REDRESS

Ending torture, seeking justice for survivors

FINANCIAL ACCOUNTABILITY AT THE INTERNATIONAL CRIMINAL COURT:

Compliance with ICC Asset Recovery Requests

September 2024

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Introduction

In recent decades, non-governmental organisations (**NGOs**) and State actors have made significant efforts at both the domestic and international level to support victims of serious human rights abuses in obtaining justice. However, these efforts have not always benefited from the mechanisms necessary to force the perpetrators of such abuses to bear adequate financial accountability for the harm they have caused. All too often, victims do not obtain adequate reparation for their suffering, particularly in the form of meaningful financial compensation.

REDRESS has launched a project under the auspices of its "Financial accountability programme" to explore how the asset recovery mechanisms of the International Criminal Court (**ICC** or **Court**) can be deployed to obtain financial recovery for the victims of international crimes. The overarching purpose of this project is to provide clear guidance for national stakeholders regarding how to respond to, and implement, asset recovery requests from the ICC (**Requests**). In doing so, REDRESS is focusing on key legal and policy recommendations for strengthening States Parties' cooperation with such Requests. As such, this work will help give "teeth" to the existing international framework on ICC asset recovery procedures to ensure that perpetrators of international crimes are held financially accountable and that the survivors of atrocities obtain reparations.

The ICC (established by the Rome Statute in 2002) is a key part of the international framework that seeks to secure reparations for victims of violations of international humanitarian law. The ICC has the ability to seek the cooperation of States Parties to recover the assets of persons accused of international crimes for use as reparations for victims. According to publicly available sources, as of 2022 the ICC is known to have made at least seven requests for asset recovery cooperation (although the actual number of requests is likely to be far higher), with the Pre-Trial Chamber having requested assistance in respect of the following persons: Thomas Lubanga Dyilo, Germain Katanga, Jean-Pierre Bemba Gombo, Uhuru Muigai Kenyatta and others, and Aimé Kilolo Musamba.[1] Significantly, the assets available for seizure need not be directly linked to, or be the proceeds of, the alleged crimes. This presents an opportunity for victims of international crimes to obtain reparation for the harm caused to them. It also provides a disincentive for perpetrators to carry out human rights violations, even if such abuses may be economically lucrative.

However, REDRESS is concerned that the domestic legal frameworks of many States Parties are not equipped to comply readily with a Request for asset recovery assistance from the ICC. As such, REDRESS has conducted a review of the existing legal and institutional framework in eight European nations, as well as the United States (**U.S.**) (each a **Relevant State**). These jurisdictions were chosen based on the likelihood of where persons accused of international crimes before the ICC may have assets. The question posed in each case is: "*how ready is the applicable legal and institutional framework to respond to, process and execute the ICC's asset recovery requests?*"

This Report is structured as follows:

a. Chapter 1 considers the ICC framework for asset recovery and reparations;
b. Chapter 2 provides a summary of the national laws of each Relevant State (which are then considered in further detail in The Annexures to the Report); and

1 Daley Birkett, Asset Freezing at the International Criminal Court and the United Nations Security Council: A Legal Protection Perspective (Eleven International Publishing, 2021), 100-101.

c. Chapter 3 sets out a comparative analysis of the frameworks in the Relevant States and brings out common themes and issues.

Chapter 1 considers the framework for recovery of assets under the Rome Statute and related Rules of Procedure and Evidence (**RPE**). The obligations of States Parties to cooperate with Requests is set out in Part 9 of the Rome Statute (Articles 86 to 102), and includes Requests pertaining to identifying, tracing, seizing and freezing assets under Article 93(1)(k). Within this framework there are two primary components to cooperation Requests: (a) the powers of the ICC to call for cooperation; and (b) the obligations of States Parties to cooperate with Requests. States Parties' cooperation on asset recovery may be requested by various organs of the Court at different stages of the proceedings. Whilst there is some lack of clarity on the precise scope and extent of these obligations (which is explored in greater detail in the Report), States Parties have a general obligation to fully cooperate with Requests made by the Court and must have the requisite domestic procedures in place in order to do so. States Parties have flexibility in how they implement a Request through their domestic systems, but procedures that hinder cooperation will cause them to fall short of their obligations under the Rome Statute (for instance, cooperation cannot be preconditioned on obtaining consent of the accused or other parties).

Against this backdrop, Chapters 2 and 3 consider how "ready" the Relevant State is to respond to, process and execute Requests. Domestic legislative and institutional structures raise some of the most difficult issues to resolve in ensuring effective cooperation, as the nature of implementing legislation and the roles of various State agencies are largely matters of domestic constitutional and legal organisation. Chapter 2 assesses each Relevant State's "readiness" by considering the following factors:

- The existence of legislation/specific legislative powers that implement the obligations of the Rome Statute into the domestic legal framework.
- The clarity and comprehensiveness of the legislation. Broadly, it appears that the most effective national implementing laws are those that modify existing domestic procedures to the specific context of ICC Requests with sufficient flexibility to adapt to developing ICC practice. The role of central authorities and the extent to which there is coordination of the different stages of assessing and executing Requests also has a material impact on the effectiveness of the Relevant State's framework.
- The ease of adaptability of existing laws where the implementing statute does not cover every eventuality or if there is no adequate implementing statute. In particular, it is helpful if implementing legislation clarifies which domestic laws of general application apply where necessary and the interaction of such general laws with provisions that apply specifically to Requests.
- The Relevant States' ability to accommodate ICC case law and interpretive guidance regarding provisions of the Rome Statute (particularly where these are replicated in national laws). National laws which are able to respond to evolving ICC practice are more likely to make the process of responding to ICC Requests easier.
- The ability of Relevant States to meet the full range of Requests from the ICC. The ease of responding to ICC Requests depends on how flexible national laws are in allowing asset recovery for a wide range of purposes and in relation to a wide range of assets.

On the basis of these factors, the Report assigns the following qualitative "readiness" numerical scores out of 10 to each Relevant State, with a higher number indicating a higher level of "readiness". In general, the Report considers a score of 9-10 to be 'Very Good', 7-8 to be 'Good', 3-6 to be 'Fair' and 0-2 'Poor'.

Rating	Numeric score	Jurisdictions
Very Good	9	France, Switzerland, United Kingdom
Good	7	Germany, Belgium
Fair	6	Italy
	5	Spain
	4	Portugal
Poor	1	United States

Key challenges

The basis of this scoring system and specifics of each Relevant State's score is explored in further detail in the Report, but at a broad level, there is general political and social willingness to cooperate with the ICC across most Relevant States (with the U.S. being a notable exception, where cooperation is prevented by the political/policy context). Further, much of the necessary framework is in place for most Relevant States to respond effectively to Requests from the ICC. However, there is significant variation between the Relevant States on the degree of "readiness" to respond to a Request.

- Six of the nine Relevant States have implemented specific self-standing legislation to incorporate the Rome Statute into their law.[22] Of the remaining three, France has incorporated the Rome Statute into existing legislation. Portugal and the U.S. do not have any implementing legislation but have long-established domestic procedures in place for asset identification, tracing, seizure and freezing, as well as mechanisms for enforcing confiscation orders.
- All the Relevant States (except the U.S.) have designated a national body to receive cooperation requests from the ICC. However, there is variation in whether these bodies act simply to process requests and pass them to another relevant organ of the Relevant State for action or whether it is also itself the body responsible for implementing Requests (the latter of which is likely to be a more efficient approach).
- All the Relevant States (except the U.S.) have a formal process in place for receiving ICC cooperation requests and determining their admissibility within the jurisdiction prior to commencing implementation (or enforcement) steps. However, there is variation among the Relevant States in relation to substantive admissibility requirements and grounds for refusal or postponement (although in no case is the decision regarding admissibility open to appeal). Broadly, the legal reasons for denying Requests are generally consistent (and typically consist of natural justice, avoidance of double jeopardy, national security and public order).
- None of the implementing legislation provides comprehensive timeframes for processing Requests (although some contemplate time limits for implementation to be included in Requests and others include time periods for certain steps in the admissibility or enforcement process). This increases the risk that an ICC Request might be substantially delayed in a potentially overburdened criminal justice system.
- Tracing and identification of assets are generally not directly regulated by implementing legislation, but most Relevant States have established procedures for asset tracing and identification as part of their general criminal procedure rules. This means that the ease of responding to ICC Requests depends on how flexible national laws are in allowing for investigatory steps for a wide range of purposes and in relation to a wide range of assets.

2 Belgium, Germany, Italy, Switzerland, Spain and the UK.

- Most Relevant States appear to contemplate forfeiture in relation to enforcement of ICC orders. A number of statutes provide for transfer of assets to the ICC upon forfeiture, although few provide details of the relevant procedure.
- A key issue is that seizure or freezing measures under most domestic seizing procedures ordinarily require a nexus between seized assets and a crime. While this requirement may be an obstacle to seizure/freezing of assets, it is not always clear how strong the link to a crime needs to be or whether the crime needs to be one investigated and prosecuted by the ICC.
- As to the rights of the accused and third parties, the Relevant States do not provide much protection under national law in respect of tracing or identification of assets beyond mechanisms for warrants or orders allowing for measures which might implicate rights (particularly privacy rights). Greater protections and various avenues for challenge appear in procedures relating to seizure or freezing of assets (and in the majority of cases are available to third parties as well as the accused). Generally, measures to permanently deprive parties of assets provide some form of third party protection but few allow challenge by the convicted person (albeit human rights claims may arise in certain instances in jurisdictions that are signatories to the European Convention on Human Rights (**ECHR**), which includes all of the Relevant States other than the U.S.).
- None of the Relevant States expressly regulate management of assets seized or frozen pursuant to ICC Requests or provide for specific remedies in case of mismanagement of seized or frozen assets or loss of value.
- A considerable gap across almost all national laws is the absence of clear procedures triggering release of assets on acquittal of an accused by the ICC. Many of the Relevant States also have complex or unclear mechanisms for the handover of assets in the absence of an action to enforce against the assets, which make it practically more challenging to effectively respond to Requests for cooperation.

Other overarching issues that this Report addresses include:

- The interaction of each Relevant State's framework for Requests and applicable sanctions regimes. Notably, none of the Relevant States has any express mechanism to resolve a conflict between their obligations to the ICC and applicable sanctions regimes. Accordingly, whether sanctions regimes will become a bar to cooperation with ICC requests depends largely on an interpretation of domestic sanctions and criminal justice or mutual legal assistance regimes.
- In-country and cross border cooperation in responding to ICC Requests. Most Relevant States do not specify the full range of inter-agency cooperation necessary to comply with Requests and implementation tends to rely on prosecutorial, judicial and police authorities. They also do not generally contemplate cross-border cooperation (although in practice this might take place through the UN in specific cases).
- The role of civil society in assisting with responding to ICC Requests. Relevant States generally do not carve out an express role for civil society (but equally do not explicitly bar its involvement).
- The role of the Ljubljana-Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes (the **Ljubljana-Hague Convention**) in facilitating inter-State cooperation on asset recovery requests for the benefit of victim reparations. While the Convention would reinforce the ICC's framework for inter-State cooperation on asset recovery, several Relevant States have yet to sign and ratify it, thereby impeding its effectiveness.

A broad theme across the Relevant States is that there is significant uncertainty about how each Relevant State's framework would work in practice as several have never received a publicly known Request and their frameworks remain largely untested. The few Relevant States that have received publicly known Requests have dealt with only a small number to date. Therefore, local courts in most Relevant States have not had the opportunity to interpret the relevant implementing legislation to identify gaps and contradictions.

Recommendations

Against this backdrop, the Report provides recommendations to enhance each Relevant State's ability to respond to Requests. A key recommendation is for the Relevant States to provide more transparency on how they would evaluate and assess the approval and execution of ICC Requests for assistance. This could be done, by way of example, through ensuring better public access to actions implemented by the Relevant State to cooperate with Requests from the ICC, or by publishing guidance for NGOs and civil society on the relevant implementing legislation.

Other recommendations in the Report include:

- Ensuring that clear procedures are put in place regarding pretrial, trial and postconviction investigation measures that may be taken;
- Introducing the relevant procedures for pretrial, trial and postconviction antidissipation measures that do not require the Request to ultimately be linked to fulfilling a forfeiture order nor clearly directed at the proceeds of crime but at the assets of the accused more generally;
- Providing specific procedural rules on the management of seized assets, recourse for asset mismanagement and provisions for effective monitoring of assets;
- Providing clear mechanisms for asset handover and return (including trigger mechanisms and parties responsible for the return, release or transmission of assets); and
- Providing a clear mechanism to resolve any conflicts with applicable sanctions regimes.

The Report explores all of the issues set out above in more detail. The Report also includes practical guidance for national stakeholders regarding how to respond to, and implement, ICC asset recovery Requests. Each jurisdiction has its own annexure, which systematically details how to (i) identify and trace the assets of accused persons; (ii) seize and freeze the assets of the accused; and (iii) forfeit the assets of the accused persons and hand them over to the ICC. The Annexures also provide further detailed, countryspecific recommendations.

The work thus far has focused on identifying key strengths and weaknesses across the inscope jurisdictions and potential areas for improvement. As a next step, REDRESS is planning to engage with a wide range of stakeholders to develop the findings further, including consultations with relevant embassies and national stakeholders. The success of this review will depend on further engagement with these stakeholders to convert its recommendations into actions, to ensure as far as possible that perpetrators of human rights abuses are no longer able to enjoy financial impunity and to provide effective mechanisms for using perpetrators' assets to compensate their victims.

CHAPTER 1: ASSET RECOVERY AND REPARATIONS AT THE ICC

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The ICC plays a crucial role in the global justice system, with the authority to collaborate with State Parties to recover the assets of individuals accused of international crimes.

Introduction: The context of cooperation

This review assesses the extent to which States, in light of their national legal frameworks, are in a position – in other words, their "readiness" – to support the work of the ICC in tracing assets and recovering funds. Recovering funds for the purpose of delivering reparations to victims of international crime is an important focus of the ICC. The Assembly of States Parties (**ASP**) has noted that "*since the identification, tracing and freezing or seizure of any assets of the convicted person are indispensable for reparations, it is of paramount importance that all necessary measures are taken to that end, in order for relevant States and relevant entities to provide timely and effective assistance…*".[3] The links between asset recovery requests and the "*benefit of victims*" in the form of reparations is integral to the scheme of the Rome Statute and has been reinforced in ICC case law and emerging practice.

This review focuses primarily on Article 93(1)(k) of the Rome Statute[4] because it is the key provision of the Statute which governs the obligations of States to cooperate with the ICC's asset recovery mandate. Cooperation under Article 93(1)(k) may overlap with other forms of cooperation, such as the execution of searches and seizures as contemplated in Article 93(1)(h) and the provision of records and documents as contemplated in Article 93(1)(i).

3 Resolution on Victims and affected communities, reparations and Trust Fund for Victims, Resolution ICC-ASP/13/Res.4, para 10 12 January 2023.

4 Article 93(1)(k) of the Rome Statute relates to States Parties' duty to assist with the Court's requests for the identification, tracing and freezing or seizure of assets.

Moreover, the language of Article 93(1)(k) states that asset recovery requests are for the purpose of "*eventual forfeiture*". In this context, the Court has interpreted "*forfeiture*" broadly to incorporate the divestiture of property without compensation, including for the purpose of using it as reparations for victims (see 6.4(a) below). In contrast, in some national legal systems, "*forfeiture*" is permitted only after a conviction has been secured, and only in relation to the proceeds or instrumentalities of a crime (or assets otherwise connected with a crime). For this reason, the role of States in the enforcement of ICC orders relating to fines, forfeitures and reparations, including under Article 109 of the Rome Statute, is also relevant to States' "readiness" to assist the Court in asset recovery efforts. There are two primary components to cooperation requests: (a) the obligations of States Parties to assist with requests from the ICC; and (b) the powers of the ICC to call for cooperation.

The Obligations of States Parties

The obligations of States Parties to cooperate with requests from the ICC are set out in Part 9 of the Rome Statute ("*International Cooperation and Judicial Assistance*"). Within this Part, the following articles are noted for this analysis:

Article 86 ("*General obligation to cooperate*"):

> "*States Parties **shall**, in accordance with the provisions of this Statute, **cooperate fully with the Court** in its investigation and prosecution of crimes within the jurisdiction of the Court.*" (emphasis added)

Article 88 ("*Availability of procedures under national law*"):

> "*States Parties **shall ensure** that there are **procedures available under their national law for all of the forms of cooperation** which are specified under this Part.*" (emphasis added)

Article 93 ("*Other forms of cooperation*") subsection (1)(k):

> "*States Parties **shall**, in accordance with the provisions of this Part and under procedures of national law, **comply with requests by the Court** to provide the following assistance in relation to investigations or prosecutions: … (k) The **identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture**, without prejudice to the rights of bona fide third parties*". (emphasis added)

Article 99 ("*Execution of requests under articles 93 and 96*") subsection (1):

> "*Requests for assistance **shall be executed in accordance with the relevant procedure under the law of the requested State** and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process*." (emphasis added)

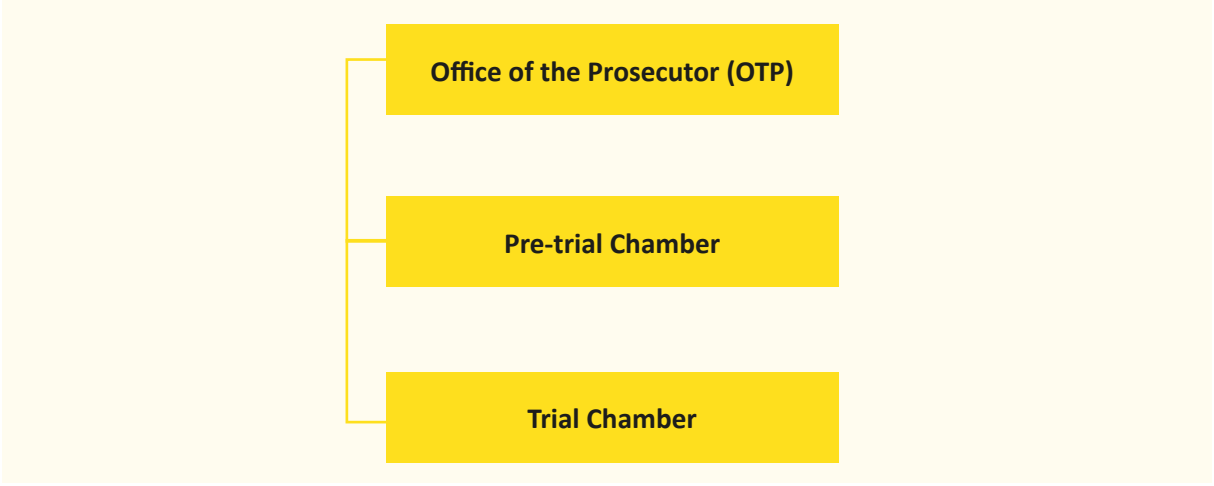
States Parties are thereby obliged to cooperate fully with the ICC and to ensure that national law provides the means to do so. The Rome Statute (and its associated Rules and Regulations) does not prescribe the content of such national procedures (nor can it do so).[5] Trial Chamber V(B) has recognised that Article 93(1) read together with Article 99(1) explicitly requires national law procedures to facilitate cooperation requests, which means that, "*where, as a matter of national procedural law, judicial intervention is required in order to execute particular*

5 Due to the principles of sovereignty and international treaty cooperation, the Rome Statute cannot prescribe the content of the implementing national laws that incorporate it into domestic legal frameworks.

requests, domestic judicial authorities shall be engaged in the ordinary manner and in accordance with relevant procedures available under national law".[6] The Trial Chamber added the qualifier that Articles 93(1) and 99(1) "*envisage that national law will facilitate rather than impede the execution of cooperation requests emanating from the Court*".[7] The effect is that while the Court recognises that States have flexibility in how they implement requests through their domestic systems, procedures that effectively undermine cooperation do not satisfy States Parties' obligations.

The powers of the ICC to call for State cooperation

State cooperation in relation to asset recovery may be requested by the Office of the Prosecutor (**OTP**), as well as by Pre-Trial and Trial Chambers. In addition, the Registry has powers to conduct financial investigations for the purposes of managing the Court's legal assistance scheme to accused / suspected persons (and the victim support scheme of the Court),[8] and to support the Presidency in enforcing financial orders of the Court.[9] In 2022/2023, the Registry transmitted 300 primary requests for cooperation of any kind to States Parties, other States, and international and regional organisations and also worked closely with the OTP "*within the inter-organ working group* […] *to develop a network of partners to foster information exchange and cooperation in the identification, freezing and seizure of assets*."[10] The Registry's financial investigations appear to be undertaken throughout the course of proceedings,[11] although it does not appear that formal cooperation requests are required for these purposes.[12] For this reason, Registry requests are not considered in further detail. Thus, the key organs of the Court which can make cooperation requests in relation to asset recovery are as follows:



6 Prosecutor v Kenyatta (Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date), ICC-01/09-02/11, 31 March 2014 (the Kenyatta Adjournment Decision), para 31, 12 January 2023.

7 *Kenyatta Adjournment Decision*, para 31

8 The Rome Statute enables the ICC to assign legal assistance "*in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay*" (art 44(2)(c); art 67(1)(d)). The scheme is administered by the Registry which is required to determine an applicant's "means" (Regulations of the Court, Doc No ICC-BD/01-05-16 (adopted 12 November 2018) (Regulations of the Court), regs 83–85).

9 See *Prosecutor v. Ntaganda* (Reparations Order) ICC-01/04-02/06 (8 March 2021) (Ntaganda Reparations Order), para 255.

10 International Criminal Court, 'Report of the International Criminal Court on its activities in 2022/23' (2023) A/78/322, paras 80 and 87, 26 October 2023.

11 See for example *Prosecutor v. Bemba et al*. (Decision on the 'Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba'), ICC-01/05-01/13-1485-Red, 17 November 2015 (Kilolo Lifting Decision) paras 20-24; *Prosecutor v. Katanga* (Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07, 24 March 2017 (Katanga Reparations Order) para 327; *Ntaganda Reparations Order* para 254.

12 Regulations of the Registry, ICC-BD/03-03-13, reg 132(2); International Criminal Court, Financial investigations and recovery of assets, (November 2017), note 3, at 6, 23 January 2023; ICC, *Report on cooperation challenges faced by the Court with respect to financial investigations*, Workshop 26-27 October 2015, The Hague, Netherlands, note 3, at 2; Aaron Moss, 'Asset Preservation, State Cooperation and the International Criminal Court' (2021) 22 Melbourne Journal of International Law 57, 64.

- **The OTP**, as part of its investigative powers, may seek the cooperation of States Parties for purposes of conducting investigations within a State pursuant to provisions of Part 9 (Article 54(2)(a)).[13]
- **The Pre-Trial Chamber** may, at any time after it has issued a warrant or summons,[14] issue a request for imposition of protective measures for the purposes of forfeiture, "*in particular for the ultimate benefit of victims*" (Article 57(3)(e)). As discussed further at 6.4(c) below, in interpreting Article 57(3)(e), the Court has confirmed that protective measures may be ordered as a pre-trial measure and, importantly, that assets subject to preservation measures need not be derived from or linked to alleged crimes within the Court's jurisdiction.[15]
- After conviction, **the Trial Chamber** may make an order for reparations to victims including ordering payment through the Trust Fund for Victims (**TFV**) established under Article 79 (Article 75(4)). It may also seek State cooperation to give effect to a reparations order (Article 93(1)).[16] In addition, the Trial Chamber may impose fines and order forfeiture of proceeds, property and assets "*derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties*" (Article 77(2)(b)).

As set out in Chapters 2 and 3 there is some variation in how closely national laws reflect the various stages of an ICC investigation, trial and conviction / enforcement and, in particular, how the lifecycle of an ICC investigation and trial are accommodated by States Parties' procedures for satisfying Article 93(1)(k) requests. The remainder of this chapter addresses the basis on which each of the OTP, Pre-Trial Chamber and Trial Chamber may issue asset recovery requests; the manner in which ICC decisions have expanded and clarified the scope of what the ICC may request of States Parties; and the corresponding obligations of States Parties. It must be noted that the Pre-Trial Chamber's powers pursuant to Article 57(3)(e) have contributed the most to the development of publicly available ICC case law and that this also informs how requests of the OTP and Trial Chamber should be interpreted.

Definitions

The Rome Statute does not define "*identification, tracing, freezing or seizure*". The Court has also not given a definitive interpretation of these terms, and there is a possibility for misalignment between the text of the Rome Statute and the Court's purposive interpretation of these terms. It also may lead to gaps in national legislation or difficulties applying national legislation to meet ICC requests. This is discussed further in Chapter 2.

A consistent interpretation of these terms is, however, helpful for comparison of how readily national laws accommodate ICC Requests. For these purposes, this review has used definitions based on guidance from the Court, academic literature, and UN Conventions and sanctions statements.[TB1]

13 The OTP may also pursue investigations without State cooperation if authorised by the Pre-Trial Chamber as contemplated in Article 54(2)(b). Such steps contemplate OTP investigatory measures without State Party cooperation and where the State lacks any authority or mechanism in the judicial system to execute a request. This review does not deal with this scenario as its focus is on States Parties' readiness to cooperate pursuant to their Part 9 obligations.

14 The Pre-Trial Chamber may apply for a warrant of arrest or summons at "*any time after initiation of an investigation*" (Article 58).

15 See Aaron Moss, 'Asset Preservation, State Cooperation and the International Criminal Court' (2021) 22 Melbourne Journal of International Law 57, 64 with reference to *Prosecutor v* [REDACTED] *(Judgment on the Appeal of the Prosecutor against the Decision of* [REDACTED]), Appeals Chamber, Case No [REDACTED], 15 February 2016, paras 1, 45-50; *Prosecutor v Lubanga (Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58)* ICC-01/04-01/06, 10 February 2006 (***Lubanga***), paras 130–138; *Prosecutor v Ntaganda (Decision on the Prosecution Application for a Warrant of Arrest)* ICC-01/04-02/06, 6 March 2007, para 85; *Kilolo Lifting Decision*, paras 17-18 (per Judge Schmitt); and the approach of the defence counsel in *Bemba* (see *Prosecutor v Bemba (Public with Confidential Ex Parte (Defence Only) Annexes 1 and 2)* ICC-01/05-01/13, 1 November 2016, annex 1, paras 71, 97.

16 Rome Statute, art 75.

TB1 Daley J Birkett, 'Asset Freezing at the International Court and the United Nations Security Council: A Legal Protection Perspective' (2021), Eleven international Publishing, The Hague, accessed 18 December 2022, 10-12 (Asset Freezing).

Identification and tracing of assets

The Court's literature indicates that "*identification*" and "*tracing*" include financial investigations[TB2] as preliminary steps for further asset recovery measures. Asset tracing activities include the gathering of evidence through law enforcement agencies, prosecuting services or investigating magistrates using a range of measures. Where these evidence-gathering methods could infringe property, privacy or other rights, they ordinarily require court supervision or permission.[TB3]

This review adopts a working definition of "*identification and tracing*" (considered together) as information-based and investigatory measures to locate and describe assets, property and other financial information relating to the estate of accused persons and related parties. From a practical perspective, assistance which the Court may request of States Parties at this stage may require the transmission of documents and information (and measures to obtain documents and information) relating to ownership of assets and flow of funds.[TB4]

Seizure and freezing of assets

"*Freezing and seizure*" are defined as a single term in several international conventions to mean "*temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority*".[TB5]

A freezing of "*funds and other financial assets and economic resources*", in the context of UNSC sanctions, appears to be sufficiently wide to cover tangible and intangible assets.[TB6] Here, freezing has been defined as "*preventing* [assets'] *use, alteration, movement, transfer or access*".

Critically, both the treaty and sanctions regimes referred to above do not contemplate that assets will be confiscated. Measures to freeze or seize assets are understood as inherently temporary.[TB7]

This review defines "*freezing or seizure*" as temporary measures focused on preserving assets and financial resources for future use (also referred to as "protective measures" or "anti-dissipation" measures). To the extent that it is necessary to differentiate between freezing and seizure (as a number of national laws do), this Report refers to "seizure" when dealing with to the preservation of tangible assets, movable and immovable property as well as financial / commercial documents. This is differentiated from "freezing" which refers to intangible items and most commonly bank funds.[TB8]

TB2 See International Criminal Court, 'Financial investigations and recovery of assets', *18 December 2022.*

TB3 See Jean-Pierre Brun et al, 'Asset Recovery Handbook: A Guide for Practitioners' (2011) *World Bank, Washington, 18 December 2022, 5 (Asset Recovery Handbook).*

TB4 *See Situation in the Republic of Kenya in the case of The Prosecutor v Uhuru Muigai Kenyatta – Decision on the implementation of the request to freeze assets, Trial Chamber, ICC-01/09-02/11-931, 8 July 2014 (Kenyatta Implementation Decision).*

TB5 See Article 1(1) of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Article 2(f) of the Convention against Transnational Organised Crime; and Article 2(f) of the Convention Against Corruption.

TB6 UNSC Al-Qaida Sanctions Committee, 'Assets Freeze: Explanation of Terms', para 9 . See also UNSC Resolution 1596 (2005), 3 May 2005, 19 December 2022, paras 15-16.

TB7 Daley, *Asset Freezing*, p 11; Brun et al, *Asset Recovery Handbook*, p 6.

TB8 Daley, *Asset Freezing*, p 11.

Forfeiture

As set out at 6.4(a) below, the Court defines "*forfeiture*" differently, depending on the context, and these definitions are adopted **in this review.**

In the context of tracing, identification, seizing and freezing assets under Article 93(1)(k) as well as protective measures under Article 57(3)(e), the Court has indicated that "*forfeiture*" refers to "*the divestiture of property without compensation*".[TB9] This means that ICC requests for "*forfeiture*" which are issued pursuant to Article 93(1)(k) and Article 57(3)(e) are wider than "*confiscation of the proceeds or instrumentalities of crime*" and need not have a nexus with the crimes being investigated or prosecuted by the Court.

By contrast, in the context of the post-conviction penalties contemplated in Article 77(2)(b), the Court understands the term "*forfeiture*" in a narrow sense of "*confiscation of the proceeds and instrumentalities of crime*".[TB10] This still involves the divestiture of assets without compensation, but refers to a narrower class of assets.

The Office of the Prosecutor

The OTP can make requests for asset recovery throughout the course of its investigations. It may trigger the relevant provisions of Part 9 once an investigation has been authorised by the Pre-Trial Chamber.[17] Article 54(2)(a) permits the OTP to issue requests for cooperation to States Parties – including for identification, tracing, freezing and seizure of assets pursuant to Article 93(1)(k).

Commencing an investigation requires Pre-Trial Chamber authorisation. However, once an investigation is underway, an order of a Pre-Trial or Trial Chamber is not required for the OTP to be able to seek State cooperation.[18] As a result, Requests for State cooperation with asset recovery measures may be made from the time an OTP investigation commences and be issued out of the OTP itself (which is also empowered to receive responses from States).[19]

The investigatory function of asset tracing is addressed in Regulation 49 of the *Regulations of the Office of the Prosecutor* (**OTP Regulations**).[20] Regulation 49 requires that "[f]*or the purposes of*" Article 57(3)(e), Article 77(2)(b) and Article 93(1)(k), the OTP must pay "*particular attention in its investigations to the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, in particular for the ultimate benefit of victims*". This suggests a clear link between OTP investigations; the OTP's powers to request State cooperation in relation to Article 93(1)(k); the Pre-Trial Chamber's powers to order "*protective measures*" under Article 57(3)(e); and the Trial Chamber's power to issue forfeiture orders as penalties pursuant to Article 77(2)(b). However, the emphasis on the OTP acting for the ultimate benefit of victims also reflects the evolving jurisprudence of the Court.

TB9 *Kenyatta Implementation Decision*, para 12.
TB10 *Kenyatta Implementation Decision*, paras 13-14
17 Rome Statute, art 15(3)-(4).
18 *Kenyatta Adjournment Decision,* paras 24-33.
19 Rule 176(2) provides that while requests for cooperation made by the Pre-Trial and Trial Chambers are to be issued by the Registrar (who also receives responses), "*The Office of the Prosecutor shall transmit the requests for cooperation made by the Prosecutor and shall receive the responses, information and documents from requested States*". Note that the position regarding the ability of the OTP to issue requests at the stage of preliminary examination is unclear (as is whether this is necessary at all). Article 15(2) read with Article 53 do not refer to Article 93 (or Part 9). In a 2003 Information Expert Paper on "Fact-finding and investigative functions of the Office of the Prosecutor, including international cooperation" a broad and narrow interpretation of the OTP's powers at the preliminary examination stage were examined. Noting that whether the OTP was required to seek cooperation formally through the mechanism of Part 9 was unclear, the expert panel preferred an approach which did not impose this requirement (allowing for greater flexibility in gathering data for the purposes of the OTP making its determination regarding whether to formally seek to open an investigation). The situation remains unclear (although, the extent to which asset recovery measures would in fact be contemplated at this stage, is likely limited in practice). See Informal Expert Paper: Fact-finding and investigative functions of the Office of the Prosecutor, including international cooperation (2003) paras 22-29, 26 October 2023.
20 International Criminal Court, Regulations of the Office of the Prosecutor, 26 October 2023.

This jurisprudence recognises that forfeiture may have the purpose of collecting and reallocating assets to satisfy reparations orders as opposed to merely seizing the proceeds or instrumentalities of crime. This is discussed further at 6.4 below (including with reference to the OTP's role in requesting protective measures in terms of Article 57(3)(e)).

Which assets?

Assets susceptible to identification / tracing measures

In the *Kenyatta Prosecution's Revised Cooperation Request,* the Trial Chamber considered that where allegations of payments and financing of crimes were the subject of investigation, it was competent to investigate entities within which an accused had a controlling interest (as owner or officer) "*to facilitate the subsequent requests for transactional records, including in respect of land transfers and bank account details*".[TB11]

In addition, requests to government agencies for information regarding company records linked with the accused were regarded as legitimate requests.[TB12] The period covered by a request may include that before and after the period of the offences under investigation in order to enable investigation of patterns of activity and comparisons necessary to demonstrate the links between assets, flow of funds and criminality.[TB13]

Regulation 49 also reflects the internal logic of the Rome Statute. This logic follows a linear timeline: identification and tracing of assets by the OTP (as well as their freezing or seizure) are presented as a precondition for protective measures issued by the Pre-Trial Chamber; forfeiture which can be ordered by the Trial Chamber; and ultimate allocation towards reparations by the Trial Chamber, penalties and costs by the Presidency. As discussed in Chapter 3 this logic is reflected in the national legislation of a number of reviewed States. Nonetheless:

- This review has identified a number of ways in which the practical implementation of cooperation requests – and the need for State cooperation – do not in fact follow this linear logic. For example, the OTP and Pre-Trial Chamber may both request identification / tracing and asset freezing / seizure measures at pre-trial stage.
- In addition, ICC proceedings require financial investigations throughout the investigation, trial and enforcement stage and for differing purposes. These financial investigations do not always rely on formal cooperation requests – but may do so.
- The Court and ASP have made it clear that asset tracing and investigation requests are integral to financial investigations carried out by the OTP through its Financial Investigation Unit.[21] The purposes of these investigations go beyond forfeiture of the proceeds of crime to include the identification of assets for the purposes of ensuring that:
  i. fines are paid;
  ii. finances are available for the fulfilment of reparations orders; and
  iii. financial aid resources of the ICC are not unduly expended in paying defence teams of the accused.[22]

TB11 Situation in the Republic of Kenya in the Case of The Prosecutor v Uhuru Muigai Kenyatta: Decision on the Prosecution's revised cooperation request, ICC-01/09-02/11, 28 July 2014 (*Kenyatta Prosecution's Revised Cooperation Request),* para 39.

TB12 *Kenyatta Prosecution's Revised Cooperation Request,* para 40.

TB13 *Situation in the Republic of Kenya: The Prosecutor v Uhuru Muigai Kenyatta – Decision on the Prosecution's revised cooperation request,* ICC-01/09-02/11, 29 July 2014, para 47., para 37.

21 International Criminal Court, Financial investigations and recovery of assets, 23 January 2023; Article 54 of the Rome Statute sets out the duties and powers of the Prosecutor with respect to investigations, including financial investigations. In particular, Article 54(2) provides that the Prosecutor may conduct investigations on the territory of a State in accordance with Part 9 of the Rome Statute, or with the Pre-Trial Chamber's authorisation. Articles 54(3)(c) and (d) provide that the Prosecutor may seek the cooperation of any State or intergovernmental organisation or arrangements in accordance with its respective competence or mandate and enter into arrangements or agreements that are necessary to facilitate such cooperation.

22 *Ibid* at p 4.

- Both the importance of financial investigations and the overlapping competencies of the Pre-Trial and Trial Chambers mean that national laws that closely adhere to the linear logic of the text of the Rome Statute may not always be straightforward to apply in the case of a particular Request. This is discussed in greater detail in Chapters 2 and 3.

The Pre-Trial Chamber

Article 57(3)(e) sets out the power of the Pre-Trial Chamber, at any time after it has issued a warrant or summons (pursuant to Article 58), to seek cooperation in relation to "*protective measures*". It provides:

> "*Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.*"

Article 57(3)(e) is supported by Rule 99(1) of the RPE which indicates that this power may be exercised on the Pre-Trial Chamber's own initiative, or on application by the OTP or by victims (or their legal representatives) who have requested reparations or undertaken to make such request. This rule ensures that the procedure includes due process rights and third party protections:

- The Pre-Trial Chamber may order protective measures without prior notice (which may occur where there is a fear that assets will be dissipated). In this situation, after the order is issued, the Pre-Trial Chamber must request that the Registrar notify the person who is the target of the request (as well as interested persons or States) in order to invite observations to revoke or modify the order. The Pre-Trial Chamber's request to the Registrar must be made "*as soon as* [it] *is consistent with the effectiveness of the measures requested*".[23]
- If the Pre-Trial Chamber decides that advance notification will not jeopardise the effectiveness of protective measures, advance notice and an opportunity for observations may be granted to affected persons, third parties and interested States.[24]

Allowing protective measures to be ordered by the Pre-Trial Chamber without prior notice is important in terms of the effectiveness of anti-dissipation or preservation measures. However, because orders for protective measures must be implemented within States to be effective, it is also necessary that national implementation laws permit freezing or seizure of assets without prior notice – and that it is possible to trigger these procedures through a Request of the Court. In this context obligations of confidentiality around Requests,[25] which are not unusual in the context of mutual legal cooperation, become relevant. However, it does raise consequent difficulties at national level with ensuring public accountability for national implementation of Requests and for enabling civil society engagement in relation to the process.

The Pre-Trial Chamber's powers under Article 57(3)(e) have been clarified in the *Kenyatta Implementation Decision*. In particular, this decision held that:

- "*Forfeiture*" in the context of Article 57(3)(e) (and Article 93(1)(k)) should be understood as "*the divestiture of property without compensation*".[26] It was not limited to the penalty of forfeiture of the proceeds of crime contemplated in Article 77(2)(b) (which was itself considered a "*residual*" penalty). Moreover, "*forfeiture*" in

23 RPE, Rule 99(1)(3).
24 RPE, Rule 99(1)(2).
25 See further 8.6 below.
26 *Kenyatta Implementation Decision*, para 12.

this context included divestiture of property for the purpose of funding reparations to victims.[27] Subsequent decisions of the Court have accepted this position and recognised that frozen or seized assets may alternatively be used to fulfil fines or pay contributions to legal costs.[28]

- The Pre-Trial Chamber was authorised to order protective measures at the pre-trial stage, after a warrant or summons had been issued. There was no need to await a conviction.[29] As a matter of practice, the *Bemba and others Arrest Warrant*[30] included a request to the States that would arrest Kilolo, Mangenda, Babala and Arido to locate and freeze their assets.[31] The *Ntaganda Arrest Warrant* similarly included an Article 57(3)(e) request.[32]
- Similarly, there was no need to prove a direct or indirect causative link between the "*proceedings, property and assets, and instrumentalities of crimes*" and the alleged offence/s.[33] No nexus was required at this stage (although the same was not true of forfeiture pursuant to Article 77(2)(b)).[34]
- The Pre-Trial Chamber did not have unlimited discretion to request protective measures. Measures needed to be appropriate to the claims of victims and the personal circumstances of the accused, as well as guided by considerations in the RPE (see below).

Which assets?

Assets susceptible to protective measures

1. The Trial Chamber has confirmed that "*proceeds, property and assets and instrumentalities of crimes*" need not be linked to a crime for the purposes of imposing protective measures under Article 57(3)(e).[TB14] The Trial Chamber has also interpreted Article 93(1)(k) in such a way that the "*instrumentalities of crime*" is read disjunctively from the terms "*proceeds, property and assets*" with the effect that seized or frozen assets, property and proceeds need not be related to crime.[TB15]
2. It also appears that such assets may be ultimately forfeited pursuant to a penalty in terms of Article 77(2)(b) or alternatively allocated towards reparations orders, fines and legal costs.[TB16] Moreover, assets that are collected through fines or forfeiture can be re-allocated for the purpose of reparations.[TB17]

27 See also *Situation in the Democratic Republic of Congo: The Prosecutor v Bosco Ntaganda – Decision on the Prosecution Application for a Warrant of Arrest*, ICC-01/04-02/06, 6 March 2007, Pre-Trial Chamber I (Ntaganda Arrest Warrant), para 85.
28 See for example *Kilolo Anti-freezing application*, para 19-20.
29 See also *Kilolo Anti-freezing application*, para 19.
30 *Situation in the Central African Republic: The Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido* (Warrant of arrest for Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido) ICC-01-05/01/13 (20 November 2013) (Bemba and others Arrest Warrant*).*
31 *Bemba and others Arrest Warrant*, para 25(d).
32 *Ntaganda Arrest Warrant*, para 88.
33 This has been further confirmed in *Prosecutor v* [REDACTED] *(Judgment on the Appeal of the Prosecutor against the Decision of* [REDACTED]), Appeals Chamber, Case No [REDACTED], 15 February 2016, which states "[t]*here is no requirement that property and assets subject to a Chamber's request for cooperation under articles 57 (3) (e) and 93 (1) (k) of the Statute be derived from or otherwise linked to alleged crimes*."
34 *Kilolo Anti-freezing application*, paras 17-18.
TB14 *Kenyatta Implementation Decision,* para 16.
TB15 *Kilolo Anti-freezing application*, para 17.
TB16 *Kenyatta Implementation Decision* paras 14-15; *Situation in the Central African Republic: Prosecutor v Jean-Pierre Bemba Gombo and others – Decision on the 'Requête de la defense aux fins de levee du gel des avoirs de Monsieur Aimé Kilolo Musamba'*, ICC-01/05-01/13, 17 November 2015, Trial Chamber VII (Kilolo Anti-freezing application), paras 17-19; *Situation in the Central African Republic: The Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo, Musumba, Jean-Jacques Magenda Kabongo, Fidele Babala Wandu and Narcisse Arido – Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/05-01/13, 22 March 2017, Trial Chamber VII (Bemba and others Sentencing Decision), para 200.
TB17 Rome Statute, art 79(2) *Bemba and others Sentencing Decision*, paras 199, 262.

CASE STUDY: THE KENYATTA IMPLEMENTATION DECISION AND CLARIFICATION OF ARTICLE 57(3)(E)

Facts: Uhuru Muigai Kenyatta was accused of five counts of crimes against humanity, including murder, rape, persecution and deportation as an "indirect co-perpetrator", in the context of the 2007-2008 post-election violence in Kenya.

Background: Pre-Trial Chamber II instructed the Registrar of the Court "*to prepare and transmit … in consultation with the Prosecutor, a request for cooperation to the competent authorities of the Republic of Kenya*", with the declared aim of identifying, tracing, freezing and/or seizing property and assets owned by (or under the control of) Mr Kenyatta "*without prejudice to the rights of bona fide third parties*", and to regularly inform the Chamber of any action taken in the execution of this order.[TB18]

Challenge: The Pre-Trial Chamber's powers were considered in the *Kenyatta Implementation Decision* in response to an argument by the Kenyan Government that Article 57(3)(e) read with Article 93(1)(k) and Rule 99(1) RPE required:

i. proof of criminal offences after a full trial prior to a request being made;
ii. a finding that the property / proceeds / assets were directly or indirectly obtained from the commission of the crime of which the defendant had been convicted; and
iii. a determination that the person had employed the assets / property in committing the crime.

The Defence appeared to argue that at a minimum a causal connection between the alleged offence and property subject to protective measures was required.[TB19]

Ruling: The Trial Chamber rejected the Defence and the Kenyan Government's arguments, concluding that:

> "*Articles 57(3)(e) and 93(1)(k) of the Statute and Rule 99(1) of the Rules confirm the authority of the Pre-Trial Chamber to take protective measures to identify, trace, freeze and seize property or assets of an accused person prior to the commencement of trial. Collectively, these provisions authorise the Pre-Trial Chamber, after the consideration of certain factors* [i.e. the strength of the evidence, the rights of the parties concerned, and whether the order for protective measures will be for the ultimate benefit of victims]*, to request cooperation from a State to implement such protective measures after the issuance of a warrant of arrest or a summons to appear and prior to the start of a trial, both for the purposes of eventual forfeiture as an applicable penalty under Article 77(2)(b) of the Statute and for reparations under Article 75 of the Statute*".[TB20]
>
> The reasoning of the Trial Chamber provides some important guidance regarding how "forfeiture" is to be construed; the relationship between forfeiture penalties contemplated in Article 77(2)(b) and reparations orders contemplated in Article 75; and the role of asset preservation in the life cycle of an ICC investigation and trial.

TB18 Situation in the Republic of Kenya: The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali – Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification Tracing and Freezing or Seizure of Property and Assets, ICC-01-09-2/11, 5 April 2011, Pre-Trial Chamber II (Kenyatta Asset Request Decision), 5.
TB19 Kenyatta Implementation Decision, para 8.
TB20 Kenyatta Implementation Decision, para 19.

The Court reached the following further conclusions.

The meaning of "forfeiture"

a. The term "*forfeiture*" should be understood as "*the divestiture of property without compensation*", and thus as encompassing a reparations award and not being limited to a power to order protective measures solely for the purposes contemplated in Article 77(2)(b).[TB21]

b. Construing "*forfeiture*" in Article 57(3)(e) without limiting it to the "*residual*" penalty in Article 77(2)(b) would be consistent with the purpose and objects of the Rome Statute and the Court's recognition of the importance of reparations for victims' harm and suffering.[TB22]

Protective measures to secure funds for reparations at an early stage[TB23]

a. Protective measures at an early stage of proceedings (i.e. before conviction) and the Pre-Trial Chamber's powers to request them for purposes of reparations were consistent with the scheme and objects of the Rome Statute.

b. Allowing the Pre-Trial Chamber to act in this manner enabled the Trial Chamber to have recourse to preserved assets for the purposes of ordering reparations at a later date. This was consistent with the recognition of the Pre-Trial Chamber in the *Lubanga* case that asset recovery requests could be made for the purposes of securing a later order for reparations.

c. The Pre-Trial Chamber's authority to order protective measures at the pre-trial stage and after a warrant of arrest or summons was issued was express and there was no basis for limiting an Article 93(1)(k) request to the post-conviction stage.

No need for identified, seized or frozen assets to be linked to a crime[TB24]

a. The language of Art 93(1)(k) referred to "*proceedings, property and assets, and instrumentalities of crimes*" without limiting those terms to assets with a direct or indirect causative link to a crime (unlike the residual forfeiture penalty contemplated in Article 77(2)(b)).

b. It would be possible to establish the requisite nexus only after conviction by the Trial Chamber. The fact that Article 57(3)(e) empowered the Pre-Trial Chamber to request protective measures at a pre-trial stage confirmed that there was no requirement for a causal connection with the alleged offence (let alone conclusive evidence of a direct or indirect connection to the crime).[TB25]

c. This did not mean that protective measures could be requested without limit, and Pre-Trial Chamber orders for protective measures for purposes of reparations should be "*appropriately tailored to the circumstances including consideration of the claims of victims and the personal circumstances of an accused, as appropriate*". In this regard, the Court referred to Rule 146(2) RPE, relating to fines, as providing useful guidance.

TB21 *Kenyatta Implementation Decision,* para 12.
TB22 *Kenyatta Implementation Decision,* para 14.
TB23 *Kenyatta Implementation Decision,* paras 18-20.
TB24 *Kenyatta Implementation Decision*, paras 16-17.
TB25 It is however worth acknowledging that "*regardless of the interpretation of Art. 93(1)(k) ICC Statute by different ICC Chambers […] the vagueness of the statutory framework has meant that the procedures put in place by certain States Parties to cooperate with such requests have narrowly focused on the proceeds and instrumentalities of crime.*" (Carla Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' (2015) Nottingham Studies on Human Rights, 5, 18 October 2022 (Ferstman)

Preconditions for issuing orders for protective measures under Article 57(3)(e)

As stated above, the only requirement for requests for asset recovery measures issued by the OTP at the investigatory stage is that an investigation has been authorised. However, in the case of Pre-Trial Chamber requests there are a number of preconditions arising from the text of Article 57(3)(e), the prerequisite of a summons or warrant issued in terms of Article 58, and the guidance of Rule 146(2) RPE.

The strength of the evidence

Article 57(3)(e) requires that "due regard" be had to the "*strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence*".

In a footnote in the *Kenyatta Implementation Decision*, Trial Chamber V(B) provided further clarification regarding the "*factors*" to be considered by the Pre-Trial Chamber when determining whether to issue an order for protective measures i.e. "*the strength of the evidence, the rights of the parties concerned, and whether the order for protective measures will, 'in particular* [be] *for the ultimate benefit of victims'*".[35]

In this case, the OTP had acknowledged that it had "*insufficient evidence to secure a conviction at trial*" and that the information provided "*may or may not yield evidence relevant to this case*". On this basis, the Trial Chamber found that the Pre-Trial Chamber's order for protective measures should be suspended.[36]

Although not expressly relating to the powers of the Pre-Trial Chamber, further indication of what is meant by the "*strength of the evidence*" is provided in the OTP Regulations. When preparing an application for a summons or warrant in terms of Article 58, the OTP is required to contemplate requesting Article 93(1)(k) measures[37] and in doing so must consider:

a. *"the availability of specific information regarding the existence of proceeds, property, assets or instrumentalities of crimes to be identified, traced or frozen within a given jurisdiction; and*
b. *any relevant information regarding persons enjoying the power of disposal with regard to such proceeds, property, assets or instrumentalities of crimes*."[38]

Pre-conditions of a warrant or summons

The fact that a warrant or summons is needed before protective measures can be requested means that the requirements for an order for protective measures implicitly include those for an issue of a warrant or summons.[39] These requirements include:[40]

- reasonable grounds to believe that the person has committed an international crime over which the Court may exercise jurisdiction; and
- that arrest of the person appears necessary to ensure that the person appears at trial, that the person does not obstruct / endanger the investigation or Court proceedings, or to prevent continued commission of the crime or a related crime within the Court's jurisdiction.

35 *Kenyatta Implementation Decision,* para 19, fn 36.
36 *Kenyatta Implementation Decision,* para 29.
37 OTP Regulations, r 54(1).
38 OTP Regulations, r 54(2).
39 See Daley J Birkett, *Coexistent but Uncoordinated: Asset Freezing Measures at the International Criminal Court and the UN Security Council*, International Criminal Law Review, 20 (2020) 983-1025, 984.
40 Rome Statute, art 58(1) read with art 58(7).

Guidance from Rule 146(2) RPE

The reference to Rule 146(2) RPE in the Kenyatta Implementation Decision appears in a footnote without elaboration. This rule appears in the section of the RPE dealing with sentencing and fines and sets out a balancing exercise which must be followed by the Trial Chamber when determining an appropriate sentence / fine (which involves a wide range of factors). Among these factors, the Court is directed to consider the "*damage and injuries caused as well as the proportionate gains derived from the crime by the perpetrator*" and that "[u]*nder no circumstances may the total amount exceed 75 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants*."

In addition, Rule 146(2) refers to Rule 146(1), which in turn directs the Court to have "*due consideration to the financial capacity of the convicted person*" including forfeiture or reparation orders, factors referenced in relation to sentencing in Rule 145[41] and the degree to which the crime was motivated by personal financial gain.

The Trial Chamber

Post-conviction, the Trial Chamber may issue orders for reparations to be paid to victims pursuant to Article 75 and, in addition to imprisonment, may issue fines or forfeiture orders as penalties pursuant to Article 77(2)(a) and (b).

It is not clear whether, post-conviction, Article 93(1)(k) (asset recovery for the purpose of forfeiture) can be used to issue requests for the purposes of determining a fine or forfeiture order (or for purposes of identifying assets after sentence). However, cooperation requests are clearly available post-conviction in relation to reparations. This may be a consequence of the fact that fines and forfeiture orders issued pursuant to Article 77(2)(a) are determined during sentencing proceedings following the finding of guilt. By contrast, reparations proceedings entail an additional stage of ICC proceedings which, to date, have occurred a number of years after conviction.[42]

Reparations to victims

Following conviction, the Trial Chamber may, pursuant to Article 75(2), "*make an order directly against a convicted person specifying appropriate reparations to, or in respect of victims, including restitution, compensation and rehabilitation*" (Reparations Order). Under Article 82(4), Reparations Orders are subject to appeal by victims, the convicted person and *bona fide* owners of property adversely affected by a Reparations Order.[43] To date, Reparations Orders have been made against five convicted persons.[44]

Prior to making a Reparations Order, the Trial Chamber:

a. must, under Article 75(3), take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States; and

41 Rule 145 mandates that, when issuing its sentence, the Court must: (i) make sure that the totality of any sentence of imprisonment and fine must reflect the culpability of the convicted person; (ii) balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime; and (iii) give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

42 *Katanga Reparations Order*, para 11.

43 See Situation in the Democratic Republic of the Congo: The Prosecutor v Thomas Lubanga Dyilo - Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129, 03 March 2015, Appeals Chamber (Lubanga Reparations Appeal) para 37; 39.

44 Thomas Lubanga, Ahmad Al Faqi Al Mahdi, Germain Katanga,Bosco Ntaganda and Dominic Ongwen. The order in relation to Ntaganda is currently awaiting reconsidering by the Trial Chamber, subsequent to appeal by various victims groups and Ntaganda.

b. may, under Article 75(4), "*determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1*" (namely, requests for cooperation by States Parties).

The minimum elements of a Reparations Order, whether individual or collective,[45] have been set out by the Appeals Chamber in *Lubanga* (and followed subsequently).[46] These are that the Reparations Order must:

a. be directed against the convicted person;[47]
b. establish and inform the convicted person of the liability in respect of which reparations are awarded;
c. specify and provide reasons for the ordering of collective and/or individual reparations;
d. define the harm caused to victims[48] and modalities of reparations considered appropriate by the Trial Chamber; and
e. identify the victims who are eligible for receipt of reparations or set out the criteria for eligibility, indicating the characteristics of eligible victims.[49]

In addition, the Appeals Chamber confirmed a set of principles applying to Reparations Orders. Among these, principle 12 states that States Parties have an obligation of full cooperation with the enforcement of Reparations Orders (referring to Parts 9 and 10 of the Rome Statute);[50] that they should not prevent enforcement; and that Reparations Orders do not remove States' responsibilities to award reparations "*under other treaties or national law*".[51]

Which assets?

Assets subject to forfeiture

1. While it has not been possible to identify a decision of the Court handing down a forfeiture order in terms of Article 77(2)(b), the language of the RPE and the *Kenyatta Implementation Decision* provides strong indications that assets subject to forfeiture under Article 77(2)(b) (which refers to penalties which may be imposed on a person convicted of a crime) are those which are proved to be the proceeds of, or instrumentalities of, crimes within the jurisdiction of the Court.
2. However, it appears that an accused person may be deprived of ownership of a broader range of assets (once seized) for purposes of implementing Reparations Orders (as defined below), fulfilling fines and paying for legal costs.[TB26]

45 *Lubanga Reparations Appeal*, para 53.
46 See *Katanga Reparations Order,* para 31; Situation: Situation in the Republic of Mali: The Prosecutor v. Ahmad Al Faqi Al Mahdi – Reparations Order, ICC-01/12-01/15-236, 17 August 2017, Trial Chamber VIII (Mahdi Reparations Order), para 38.
47 *Lubanga Reparations Appeal*, paras 69 and 76; Situation in Uganda: *The Prosecutor v. Dominic Ongwen* - Reparations Order, ICC-02/04-01/15-2074, 28 February 2024, Trial Chamber IX (Ongwen Reparations Order).
48 The harm is to be caused by a crime within the jurisdiction of the Court for which the person was convicted while the causal link between the crime and the harm must be determined, for the purposes of reparations, in light of the circumstances of a case. This is subject to a scenario where harm is proved during reparations proceedings (with the possibility of challenge by the convicted person) on new evidence. See *Lubanga Reparations Appeal* paras 80; 184; 185; Annexure para 11.
49 *Lubanga Reparations Appeal*, para 32.
50 See also *Katanga Reparations Order* para 324. In this case, the Trial Chamber ordered the TFV to contact the DRC Government to ascertain how it could "*contribute to the reparations process*" (para 325).
51 *Lubanga Reparations Appeal*, Annexure para 50. See also *Mahdi Reparations Order*, para 36.
TB26 *Kilolo Anti-freezing application*, paras 17-19.

Can cooperation requests be used to implement Reparations Orders?

The Court's decisions have emphasised the importance of Parts 9 and 10 of the Rome Statute for the purposes of implementing Reparations Orders. However, the role of Article 93(1)(k) requests is not immediately apparent from the Statute itself. The specific provision dealing with Reparations Orders (Article 75(4)) refers to Article 93(1). The language of Article 75(4), however, appears to contemplate that cooperation requests are made before a decision is made regarding a Reparations Order – rather than after it has been made. Specifically, it refers to a Reparations Order which the Court "*may make*". Despite this apparently forward-looking language, the Court appears to have taken the view that cooperation in implementing Reparations Orders may occur at any point in time.

In the *Katanga Reparations Order*, the Court referred to Katanga's indigence. This appears to have been based on Katanga's own submissions as well as Registry submissions and assessments.[TB27] The finding of indigence led the Trial Chamber to direct the Presidency, assisted by the Registrar, to continue to monitor Katanga's financial position.[TB28] In doing so, it stated that "[t]*he Chamber would recall in this regard the duty of full cooperation with the Court is cast on States Parties*" (referring to Parts 9 and 10 of the Statute).[TB29]

The Trial Chamber continued by indicating that it would "*in due course*" consider the need to seek cooperation pursuant to Article 75(4) (i.e. by seeking cooperation in terms of Article 93(1)).[TB30] This suggests that the Trial Chamber contemplated the obligation to cooperate with Requests after the issuance of a Reparations Order to ensure that it could be implemented (and the same approach was adopted in *Ntaganda's* case).[TB31] Although the Trial Chamber did not explicitly refer to Article 93(1)(k), the Court's approach suggests that requests for identification, tracing, freezing or seizure of assets could be issued as part of the Reparations Order enforcement process.[TB32]

Fines and forfeiture

The Trial Chamber is empowered to order fines (according to criteria contained in the RPE)[52] or "*a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties*" (Article 77(2)).

While the Trial Chamber has recognised that frozen assets may be used to pay fines (and Pre-Trial Chambers have recognised that frozen assets may be used to pay fines and legal costs), Rule 221(2) RPE provides that where determining an allocation of assets, the Presidency is required to prioritise enforcement of measures giving effect to reparations. It is therefore unsurprising that the Trial Chamber also has competence to order that money or property collected through fines or forfeiture is transferred to the TFV in terms of Article 79(2).[53]

TB27 *Katanga Reparations Order*, para 327, fn 474 and 475; *Situation in the Democratic Republic of the Congo: The Prosecutor v Germain Katanga – Decision on Sentence pursuant to article 76 of the Statute*, ICC-01/04-01/07, 23 May 2014, Trial Chamber II (Katanga Sentencing Decision), para 169; *Situation en Republique Democratique du Congo: Le Procureur c Germain Katanga – Observations du Greffe relatives a la solvabilite, l'indemnisation des victims et au comportement en detention de German Katanaga*, ICC-01/04-01/07, 4 avril 2014, La Chambre de Premiere Instance II.

TB28 See also *Ntaganda Reparations Order*, para 255 (Note that the Reparations Order was reversed and the matter remanded to the Trial Chamber by the Appeals Chamber on 12 September 2022, however, this particular point was not considered).

TB29 *Katanga Reparations Order*, para 329. See also *Ntaganda Reparations Order*, para 102 (Note that the Reparations Order was reversed and the matter remanded to the Trial Chamber by the Appeals Chamber on 12 September 2022, however, this particular point was not considered).

TB30 *Katanga Reparations Order*, para 329.

TB31 *Ntaganda Reparations Order*, para 256.

TB32 See Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Cambridge University Press 2023), 190-191.

52 See RPE, r 146.

53 The Trial Chamber may call upon representatives of the TFV to submit oral or written observations before making such an order, in terms of Rule 148 RPE.

Can cooperation requests be used for purposes of fulfilling fines and forfeiture orders?

Fines may not exceed 75% of the value of a convicted person's identifiable assets after deducting an amount to satisfy the financial needs of the convicted person and their dependents.[TB33] To date, the amount of a fine appears to have been calculated based on Registry reports and investigations – and without expressly invoking formal cooperation.

Forfeiture orders may be based on additional evidence provided during sentencing hearings regarding the "*identification and location of specific proceeds, property or assets which have been derived directly or indirectly from the crime*".[TB34] Where known, *bona fide* third parties are to be provided with notice of such proceedings. Third parties, together with the OTP and convicted person, may submit evidence to the Trial Chamber.[TB35] Rule 147(4) RPE makes it clear that a forfeiture order requires the Trial Chamber to be satisfied that the specific proceeds, property or assets to be forfeited were derived "*directly or indirectly from the crime*".[TB36] As recognised in the *Kenyatta Implementation Decision*, "*forfeiture*" at this stage of proceedings is much narrower than that contemplated in relation to OTP or Pre-Trial Chamber asset recovery requests.

Role of the TFV

The TFV acts as a depository for any assets seized for the eventual purposes of providing reparations and is responsible for implementing Reparations Orders where it would be impractical or impossible for the Court to award reparations directly to each victim.[TB37] The Court has exercised this power in relation to the sentencing of Kilolo and Bemba for offences against the administration of justice.[TB38] The fines of EUR 30,000 and EUR 300,000 imposed on Kilolo and Bemba respectively were ordered to be paid to the Court within three months, in instalments, if necessary.[TB39] The Trial Chamber held that Kilolo (who had had funds in a Belgian bank account frozen on the order of the Pre-Trial Chamber) could elect to use such funds to pay his fine, or else such funds would remain frozen until the fine was paid.[TB40]

States Parties' obligations with respect to asset recovery

Compliance and enforcement of cooperation requests

As indicated above, States Parties' primary obligation is to have the necessary national procedures in place to respond to and implement an ICC request for cooperation (and to enforce an ICC order).[54] However, a State is obliged to comply with a cooperation request even if such compliance requires an action that may not be compatible with its national law.[55] In addition, a State Party's cooperation cannot be preconditioned on requiring the consent

TB33 RPE, r 146(2).
TB34 RPE, r 147(1).
TB35 RPE, rr 147(2)-(3).
TB36 RPE, r 147(4).
TB37 REDRESS, Justice for Victims: The ICC's Reparations Mandate, May 2011, 27 October 2023.
TB38 *Bemba and others Sentencing Decision*, para 199; 262.
TB39 *Bemba and others Sentencing Decision*, paras 199; 262.
TB40 *Bemba and others Sentencing Decision*, para 200.
54 Rome Statute, art 88.
55 *Situation in the Central African Republic: The Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido – Decision on Requests to Exclude Dutch Intercepts and Call Data Records*, ICC-01/05-01/13, 29 April 2016, Trial Chamber VII (Dutch Materials Decision) para 17.

of the accused or other parties.[56] States Parties should also have the ability to use compulsory measures where appropriate[57] and their procedures should provide a sufficient basis for executing an ICC Request.[58]

States are required to designate a national authority for the purposes of receiving cooperation requests and may state the language in which requests are to be received.[59] Any changes to communication channels or languages must be communicated to the Registrar in writing.[60]

Transmitting and receiving requests and minimum requirements

Communications regarding requests for cooperation take a variety of forms. The OTP issues its own requests via a State's designated communication channel and receives responses from States directly.[61] By contrast, orders of the Pre-Trial and Trial Chambers and enforcement requests of the Presidency are transmitted via the Registry,[62] which is also responsible for receiving responses, information and documents from States.[63] It is also possible that the ICC may transmit requests through the International Criminal Police Organization (**INTERPOL**) or an "*appropriate regional organisation*".[64]

Where a fundamental legal principle of general application within a State Party's national law prohibits the fulfilment of a cooperation request, the State in question is required to consult with the Court to try and resolve the situation.[65] It is also possible (and encouraged) that the Court and State authorities engage in informal communications to ensure that formal requests contain the necessary information and that requests are effectively implemented.[66]

Requests must meet the requirements of "*relevance, specificity and necessity*".[67] For example, records of corporate entities in which the accused had an interest were recognised as necessary for the investigation of financing of crimes (as they were core to the allegations against the accused) but were also recognised as necessary to facilitate further requests for transactional records.[68] Requests for information held by government registries were regarded as appropriate and the requirement of specificity had been met by the request identifying the relevant time period, the individual in question and the nature of records sought.[69]

56 *Situation in the Republic of Kenya: The Prosecutor v Uhuru Muigai Kenyatta – Decision on the Prosecution's revised cooperation request*, ICC-01/09-02/11, 29 July 2014, para 47.
57 *Situation in the Republic of Kenya: The Prosecutor v Uhuru Muigai Kenyatta – Decision on the Prosecution's revised cooperation request*, ICC-01/09-02/11, 29 July 2014, para 47.
58 *Kenyatta Adjournment Decision* para 49.
59 Rome Statute, art 87(2); RPE, rr 177(1); 178(1) (in cases where no language is designated, working languages of the court may be used in terms of Rule 178 as is the case of with non-States Parties in terms of Rule 179).
60 Rome Statute, art 87(3); RPE, r 180(1).
61 Rome Statute, art 87(1)(a); RPE, r 176(2).
62 RPE, r 176(2); r 217.
63 RPE, r 176(2).
64 Rome Statute, art 87(1)(b).
65 Rome Statute, art 93(3), and see further para 8.19 below.
66 See for example *Dutch Materials Decision* paras 23(ii)-(v); 24-25.
67 *Situation in the Republic of Kenya: The Prosecutor v Uhuru Muigai Kenyatta – Decision on the Prosecution's revised cooperation request*, ICC-01/09-02/11, 29 July 2024, paras 32; 34.
68 *Situation in the Republic of Kenya: The Prosecutor v Uhuru Muigai Kenyatta – Decision on the Prosecution's revised cooperation request*, ICC-01/09-02/11, 29 July 2024, para 39.
69 *Situation in the Republic of Kenya: The Prosecutor v Uhuru Muigai Kenyatta – Decision on the Prosecution's revised cooperation request*, ICC-01/09-02/11, 29 July 2024, para 40.

Formal requirements: Requests must be issued in writing (or in a medium that is capable of providing a written record and with subsequent confirmation in writing) and the contents of a request must, under Article 96(2), contain or be supported by the following:

- A concise statement of the purpose of the request and assistance sought (including the legal basis and grounds for the request);
- As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
- A concise statement of the essential facts underlying the request;
- The reasons for and details of any procedure or requirement to be followed;
- Such information as may be required under the law of the requested State in order to execute the request; and
- Any other information relevant in order for the assistance sought to be provided.

Confidentiality of requests

Cooperation requests are transmitted confidentially, and States Parties are required to maintain that confidentiality except where "*disclosure is necessary for the execution*".[70] The Court can also take measures to protect information for the purpose of ensuring the safety of victims, witnesses and their families (and request that information is handled in a way to support these measures).[71]

The Court is also under a corresponding obligation to ensure that documents and information remain confidential, except to the extent required for the investigations and proceedings that are described in the request.[72] Therefore, Court documents relating to asset recovery are filed under seal and are only released once re-classified by the Court.[73]

The obligations on States Parties and the Court to maintain confidentiality includes the obligation to investigate potential breaches of confidentiality and take remedial measures (including reporting such breaches to the Chambers which may issue sanctions as appropriate).[74]

Public statements regarding cooperation requests and breaching confidentiality was one of the issues that arose in the series of cases relating to the Situation in the Republic of Kenya, in the case of *The Prosecutor v Uhuru Muigai Kenyatta* (collectively, the *Kenyatta* proceedings). As the Trial Chamber V(B) made clear, "[t]*he underlying rationale* […] *is to ensure that steps are not taken to frustrate the implementation of the order prior to its execution.*" [TB41]

Timeframes for responding to cooperation requests

There is no specific timeframe in the Rome Statute for a State to respond to a request from the ICC for cooperation pursuant to Articles 57(3)(e) and 93(1)(k). However, in *Lubanga* the Pre-Trial Chamber recognised that early

70 Rome Statute, art 87(3) of the; *Kenyatta Asset Request Decision*, para 10.
71 Rome Statute, art 87(4).
72 Rome Statute, art 93(8)(a).
73 See Rome Statute, art 64(7)
74 *Kenyatta Implementation Decision*, para 35.
TB41 *Prosecutor v Kenyatta (Order concerning the Public Disclosure of Confidential Information)*, Trial Chamber V(B), ICC-01/09-02/11, 21 October 2014, para 14.

identification, tracing, freezing or seizure of the property and assets of a person against whom a warrant of arrest or summons to appear has been issued was a necessary tool to ensure that reparation awards can be enforced.[75]

A chamber is not required to wait indefinitely for cooperation by a State Party which fails to take meaningful steps to obtain the requested material or to provide clear, timely and relevant responses.[76] Accordingly, States Parties are encouraged to respond to requests for cooperation as soon as possible (and raise objections to implementation promptly) to minimise the risk of dissipation of property or assets.[77]

However, there are some situations where a State may postpone the execution of requests. Articles 94 and 95 contemplate two such scenarios.

a. The first scenario is where execution of a request would interfere with an ongoing investigation or prosecution in a requested State.[78] Should this situation arise, the postponement must be for a period agreed between the State and the Court and be "*no longer than is necessary to complete the relevant investigation or prosecution*".[79] States are also required to consider whether conditional assistance may be provided, rather than postponing implementation of a request entirely.[80]
b. The second case is where the Court is seized of an admissibility challenge under Articles 18 or 19. In this case, the State may postpone executing a request, unless the Court specifically orders that a Prosecutor may collect evidence for the purposes of Articles 18 and 19.[81] It seems unlikely that any asset recovery request would fall within the proviso.

Management of assets subject to Pre-Trial Chamber protective measures

A key issue arising in relation to Pre-Trial Chamber requests for freezing or seizure of assets relates to their management and the prevention of devaluation of assets which are identified and frozen / seized, throughout often very lengthy trials.[82] It is important that the seized or frozen assets are properly managed. As the UN Office of Drugs and Crime on the effective management and disposal of seized and confiscated assets notes: "*Failure to take adequate care of an asset to ensure that its economic value is preserved during this phase may well frustrate efforts to compensate victims for their loss and undermine efforts to repair the harm done by criminal conduct*."[83] It can, of course, also have adverse consequences for a defendant who is ultimately acquitted.

As indicated above, the ICC has recognised that frozen or seized assets may be used for a range of purposes during proceedings as well as upon conviction – including payment of fines; fulfilment of forfeiture orders; payment of reparations to victims; and payment of defence fees. While the ICC appears to have recognised the possibility of using assets for

75 *Situation in the Democratic Republic of Congo (DRC) in the case of the Prosecutor v Thomas Lubanga, "Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58"*, issued under Seal, and reclassified as public on 24 February 2006, para 136. See also *Kenyatta Asset Request Decision*, para 9.

76 *Situation in the Republic of Kenya: Prosecutor v Uhuruu Muigai Kenyatta – Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'decision on prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'*, ICC-01/09-02/11 OA 5, 18 August 2015, Appeals Chamber *(Kenyatta Non-Cooperation Appeal)* para 20.

77 *Lubanga Arrest Warrant Decision*, at para 132: '*The Chamber notes that, although a first reading of article 57(3)(e) of the Statute might lead to the conclusion that cooperation requests for the taking of protective measures under such a provision can be aimed only at guaranteeing the enforcement of a future penalty of forfeiture under article 77(2) of the Statute, the literal interpretation of the scope of such provision is not clear, because of the reference to the "ultimate benefit of the victims"*'; *Kenyatta Adjournment Decision*, para 51.

78 Rome Statute, art 94(1).

79 Rome Statute, art 94(1).

80 Rome Statute, art 94(1).

81 Rome Statute, art 95. See relating to requests for surrender and return of seized (privileged) documents and destruction of copies, *Situation in Libya: The Prosecutor v Saif Al-Islam Gaddafi – Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council*, ICC-01/11-01/11, 10 December 2014, Pre-Trial Chamber I (Libya Non-Cooperation Decision) paras 8-9.

82 International Criminal Court, Financial investigations and recovery of assets (2017), 23 January 2023, at 16.

83 UN Office of Drugs and Crime, 'Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets', 23 August 2017 (Open-Ended Intergovernmental Working Group on Asset Recovery, Vienna, August 2017, CAC/COSP/WG.2/2017/CRP.1), 26 October 2023.

payment of defence fees even upon acquittal, notionally, seized assets need to be returned and frozen assets released on acquittal. In both cases, prevention of loss of value of assets is key to realising the objective of protective measures.[84]

However, there is an important gap in the Rome Statute as it does not contain any guidance on how to manage assets or provide for a remedy where assets are mismanaged. In *Bemba*, the Court held that once assets are frozen or seized, management of the frozen or seized assets is the responsibility of the State that is dealing with the assets (and not the Court).[85] In refusing to be held responsible for the mismanagement of any seized assets, the Court "*has signalled to states that they alone are responsible for the management of these assets*."[86] The Registry has also now expressly indicated that States are responsible for the management of seized assets in any request for cooperation. In addition, adjudication of issues arising from mismanagement or devaluation of assets does not fall within the jurisdiction of the Court.[87]

Moreover, the Court precluded application of Article 85 ("*Compensation to an arrested or convicted person*") to claims for damage to property or assets[88] but this finding was without prejudice to the ability to seek damages under the relevant national law on the basis of measures taken by requested States to implement the Court's freezing orders.[89] It is not clear what remedy, if any, victims or victims' representatives may have regarding management of assets – or whether the absence of a remedy under national law would constitute absence of cooperation. The approach of the Court in the *Dutch Materials Decision* suggests that this is not likely to be the case.[90] The Court has shown a reluctance to undertake intricate inquiries about domestic laws and procedures.[91]

States Parties' cooperation obligations in respect of fines, forfeitures and reparations orders

States Parties' obligations to implement orders for fines, forfeiture orders and reparations orders appear in Article 109 (made applicable to reparations by virtue of Article 75(5)).

States Parties have an obligation to give effect to fines or forfeitures "*without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law*".[92] Where forfeiture cannot be effected, States Parties are required to recover the equivalent value of the proceeds, property or assets,[93] with such proceeds or property to be transferred to the Court.[94]

While Article 109 appears in Part 10 of the Rome Statute, cooperation requests are expressly envisaged in Rule 217 RPE which contemplates the Presidency seeking cooperation and measures for enforcement, in accordance with Part 9. This appears to be in addition to other steps taken by the Presidency to transmit orders for the purposes of enforcement to any State "*with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection*".[95] States are expressly prohibited from modifying Reparations Orders or fines.[96]

84 See Daley J. Birkett, "Managing Frozen Assets at the International Criminal Court: The Fallout of the Bemba Acquittal" *Journal of International Criminal Justice* 18 (2020), paras 765–790, 767.
85 *Situation in the Central African Republic: The Prosecutor v Jean-Pierre Bemba Gombo – Decision on Mr Bemba's claim for compensation and damages*, ICC-01/05-01/08, 18 May 2020, Pre-Trial Chamber II *(Bemba Compensation Decision),* para 57.
86 Owiso, Owiso, 'Responsibility for Property and Assets Frozen or Seized upon Request by the International Criminal Court' (2022) in R. Barbosa, F. Mazzacuva, & M. Ochi (Eds.), *Contemporary Challenges and Alternatives to International Criminal Justice,* 117, 132.
87 *Bemba Compensation Decision*, para 58.
88 *Bemba Compensation Decision* para 61.
89 *Bemba Compensation Decision*, para 64.
90 *Dutch Materials Decision*, paras 17-20.
91 Preparatory Committee, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, March-April and August 1996, A/51/22 Supp. 22, 60-61.
92 Rome Statute, art 109(1) (the counterpart to art 77(2)).
93 Rome Statute, art 109(2).
94 Rome Statute, art 109(3).
95 RPE, r 217.
96 RPE, r 219; 220.

Avenues for States Parties to challenge requests for cooperation and the obligation of consultation

According to Article 93(3), where a measure cannot be implemented due to a fundamental legal principle of general application, the requested State must consult with the Court promptly to find a resolution. Where no resolution can be found (and no alternative is available), the Court is required to modify its request. This is separate from a denial of assistance (in whole or in part) on the basis that the request concerns the production of any documents or disclosure of evidence which relates to national security; no modification is required in this instance.[97] States Parties must inform the Court or Prosecutor of any denied requests and the reasons for such denials.[98]

Consultations are expressly dealt with in Article 97, which contemplates potential barriers to compliance as including insufficient information and the possibility of breaching existing obligations to another State.[99] Such consultations should be undertaken "*without delay*"[100] and States are obliged to initiate consultations where they have identified difficulties with implementing requests (including challenging their lawfulness).[101]

In case of a dispute regarding the legality of a request for cooperation under Article 93, the Regulations of the Court provide that the requested State can apply for a ruling from the competent Chambers.[102] Any such ruling may be sought only after a declaration has been made by the requested State that consultations with the Court have been exhausted and within 15 days following such declaration.[103]

Article 93(3) does not provide for cases of practical or administrative difficulties experienced by a State in responding to and implementing a request.[104] It is, however, open to States to consult with the Court to establish how best to comply with requests where practical difficulties arise.[105]

Consequences of failing to comply with cooperation requests

The primary mechanism for ensuring cooperation is provided in Article 87(7)[106] which states that failure to cooperate may result in the Court making a finding of non-cooperation and potentially referring the matter to the ASP (or the United Nations Security Council (**UNSC**), if it referred the matter to the Court).[107] To date, the ICC has referred 16 instances of non-cooperation (mostly related to the failure of states to implement ICC requests for arrest and surrender) to the ASP and/or the UNSC, although no action has been taken.[108]

97 Rome Statute, art 93(4).
98 Rome Statute, art 93(6).
99 Rome Statute, art 97(a) – (c).
100 *Kenyatta Implementation Decision*, para 24.
101 *Kenyatta Adjournment Decision*, paras 49-50.
102 Regulations of the Court, reg 108(1) which states that "*In case of a dispute regarding the legality of a request for cooperation under article 93, a requested State may apply for a ruling from the competent Chamber*".
103 Regulations of the Court, reg 108(2) which states that "*A ruling under sub-regulation 1 may be sought only after a declaration has been made by the requesting body that consultations have been exhausted and within 15 days following such declaration. In case of requests under article 99, paragraph 4, and should no further consultations be possible, the requested State may seek a ruling within 15 days from the day on which the requested State is informed of or became aware of the direct execution*."
104 *Situation in the Republic of Kenya: The Prosecutor v Uhuru Muigai Kenyatta – Decision on the Prosecution's revised cooperation request*, ICC-01-09/02/11, 29 July 2014, Trial Chamber V(B) *(Kenyatta Revised Cooperation Request Decision)* para 34.
105 *Situation in the Republic of Kenya: The Prosecutor v Uhuru Muigai Kenyatta – Decision on the Prosecution's revised cooperation request*, ICC-01/09-02/11, 29 July 2014, paras 41-42.
106 *Kenyatta Cooperation Appeal*, para 51.
107 An equivalent mechanism is provided in Article 87(5)(b) for non-States Parties that have entered into an ad hoc arrangement for cooperation. See *Libya Non-Cooperation Decision*.
108 International Bar Association, 'Strengthening the International Criminal Court and the Rome Statute System: A Guide for States Parties' (2021), para 2.3, 26 October 2023.

- It is worth noting that the obligations to "*cooperate*" and "*enforce*" set out in Articles 75, 86, 88 and 109 do not have any formalised follow-up mechanism and are vaguely worded, making it difficult to identify clear instances in which a State Party has objectively failed to cooperate.[109]
- However, pre-conditions for a Chamber finding of non-cooperation are ordinarily exhaustion of consultation opportunities[110] and provision of an opportunity for the State to be heard. A finding of non-cooperation requires a determination that a State "*failed to comply with a cooperation request which prevented the Court from exercising its duties and powers under the Statute*".[111] Non-compliance must, accordingly, be sufficiently serious and based on an objective determination[112] that it prevented the Court's exercise of its powers and duties.[113]
- Even then, referral to the ASP or UNSC is not an automatic consequence of such a finding and the Court has a discretion to determine whether it is appropriate to refer the matter to the ASP or UNSC.[114]
- The Appeals Chamber has upheld the discretionary nature of this step on the basis that the ASP and UNSC, as "*external parties*", should be engaged only if, in the circumstances, this is the most effective means of obtaining State cooperation in light of its interpretation of the scheme of Part 9 as aiming to foster cooperation.[115] It also appears that the Court may engage other parties, including third States and regional bodies, to secure cooperation.[116] Considerations relevant to a referral to the ASP or UNSC include the impact on future cooperation of the requested State;[117] and whether the ASP / UNSC could practically assist with the substance of the request (or provide oversight regarding any further consultations).[118]
- Once a referral is made to the ASP, Article 112(2) empowers the ASP to consider questions relating to non-cooperation. The ASP may take action in relation to non-cooperation in cases of such referral and, exceptionally, prior to such referral where an incident of non-cooperation is imminent or ongoing and urgent intervention to secure cooperation is warranted.[119]
- In the case of formal referrals under Article 87(7) or Article 87(5), the Secretariat of the ASP should forward the Court's decision on non-cooperation without delay and a public statement should be made by the ASP President.[120] The *Assembly Procedures Relating to Non-cooperation* set out a number of minimum steps to be taken including an Emergency Bureau meeting to determine the requisite steps to be taken; open letters from the ASP President to the requested State requesting a formal response; subsequent discussions and open dialogues with the requested State (including participation of States Parties and civil society observers); and an address to the UNSC regarding steps taken to encourage cooperation.[121]
- The avenues available to the ASP have historically been ineffective – and by their very nature may be undertaken only after the fact and with no coercive means for effecting compliance. While the "informal" responses to anticipated incidents of non-cooperation may be designed to have greater efficacy, the *Toolkit* developed

109 Ferstman, 5.
110 See *Kenyatta Adjournment Decision*, para 45; *Situation in the Republic of Kenya: Prosecutor v Uhuruu Muigai Kenyatta – Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'decision on prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'*, ICC-01/09-02/11 OA 5, 18 August 2015, Appeals Chamber (*Kenyatta Non-Cooperation Appeal)*, para 81; *Situation in the Republic of Kenya: Prosecutor v Uhuruu Muigai Kenyatta – Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the* Statute, ICC-01/09-02/11-1037, 19 September 2016, Trial Chamber V(B) (Kenyatta Second Non-Cooperation Decision), paras 17-21.
111 *Kenyatta Non-Cooperation Appeal*, para 48; *Libya Non-Cooperation Decision*, para 24.
112 *Libya Non-Cooperation Decision* para 33.
113 *Kenyatta Non-Cooperation Appeal*, para 81.
114 *Kenyatta Non-Cooperation Appeal*, para 49; *Libya Non-Cooperation Decision*, para 23.
115 *Kenyatta Non-Cooperation Appeal*, para 51; 53.
116 *Kenyatta Non-Cooperation Appeal*, para 53; *Kenyatta Second Non-Cooperation Decision*, para 37.
117 *Kenyatta Non-Cooperation Appeal*, para 77; *Kenyatta Second Non-Cooperation Decision*, para 35.
118 *Kenyatta Second Non-Cooperation Decision*, para 36.
119 ASP, *Assembly Procedures Relating to Non-cooperation*, ICC-ASP/17/20, para 13. Note that a *Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation* has been published in relation to the second scenario of urgent and informal intervention. The Toolkit is primarily relevant to cooperation in relation to arrest and surrender of persons. See ICC-ASP/17/31 Annex III.
120 ASP, *Assembly Procedures Relating to Non-cooperation*, ICC-ASP/17/20, para 13.
121 ASP, *Assembly Procedures Relating to Non-cooperation*, ICC-ASP/17/20, para 14.

for this purpose focuses primarily on failures to cooperate in relation to the arrest and surrender of indicted persons and does not provide express guidance in relation to asset recovery requests.

Asset recovery cooperation obligations under the Ljubljana-Hague Convention

The Ljubljana-Hague Convention, which is due to enter into force, is aimed at enhancing State cooperation during the investigation and prosecution of international crimes, once crimes have been committed and judicial proceedings are triggered as a response.[122] It further provides avenues for States to cooperate towards the implementation of reparation awards and orders, including through the confiscation of assets. It therefore reinforces and complements the ICC's framework for inter-State judicial cooperation to respond to, and facilitate reparation, for the most serious crimes under international law.

In the final text of the Ljubljana-Hague Convention, asset recovery is encapsulated in Articles 45, 46 and 47, reinforced by Article 83 on victims' rights. Thus, Article 45(1) requires States Parties to comply with a request for confiscation of the proceeds of crime and "*other property for the purposes of providing reparations to victims in accordance with Articles 83, paragraph 3, situated in its territory*". Article 45(2) further stipulates that upon receipt of such a request, the requested State Party must, to the greatest extent possible in accordance with its domestic law, take measures to identify, trace and freeze or seize the proceeds of crime or property destined to be used in such crime. Finally, pursuant to Article 47(2) States Parties should give priority consideration to returning confiscated proceeds of crime to provide compensation to the victims. Accordingly, the Ljubljana-Hague Convention presents a critical opportunity to establish a concerted approach towards asset recovery for the purpose of reparation for victims of international crimes.

However, to date, only 34 States have become signatories to the Ljubljana-Hague Convention, including Belgium, France, Germany and Switzerland, despite 80 countries having initially having supported the initiative leading to the conclusion of the Convention.[123] To make the Ljubljana-Hague Convention as effective as possible in combatting impunity for international crimes and realising victim's rights to reparations, it is critical that States continue to sign and ratify it without reservations.

The rights of the accused and third parties

Human rights considerations and rights of the accused/convicted persons

While the Rome Statute does not expressly refer to specific human rights treaties, the application and interpretation of the Rome Statute and other sources of law applied by the Court must be consistent with internationally recognised human rights.[124] Accordingly, in its decisions relating to execution of asset freezing measures, the ICC has referred to various international human rights instruments and the rights they contain, including the right to respect for private and family life under Article 8 of the ECHR and associated case-law of the European Court of Human Rights (**ECtHR**)[125] – although the ICC has often failed to provide clear reasoning for its decisions when referring to such

122 Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and other International Crimes, 23 July 2024.

123 See The Ministry of Justice of the Republic of Lithuania, 'Lithuania signs the Ljubljana-The Hague Convention to end impunity for the most serious international crimes', 14 February 2024, 23 July 2024.

124 Rome Statute, art 21(3). Further, Article 21(1)(b) of the Rome Statute recognises "*applicable treaties and the principles and rules of international law*" as sources of law.

125 *Situation in the Central African Republic: In the case of the Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido: Decision on Kilolo Defence Motion for Inadmissibility of Material*, ICC-01/05–01/13–1257, Trial Chamber VII, 16 September 2015, at para 16, citing Article 17 ICCPR; Article 8(1) ECHR; Article 11 ACHR; Article 21(1) Arab CHR.

regional human rights jurisprudence.[126] Property rights under Article 1 of Protocol 1 of the ECHR are also relevant (as are the equivalent rights in other regional treaties as well as national constitutions and laws).[127] Similarly, rights to a fair trial are relevant, including where the asset seizure impacts a person's right to pay for legal representation.

Consistency with international human rights regimes does not, however, necessarily widen the scope for challenges to ICC cooperation measures under national laws[128] or before the Court. Instead, the Court has appeared to accept that rights may be limited where, as is the case with Article 8 of the ECHR, interference with privacy rights is possible, provided that it is "*in accordance with the law*".[129] It has similarly applied the ECtHR's criteria concerning the circumstances in which the right to family life could be interfered with, analysing whether asset freezing was (i) undertaken in accordance with the law and for a legitimate aim, and (ii) proportionate to a legitimate aim being pursued.[130]

The requirement that measures taken in relation to ICC proceedings must be "*in accordance with the law*" has been invoked by the Court when considering challenges to admissibility of evidence obtained pursuant to asset tracing assistance in terms of Article 69 of the Rome Statute. Here, the Court has recognised that it has no authority to examine domestic laws and procedures other than to determine whether there has been manifestly unlawful conduct at the national level which amounts to a violation of the Rome Statute or internationally recognised human rights. The general approach is, accordingly, to defer to national legal systems in respect of due process remedies and rights protections.[131]

More generally, the Court has repeatedly affirmed that Reparations Orders should not violate the rights of convicted persons, including the right to a defence.[132]

Rights of appeal and revision

Broadly, appeals are provided for in Part 8 of the Rome Statute which distinguishes between appeals against decisions of acquittal, conviction or sentence in Article 81 and appeals against other specified decisions, including Reparations Orders, in Article 82. In addition to the right of appeal, Article 84 provides for revision of conviction or sentence (but not Reparations Orders) in a set of narrowly defined circumstances.[133] However, neither Article 81 nor Article 82 expressly contemplates appeals against measures associated with cooperation requests.

126 See Annika Jones, 'Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court' (2016) 16 Human Rights Law Review 701, 708; Daley Birkett, 'Asset Freezing at the European and Inter-American Courts of Human Rights: Lessons for the International Criminal Court, the United Nations Security Council and States' (2020) 20(3) Human Rights Law Review 502, 522.

127 As protected in, e.g., 1952 Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 262, at Art. 1. The protection of this fundamental right was also explicitly acknowledged by Pre-Trial Chamber II in *Kilolo Notice Decision*.

128 However, it is worth noting that the execution of an ICC request to freeze assets has been challenged before the Italian domestic courts, see *Corte di Appello di Roma* (Rome Court of Appeal)*, Sezione Quarta Penale, Ordinanza,* N4/12 RGIE, 19 July 2012.

129 *Situation in the Central African Republic: In the case of the Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido: Decision on Kilolo Defence Motion for Inadmissibility of Material*, ICC-01/05–01/13–1257, Trial Chamber VII, 16 September 2015, at paras 16 and 21.

130 Bemba, Kilolo, Kabongo, Babala and Arido ICC-01/05–01/13–1485-Red, Decision on the 'Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba', Trial Chamber VII, 17 November 2015, at paras 21–23.

131 See *Situation in the Central African Republic: In the case of The Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido: Decision on Requests to Exclude Dutch Intercepts and Call Data Records, Trial Chamber VII*, ICC-01/05-01/13, 29 April 2016; *Situation in the Central African Republic: In the case of The Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido: Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7),* Trial Chamber VII, ICC-01/05-01/13, 29 April 2016.

132 See *Ntaganda Reparations Order*, para 101; *Mahdi Reparations Order*, para 37.

133 Grounds are (1) discovery of new evidence that was unavailable at the time of trial (without this being caused wholly or partially by the party making application) and is sufficiently important that if produced at trial, it would have resulted in a different verdict; (2) a new discovery that decisive evidence taken into account at trial and on which conviction depends was false/forged/falsified; or (3) one or more of the judges participating in conviction or confirmation of charges has committed an act of serious misconduct or serious breach of duty so as justify removal.

Nonetheless, certain measures that may be related to a cooperation request can be appealed. Where the Pre-Trial Chamber determines to take investigative steps within a State's territory without issuing a cooperation request, the decision to do so may be appealed.[134] In addition, the Pre-Trial Chamber has recognised that a direct right of appeal should lie in respect of measures to seize assets pursuant to Article 57(3)(e), in light of the implications of such seizure for individual rights.[135]

Convicted persons may also appeal certain measures:

a. Convicted persons may appeal sentences (including fines or forfeiture orders).[136] Where appeals are not filed within the requisite time period (30 days from notice of the decision), decisions become final.[137] An appeal against a sentence may trigger the Court considering the grounds on which a conviction may be set aside in whole or in part – in which case, it is empowered to invite the OTP and the convicted person to submit grounds for appeal of a conviction (restricted to procedural errors, errors of fact and errors of law).[138] Conversely, an appeal against a conviction may lead the Court to consider grounds for appealing a sentence (inviting the OTP and convicted person to make the necessary representations).[139]
b. The right of appeal against a Reparations Order is granted to convicted persons, but also to the legal representatives of victims and *bona fide* owner of property adversely affected by such order.[140] The procedure for appeals against Reparations Orders is governed by the same rules as those against sentence and the RPE provide that, on appeal, "[t]*he Appeals Chamber may confirm, reverse or amend a reparation order made under article 75*".[141]

The principle of proportionality is one of the key principles governing the balancing of the rights of convicted persons against the rights of other parties.

a. For example, an appeal against a sentence may be based on alleged "*disproportion between the crime and the sentence*".[142]
b. The principle of proportionality has also been established in relation to the calculation of reparations. The *Lubanga Reparations Appeal* held that "[a] *convicted person's liability for reparations must be proportionate to the harm caused and, inter alia, his or her participation in the commission of crimes for which he or she was found guilty, in the specific circumstances of the case*".[143] The subsequent *Katanga Reparations Appeal* confirmed and clarified this approach. The Court emphasised that the focus of Reparations Orders should be on the cost of repairing harm to victims and the extent of such harm – rather than the role of convicted persons and other perpetrators with reference to international human rights treaties providing for reparations, including the African Charter on Human and Peoples' Rights and the American Convention on Human Rights.[144] Accordingly, while the amount ordered in respect of reparations should not be greater than the overall cost to repair the harm caused, the principle of proportionality does not necessarily mean that the full

134 Rome Statute, art 82(1)(c).
135 *Situation in the Central African Republic: In the case of the Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido: Decision on Mr Kilolo's "Notice of appeal against the decision of the Single Judge ICC-01/05-01/13-743-Conf-Exp" dated 10 November 2014 and on the urgent request for the partial lifting of the seizure on Mr Kilolo's assets dated 24 November 2014*, ICC-01/05-01/13, 1 December 2014.
136 Rome Statute, art 81(2)(a).
137 RPE, r 150. Note that the period for filing an appeal may be extended by the Appeals Chamber on application where "good cause" is shown. The same procedure applies to appeals of Reparations Orders.
138 Rome Statute, art 81(2)(b) read with art 81(1).
139 Rome Statute, art 81(2)(c).
140 Rome Statute, art 84.
141 RPE, r 153(1).
142 Rome Statute, art 81(2)(a).
143 *Lubanga Reparations Appeal*, para 118.
144 See *Situation in the Democratic Republic of Congo: In the case of the Prosecutor v Germain Katanga: Judgment on the appeals against the order of the Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute'*, Appeals Chamber, ICC-01/04-01/07 A3 A4 A5, 8 March 2018 (***Katanga Reparations Appeal***), paras 177; 180; 184.

amount cannot be ordered (or that the amount should be reduced to reflect relative responsibility for harm caused by other perpetrators).[145] At the same time, this does not preclude the possibility of apportioning liability to repair harm.[146]

Provision for indigent accused and convicted persons

Significantly, the Court has held that indigence is not relevant for the ordering of reparations or the amount of reparations ordered (although it may affect enforcement and subsequent steps taken by the ICC to engage with States and monitor a convicted person's financial position).[147]

However, it is possible for the relevant chamber to make an order of contribution to recover the cost of providing counsel if legal assistance was provided to a person who claimed to have insufficient means (but that was later found to be untrue). Rule 21(5) RPE provides that "[w]*here a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel*".[148]

Rule 21(5) must be reconciled with Rule 221(2) RPE which states that, "[i]*n all cases, when the Presidency decides on the disposition or allocation of property or assets belonging to the sentenced person, it shall give priority to the enforcement of measures concerning reparations to victims*".[149] Rule 221(2) arguably comes into effect only after a conviction, whereas Rule 21(5) would operate earlier in proceedings, such that some portion of an accused person's assets could be used for their defence, thereby leaving fewer assets to be paid to victims as reparations upon conviction.[150] For example, in the case of *Bemba*, the Pre-Trial Chamber allowed some of Jean-Pierre Bemba Gombo's assets, which had been frozen, to be unfrozen to allow him to pay for his family's living expenses and his defence expenses.[151]

Rights of third parties

The Rome Statute contemplates that assistance with asset recovery should generally be without prejudice to the rights of any *bona fide* third parties. Specifically, Article 93(1)(k) provides that States Parties are obliged to assist the Court in identifying, tracing, freezing and seizing assets "*without prejudice to the rights of bona fide third parties*"[152] and Article 77(2)(b) (which empowers the ICC to order the forfeiture of assets) provides that such forfeiture proceedings must be "*without prejudice to the rights of bona fide third parties*".[153]

In addition, Article 82(4) grants a right of appeal to *bona fide* third party owners of property adversely affected by Reparations Orders. Rule 147 RPE further provides that any "*bona fide third party who appears to have an interest in relevant proceeds, property or assets*" must be notified of the proceedings and given "*the right* to *submit evidence relevant to the issue*".[154]

145 *Katanga Reparations Appeal*, para 175; 178.
146 *Katanga Reparations Appeal*, para 180.
147 See *Katanga Reparations Appeal*, paras 189-190; *Situation in the Republic of Mali: In the Case of the Prosecutor v Ahmad al Faqi al Mahdi: Reparations Order*, Trial Chamber VIII, ICC-01/12-01/15, 17 August 2017, para 114.
148 RPE, r 21(5).
149 Ferstman, 5; RPE, r 221(2).
150 Ferstman, 15.
151 *Ibid.*
152 Rome Statute, art 93(1)(k)
153 Rome Statute, art 77(2)(b).
154 RPE, r 147(3).

Collectively, these provisions recognise that third parties' right to the peaceful enjoyment of possessions could be impacted if they are in possession of asset(s) belonging to the accused person or have a right in property which at the time of an ICC cooperation request is in the hands of the accused.[155] This includes owners, creditors, purchasers, business partners, and joint tenants, among others.[156]

However, there is no further guidance on these rights in the Rome Statute or the RPE. Hence, it seems that national courts are required to determine which rights are relevant and when a party qualifies as *bona fide*, which could result in deviating practice between States Parties and potentially inconsistent application.[157]

155 Daley Birkett, 'Pre-trial 'Protective Measures for the Purpose of Forfeiture' at the International Criminal Court: Safeguarding and balancing competing rights and interests' (2019) 32(3) Leiden Journal of International Law 585, 12 January 2023

156 M. Goldsmith and M. J. Linderman, 'Asset Forfeiture and Third Party Rights: The Need for Further Law Reform' (1989) 5 Duke LJ 1254, at para 1257

157 M. Stiel and C. F. Stuckenberg, 'Article 109: Enforcement of fines and forfeiture measures' (2017), in M. Klamberg (ed.), Commentary on the Law of the International Criminal Court, 704, at 705, note 810: "*The only ground for refusal to enforce fines and forfeiture orders mentioned in the Statute is prejudice to the "rights of bona fide third parties", an expression nowhere defined in the Statute or RPE. Hence, it seems that national courts have to determine which rights are relevant and when a party qualifies as bona fide, which not only deviates from inter-State practice but may result in an uneven application*."

CHAPTER 2: SUMMARY OF NATIONAL LAWS

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Under the Rome Statute States Parties are obligated to fully cooperate with the Court and ensure that their national laws enable them to fulfil this obligation.

Methodology for assessing the readiness of each jurisdiction

Overview

To determine the "readiness" of each Relevant State, the Report considers the following factors and assigns points to each of the relevant metrics as follows:

- Existence of legislation / specific legislative provisions. (2 points)
- The clarity and comprehensiveness of the legislation/provisions that implement the obligations of the Rome Statute into the domestic legal framework. (3 points)
- The ease of adaptability of existing laws where the implementing statute does not cover every eventuality or if there is no adequate implementing statute. (3 points)
- Relevant States' ability to accommodate ICC case law and interpretive guidance regarding provisions of the Rome Statute (particularly where these are replicated in national laws). (1 point)
- The ability of Relevant States to meet the full range of Requests from the ICC. (1 point)
- On the basis of these factors, the Report assigns the following qualitative "readiness" numerical scores out of 10 to each Relevant State, with a higher number indicating a higher level of "readiness". In general, the Report considers a score of 9-10 to be 'Very Good', 7-8 to be 'Good', 3-6 to be 'Fair' and 0-2 'Poor'.

Assessment of Jurisdictions

Jurisdiction	Score	Rating	Commentary
France	9	Very Good	France provides a robust implementation regime, which is clearly integrated into the French Code of Criminal Procedure. Provisions are wide enough to accommodate almost all ICC cooperation requests as well as enforcement of fines, forfeiture orders and Reparations Orders. There is also a centralised system to assess, coordinate and implement Requests with few additional requirements for implementation and no need for separate recognition proceedings for ICC orders. There are also appropriate third party protections depending on the degree of intrusiveness of the measure. However, seizure and freezing procedures could be more clearly tailored to the ICC context and there is some lack of clarity on managing seized or frozen assets as well as a lack of guidance on conflicts with the sanctions regime.
Switzerland	9	Very Good	Switzerland's implementing legislation contains a clear mechanism for assessing the admissibility of ICC Requests and ensuring implementation. There is a clear centralised system (through the Central Office established by the Swiss Federal Office of Justice), clear law indicating that all requested measures are to be carried out, and provision for third party protections and appeal rights. A particular strength is the express contemplation of transfer of assets for forfeiture, as well as transfer to the Court's designated fund for victims for reparations. However, there are a number of weaknesses including a lack of clear time periods, absence of procedures to manage seized assets prior to transfer or release, and a lack of clarity on resolving conflicts with the sanctions regime.
United Kingdom	9	Very Good	The legislative framework in the UK reflects a clear and practical approach to integrating ICC requirements with domestic procedures without overburdening the national authorities with additional procedural avenues for implementation and enforcement. The fact that the UK requires international law to be transposed into domestic law, whilst also strongly relying on precedent established through domestic case law, could create challenges for the effective enforcement of ICC orders.

Jurisdiction	Score	Rating	Commentary
Germany	7	Good	Clear procedures appear to be provided for pre-conviction searches and seizure of assets – although the scope for investigatory measures appears to be restricted to evidence to be placed before the ICC and the proceeds of crime. Asset recovery measures, including the ability to impose precautionary freezes, appear to be possible under the German law. Further, the German law provides for the enforcement of fines, forfeiture orders and reparations orders in terms which integrate the context of the ICC into existing criminal procedures. Overall, the German law appears to be one of the most comprehensive statutes reviewed with particular clarity provided on division of power between decision-makers and implementing authorities. A potential limitation is the scope of assets which may be targeted at the initial stages of ICC proceedings and the apparent absence of links between pre-conviction seizure measures and post-conviction enforcement.
Belgium	7	Good	The Belgian framework closely follows the provisions of the Rome Statute in respect of ICC Requests, with limited modifications to align with the Belgian legal environment. It is particularly effective in establishing a centralised division to direct the process and to provide guidance as to the manner in which asset tracing, identification and seizure measures are to be carried out. However, there are gaps in respect of how asset recovery measures are to be challenged or which Belgian legal instruments should be employed where procedures are not entirely covered by the Belgian Act. Other weaknesses include a lack of clarity regarding proper management of seized assets, no specified time periods for responding to ICC Requests or a clear mechanism for resolving conflicts with Belgium's sanctions regime.

Jurisdiction	Score	Rating	Commentary
Italy	6	Fair	Italy's implementing legislation provides a strong coordinating role for the Ministry of Justice and General Prosecutor before the Court of Appeal of Rome. However, it focuses on personal precautionary measures, rather than measures dealing with *in rem* precautionary measures aimed at asset recovery and anti-dissipation measures. As a result, asset recovery must rely on the Italian Code of Criminal Procedure, which creates certain additional requirements for admissibility / enforceability and seizure / freezing measures that may limit ease of implementation. Remedies are provided for mismanagement of assets under generally applicable Italian laws and clear rights are provided for bona fide third parties in cases of seizure or forfeiture. However, there is no clear provision ensuring that the types of assets recognised in ICC jurisprudence and practice may be subject to the precautionary measures recognised under Italian law. Similarly, while criminal procedural law provides for use of confiscated assets to compensate victims of crime, there is no specific Italian provision for use of seized and confiscated assets for purposes of reparations.
Spain	5	Fair	Spain has a number of strengths in its existing framework including that implementation legislation is in place (and contemplates implementation of fines, forfeiture and reparations orders) and it has a well-established, centralised authority for managing seized assets. However, the procedures for determining the admissibility of ICC Requests are cumbersome and significant aspects of implementation rely on common criminal procedural laws. While procedures for tracing / identification and forfeiture of assets are relatively robust and appear generally able to accommodate the purpose and context of ICC Requests, the position regarding precautionary measures is problematic. In particular, ordinary requirements for seizure require a link between seized / frozen assets and criminality. There is also some confusion created by the application of criminal forfeiture requirements to implementation of Reparations Orders.

Jurisdiction	Score	Rating	Commentary
Portugal	4	Fair	Portugal has no specific implementing legislation, despite having existing procedures in place for enforcement of foreign judgments as well as for asset recovery measures and enforcement of confiscation orders. This means that these national procedures need to be adapted or applied by analogy to implementation of ICC Requests and a number of the available procedures restrict the circumstances and conditions in which asset recovery steps can be taken. In particular, seizure measures presume that seized assets will ultimately be forfeited (rather than merely conserved) and require proof of a nexus with a crime. Similarly, the process for admissibility and assessing enforceability of forfeiture orders entails a number of stages and requirements which may create obstacles to effective cooperation. In particular, it is not clear how Portuguese law would respond to requests for implementation of reparations orders. In addition, it is unclear whether sufficiently robust pre-emptive measures are in place to secure the value of seized assets. Nevertheless, Portugal's foreign legal assistance law is long-standing and effective; criminal and civil procedural codes provide for robust human rights protections; and the system has been used on at least one occasion to seize assets at the request of the ICC.
United States	1	Poor	The U.S. achieves the lowest possible rating of 1 due to the policies in place preventing U.S. cooperation with the ICC. Even in the event of a policy change allowing the U.S. to cooperate with the ICC, the U.S. readiness would likely still be rated low as there are no procedures in place to address specific ICC Requests. While there is a strong foundation in place to address foreign requests for assistance, procedures for seizure and forfeiture are strongly linked to evidence of assets being linked to the crime and there is presently little express scope to seize or confiscate assets for reparations. Further, it is very unlikely that the U.S. will join the ICC due to domestic political constraints.

France

Readiness Rating

France provides a robust implementation regime which is clearly integrated into the French Code of Criminal Procedure (**FCCP**). Provisions are wide enough to accommodate almost all ICC cooperation requests as well as enforcement of fines, forfeiture orders and reparations orders. Procedures are characterised by a strong, centralised system for assessing, coordinating and implementing requests; few additional requirements or procedures for implementation; no need for recognition proceedings for ICC orders; and provision of appropriate third party protections depending on the degree of intrusiveness of the measure.

Seizure and freezing procedures could be more clearly tailored to the ICC context with time limits for the lifting of precautionary measures better aligned with the long duration of ICC proceedings. Similarly, clear mechanisms for managing seized or frozen assets to preserve their value are absent, as is guidance for resolving conflicts with France's sanctions regime.

Relevant Legislation

France has implemented domestic provisions since 2002 in order to cooperate with the ICC. These are incorporated into the FCCP at Articles 627 to 627-20.158 These specific provisions cover all relevant aspects of ICC cooperation and refer in part to existing national provisions.

Admissibility of Requests

France has specified that the channel for transmitting ICC communications is through the French embassy in The Hague (and, in urgent cases, to the *Procureur de la République* for Paris and thereafter through diplomatic channels).[159] French implementing legislation specifies that cooperation requests are sent to the national authority and thereafter forwarded to the anti-terrorist public prosecutor (*Procureur de la République antiterroriste*) who initiates all necessary actions.[160] These may be implemented by the anti-terrorist public prosecutor itself or an investigating judge at the Paris court, depending on the relevant measures.

The FCCP makes no express reference to any formal or substantive requirements for admissibility of an ICC Request. However, international treaties are directly applicable within the French legal system, and, in any event, the Rome Statute was incorporated into French law through national legislation. As such, France may refuse to execute an ICC request for cooperation if it fails to meet the formal and substantive admissibility requirements set out in the Rome Statute, notably on the basis of Article 97 of the Rome Statute.

ICC Requests must comply with Article 96(2) of the Rome Statute, which sets out various types of information that should be provided within, or in support of, a Request. France may postpone the execution of an ICC Request where insufficient information is provided to execute it (reflecting Article 97 of the Rome Statute). The grounds for postponing or refusing requests provided by the Rome Statute will be engaged if a measure is likely to undermine public order or the national interests of France.[161]

158 See FCCP, art 627 to 627-20 that came into force on 27 February 2002. Some provisions were subject to minor amendment in 2007, 2010, 2011 and 2020, 26 October 2023 (FR).
159 Declarations and Reservations under Rome Statute, 10 May 2004, 21 December 2022.
160 FCCP, art 627-1 (FR).
161 See FCCP, art 694-4 (FR); Rome Statute, art 93(3).

Asset Identification and Tracing

The anti-terrorist public prosecutor implements identification and/or tracing measures unless the cooperation request entails actions reserved for judicial investigations. Typically, these judicial investigations would be more intrusive or implicate restriction of fundamental rights. For example, when seeking to implement home searches and seizures or information requests to third parties (such as financial institutions and telecom companies), the prosecutor must request an authorising order from a *Juge des libertés et de la detention* (**JLD**).[162]

While, in general, investigatory measures may not be challenged, there is a theoretical possibility of filing a damages claim before France's administrative courts claiming that the prosecutor or investigating judge exceeded their powers (*action en responsabilité de l'état*). The bar for such a claim, however, is high, with little prospect of success in practice. In the case of home searches by the police, Article 802-2 FCCP provides that a person subject to such a search, who has not been prosecuted or indicted within six months after completion of the search, may challenge the measure before a JLD.

Freezing or Seizure of Assets

Article 627-3 FCCP specifically refers to protective measures contemplated in Article 93(1)(k) of the Rome Statute. These are carried out using procedures under general provisions of the FCCP over a period of up to two years (renewable for a further two years at the ICC's request).[163] General provisions require that anti-dissipation measures are authorised by a JLD and become effective on service on the owner of the asset (or a financial institution where funds are held).

French law requires the anti-terrorist prosecutor to specify, when requesting an authorising order from the JLD, whether the targeted property is the object, means or proceeds of a crime or whether the aim is to seize all property of the person under investigation. Accordingly, there is no requirement for assets to be linked to the alleged crime. While the FCCP does not expressly require an ICC forfeiture order for seizure or freezing of assets, the general provisions governing seizure (*saisies*) specify that because the purpose of seizures is to guarantee potential forfeiture, the targeted property must be eligible for forfeiture under French law. Accordingly, for seizure but not for freezing (*gel*) of assets, it is necessary to determine that the targeted property does not attract any form of immunity (such as diplomatic immunity); and that it is either believed to belong to the defendant or is believed to be the proceeds, subject or instrumentality of the alleged offence.

Once the relevant property is seized, *l'Agence de gestion et de recouvrement des avoirs saisis et confisqués (***AGRASC**), supervised by the Ministry of Justice and Ministry of Finance, is responsible for managing and recovering seized and forfeited assets. This includes implementing administrative measures to preserve and maintain assets; managing money seized during criminal proceedings; and selling, transferring or destroying seized and forfeited goods.[164] Frozen bank accounts, however, are not supervised by AGRASC but remain the responsibility of the relevant bank (and banks are required to have action plans for managing frozen assets[165]).

Mismanagement of frozen assets may be challenged by initiating an action against the public administration, alleging gross negligence and/or denial of justice.[166] Where frozen assets are held by banks, the beneficiary may (in theory) initiate proceedings based on their contractual relationship for mismanagement before French courts.

162 FCCP, art 81 (FR).
163 FCCP, art 627-3 (FR).
164 FCCP, art 706-159 to 706-161 (FR).
165 In accordance with Articles L. 612-1 and L. 561-36-1 of the French Monetary and Financial Code (FMFC), the Autorité de Contrôle Prudentiel et de Résolution (ACPR) checks the compliance of banks subject to freezing assets' obligations with such obligations; in case of non-compliance, the Sanctions Committee of the ACPR can issue disciplinary sanctions.
166 Article L.141-1 of the French Code of Judicial Organisation (FR).

However, due to their nature, frozen funds are not considered to be managed and, therefore, these proceedings are unlikely to succeed in most cases. The main risk incurred by banks regarding frozen assets is criminal or disciplinary liability for failure to comply with the freezing order.[167]

No specific provision is made for release of funds where the ICC acquits the accused. However, general provisions of French law provide for automatic release of seized assets on acquittal at the State's expense.[168]

Forfeitures, Fines and Reparations

ICC requests for enforcing fines, forfeiture orders and Reparations Orders are transmitted by the anti-terrorist public prosecutor to the public prosecutor who is required to file a petition with the Paris criminal court for authorisation in terms of Article 627-16 and general rules of the FCCP.

There are no specific evidentiary requirements prescribed for the hearing, and the criminal court is bound by the ICC's decision, including with regard to the rights of third parties. However, a hearing is afforded to the convicted person and any persons with rights to the property, who may be summoned by means of "*letters rogatory*", i.e. a formal request for assistance from the court of one jurisdiction to the court of another, if necessary.[169] If the criminal court finds that execution of a confiscation or reparations order would prejudice a *bona fide* third party who cannot challenge the ICC order, the court must inform the Public Prosecutor for the purposes of referring the matter to the ICC.

In the case of forfeiture orders, if it appears that the order cannot be specifically enforced, the criminal court may order alternative measures to cover the value of assets to be forfeited.

All proceeds must be transferred to the ICC, the TFV or, if the ICC has determined to allocate sums specifically to them, the victims. Any dispute regarding allocation of funds is referred to the ICC.[170] Significantly, the FCCP does not appear to limit forfeiture measures to confiscation of proceeds or instrumentalities of crime and recognises the use of collected funds and seized assets for reparations.

Key Strengths of the French Enforcement Framework

France has set up specific provisions with respect to ICC requests and is politically inclined to cooperate with the ICC. This has been recently demonstrated with the agreement between France and the ICC on the enforcement of sentences pronounced by the ICC. In February 2023, a bill was passed to authorise this agreement.[171]

The process for cooperation is embedded within the FCCP itself which seems to provide for clear integration with existing procedures, while indicating where modification is necessary to enable compliance with ICC requests and the particular context of ICC investigations and prosecutions.

A strong, centralised system for assessing, coordinating and implementing requests is in place.

167 Pursuant to Articles L. 612-1 and L. 561-36-1 of the FMFC, the ACPR monitors the compliance of banks who manage frozen assets, and in case of non-compliance with the freezing order, the Sanctions Committee of the ACPR may issue disciplinary sanctions. Additionally, paragraphs 1 bis and 1 ter of Article 459 of the Customs Code provides the regime for criminal liability for banks who fail to comply with a freezing order.

168 FCCP, art 484-1 (FR).

169 FCCP, art 627-16, para 2 (FR).

170 FCCP, art 627-17 (FR).

171 'Projet de loi, adopté, par l'Assemblée nationale, autorisant l'approbation de l'accord entre le Gouvernement de la République française et la Cour pénale internationale sur l'exécution des peines prononcées par la Cour, n° 196, déposé(e) le jeudi 8 décembre 2022' (National Assembly 2022), 21 July 2024

There are few criteria or barriers in place for implementation beyond those enumerated in the Rome Statute. Nonetheless, rights protections are in place, including as regards judicial oversight of potentially intrusive asset tracing measures. However, these do not require significant additional procedures or hearings that might lead to delays in implementation. In particular, the enforcement of fines, forfeiture and reparations is premised on France being bound by the ICC sentencing or reparations decision. Accordingly, findings of prejudice to third party rights through execution of ICC cooperation orders are referred to the ICC for resolution.

Provision is made for the transfer of the sums forfeited in favour of the victims.

Key Weaknesses of the French Enforcement Framework

Implementing provisions remain silent on a number of subjects relating to the identification, freezing or seizing of assets.

While the time limit on the duration of seizure measures affords protections to the accused and third parties (and limits costs of seizure by the state), the duration does not necessarily accommodate the lengthy nature of ICC proceedings.

There is no publicly available data on France's cooperation with the ICC, except on the websites of the Permanent Mission of France to the United Nations in New York and the French Ministry of Foreign Affairs, which indicate that, in 2021, France helped in relation to thirty mutual assistance requests.[172]

There is no clear provision for cross-border collaboration in relation to cooperation requests.

There is no clear mechanism for resolving conflicts between sanctions obligations and ICC requests.

Recommendations

The primary recommendation is to enable better public access to all actions implemented by France to cooperate with the ICC either directly on the websites of the French Delegation at the UN and French Ministry of Foreign Affairs, which centralise information regarding the ICC, or on legal databases.

France should also consider mechanisms to enable longer seizure periods and coordinated management of seized or frozen assets to preserve their value.

France should provide clear channels for cross-border collaboration in relation to cooperation requests.
It should also establish a mechanism for resolving conflicts between sanctions obligations and ICC requests, providing for the release of assets frozen pursuant to the sanctions regime for the purposes of transfer to the ICC.

172 See 'L'engagement constant de la France pour la CPI', Mission Permanente de la France auprès des Nations Unis à New York, 30 November 2022.

Switzerland

Readiness Rating 0 — Very good — 9 — 10

Switzerland's implementing legislation contains a clear mechanism for assessing admissibility of ICC Requests and ensuring implementation. The Central Office, established within the Swiss Federal Office of Justice (**Central Office**), acts both as the channel for communicating with the ICC and for determining how Requests are to be implemented (and by which federal or cantonal authorities). Whilst there is no express monitoring procedure provided, the law is clear in indicating that all requested measures are to be carried out under direction and provides for third party protections and appeal rights after implementation. Post-implementation appeal rights are not afforded to convicted persons. However, the mechanism established in the legislation rests on the ICC's ability to hear and consider objections on the merits and Swiss authorities' deference to the ICC.

A particular strength is the express contemplation of transfer of assets seized pursuant to precautionary measures for purposes of forfeiture as well as transfer to the TFV and for purposes of reparations. However, there are a number of weaknesses, including a lack of clear time-periods for compliance and an absence of procedures for managing seized assets prior to transfer or release. There is also a lack of clarity regarding how to resolve third party claims over assets and how to resolve any conflicts with Switzerland's sanctions regime.

Relevant Legislation

When ratifying the Rome Statute in 2001, Switzerland simultaneously enacted the necessary legal foundation for cooperation with the ICC. The Federal Act on Cooperation with the International Criminal Court (**ICCA**)[173] was enacted on 22 June 2001 (and came into effect on 1 July 2002). Together with the Rome Statute, it regulates the cooperation of the Swiss authorities with the ICC (including all relevant procedures).[174]

Admissibility of Requests

The Central Office receives requests from the ICC, decides on the scope and details of the cooperation, and, if applicable, challenges the jurisdiction of the ICC. The Central Office is also responsible for ordering other forms of cooperation and will designate which federal or cantonal authority is responsible for carrying out the request.[175] The Central Office's determination is not subject to appeal.[176]

The ICCA provides a closed list of scenarios in which implementation of a cooperation request may be postponed, such as interference with an ongoing investigation (allowing for postponement for a period agreed with the ICC);[177] and for the duration of an admissibility challenge before the ICC pursuant to Articles 18 or 19 of the

173 Loi fédérale du 19 mars 2010 sur l'organisation des autorités pénales de la Confédération (Loi sur l'organisation des autorités pénales, LOAP) RS 173.31 (CH), <RS 351.6 - Loi fédérale du 22 juin 2001 sur la coopération avec la Cour pénale internationale (LCPI) (admin.ch)> accessed 30 January 2023.

174 ICCA, art 2 (CH).

175 ICCA, art 3 §2 (a), (b) and (c) (CH). Art. 3 §2 ICCA contains a non-exhaustive list of responsibilities of the Central Office. This list includes notably the following attributions: (a). to receive requests from the ICC; (b). to rule on the admissibility of cooperation, to determine the modalities thereof and, where appropriate, to challenge the jurisdiction of the ICC; (c) to order the necessary measures, determine the scope of such measures, decide on the manner in which the request is to be executed and designate the federal or cantonal authority to execute the request; (d) if necessary, to appoint an ex officio defender; (e) hand over the persons prosecuted to the ICC and transmit to the ICC the results of the execution of the request; (f) to refer the matter to the competent authority for prosecution, at the request of the ICC, in accordance with Article 70(4)(b) of the Statute; (g) to decide, at the request of the ICC, to take over the enforcement of sentences; (h) recovering fines.

176 ICCA, art 43 §1 (CH).

177 ICCA, art 43 § 2 (CH).

Rome Statute.[178] The sole express basis for refusal of a cooperation request relates to disclosure of documents or evidence which relates to national security.[179] As soon as the Central Office has serious reason to believe that execution of the request could affect national security, it must immediately inform the Federal Department of Justice and Police which may suspend execution measures.[180]

Identification, Tracing, Freezing or Seizure of Assets and Forfeiture, Fines and Reparations

The Central Office determines the implementation steps to be taken by the relevant federal or cantonal authority. This is the case in terms of identification, tracing and freezing or seizure of assets pursuant to Article 30(j) of the ICCA; the taking of precautionary measures under Article 31; and enforcement of both forfeiture orders and Reparations Orders. Significantly, the seizure of assets and their transfer to the ICC is contemplated for purposes of forfeiture orders and Reparations Orders. In addition, the ICCA provides for enforcement of fines where a person has assets in Switzerland.[181]

Implementation of ICC Requests must adhere to any procedural requirements specified by the ICC.[182] In addition, the ICCA provides specific requirements for various contemplated forms of cooperation. Asset identification and tracing are not explicitly listed, but Article 40 refers to the "*Handing over of evidence*" (which is wide enough to cover evidence relating to assets, property, proceeds and instrumentalities of crime as contemplated in Article 93(1)(k) of the Rome Statute). In addition Switzerland requires the Court to clearly demonstrate a link between the assets in questions and the commission of the crime(s).[183]

Protections are provided to *bona fide* third parties and to authorities or injured parties ordinarily resident in Switzerland who claim rights to seized documents or assets.

a. In the case of objects, documents or assets seized as evidence and transferred to the ICC, Switzerland may impose an obligation that they are returned to the relevant party, free of charge, at the conclusion of ICC proceedings.[184]
b. The ICCA also provides that objects / assets to be transferred to the ICC will be retained in Switzerland if an injured party is ordinarily resident in Switzerland (and objects / assets are to be restored to them); where authorities assert rights over the assets; or where a *bona fide* third party acquires assets in Switzerland (or has acquired them outside Switzerland but is ordinarily resident in the jurisdiction).[185]
c. In addition, where objects, documents or assets are required for criminal proceedings pending in Switzerland, their transfer may be postponed for a period agreed between Switzerland and the ICC[186] and may be retained in Switzerland if required for criminal proceedings or liable for forfeiture in the jurisdiction.[187]

The acts of the federal and cantonal authorities implementing cooperation requests are not subject to appeal.[188] However, the final decision (closing order) of the Central Office is. Once the Central Office has processed a request in full or in part, it issues a closing order on granting the request and the scope of cooperation.[189] This decision is

178 ICCA, art 29 § 2 (CH).
179 ICCA, art 44 § 3 (CH).
180 ICCA, art 43 § 2 (CH).
181 ICCA, art 58; 53 § 2; art 41 (CH).
182 ICCA, art 32 (CH).
183 Daley Birkett, 'Recovering Assets at an International Anti-Corruption Court: Cautionary Tales from Rome, The Hague and the Field' (2023) 2(1) Transnational Criminal Law Review, 10.
184 ICCA, art 40 § 2 (CH).
185 ICCA, art 41(4) (CH).
186 ICCA, art 40(3) (CH).
187 ICCA, art 41(4) (CH).
188 ICCA, art 5(2) (CH).
189 ICCA, art 48 (CH).

subject to an appeal to the Federal Criminal Court[190] on grounds of violations of federal law (including excess or abuse of discretion).[191] There is no right of appeal for the accused. However, appeal is available to *bona fide* third parties who are personally and directly affected by a measure; have a legitimate interest in having the contested decision amended or quashed; and who cannot assert their rights before the ICC (or cannot be reasonably expected to do so).[192] Where grounds of appeal are raised which, under the Rome Statute, fall within the exclusive competence of the ICC, the Central Office must forward the appeal to the ICC (unless the Court has already made a determination of the issues).[193]

Key Strengths of the Swiss Enforcement Framework

The ICC's request for cooperation shall be granted if the facts in question fall within the ICC's jurisdiction.[194] There are only few exceptions to this rule, with the risk of harming national security being the only ground for refusing cooperation.[195]

The regime is relatively flexible and is designed to support ICC processes. For example, upon the ICC's request, at any time, the objects or values seized as a precautionary measure can be transmitted to the ICC for confiscation, allocation to the TVF or restitution to the beneficiaries.[196] The express link between seized assets and transfer to the ICC for purposes other than forfeiture is particularly helpful.

If the ICC has issued a confiscation order, it can be enforced directly in Switzerland.[197]

The ICCA does not contain any provision that would imply any differential treatment depending on when the ICC cooperation request is made (during the ICC's investigative, pre-trial or post-conviction stage).

Key Weaknesses of the Swiss Enforcement Framework

The ICCA does not provide any timeframes (except for the appeal deadline and a timeframe in proceedings regarding the surrender of persons prosecuted or convicted by the ICC – the latter not being applicable to asset recovery measures).

The ICCA does not contain specific rules on the question of the management of the assets frozen and/or seized at the ICC's request. The authorities may be guided by the principles that apply in the context of national criminal proceedings, but the ICCA could expressly indicate that the Swiss Criminal Procedural Code (**CrimPC**) and the Federal Ordinance on the management of seized assets are applicable by analogy to this question.

The mechanism for resolving claims over assets which are liable to be retained in Switzerland is not immediately clear from the language of the ICCA. This includes lack of clarity regarding the effect of sanctions on compliance with ICC cooperation requests.

The ICCA does not contain specific rules on the question of the protection of the secret domain (in particular banking secrecy) which leads to lack of clarity regarding requests for banking information and documents.

190 ICCA, art 49 (CH).
191 ICCA, art 51(1) (CH).
192 ICCA, art 50 (CH).
193 ICCA, art 51(2) (CH).
194 ICCA, art 29(1) (CH).
195 ICCA, art 44(3) (CH).
196 ICCA, art 41(1) and (2) (CH).
197 ICCA, art 58 (CH).

Recommendations

The ICCA should be amended to indicate expressly the regime applicable to the question of the management of the assets frozen and/or seized at the ICC's request, including in particular whether the provisions of the CrimPC and the Federal Ordinance on the management of seized assets are applicable by analogy.

Clarification regarding the mechanism for resolving conflicts regarding competing claims to assets and retention in Switzerland would be beneficial.

Clarification regarding the relationship between ICC cooperation requests and Switzerland's obligations under the Rome Statute and its sanctions regime would be beneficial.

It would be preferable if the ICCA expressly indicated that Swiss banking secrecy laws are regulated in accordance with the provisions on the right to refuse to testify (as was done in Article 9 of the Federal Act on International Mutual Assistance in Criminal Matters).

United Kingdom

Readiness Rating

Overall, the legislative framework in the UK reflects a clear and practical approach to integrating ICC requirements with domestic procedures without overburdening the national authorities with additional procedural avenues for implementation and enforcement.

However, as set out below, interplay between the UK's system of precedent and dualist framework could create challenges for the effective enforcement of ICC orders.

Relevant Legislation

In England and Wales and Northern Ireland, the Rome Statute is implemented by the International Criminal Court Act 2001 (**UK Act**), which came into force on 1 September 2001. The corresponding act of the Scottish Parliament is the International Criminal Court (Scotland) Act 2001 (asp 13).[198]

This Report focuses only on the UK Act.[199] The UK Act is supported by the International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations 2001 (**Regulations**),[200] which make provision for the enforcement in England, Wales and Northern Ireland of forfeitures, fines and reparations ordered by the ICC.

Admissibility of Requests

Under the UK Act, requests for cooperation made by the ICC under Article 93(1)(k) of the Rome Statute are to be transmitted to the Secretary of State. Upon receipt of the request, the Secretary of State has a discretionary

198 Although Scotland is part of the UK, Scotland has its own distinct judicial system and its own jurisdiction. For this reason, separate Acts of Parliament are required to incorporate international law into the domestic legal framework. However, the substantive provisions of the International Criminal Court (Scotland) Act 2001 are essentially identical to those contained in the UK Act.

199 However, it is important to note that even under the UK Act, the Secretary of State has the ability to re-direct requests to Scotland if appropriate (see for example, the UK Act, ss 2(2) and 3(3)).

200 The International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations 2001, SI 2001/2379 (the Regulations).

power to direct a "*person*" appointed to act on behalf of the ICC to apply to the courts of England and Wales or Northern Ireland for an order implementing the ICC requests. Sections 37 and 38 of the UK Act together make provision for such requests to be carried out. The sole statutory basis for the Secretary of State refusing disclosure of any information is prejudice to national security.[201]

Given that Article 96(2) of the Rome Statue has not been incorporated into English law, the Secretary of State has discretion in determining the admissibility of an ICC request for cooperation.

Identification, Tracing, Freezing and Seizure of Assets

Where the ICC requests cooperation in ascertaining whether a person has benefited from an ICC crime or in identifying property derived from an ICC crime, the Secretary of State may direct a person to apply for a production/access order or warrant, pursuant to section 37 and as elaborated in Schedule 5 of the UK Act. Where the ICC requests cooperation in the freezing or seizure of property for possible forfeiture, the Secretary of State may, pursuant to section 38, direct a person to apply for a freezing order in accordance with the provisions of Schedule 6. Frozen assets will be managed through a receiver under the supervision of the High Court. Recourse for mismanagement of assets would arise on the basis of negligence in terms of ordinary rules of tort (delict), with recourse against the receiver for loss or damage to property otherwise excluded by paragraph 5(5), Schedule 6 of the UK Act.

Section 37 refers only to ICC cooperation requests for "*ascertaining whether a person has benefited from an ICC crime*" and "*identifying the extent or whereabouts of property derived directly or indirectly from an ICC crime*" (under the heading "*Investigation of proceeds of ICC crime*") (in comparison with a wide range of possible asset tracing requests which may emanate from the Court). While section 27(3) of the UK Act provides that "[n]*othing in this Part shall be read as preventing the provision of assistance to the ICC otherwise than under this Part*",[202] a separate statutory basis for cooperation beyond the terms of section 37 may need to be identified. Similarly, the scope for freezing orders appears to be narrow, as suggested by the heading of section 38 which reads "*Freezing orders in respect of property liable to forfeiture*". However, English case law has confirmed that the domestic courts must interpret any UK legislation that gives effect to an international treaty in accordance with the principles of interpretation applicable to treaties as a matter of international law.[203] In particular, the courts "*cannot simply adopt a list of permissible or legitimate or possible or reasonable meanings and accept that any one of those when applied would be in compliance with the* [relevant] *Convention*."[204] For this reason, it is likely that any dispute over the scope of a request for a freezing order would likely have regard to the manner in which ICC case law has interpreted the term "*forfeiture*" for the purposes of Articles 93(1)(k) and 57(3)(e).[205]

Challenges to Measures for Identification, Tracing, Freezing or Seizure of Assets

While Schedule 5 of the UK Act contemplates varying or discharging of production / access orders, the relevant rules have not been promulgated (and a similar provision is not specified in relation to warrants). It is likely that both measures can be varied or discharged, under the Criminal Procedure Rules (**CPR**). The grounds for doing so likely rest on non-compliance with the preconditions for having these orders issued. In addition, it is likely that

201 The UK Act, s 39.

202 In addition, the explanatory notes to Section 27 of the UK Act make clear that the forms of assistance detailed in Part 3 of the UK Act "*are not exclusive and that nothing in this Part prevents other assistance being provided to the ICC.*"

203 See, e.g., *Fothergill v Monarch Airlines Ltd* [1981] AC 251

204 See Lord Slynn in *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 509. Note that this case did not consider interpretation of the Rome Statute but addresses general principles of interpretation applicable to legislation giving effect to international treaties.

205 This is also reflected in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (signed 23 May 1969, entered into force 27 January 1980), which states that "*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*" should be taken into account.

these measures can be challenged by way of appeal before the Crown Court pursuant to the Criminal Justice and Police Act 2001 (**CJPA**); the High Court by way of judicial review; or in the High Court through a claim brought pursuant to the Human Rights Act 1998 (**HRA**).

Similarly, variation or discharge of freezing orders is contemplated by the UK Act.[206] However, specific procedures and grounds for variation or discharge are not specified in the UK Act. English case law suggests that the basis for variation / discharge will be a failure to meet the requirements for freezing orders (presumably as provided by the UK Act) and whether the freezing order causes oppression through, for example, setting the value of assets too high or the value of necessary maintenance too low. In addition, judicial review likely remains available on grounds of unlawfulness (specifically, that the criteria for issuing the order in the UK Act were not met) or that the High Court failed to consider all submissions during freezing proceedings while an HRA claim may arise if the courts acted in a manner incompatible with an ECHR right.[207]

Forfeiture of Assets

The UK Act contemplates, and the Regulations facilitate, the enforcement of fines or forfeitures ordered by the ICC, as well as for orders by the ICC against convicted persons specifying reparations to, or in respect of, victims.[208] Enforcement procedures are carried out by a person appointed by the Secretary of State for this purpose who is required, in the first instance, to apply to the King's Bench Division of the High Court for registration of the ICC order (a process that does not entail reconsideration of the merits).[209] The application will seek vesting of the property to which the ICC forfeiture order / Reparations Order relates in the appointed person so the property may be disposed of according to the Secretary of State's directions.[210]

Once registered, the ICC order has the same force and effect as a court order of England and Wales or Northern Ireland and may be enforced accordingly.[211]

The appointed person must account to the Secretary of State regarding the proceeds obtained and the Secretary of State must transmit proceeds to the ICC (although the procedure and timing for doing so is not specified).[212] The UK Act contemplates safeguards for persons with an interest or right in property affected by a forfeiture order / Reparations Order by providing that enforcement powers may only be exercised if a court is satisfied that such persons have had an opportunity to make representations to the court and *bona fide* third parties' rights will not be prejudiced (although the procedure for receiving representations is not specified).[213] It may also be possible to challenge the directions of the Secretary of State or court orders registering and giving effect to ICC orders pursuant to the HRA, on the basis that they do not bear a proportionate relationship with the purposes of the orders specified in the Rome Statute.[214]

Key Strengths of the UK Enforcement Framework

The UK Act provides a very comprehensive framework to implement the UK's obligations under the Rome Statute with respect to asset recovery. Further, it sets out clearly the steps which government officials, police officers and courts need to follow when assisting the ICC with investigating and recovering the assets of persons accused of

206 The UK Act, Schedule 6, para 4.
207 See *R. (on the application of Javadov) v Westminster Magistrates' Court* [2021] EWHC 2751 (Admin) (UK).
208 The UK Act, s 49(1); Regulations, reg 1.
209 Regulations, reg 4.
210 Regulations, reg 6(1).
211 Regulations, reg 5.
212 Regulations, reg 6(2).
213 The UK Act, s 49(5).
214 See *R v Waya* [2012] UKSC 51; *R v Ahmad & Fields* [2015] AC 299 (UK).

international crimes for the eventual purpose of forfeiture or reparations. In addition, detailed explanatory notes have been published explaining the purpose of the UK Act and providing background to the sections dealing with ICC requests for cooperation in investigating the proceeds of crime.[215]

The provisions of the UK Act largely adapt existing procedures in the laws of England, Wales and Northern Ireland to the ICC context, including indicating how asset freezing/seizure under the UK Act interacts with existing land registry and insolvency legislation. In particular, clear provision is made under Schedule 5 for the production of material helping to trace the assets of accused persons, including material held by the government, and the timeframes when such information needs to be made available. Search warrants may be granted where there is material on premises that cannot be particularised but which relates to the specified person, or to the question whether that person has benefited from an ICC crime and is likely to be of substantial value. With respect to freezing orders, Schedule 6 sets out the procedures for the making, variation and discharge of freezing orders. It also provides a power to appoint a receiver and seize property to prevent its removal from the jurisdiction and secures the ICC's claim to frozen property *vis-à-vis* potential acquirers or bankruptcy debtors under existing land registration and bankruptcy legislation, with realisable property which is the subject of an ICC order being excluded from the property of the bankrupt. Further, the Regulations specifically identify "*reparations in respect of victims*" of international crimes as an objective of the enforcement of ICC orders.

Throughout each stage of the asset recovery process, from tracing through to forfeiture, the rights of accused persons are protected under domestic law. Rights to vary and/or appeal the respective court orders are, to differing degrees, provided for under criminal procedural law and each order is, in principle, subject to judicial review. In addition, the accused person's rights to the peaceful enjoyment of their possessions, private life and rights to a fair trial are guaranteed by the HRA which incorporates the ECHR into domestic law.

Key Weakness of the UK Enforcement Framework

Whilst the UK Act makes provision for cooperation with ICC Requests, neither it nor its accompanying explanatory notes expressly incorporate the entirety of Part 9 of the Rome Statute, and nor do they require domestic courts to take into account any relevant judgment, decision or guidance of the ICC when applying sections 37 or 38 of the UK Act (relating to asset tracing and freezing orders). Further, neither the UK Act nor the explanatory notes distinguish between requests for cooperation made during the pre-trial phase under Article 57(3)(e) of the Rome Statute or post-conviction stages, which means that some of the requirements that need to be established before certain orders can be granted are not well-suited to requests for cooperation before wrongdoing of an accused person has been sufficiently established during the investigative phase (see further below at 13.20).

Despite the UK Act contemplating integration with domestic criminal procedures, no specific criminal procedural rules have been published in respect of production/access orders or warrants. The result is a presumption that the CPR will apply, and the CPR provides for various rights of the accused or third parties to have such orders or warrants discharged or varied.

The UK Act deviates from the ICC framework in certain key instances. Additional pre-conditions must be satisfied before asset tracing and freezing orders or search warrants can be granted. These are stricter than the Rome Statute's requirements including a level of proof of wrongdoing by the accused person (at a stage earlier than ICC case law has required). For example, to grant a production order (in response to request for asset identification / tracing from the ICC), the courts need to be satisfied that: (i) a specified person has benefitted from an ICC crime; and (ii) the material to which the application relates is likely to be of substantial value (whether by itself or together with

215 International Criminal Court Act 2001, Explanatory Notes, 5 January 2023.

other material) to the investigation for the purposes of which the application is made.[216] Such deviations create the risk of inconsistency with the Rome Statute framework and may hamper effective cooperation with the ICC. The UK Act does not specify the timeframes that should apply for responding to ICC requests for cooperation, and nor do they provide for formal mechanisms for how to hand over forfeited assets to the ICC.

The decision whether to respond to the ICC Request and initiate the relevant procedural steps to identify, freeze and seize assets lies with the Secretary of State, affording them a wide discretionary power to cooperate without stipulating any criteria that need to be taken into account when deciding whether to respond to the Request (and without incorporating into domestic law Article 96 of the Rome Statute, which sets out the States Parties obligation to consult the ICC upon receipt of the request). Where government ministers have been afforded such wide discretion, especially in relation to matters affecting national security, the English courts have historically been reluctant to intervene and may grant the government a wide margin of appreciation. This leaves the process potentially vulnerable to political or policy considerations.

Recommendations

To further strengthen the UK's readiness to responding to ICC Requests, a greater degree of transparency surrounding the Secretary of State's approach to ICC requests for cooperation in investigating, freezing and seizing the proceeds of crime would enhance accountability and facilitate civil society engagement. Guidelines to structure the Secretary of State's exercise of discretion could be published. Such enhanced transparency could, by way of example, involve publishing information about previous requests received once the accused person has been convicted and sentenced to avoid prejudicing any ongoing investigations or proceedings. Where cooperation has been refused, the Secretary of State should set out the grounds on which this decision was reached to ensure that all relevant stakeholders have more complete and informed oversight over the decision-making process.

The UK Act and its accompanying explanatory notes should be amended to make reference to all States Parties' obligations to cooperate with ICC Requests pre- and post-conviction under the Rome Statute (including its Articles 57 and 96). Further, provisions should be included in the UK Act, stating that, in interpreting and applying sections 37 and 38 as well as Schedules 5 and 6, the courts should take into account any relevant judgment, decision or guidance of the ICC. Equivalent provisions have been included in sections 54, 61 ("*Offences in relation to the ICC*") and 65 ("*Responsibility of commanders and other superiors*") of the UK Act and would ensure the UK Act is applied in accordance with ICC jurisprudence and guidance on asset recovery. In addition, where the UK Act contemplates integration with domestic criminal procedures, criminal procedural laws need to be amended to make specific provision for applying for, varying, discharging or enforcing orders made under the UK Act to avoid gaps in the domestic framework for enforcement.

Similarly, clear timetables for responding to ICC Requests would improve certainty and efficiency in asset recovery processes and the UK's cooperation with the ICC.

It is possible that the UK government could develop a specific strategy for assisting with ICC requests for cooperation to be included as part of the UK Government's Serious and Organised Crime Strategy.[217] The Home Office has already published the Asset Recovery Action Plan (the current plan running from 2019–2022) which supports this strategy[218]. For example, in the context of confiscation orders made under domestic criminal legislation (the Proceeds of Crime Act 2002 (**POCA**)), the Law Commission of England and Wales has already made a series of proposals in 2020 which aimed to strengthen each stage of the confiscation process under ordinary domestic provisions by introducing new,

216 The UK Act, Schedule 5, Part 1.
217 UK Government, Serious and Organised Crime Strategy (November 2018) Cm 9178 3 February 2023.
218 UK Home Office, Asset Recovery Action Plan (updated 13 September 2019) 5 January 2023.

clear processes and frameworks specified in legislation, rules of procedure and in official guidance as to how to courts should approach confiscation.[219] Recommendations included specifying statutory objectives of the confiscation regime (accounting for victim compensation) as well as measures to improve efficiency such as standard timetables for confiscation and a maximum period between sentencing a defendant and a confiscation order coming into effect. Similarly, the Crown Prosecution Service (**CPS**) has issued guidance on a number of criminal law issues (including POCA[220]). It would be beneficial if similar recommendations and/or guidance are developed for the UK Act, which could mirror the objectives of asset recovery contemplated in the Rome Statute and ICC case-law including "*compensating victims of international crimes"* and "*ensuring financial accountability for perpetrators of international crimes*". It would also provide clarity on the UK Act and its enforcement before courts.

Germany

Readiness Rating

The legal basis for implementing ICC Requests in Germany, i.e. the Law on Cooperation with the International Criminal Court (*Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof*) (**IStGHG**), came into force over twenty years ago. However, it does not appear that any ICC Requests have been received in this time. The IStGHG appears to be one of the most comprehensive statutes reviewed. It provides particular clarity regarding the division of jurisdictions between decision-makers and implementing authorities within Germany, focused on the central implementing role of the Higher Regional Court (*Oberlandesgericht*) and associated public prosecution office where assistance is to be provided. Clear procedures appear to be provided for pre-conviction searches and seizure of assets – although the scope for investigatory measures appears to be restricted to evidence to be placed before the ICC and proceeds of crime.

Asset recovery measures, including the ability to impose precautionary freezes, appear to be possible under the IStGHG. Enforcement of fines, forfeiture orders and Reparations Orders are contemplated in terms that integrate the context of the ICC into existing criminal procedures (including developing a way to incorporate the novelty of a Reparations Order into the existing criminal procedural framework).

A potential limitation of the legislative framework is the scope of assets which may be targeted at the initial stages of ICC proceedings and the apparent absence of links between pre-conviction seizure measures and post-conviction enforcement (noting that these may relate to the same assets).

Relevant Legislation

The Rome Statute was incorporated into German law by means of two legal acts: the Code of Crimes against International Law (*Völkerstrafgesetzbuch*) (**VStGB**),[221] which incorporates ICC crimes into domestic law; and the IStGHG, which provides the basis for cooperation with the ICC and came into effect on 1 July 2002.[222]
Section 72 of the IStGHG states that where matters are not covered by its provisions, specified legislation will apply. Of these, the most relevant to implementation and enforcement of ICC requests for assistances is the German Code of Criminal Procedure (*Strafprozessordnung*) (**StPO**).

219 Law Commission, *Confiscation of the proceeds of crime after conviction: a final report* (Law Com No 410, 2022).
220 See, CPS, Legal Guidance, Proceeds of Crime (updated 29 December 2019) . In some exceptional cases, a failure to have due regard to CPS guidance may give grounds to bring proceedings for abuse of process: see para 142(4) of *Regina v AAD* [2022] EWCA Crim 106.
221 Code of Crimes against International Law (CCAIL) of 26 June 2002 (Federal Law Gazette I, p. 2254), as last amended by Article 1 of the Act of 22 December 2016 (Federal Law Gazette I, 3150), 30 January 2023 (DE).
222 Law on Cooperation with the International Criminal Court, Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof (DE) 30 January 2023 (IStGHG) (DE).

Admissibility of Requests

The IStGHG sets out a chain of authority and delegations (section 68). The decision regarding whether to comply with a request for cooperation by the ICC is taken by the German Federal Ministry of Justice and Consumer Protection (**Federal Ministry of Justice**) in agreement with the German Foreign Ministry and other federal ministries whose work or responsibilities might be affected by the provision of assistance. However, where implementation will be required by an authority falling within the scope of responsibility of a federal ministry other than the Federal Ministry of Justice, that ministry must make the decision in agreement with the Federal Ministry of Justice and the Foreign Ministry. This does not, however, affect the role of the Federal Ministry of Justice as being responsible for consultations with the ICC.[223]

a. The responsible federal ministry may transfer the exercise of their powers to subordinate federal authorities in individual cases.
b. In addition, the Federal Government is empowered to transfer the exercise of the power to decide on a request for cooperation from the ICC under Part 5 of the IStGHG to a state government (*Landesregierung*). A state government may, in turn, transfer such powers to another competent authority under state law.[224]

Part 5 of the IStGHG, dealing with "*other forms of legal assistance*", governs ICC requests relating to asset identification/tracing and freezing/seizure. The general principle for legal assistance relating to Article 93(1) and Articles 96(1) and (2) of the Rome Statute is established in section 47. Legal assistance must be provided on receipt of a request if the relevant requirements under Article 93(1) and Article 96(1)-(2) are met; there are no additional admissibility requirements.

Identification, Tracing, Freezing or Seizure of Assets Pre-Conviction

Asset identification/tracing, freezing/seizure measures and pre-conviction forfeiture are also dealt with in Part 5 of the IStGHG, in particular sections 51-52. It appears that these procedures do not apply to requests for cooperation made after an ICC conviction has been handed down and that they are designed to give effect to requests issued by the OTP and/or issued pursuant to Pre-Trial Chamber requests for precautionary measures. The IStGHG contemplates implementation by the Higher Regional Court in cooperation with the attached public prosecution office (Generalstaatsanwaltschaft).[225]

The jurisdiction of the relevant Higher Regional Court and public prosecution office is determined by the place where the request is to be carried out (with the seat of the Federal Government having jurisdiction where jurisdiction is unclear).[226] It appears that the Ministry of Justice is required to refer a request to the relevant public prosecution office, which must then prepare and initiate implementing steps. The relevant Higher Regional Court is responsible for judicial decisions relating to the implementation of a request. Court orders are required for all search and seizures described here, including any decision to hand assets to the ICC. These decisions are final and not subject to appeal.[227] However the Higher Regional Court can submit a legal question of fundamental importance to the Federal Court of Justice, who will decide the issue and return the matter to the Higher Regional Court to take the necessary action.[228] Proceedings before the Federal Court of Justice must allow the suspect/affected party an opportunity for written comment (oral hearings expressly being precluded).[229]

223 IStGHG, s 68(3), (DE).
224 IStGHG, s 68(1), sentences 4 – 5 (DE).
225 IStHG, s 49(3)-(4) (DE).
226 IStHG, s 49(1)-(2) (DE).
227 IStGHG, s 50(1) (DE).
228 IStGHG, ss 50(2); 33 (DE).
229 IStGHG, s 33(3) (DE).

The scope of investigatory measures before and after arrest warrants/charges

The provisions of the IStGHG relevant to search and seizure (and handing over the relevant assets) appear to contemplate differences between requests for cooperation from the ICC made prior to and subsequent to the ICC issuing an arrest warrant or charging a person with a crime. Action which may be taken in response to requests made prior to an arrest or charge is more limited in scope than in response to requests issued at a later stage of proceedings.

a. Section 52(1) provides for seizure or another form of securing assets that "*might be handed over to the ICC*" (*Beschlagnahme und Durchsuchung, Vermoegensbeschlagnahme*) and permits a search for this purpose. The assets/objects which may be seized are those which: (i) may be used as evidence in ICC proceedings; or (ii) could have been obtained a person or their accomplice, through an act for which they are being investigated or prosecuted by the ICC (i.e. the proceeds of ICC crimes). Search, seizure and confiscation of potential evidence are permissible where ultimate handover to the ICC is not contemplated. However, the provision appears to presume that the scope of search and seizure of assets will be directed at the proceeds of an ICC crime (although when read with section 51, it may be broad enough to accommodate financial investigations insofar as "evidence" is included).
b. This limitation on the type of assets that may be seized does not appear to apply to a request by the ICC made in respect of specific objects belonging to a person charged with a crime under the Rome Statute or where an arrest warrant has been issued. It appears that the relevant provisions (which also provide for emergency seizure as explained below) are designed to meet the requirements of a request for precautionary measures (Articles 57(3)(e) and 93(1)(k) of the Rome Statute). However, the provisions of the IStGHG seem to accommodate asset seizure measures at this stage, which might focus on a wider pool of assets than those of evidentiary value or the proceeds of crime (i.e. that could be any assets located in Germany as well as future assets of the accused, provided the person in question has been charged or arrested).

Pre-conviction seizure and precautionary measures

Within the context of German law, "*seizure*" and "*confiscation*" bear specific meanings that differ slightly to those used in this Report in relation to ICC Requests. This has a bearing on the scope and operation of section 52, allowing for both seizure and pre-conviction forfeiture.

a. In German law, "*seizure*" refers to the voluntary handing-over of property. By contrast, "*confiscation*" refers to the deprivation of custody of property against the will of the possessor/owner.
b. Where confiscation is required, the relevant provisions of the StPO (which regulates the conduct of criminal investigations and proceedings in the ordinary course) include requirements for a court order (or, in cases of urgency, the public prosecution office and its investigators); and restrictions over removal of documents containing confidential information.
c. Where an ICC Request is made after an ICC arrest warrant has been issued or a person has been charged, section 52(3) of the IStGHG provides for similar urgent confiscation of goods (subject to confirmation by the Higher Regional Court within three days). This seems to be specifically designed to permit the urgent seizure processes contemplated by the Rome Statute under Article 57(3)(e) read with Article 93(1)(k) and the relevant rules of the RPE (see 6.2 above) and does not appear to apply to asset identification/tracing requests made at an earlier stage of ICC proceedings. Similarly, references to the StPO suggest that section 52 measures may only be carried out for investigative purposes, i.e. prior to any conviction.

The IStGHG make no provision for management of seized assets. However, the StPO provides that the Attorney General's Office should take on this responsibility (which may be delegated).[230] It is possible that German state regulation may determine how assets should be managed, in which case a department of the relevant public prosecution office

230 StPO, s 111m (DE).

will be responsible. The StPO provides for the sale of confiscated items ordered by the public prosecution office where loss of value is likely or the costs of managing the asset gives rise to significant costs or difficulties (with an opportunity to the person affected by the seizure / confiscation to be heard).[231] It also permits the person subject to a confiscation order to apply for a court order to prevent measures taken in respect of the management of the assets.[232]

Pre-conviction forfeiture

Due to the manner in which confiscation is understood in German law, the "*search and seizure*" provisions of the IStGHG, described above, may also apply to pre-conviction forfeiture. Evidence and proceeds of crime may be transferred to the ICC on request,[233] where: (i) the ICC has issued a freezing/seizure order (within the meaning of Article 93(1)(k) of the Rome Statute);[234] and (ii) it is guaranteed that third party rights remain unaffected, always subject to the proviso that objects/assets will be returned promptly upon request.[235] Provisions pertaining to the transfer of such objects/assets include conditions regarding the protection of personal information data,[236] as well as property originally received from a foreign State, intergovernmental entity or supra-national entity.[237]

Post-Conviction Forfeiture and Enforcement of Fines and Reparations Orders

Part 4 of the IStGHG deals with all legal assistance provided through execution of ICC decisions and orders and rests on the principle that Germany will enforce non-appealable criminal penalties in accordance with the IStGHG and Rome Statute, as well as forfeiture orders under Article 77(2)(b) and Reparations Orders under Article 75. Fines, forfeiture orders and Reparations Orders are dealt with in section 43, 44 and 45 of the IStGHG respectively – in each case with specific reference to the equivalent article of the Rome Statute. No registration/recognition process appears to be contemplated and, in each case, the IStGHG focuses on enforcement steps.

A forfeiture order handed down by the ICC under Article 77(2)(b) of the Rome Statute in respect of assets located in Germany has the effect of passing ownership to the ICC on approval of the cooperation request by the Ministry of Justice in cooperation with the Foreign Ministry, in accordance with section 68(1) IStGHG (subject to the assets being owned by the party affected by the order).[238]

a. Prior to approval of the cooperation request, the forfeiture order acts as a bar to disposal of the assets in accordance to section 136 of the German Civil Code (*Bürgerliches Gesetzbuch*) (**BGB**).[239] While the forfeiture order is being considered, objects/assets subject to the order may be subject to preliminary seizure/confiscation (with searches being permitted for the purpose of locating such assets).[240] Once the request is approved, a forfeiture order is enforceable by way of a domestic court order for the confiscation of the proceeds of crime. The enforcement steps for these orders are governed by the provisions of the German Criminal Code (**StGB**)[241] relevant to domestic confiscation orders.[242] Confiscation orders must be issued by the relevant Higher Regional Court. Jurisdiction is determined by the location of the relevant asset. Confiscation orders are governed by the StPO,[243] and are non-appealable.[244]

231 StPO, s 111p (DE).
232 StPO, s 111m (DE).
233 IStGHG, s 51(1) (DE).
234 IStGHG, s 51(2)(1) (DE).
235 IStGHG, s 51(2)(2) (DE).
236 IStGHG, s 51(3) (DE).
237 IStGHG, s 51(1) read with s 58(3) (DE).
238 IStGHG, s 44(3) (DE).
239 German Civil Code, 30 January 2023.
240 IStGHG, s 44(5) (DE).
241 German Criminal Code, 26 October 2023.
242 IStGHG, s 44(1)-(2) (DE).
243 IStGHG, s 44(4) (DE).
244 IStGHG, s 44(3) read with s 44(2) (DE).

b. The ICC's forfeiture order is binding on third parties unless: (i) that third party was not afforded the opportunity to defend their rights; (ii) the decision was incompatible with a domestic civil judgment dealing with the same matter; or (iii) the decision related to the rights of third parties to property located in Germany.
c. With respect to (i), the ICC is provided with an opportunity to comment during the section 68 approval process. Third parties who could assert rights to the relevant assets are also provided the opportunity to comment (with the right to legal assistance) before a decision to enforce the ICC forfeiture order is taken, provided they had not already had the opportunity to make representations to the ICC in the same matter. Pursuant to section 44(5), assets seized may be surrendered to the last person having possession of them should they no longer be required for the purposes of the criminal proceedings.

Reparations Orders are enforceable if: (i) the ICC has issued a guilty verdict, sentenced the accused person and made an order under Article 75 of the Rome Statute for reparations to victims to be paid; and (ii) if the ICC requests enforcement of the order from several States Parties, the request states the amount up to which the Reparations Order is to be enforced in Germany.[245] The enforcement procedures for fines under section 43 apply, together with the Court-Fee Collection Ordinance (*Justizbeitreibungsordnung*) and relevant provisions of the StPO.[246] The penalty amount (or reparations amount) falls due when the ICC request for enforcement is received by Germany. While questions regarding interpretation of the order may be referred back to the ICC, this does not necessarily stay enforcement, which may proceed using domestic provisions and may entail search and confiscation.[247] The public prosecution office of the Higher Regional Court with jurisdiction carries out the relevant enforcement steps with necessary orders made by the Higher Regional Court (without any right of appeal).[248]

Key Strengths of the German Enforcement Framework

The German framework provided by the IStGHG resembles the Rome Statute closely and largely follows the same structure. For most sections of the IStGHG, the statute specifically links them to the corresponding provisions of the Rome Statute. For example, section 47 is explicitly linked to the obligations under Rome Statute Articles 93(1)(k) and 96, ensuring consistency with, and a strict implementation of, the Rome Statute framework. Further, it clearly distinguishes between requests for cooperation to enforce ICC forfeiture or reparation orders post-conviction; and requests for legal assistance in terms of identifying and seizing assets of accused persons prior to conviction.

Moreover, the IStGHG specifically provides for compensation payments through the enforcement of ICC Reparations Orders under section 45 IStGHG, which is a unique feature of German criminal law. It cannot be equated with the decisions made in German domestic criminal proceedings by way of ancillary proceedings regarding civil law claims for damages by an injured party. Rather, it is a unique criminal law sanction, which may be issued and enforced *ex officio*. Notwithstanding the novelty, the IStGHG has resolved the difficulty of how enforcement should be integrated into domestic criminal procedure by making procedures for enforcing fines applicable.
The IStGHG also clearly allocates domestic institutional responsibility between the relevant government authorities (including defining how jurisdiction should be established); sets out the legal procedures to be followed domestically; and details how ICC requests interact with other relevant national legislation, such as the StPO. It also clearly sets out the spheres of responsibility between different regional courts and prosecution services.

245 IStGHG, s 45 (DE).
246 IStGHG, s 45 read with s 43(2)-(4) (DE).
247 IStGHG, s 43(3) (DE).
248 IStGHG, s 46(2) (DE). The provision sets out a hierarchy which specifies that jurisdiction will lie where the convicted person has legal residence; failing which, habitual residence; and as a final option, where the assets are situated (with the first seized office assuming jurisdiction if assets are situated in multiple jurisdictions and the jurisdiction of the seat of the federal government providing a default jurisdiction if none can be established).

The IStGHG provides that orders by the Higher Regional Court enforcing an ICC request are final and unchallengeable, which gives these requests a strong basis under domestic law and, in theory, ensures swift implementation.

Finally, the IStGHG specifically includes provisions protecting the confidentiality of the accused person and affected third parties, which adds to the general rights they are afforded under the German Basic Law.[249]

Key Weaknesses of the German Enforcement Framework

The Federal Ministry of Justice decides whether to accept an ICC Request in agreement with the Foreign Ministry and other federal ministries whose work or responsibilities might be affected by the provision of cooperation, essentially affording them a discretion as to whether to cooperate. The IStGHG does not necessarily set out all the criteria that need to be taken into account when deciding whether or not to cooperate (and in some cases, such as seizure, the Higher Regional Court needs to make a decision taken in terms of criteria of the StPO).

The IStGHG does not include specific timeframes for responding to or implementing ICC Requests. Coupled with the generally high workload at the Higher Regional Courts and their public prosecution offices, this absence of time periods could lead to significant delays in the implementation of ICC requests. Further, the IStGHG does not provide specifically for asset freezing, which creates uncertainties regarding how ICC asset freezing requests will be implemented in Germany.

No clear guidance is provided regarding management of assets.

There may be a limitation on the scope of assets that may be targeted at the initial stages of ICC proceedings. Further, the IStGHG does not appear to contemplate links between pre-conviction seizure measures and post-conviction enforcement (noting that these may relate to the same assets).

Recommendations

Clear timetables for responding to ICC Requests for asset tracing, seizing and forfeiture would improve certainty and efficiency in asset recovery processes and Germany's cooperation with the ICC.

A greater degree of transparency surrounding the relevant federal ministries' approach to ICC requests for assistance in investigating, freezing and seizing the proceeds of crime would enhance accountability and facilitate civil society engagement. Such enhanced transparency could involve publishing information about previous requests received once the accused person has been convicted and sentenced to avoid prejudicing any ongoing investigations or proceedings.

249 Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 28 June 2022 (Federal Law Gazette I, 968)

Belgium

Readiness Rating 0 Good 7 10

The Belgian Act (as defined below) closely follows the provisions of the Rome Statute in respect of ICC Requests, with limited modifications to align with the Belgian legal environment. It is particularly effective in establishing a centralised division within the Ministry of Justice to direct the process associated with ICC Requests, and to provide guidance as to the manner in which asset tracing, identification and seizure measures are to be taken.

The close mirroring of Rome Statute provisions, however, means that there are gaps regarding how measures are to be challenged or which Belgian legal instruments should be employed where procedures are not entirely covered by the Belgian Act. A particular weakness, evident in the *Bemba* case,[250] is the lack of clarity regarding the proper management of seized assets. In addition, Belgian law does not provide time periods for responding to ICC Requests or a clear mechanism for resolving any conflicts between ICC Requests and Belgium's sanctions regime.

Relevant Legislation

The Belgian Act of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals (the **Belgian Act**) entered into force on 1 April 2004 and governs the cooperation between Belgium and the ICC.[251]

Admissibility of Requests

Under the Belgian Act, requests for cooperation by the ICC are communicated to the department focusing on international humanitarian law within the Ministry of Justice (the **IHL Service**) (Article 22). The IHL Service approves requests provided that they: (i) meet the formal conditions provided by the Rome Statute, which are replicated in the Belgian Act; and (ii) are otherwise in accordance with Belgian law (which includes respect for due process and fair trial rights). Belgium will always ask for a link between the assets and the commission of the crimes for which the individual is being investigated or prosecuted.[252]

The grounds for postponing or refusing to implement cooperation requests are limited to those specified in the Rome Statute.

a. Postponement: Implementation may be postponed for a period agreed with the ICC where the request would interfere with an ongoing investigation,[253] and for the duration of an admissibility challenge before the ICC pursuant to Articles 18 or 19 of the Rome Statute.[254]
b. Refusal: The sole basis for refusal of a request under the Belgian Act relates to disclosure of documents or evidence which relates to national security.[255]

The IHL Service's decision regarding the admissibility of a ICC request for cooperation in Belgium is not subject to appeal or other challenge.

250 *Bemba Compensation Decision*, para 58.
251 Act of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals (BE), 12 January 2023.
252 REDRESS, 'Reparations before the International Criminal Court: Issues and Challenges, 12 May 2011, 16.
253 Belgian Act, art 29 (BE); it is not clear whether this relates only to investigations in Belgium or also to investigations in other jurisdictions (or carried out by the ICC itself).
254 Belgian Act, art 30 (BE).
255 Belgian Act, art 31 (BE).

Asset Identification, Tracing, Freezing or Seizure

Once accepted, the ICC Request is transmitted either to the public prosecutor or to an investigating magistrate. The relevant individual issues the necessary orders to start an investigation, which is then undertaken by the police.

a. In principle, the prosecutor is able to carry out investigatory measures without the need for a court order. However, intrusive measures that may restrict personal liberty or the right to private life (such as house searches) require an order issued by an investigating magistrate (without a hearing). Seizure of immovable property requires a bailiff's writ, which must be officially registered and served on the property owner, together with the prosecutor's seizure order.
b. These requirements are not specified in the Belgian Act but in the general provisions of the Belgian Code of Criminal Procedure (**BCCP**). Under the BCCP, any person who is prejudiced by a particular measure is allowed to request that the measure be lifted. In practice, it is unlikely that measures relating to asset identification or tracing would be lifted on these grounds, although the need to lift a measure may more readily be established in relation to asset freezing or seizure.
c. Where the prosecutor or investigating magistrate refuses to lift a measure, the prejudiced individual may appeal to the indictment chamber of the Belgian Court of Appeal. The consequences of a measure being lifted (either by the prosecutor or investigating magistrate, or on appeal) with respect to cooperation with the ICC are not set out in the Belgian Act. As such, in practice, it seems more logical for parties to file a lifting request before the relevant chambers of the ICC itself, and not before the national authority.

Where seized assets are transferred to the ICC, the case may be reviewed by a Belgian council chamber of the first instance court that has territorial jurisdiction over the assets. The council chamber is required to assess the case and any third party claims within a five-day period, prior to transmission to the ICC (and its decision is not subject to appeal).

The relevant public prosecutor or investigating magistrate is theoretically responsible for ensuring that assets retain their value. However, there is no formal guidance on how to achieve this and the usual practice is for the Belgian Central Office for Seizure and Confiscation to manage assets, including funds seized from bank accounts. The assets may be sold at a public auction, or may be returned to the accused person in exchange for a payment of money. This is because holding the assets for too long may lead to their depreciation, damage or disproportionate costs. A decision to sell seized assets may be challenged before the indictment chamber.

No specific mechanisms are provided under Belgian law to challenge mismanagement of seized or frozen assets. However, if the mismanagement of assets leads to loss in value and it can be shown that damage has been caused, it is theoretically possible for an accused person to lodge a claim for reparations against the Belgian State.

There is no provision for how assets should be treated where an accused person is acquitted (although the public prosecutor or investigating magistrate would need to issue an order to effect release).

Fines and Forfeiture

Enforcement of fines and forfeiture orders under Part 7 of the Rome Statute is governed by Article 40 of the Belgian Act. In respect of forfeiture orders, the Belgian Criminal Court has jurisdiction over the property to be forfeited and is required to hear submissions from the public prosecutor and the convicted person prior to rendering the forfeiture order of the ICC enforceable.

Where forfeiture is impossible because the assets subject to the forfeiture order cannot be located by the Belgian authorities, the court may order equivalent forfeiture measures in accordance with Article 109(2) of the Rome Statute. Funds must be transferred in full to the ICC and notice of compliance will be given to the IHL Service.

Key Strengths of the Belgian Enforcement Framework

The key strengths of the Belgian framework include the establishment of the IHL Service, which is tasked with processing requests for cooperation from the ICC and, more broadly, the fact that the Belgian framework in principle allows for every request for cooperation from the ICC to be executed, as long as the formal conditions are fulfilled and the request is in accordance with Belgian law.

The Belgian framework closely adheres to the rules established by the Rome Statute, and it seems that the Belgian legislature aimed to make the framework for approving requests for cooperation to the ICC as efficient as possible and therefore introduced few additional procedural hurdles.

Key Weaknesses of the Belgian Enforcement Framework

Key weaknesses include the lack of specific timeframes by which ICC Requests need to be executed and a lack of transparency as to how ICC Requests are assessed and executed in practice.

The Belgian Central Office for Seizure and Confiscation plays an important role with respect to the effective execution of requests for assistance but may cause long delays in practice when it needs to release funds that have been forfeited. Delays in the process of managing and handling the assets may in turn result in assets losing their value, and defendants in ICC proceedings may try to obtain compensation.

There is no mechanism for resolving conflicts between Belgium's sanctions regime and ICC requests where relevant assets are subject to sanctions freezes.

Recommendations

There should be a more transparent process to evaluate and assess the approval and execution of ICC requests for cooperation, in particular in respect of the speed with which the Belgian authorities comply with such requests. By way of example, it would be valuable if the IHL Service could periodically issue public reports to provide more details on the execution of ICC requests for cooperation and on its general activities. In doing so, the rules on confidentiality that apply to ICC proceedings should of course be respected.

Italy

Readiness Rating

Italy's implementing legislation provides a strong coordinating role for the Ministry of Justice (**MoJ**) and General Prosecutor (*Procuratore Generale*) before the Court of Appeal of Rome (the **General Prosecutor**). However, it does not provide sufficient detail on precautionary measures aimed at asset recovery and anti-dissipation measures. The resulting recourse to the Italian Code of Criminal Procedure (**ICCP**) creates certain additional requirements for admissibility/enforceability and freezing/seizure measures which may limit ease of implementation.

Remedies are provided for mismanagement of assets under generally applicable Italian laws and clear rights are provided for *bona fide* third parties in cases of seizure or forfeiture. There is no clear provision ensuring that the types of assets recognised in ICC jurisprudence and practice may be subject to the precautionary measures recognised under Italian law. Similarly, while Italian criminal procedural law provides for the use of confiscated assets to compensate victims of crime, there is no specific Italian provision for the use of seized and confiscated assets for purposes of transfer to the TFV or for purposes of satisfying Reparations Orders passed by the ICC.

Relevant Legislation

By Law no. 237 of 20 December 2012 (**Law 237**), Italy adopted a set of procedural rules related to: (i) the judicial cooperation between Italy and the ICC; and (ii) the enforcement of the decisions of the ICC.

There appears to be neither any case law,[256] nor any extensive academic analysis,[257] regarding the implementation of ICC Requests in Italy following the introduction of Law 237. Analysis of Law 237 shows that there are no specific provisions for the implementation of ICC requests for cooperation for precautionary measures related to the recovery of property. As this is relevant to asset recovery, it is reasonable that the rules of the ICCP apply due to express cross-referral to the ICCP in Article 3 of Law 237. However, Law 237 does not clearly provide criteria for coordinating the provisions of Law 237 and the ICCP. Accordingly, the practical coordination mechanism is not straightforward.

Moreover, by Ministerial Decree dated 22 March 2022, the MoJ appointed an internal commission to prepare a draft of the Code of International Crimes which aims to introduce the necessary provisions to ensure that the crimes described in the Rome Statute may be subject to Italian jurisdiction. While little information is available regarding approval or amendment of the draft Code of International Crimes, the report of the appointed internal commission suggests that the Code will not provide for any procedural measures and the position will remain governed by Law 237.

Admissibility of Requests

The MoJ and the General Prosecutor play a key role in enforcing ICC Requests.[258] Italy has designated "*diplomatic channels*" for receipt of ICC cooperation requests. However, Law 237 provides that the MoJ should forward requests to the General Prosecutor so that the latter can execute the requests. If the requests relate to investigation or acquisition of evidence, the General Prosecutor requests execution by the Court of Appeal of Rome. The Court of Appeal of Rome will execute requests by decree, if all conditions are met. In issuing its decree, the Court of Appeal of Rome will delegate either a member of that court or the preliminary investigating judge (the so-called **GIP**) of the place where execution will take place to implement the requested measures.

Article 96(2) of the Rome Statute and other formal requirements are not set out expressly. However, Law 237 recognises that the formalities of the ICC should be followed, unless these are contrary to the fundamental prin-

256 There is one case relating to ICC requests that occurred before Law 237 entered into force; the asset-freezing measures were adopted pursuant to the ICCP. See, Corte di Appello di Roma (Rome Court of Appeal), Sezione Quarta Penale, N4/12 RGIE, 23 July 2012, para 1 (IT), in which the Libyan Investment Authority appealed against the freezing of certain assets by the Italian authorities in response to a request for assistance from the ICC.

257 See, e.g., Daley J. Birkett and Dini Sejko, 'Challenging UN Security Council- and International Criminal Court-Requested Asset Freezes in Domestic Courts: Views from the United Kingdom and Italy' (2022), 55(2) Israel Law Review, 107-126.

258 Please note that the functions of the Prosecution Office are exercised in the first degree of justice by the Public Prosecutor before the competent court (*Procura della Repubblica presso il Tribunale*) and in the second degree of justice by the General Prosecutor before the competent court of Appeal (*Procura Generale presso la Corte di Appello*). Therefore, Law 237 provides for a derogation in respect of the ordinary activities carries out by the General Prosecutor: broadly speaking, the main activities of investigation are carried out during the first instance degree by the Public Prosecutor while in the context of Law 237 those activities appear to be coordinated by the General Prosecutor before the Court of Appeal of Rome.

ciples of Italian law.[259] Accordingly, it is assumed that decisions on admissibility rest on the requirements of Article 96(2) of the Rome Statute.

As contemplated in the Rome Statute, Law 237 provides for the refusal of a ICC cooperation request if it is contrary to the fundamental principles of Italian law; or for the stay of the cooperation request if there are reasons to believe that the delivery of certain documents or the performance of certain activities of investigation or acquisition of evidence might threaten national security.[260] Further, general principles of complementarity suggest that no request could be implemented if relating to an ongoing Italian investigation – although this is not expressly stated in Law 237.

The requirement that cooperation by the Italian State must be "*in compliance with the fundamental principles of the Italian legal system*"[261] arguably introduces considerations beyond the limited scenarios for refusing to implement requests (or postponing their implementation) which are contemplated by the Rome Statute. These additional requirements arise from ICCP provisions, by virtue of express reference included in Article 3 Law 237, dealing with foreign mutual legal assistance requests. Among these scenarios is where there exist "*reasonable grounds for believing that considerations relating to race, religion, sex, nationality, language, political opinions or personal or social conditions may adversely affect the conduct or outcome of the trial and it does not appear that the defendant has freely expressed his consent to the rogatory*".[262] This scenario is also a ground for the General Prosecutor to refuse to execute a request (further grounds being that a request is contrary to Italian legal principles or law; or that the facts on which the request was based do not constitute a crime in Italy, unless the accused agreed to the request).[263]

Asset Tracing and Investigation

Investigations would likely be carried out by the Judicial Police (*Polizia Guidiziaria*) (including the tax police, i.e. *Guardia di Finanza*) under delegation by the General Prosecutor.[264]

Freezing or Seizure of Assets

The ICCP provides for two forms of seizure as "*protective measures*": conservative and preventive seizure. The pre-trial and trial phases under the Rome Statute and ICCP are not exactly the same,[265] but this distinction does not prevent both forms of seizure being available at the pre-trial and trial stage in Italy in the context of an ICC Request. Nor does the distinction between the Rome Statute and ICCP pre-trial and trial phases prevent either form of seizure being executed according to the ICCP. In addition, the ICCP provides for the possibility of post-conviction seizure to fulfil a forfeiture order.[266]

Conservative and preventive seizure each have specific pre-conditions and it is not clear how the election of the applicable procedure would be made or whether these procedures can account for all potential ICC requests. However, Article 22 of Law 237 provides a potential resolution through consultations with the ICC (triggered by the General Prosecutor directing the MoJ to initiate consultation procedures).

259 Law 237, art 3 (IT).
260 Law 237, art 5 (IT).
261 Law 237, art 1, (IT).
262 ICCP, art 723(5) (IT).
263 ICCP, art 724(7) (IT).
264 ICCP, art 55 (IT).
265 Under the Rome Statute, the pre-trial phase is concluded by the hearing during which the Pre-trial Chamber confirms the charges on which the Prosecutor intends to seek trial. The trial phase then follows. Under ICCP, the trial phase begins when the Public Prosecutor formally prosecutes the investigated person, who becomes the accused person, however, the hearing during which the judge confirms the charges of the Public Prosecutor is included in the trial phase.
266 ICCP, art 737-*bis*, (IT).

a. Conservative seizure is a precautionary measure aimed at satisfying the payment of procedural expenses, sums due to the Italian State or civil claims arising from criminal proceedings. The requirements are that: (1) there is *prima facie* evidence that a crime has been committed; (2) a prosecution has commenced; and (3) there is a risk of loss of funds for payment of sums due to the State or a civil party.[267]
b. Preventive seizure aims at preventing the availability of assets furthering the consequences of crimes or at ensuring the effectiveness of any subsequent forfeiture (a measure which may be ordered urgently with subsequent validation by the investigating judge). The requirements are that: (1) there is *prima facie* evidence of commission of a crime; and (2) the risk of the commission of further crimes relating to the assets remaining at the disposal of the accused or that, pending the proceedings, any subsequent forfeiture could become impracticable.[268]

Depending on the nature of the frozen/seized asset, a judicial administrator or custodian is usually appointed.[269] It is possible for a judge to include guidelines for administration of the assets in the seizure order which might also regulate the use, sale or destruction of assets.

a. Specific provision is made in respect of the obligations and duties of a judicial administrator appointed to manage ongoing business entities[270] and various civil remedies are available depending on whether a custodian or judicial administrator has been appointed. The Italian Code of Civil Procedure provides for pecuniary sanctions and compensatory damages where losses are caused by a custodian's lack of due diligence in performing their duties.[271] The bar for liability of judicial administrators under the Anti-Mafia Code is higher, requiring wilful misconduct or gross negligence.[272]
b. In addition, the Italian Criminal Code provides for penalties for breaking of seals affixed pursuant to seizure orders (with penalties increased for persons with custody of the assets);[273] as well as in any way destroying or dissipating assets kept in a public office or in the custody of a public official, or of an individual performing a public service entrusted with seized assets.[274]

Law 237 does not provide for release of seized assets in case of acquittal. However, general provisions of Italian law provide that, on acquittal, the judge issuing the decision provides for restitution of seized assets.[275] In the case of ICC acquittals, the procedure would likely require the General Prosecutor to request the Court of Appeal of Rome to order the relevant restitution to release the assets.

Forfeiture of Assets

Italian law provides for the enforcement of fines/forfeiture orders and Reparations Orders through different mechanisms in Article 21 of Law 237.[276] Final ICC orders for fines/forfeiture require the General Prosecutor to request the Court of Appeal of Rome to order forfeiture (or assets/money of equivalent value if it is not possible to specifically enforce the order). A person convicted by way of a final decision (i.e., a finding of guilt without possibility of appeal) has no right of appeal relating to the enforcement of forfeiture orders. However, *bona fide* third parties with an interest in the forfeited assets may challenge the judge enforcing the forfeiture.

267 ICCP, art 316, (IT).
268 ICCP, art 321, (IT).
269 Note that, if the assets to be seized are bank funds, the bank could be appointed as custodian.
270 See Legislative Decree no. 159 of 6 September 2011 (the *Anti-Mafia Code)* (IT).
271 Italian Code of Civil Procedure, art 67 (IT).
272 Anti-Mafia Code, art 35-*bis*, (IT).
273 Italian Criminal Code, art 349 (IT).
274 Italian Criminal Code, art 351 (IT).
275 ICCP, art 323 (IT). Note that pursuant to Article 240, para 2(2) of the Italian Criminal Code "*Forfeiture is always ordered:* […] *(2) assets, manufacture, use, carry, possession and sale of which is a criminal offence, even if no conviction has been issued.*"
276 Article 21(6) of Law 237 makes clear that any Reparations Orders are to be executed in line with Articles 75 and 85 of the Rome Statute.

Assets may be subject to sale. Where this is not possible, or assets cannot be transferred to the ICC, the General Prosecutor is required to inform the MoJ to commence consultation procedures with the ICC. One situation where sale or transfer may be barred is where assets of Italian cultural heritage are involved in which case, in the absence of alternative assets being forfeited, consultations may be initiated.

Forfeited amounts and assets collected by the Court of Appeal of Rome are paid to the Italian State Budget and thereafter assigned by Ministerial Decree to the MoJ for transfer to the ICC. Costs of forfeiture are deducted from the collected sums.[277]

Key Strengths of the Italian Enforcement Framework

The fact that the ICC deals exclusively with the MoJ when requesting the enforcement of an ICC Request can reasonably be regarded as a major strength of the Italian legal framework implementing the Rome Statute. From a theoretical point of view (though this remains untested in practice), the central role of the MoJ (and of the General Prosecutor) might ease the process, avoid different approaches in handling an ICC Request and improve efficiency.

A benefit of reliance on ICCP procedures is that the relevant authorities should have a good degree of experience in executing requests.

Key Weaknesses of the Italian Enforcement Framework

The main weakness of the system is that it appears to be untested. This creates a degree of uncertainty in anticipating how, in practice, the Italian authorities will execute ICC requests.

Analysis of Law 237 suggests that it focuses primarily on personal precautionary measures while procedures in the ICCP could apply for *in rem* precautionary measures required for asset tracing and recovery requests. However, Law 237 does not clearly provide criteria for coordinating the provisions included in Law 237 with the ICCP which makes practical coordination unclear and sometimes complex.

Specific difficulties in reconciling provisions of the ICCP with the context of ICC Requests include the possibility of additional admissibility requirements and criteria for seizure measures that restrict the scenarios in which these may be implemented.

Recommendations

It would appear desirable for there to be, to the extent possible, an open channel of communication between the OTP, on the one hand, and the MoJ and the General Prosecutor, on the other, in order to highlight the unique aspects of each ICC Request and, if needed, provide assistance in its enforcement.

Law 237 could be amended by expressly providing for a procedure to implement *in rem* ICC Requests. This could avoid any uncertainty in relation to the implementation of the ICC Request also in light of the provisions of the ICCP. Moreover, there would be clear advantages in incorporating the provisions contained in Law 237 directly into the ICCP, expressly mentioning the relevant provisions applicable at all the stages of an ICC Request for precautionary *in rem* measures (e.g. management of seized assets).

277 Law 237, art 21(5) read with Law no. 400/1988, art 17(3) and Ministerial Decree no. 61/2020 (IT).

Spain

Readiness Rating

Spain has a number of strengths in its existing framework. Implementation legislation is in place; it contemplates implementation of fines, forfeiture orders and Reparations Orders; and has a well-established, centralised authority for managing seized assets. However, the procedures for determining the admissibility of ICC requests are cumbersome. In addition, significant aspects of implementation rely on common criminal procedural laws.

While procedures for identification/tracing and forfeiture of assets are relatively robust and appear generally able to accommodate the purpose and context of ICC Requests, the position regarding precautionary measures is problematic. In particular, ordinary requirements for seizure require a link between frozen/seized assets and criminality. There is also some confusion created by the application of criminal forfeiture requirements to the implementation of Reparations Orders.

Relevant Legislation

Organic Law 18/2003, 10 December 2003, on Cooperation with the International Criminal Court (**Organic Law 18/2003**) entered into force on 11 December 2003 and regulates the systematic and procedural aspects pertaining to cooperation with the ICC.[278] Due to the limited regulation contained in Organic Law 18/2003, requests for cooperation regarding asset recovery and enforcement of fines, forfeiture orders and Reparations Orders are executed in accordance with provisions of national laws of general application, including in particular the Law 41/2015, 5 October 2015, which amends the Criminal Procedure Act (**Criminal Procedure Act**); Organic Law 10/1995, 23 November 1995 (**Spanish Criminal Code**); Law 50/1981, 30 December 1981, which regulates the Organic Statute of the Public Prosecutor's Office (**Law 50/1981**) and Royal Decree 948/2015, 23 October 2015 (**RD of the Office for Asset Recovery**).

Admissibility of Requests

The initial request for cooperation is submitted by the ICC to the Ministry of Justice (*Ministerio de Justicia*) and the request must be implemented provided it complies with Spanish national law and has the objective of facilitating ICC proceedings.[279] Where an ICC request could affect national security or defence, or where it concerns documents transmitted to Spain confidentially by another State, international organisation or intergovernmental organisation, the Ministry of Foreign Affairs (*Ministerio de Asuntos Exteriores*), in coordination with the Ministries of Justice, Interior and Defence or other competent Ministries, must carry out consultations internally and with the relevant State or organisation to explain the reasons for the denial of a request and consider how best to comply with the request.[280] The Organic Law 18/2003 contemplates that "*any other difficulty*" with meeting requests will be the subject of consultation between the Ministry of Justice and the Court.[281] Where, after transmitting a request to the relevant Spanish authority for implementation, that authority considers that the request cannot be carried out, it must submit reasons to the Ministry of Justice who must then engage in consultations with the Court.

It is possible that a cooperation request would also trigger the provisions of Organic Law 18/2003 permitting Spain to raise a challenge to the jurisdiction of the Court or to seek a deferral of ICC investigations where Spanish courts are (or were) seised of the matter due to Spanish territory or Spanish citizens being implicated. In such

278 Organic Law 18/2003, art 1 (ES).
279 Organic Law 18/2003, arts 6.1; 8.4; and 20 (ES).
280 Organic Law 18/2003, arts 20.2; and 20.4 (ES).
281 Organic Law 18/2003, art 20.3 (ES).

cases, a joint proposal of the Minister of Justice and Minister of Foreign Affairs must be submitted to the Council of Ministers (*Consejo de Ministros*) to challenge the Court's jurisdiction or the admissibility of the case; or to seek deferral of ICC investigations to enable investigations to proceed in Spain. The challenge or request for deferral will be transmitted by the Ministry of Justice to the Court. In the case of an admissibility challenge, this must occur as soon as possible before the start of the ICC trial or, in exceptional circumstances only, after the ICC trial is initiated; and, only in cases of the matter being *res judicata* in Spain, at a later time after the ICC trial has begun.[282] If, despite Spain's objections, the ICC decides to proceed with the investigation or maintains its jurisdiction, the Spanish authorities will disqualify themselves in favour of the Court and transfer relevant documentation of proceedings to the Court.[283]

Enforcement requests follow a slightly different order, with the Ministry of Justice transferring the request to the Public Prosecutor (*Fiscal General del Estado*) for them to take necessary enforcement steps before the competent court.[284]

Asset Identification and Tracing

As there is no specific procedure to ascertain whether a person has benefited from an ICC crime or to identify property derived from an ICC crime, the Asset Recovery and Management Office (**OAPM**), the Public Prosecutor's Office and the judge in charge of the investigation/enforcement will collaborate with other authorities or officers of the Judicial Police (as well as financial entities, public bodies and registries) to locate the assets or rights of interest to the ICC, in accordance with the common asset location procedure established in Spanish legislation.[285]

The OAPM is ordinarily responsible for the search for and location of assets and proceeds of crime (within or outside Spanish territory) as well as for their safeguarding and management.[286] The regulatory provisions of the OAPM (and more specifically, the General Sub-directorate for the location and recovery of assets[287]) provide for coordination with the State Security Forces and Agencies (*Fuerzas y Cuerpos de Seguridad del Estado*) for the location and recovery of assets.[288] It may also seek the collaboration of any other public or private entities whose specific regulations require cooperation.[289] The OAPM is not responsible for the location or management of assets where the sole purpose is the payment of a fine, and nor is it responsible for identifying assets at post-conviction stage (a function performed by the Public Prosecution).[290] At post-conviction stage, asset identification is carried out by the Public Prosecutor's Office (including through other agencies, such as the Judicial Police and with the technical assistance of the OAPM).[291] The Public Prosecutor may also engage with financial entities, public bodies, registries and natural/legal persons as part of its investigations.[292]

Freezing or Seizure of Assets

At a pre-trial stage, cooperation with requests for freezing or seizure of assets may become more burdensome under the Spanish legislative framework. Although Spanish domestic law provides for the possibility of freezing

282 Organic Law 18/2003, art 9.2 (ES).
283 Organic Law 18/2003, art 10 (ES).
284 Organic Law 18/2003, art 22.7 (ES).
285 RD of the Office for Asset Recovery, art 6 (ES).
286 RD of the Office for Asset Recovery, art 3 (ES).
287 RD of the Office for Asset Recovery, art 6.1.(a) (ES).
288 RD of the Office for Asset Recovery, art 6.1.(a) (ES).
289 Sixth Additional Provision of the Criminal Procedure Act (ES).
290 RD of the Office for Asset Recovery, art 3.1 (ES).
291 Criminal Procedure Act, art 803 ter q (ES).
292 Section 6 of Circular 4/2010 sets out the persons and institutions from which the Prosecutor may collect data within investigation proceedings, i.e. The Spanish Confederation of Savings Banks (CECA); the Spanish Banking Association (AEB); the General Treasury of the Social Security; the Mercantile Registries; the Registry of automobiles of the General Directorate of Traffic; the Registry of vessel registrations of the General Directorate of the Merchant Marine; the Registry of Aircraft registrations of the State Aviation Safety Agency; the Personal Property Registry; the Property Registries; the General Directorate of the Cadastre

or seizing assets from the beginning of proceedings (at the sole discretion of the judicial authority)[293] or as a precautionary measure,[294] the "*innocent until proven guilty*" principle (*presunción de inocencia*) has a strong effect on the actions which may be taken. Specifically, there must be a clear indication that the assets are the proceeds or fruits of (or in some way linked to) a crime. The argument must be strong enough to support the relevant order.[295]

In particular, any order for precautionary measures must meet a number of requirements including that the measures are necessary to guarantee effectiveness of asset recovery in case of future conviction[296] and meet the preconditions for injunctive relief i.e. *periculum in mora* ("danger of delay") and *fummus boni iuris* ("likelihood of success on the merits").[297] Further, precautionary measures may be challenged by the accused and affected third parties before the issuing court (subject to a further appeal).[298] There is also an opportunity for challenge in cases where precautionary measures handed down on an urgent basis and without prior hearing.[299] To be successful, a challenge would need to show that the requirements for precautionary measures were not met and the accused could argue that the measure adopted does not meet its intended purpose or tender security to have it lifted.

The OAPM is responsible for managing frozen or seized assets through its sub-directorate general for asset preservation, administration and realisation.[300] This sub-directorate is responsible for determining the use or destruction of seized goods (subject to judicial authorisation) and protection measures to be adopted.[301]

Forfeiture of Assets

Article 22(7) (and Article 23(3)) of Organic Law 18/2003 provide that the Public Prosecutor is responsible for ensuring that fines/forfeiture orders (and Reparations Orders) are enforced by the court with the necessary jurisdiction, and that the Prosecutor is responsible for delivering recovered assets or sums to the Ministry of Justice (*Ministerio de Justicia*) for transfer to the ICC.[302] The remaining procedural steps are determined by provisions pertaining to forfeiture in the Spanish Criminal Code.[303]

Forfeiture proceedings take place on notice to the defendant, with an opportunity to respond (non-response being taken as acceptance of the confiscation)[304] and provide for third party intervention.[305] Where profits or assets have been acquired by third parties who knew or ought to have known that they derived from illegal activities or that their acquisition would frustrate forfeiture, forfeiture of assets held by such third parties may be ordered.[306] If forfeiture is ordered, the Public Prosecution acting itself or through other authorities (including the OAPM) will take the necessary steps to locate assets or rights to fulfil the order.[307]Appeal against forfeiture proceedings is permitted employing "fast-track" criminal proceedings (*procedimiento abreviado*) entailing a five-day window for appeal (rather than the usual twenty days).[308]

293 Spanish Criminal Code, art 127 *octies* (ES).
294 Criminal Procedure Act, art 803 *ter* (ES).
295 Circular 4/2010, s 2.4 (ES).
296 Criminal Procedure Act, art 803 ter l (ES).
297 Criminal Procedure Act, art 764 in relation to Civil Procedure Act, art 729; AAP Seville, Section 6, of 25 December March 2004, JUR 2004, 135603 (ES).
298 Criminal Procedure Act, art 764 read with Civil Procedure Act, arts 734-735 (ES).
299 Criminal Procedure Act, art 764 read with Civil Procedure Act, arts 733.2; 739; 741, (ES).
300 RD of the Office for Asset Recovery, art 6.1. (b) (ES).
301 RD of the Office for Asset Recovery, arts 6.1. (b); 40 (ES).
302 Organic Law 18/200, arts 22.7; 23.3, (ES).
303 Spanish Criminal Code, arts 127-127 *septies* (ES). In very limited circumstances, no court order is required, however, it is unlikely that these would find application in the case of ICC requests.
304 Criminal Procedure Act, art 803 *ter* l; art 803 *ter* m 2 (ES).
305 Spanish Criminal Code, art 127 *quarter* (ES).
306 Criminal Procedure Act, art 803 *ter* a (ES).
307 Criminal Procedure Act, art 803 *ter* 1, (ES).
308 Criminal Procedure Act, art 803 *ter* r (ES).

The application of forfeiture procedures to enforcement of Reparations Orders of the ICC in terms of Article 23(3) of Organic Law 18/2003 has implications for the assets that may be seized and confiscated. Article 127(1) of the Spanish Criminal Code contemplates forfeiture of assets derived from the commission of crime; the means or instruments of crime; and profits of crimes – which means that there must be a nexus with an underlying crime for forfeiture to be ordered. It is not clear, however, whether this limits the effect of Reparations Orders in Spain.

Key Strengths of the Spanish Enforcement Framework

Spain is well prepared to search for, manage and liquidate assets. There is an institution solely dedicated to these purposes.

Spain has taken (and is continuously taking) legislative measures to cooperate fully with the ICC (establishing certain rules for procedure and evidence to facilitate cooperation).

In a post-conviction scenario, executing an order made by the ICC to forfeit assets is a straightforward process.

Key Weaknesses of the Spanish Enforcement Framework

Although the Spanish legal jurisdiction and authorities are committed to cooperating with ICC Requests, the procedure for collaboration may become burdensome (especially noting that the process must proceed through various Ministries and institutions that might not work at a speedy pace).

The availability of pre-trial precautionary measures is curtailed by the "*innocent until proven guilty*" principle. Therefore, there has to be a convincing evidentiary component to have precautionary measures, or freezing/seizure of assets, prior to a conviction. Additionally, certain conditions have to be met by law in order to grant precautionary measures which are additional to those in the Rome Statute.

Given that there is no publicly available information about previous examples of the Spanish government complying with ICC Requests, the provisions of the Organic Law 18/2003 and other domestic legislation in this respect remain untested.

Recommendations

In order to improve the overall process for cooperating with the ICC and ensure that the process does not become too burdensome, Spain should address its lack of procedure for regulating: (i) the eventual opposition of the accused; (ii) the decision of Spain to cooperate with the ICC; and (iii) the request of the ICC to locate their assets.

Moreover, there is no specific procedure to have the assets handed over to the ICC upon forfeiture and it would be beneficial to have an established procedure for clarity.

It may be possible to achieve the desirable streamlining by modifying existing mechanisms within the Spanish legal system[309] for the execution of final judgments by courts of other European Union Member States requesting confiscation, which could be adapted to be applicable to ICC orders of a similar nature.

309 Such as under Act 23/2014, of 20 November, on Mutual Recognition of Judicial Decision in Criminal Matters in the European Union (ES), 26 October 2023.

Portugal

Readiness Rating 0 Fair 4 10

Portugal has existing procedures in place for the enforcement of foreign judgments and for asset identification, tracing, freezing and seizure as well as mechanisms for enforcing confiscation orders. However, the absence of specific implementing legislation means that these procedures need to be adapted or applied by analogy to the implementation of ICC Requests.

A number of the available procedures restrict the circumstances and conditions in which asset recovery steps can be taken. In particular, seizure measures presume that seized assets will ultimately be forfeited (rather than merely conserved) and require proof of a nexus with a crime.

Similarly, the process for determining the admissibility and enforceability of forfeiture orders entails several stages and requirements which may create obstacles to effective cooperation – and it is not clear how Portuguese law would respond to requests for implementation of Reparations Orders. In addition, it is not clear that sufficiently robust pre-emptive measures are in place to secure the value of seized assets (an issue reflected in complaints raised in the *Bemba* case). Nevertheless, Portugal's foreign legal assistance law is long-standing and effective; criminal and civil procedural codes provide for robust human rights protections; and the system has been used on at least one occasion to seize assets at the request of the ICC.

Relevant Legislation

The Rome Statute has been adopted into Portuguese legislation through: (1) Parliament Resolution No. 3/2002 of 18 January 2002 having approved the Rome Statute for further ratification (**PR 3/2002**); (2) the Decree of the President of the Portuguese Republic No. 2/2002 of 18 January 2002 having ratified the Rome Statute; and (3) Law No. 31/2004 of 22 July 2004 having established the international crimes as foreseen in the Rome Statute.

PR 3/2002 included Portugal's indication that cooperation requests in terms of Article 87(2) of the Rome Statute, as well as any supporting documents, must be written in Portuguese or accompanied by a Portuguese translation. There is, however, no specific Portuguese legislation providing procedural rules for cooperation with the ICC. Accordingly, regard must be had to the Law on International Judicial Cooperation in Criminal Matters (**Law No. 144/99**) and the Portuguese Code of Criminal Procedure (Decree-Law No. 78/87) (**CCP**).

Admissibility of Requests

A Request from the ICC is received by the Ministry of Foreign Affairs which forwards it to the Public Prosecutor's Office. The Public Prosecutor, in turn, forwards the Request to the Minister of Justice for a decision on admissibility.[310]

The Minister of Justice[311] determines compliance with the requirements of Articles 87, 93 and 96 of the Rome Statute as well as local legal requirements.

a. These are for the most part found in Law No. 144/99 which provides formal requirements which are similar to the formal requirements of Article 96(2) Rome Statute (and contemplate requests specifying issues of confidentiality and deadlines for compliance).[312]

310 Law No. 144/99, art 24 (PT).
311 Law No. 144/99, art 21 (PT).
312 Law 144/99, art 151(c) (PT).

b. In addition, there are formal requirements for specific types of requests. Requests to ascertain whether the proceeds, objects or instrumentalities of an alleged crime are in Portugal must specify the reasons to believe that they are in Portugal;[313] and requests for search, seizure, examination or an expert opinion must include a declaration stating that such a request is admissible under the Rome Statute.[314]

c. A strict interpretation of Law No. 144/99 also suggests that a request will be inadmissible if it contravenes the legal prohibitions in Article 6 of that Law. These include (*inter alia*) non-compliance with the ECHR (and any other human rights instruments ratified by Portugal); reasonable grounds for believing that cooperation is requested to prosecute or punish a person due to their race, religion, sex, nationality, language, political or ideological beliefs, or membership of a particular social group; risk of limiting defence rights or increasing a sentence due to any aspect of the person's identity; or violation of the *ne bis in idem* principle (which prohibits a second prosecution in cases that have already been concluded by a final decision).

d. There are additional grounds for refusal pertaining to requests communicated by letters rogatory (however the request is transmitted).[315] The relevant grounds for refusal are lack of competence by the requested authority to perform the act; prohibition by Portuguese law or public order; execution threatening sovereignty or national security; and where a request entails direct enforcement of a foreign judgment without revision and confirmation in Portugal.[316]

If a request is found to be inadmissible, the Minister of Justice must communicate this to the ICC.[317] If a request is found to be admissible, it is returned to the Department of Judicial Cooperation and International Relations in the Public Prosecutor's Office for implementation.[318] The Minister of Justice's decision is not appealable. However, a decision of admissibility is also not binding, and the judicial authorities (including the Public Prosecutor's Office) may again verify the requisite legal requirements in what is, in effect, a "second admissibility" decision. In urgent cases, the ICC may communicate through bodies such as INTERPOL to adopt precautionary measures or carry out urgent precautionary measures.[319]

Asset Identification and Tracing

Asset identification and tracing measures are generally carried out by the Public Prosecutor, subject to judicial orders required for measures implicating fundamental rights. Search warrants and expedited data preservation orders[320] may generally be issued by the Public Prosecutor unless searches relate to homes,[321] lawyers' offices,[322] banks[323] or medical facilities.[324]

Freezing or Seizure of Assets

Procedures for the freezing or seizure of assets depend on the stage of proceedings. Law No. 144/99 provides for measures to be taken by Portuguese authorities to prevent transactions, transmission or disposal of assets which are or may be targeted by a decision of a foreign authority (in this case, the ICC) to enforce a forfeiture decision. The relevant procedures appear to presume that the ultimate purpose of seizure will be forfeiture.

313 Law No. 144/99, arts 160(1), (2) and (5) (PT).
314 Law No. 144/99, art 151(b) (PT).
315 The requirements pertaining to letters rogatory under Article 152 of Law 144/99 are made applicable to all requests (including those transmitted in terms of Article 29) by virtue of Article 152(6).
316 Law 144(99), art 152(4), (PT).
317 Law 144/99, art 24(2)-(3) (PT).
318 Law 144/99, art 24(1); art 21 (PT); and Public Prosecutor's Statute, art 54 (PT).
319 Law No. 144/99, art 29 (PT).
320 Cybercrime Law, arts 12 and 14 (PT).
321 CCP, arts 177(1) and 269(1)(c) (PT).
322 CCP, arts 177(5) and 268(1)(c) (PT).
323 CCP, arts 177(5) and 268(1)(c) (PT).
324 CCP, arts 177(5)(6) and 268(1)(c) (PT).

a. At pre-trial stage, the Code of Criminal Procedure permits seizure or freezing of funds or assets directly linked to a crime.[325]

b. Where criminal proceedings are pending, provisional seizure may be ordered[326] by judicial decree without a hearing,[327] but only if there is proof that procedural delay could jeopardise eventual forfeiture. In addition, the applicable procedure under the Code of Civil Procedure requires that the Public Prosecutor place facts before a court alleging fear of dissipation; indicating the assets to be seized; and indicating the likelihood of the debt.[328] Protections are provided for living expenses insofar as a person may not be deprived of income necessary for personal and family maintenance (an amount set by agreement of the parties or by a judge on submission of evidence).[329]

c. Seizure of funds and provisional seizure cannot be utilised after conviction. However, Article 112 of Law No. 144/99 provides for a judicial order of precautionary measures including seizure to ensure enforcement of a confiscation penalty.

In Portugal, seized assets (other than bank funds) are managed by an appointed legal depositary,[330] while bank funds remain under management by an individual bank. The depositary may be the owner of the asset (primarily where the asset is the home of the suspect / accused / convicted person) or a third party appointed by the enforcement agent with the agreement of the party seeking enforcement. Legal depositaries have a duty to manage assets with care and diligence. Liability accrues for breach of this duty (particularly if assets are lost[331]) and civil liability may be imposed in terms of general principles of Portuguese law. It is also possible that a depositary failing to fulfil its obligations may be removed by the court at the instance of an interested party or the court itself.[332] Similarly, a court is responsible for settling disagreements between the owner of the assets and beneficiary of the seizure over management of the assets.

Forfeiture of Assets

Where the ICC requests enforcement of a forfeiture order handed down in terms of Article 77(2)(b), it is not clear whether the ICC's decision would be directly enforceable in Portugal without the need for review by a domestic court[333] or whether recognition proceedings would be required using procedures for execution of foreign judgments provided by Law No. 144/99. It is more likely that the latter applies, although Law No. 144/99 would need to apply by analogy as the language of the law clearly refers to enforcement of final decisions of foreign courts (rather than by international bodies). In this case, the formal and substantive admissibility requirements of Law No. 144/99 would apply. Among these, the most problematic is the requirement that the offender is Portuguese or is habitually resident in Portugal.

Once determined to be admissible by the Ministry of Justice, the forfeiture request is sent via the General Public Prosecutor's Office to the Public Prosecutor of the Court of Appeals to proceed with revision and confirmation of the decision.[334] This stage of the procedure entails further requirements which deal broadly with issues of finality of the judgment; due process rights of the convicted person; dual criminality under Portuguese Law; compatibility with Portuguese law and principles; and non-interference with Portuguese jurisdiction.[335]

325 CCP, art 178 (PT).
326 CCP, art 228 (PT).
327 Code of Civil Procedure, art 393(1) (PT).
328 Code of Civil Procedure, art 392(1) (PT).
329 Code of Civil Procedure, arts 393(3) and 385 (PT).
330 Code of Civil Procedure, art 756 (PT).
331 Code of Civil Procedure, art 760 (PT).
332 Code of Civil Procedure, art 76(1)-(2) (PT).
333 Portuguese Constitution, art 8; and Rome Statute, arts 99 and 103.
334 Law 144/99, art 100 (PT).
335 CCP, art 237; Civil Procedural Code, art 980, *ex vi* CCP, art 237(2) (PT).

a. Proceedings are on notice,[336] and may be opposed on grounds that pre-conditions for confirmation are not met (and the merits may not be examined until such an argument is resolved).[337] Confirmation decisions may be subject to the appeal before the Supreme Court which renders an order of final effect.
b. If the penalty has expired in terms of Portuguese statute of limitations or are extinguished by an amnesty, confirmation may be granted, but the sentence will be unenforceable. In other cases, an order is transmitted to the first instance court with jurisdiction for execution with procedures differing for specified assets[338] and the value of proceeds, property and assets.[339] Search and seizure for purposes of enforcement are permitted[340] and protections are in place in respect of seizure of residential property,[341] salaries and non-disposable assets.[342] In addition, enforcement proceedings may be opposed by the convicted person.[343]

Any collected sums (including proceeds of sold assets) must be promptly delivered by the enforcement agent to the party seeking enforcement with steps for payment taking place within three months of seizure.[344] In Portugal, the sole means of guaranteeing the handover of assets for victim's reparation is by filing an enforcement action.

Key Strengths of the Portuguese Enforcement Framework

There is a general law on international cooperation in criminal matters that has been extensively implemented in the past for cooperating with foreign States. In the absence of specific legal provisions regarding ICC requests for cooperation, this law applies.

Strong rights protections with reference to the ECHR are built into the relevant Portuguese procedures.

Key Weaknesses of the Portuguese Enforcement Framework

There is a lack of specific domestic legislation providing procedural rules for cooperation with the ICC. Law No. 144/99 applies to any request for cooperation made by foreign States (and not specifically to ICC Requests). This can lead to difficulties in applying its provisions.

There are no clear mechanisms for managing seized assets.

There are no mechanisms for the handover of assets without the need to file an enforcement action, which raises questions about the ability to seize and subsequently hand over assets for purposes of reparations, fines or purposes other than fulfilling ICC forfeiture orders. The overall procedure for enforcement can be relatively lengthy and is subject to opposition.

The requirements or ability to enforce ICC decisions relating to conviction and ICC enforcement requests are unclear when the offender is neither Portuguese nor a habitual resident of Portugal.

There is a lack of experience in complying with ICC requests for cooperation in Portugal, as there is only one publicly known precedent of cooperation with the ICC.

336 Law No. 144/99, art 99(5) (PT).
337 Law No. 144/99, art 100(2) (PT).
338 Civil Procedural Code, art 859 (PT).
339 Civil Procedural Code, art 727 (PT).
340 Civil Procedural Code, art 749(1); art 861(1) (PT).
341 Civil Procedural Code, art 861(6); art 862; and art 863(3), (4) and (5) (PT).
342 Civil Procedural Code, art 737, (PT).
343 Civil Procedural Code, art 729 (PT).
344 Statute of the Association of Solicitors and Enforcement Agents, art 168(1)(c); Civil Procedural Code, art 796(1) (PT).

There is a lack of ability to release assets for purposes of fulfilling forfeiture orders or Reparations Orders where they are subject to restrictive measures under Portugal's sanctions obligations. This is because under Portuguese law there is an absolute ban on handling any assets that have been frozen in accordance with UN or any other sanctions regimes.

Recommendations

It would be highly desirable for Portugal to pass specific domestic legislation on cooperation with the ICC, as well as to provide adequate training on the execution of such requests. Such legislation should:

a. provide fast-track mechanisms for responding to an ICC request for cooperation;
b. clarify that the admissibility requirements to be met are those in Article 96(2) Rome Statute;
c. specify the competent bodies to respond and comply with the request, so that there is no uncertainty as to the correct procedure;
d. allow for the direct enforcement of an ICC judgment, without the need for the confirmation and review procedure provided for foreign judgements;
e. provide specific mechanisms for the handover of assets to the ICC (instead of applying the general legal dispositions applying to seizure of assets); and
f. mindful of the objectives of the EU and ONU sanctions regimes, provide for release of assets subject to sanctions restrictions for purposes of fulfilling forfeiture orders or Reparations Orders of the ICC.

United States (U.S.)

Readiness Rating

Due to the policies in place preventing U.S. cooperation with the ICC, the U.S. is assessed as "*not ready*" for implementation of ICC cooperation requests. Even in the event of a policy change allowing the U.S. to cooperate with the ICC, the U.S. readiness would likely still be rated low as there are no procedures in place to address specific ICC requests for cooperation.

While the U.S. has a strong foundation in place to address foreign requests for assistance, a key weakness is that procedures for seizure and forfeiture are strongly linked to evidence of assets being linked to crime (as proceeds, products, fruits or instrumentalities) and there is little express scope in existing procedures for seizing or confiscating assets for purposes of fulfilling Reparations Orders or meeting victims' claims.

If the U.S. were to join the Rome Statute and pass implementing legislation, the pre-existing procedures for seizure and forfeiture would put the U.S. in a strong position to respond to ICC Requests. However, there does not appear to be any prospect of that happening in the foreseeable future.

The U.S. and the ICC

The U.S. is not a State Party to the Rome Statute. The U.S. participated in the negotiations of the Rome Statute, but ultimately voted against its final adoption at the diplomatic conference.[345] The U.S. nevertheless signed the treaty

345 See 22 U.S.C. § 7421 (Congressional findings) (U.S.). The core of the U.S. objection was the concern that the ICC would assert jurisdiction over: (i) U.S. soldiers for "*war crimes*" resulting from legitimate uses of force; and (ii) other American officials charged with conduct arising from policy decisions.

on 31 December 2000, but President Clinton did not submit the treaty to the U.S. Senate for ratification. On 6 May 2002, the U.S. informed the UN Secretary-General that it "[did] *not intend to become a party to the treaty*."[346] The import of this communication is that the Statute could not be provisionally applied to the U.S. pending ratification.[347]

On 1 July 2002, President Bush signed into law the American Servicemembers' Protection Act (**ASPA**), which limits U.S. support to the ICC and UN peacekeeping missions, and authorises the president to use "*all means necessary and appropriate to bring about the release of certain U.S. and allied persons who may be detained or tried by the ICC*".[348] The law also prohibits responding to "*a request for cooperation*" or "*any letter rogatory*", or providing "*support*" to the ICC, but does allow the president to waive the application of these and other provisions.[349] The high threshold for ratifying treaties under U.S. constitutional law, and lingering concerns over the ICC exercising its jurisdiction over the U.S. military, makes it unlikely that the U.S. will ratify the treaty in the future.

Notwithstanding its formal non-participation in the treaty regime and the strictures of ASPA, U.S. presidential administrations have taken different approaches with respect to the ICC. Even administrations perceived to be hostile to the Court have not wielded the U.S. veto to prevent the UN Security Council from referring cases to the ICC.[350] In 2013, the U.S. expanded its War Crimes Reward Programme by increasing the amounts awarded to individuals who provide information to facilitate the arrest of foreign individuals wanted by international courts, including the ICC (though not mentioned by name).[351]

The current Biden Administration has adopted a conciliatory approach to the ICC, accepting the political constraints but nonetheless trying to facilitate the ICC's work. For instance, the administration repealed sanctions placed upon ICC personnel,[352] and began an internal policy review of the U.S. position with respect to the ICC.[353]

Recovery of Proceeds/Property of Foreign Crimes Found in the U.S.

As a general standard, the U.S. considers requests by foreign countries for assistance in restraining, forfeiting, and repatriating assets found in the U.S. that are forfeitable under foreign law to be a high priority. The two main ways to pursue such requests are: (i) for the foreign country to obtain a forfeiture or confiscation judgment through its own court and then seek the assistance of the U.S. in having that judgment registered and enforced by a U.S. court;[354] or (ii) for the foreign country to provide evidence connecting the proceeds or property located within the U.S. to a foreign crime to the U.S. Department of Justice (**DOJ**), which then may use that evidence to commence a non-conviction-based (**NCB**) forfeiture action against the property under federal law.[355]

While there is no general law in place relating to a request for cooperation in ascertaining whether a person has benefited from a foreign crime or for identifying property derived from a foreign crime, the U.S. does have Treaties on Mutual Legal Assistance in Criminal Matters (**MLATs**). MLATs are intended to facilitate the production of evidence located in one country to the competent authorities investigating criminal activity in another country. While MLATs are in place to allow the U.S. to assist specific other countries, U.S. law prohibits the use of MLATs for indirectly supporting the ICC.[356] If the prohibition against assistance to the ICC were lifted, it is likely that any request by

346 See, UN Treaty Collection, 'Rome Statute of the International Criminal Court', 24 October 2022.
347 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (signed 23 May 1969, entered into force 27 January 1980), art 25(2).
348 Pub. L. 107-206, 116 Stat. 820 (2002), codified at 22 U.S.C. Chapter 81 (U.S.).
349 22 U.S.C. § 7423(b) (request for cooperation), (c) (letters rogatory), (e) (support); *id*. § 7422(c) (waiver) (U.S.).
350 See U.N.S.C. Res. No. 1593 (2005) (Darfur); U.N.S.C. Res. No. 1970 (2011) (Libya).
351 See 22 U.S.C. § 2708 (U.S.); see also U.S. Department of State, 'War Crimes Rewards Program', 24 October 2022)
352 E.O. 13928 of June 11, 2020, 85 Fed. Reg. 36139, *repealed by* E.O. 14022 of Apr. 1, 2021, 86 Fed. Reg. 17895 (U.S.).
353 Colum Lynch, 'America's ICC Animus Gets Tested by Putin's Alleged War Crimes' (*Foreign Policy*, 15 March 2022) 20 January 2023.
354 28 U.S.C. § 2467 (U.S.), 24 October 2022
355 See Stefan D Cassella. "Nature and Basic Problems of Non-Conviction-Based Confiscation in the United States" [2019] 16 Veredas Do Direito (Brazil) 41, 59.
356 22 U.S. Code § 7423(g) (U.S.).

the ICC would be dealt with in a similar manner, in that the process would likely involve some kind of agreement between the U.S. and the ICC, and the DOJ and Office of International Affairs (**OIA**) would likely be involved.

The systems in place for dealing with requests for foreign assistance include robust and frequently used seizure and forfeiture laws with clear mechanisms in place for managing seized or frozen assets; restraining assets prior to final forfeiture orders; and transmitting confiscated assets to foreign States. Seizure processes include opportunities for challenge (including mitigation or rescission of a warrant). The same is not true of implementation of foreign forfeiture orders (outside narrow recognition / admissibility requirements). However, notification and due process requirements of the foreign court are pre-conditions for admissibility. Outside the formal MLAT procedures in place, U.S. authorities have experience with informal police-to-police or prosecutor-to-prosecutor requests which may be used to inform subsequent formal requests (and are particularly relevant to asset tracing and identification).

The U.S. has a robust economic sanctions regime. Where assets are blocked pursuant to Executive Order 14024 (Blocking Property With Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation), the Magnitsky Act or Global Magnitsky Act, there is no clear provision for unblocking assets for purposes of reparations to victims of crime or human rights violations. It is possible for the U.S. President to issue an Executive Order (**E.O.**) to unblock certain assets for the purpose of compensating victims. For example, in February 2022, President Biden signed an E.O. meant to enable USD$3.5 billion in assets belonging to the Afghanistan Central Bank to be used to benefit the Afghan people and be kept out of the hands of the Taliban.[357] Further, through this E.O. the President also unfroze another USD$3.5 billion to be made available for victims of terrorism who have been fighting in the U.S. courts for compensation using the frozen funds.

Key Strengths of U.S. Framework

The U.S. has a robust set of laws and regulations that allow for the seizure and confiscation of assets linked to criminal activity, including foreign crimes. There are no obvious lacunae in the laws, which are of long standing. While the majority of this response concerns the federal system (which takes precedence in response to a foreign request), each individual state also has its own set of laws concerning asset freezes and forfeiture.

The system is frequently used and has a record of being effective in practice. The criminal justice system routinely confronts issues relating to seizure and confiscation of assets in support of criminal proceedings occurring outside the U.S., so it is likely that a prosecutor or judge would be familiar with the relevant issues.

The U.S. has a sophisticated system of financial intelligence. The U.S., particularly New York, is a global financial hub, which means that the country is well placed to trace, identify, and isolate the assets of criminal defendants.

Clear mechanisms and guidance are in place for frozen/seized assets under court supervision in order to maintain asset value and mitigate costs. Similarly, legislation and institutional infrastructure is in place to manage and transmit forfeited assets to third parties including foreign governments.

Provision is made for the restraint of assets after initiation of foreign forfeiture proceedings and prior to forfeiture being ordered – allowing for asset and value preservation. Provision is also made for NCB forfeiture which would likely be applicable in case of international crimes (although it remains necessary to prove a crime was committed and the property was derived from or used to commit that crime).

357 The White House, 'FACT SHEET: Executive Order to Preserve Certain Afghanistan Central Bank Assets for People of Afghanistan', (11 February 2022) 20 January 2023.

The U.S. has experience in dealing with informal police-to-police or prosecutor-to-prosecutor information-sharing requests which can assist in preparing formal requests for cross-border cooperation.

Key Weaknesses of the U.S. framework

The key weakness is that the U.S. is not a party to the Rome Statute, and provisions of U.S. law expressly limit the ability of the U.S. to support or otherwise interact with the ICC.

Were the U.S. to lift the bar on cooperating with the ICC and seek to adapt its existing regime to facilitate such cooperation, the regime for implementing requested measures may include requirements beyond those contemplated in the Rome Statute, such as the requirement of dual criminality and probable cause in ordering warrants for seizure of assets. Currently, the legal framework for implementing foreign forfeiture or confiscation orders includes a dual criminal requirement and requires that the Attorney General regard it in the "interests of justice" to certify a request.

In practice, U.S. law does recognise international crimes over which the ICC has jurisdiction through various enactments including 18 U.S.C 1091 (Genocide) and 18 U.S.C 175, 831, 2332C, 2332A (Use of biological, nuclear, chemical or other weapons of mass destruction). Further, conspiracies under the Racketeer Influenced and Corrupt Organizations Act (**RICO**) can be applied broadly to cover most crimes identified in the Rome Statute where an organisation is involved and forfeiture is permitted. However, there is a risk that particular crimes under the Rome Statute that are relevant in a particular case would not be recognised under U.S. law and there remains at least some risk of misalignment.

Recommendations

It is unlikely that the U.S. will join the ICC due to domestic political constraints. However, consideration should be given as to whether the bar against cooperation could (or should) be lifted.

CHAPTER 3: COMPARATIVE ANALYSIS OF DOMESTIC LEGAL REGIMES AND KEY ISSUES

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The ICC dropped charges against Kenya's President Uhuru Kenyatta after the Kenyan government failed to comply with a cooperation request from the prosecution.

Structure of Legislation and Designated National Authority

Overview

The manner in which States enact implementing legislation and the roles that various State agencies play in cooperating with the ICC is largely a domestic constitutional and legal matter. This can complicate States' cooperation with the ICC, although successful legislative regimes facilitate effective and efficient cooperation. The trends outlined in this section 20 provide some guidance for jurisdictions that lack implementing legislation or that are considering amendments to their implementing legislation.

The most effective national implementing laws appear to be those that modify existing domestic procedures to the specific context of ICC Requests – and do so with sufficient flexibility to adapt to developing ICC practice and jurisprudence. In addition, the following attributes of implementing legislation, when present, lead to more clarity and ease of enforcement:

a. the implementing legislation reflects the different stages and types of orders which exist within the Rome Statute and the ICC's own RPE and other governing documents, as well as creating alignment with orders and judgments of the ICC;

b. the implementing legislation clarifies which domestic laws of general application apply where recourse to such general laws is necessary;
c. there is a strong coordinating authority that is responsible for determining the admissibility and implementation of ICC Requests at all stages, and that also handles communications with the ICC; and
d. there is a designated coordinating body empowered to develop expertise in interpretation and application of the Rome Statute.

Structure of implementing legislation and relationship with ICC jurisprudence

The approaches of the States reviewed here range from that of the UK, which has very detailed implementing legislation, to that of Portugal, which has no implementing legislation (despite its intention to cooperate with the ICC). A given jurisdiction's readiness to implement ICC Requests is largely influenced by the extent to which implementing legislation modifies domestic asset recovery measures to the ICC context (or how effectively the ICC request process is integrated into existing national legal frameworks). In addition, national laws that can respond to evolving ICC practice are more likely to facilitate the process of responding to ICC Requests.

Belgium, Germany, Italy, Switzerland, Spain and the UK have self-standing implementing laws which deal with asset recovery requests in varying degrees of detail. In all cases, where the respective implementing laws do not provide guidance on specific implementation steps, recourse is had to existing domestic law, mainly to criminal procedure laws. For example, the implementing legislation in Italy and Spain is primarily focused on cooperation requests affecting persons (such as arrest and surrender). Consequently, procedures for implementing asset recovery requests are almost entirely resolved by other procedural laws. While Italy's implementing legislation (i.e. Law 237) explicitly refers to the ICCP,[358] Spain's Organic Law 18/2003 is less clear in that it indicates only that generally applicable rules will apply.[359]

The specific cross-reference to the ICCP in Italy's Article 3 of Law 237 is unusual among the implementing statutes reviewed; the UK Act is the only other implementing statute that consistently cross-refers to other legislative instruments, including various land, bankruptcy and insolvency legislation. In most national jurisdictions, determining whether domestic legislation applies where implementing laws are silent is a matter of interpretation. This can create confusion regarding the most appropriate domestic procedures for executing Article 93(1)(k) requests as well as for giving effect to ICC orders for fines, forfeitures and reparations. In addition, where extensive recourse is required to generally applicable procedures (as in Spain, Italy and Portugal), application of the relevant criminal and civil procedural codes, criminal codes and laws regulating foreign legal assistance do not always easily align with the purpose and context of ICC Requests. It should be noted, however, that the omission of a particular regulating provision does not necessarily mean that all national processes are ineffective – as is illustrated by the domestic procedures in place in the U.S. and Spain regarding management of seized assets.

France is the only reviewed jurisdiction that has introduced the implementing law entirely through amendment to the national Code of Criminal Procedure (the FCCP). Law No. 2002-268 of 26 February 2002 (as amended) created a new chapter in the FCCP entitled "*The cooperation with the International Criminal Court*" (Articles 627 to 627-20 FCCP). While recourse to other sections of the FCCP is required for certain aspects of implementation, this approach more clearly aligns the context of ICC cooperation with French criminal procedure. The UK Act, while self-standing, has a similar effect insofar as it replicates existing criminal procedures allowing, in many cases, recourse to general laws where the UK Act does not cover a particular scenario.

358 Law 237, art 3 (IT).
359 Organic Law 18/2003, art 1 (ES).

The UK Act, however, raises questions about the relationship between domestic implementing legislation and the evolving jurisprudence of the ICC. In the UK, as in all jurisdictions, the process of enacting implementing legislation has required interpretation of the scope and meaning of ICC requests for cooperation. While some implementing statutes expressly allow for direct application of the Rome Statute in addition to the provisions of the implementing law,[360] the UK Act does not. The role of ICC jurisprudence is unclear in other jurisdictions as well. Only Switzerland has a clear regime requiring the Central Office to take account of ICC case law in responding to ICC requests for cooperation – and Switzerland's ICCA is perhaps one of the most effective implementing laws reviewed. In most cases, ICC case law is in practice likely to be of persuasive effect – however, this may not always be sufficient to resolve the interpretive difficulties raised by, for example, the ICC's expansive understanding of "*forfeiture*" discussed in 6.4(a) above. A key recommendation is, therefore, to seek clarity regarding how implementing laws can (and should) respond to evolving ICC practice and jurisprudence.

Role of competent / central authorities

A second element of readiness arises from the role of central authorities and the extent to which central authorities coordinate the different stages of assessing and executing ICC Requests. All States forming part of this review have designated a national body to receive ICC cooperation requests. However, some formal channels of communication act more like a "*clearing house*" (such as in France, Portugal, Spain, and the UK), whilst others (such as Switzerland, Germany and, to a certain extent, Italy and Belgium) are also involved in implementation. Whatever model is chosen, the critical factor is whether there is strong and centralised coordination or whether a large number of bureaucratic processes that may slow response times are involved (a particular issue as timelines are largely absent from national laws). In addition, it appears easier to resolve any complications regarding execution of ICC Requests where agencies responsible for implementation are also those empowered to consult with the ICC.

Switzerland has a particularly clear coordinating structure, and, in Belgium, the IHL Service has certain important coordination tasks. In both cases, divisions within the Ministry of Justice are responsible for receiving and assessing ICC cooperation requests, communicating with the ICC, and designating which national authorities or agencies should execute asset recovery measures. The Swiss Central Office has the competence to issue specific directions regarding implementing procedures and designating relevant authorities.[361] In France, once the national authority has transmitted ICC communications to the anti-terrorist public prosecutor, this prosecutor plays a clear and proactive role similar to that of the Belgian IHL Service and the Swiss Central Office.[362] The German Ministry of Justice appears to perform a similar function.

Italy, Portugal, Spain, Germany and the UK all have structures where requests are received by a designated ministry before being forwarded to the public prosecution service.[363] While in each of these cases the relevant prosecutorial authorities effectively coordinate execution of a request, there is variation in whether ministers, judicial authorities, public prosecutors, or some combination of those actors determine the admissibility of a ICC request for cooperation. There is also variation in how jurisdictions treat the admissibility of enforcement requests. In the UK, for example, the Secretary of State plays a more active role in directing steps for forfeiture than in the case of requests for identification/tracing of assets or precautionary measures.

360 See Belgian Act, art 4 (BE); ICCA, art 2 (CH); Organic Law 18/2003, Preamble (ES); Law 237, art 1 (IT).

361 ICCA, arts 3(2)(a), (b) and (c) (CH).

362 FCCP, art 627-1 (FR). Note that France, has specified that the channel for transmitting ICC communications is through the diplomatic channel of the embassy of France at The Hague (and in urgent cases to the *Procureur de la République* for Paris and thereafter through the diplomatic channel). See Declarations and Reservations under Rome Statute, 10 May 2004, 21 December 2022.

363 Italy has designated "diplomatic channels" for receipt of cooperation requests; however, the law provides for the Ministry of Justice forwarding a request to the General Prosecutor to initiate further steps before the Court of Appeal of Rome. In Spain, the Ministry of Justice (*Ministerio de Justicia*) is the designated channel for receiving ICC request and regulates the admissibility process, however, implementation is carried out by the designated national agencies (Organic Law 18/2003, arts 8.5 and 20 (ES)).

It is important to note that the presence or absence of implementing laws is not necessarily the determining factor in whether or not domestic institutions are able to respond swiftly to ICC cooperation requests. Rather, this is a matter for the internal organisation of the State bureaucracy and the relationship between a State's justice system and foreign affairs department. This can be illustrated by comparing the positions in Portugal and the U.S., both of whose compliance with cooperation requests is regulated by international cooperation procedures rather than ICC-specific legislation.[364]

a. Portugal provides a good illustration of bureaucratic complexity. Here, a request is transmitted to the Ministry of Foreign Affairs which forwards it to the Public Prosecutor's office. The Public Prosecutor's office, in turn forwards a request to the Minister of Justice for a decision on admissibility.[365] If found to be admissible, the request is returned to the Department of Judicial Cooperation and International Relations in the Public Prosecutor's Office for implementation.[366] Significantly, the decision on admissibility by the Minister of Justice is not binding and the judicial authorities (including the Public Prosecutor's Office) may again verify compliance with the requisite legal requirements in what is, in effect, a "second admissibility" decision. This is a relatively cumbersome process.
b. By contrast, the U.S. approach to foreign legal assistance is more streamlined. The MLATs to which the U.S. is a party designate the U.S. Attorney General as the Central Authority. Through federal regulation, the Attorney General delegated this authority to the OIA (within the Criminal Division of the Department of Justice). As the designated Central Authority, the OIA is responsible for addressing international cooperation requests and, after determining that a request is factually and legally sufficient in terms of the specific requirements of the relevant MLAT, may either take steps itself to execute a request or refer it to another U.S. authority, such as a U.S. federal prosecutor or a U.S. law enforcement agency.[367] Such a framework, if it were extended to the ICC (which it currently is not), would appear to be effective and efficient, despite the absence of legislation specific to implementing ICC requests.

Receiving requests, admissibility decisions and timeframes for cooperation

Overview

All jurisdictions have a formal process for receiving ICC cooperation requests and determining their admissibility within the jurisdiction prior to commencing implementation (or enforcement) steps. In no case is this decision appealable, although a number of jurisdictions such as Spain and Germany provide for inter-ministerial consultation as part of the admissibility process.

Formal requirements for admissibility do not depart significantly from those of Article 96(2) of the Rome Statute. Where not expressly incorporated into implementing legislation, Article 96(2) is either directly applied in the jurisdiction, or is mirrored by similar requirements derived from mutual legal assistance provisions. Any additional requirements (as in Portugal) do not seem to hinder the implementation of requests in practice, and it appears that any barriers could be easily surmounted through informal engagement between the ICC and national authorities prior to the transmission of formal requests. By contrast, as the UK Act does not refer to Article 96(2), the Secretary of State has discretion in determining the admissibility of an ICC request for cooperation.

364 As indicated at 19.4 above, U.S. legislation does not permit U.S. cooperation with the ICC. Accordingly, the procedure here is referenced for purposes of comparison as a robust international cooperation procedure.
365 Law No. 144/99, art 24 (PT).
366 Law 144/99, art 24(1); art 21 (PT); and Public Prosecutor's Statute, art 54 (PT).
367 18 U.S. Code § 3512 (U.S.).

There is slightly greater variation among jurisdictions in relation to substantive admissibility requirements and grounds for refusal or postponement. Approaches vary from narrow bases for refusing or postponing the execution of requests based only on scenarios contemplated in the Rome Statute to additional requirements (and grounds for refusal) including "*non-discrimination*" and dual criminality considerations. In the latter case, the practical effects of requiring ICC Requests to relate to crimes recognised within the national jurisdiction are only material where not all crimes under the Rome Statute have been recognised under domestic law. However, the presence of these requirements indicates that certain jurisdictions would require specific facts or averments to be included for Requests to be admitted. Greater streamlining of grounds for postponement or refusal (and the requisite content of ICC Requests) would thus be preferable, particularly to facilitate processes involving requests across multiple jurisdictions.

While some jurisdictions contemplate time limits for implementation of ICC requests for cooperation and others include time periods for certain steps in the admissibility or enforcement process, no jurisdiction provides a comprehensive timeframe for cooperation. The disadvantage of this is that it may not incentivise overburdened criminal justice systems to deal with ICC requests for cooperation in a timely fashion. However, the French approach, which places time limits on the duration of execution measures, risks misalignment with the long duration of ICC proceedings.

Formal requirements

All States subject to review have specified the language in which ICC cooperation requests should be communicated[368] and formal admissibility requirements for ICC cooperation requests are similar across most of these States. This arises from express incorporation of Article 96(2) of the Rome Statute, its presumed application or the incorporation of broadly similar requirements in foreign legal assistance legislation.

Belgium, Germany and Switzerland have implemented legislation which closely resembles the text and structure of the Rome Statute and expressly incorporates the formal requirements of Article 96(2) of the Rome Statute.[369] Where formal requirements are not met, Belgian and Swiss authorities may consult with the Court to ensure that the request is corrected or supplemented.[370] In Belgium, the authorities may take interim and conservatory measures in urgent cases.

Italy, France, Portugal, Spain and the UK have not expressly incorporated Article 96(2) into the relevant implementing legislation and there are differences in formal admissibility requirements. This is partly a consequence of whether or not Article 96(2) is directly applicable. It is also the result of the applicability of additional foreign legal assistance legislation, not only in Portugal where there is no implementing legislation, but also in Italy where relevant provisions of the ICCP likely apply in parallel.

a. In France, Italy and Spain, the requirements of Article 96(2) apply to admissibility decisions due to general obligations to comply with procedures under the Rome Statute and the procedural obligations of Article 96(2) on the ICC. (This is likely also the case in Portugal.) Conversely, as the UK is a dualist legal system and Article 96(2) has not been incorporated into UK law (such as through the UK Act), its requirements do not directly apply to admissibility decisions in the UK (which remain discretionary), although the statutory framework must be interpreted in light of the UK's international obligations including under the Rome Statute.
b. In Italy formal requirements of the ICCP likely apply.[371] However, the most material impact of ICCP requirements appears to be substantive rather than formal (as discussed further below).

368 Specified languages for the relevant jurisdictions are as follows: Belgium (French, Dutch or German); France (French); Germany (a German translation is required); Italy (Italian, with a French translation); Portugal (Portuguese or with a Portuguese translation); Spain (Spanish); Switzerland (French, German and Italian); UK (English).
369 Belgian Act, arts 23-24 (BE); ICCA, art 42 § 1, (CH); IStGHG, s 47 (DE) – although note that the IStGHG only refers to Article 96(2) in the heading of the relevant provision and does not replicate the contents of Article 96(2) expressly.
370 ICCA, art 42 § 2 (CH).
371 Law 237, art 3 read with ICCP, art 723 (IT).

c. In Portugal, formal requirements under Law No. 144/99 are similar to those of Article 96(2).[372] However, Portuguese law also requires that asset tracing requests specify the reasons to believe proceeds, objects or instrumentalities of an alleged crime are in Portugal[373] and search or seizure requests require a declaration stating that the steps are admissible under the Rome Statute.[374]

Substantive requirements and grounds for refusal or postponement

Overview

The Belgian, German and Swiss implementing legislation most closely follow the provisions of the Rome Statute regarding grounds of postponement and refusal, as well as regarding mechanisms for resolving substantive difficulties at the admissibility stage. While Spain's Organic Law 18/2003 reflects the same requirements, some lack of legislative clarity means that there may be additional hurdles in resolving difficulties with ICC cooperation requests prior to consulting with the Court. The fact that the legislation of France and the UK deal expressly only with concerns of national security creates some uncertainty regarding the process. Conversely, in Italy and Portugal, the incorporation of or need to have recourse to foreign legal assistance provisions introduces additional substantive requirements, including those concerned with ECHR rights and non-discrimination concerns.

Belgium, Switzerland and Germany

The Belgian Act, Swiss ICCA and German IStGHG reflect the narrow grounds for refusal or postponement of cooperation under the Rome Statute. Postponement is permitted for a period of time to be agreed with the ICC in case of interference with an ongoing investigation[375] and for the duration of an admissibility challenge before the ICC pursuant to Articles 18 or 19 of the Rome Statute.[376] Switzerland also provides for suspension of a request for the duration of any jurisdictional challenge.[377]

Other than non-compliance with national law,[378] the sole express basis for refusal of an ICC cooperation request under the Belgian Act, ICCA and IStGHG relates to disclosure of documents or evidence concerning national security.[379] However, the IStGHG frames issues of national security in terms of postponement pending resolution with the ICC, rather than outright refusal.[380]

a. In terms of the Rome Statute, each of these scenarios triggers a requirement for consultations between a requested State and the ICC.
b. In Switzerland, in case of serious reasons to believe that execution of the ICC cooperation request could affect national security, the ICCA provides that the Central Authority must immediately inform the Federal Department of Justice and Police which may suspend execution measures.[381]

372 Law 144/99, art 151(c) (PT).
373 Law No. 144/99, art 160(1), (2) and (5) (PT).
374 Law No. 144/99, art 151(b) (PT).
375 Rome Statute, art 94; Belgian Act, art 29 (BE); ICCA, art 43 § 2 (CH); IStGHG, art 48 (DE).
376 Rome Statute, art 95; Belgian Act, art 30 (BE); ICCA, art 29 § 2 (CH).
377 ICCA, art 29(2) (CH).
378 Rome Statute, art 93(3).
379 Belgian Act, art 31 (BE); ICCA, art 44 § 3 (CH).
380 IStGHG, art 48 (DE).
381 ICCA, art 43 § 2 (CH).

The minimalist position in France and the UK

The French and UK legislation expressly refers only to refusal of cooperation on grounds of national security (in the French case, referred to as "*undermining the public order or the essential interests of the Nation*").[382] The UK Act further provides that a certificate signed by or on behalf of the Secretary of State constitutes conclusive evidence of a threat to national security.[383] Neither State expressly contemplates consultations with the ICC to resolve the situation but, in France, such consultations would likely be required as per Article 91(4) of the Rome Statute.

Variations in Spain

In Spain, Organic Law 18/2003 is similar, albeit with some modifications, including a requirement for inter-ministerial consultations in case of a potential effect on national security or defence.[384] Organic Law 18/2003 provides that "*any other difficulty*" with meeting ICC cooperation requests will be subject to consultation between the Ministry of Justice and the ICC.[385]

An ICC cooperation request could also trigger provisions of Organic Law 18/2003 which permit Spain to challenge ICC jurisdiction or to request a deferral of ICC actions where the Spanish courts are (or were) seised of a matter due to an investigation which involves Spanish territory or citizens. This is similar to the position in Switzerland but entails additional internal steps, including submission of a joint proposal of the Minister of Justice and Minister of Foreign Affairs to the Council of Ministers to challenge the admissibility of the request or seek deferral of ICC investigations to enable the matter to proceed in Spain. The Council of Ministers must then decide whether or not to accept the request and the Minister of Justice communicates the decision to the ICC.[386] If, despite Spain's objections, the ICC decides to proceed with the investigation or maintains its jurisdiction, the Spanish authorities will disqualify themselves in favour of the Court and transfer relevant documentation of proceedings to the Court.[387]

Additional requirements of foreign legal assistance

Where national implementing legislation requires extensive recourse to criminal procedure laws or general legislation concerning foreign cooperation, the situation becomes more complex. This is the case in Italy and Portugal, whilst the general principles of the U.S. MLAT regime provide a useful point of comparison.

a. In Italy, the requirement that cooperation by the State must be "*in compliance with the fundamental principles of the Italian legal system*"[388] and applicability of the ICCP arguably introduces considerations that pertain to foreign legal assistance requests that fall outside the limited scenarios contemplated by the Rome Statute (and which appear in Law 237).[389] While most of these overlap with those contemplated by the Rome Statute, one clear additional basis for refusal is "*reasonable grounds for believing that considerations relating to race, religion, sex, nationality, language, political opinions or personal or social conditions may adversely affect the conduct or outcome of the trial and it does not appear that the defendant has freely expressed his consent to the rogatory*".[390] This "*non-discrimination*" provision and other ICCP grounds may be considered by the General Prosecutor in refusing to execute a request if the request is contrary to Italian legal principles or law or if the facts on which the request was based do not constitute a crime in Italy, unless the accused agreed to the request.[391]

382 See FCCP, art 694-4 (FR); and Rome Statute, art 93(3).
383 The UK Act, s 39 (UK).
384 Organic Law 18/2003, arts 6.1; 8.4; 20 (ES).
385 Organic Law 18/2003, art 20.3 (ES).
386 Organic Law 18/2003, art 9.2 (ES).
387 Organic Law 18/2003, art 10 (ES).
388 Law 237, art 1 (IT).
389 Law 237, art 5 (IT).
390 ICCP, art 723(5) (IT).
391 ICCP, art 724(7) (IT).

b. Portuguese legal prohibitions provided in Article 6 of Law No. 144/99 are similar to those of the ICCP, including the same "*non-discrimination*" provision and non-compliance with the ECHR (and other binding human rights instruments). In addition, grounds for refusal pertaining to requests communicated by letters rogatory are also applicable (however the request is transmitted).[392] These grounds include lack of competence by the requested authority to perform the act, prohibition by Portuguese law or public order, execution threatening sovereignty or national security, or where a request entails direct enforcement of a foreign judgment without revision and confirmation in Portugal.[393]

c. The U.S. position varies according to the specific MLAT in place. However, the OIA will generally not proceed with foreign assistance requests that do not meet U.S. legal process standards for execution of the particular type of request (possibly an equivalent of a requirement to be "*in compliance*" with national law). For example, in the case of a request for executing a warrant, the U.S. requirements of dual criminality and probable cause must be satisfied.

Domestic challenges to decision by authorities on admissibility

None of the States reviewed permits the decision to accept and execute a cooperation request to be appealed or otherwise challenged. Challenges to implementation of various measures are, however, provided for as discussed at 25.3 below.[394]

Timeframes for complying with ICC requests

None of the jurisdictions reviewed specifies timeframes for finalising cooperation with ICC requests. This can pose a problem in jurisdictions such as Portugal and Spain that require a series of transmissions of the request within the jurisdiction before reaching a decision-maker.

Some national laws specify time periods for discrete aspects of either the determination of admissibility of a request or its execution.

a. In Italy, Article 2 of Law 237 provides that the Ministry of Justice shall ensure execution in a "*timely fashion*". Whilst it does not specify a time period, when read in conjunction with Article 723 of the ICCP, the time limit is likely 30 days from the time the ICC cooperation request is received. Notwithstanding this interpretation, the ICCP deadline is not mandatory. No time limit is provided for the process of execution.

b. Under Portuguese law, the ICC may specify deadlines for compliance.[395] In addition, time periods for enforcement of foreign judgments (likely to find application to enforcement of requests for forfeiture) include time limits for confirmation and revision proceedings.[396]

c. Spain's Organic Law 18/2003 does not provide time limits for ICC cooperation or the determination of admissibility. However, where Spanish courts are (or were) seised of a matter due to an investigation which involves Spanish territory or citizens, an ICC request for cooperation may trigger a process for requesting deferral of ICC actions or for challenging the admissibility of the case. This requires that a joint proposal of the Ministry of Justice and Ministry of Foreign Affairs to the Council of Ministers (based on enquiries made to the General Public Prosecutor) be made within 20 days of receiving the cooperation request from the ICC.[397]

392 The requirements pertaining to letters rogatory under Article 152 of Law 144/99 (PT) are made applicable to all requests (including those transmitted in terms of Article 29) by virtue of Article 152(6) of Law 144/99 (PT).
393 Law 144(99), art 152(4) (PT).
394 Note that under the IStGHG, where the Higher Regional Court needs to take a decision prior to the Ministers' decision on admissibility, section 50(1) provides that this may not be challenged.
395 Law 144/99, art 151 (PT).
396 Law 144/99, art 100(4)-(7) (PT).
397 Organic Law 18/2003, art 8 (ES).

d. The UK Act empowers the judge issuing production/access orders to institute time limits for production / access to documents.
e. In France, Article 627-3 FCCP provides that, once implemented, execution measures may last only up to two years from the date of implementation, subject to extension for an additional two years, at the request of the ICC. This does not provide a limit on the time taken for cooperation with the ICC to occur in the first place, but a longstop as to how long that cooperation may last once in place. It could create difficulties in light of the extended periods taken for ICC proceedings.

Identification / tracing

Overview

General criminal procedure codes, as opposed to implementing legislation, typically regulate identification and tracing of assets. Even in the case of the UK Act, which does provide specific mechanisms regarding identification/ tracing requests, the mechanisms are based on existing legal procedures. This means that the ease or otherwise of responding to ICC requests for cooperation depends on how flexible national laws are in allowing for investigatory steps for a wide range of purposes and into a wide range of assets (including those not directly linked to the crime in question). Conversely, the closer ICC cooperation requests are to requiring tracing of assets which are the proceeds or instrumentalities of crime, or are otherwise clearly linked to the crime under investigation by the ICC, the easier implementation will be in most of the national legal systems reviewed.

Asset tracing is typically considered an investigatory function implemented by prosecutorial authorities with the assistance of the police. In the UK, the police, rather than the public prosecution, take primary responsibility for implementation. In Switzerland, pursuant to the greater coordinating function of the Central Office, a division of the Ministry of Justice directs implementation steps.

There are few opportunities for challenging investigatory measures (which are most commonly searches or requests for information from regulators, government offices or individuals). However, most jurisdictions provide for the involvement of an investigatory magistrate and the use of warrants and judicial orders for measures that may intrude upon privacy or property rights. The particular mechanism in Switzerland which provides for limited challenge at the time of transfer of any assets or documents identified (and which applies also to the transfer of seized and forfeited assets) is described in 22.10 below.

Most, but not all, jurisdictions allow for identification/tracing measures to be implemented throughout all stages of ICC proceedings. For example, the UK and Germany limit post-conviction investigations. In addition, the distinctions between the "*pre-trial*", "*trial*" and "*post-conviction*" stages under the Rome Statute do not always align clearly with stages of domestic criminal proceedings. For this reason, in some cases, differing asset tracing procedures may apply depending on the stage of ICC proceedings.

In the absence of clear examples of implementation of ICC Requests, it is difficult to assess which particular institutional arrangements and procedures are best suited to implementing requests. However, given that financial investigations often require particularly rapid responses, the most effective procedures are likely to be those which provide the fewest preliminary bureaucratic steps and authorise the obtaining of a wide range of asset-related information. In addition, attention should be paid to those implementing laws which potentially restrict asset tracing attempts after conviction or which have the effect of precluding asset tracing for the purposes of ensuring fines are paid, finances are available for fulfilling Reparations Orders or verifying eligibility for ICC financial aid.

Implementing authorities / agencies

In most cases, general criminal procedural laws regulate implementation procedures, and a public prosecution office coordinates them, sometimes by delegating powers to police bodies. More intrusive measures, such as home search and seizure, typically require the oversight of an investigating judge.

a. Portugal reflects a typical structure in which the Public Prosecutor's Office is primarily responsible for implementing investigative measures (subject to exclusive jurisdiction of an investigating judge) and can delegate powers to the police. Similarly, in Italy, the General Prosecutor would likely delegate authority to the Judicial Police (*Polizia Guidiziaria*) (including the tax police (*Guardia di Finanza*)) to carry out investigations.[398] France is also similar, where the anti-terrorist public prosecutor takes implementing measures unless cooperation requests entail actions, such as phone tapping measures, reserved for judicial investigations.
b. In Switzerland, the Ministry of Justice provides greater control through the Central Office, which specifies the measures to be implemented by the designated federal or cantonal offices of the Attorney General.[399] At the Swiss federal level, ICC cooperation requests are executed by a taskforce specialising in international criminal law within the Attorney General's office.
c. Spain has a variation on these systems, where OAPM acts at the instance of the competent judge or at the Public Prosecutor's request[400] to locate and recover assets.[401] The regulations of the OAPM provide for extensive cooperation with other Spanish authorities and agencies.[402] The OAPM, however, is not responsible for the location or management of assets where the sole purpose is the payment of a fine, nor is it responsible for identifying assets at the post-conviction stage, which is a function performed by the Public Prosecutor.[403]

Conversely, the UK Act provides that a "*constable*" (police officer) may be directed by the Secretary of State to apply for the orders or warrants necessary to implement requests.[404] This slightly different approach likely reflects differences in the role of the public prosecution and police in the UK's criminal justice system. However, similar to civil law jurisdictions, ordinary criminal investigation procedures are employed for the purposes of implementing ICC requests.

Role of investigation judges or magistrates and scenarios requiring court orders

In Belgium, France and Portugal, investigatory measures require a court order where they may restrict personal liberties or infringe upon rights.

a. These requirements do not emerge from Belgium or France's legislation implementing the Rome Statute, but from national laws governing the execution of investigatory measures. Accordingly, in Belgium, intrusive measures that may restrict personal liberty or the right to private life, such as house searches, require an order issued by an investigating magistrate in chambers (and without a hearing). France similarly requires an authorising order from the liberties and detention judge (*Juge des libertés et de la detention*) in the case of home searches and seizures and information requests to third parties such as financial institutions and telecom companies.[405] In both cases, *ex post facto* challenges are theoretically possible (although unlikely to be successful) if the measure has caused prejudice (in Belgium) or based on a claim that the authorities exceeded their powers (*action en responsabilité de l'état*) (in France).

398 ICCP, art 55 (IT).
399 ICCA, art 5 § 1 (CH); ICCA, art 32 (CH).
400 RD of the Office for Asset Recovery, art 1 (ES).
401 RD of the Office for Asset Recovery, art 6.1. (a) (ES).
402 RD of the Office for Asset Recovery, art 6.1. (a) (ES); Sixth Additional Provision of the Criminal Procedure Act (ES).
403 RD of the Office for Asset Recovery, art 3.1 (ES).
404 The UK Act, s 37 (UK).
405 FCCP, art 81 (FR).

b. Similarly, in Portugal, court orders are required for purposes of the search and seizure of homes,[406] lawyers' offices,[407] banks[408] or medical facilities[409] and in cases of seizure of correspondence and e-mails or similar communications for purposes of gathering evidence.[410] Warrants or orders issued by the Public Prosecutor are ordinarily required for computer data searches,[411] and seizures for purposes of taking evidence or collecting products, property and assets derived directly or indirectly from the crime (*apreensão*).

In Germany and the UK, the only means of cooperating with asset tracing or identification requests is by way of court order. In Germany, a search warrant is required under section 52(1) IStGHG, while the UK Act contemplates production or access orders (providing for handing over or access to documents and material relevant to investigations) and warrants, incorporating provisions into Schedule 5 of the UK Act which are substantially based on existing procedures under the Criminal Justice Act 1988. In both cases, requirements for the relevant orders or warrants restrict the scope of identification or tracing to assets that are linked to an ICC crime.[412]

The Swiss approach

By contrast, in Switzerland, the Central Office determines the implementation steps to be taken by the relevant Attorney's General Office. The ICCA provides that the manner of implementation will reflect any procedural requirements of the Court[413] but also provides for specific requirements for various contemplated forms of cooperation. The ICCA does not specifically list asset identification/tracing but Article 40 refers to the "*Handing over of evidence*" (which is broad enough to cover evidence relating to assets, property, proceeds and instrumentalities of crime as contemplated by Article 93(1)(k) of the Rome Statute).

a. Where a *bona fide* third party purchaser, authority or injured party with a usual place of residence in Switzerland claims a right to objects, documents or assets seized as evidence, Swiss law requires that they will be returned free of charge at the conclusion of ICC proceedings.[414]
b. If objects, documents, or assets are required for criminal proceedings pending in Switzerland, their transfer to the ICC may be postponed for a period agreed between Switzerland and the ICC.[415]

Implementation of requests by federal and cantonal authorities is not subject to appeal.[416] However, once the Central Office has processed a request in full or in part, it issues a closing order granting the request and the scope of cooperation.[417] The Central Office's decision is subject to appeal to the Federal Criminal Court[418] on grounds of violation of federal law (including excess or abuse of discretion).[419]

Timing of asset identification and tracing

While the Rome Statute identifies clear pre-trial, trial and post-conviction/enforcement steps permitting requests from different organs of the ICC, domestic criminal systems do not uniformly reflect this structure. Broadly, however, under Belgian, French, Swiss and Italian law, asset identification/tracing may be undertaken at any stage

406 CCP, art 177(1); art 269(1)(c) (PT).
407 CCP, art 177(5); art 180; art 268(1)(c) (PT).
408 CCP, art 177(5); art 181; art 268(1)(c) (PT).
409 CCP, art 180; art 268(1)(c) (PT).
410 CCP, art 179; art 268(1)(d) (PT); Cybercrime Law, art 17 (PT).
411 CCP, art 174(2); art 176–177 (PT); Cybercrime Law, art 15 (PT).
412 The UK Act, Schedule 5, para 7, 10(2)-(6) (UK); IStGHG, ss 51-52 (DE).
413 ICCA, art 32 (CH).
414 ICCA, art 40 § 2 (CH).
415 ICCA, art 40 § 3 (CH).
416 ICCA, art 5 § 2 (CH).
417 ICCA, art 48 (CH).
418 ICCA, art 49 (CH).
419 ICCA, art 51 § 1 (CH).

of ICC proceedings (although slightly different processes apply for post-conviction investigations in Italy).[420] The Portuguese provisions for tracing assets apply to all stages of proceedings where there is a need for the taking of evidence (i.e. the pre-trial and trial stages). However, at the post-conviction stage, asset tracing measures will be possible only to ascertain whether a person has benefited from an ICC crime or for identifying property derived from such criminal conduct.

The UK Act accommodates cooperation with Article 93(1)(k) requests only where the ICC has already initiated an investigation and proceedings have not yet concluded.[421] However, it is not clear whether this precludes asset tracing in order to enforce sentences or Reparations Orders after sentencing and/or reparations proceedings have concluded. Similarly, the IStGHG in Germany does not distinguish between stages of ICC proceedings, however, reference to the StPO, which regulates the conduct of criminal investigations and proceedings, suggests that investigatory measures may only be carried out prior to indictment (i.e. prior to the commencement of the trial).

Freezing or seizure of assets

Overview

There are two key areas where States' readiness to implement freezing/seizure requests have been assessed. The first relates to the scope of freezing/seizure requests. In particular, this concerns a State's responsiveness to the evolving jurisprudence of the ICC regarding the Pre-Trial Chamber's ability to request "*protective measures for the purposes of forfeiture*" under Article 57(3)(e) read in conjunction with Article 93(1)(k) of the Rome Statute (as discussed in 6.4 above). The second relates to how assets are handled once frozen or seized. This concerns domestic procedures for effective management of seized or frozen assets and recourse for parties prejudiced by mismanagement (see 8.12 above). It also relates to provisions for the release of assets at the end of ICC proceedings, particularly in the case of an acquittal.

The scope of freezing / seizure requests

The ICC's expansive interpretation of "*forfeiture*" and the range of assets subject to freezing/seizure measures is most definitively stated in its 2014 *Kenyatta Implementation Decision*. Since the implementing statutes of the States reviewed were all promulgated prior to this decision, it is not clear in every case whether they can accommodate this developing jurisprudence. This is particularly true where "*forfeiture*" appears to be understood in the legislative scheme as a penalty contemplated by Article 77(2)(b) of the Rome Statute.

Critically, most procedures for freezing or seizing assets are contained in (or closely modelled on) general criminal procedural laws. It is here that requirements for the relevant domestic orders and authorisations typically assume that precautionary measures are taken with the ultimate purpose of enforcing a penalty. This may restrict the applicability of domestic procedures to ICC requests for cooperation (in that they may not accommodate requests for assets which may be used to satisfy, for example, Reparations Orders) or at least create some challenges for prosecutors seeking to obtain the necessary court orders for such requests. At the same time, it appears that, even where domestic requirements appear similar, the thresholds for obtaining precautionary measures/injunctive relief vary in practice. This is a particular area where guidance and potential legislative reform might assist in aligning domestic and ICC approaches.

420 Compare ICCP, art 723 and art 723 *bis* (IT).

421 The UK Act, s 27(1) (UK). However, section 27(3) makes clear that the forms of assistance detailed in Part 3 of the UK Act are not exclusive and that nothing in this Part prevents other assistance being provided to the ICC.

In addition, while the ICC has recognised that protective measures may be requested after a warrant or summons has been issued, it has not required a direct or indirect causative link between the alleged Rome Statute offence/s and the assets to be seized or frozen. Moreover, the ICC has recognised that the assets themselves need not be linked to the applicable offence at all, particularly where the purpose of a request is ultimately to secure funds for purposes such as reparations payments, fines or fulfilment of other court costs (see 6.4(c) above). However, domestic provisions governing freezing and seizure measures may require a stronger link to criminal activity or the specific offence under the Rome Statute that is being investigated.[422] Accordingly, this is a further area where guidance and potential legislative reform may be necessary to facilitate cooperation.

Finally, the provisions of the RPE that provide for specific circumstances in which protective measures may be issued without notice are an area in which compatibility of domestic procedures can be assessed. The jurisdictions reviewed generally accommodate requests of this nature, but the basis varies from express contemplation of identification/tracing and freezing orders without notice, such as the UK Act and Swiss ICCA, to general principles that requests should be carried out in the manner specified by the ICC and applicable domestic measures permitting freezing/seizure without notification.

Management and release of assets

None of the reviewed jurisdictions expressly regulates management of assets frozen or seized pursuant to ICC cooperation requests, although the UK Act contains provisions relating to receivership. This is unsurprising as the Rome Statute itself does not contemplate mechanisms for managing assets, let alone throughout the long duration of ICC proceedings. However, some jurisdictions appear to have particularly effective procedures for managing seized assets in the ordinary course. In Spain and the U.S., for example, centralised agencies and clear guidance for their operation appear to illustrate best practice. The effectiveness of systems that rely on custodians, judicial administrators or similar is, however, unclear due to a lack of information regarding their management of assets pursuant to ICC Requests.

Similarly, there is little in the reviewed implementing legislation regarding recourse in case of mismanagement of assets. Legal remedies appear most likely to stem from general domestic provisions founded in tort/delict and in some cases for actions against the State or public administration founded in specific provisions of domestic law (and with relatively high thresholds).

Finally, a key area where greater clarity would be beneficial across all jurisdictions is the trigger mechanism and process for release and return of seized or frozen assets in cases of acquittal.

Procedures for freezing or seizure of assets

Switzerland, the UK and Germany are the only reviewed jurisdictions that include procedures for freezing or seizure of assets in their implementing laws.

a. The Swiss ICCA employs the same processes for identification and tracing of assets under Article 30(j) ICCA (i.e. the Central Office orders the relevant measures, designates the relevant federal or cantonal authorities to implement measures, and issues a final decision which may give rise to an appeal process). The Swiss ICCA also provides for "*Preserving Measures*" in Article 31 (which would also follow this process).

422 It should be noted that most of the jurisdictions reviewed are civil law jurisdictions which include similar requirements for injunctive relief – in many cases applicable to one or more of the available procedures for implementing protective measures. However, the similarity in domestic law requirements in the relevant criminal and civil procedural codes does not mean that the threshold in all cases is the same. In particular, the strength of the connection between the targeted assets and criminal activity cannot be assumed to be uniform. Nevertheless, it appears that in most cases, the law can be interpreted to accommodate ICC requests.

b. The UK Act provides that the Secretary of State may direct a "*person*" (likely a constable) to apply for a freezing order from the High Court (which may be granted without notice and without a hearing).[423]

c. While the ICCA appears to allow assets to be seized for a range of purposes, the UK Act appears to limit the scope of seizure or freezing measures to property liable for forfeiture. As discussed at 6.4(a) above, it is likely that the definition of "*forfeiture*" will reflect developments in ICC case law should it be challenged.

d. Germany's IStGHG contains the most detailed procedures dealing with the handover of assets to the ICC[424] and search and seizure.[425] These provide for the transfer of assets pursuant to freezing requests contemplated in Article 93(1)(k) of the Rome Statute (provided third party rights are guaranteed and subject to protections for personal data)[426] and for seizure of items even if confiscation/surrender is not ultimately contemplated.[427] They also specify which authorities are permitted to seize (and confiscate) assets and the orders required for this purpose.[428]

In most cases, however, general procedural codes, rather than the relevant ICC implementing legislation, provide the procedures for executing freezing or seizure requests. This remains the case in Belgium and France, where freezing and seizure of assets is expressly contemplated in the Belgian Act and FCCP. However, the implementing procedure remains subject to general laws.[429] The legislation in both Belgium and France also contemplates a specific check on precautionary measures: Article 26 of the Belgian Act requires that, prior to transfer of assets or documents subject to seizure, the matter is considered by a council chamber. In France, Article 627-3 FCCP imposes a two-year limit (subject to a renewal period of an additional two years) for the duration of protective measures.[430]

All national procedures require supervision of an investigatory magistrate or judge for searches, seizures and anti-dissipation measures. The pre-conditions for the necessary orders sometimes suggest difficulties in implementing ICC seizure or freezing requests which are not linked to ultimately fulfilling a "*forfeiture order*" (i.e. in the narrow sense contemplated in Article 77(2)(b) of the Rome Statute) or which are not clearly directed at the proceeds of crime but at assets held by an accused more generally. In practice, however, it seems that most jurisdictions have a sufficient range of procedural options to respond to requests.

Italy's mechanisms for "*conservative*" and "*preventive*" seizure (available at the pre-trial and trial stage only) are examples of procedures which may be sufficiently flexible to accommodate ICC requests for cooperation.[431] Conservative seizure requires *prima facie* evidence that a crime has been committed, that prosecution has commenced, and that there is a risk of loss of funds for payment of sums due to the State or a civil party.[432] Preventive seizure requires *prima facie* evidence of commission of a crime and the risk of the commission of further crimes if assets remain at the disposal of the accused.[433] While it is unclear how the election of these procedures would be made in a particular case, both are distinguishable from the post-conviction seizures to fulfil a forfeiture order.[434] Furthermore, Article 22 of Law 237 provides a potential mechanism for determining which procedure best meets ICC requirements through consultations with the ICC.

423 The UK Act, Schedule 6, para 1(1); 1(2)(a) (UK).
424 IStGHG, s 51 (DE).
425 IStGHG, s 52 (DE).
426 IStGHG, s 51 (DE).
427 IStGHG, ss 51-52 (DE).
428 See IStGHG, ss 50 and 52 (DE).
429 Note also that under Belgian law, "freezing" has a specific and very limited meaning which allows for a five-day measure to prevent dissipation of assets prior to seizure being effected. France, similarly, clearly distinguishes between the purposes "freezing" (*gel*) and seizure (*saises*). See 12.10 above.
430 FCCP, art 627-3 (FR).
431 ICCP, art 317 (IT).
432 ICCP, art 316 (IT).
433 ICCP, art 321 (IT).
434 ICCP, art 737-*bis* (IT).

Which assets?

As indicated above, a key issue is that freezing/seizure measures under domestic procedures ordinarily require a nexus between seized assets and a crime. While this requirement may be an obstacle to freezing/seizure of assets, it is not always clear how strong the link to a crime needs to be or whether the crime needs to be one investigated and prosecuted by the ICC. Belgian law, for example, requires "*indications*" that assets or property are the instrumentalities, subject, proceeds or fruits of crime. However, it is sufficient for the facts to indicate the presence of a crime which need not be one recognised under the Rome Statute.

Complications (or at least interpretive challenges) also arise in implementing legislation. For example, the Swiss and UK implementing legislation appear to reflect an interpretation of Article 93(1)(k) which does not regard the phrase "*instrumentalities of crime*" as separate from "*assets, products and proceeds*" subject to seizure, and also interpret the "*purposes of forfeiture*" narrowly and within the meaning of Article 77(2)(b) of the Rome Statute.

a. Section 38 of the UK Act provides for freezing of assets "*for the purposes of forfeiture*" without defining what this means. However, the grounds for issuing a freezing order provided in paragraph 2 of Schedule 6 make it clear that an ICC forfeiture order will/may be made by the ICC and that the relevant property "*consists of or includes property that is or may be affected by such a forfeiture order*". As indicated in 13.8 above, it is likely that, under national law, the text of the UK Act would be interpreted to accommodate the broader meaning of Article 93(1)(k) read with Article 57(3)(e) contemplated in ICC jurisprudence. However, this remains a matter of interpretation and does not arise from the plain language of the legislation.
b. Similarly, a *prima facie* interpretation of Article 30(j) ICCA suggests that proceeds, property, assets and instrumentalities subject to freezing/seizure measures (as well as identification/tracing requests) must be linked to or be the proceeds of crime. However, Article 41, which concerns objects or assets subject to precautionary measures which may be transferred to the ICC for purposes of forfeiture, transfer to the TFV or reparations, appears slightly wider. It includes the instrumentalities of the crime, the products or proceeds of crime, their replacement value and illicit benefits, as well as gifts or other contributions that served or were intended as an inducement or reward for a criminal act (including replacement value).

The French position is also unclear, but the context of the provisions seems to allow for an interpretation that is sufficiently wide to accommodate ICC seizure requests. On the one hand, general seizure provisions under the FCCP specify that, because the purpose of a seizure is to guarantee potential forfeiture, the targeted property must be eligible for forfeiture. On the other hand, when requesting an authorising order from the liberties and detention judge, the prosecutor must state whether the targeted property is the object, means or proceeds of a crime or whether the aim is to freeze all property of the person under investigation. With respect to the latter, principles of French criminal law recognise that persons suspected or convicted of crimes against humanity may have all or part of their assets seized.[435] Accordingly, it appears that French law provides scope for any assets of an accused party to be seized (subject to immunities) but that this may be limited by eligibility for forfeiture.

Germany establishes a slightly different distinction by requiring a stronger link between assets seized as evidence prior to confirmation of indictment under Article 5 of the Rome Statute than is required after confirmation of indictment, at which point seizure may target any assets located in Germany belonging to the arrested/charged person.

435 French Criminal Code, art 213-1 (FR).

Management of seized or frozen assets

Various models of asset management exist which derive from general national procedures with little uniformity regarding who is responsible for asset management or regarding remedies for loss or damage to seized or frozen assets. There are, however, a number of commonalities which are set out below.

The general procedures of France, Spain, Belgium and the U.S. have some form of central agency for managing seized assets. However, in all cases there are either limits to the types of assets that fall within the agency's jurisdiction (frozen funds in bank accounts being excluded in France for example) or an absence of formal guidance on how these agencies should carry out their duties (such as in Belgium). The most effective centralised asset management models are possibly those in the U.S. and Spain (through the OAPM described above).

The U.S. system for freezing/seizure of assets falls within the jurisdiction of the Department of Justice. However, all relevant agencies are expected to coordinate with the U.S. Marshals Services (**USMS**), which is responsible for management and disposal of most seized assets.[436] The USMS's management of assets is governed by a clear policy[437] and, where necessary, the USMS may appoint a trustee or custodian to handle complex assets.[438] In most cases, the USMS may not use seized assets until forfeiture is ordered, with the exception of a business or asset that otherwise requires maintenance, in which case a court order is required.[439] Proceeds from any pre-forfeiture sale are deposited into a Seized Assets Deposit Fund (**SADF**) managed by the USMS.[440] There is a separate management structure for assets seized by the Departments of the Treasury and Homeland Security (particularly where assets were used in relation to terrorism, illicit finance or international sanctions).[441] These assets are managed by the Treasury Executive Office of Asset Forfeiture (**TEOAF**), which, like the USMS, manages assets in accordance with policy directives generally aligned with those of the USMS.[442]

In jurisdictions that lack a central agency, assets are managed by custodians, judicial administrators or similar. The systems in Germany, Italy, Portugal and the UK envisage various degrees of control. The UK Act incorporates the generally applicable system of receivership into its freezing procedures. Like judicial administrators or custodians appointed in Italy and the Attorney General's office or its delegates in Germany, receivers manage assets subject to court supervision.[443] Various guidelines set out receivers' obligations and the scope for liability of receivers.[444] Portugal's system of legal depositaries is similar but bank funds are excluded from their management.[445] In addition, under Portuguese law, a legal depositary can become the legal owner of the asset (primarily where the asset is the home of the suspect / accused / convicted person).

In some jurisdictions, including France, Italy and Portugal, banks have responsibility for funds frozen in their accounts. While in France, banks are required to have action plans for managing frozen assets, there are no specific provisions regarding management of frozen bank accounts in Portugal (although the beneficiary of the assets may request that specific measures be taken to preserve them).

436 28 C.F.R. § 0.111(i) (U.S.); one exception is firearms and ammunition, which are kept in the custody of the Bureau of Alcohol, Tobacco, Firearms, and Explosives.
437 US DOJ Criminal Division, Asset Forfeiture Policy Manual (2021), 1 December 2022.
438 18 U.S.C. § 983(j) (civil forfeiture) (U.S.); 18 U.S.C. §§ 1963(d) & (e) (criminal forfeiture) (U.S.).
439 Fed. R. Crim P. 32.2(3) (U.S.); See also US DOJ, *Asset Forfeiture Policy Manual*, Ch. 10.II.B.
440 Fed. R. Crim P. 32.2(3) (U.S.); Ch. 10.II/.C (U.S.).
441 18 U.S.C. § 981(b) (U.S).
442 U.S Department of the Treasury, TEOAF Policy Directives, 3 December 2022.
443 See the Anti-Mafia Code, Legislative Decree no. 159 of 6 September 2011 (IT); StPO, s 111m (DE).
444 POCA, s 295(1) (UK); Code of Practice Issued under Section 47S of the Proceeds of Crime Act 2002: Search, Seizure and Detention of Property (England and Wales) (March 2016), para 130 (UK).
445 Code of Civil Procedure, art 756 (PT)

Remedies for mismanagement of seized or frozen assets

None of the implementing legislation provides for specific remedies in case of mismanagement of seized or frozen assets or their loss of value. Only the UK Act contemplates recourse against persons responsible for managing assets albeit in terms of limiting the liability of receivers for loss or damage, except in cases of negligence.[446] The limitation of liability suggests that the available remedy would be a damages claim brought in terms of ordinary rules of tort/delict. This reflects the general position that, insofar as remedies are available, they are likely to be specific damages claims provided in a particular jurisdiction (or removal of an individual charged with managing assets).

Portuguese law provides for a similar scheme to the UK insofar as legal depositaries have a duty to manage assets with care and diligence. If a depositary fails to do so, they may be held civilly liable according to general legal principles and, at the instance of an interested part or the court itself, the depositary may be removed for failure to fulfil its obligations.[447] Italian law provides a specific regime of civil remedies for damages caused by custodians' lack of due diligence in performing their duties[448] and liability for judicial administrators in cases of wilful misconduct or gross negligence.[449] In addition, the Italian Criminal Code provides for penalties for breaking of seals affixed pursuant to seizure orders (with penalties increased for persons with custody of the assets);[450] as well as for in any way destroying or dissipating assets in the custody of a public official, which would include liability for a person entrusted with seized assets.[451]

Belgian law does not provide any specific mechanisms for challenges against mismanagement of frozen or seized assets. However, if mismanagement of assets has led to loss of value and a fault causing the damage can be proven, it would be possible to lodge a claim for reparation against the Belgian State. French law similarly provides for an action against the public administration if gross negligence or a denial of justice can be proven.[452]

Release on acquittal

Almost all national laws lack clear procedures for releasing assets after an accused is acquitted by the ICC. Switzerland is a possible exception with Article 41(3) ICCA providing that seized objects and assets remain seized until transmitted to the ICC or until the ICC notifies the Central Office that it no longer requests transmission. This appears to contemplate a communication from the ICC that assets should be released. However, it is not clear whether a notification from the ICC is required in case of acquittal or whether the Swiss authorities may simply lift the seizure order following acquittal.

General provisions of French and Portuguese law provide for automatic release of seized assets on acquittal at the State's expense.[453] However, in other cases, such as Spain and Italy, national procedures presume that freezing orders will be lifted as part of orders acquitting an accused. In Italy, while Organic Law 18/2003 does not appear to provide a clear solution in respect of ICC acquittals, it is possible that the General Prosecutor could request that the Court of Appeal order restitution. The "trigger" for such action by the General Prosecutor, however, is unclear.

446 The UK Act, Schedule 6, para 5(5) (UK).
447 Code of Civil Procedure, art 76(1) and (2) (PT).
448 Code of Civil Procedure, art 67 (IT).
449 Anti-Mafia Code, art 35-*bis* (IT).
450 Italian Criminal Code, art 349 (IT).
451 Italian Criminal Code, art 351 (IT).
452 French Code of Judicial Organisation, art L.141-1 (FR).
453 FCCP, art 484-1 (FR); CCP, art 186 (PT).

Forfeiture

Overview

Most implementing laws reviewed appear to contemplate forfeiture in relation to enforcement of ICC orders as per Article 77(2)(b) of the Rome Statute. While there is variation between jurisdictions regarding whether it is necessary for ICC orders to be recognised or registered, in almost all cases (France being an exception)[454] steps for execution of the order are not included in the implementing law but are instead governed by domestic procedural laws. The most important variables across jurisdictions regarding treatment of ICC forfeiture orders are: (a) whether they are directly enforceable; (b) the ease of registration or recognition procedures where these are required; and (c) whether third party rights are dealt with by national courts or referred to the ICC (see 25.11 below). In addition, laws vary in terms of the relationship between provision for confiscation of assets at the instance of the ICC, and the use of such assets for payment of reparations, fines or other court costs, as well as the types of assets which may be subject to forfeiture. Most laws provide for transfer of assets to the ICC, but few provide details regarding this procedure. Clarity in this area would be beneficial.

Registration and recognition of forfeiture orders (or ICC "sentences")

The legislation in Belgium, France, Italy, Spain and the UK deals with forfeiture in relation to enforcement of ICC penalties and do not appear to contemplate pre-conviction forfeiture. The implementing laws in these jurisdictions give varying details regarding how an ICC order should be recognised in the domestic system and generally provide statements regarding an obligation to hand over assets or equivalent value to the ICC. Germany's IStGHG provides slightly more detail and appears to permit forfeiture prior to conviction, while the ICCA in Switzerland provides a mechanism linking seizure and forfeiture processes, in addition to providing for enforcement of forfeiture orders, fines and Reparations Orders.

In Spain, Italy,[455] Germany and Switzerland, implementing legislation facilitates enforcement of ICC orders without requiring recognition or registration proceedings. In each case, provision is made for placing the ICC request or forfeiture order before a domestic court for purposes of enforcement.[456] By contrast, France, Belgium and the UK require either registration or recognition proceedings. In the UK, this takes the form of registration proceedings while Belgium and France require a hearing (including a hearing for the convicted person, and in the case of France, a hearing for any affected third parties). In none of these cases, however, are proceedings concerned with the merits of the matter.

The most cumbersome procedure prior to enforcement steps is that of Portugal, which relies on procedures for executing foreign judgments with requirements not consistently well-suited to ICC forfeiture requests. The same would likely be true of the U.S. if the current prohibition on assisting the ICC were to be lifted, if assistance were to be provided on the basis of the existing model for cooperation with foreign States.

a. Portuguese law is unclear as to whether forfeiture orders handed down in terms of Article 77(2)(b) (or Reparations Orders pursuant to Article 75) would be directly enforceable in Portugal without the need for review by a domestic court[457] or whether recognition proceedings would be required using procedures for execution of foreign judgments provided by Law No. 144/99.

454 FCCP, art 627-16 (FR) permits the Paris criminal court to order all necessary enforcement measures and refers to rules contained in the FCCP for purposes of the relevant court procedures.
455 Note that Law 237, art 21 (IT) does include specific recognition procedures where imprisonment is ordered by the ICC.
456 Note that Germany does require an interim step of approval of the request by the Ministry of Justice in cooperation with the Foreign Ministry. See IStGHG, s 68(1) (DE).
457 Portuguese Constitution, art 8 (PT); and Rome Statute, art 99; and art 103.

i. Absent implementing legislation, the latter situation is more likely. However, Law No. 144/99 would need to be applied by analogy as its language clearly refers to enforcement of final decisions of foreign courts (rather than of international bodies). Thus, the formal and substantive admissibility requirements of Law No. 144/99 would apply. Among these, the most problematic is the requirement that the offender is a national of and/or habitually resident in Portugal.[458]

ii. In addition, once determined to be admissible in Portugal, a forfeiture request would need to proceed through revision and confirmation proceedings.[459] This stage of the procedure does not entail reconsideration of the facts but does include further requirements regarding issues of finality of the judgment, due process rights of the convicted person, dual criminality, compatibility with Portuguese law and principles, and non-interference with Portuguese jurisdiction.[460] The requirement of finality would, in the case of ICC cooperation requests, mean that the ICC sentencing procedure was either not subject to appeal or that any such appeal had been decided. Moreover, it is possible that an otherwise confirmed decision would be unenforceable if the penalty had expired due to the Portuguese statute of limitations or if it was otherwise extinguished (for example, by virtue of an amnesty).

iii. Only once an ICC order is considered admissible under Law No. 144/99 and revised and confirmed (including with any appeals being exhausted) can it be executed through enforcement proceedings governed by the Civil Procedural Code.

b. The U.S. procedure for enforcing foreign judgments is slightly more streamlined insofar as the Attorney General both determines admissibility and, thereafter, is responsible for applying to a district court for enforcement of the judgment as if entered before the U.S. courts.[461] While requirements for recognition are unlikely to be problematic, admissibility requires that it is "*in the interest of justice*" to enforce the foreign order;[462] and that the offence would give rise to forfeiture under U.S. federal law or is one of a number of listed offences, none of which is specifically a crime within the jurisdiction of the ICC.[463]

Forfeiture, reparations and the timing of forfeiture requests

As discussed above, the Rome Statute distinguishes between forfeiture orders as part of an ICC sentence in Article 77(2)(b) and Reparations Orders in Article 75, both of which are post-conviction measures. However, the Rome Statute also refers to "*the purpose of forfeiture*" in Article 93(1)(k). As outlined in 6.4(a) above, this has given rise to ICC decisions interpreting "*forfeiture*" as also occurring at the pre-conviction stage, with the effect being that ICC requests for "*forfeiture*": (i) need not be linked to a "*forfeiture order*" within the meaning of Article 77(2)(b); (ii) may arise prior to conviction; and/or (iii) may be for purposes other than enforcement of an ICC forfeiture order. This gives rise to difficulties with the interpretation of certain of the implementing laws considered in this review,

458 It is not clear how this conflict between this provision and Portugal's obligation to cooperate with the ICC is to be resolved. This provision suggests that there is no possibility of executing an ICC judgment if the defendant is not Portuguese or not habitually resident in Portugal. It may be argued that, since this rule impedes the full application of the Rome Statute, it is in violation of international law and, therefore, should not be applied. However, there is no doctrine or jurisprudence on this issue and, therefore, it is not certain how this rule would be applied in practice.

459 Law 144/99, art 100 (PT).

460 CCP, art 237; Civil Procedural Code, art 980, *ex vi* Article 237(2) of the CCP (PT).

461 28 U.S.C. § 2467 (U.S.), 24 October 2022.

462 28 U.S.C. § 2467(b)(2) and (d)(3)(B)(ii) (U.S.).

463 18 U.S.C. § 1956(c)(7)(B) (U.S.), 26 October 2022. These offences include: (i) the manufacture, importation, sale, or distribution of a controlled substance; (ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence; (iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank; (iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official; (v) certain smuggling or export control violations; (vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; and (vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harbouring a person, including a child, for commercial sex acts.

particularly where they closely mirror the structure of the provisions of the Rome Statute, but it is not clear that the ICC's case law will be considered in responding to ICC cooperation requests.

Among the national implementing laws reviewed that refer to Reparations Orders, the example with the clearest potential difficulties is the UK Act. The "[p]*ower to make provision for enforcement of other orders*" provided for in section 49 of the UK Act distinguishes between the Secretary of State's ability to regulate for enforcement of fines and forfeiture orders on the one hand and Reparations Orders on the other. The legislative scheme appears to contemplate that this provision gives effect to post-conviction ICC orders[464] and there does not appear to be an alternative mechanism for either effecting forfeiture of assets prior to conviction or forfeiting assets for purposes such as fulfilment of Reparations Orders or payment of litigation costs.[465]

Italy, Spain, and Germany all provide for enforcement of post-conviction fines/forfeiture orders and Reparations Orders. However, within the implementing laws in these jurisdictions, the structure and reference to domestic enforcement procedures leads to variation in their scope and application.

a. In Italy, it appears that forfeiture may be requested only pursuant to a post-conviction forfeiture order. However, it is unclear whether forfeited assets may be used for purposes of reparations (and nothing explicitly prohibits this).
    i. Article 21 of Law 237 provides for forfeiture of profits, assets or goods ordered by the ICC by means of a final decision and concerns both enforcement of penalties and fulfilment of Reparations Orders. The procedures appear to be different (the procedure for Reparations Orders is unclear) but both contemplate post-conviction steps.
    ii. While there is nothing in Law 237 that expressly permits (or prohibits) use of forfeited assets for purposes of fulfilling Reparations Orders, the provisions relating to enforcement of final penalties refer to the ICCP dealing with confiscation. The term used (*confisca*) entails a penalty which requires removal of assets connected with a crime. It is, accordingly, unclear whether forfeited assets contemplated within this provision of Law 237 can be used for purposes other than fulfilment of an ICC penalty. Similarly, the provisions regarding seized assets provide no clarity.

b. Spain's legislation similarly contemplates post-conviction forfeiture, but the applicable enforcement procedures suggest some scope for pre-conviction forfeiture. They also suggest a limitation on the assets that may be subject to forfeiture as well as those obtained through Spain's domestic forfeiture mechanisms, which are applicable to Reparations Orders.
    i. Pursuant to Spain's Organic Law 18/2003, procedures applicable to forfeiture also apply to enforcement of Reparations Orders.
    ii. As the relevant enforcement procedures are contained in general provisions of Spanish criminal and procedural law, some limitations may arise regarding which assets are liable for forfeiture and which may be handed over to the court for purposes of fulfilling Reparations Orders. This limitation arises from Article 127(1) of the Spanish Criminal Code which provides only for forfeiture of assets derived from the commission of crime, the means or instruments of crime, and profits of crimes. If applied to enforcement of Reparations Orders, this suggests that only assets with a nexus to the crime may be handed over even for purposes of compensation of victims.
    iii. While Organic Law 18/2003 seems to contemplate only post-conviction forfeiture, the provisions of Spain's Criminal Procedure Act which govern confiscation proceedings suggest some scope for

464 See Explanatory Notes, paras 81-82 (UK).

465 See the UK Act, Schedule 6, para 2 which contemplates that freezing orders may be issued by a domestic court where a forfeiture order has been made by the ICC or there are reasonable grounds to believe that a forfeiture order will be made. See also the UK Act, Schedule 6, para 14(2) referring to the conclusion of ICC proceedings when there is no further possibility of a forfeiture order being made or where a forfeiture order has been satisfied.

pre-conviction forfeiture. This is because these may be initiated prior to conviction for purposes of obtaining precautionary measures. This suggests an argument can be made under Spanish law for forfeiture without the trigger of a request to enforce an ICC sentence.

c. German law contemplates not only post-conviction enforcement of forfeiture orders and Reparations Orders but also pre-conviction forfeiture of the proceeds of crime. Like Spain, the IStGHG in Germany makes the procedure for enforcement of penalties applicable to enforcement of Reparations Orders.[466] However, the IStGHG also provides for release of assets prior to a forfeiture order pursuant to a request for cooperation in terms of Article 93(1)(k) if the assets may serve as evidence during proceedings before the ICC or if the assets have been obtained by a person or their accomplice for an act being investigated or prosecuted by the ICC.[467] While this appears to be restricted to assets of evidentiary value or the proceeds of crime, and does not provide for forfeiture for the purposes of fulfilling Reparations Orders, it does broaden the context in which assets may be removed and handed over to the ICC.

The widest scope for forfeiture is provided by the French and Swiss implementing laws, although these adopt different structures.

a. In France, provisions relevant to forfeiture as well as reparations appear to contemplate post-conviction steps. However, they are framed in what appears to be the most flexible manner in terms of the types of assets that may be forfeited and the purposes of such forfeiture. Article 627-16 FCCP governs the process relevant to enforcing fines, forfeiture orders and Reparations Orders without distinguishing between them. Article 627-17 (mirroring the Swiss ICCA) provides for the proceeds of forfeiture measures (or alternative measures where forfeiture is not possible) to be transferred to the ICC, the TFV or victims (if the ICC has determined to attribute sums to them). The terms of Article 627-17 appear sufficiently wide to permit forfeiture of assets for purposes of compensating victims of crimes, as well as for fulfilling fines or forfeiture orders.
b. Switzerland's law may most easily accommodate evolving ICC practice. As in Spain and Germany, the ICCA in Switzerland appears to apply the same procedures to forfeiture orders and Reparations Orders. However, the ICCA also provides that the assets seized pursuant to precautionary measures may be transmitted to the ICC for purposes of confiscation/forfeiture, allocation to the TFV, or restitution to victims.[468] Moreover, seized assets may be handed over at any time and thus the transfer of seized assets is not dependent on post-conviction ICC orders.[469] It is likely that the same expedited procedure would apply to fines, though no express reference is made to payment of fines in the relevant provision.[470] Some restrictions on forfeiture (for any purpose) arise to protect third party rights (see 25.11 below). Further, enforcement of final and executable sentences requires that the convicted person be a Swiss citizen or be habitually resident in Switzerland (although this appears not to apply to fines where assets are in Switzerland).[471] Finally, the range of assets liable for forfeiture, transfer to the TFV or reparations includes instruments used to commit an offence, the product/result of the offence (including replacement value and illicit benefits), and gifts or other benefits used to reward the offender (and their replacement value).

Transfer to the ICC

While a number of statutes provide for transfer of assets to the ICC upon forfeiture, few provide details of the relevant procedure. The UK Act, for example, provides only that the Secretary of State must transmit proceeds

466 IStGHG, s 43 (DE).
467 IStGHG, s 51(1) (DE).
468 ICCA, art 41(1)-(2) (CH).
469 ICCA, art 58 (CH).
470 Note that ICCA, art 53(2) (CH) provides for execution of fines where assets are in Switzerland, notwithstanding the convicted person not being a Swiss citizen or not being habitually resident in Switzerland.
471 ICCA, art 53(2) (CH).

to the ICC without detailing the timing or procedure.[472] French law does not provide any process for transfer but the FCCP adds that any challenge regarding the allocation of the proceeds of fines, assets or the proceeds of their sale should be referred to the ICC.

Italy is perhaps an exception as Law 237 provides that forfeited sums and assets collected by the Court of Appeal of Rome are paid to the Italian State Budget and thereafter assigned by Ministerial Decree to the Ministry of Justice for transfer to the ICC. Costs of forfeiture are deducted from the collected sums.[473]

Switzerland is also unusual in providing specific protection of third party rights at the time of transfer of assets to the ICC, although Swiss law otherwise does not specify the procedure for handover of assets by the Central Office to the ICC. Assets may be retained in Switzerland if: (i) an affected party has his/her residence in Switzerland and assets must be returned to him/her; (ii) an authority asserts rights over the assets; (iii) a *bona fide* third party claims rights in the assets (provided they were acquired in Switzerland or, if acquired outside Switzerland, that the third party resides in Switzerland); or (iv) assets are required for Swiss criminal proceedings and are liable to confiscation in Switzerland.[474] In the first three cases, transfer is suspended while the issue is resolved. However, objects or assets will be handed over only if the ICC agrees; the authority consents (where it asserts a claim); or a Swiss authority recognises the validity of the claim.[475] There is no right of appeal for the accused. However, third parties personally and directly affected by the measure can appeal on the same basis as appeals against identification, tracing, freezing or seizure measures.[476]

The rights of the accused and third parties

Overview

Few protections are provided under national laws in respect of identification/tracing of assets beyond provisions requiring warrants or court orders for measures which might implicate rights (including privacy rights). However, greater protections and various avenues for challenge appear in all procedures relating to seizure or freezing of assets (and in most cases are available to third parties as well as the accused, with some exceptions).

Measures to permanently deprive parties of assets – whether pursuant to forfeiture orders, enforcement of fines or requests to implement Reparations Orders – generally provide some form of third party protection. However, few allow opportunities for challenge by the convicted person, and those that do envisage that this will occur primarily through deference to the ICC decision built into the relevant procedures. In all European jurisdictions, human rights claims may arise in certain instances.

Challenges to asset identification/tracing measures

In most cases, implementing legislation does not contemplate a challenge in relation to identifying/tracing requests. However, where ordinary national laws apply to searches, there is room for challenge to specific implementation steps. This is the case in France, Italy and Spain. By contrast, in Switzerland, Germany and Belgium, the expedited procedures provided in implementing legislation provide little[477] to no room for challenges to implementing

472 Regulations, reg 6(2) (UK); FCCP, art 627-17 (FR). See also Organic Law 18/2003, art 22(7) (ES); Belgian Act, art 40 (BE).
473 Law 237, art 21(5) (IT) read with Law no. 400/1988, art 17(3) and Ministerial Decree no. 61/2020 (IT).
474 ICCA, art 41 § 4 (CH).
475 ICCA, art 45 § 5 (CH).
476 ICCA, arts 50-52 (CH).
477 In Belgium, where an investigative measure causes prejudice, they may request that it be lifted – although it is unlikely that the requirements for lifting an investigative measure would be met in the case of investigatory steps.

measures. However, checks exist prior to transfer of assets/documents to the ICC in Belgium and Switzerland and provision is made for the German Higher Regional Court to submit a legal question of fundamental importance to the Federal Court of Justice.[478]

The UK provides the greatest scope for challenge to identification/tracing measures, though most are not contemplated in the UK Act itself.

a. The UK Act contemplates variation to or discharge of freezing orders[479] pursuant to the CPR. While specific rules have not been promulgated, it is likely that existing rules for the variation or discharge of production or access orders issued in the ordinary course likely apply. No equivalent provision is made in respect of warrants. However, in the absence of any indication that the CPR applies, variation or discharge is likely governed by the common law.
b. In addition, production/access orders or search warrants can likely be challenged by way of: (i) appeal under section 59 CJPA; (ii) judicial review; or (iii) under the HRA.
c. In the first two cases, the aim is to ensure that measures are not ordered in contravention of legal requirements or principles of legality, procedural fairness, and rationality. In both cases, it may be possible for the police/constable to reapply for the requisite order or warrant (although the UK Act does not deal with these scenarios, and this interpretation rests on the operation of appeal and judicial review in the ordinary course of criminal proceedings).
d. HRA claims may be brought, for example, by persons subject to a search warrant or production/access order against the police or courts where the ordering of the warrant/order is claimed to have breached a right protected under the ECHR. The provisions of greatest relevance are Article 8 of the ECHR (regarding the right to respect for private and family life, the home, and correspondence) and Article 1 of Protocol 1 (protecting the right to peaceful enjoyment of one's possessions).[480] While HRA claims may be raised to challenge all measures relating to property, the UK Act does not expressly address the consequences for UK cooperation with ICC Requests.

The availability of HRA claims in the UK raises questions about the possibility of challenging identification/tracing (as well as seizure/freezing and forfeiture) measures on grounds of ECHR violations across all European jurisdictions. However, the manner in which the ECHR has been domesticated in the UK provides a procedural route which differs from other jurisdictions. In Portugal, for example, Law No. 144/99 prohibits judicial cooperation if the process fails to comply with ECHR requirements. In the absence of implementing legislation, these requirements would likely also apply to ICC Requests. Fundamental rights might also be protected through the availability of a constitutional challenge. For example, in Germany a court decision ordering a search could be challenged under the German Basic Law.

The Swiss regime provides no appeal against enforcement of identification/tracing measures.[481] However, as outlined in 12.9 above, under the ICCA, the Central Office issues a closing order once it has processed the request in full or in part and this closing order may be appealed to the Swiss Federal Criminal Court.[482] The right of appeal is not afforded to the person charged in the proceedings before the ICC. It is only granted to persons who are personally and directly affected by a measure, who have a legitimate interest in having the contested decision quashed or amended, and who are unable to assert their rights before the ICC (or could not reasonably be expected to do

478 IStGHG, s 50 (DE).
479 The UK Act, Schedule 6, para 4 (UK).
480 See *R. (on the application of Javadov) v Westminster Magistrates' Court* [2021] EWHC 2751 (Admin) (UK).
481 ICCA, art 5(2) (CH).
482 ICCA, art 48 read with art 49 (CH).

so).[483] Grounds of appeal include a violation of federal law, including excess or abuse of discretionary power.[484] Any challenge to execution measures may be raised in this context. However, if grounds of appeal are raised which, under the Rome Statute, fall within the exclusive competence of the ICC, the Central Office must forward the appeal to the ICC (unless the ICC has already decided the matter).[485]

Article 26 of the Belgian Act provides a similar check prior to transferring seized assets or documents to the ICC. A Belgian council chamber (with a role similar to a pre-trial chamber) must assess the case and decide any claims over material filed by third parties within five days. The decision of the council chamber is not subject to appeal by third parties (and Article 26 provides no further guidance on how claims are to be assessed).

Variations, discharge and appeal against freezing or seizure of assets

Generally, national procedures relating to precautionary measures and various forms of seizure orders provide for revision / re-examination and appeal by the accused and third parties with an interest in the seized property.

a. In Belgium, for example, the accused or a third party alleging prejudice by an investigative measure may file a formal written request with the issuing public prosecutor or investigating magistrate for the measure to be lifted. While it is ordinarily difficult to convince an indictment chamber to lift investigative measures, this is the process through which arguments could be raised regarding breach of fundamental rights or lack of proportionality. A refusal to lift the investigative measure can be appealed before the indictment chamber of the Belgian court of appeal.
b. Similar mechanisms are provided for various seizure measures under U.S.[486] as well as under Spanish and French law (with variations on whether further appeal is permitted or not depending on the specific measure).[487] Similar mechanisms are also provided for under Italian law in relation to conservative and preventive seizure[488] (with variations on the availability of further appeal). In addition, Portugal permits opposition of provisional seizure without suspending the effect of the seizure order,[489] as well as providing for provisional seizures to be appealed[490] or lifted after provision of an economic guarantee.[491]

The UK Act provides for discharge or variation of a freezing order.[492] However, it does not specify any particular procedure. Recourse to the common law suggests that both the accused and third parties with legitimate interests may have standing to seek variation or discharge on the basis that the requirements for the order were not met (presumably as provided by the UK Act). In addition, variation or discharge may be claimed on grounds that the freezing order causes oppression through, for example, setting the value of assets too high or the value of necessary maintenance too low. While not expressly contemplated in the UK Act, it is again possible to challenge freezing orders through judicial review or in terms of an HRA claim.[493]

Germany is unusual in providing no room for challenge, beyond referral of a fundamental question of importance by the Higher Regional Court to the Federal Court of Justice[494] and a constitutional challenge based on violation of rights under the German Basic Law.

483 ICCA, art 50 (CH).
484 ICCA, art 51(1) (CH).
485 ICCA, art 51(2) (CH).
486 18 U.S. Code § 981 (U.S.), 27 October 2022.
487 Criminal Procedure Act, arts 217; 219; and 220 (ES); Criminal Procedure Act, art 764 read with Civil Procedure Act, arts 733.2; 734-735; 739 and 741 (ES); French Code of Criminal Procedure, arts 706-141 *et seq* (FR).
488 ICCP, arts 318, 322; and 325 (IT).
489 Code of Civil Procedure, arts 105(1); 372(1)(b) (PT); CCP, art 228(3) (PT).
490 CCP, arts 399; 411(1) (PT).
491 CCP, art 229(5) (PT).
492 The UK Act, Schedule 6, para 4.
493 See *R (on the application of Javadov) v Westminster Magistrates' Court* [2021] EWHC 2751 (Admin) (UK).
494 IStGHG, s 50(1) (DE).

Rights protections in enforcing ICC orders

All reviewed jurisdictions have a process for protecting third party rights. However, opportunities for challenge to enforcement of ICC orders by convicted persons are more limited.

Belgium and France require that the Belgian criminal court or Paris criminal court, respectively, must hear the convicted person prior to declaring an ICC forfeiture order enforceable.[495] In France, this is also true in respect of fines/Reparations Orders.[496] While the Belgian Act provides for a hearing of the convicted person or their legal representative and the Belgian public prosecutor, it provides little additional detail regarding the effect of such hearing or third party rights in this context. By contrast, the FCCP in France provides for a hearing of the convicted person and any persons with rights to the property. The Paris criminal court is not, however, empowered to reconsider the merits and, where it finds that execution of an ICC order would prejudice a *bona fide* third party who cannot challenge the ICC order, it must inform the public prosecutor for purposes of referring the matter back to the ICC.

There are similar prohibitions in the UK Act on ordering forfeiture where rights of *bona fide* third parties are affected. The UK Act also provides that the domestic court must be satisfied that a reasonable opportunity to make representations has been provided to persons with an interest or right in property affected by a forfeiture order.[497] It is not clear whether the right to make representations is satisfied by representations having been made before the ICC or whether an opportunity to be heard before a domestic court is required, although common law principles suggest the latter. The UK Act does not provide a provision for appeal. However, given that enforcement of forfeiture or Reparations Orders is meant to follow the same processes as domestic orders, it is likely that ordinary avenues for appeal are available. In addition, it is likely that HRA claims are available.[498]

In Spain and Portugal, opportunities for intervention by the convicted person as well as by affected third parties are provided during enforcement proceedings governed by generally applicable procedural laws.[499] In addition, the confirmation and revision procedure required under Portuguese Law No. 144/99 provides for representations from the convicted person (although on limited grounds relating to revision and confirmation requirements).[500] Various protections arise for third parties depending on the specific assets seized. In Portugal, this includes specific protections for seizure of residential property,[501] salaries, and non-disposable assets.[502]

By contrast, in Italy, a person convicted in a final decision (i.e. a decision no longer subject to appeal) is not granted a specific right to be heard during enforcement proceedings, as Law 237 provides for enforcement of a final decision which is no longer subject to appeal. However, *bona fide* third parties with a right or interest in the forfeited assets can challenge enforcement measures before the Judge competent to enforce the forfeiture (*incidente di esecuzione*), claiming the property of the relevant assets.

Switzerland does not provide a specific mechanism for challenge within the process of executing ICC court orders. However, it does provide for challenge to the transfer of assets to the ICC prior to transmission. An injured party resident in Switzerland, an authority asserting rights to assets, or a *bona fide* third party may raise a claim, which has the effect of suspending transfer of assets.[503] Transfer may only occur if the ICC agrees or, where the authority asserts a claim, it consents. Transfer may also occur if the validity of the claim is recognised by the Swiss

495 Belgian Act, art 40 (BE).
496 FCCP, art 627-16 (FR).
497 The UK Act, s 49(5) (UK).
498 See the analogous position in *R v Waya* [2012] UKSC 51 and *R v Ahmad & Fields* [2015] AC 299 (UK).
499 Code of Civil Procedure, art 729 (PT); Criminal Procedure Act, art 803 *ter* 1 (ES).
500 Law No. 144/99, art 99(5) (PT).
501 Civil Procedural Code, arts 861(6); 862; and 863(3), (4) and (5) (PT).
502 Civil Procedural Code, art 737 (PT).
503 ICCA, art 41(4) (CH).

authorities.[504] Accused or convicted persons are not granted the right to challenge confiscation or transfer of their assets[505] (other than via an appeal against a closing order).[506]

Germany provides for third party protections in a similar manner, although with different mechanisms applying to assets transferred to the ICC pursuant to enforcement of ICC confiscation orders and where assets are transferred as a consequence of Article 93(1)(k) requests. In the latter scenario, a precondition for transfer is that third party rights are unaffected (although further detail is not provided).[507] In cases of post-conviction forfeiture, approval is required by the Ministry of Justice in cooperation with the Foreign Ministry prior to transfer of the assets to the ICC.[508] As part of this approval process, a third party has an opportunity to comment where: (i) the third party was not afforded the opportunity to defend their rights; (ii) the confiscation decision is incompatible with a German civil judgment dealing with the same matter; or (iii) the decision relates to third party rights in property located in Germany.[509] Comment is only available, however, where a third party has not had an opportunity to make representations before the ICC. No other avenue for appeal is available, save for a constitutional challenge under the German Basic Law.

The ICC and sanctions

Lack of clarity

None of the reviewed jurisdictions has any express mechanism for resolving a conflict between ICC obligations and applicable sanctions regimes. In particular, there is no known legislation which expressly determines whether assets frozen pursuant to UN, EU or domestic sanctions regimes may be released for the purposes of fulfilling ICC requests to enforce orders of fines, forfeiture or reparations. Similarly, there is little that expressly regulates engagement between the authorities responsible for enforcing sanctions and those responsible for implementing ICC cooperation requests, as these are in many cases different agencies.[510]

Accordingly, whether sanctions regimes will become a bar to cooperation with ICC requests depends largely on an interpretation of domestic sanctions and criminal justice or mutual legal assistance regimes.

The possibility of sanctions blocking ICC requests

In Portugal and Switzerland, it appears that sanctions measures would likely take precedence over ICC cooperation requests.

The Portuguese sanctions regime bans handling assets that are subject to restrictive measures. This suggests that assets frozen pursuant to sanctions may not be released for purposes of satisfying fines, forfeiture orders, or Reparations Orders.

The Swiss position is perhaps a little more complex. In the note regarding the draft bill preceding enactment of the ICCA, the Swiss Federal Council indicated that States Parties have an obligation to enforce confiscation measures ordered by the ICC. However, the ICCA does not expressly refer to sanctions and it is likely that the applicable

504 ICCA, art 41(5) (CH).
505 ICCA, art 50 (CH).
506 ICCA, art 45(1) (CH).
507 IStGHG, s 51(2) (DE).
508 IStGHG, s 44(3) (DE).
509 IStGHG, s 44(4) (DE).
510 See for example Belgium where sanctions are monitored and enforced by the General Administration of the Treasury (while the IHL Service is situated within the Ministry of Justice).

principles would mirror those governing conflicts between sanctions measures and mutual legal assistance in criminal matters (**MLAT requests**).

a. In the event of an MLAT request to freeze assets that have already been frozen in accordance with Swiss sanctions provisions under Article 2(3) of the Embargo Act 2002 (**EmbA**),[511] the executing authority may only order an interim measure. When issuing its closing order regarding the MLAT request, the executing authority will not be able to order the return to the requesting State of objects or assets frozen on the basis of an order implementing international sanctions.
b. At the same time, an asset freeze pursuant to the EmbA will not suspend freezing measures ordered pursuant to the mutual assistance framework. The two measures coexist, although with the effect that the assets frozen for purposes of mutual assistance cannot be transmitted to the requesting State.
c. In the context of the ICCA, assets may be retained in Switzerland if they are liable to forfeiture in the jurisdiction or if an authority asserts rights over them.[512] This could be interpreted to mean that where assets are frozen pursuant to the EmbA, their release to fulfil ICC cooperation requests would probably not be possible.

No bar to ICC cooperation

Italy and Spain are among the few jurisdictions where the sanctions regime is likely not to act as a bar to implementing ICC requests.

In Italy, Legislative Decree No. 109 of 22 June 2007 (regulating measures against the financing of terrorism and the activities of States threating peace and international security) provides that freezing orders issued by the UN or the EU do not prejudice the effects of potential seizure or forfeiture adopted in the context of national criminal or administrative proceedings where these are related to the same assets. Accordingly, it is reasonable to conclude that UN and EU sanctions would not prevent implementation of ICC asset recovery requests.

Similarly, in Spain, Article 42 of Act 10/2010 of 28 April on the prevention of money laundering and terrorist financing (**Act 10/2010**) provides that financial sanctions established by the UN Security Council related to the prevention and suppression of terrorism and the financing of terrorism are compulsorily applicable for any natural or legal person in terms provided by Community regulations or by agreement of the Council of Ministers.[513] However, Article 43.4 provides that asset recovery organisations, including the OAPM, may access the Financial Ownership File (*Fichero de Titularidades Financieras*)[514] when they have been entrusted with locating assets by judicial bodies or prosecutors. According to this article, these organisations may also access this file to carry out their information exchange functions with other similar offices of the EU or institutions of third States whose purpose is the seizure or confiscation in the framework of a criminal proceeding and in the case of crimes related to money laundering or the financing of terrorism. This suggests that there would be no bar to complying with ICC asset recovery requests.

A clear mechanism should be provided to resolve any such conflicts. In each jurisdiction, this could be in the form of a legislative amendment to clarify an order of precedence between sanctions and ICC cooperation obligations. As is illustrated by the contrasting approaches in Portugal and Switzerland on the one hand, and Italy and Spain on the other, the objectives behind sanctions freezes and any potential release of funds or assets appear key. Any legislative amendment would thus need to have regard to the objectives and operation of UN sanctions (as well

511 Embargo Act (EmbA) (22 March 2002), 20 January 2023.
512 ICCA, art 41 § 4 (CH).
513 Law 10/2010 of 28 April, art 42 (ES), on the prevention of money laundering and terrorist financing, 20 January 2023.
514 The Financial Ownership File (FTF) is an administrative file created with the purpose of preventing and avoiding money laundering and terrorist financing, in which information on certain types of financial products and their participants is registered.

as, in most of the reviewed jurisdictions, EU sanctions regulations) and would likely require engagement at the international level.

One possible approach which may allow for a release of funds for purposes of reparations is that of the U.S. Assets that are blocked due to U.S. sanctions, or assets belonging to individuals sanctioned under the Magnitsky Act or Global Magnitsky Act,[515] are not necessarily forfeitable. However, U.S. law does not entirely preclude this possibility as U.S. sanctions do not impair any powers of U.S. government agencies, such as the power to dispose of blocked property that is otherwise forfeitable,[516] and the U.S. has discretion to unblock assets to remit funds to victims.

Cooperation, accountability and transparency

In-country cooperation for purposes of implementing asset recovery requests

Most jurisdictions do not specify the full range of inter-agency cooperation that might be necessary to comply with ICC Requests. Moreover, implementation of asset recovery requests tends to rely on the prosecutorial, judicial and police authorities. In almost all jurisdictions under review, ordinary criminal investigatory, seizure and forfeiture measures provide the frameworks in which cooperation from specialist agencies and financial institutions can be procured if necessary.[517]

One particular example of extensive inter-governmental cooperation based on general laws arises in Spain, where the regulatory provisions of the OAPM require coordination with the State Security Forces and Agencies (*Fuerzas y Cuerpos de Seguridad del Estado*) for the location and recovery of assets[518] as well as providing for obligations of cooperation for other public, as well as private, entities.[519] These provisions are strengthened by collaboration agreements to support the OAPM such as a collaboration agreement between the General Public Prosecutor's Office and Ministry of Justice;[520] an agreement between the General Council of the Judiciary (*Consejo General del Poder Judicial*) and the Ministry of Justice;[521] an agreement between the Bank of Spain and Secretary of State for Justice;[522] and an agreement between the Ministry of Justice and the Tax Administration.[523]

A number of implementing statutes appear to assume inter-agency cooperation by establishing a clear coordinating agency. One of the strongest models of a coordinating body appears in Switzerland where the Central Office established within the Federal Ministry of Justice is both the designated communication channel with the ICC and coordinator of implementing measures. As is the case with most jurisdictions, however, express cooperation requirements on other

515 All such individuals are incorporated into OFAC's Specially Designated Nationals list, which can be viewed on the website <www.treasury.gov/sdn>.
516 See, e.g., 31 C.F.R. § 587.201; EO 14024 § 11 (15 April 2021) (U.S.).
517 See for example the express provisions in Portugal of CCP, arts 262; 263; and 267 (PT).
518 RD of the Office for Asset Recovery, art 6.1.(a) (ES)
519 This is regulated in the sixth Additional Provision of the Criminal Procedure Act (ES).
520 See Collaboration Agreement signed between General Public Prosecutor's Office and the Ministry of Justice in terms of collaboration and support for the operation of the Asset Recovery and Management Office (Convenio de Colaboración suscrito entre la Fiscalía General del Estado y el Ministerio de Justicia en Materia de colaboración y apoyo al funcionamiento de la Oficia de Recuperación y Gestión de Activos) of 15 May 2022 (ES), 30 November 2022.
521 See Agreement between the General Council of the Judiciary and the Ministry of Justice regarding collaboration and support for the operation of the Asset Recovery and Management Office (Convenio entre el Consejo General del Poder Judicial y el Ministerio de Justicia en material de colaboración y apoyo al funcionamiento de la Oficina de Recuperación y Gestión de Activos), of 20 March 2018 (addendum for extension and modification on 14 March 2022 (ES), 30 November 2022.
522 See Collaboration Agreement between the Secretary of State for Justice and the Bank of Spain in terms of collaboration and support for the operation of the Asset Recovery and Management Office (Convenio de Colaboración entre la Secretaría de Estado de Justicia y el Banco de España en materia de colaboración y apoyo al funcionamiento de la Oficina de Recuperación y Gestión de Activos) of 10 March 2017 (addendum for extension and modification on 14 April 2021) (ES), 30 November 2022.
523 See Agreement between the Ministry of Justice and the State Tax Administration Agency on the transfer of information and for cooperation in customs surveillance (Convenio entre el Ministerio de Justicia y la Agencia Estatal de Administración Tributaria en materia de cesión de información y para la cooperación de vigilancia aduanera) (ES), 30 November 2022.

government departments are not provided for in the ICCA. The Belgian Act similarly assigns a strong central role to the IHL Service and clarifies that cooperation with different offices is possible. However, it does not specify the manner of cooperation and it does not expressly contemplate cooperation by financial institutions or authorities such as tax, customs or ports authorities. A similar position pertains to the anti-terrorist public prosecutor in France (where cooperation with the French tax authorities and Financial Prosecutor of Paris has become increasingly noticeable).

The practical effect of these frameworks may not differ significantly from the position under the UK Act or Portuguese general laws dealing with seizure and management of assets. In these cases, a receiver or legal depository may require the cooperation of multiple agencies to carry out their functions. There is not enough publicly available information regarding the process of implementing ICC asset recovery requests to determine whether statutory obligations of cooperation within implementing legislation are necessary to facilitate inter-agency cooperation.

A final category of inter-agency cooperation appears in Italy where Law 237 requires the Ministry of Defence to cooperate where military courts are involved and the Ministry of Economy and Finance to cooperate in relation to transfer of forfeited assets to the ICC. This specific reference to inter-ministerial cooperation for purposes of implementation is distinct from the procedure in jurisdictions such as Germany and Spain where joint ministerial action is required at the admissibility stage (see 14.7 and 17.4 above).

Cross-border cooperation

Generally, implementing legislation does not contemplate cross-border cooperation, focusing only on the relationship between a State and the ICC. However, membership in the UN and the UN's engagements or cooperation with the ICC may lead to cross-border cooperation in specific cases.[524]

Unusually, the Swiss ICCA expressly provides for integration with its mutual legal assistance legislation in relation to transmission of documents and evidence from Switzerland by the ICC to another State.[525] Mutual legal assistance mechanisms may also be available to support implementation of ICC requests in Italy and Spain, although no express reference appears in either Italy's Law 237 or Spain's Organic Law 18/2003.

An interesting variation arises in the UK. As in other reviewed jurisdictions, the UK Act does not specifically provide for international cooperation. However, it does provide for cooperation between England, Wales, Northern Ireland and Scotland, in relation to ICC requests affecting the movement, arrest and surrender of persons.[526] However, the UK Act does not provide for equivalent cooperation requirements between the nations of the UK in respect of asset tracing. A potential area for further consideration is whether specific cooperation requirements are necessary in this regard. Further, it raises questions regarding how States Parties with separate protectorates and/or territories may implement requests where assets are held offshore.

A further consideration is the use of informal information-sharing in the U.S. through police-to-police and prosecutor-to-prosecutor requests. Informal requests through these channels may be made for various, routine investigative measures and may also be used to confirm information in order to prepare formal mutual legal assistance requests.[527] In the context of this review, this process is analogous to the scenario in which the ICC might engage informally with a State Party to establish the specifics of domestic requirements for requests. However, it also highlights the importance of informal cross-border engagements as a means of supporting ICC requests. This is particularly the case in respect of identification of assets (as well as tracing of persons). Police-to-police cooperation

524 See, for example, the French Foreign Affairs Ministry, France's Constant Commitment to the ICC, 20 January 2023.
525 ICCA, art 33 (CH)
526 The UK Act, ss 5; 32; and 42 (UK).
527 U.S. DOJ and U.S. State Department, U.S. Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation, 3 December 2022.

of this kind may also be suggested by the role of INTERPOL in implementing precautionary measures in Portugal and the possibility for police and/or intelligence organisations to facilitate cooperation in Italy.

Role of civil society

Most implementing legislation provides no express role for civil society, but nor does it bar its involvement.

Despite the absence of a formal role for civil society, there are indications that there is scope for advocacy and civil society involvement in France, Italy and the UK. In France, NGOs advocating for transparency in the business sector have brought litigation before the French courts. These cases may highlight particular issues with a consequent effect of supporting ICC investigations.[528] In Italy, recognised NGOs may engage in activities which relate to ICC requests (such as ONG, which focuses on search and rescue of migrants in Italian seas). In the UK, the FCDO offers consultations with representatives from civil society, including on human rights issues.[529]

By contrast, it possible that a practical consequence of ICC implementing measures being integrated in the domestic criminal framework is that civil society organisations may have little formal scope of intervention. This is the case in Belgium and possibly also in Spain. In the latter, Preamble II of the OAPM[530] states that it does not "*introduce administrative burdens to citizens, as it strictly affects the internal organizational scope of the Public Administration, characterized by proportionality and efficiency*". This suggests that there is little to no scope for civil society engagement in relation to OAPM activities.

Lack of transparency

A key issue across jurisdictions is the lack of information available regarding responses to ICC cooperation requests. Switzerland and France, for example have provided statistics regarding the number of requests processed, but the nature of these requests is not specified.

Conclusion

This Report has considered the "*readiness*" of the applicable legal and institutional frameworks in nine jurisdictions to respond to, process and execute the ICC's asset recovery requests. In doing so, it has highlighted the challenges each Relevant State faces, particularly since, according to publicly available information, several have never received a Request and their frameworks remain largely untested. The Relevant States should engage with the recommendations provided in this Report to ensure that they are best placed to hold human rights abusers to account and ensure that the survivors of atrocities obtain reparations.

528 Sherpa, Aiding and abetting war crimes in Yemen: Criminal complaint submitted against French arms companies (2 June 2022) Press Release, 20 January 2023.

529 For instance, please see the list of FCDO's ministerial meetings from April to June 2022, 5 January 2023.

530 Royal Decree 93/2018, of 2 March 2018, which modifies Royal Decree 948/2015, of 23 October 2015, which regulates the Asset Recovery and Management Office (ES).

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Judges of the ICC and legal representatives
of victims at the trial of Jean-Pierre Bemba Gombo.

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