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Ending torture, seeking justice for survivors

FINANCIAL ACCOUNTABILITY AT THE INTERNATIONAL CRIMINAL COURT:

Compliance with ICC Asset Recovery Requests

Report Summary

September 2024

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EXECUTIVE SUMMARY

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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.

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 to ensure reparation for 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 publicly 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 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 shortened version of the Report is structured as follows:

a. Section 2 provides a brief overview of certain relevant aspects of the Rome Statute;
b. Section 3 sets out a high-level summary of the readiness of each Relevant State; and
c. Section 4 discusses the common themes and recommendations for the Relevant States.

Section 2 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 effectively undermine cooperation do not satisfy their obligations under the Rome Statute (for instance, cooperation cannot be preconditioned on obtaining consent of the accused or other parties).

Against this backdrop, Sections 3 and 4 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. Section 3 assesses each Relevant State's "readiness" by considering the following factors:

a. The existence of legislation/specific legislative powers that implement the obligations of the Rome Statute into the domestic legal framework.
b. 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.

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. 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.
d. 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.
e. 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 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

The basis of this scoring system and specifics of each Relevant State's score is explored in further detail in the both the Report and shortened version, 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.[2] 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).

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

- 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.
- 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 individual 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 the Report addresses include:

a. **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.
b. **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).

c. **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).

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.

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:

a. Ensuring that clear procedures are put in place regarding pre-trial, trial and post-conviction investigation measures that may be taken;
b. Introducing the relevant procedures for pre-trial, trial and post-conviction anti-dissipation 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;
c. Providing specific procedural rules on the management of seized assets, recourse for asset mismanagement and provisions for effective monitoring of assets;
d. Providing clear mechanisms for asset handover and return (including trigger mechanisms and parties responsible for the return, release or transmission of assets); and
e. 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 in the Report also provide further detailed, country-specific recommendations.

The work thus far has focused on identifying key strengths and weaknesses across the in-scope 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 international crimes are no longer able to enjoy financial impunity and to provide effective mechanisms for using perpetrators' assets to provide reparation to their victims.

BACKGROUND TO THE ROME STATUTE LEGAL FRAMEWORK

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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.

The Rome Statute and related RPE set out a framework for the recovery of assets. 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.

A key difficulty in measuring the implementation "*readiness*" of Relevant States arises from the lack of clear definitions in the Rome Statute and a lack of clarity in the Court's approach to interpreting the key provisions relating to asset recovery and forfeiture.

Crucially, the Rome Statute does not define what is meant by the terms "*identification, tracing, freezing or seizure*". Depending on how different Relevant States treat ICC case law, discrepancies can arise as to how Relevant States apply national legislation to meet ICC Requests. To allow for comparison of how easily national laws accommodate ICC Requests, this review has used definitions based on guidance from the Court, academic literature, and UN Conventions and sanctions statements.

Notably, the Court has clarified certain points of interpretation regarding corporate entities controlled by an accused and that assets need not be directly linked to a crime for the purpose of seizure/freezing:

a. The Court has made clear that where allegations of financing of crimes are the subject of investigation, it can investigate entities controlled by an accused.[3] In addition, the Court considers that requests to government agencies for information regarding company records linked to the accused are legitimate.[4]
b. The Court has also confirmed that "*proceeds, property and assets and instrumentalities of crimes*" need not be linked to a crime for purposes of imposing protective measures,[5] or seizing/freezing assets.[6]

Powers of the ICC to call for cooperation

States Parties' cooperation on asset recovery may be requested by various organs of the Court at different stages of the proceedings, including:

a. the Office of the Prosecutor (**OTP**) as part of its investigative remit;[7]
b. the Pre-Trial Chamber at any time after it has issued a warrant or summons (where it seeks to institute protective measures over assets, in case forfeiture is later required);[8] and/or
c. the Trial Chamber after conviction (where it has issued a Reparations Order).[9]

In addition, the Registry has powers to conduct financial investigations for the purposes of managing the Court's legal assistance scheme to accused or suspected persons as well as the victim support scheme. Further, the Registry has powers to support the Presidency in enforcing financial orders of the Court.

Reparations Orders and the Role of the Trust Fund for Victims

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 proceedings entail an additional stage of ICC proceedings separate to sentencing. To date, reparations proceedings typically have occurred a number of years after conviction.[10]

ICC case law has determined that a Reparations Order must: (i) be directed against the convicted person; (ii) establish and inform the convicted person of the liability in respect of which reparations are awarded; (iii) specify and provide reasons for the ordering of collective and/or individual reparations; (iv) define the harm caused to victims and forms of reparations considered appropriate by the Trial Chamber; and (v) identify the eligible victims for receipt of reparations.[11]

The Trust Fund for Victims (**TFV**) acts as a depository for any assets seized for the eventual purposes of reparation and is responsible for implementing Reparations Orders where it would be impractical or impossible for the Court to award repara-

3 *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, 29 July 2014, Trial Chamber V(B) (*Kenyatta Prosecution's Revised Cooperation Request*), para 39.
4 *Kenyatta Prosecution's Revised Cooperation Request*, para 40.
5 Rome Statute, art. 57(3)(e). 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, ICC-01/09-02/11-931, 08 July 2014, 11 December 2022 (*Kenyatta Implementation Decision*), para 16.
6 Rome Statute, art. 93(1)(k). 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*), para 17.
7 The only requirement for Requests issued by the OTP at the investigatory stage is that an investigation has been authorised by the Pre-Trial Chamber. See, in particular, Rome Statute, arts 54(2)(a) and 93(1)(k).
8 Rome Statute, art 57(3)(e). See also RPE, r. 99(1): this power may be exercised without prior notice and before conviction, on the Pre-Trial Chamber's own initiative, or on application by the OTP or by victims (or their legal representatives).
9 Rome Statute, arts 75(2), 77(2)(a) and 77(2)(b).
10 We note that, it is not clear whether Article 93(1)(k) of the Rome Statute confers the power to issue Requests for the purposes of determining a sentence of a fine or forfeiture order (or for purposes of identifying assets after sentence) post-conviction. The text of the Rome Statute is unclear and there is no ICC case law on the point.
11 *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). Situation in Uganda: The Prosecutor v Dominic Ongwen – Reparations Order*, ICC-02/04-01/15-2074, 28 February 2024, Trial Chamber.

tions directly to each victim. This power has been exercised by the Court in relation to the fines imposed in the cases of *Kilolo* and *Bemba* for offences against administration of justice, and they were fined EUR 30,000 and EUR 300,000, respectively.[12]

States Parties' cooperation obligations under the Rome Statute

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*",[13] including, as necessary, by "*ensur*[ing] *that there are procedures available under their national law for all* [relevant] *forms of cooperation*".[14] As such, States Parties have an important role to play in identifying, tracing, freezing and seizing the assets based in their jurisdictions. The Assembly of States Parties (**ASP**) has noted that:[15]

> ***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…"***

States Parties' national law procedures must facilitate cooperation requests (though the procedure may include judicial intervention as necessary if required by national procedural law).[16] While States Parties have flexibility in how they implement Requests through their domestic systems, procedures that hinder cooperation will cause a State Party to fall short of its obligations under the Rome Statute.

In brief, States Parties procedures to ICC Requests must reflect that:

a. 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);
b. 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;
c. cooperation cannot be preconditioned on the States Parties obtaining the consent of the accused or other parties; and
d. it should be possible for the States Parties to use compulsory measures where appropriate.[17]

Timeframes for responding to cooperation Requests

There is no specific timeframe in the Rome Statute for States Parties to respond to a Request from the ICC. However, States Parties are encouraged to respond to Requests as soon as possible (and raise objections to implementation promptly) to minimise the risk of dissipation of assets. The Pre-Trial Chamber has recognised that early identification, tracing, freezing or seizure of the assets of the accused in question is a necessary tool to ensure that reparation awards can be enforced and that there is an urgent need to trace and seize property early to mitigate the risk of dissipation.[18]

12 *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*) 199; 262.

13 Rome Statute, art. 86.

14 Rome Statute, art. 88.

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

16 Rome Statute, arts. 93(1) and 99(1). See also *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.

17 *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.

18 *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***)**, 60-61. There are some scenarios in which States Parties may postpone execution of Requests (such as where execution would interfere with an ongoing investigation or prosecution in the States Party or where there is an admissibility challenged made to the Court).

Consequences of failing to comply

If a State Party fails to cooperate with a Request, the Court may make a finding that the State Party is non-cooperative and, in its discretion, may refer the matter to the ASP or United Nations Security Council (**UNSC**), if this body referred the matter to the Court.[19] In order to make such a finding, the Court must objectively determine that the States Party's behaviour prevented the Court's exercise of its powers and hindered its ability to carry out its duties.[20]

The ASP may take action in cases referred to it and, exceptionally, may do so prior to a referral where an incident of non-cooperation is imminent or ongoing and urgent intervention to secure cooperation is required.[21] The *Assembly Procedures Relating to Non-cooperation* set out a number of minimum steps to be taken including (i) an Emergency Bureau meeting to determine the requisite steps to be taken; (ii) open letters from the ASP President to the requested States Party requesting a formal response; (iii) subsequent discussions and open dialogues with the requested State (including participation of States Parties and civil society observers); and (iv) an address to the UNSC regarding steps taken to encourage cooperation.[22]

19 Rome Statute, art. 87(7).

20 *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, 19 August 2015, Appeals Chamber (*Kenyatta Non-Cooperation Appeal)*, para 48.

21 Rome Statute, art. 112(2); 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.

22 ASP, *Assembly Procedures Relating to Non-cooperation*, ICC-ASP/17/20, para 14.

"READINESS" OF NATIONAL LEGAL FRAMEWORKS

This review assesses the extent to which national legal frameworks of each of the Relevant States are prepared to support and enable the work of the ICC in tracing assets and recovering funds – in other words, the "*readiness*" of the Relevant States.

To determine the "*readiness*" of each Relevant State, we have looked at the following factors:

a. Existence of legislation/specific legislative provisions (2 points).
b. The clarity and comprehensiveness of the legislation/provisions that implements the obligations of the Rome Statute into the domestic legal framework (3 points).
c. The compatibility and 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).
d. 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).
e. The ability of Relevant States to meet the full range of Requests from the ICC (1 point).

On the basis of these factors, 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'.

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 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.

Jurisdiction	Score	Rating	Commentary
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. However, 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.
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. 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. Nonetheless, 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.

Jurisdiction	Score	Rating	Commentary
Belgium	7	Good	The Belgian framework closely follows the provisions of the Rome Statute in respect of 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 Requests or a clear mechanism for resolving conflicts with Belgium's sanctions regime.
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 (ICCP), 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.

Jurisdiction	Score	Rating	Commentary
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.
Portugal	4	Fair	The main criticism that can be levelled at Portugal is that it 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 not clear that 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.

Jurisdiction	Score	Rating	Commentary
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 ICC reparations. Finally, it is very unlikely that the U.S. will join the ICC due to domestic political constraints.

In the remainder of this Section, we set out seven key considerations regarding the readiness of each Relevant State.

Consideration 1: Structure and nature of national implementing legislation and how this interacts with ICC jurisprudence

Some of the most difficult issues in ensuring effective cooperation with the ICC relate to domestic legislative and institutional structures. The way in which implementing legislation has been enacted and the roles of various States' agencies are largely matters of domestic constitutional and legal organisation. Despite these structural challenges, it appears that the most effective national implementing laws are 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.

The Relevant States have adopted a range of approaches to implementing legislation to deal with cooperation Requests from the ICC, as follows:

Integration into procedural law	Self-standing implementing statute23	No implementing legislation
France[24]	Belgium	Portugal
	Germany	U.S.
	Italy	
	Spain	
	Switzerland	
	UK	

23 In all cases, where specific implementation steps are not provided for in the relevant piece of legislation, it is possible to rely on existing procedures – primarily those contained in national criminal procedure laws.

24 In France, the implementing law has been introduced entirely through an amendment to the French Code of Criminal Procedure (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).

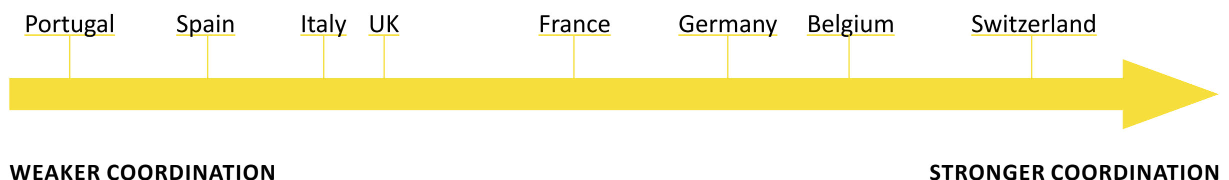
France's approach – integrating ICC cooperation in existing criminal procedural law – has resulted in a clearer alignment between domestic and ICC procedures. The UK Act has a similar effect despite being a self-standing statute[25]: it replicates existing criminal procedures allowing, in many cases, recourse to general laws where the UK Act does not cover a particular scenario.

However, the UK Act raises certain questions about the relationship between domestic implementing legislation and the evolving practice of the ICC and its interpretation of the Rome Statute. The UK Act does not expressly allow for the direct application of the Rome Statute in addition to the provisions of the implementing law and the role of ICC jurisprudence is not clear. Only Switzerland has a clear regime requiring the Central Office to take account of ICC case law in responding to ICC Requests. National laws which are able to respond to evolving ICC practice and jurisprudence are more likely to make the process of responding to ICC Requests easier.

Consideration 2: Role of competent/central authorities and the extent to which there is coordination of the different stages of assessing and executing ICC Requests

The role of central authorities and the extent to which there is coordination of the different stages of assessing and executing ICC Requests has a material impact on the readiness of a State to respond to ICC Requests.

All the Relevant States (other than the U.S.) have designated a national body to receive ICC Requests. However, there is variation in whether this body acts as a "*clearing house*" and only directs the ICC Request to another department (such as in France, Portugal, Spain, and the UK); or whether it is also involved in the implementation of the Request (such as in Switzerland, Germany and, to a certain extent, Italy and Belgium).



WEAKER COORDINATION **STRONGER COORDINATION**

Whatever model is chosen, the critical factor is whether there is strong and centralised coordination. It is easier to resolve any complications regarding the execution of ICC Requests where agencies responsible for implementation are also those empowered to consult with the ICC. Where there is no centralised coordination, and a large number of bureaucratic processes are involved, there is also the potential for miscommunication and slower response times (a particular issue as timelines are largely absent from national laws).

For example:

a. Switzerland has a particularly clear coordinating structure. Certain departments within the Ministry of Justice are responsible for receiving and assessing Requests; communicating with the ICC; and designating which national authorities or agencies should execute asset recovery measures.

b. By contrast, 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.

25 The International Criminal Court Act 2001 (the UK Act).

i. While the relevant prosecutorial authorities effectively coordinate execution of a Request in all their cases, there is variation in how the admissibility of a Request is determined and whether this occurs at ministerial level, by the judicial authorities (including the Public Prosecution) or with the involvement of both entities.

ii. There is also some variation in how the admissibility of Requests relating to enforcement are treated: for example, the Secretary of State in the UK plays a more active role in directing steps for forfeiture than in the case of Requests for identification/tracing of assets or precautionary measures.

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 Requests: rather, it is typically more dependent upon the internal organisation of the States. It is illustrative to compare the situation in Portugal and the U.S.:

a. Portugal provides a good illustration of bureaucratic complexity.

   i. A Request is first transmitted to the Ministry of Foreign Affairs, which forwards it to the Public Prosecutor's Office.

   ii. The Public Prosecutor's Office, in turn, forwards a Request to the Minister of Justice for a decision on admissibility.

   iii. 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. 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. The U.S. approach to foreign legal assistance reflects a more streamlined approach.

   i. Under the MLATs to which the U.S. is a party, the U.S. Attorney General has been designated as the Central Authority of the U.S. (for foreign requests for legal assistance generally).

   ii. Through federal regulation, the Attorney General delegated this authority to the Office of International Affairs (**OIA**) (within the Criminal Division of the Department of Justice).

   iii. 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 request another U.S. authority to do so. 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.

To summarise, implementing legislation tends to provide clarity and make enforcement of ICC Requests more straightforward if:

a. it clarifies which domestic laws of general application apply where necessary and their interaction with provisions specifically applicable to ICC Requests;
b. there is a strong coordinating authority to determine admissibility and implementation of ICC Requests at all stages;
c. the same coordinating authority also handles communications with the ICC; and
d. there is a designated body empowered to develop expertise in interpretation and application of the Rome Statute.

Consideration 3: Initial response to receiving Requests for cooperation from the ICC (including timing of responses, degree of formal requirements, substantive requirements and grounds for refusal or postponement)

All the Relevant States (except the U.S.) have a formal process for receiving ICC Requests and determining their admissibility within the jurisdiction prior to commencing implementation (or enforcement) steps. This suggests a certain level of "*readiness*" amongst the jurisdictions.

Formal requirements

Formal requirements for admissibility do not depart significantly from those contained in the Rome Statute,[26] largely either because the Rome Statute has direct application in the Relevant States, or because implementing legislation or other applicable legal instruments track these requirements closely.[27]

All the Relevant States have specified the language in which Requests should be communicated and formal admissibility requirements for ICC Requests are similar for most of the Relevant States, subject to relatively minor variations.[28]

Substantive requirements and grounds for refusal

There is slightly greater variation among the Relevant States in relation to substantive admissibility requirements and grounds for refusal or postponement. Some Relevant States permit only the limited grounds contemplated in the Rome Statute to be capable of postponing the execution of Requests (for example, Belgium, Germany and Switzerland).[29] Other Relevant States incorporate additional or distinct requirements and grounds for refusal including "*non-discrimination*" and dual criminality considerations.

For example:

a. France and the UK adopt legislation where the provisions relating to substantive admissibility deal expressly only with concerns of national security. Little further detail is provided in either case about the national security concerns involved. Consultations with the ICC to resolve the situation are not expressly contemplated. This creates some uncertainty regarding the process in these jurisdictions.
b. Spain's approach includes a requirement for inter-ministerial consultations in case of a potential effect on national security or defence.
c. In Italy and Portugal, the incorporation of ,or need to have, recourse to foreign legal assistance provisions introduces additional substantive requirements, including consideration of ECHR rights and non-discrimination concerns.

As a general observation, it appears that where national implementing legislation involves extensive reliance on general criminal procedure laws, determining what grounds for refusal of ICC Requests might exist becomes more complex and opaque. By contrast, Relevant States with clear implementing legislation that stands alone tend to have more readily ascertainable standards for when an ICC Request might be refused.

26 Rome Statute, art. 96(2).
27 For instance, Belgium, Germany and Switzerland have implemented legislation which closely resembles the text and structure of the Rome Statute and in each case, the formal requirements of Article 96(2) of the Rome Statute are expressly incorporated.
28 In Italy, France, Spain and the UK, Article 96(2) has not been expressly incorporated into the relevant implementing legislation and there are differences in formal admissibility requirements. In Italy, France, Spain and (likely) Portugal, Article 96(2) of the Rome Statute applies due to a general requirement to comply with procedural requirements set out in the Rome Statute and by the ICC. In the UK, Rome Statute provisions do not automatically apply and the Secretary of State has discretion in this area.
29 Other than non-compliance with national law, the sole express basis for refusal of a Request in these jurisdictions relate to disclosure of documents or evidence which relates to national security.

Time limits

None of the Relevant States provides a comprehensive timeframe for cooperation with Requests. Some Relevant States do incorporate time limits for certain steps of the admissibility or enforcement process, but they are not comprehensive. This presents clear disadvantages in ensuring that potentially overburdened criminal justice systems deal with ICC Requests swiftly. There is also a risk that imposing strict time limits on the duration of execution measures (as is the case in France) may not be aligned with the long duration of ICC proceedings.[30]

None of the Relevant States allow the decision to accept and execute an ICC Request to be appealed or otherwise challenged, although a number of jurisdictions (including Spain and Germany) provide for inter-ministerial consultation as part of the admissibility process. In addition, challenges to implementation of various measures are provided in some jurisdictions.[31]

Consideration 4: Responding to Requests (tracing/identification of assets)

Once the Relevant States have received an ICC Request, they must begin to trace and identify the relevant assets. The tracing and identification of assets is typically not directly regulated by implementing legislation but by general criminal procedural codes. 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 into a wide range of assets.

The typical approach

Generally, asset tracing is considered an investigatory function implemented by prosecutorial authorities with the assistance of the police.

For example:

a. Portugal and Italy reflect a typical structure in which the Public Prosecutor's Office is primarily responsible for implementing investigative measures and is able to delegate powers to the relevant police force.
b. Belgium is similar but, in addition to the public prosecutor, a request can also be transferred to an investigating magistrate to issue an order to carry out the relevant investigative measure.
c. In France, the Anti-terrorist Public Prosecutor undertakes this role, unless the Request requires an act that is only capable of being ordered by a judge (such as phone tapping measures).
d. In Spain, the Asset Recovery and Management Office takes on responsibility for tracing and identification of assets, acting at the request of either a judge or the Public Prosecutor.
e. In Switzerland, the Central Office specifies the measures to be implemented by the designated federal or cantonal offices of the Attorney General; although at the federal level, requests are executed by a taskforce specialising in international criminal law within the Attorney General's office.
f. In the UK, the Secretary of State (rather than the Public Prosecutor) is responsible for directing the police to apply for the orders or warrants necessary to implement Requests.

30 For example, the events giving rise to the charges against Jean-Pierre Bemba occurred in the Central African Republic in 2002–2003. He His appeared before the Pre-Trial Chamber in July 2008. His trial began in November 2010 and lasted four years. The Trial Chamber found him guilty in March 2016. Another two years passed before the Appeals Chamber finally acquitted him in June 2018.

31 For instance, in France, Italy and Spain where ordinary national laws apply to searches, there is room for challenge to specific implementation steps. In addition, in the UK, production/access orders or search warrants can likely be challenged by way of (i) appeal under section 59 Criminal Justice and Police Act 2001; (ii) judicial review; or (iii) under the Human Rights Act 1998.

In addition, the Relevant States typically provide that a judicial authority should be involved to oversee the use of measures that might intrude into personal rights to privacy or property. In some Relevant States (such as Belgium, France and Portugal) certain particularly intrusive measures require a form of judicial approval; whereas in other Relevant States (such as Germany and the UK), all measures seeking to fulfil an ICC Request to trace and identify assets require a court order.

Switzerland: a different approach

The Swiss implementing law adopts a slightly different approach to the other jurisdictions under review. Here, the Central Office determines the implementation steps to be taken by the relevant Attorney's General Office. The relevant legislation provides that the manner of implementation will reflect any procedural requirements of the ICC but also provides for specific requirements for various contemplated forms of cooperation.

Timing of tracing and identification measures

While most Relevant States allow for tracing and identification measures to be implemented throughout all stages of ICC proceedings, this is not the case in all Relevant States (with the UK and Germany limiting post-conviction investigations).

In some cases, different asset tracing procedures may be required in a Relevant State, depending on the stage of ICC proceedings. This may be a complex process: 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, which drive the requirement to adopt different approaches at different stages of proceedings.

Tracing and identification in practice

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, financial investigations often require rapid responses. As such, the most effective procedures are likely to be those that: (i) adopt a minimally bureaucratic process; and (ii) provide the opportunity for investigators to access a wide range of asset-related information.

Care is also required where implementing laws restrict ICC Requests after conviction only or which have the effect of precluding asset tracing for specific purposes.

Consideration 5: Seizure and freezing of assets – scope, management and release of assets, remedies for mismanagement, and release of assets on acquittal

The Report examines the scope of seizure and freezing measures provided for in the Relevant States' implementing legislation (including how those procedures might evolve to accommodate ICC jurisprudence). It also assesses how assets are handled once they have been seized or frozen (and how they are released at the end of ICC proceedings, if required), including what recourse parties have with respect to any mismanagement of seized or frozen assets.

Scope of seizure/freezing Requests

The implementing legislation of Switzerland, the UK and Germany includes procedures for freezing or seizure of assets. In the other Relevant States, the procedures for freezing and seizure of assets are provided in the general criminal procedural framework. All the Relevant States' procedures require judicial supervision of searches, seizures and anti-dissipation measures.

Most domestic procedures for the freezing or seizure of assets require precautionary measures to be taken with the ultimate purpose of enforcing a penalty. This assumption may restrict the applicability of domestic procedures to ICC Requests (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 if assets are being seized or frozen for the purposes of obtaining reparations, rather than to impose a penalty.

We note that, even if it appears that various Relevant States' domestic requirements for seizure or freezing assets are similar, the thresholds for obtaining precautionary measures and injunctive relief might vary materially in practice.

Requirement for a nexus between seized or frozen assets and a crime

There is some inconsistency between the ICC position and that of several of the Relevant States regarding whether or not the seized or frozen assets need to be linked to the crime within the context of ICC proceedings. The ICC does not require a nexus between the crime and the seized or frozen assets. By contrast, seizure or freezing measures under domestic procedures ordinarily require such a nexus. The precise requirements vary between the Relevant States but, for example:

a. In Switzerland and the UK, the implementing legislation for ICC cooperation makes it necessary to demonstrate that assets or property to be seized or frozen are the subject, proceeds or fruits of crime.
b. In Germany, the implementing legislation makes it necessary to prove a stronger link between assets seized as evidence prior to confirmation of indictment under Article 5 of the Rome Statute than seizures of assets made after this step.

Management and release of assets

None of the Relevant States expressly regulate management of assets frozen or seized pursuant to ICC Requests. However, some Relevant States have effective procedures for managing seized assets under their general procedural rules.

In general, Relevant States' management and release of frozen or seized assets follows one of two broad structures:

a. Central agency management

    i. In France, Spain, Belgium and the U.S., a central agency manages seized assets. In each case there are local procedural rules that determine what type of assets can be managed by the relevant central agency.
    ii. The central agencies in Spain and the U.S. have clear guidance regarding their operations and represent preferred practice.

b. Judicial or custodial management

    i. In the absence of a central agency, assets are managed by custodians, judicial administrators or other similar entities.
    ii. The systems in Germany, Italy, Portugal and the UK demonstrate different approaches, and the relevant custodian can exercise various degrees of control in each jurisdiction. In some jurisdictions, the process is relatively formalised (with the UK, for example, applying the receivership system to frozen assets). In other jurisdictions such as France, Italy and Portugal, parts of the systems handling frozen or seized assets are less formalised (with banks being responsible for frozen funds in their accounts, for example).

Recourse in instances of mismanagement of seized or frozen assets

None of the Relevant States' implementing legislation, save for the UK Act, makes specific provision for cases of mismanagement of seized or frozen assets or their loss of value. The provisions of the UK Act do not, in any event, provide a specific remedy for mismanagement: they simply limit the liability of receivers for loss or damage, except in cases of negligence.

The position in all the Relevant States (including the UK) is that insofar as remedies are available, they are likely to be claims founded in the general civil or criminal law of each Relevant State as it applies to standards of care required when managing assets. For example, such local law obligations include:

a. a duty to manage assets with due care and diligence (in Portugal and the UK);

b. a statutory set of standards required of custodians and judicial administrators when managing assets and remedies for breach of those standards in cases of wilful misconduct or gross negligence (in Italy); and

c. a route of recourse against the state if mismanagement of seized assets causes a loss of value (in Belgium).

Release of seized or frozen assets

The final consideration of this section is the trigger mechanism and processes for the release of seized or frozen assets where ICC proceedings end in an acquittal. This is a key area in which all the Relevant States should strive for greater clarity, because at present there is little transparency over when and how seized or frozen assets would be returned in the event of acquittal.

The best practice amongst the Relevant States in this respect is possibly found in Switzerland. The Swiss implementing legislation provides that seized objects and assets will remain seized until transmitted to the ICC or until the ICC notifies the Central Office that it will no longer request transmission of the assets.[32]

However, other Relevant States do not provide such a clear process for what is an easily conceivable outcome.

Consideration 6: Forfeiture of assets – including recognition of forfeiture orders

Registration and recognition of forfeiture orders

Most Relevant States' implementing laws contemplate forfeiture in relation to enforcement of ICC orders. There is variation between the Relevant States as to whether ICC forfeiture orders must be recognised or registered. However, in all cases except France, the steps for execution of the order are not included in the implementing law and domestic procedural laws apply.

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 required);

c. whether third-party rights are dealt with by national courts or referred to the ICC;

d. whether the assets can be used to fund reparations, fines or other court costs;

e. the types of assets subject to forfeiture; and

f. the procedure to transfer assets to the ICC.

32 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 (ICCA) (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, art. 41(3).

Timing of forfeiture Requests

The Relevant States' implementing legislations differ as to whether forfeiture is permitted pre-conviction or not. For example:

a. Italy, Spain, Germany and the UK all provide for enforcement of post-conviction fines/forfeiture orders and Reparations Orders (with varying degrees of flexibility regarding what assets may be targeted), but do not provide for pre-conviction forfeiture orders.
b. France and Switzerland provide the process that most easily accommodates evolving ICC practice, and the ICCA in Switzerland even contemplates enforcing pre-conviction forfeiture orders.

Transfer to the ICC

While most of the Relevant States' implementing legislation provides for transfer of assets to the ICC upon forfeiture, few provide details of the relevant procedure.

Two Relevant States do provide more specific guidance on this topic:

a. Italy provides that 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 Ministry of Justice for transfer to the ICC.[33]
b. Switzerland provides specific protection of third-party rights at the time of transfer of assets to the ICC (although the procedure for handover of assets by the Central Office to the ICC is otherwise not specified).[34] This is certainly an area where further clarity would be beneficial.

Consideration 7: Rights of accused and third parties – ability to challenge measures, third party rights protection

Challenging measures relating to tracing and identification of assets

Relevant States' domestic laws provide few protections with respect to the tracing and identification of assets, save that judicial oversight is typically required where privacy and property rights might be infringed. The ability to appeal or challenge tracing or identification measures does not exist in most of the Relevant States (including Switzerland, Germany and Belgium), though in some (such as France, Italy and Spain) domestic rights of appeal relating to searches do exist.

The UK appears to provide the greatest scope for challenge to identification/tracing measures, although most of these challenges are not provided for in the UK Act itself: it is likely that production/access orders or search warrants can be challenged, including by judicial review or under the Human Rights Act 1998 (**HRA**). 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.

33 Law no. 237 of 20 December 2012, art 21(5) (IT) read with Law no. 400/1988, art 17(3) and Ministerial Decree no. 61/2020 (IT).
34 ICCA, art. 41 § 4 (CH).

However, the manner in which the ECHR has been domesticated in the UK provides a procedural route which differs from other jurisdictions. That said, Portugal prohibits judicial cooperation if a relevant process fails to comply with ECHR requirements. In the absence of implementing legislation, these requirements would likely also apply to ICC Requests.

Furthermore, fundamental rights might also be protected through the availability of constitutional challenge – as in Germany where a court decision ordering a search could be challenged under the German Basic Law.

Variations, discharge and appeal against seizure or freezing of assets

In all Relevant States, greater protections are provided where assets may be frozen or seized, including rights to seek revision and re-examination of such orders. Those enhanced protections are often available to third parties as well as the accused.

For example:

a. In Belgium, the U.S., Spain, Italy and France, the accused or an interested third-party may apply to a court seeking that seizure or freezing orders are modified or struck down.
b. In Portugal, it is possible to oppose provisional seizure of assets without suspending the effect of the seizure order.
c. In the UK, the UK Act provides for discharge or variation of a freezing order, without specifying a particular procedure.

We note that Germany is unusual in this regard: its domestic laws and implementing legislation provide no room for challenge, beyond referral of a fundamental question of importance by the Higher Regional Court to the Federal Court of Justice and a constitutional challenge based on violation of basic rights under the German Basic Law.

Rights protections in enforcing ICC orders

In all the Relevant States, the opportunities for challenge to enforcement of ICC orders by convicted persons are limited.

For example:

a. In Belgium and France, a court must provide reasonable opportunity for a convicted individual to be heard prior to declaring an ICC forfeiture order enforceable.[35]
b. In Spain, the UK and Portugal, opportunities for intervention by the convicted person as well as affected third parties are provided during enforcement proceedings governed by generally applicable procedural laws.
c. In Italy, a person convicted by means of a decision no longer subject to appeal is not granted a specific right to be heard during enforcement proceedings. However, bona fide third parties with an interest in the forfeited assets can challenge enforcement measures.
d. In Switzerland, there is no specific mechanism for challenge within the process of executing ICC court orders. However, convicted individuals may challenge the transfer of assets to the ICC prior to the event.
e. In Germany, third parties may challenge transfer of assets to the ICC prior to the event.

35 However, the jurisdiction of these courts is limited. For example, the Paris criminal court is not empowered to reconsider the merits of the ICC order. 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 and request that the matter is referred back to the ICC.

CONCLUSION

This review has provided an overview of nine Relevant States' readiness to respond to asset tracing and recovery requests from the ICC and has offered an analysis of the gaps in national legal frameworks in responding to such Requests. Alongside this, it has also provided key legal and policy recommendations for strengthening the Relevant States' cooperation with such Requests.

In short, the Relevant States generally appear to have reasonable degrees of readiness on paper. Of the nine Relevant States in question, six have implemented specific self-standing legislation to incorporate the Rome Statute, whilst France has incorporated the Rome Statute into existing legislation. Despite Portugal and the U.S. not having any implementing legislation, both have long-established procedures in place for asset identification, tracing, seizure and freezing, as well as mechanisms for enforcing confiscation orders. Nevertheless, in the case of the U.S., such procedures have limited value given that it is not a State Party to the Rome Statute.

Nevertheless, given how untested many of the regimes are, there is much uncertainty about how ICC Requests will be treated. For instance, none of the implementing legislations provide comprehensive time-frames for processing Requests, which increases the risk that an ICC Request might get lost in a potentially overburdened criminal justice system. Many of the Relevant States also have complex or unclear mechanisms for the handover of assets in the absence of an enforcement action, which make it practically more challenging to effectively respond to Requests for cooperation.

In short, the Relevant States lack experience in dealing with ICC Requests and, therefore, there is a lack of opportunity for local courts to interpret the relevant legislation, which would help to identify gaps and contradictions within the domestic framework.

As such, the 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 can be through ensuring better public access to actions implemented by the Relevant State to cooperate with the ICC, or by publishing guidance for NGOs and civil society on the relevant implementing legislation, for example.

Several key recommendations relate to ensuring that clear procedures are put in place regarding pre-trial, trial and post-conviction investigation measures that may be taken. Relevant States also need to introduce the relevant procedures (and empowering provisions) for pre-trial, trial and post-conviction anti-dissipation measures which are not dependent on forfeiture orders. This is in addition to providing specific procedural rules on the management of seized assets, recourse for asset mismanagement and provisions for effective monitoring of assets, amongst other things.

All of the issues set out in this review are explored in more detail in the long Report. Contained within the long Report is also practical guidance for national stakeholders regarding how to respond to, and implement, ICC 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 in the Report also provide further detailed, country-specific recommendations.

The long Report also considers the interaction between ICC Requests and sanctions regimes, as well as in-country and cross-border cooperation, alongside the role of the civil society in assisting with responding to ICC Requests. None of the Relevant States has any express mechanism for resolving a conflict between ICC obligations and applicable sanctions regimes. Similarly, most of the implementing legislation does not contemplate cross-border cooperation, focusing only on the relationship between a Relevant State and the ICC. Most implementing laws

also provide no express role for civil society. The lack of clarity in all cases leads to a general recommendation to provide a clear mechanism for resolving any such conflicts.

The work thus far has focused on identifying key strengths and weaknesses across the in-scope 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 the relevant embassies and national stakeholders. The success of this review will depend on further engagement with relevant stakeholders to convert its recommendations into actions, to ensure that perpetrators of human rights abuses are no longer able to enjoy financial impunity and to provide effective mechanisms for using perpetrators' assets to fund reparations for their victims.

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

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