v Dorélien (available at: <https://cja.org/what-we-do/litigation/jean-v-dorelien/>).

and provides technical guidance on these points. Tracing and locating the assets of perpetrators is likely to be an area of significant importance, particularly where assets are located in offshore jurisdictions or held in complex holding structures using shell companies or nominees. The distribution of assets can pose challenges, particularly for mass-claimant actions. Moreover, complex funding solutions may be required to support the high costs associated with some models.

This area of work seeks to build upon established practice and precedent from other sectors, particularly the anti-corruption and serious and organised crime sectors. Some of the models rely upon tools which are commonly used in those sectors, such as non-conviction based confiscation mechanisms, which allow authorities to seize the proceeds of criminal conduct. Others rely upon tools and techniques which are used in other contexts, such a cross-border enforcement of civil judgments arising in the commercial context.

Case Study: the Mau Mau case

Civil claim against UK leads to £15 million settlement for Mau Mau victims: During the Kenya emergency in the 1950s, thousands of Kenyan nationals were subjected to torture and other serious human rights abuses by the British colonial administration. In 2009, five test claims were brought against the United Kingdom's Foreign and Commonwealth Office ("FCO") in the English courts. These alleged that the United Kingdom was responsible for torture and other abuses. The UK government ultimately settled the claim for approximately £20 million (including legal costs).³



Photo Credit: Leigh Day

³ UK to compensate Kenya's Mau Mau torture victims, The Guardian, 6 June 2013 (available at: <https://www.theguardian.com/world/2013/jun/06/uk-compensate-kenya-mau-mau-torture>)

POLICY AND PRACTICE RECOMMENDATIONS

In the course of developing the Framework document, we have identified a number of policy and practice recommendations, which we set out below. These are divided between recommendations for practitioners, and legislative and policy recommendations:

Practitioner recommendations

Expansive approach to developing case strategy: As set out in the Framework, there are a range of models that can promote or achieve financial accountability. These models offer a diversity of different outcomes, and most, if not all, have complex threshold requirements that need to be met if they are to be used. For these reasons, we recommend that practitioners invest considerable time at the outset of case development, in considering a range of models before finalising case strategy. It may be helpful, for example, to have a process of internal or independent review (subject to any concerns regarding confidentiality or privilege) to test strategy development.

Inter-disciplinary learning and knowledge exchange: A number of the models are built on tools used in other sectors, for example, the anti-corruption sector. These sectors also have considerable expertise in technical aspects of claims seeking to freeze and confiscate assets. We recognise the importance of and opportunities associated with inter-disciplinary learning exchange to improve outcomes in claims to promote financial accountability, and encourage practitioners to take advantage of these opportunities.

Protecting rights of alleged perpetrators: The corollary of measures taken to promote financial accountability is the potential impact on the rights of perpetrators. CSOs and others should ensure, as far as appropriate, that steps taken to promote financial accountability do not themselves transgress the fundamental rights of alleged perpetrators, including the rights to due process. Many of the models we have identified may contain safeguards to protect the rights of perpetrators, but where this is not the case, it may be appropriate for CSOs to consider how to mitigate potentially adverse impacts.

Policy and legislative recommendations:

1. General

Transparency and Beneficial Ownership: Financial accountability is dependent upon being able to identify perpetrators' assets, in order to take action against them. Sophisticated perpetrators may make use of complex holding structures, including those that obscure ownership of assets, and impede investigations and claims. CSOs seeking financial accountability should support efforts to promote transparency in the ownership of assets, for example, through the creation of registers of beneficial ownership.

Professional advisors and service providers: The focus of the Framework is on perpetrators of torture and other serious human rights abuses. However, perpetrators do not work in isolation. Those perpetrators who use sophisticated structures to hold assets rely upon professional advisors and service

providers to aid with designing and building such structures. We recommend that:

- Professional advisors and service providers (such as lawyers, accountants and other professional advisors) should take appropriate steps to ensure that they do not support, facilitate or profit from perpetrators' corrupt practices or human rights abuses or associated financial flows, including denying service where necessary.
- Regulatory and supervisory bodies should consider urging their members to refrain from providing services to perpetrators or facilitators of serious human rights abuses where they cannot guarantee that they will not be supporting, facilitating or profiting from corrupt practices or human rights abuses.
- States should consider supplementing anti-money laundering law, regulation and guidance to address specifically the financial flows that may be associated with torture and other serious human rights abuses, and restrict the ability of professional advisors and service providers in appropriate circumstances.

2. Non-conviction based confiscation mechanisms

Establish mechanisms to seize the proceeds of serious human rights abuses: Non-conviction-based confiscation mechanisms have proven to be a valuable tool in combatting corruption and serious organised crime, by seizing the proceeds of such conduct, even in the absence of a formal criminal conviction. Governments should consider establishing comparable mechanisms for seizing the proceeds of human rights abuses, to limit financial incentives for perpetrating abuses and depriving perpetrators of the pro-

ceeds of such conduct.

Establish mechanisms for victims to participate in and benefit from non-conviction based confiscation mechanisms:

At present, there is often considerable discretion left to governments regarding the use and disposal of confiscated assets, with few (if any systems) granting victims of serious human rights abuses standing to participate in proceedings or formal entitlement to benefit from confiscated assets. Governments should consider modifying or supplementing mechanisms to enable victims to participate in and benefit from assets seized through non-conviction based confiscation mechanisms. Approaches may include building upon existing rights for victim participation in proceedings.

3. Criminal confiscation and compensation measures

Ensure that compensation for victims is considered from the outset of criminal proceedings: Criminal prosecutions can play a significant role in providing accountability following torture and other serious human rights abuses. To address the financial consequences of violations (both perpetrators profiting from abuses and the practical consequences that victims suffer), we recommend that law enforcement and prosecuting authorities should prioritise compensation from the outset of criminal proceedings, so that it is fully integrated into case strategy. This may include measures to freeze and preserve assets where there is a risk of asset dissipation or asset flight.

4. Global Human Rights Sanctions Regimes

Promote uptake and use of targeted human rights sanctions regimes: Targeted global human rights regimes provide a flexible tool which can be used to provide a measure of financial accountability in response to serious human rights violations. While

there are existing regimes, including in the United States of America, Canada and (as of July 2020) the United Kingdom, there is still considerable scope for other countries to introduce regimes. For example, comparable regimes are under consideration in the European Union and Australia. We recommend that the European Union and Australia implement planned sanctions regimes, and that governments allocate sufficient resources to ensure that sanctions can be implemented across a range of targets. We recommend that CSOs support the introduction and expansion of targeted human rights sanctions regimes, and engage with those mechanisms to target perpetrators (including those who have benefited financially from the abuse they have carried out). CSOs can also work to encourage states to adopt a multilateral and co-ordinated approach to sanctions, to maximise their impact.

5. Civil Claims

Reduce barriers to private civil claims: Private civil claims have the potential to provide significant financial accountability for perpetrators of torture, while also providing a mechanism for victims of torture to obtain damages or compensation from perpetrators. There are, however, a significant number of barriers and difficulties associated with the use of this model:

- *Limitation periods:* In some jurisdictions, private claims may not be brought after a certain period has elapsed. While discretion may exist for a court not to apply limitation periods, we recommend that states introduce specific exceptions for claims built upon torture and other serious human rights abuses.
- *International enforcement:* A key challenge associated with bringing a private civil claim arises when a judgment is issued in one jurisdiction, but enforcement takes place against assets located in another jurisdiction. This can lead to complexities, and potentially additional litigation. To reduce and mitigate this risk, we recommend that states accede to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.
- *Adverse costs protection:* In some judicial systems, an unsuccessful party may bear some or all or the successful party's costs. This presents significant risks to vulnerable victims, including the risk of re-victimisation in the event that their claim is unsuccessful, and costs are pursued against them. We recommend that jurisdictions where such a costs risk exist consider introducing or expanding the scope of protections to victims of serious human rights abuses.

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

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