ANNEXURES TO REPORT FINANCIAL ACCOUNTABILITY AT THE INTERNATIONAL CRIMINAL COURT

These Annexures to the REDRESS' report *Financial Accountability at the International Criminal Court: Compliance with ICC Asset Recovery Requests* examine in more detail the national laws of each Relevant State.

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, the Report considers the following factors and assigns points to each of the relevant metrics as follows:

1. Existence of legislation/specific legislative provisions. (2 points)
2. The clarity and comprehensiveness of the legislation/provisions that implement the obligations of the Rome Statute into the domestic legal framework. (3 points)
3. 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)
4. 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)
5. 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" numeric 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'.

ANNEXURE 1: BELGIUM [Readiness rating: 7 - Good]

No	Question	Response
1.	**Primary Legislative Instrument**	• The Belgian Act of 29 March 2004 on the cooperation with the International Criminal Court and the International Criminal Tribunals (the **Belgian Act**), which entered into force on 1 April 2004, governs the cooperation between Belgium and the International Criminal Court (**ICC**).[1] The Act of 29 March 2004 has been amended a number of times by the Belgian legislator.[2] This questionnaire is based on the most recent and consolidated version of the Act of 29 March 2004, as last updated on 11 July 2018.
2.	**Additional implementing legislation**	• N/A
3.	**Competent authority and decision-maker/s**	• As required under Article 22 of the Belgian Act, requests for assistance should be communicated by the ICC directly to a specific service focusing on international humanitarian law within the Ministry of Justice (the IHL Service). • The IHL Service has the power to approve requests for assistance and will – in accordance with the Rome Statute – in principle allow the implementation of the request if the applicable formal conditions are fulfilled and if the request is otherwise in accordance with Belgian law.
4.	**Key strengths of enforcement framework**	• The key strengths of the Belgian framework include the establishment of the IHL Service, which is tasked with processing requests for assistance from the ICC and, more broadly, the fact that the Belgian framework in principle allows for every request for assistance 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 Rome Statute, and it seems that the Belgian legislator aimed to make the framework for approving requests for assistance to the ICC as efficient as possible and therefore introduced few additional procedural hurdles.

1 Act of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals (BE), https://www.legal-tools.org/doc/98c547/, accessed 12 January 2023.

2 See for example, http://www.ejustice.just.fgov.be/eli/wet/2014/03/26/2014009133/staatsblad and http://www.ejustice.just.fgov.be/eli/wet/2006/07/01/2006009558/staatsblad.

5.	**Notable weaknesses of enforcement framework**	• Key weaknesses include the lack of specific time frames by which ICC requests need to be executed and a lack of transparency as to how ICC requests are assessed and executed in practice. In addition, more broadly, Belgian criminal enforcement authorities are often overburdened, which may lead to delays in criminal investigations and in the execution of requests for assistance. This may also be the case for requests to forfeit assets of convicted persons. The Belgian Central Office for Seizure and Confiscation plays an important role in this respect, 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.
6.	**Recommendations**	• To combat these weaknesses, we would recommend a more transparent process to evaluate and assess the approval and execution of ICC requests for assistance, in particular in respect of the speed according to which the Belgian authorities comply with such requests. By way of example, we would consider it valuable if the IHL Service would periodically issue public reports, in which it provides more details on the execution of ICC requests for assistance and on its general activities. In doing so, the rules on confidentiality that apply to ICC proceedings should of course be respected.
A. Identifying and tracing assets		
1.	**Requests for assistance**	1) As required under Article 93 of the Rome Statute, Article 22 of the Belgian Act provides that Belgium shall provide assistance to the ICC in relation to "*the identification and whereabouts of persons or the location of items*"; "*the execution of searches and seizures*"; and "*the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice*".[3] 2) Requests for assistance with investigating and tracing assets follow the same process, regardless of whether the ICC request is made during the ICC's pre-trial, trial or post-conviction stage.

3 Belgian Act, art 22.

2.	**Formal conditions applicable to requests for assistance and IHL Service approval**	1) Requests for assistance should be addressed to the IHL Service in writing, and should be drawn up in one of the official languages of Belgium (French, Dutch or German). 2) Article 23 of the Belgian Act incorporates the requirements of Article 96(2) of the Rome Statute, providing that requests for assistance should be accompanied by (a) a concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request; (b) 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; (c) a concise statement of the essential facts underlying the request; (d) the reasons for and details of any procedure or requirement to be followed; (e) such information as may be required under Belgian law in order to execute the request; and (f) any other information relevant in order for the assistance sought to be provided. 3) Article 24 of the Belgian Act provides that if the IHL Service considers the formal conditions set out in Article 23 of the Belgian Act to be fulfilled, it will, in principle, approve the request and forward it to the relevant competent authorities. These authorities are the public prosecutor or an investigating magistrate, who lead all criminal investigations in Belgium. Where the IHL Service considers that a request does not meet the formal requirements, it may require that the request is corrected or supplemented. However, Belgian authorities may decide to carry out interim and conservatory measures in the meantime (for example if there is a sense of urgency) using general powers available to them under Belgian law. 4) The IHL Service's decision to execute a request for assistance is not subject to appeal and can therefore not be challenged. However, if an investigative measure causes prejudice to a person, they may request that it be lifted. This will, however, be uncommon for investigative measures through which assets are identified and traced (as these measures typically do not harm anyone, but serve an investigative purpose only).

3.	**Refusals/ postponement of requests**	1) The Belgian Act provides a closed list of situations in respect of which the IHL Service may postpone or refuse to carry out a request for assistance which replicate conditions for refusal contemplated in the Rome Statute: a) if the immediate execution of a request for assistance would interfere with another ongoing investigation, the IHL Service may postpone the execution for a period of time agreed upon with the ICC;[4] b) where there is an admissibility challenge under consideration by the ICC pursuant to Article 18 or 19 of the Rome Statute, the IHL Service may postpone the execution of a request pending the determination of such admissibility challenge by the ICC;[5] or c) the IHL Service may deny a request for assistance, in whole or in part, if the request concerns the production of any documents or disclosure of evidence which relates to Belgian national security.[6] 2) The IHL Service is bound by these refusal grounds, and will not be able to use other considerations to refuse an ICC request for assistance. However, as set out below, at a later stage, appeal before an indictment chamber is possible when the requested measure is effectively carried out and causes hardship, and various legal arguments may be developed at that stage. 3) In addition, as set out above, as a general rule, the request for assistance must adhere to formal conditions and be in accordance with Belgian law. This also means that applicable due process and fair trial rights must be respected, as well as the other fundamental rights applicable in Belgium (which includes but is not limited to the rights enshrined in the European Convention on Human Rights).
4.	**Time frames for requests**	1) No time frames are specified in the Belgian Act. 2) The grounds for refusal set out above may lead to postponements of the execution of requests for assistance in case of admissibility challenges before the ICC or ongoing proceedings in Belgium. 3) In practice, this may lead to delays in the execution of requests for assistance. If no binding time frames are provided, the authorities in Belgium – which are in general overburdened and suffer from a lack of resources – may prioritise other more urgent cases. As a general proposition, time frames for investigations depend on the investigating magistrate, public prosecutor and/or police authorities that handle a particular case, and time frames can vary widely from days to years.

4 Belgian Act, art 29. Is not clear whether this relates only to investigations in Belgium or could be interpreted to mean investigations in other jurisdictions (or carried out by the ICC itself). As this provision is based on art 94 of the Rome Statute, further guidance on its interpretation could be sought in the preparatory works of the Rome Statute or in jurisprudence and doctrine on the Rome Statute.

5 Belgian Act, art 30.

6 Belgian Act, art 31.

5.	**Implementing requests for cooperation**	1) Article 25 of the Belgian Act provides that requests for assistance must be executed in accordance with the relevant provisions of Belgian law and, unless prohibited by Belgian law, in the manner specified in the request. Following the approval by the IHL Service of the implementation of the request for assistance, the request is transferred to the public prosecutor or to an investigating magistrate. Subsequently, the public prosecutor or an investigating magistrate would issue an order to carry out the relevant investigative measure. 2) The authorities have a wide range of investigative measures at their disposal, however, in practice, house searches and investigative measures targeting bank accounts tend to be the preferred methods utilised to identify and trace the assets of accused persons. 3) The Belgian public prosecutor is, in principle, competent to carry out these investigating measures without the need for an additional court order. However, for certain intrusive measures restricting personal liberty and the right to private life, such as house searches, principles of Belgian criminal law, including due process, require the intervention of an investigating magistrate who must issue the necessary order. a) Belgian law specifies for each investigating measure whether or not an investigating magistrate must be seized of jurisdiction. Orders by the investigating magistrate are issued in chambers and not subject to appeal. b) As set out in more detail below, if an investigating measure has been carried out and if it causes prejudice, any person who is harmed by the investigative measure may ask the Belgian public prosecutor or the investigating magistrate (depending on who ordered the investigative measure) to lift it. This will however be uncommon for investigative measures by which assets are identified and traced (as these measures typically do not harm anyone, but just serve an investigative purpose). 4) The public prosecutor and the investigating magistrate are assisted by the Belgian police. The police authorities are responsible for the practical implementation of the orders of the public prosecutor and the investigating magistrate, wherever such a practical implementation is necessary.
6.	**Constraints on state cooperation**	1) In practice, the criminal enforcement authorities are overburdened in Belgium, which commonly leads to delays in criminal investigations. We see two possible bottlenecks that could lead to delays: a) the IHL Service may take time to effectively approve the implementation of a request for assistance; and b) once the approval is given, additional delays may be caused by inactivity by the public prosecutor, the investigating magistrate or the police authorities.

B. Seizing and freezing assets		
1.	**Implementing requests for seizing and freezing assets**	1) The ICC may request the IHL Service to seize or freeze assets, under Article 22(11) of the Belgian Act. Further, Article 22(8) of the Belgian Act refers to the carrying out of house searches and the seizing of assets. The general requirements for assistance with seizing and freezing assets under the Belgian Act are the same as those (above) regarding identification and tracing assets and contained in Article 23 of the Belgian Act. As set out below, Article 26 of the Belgian Act clarifies that if the intervention of an investigate magistrate is required, the investigate magistrate who has territorial jurisdiction over the place where the measure has to be carried out will be responsible. Thereafter, requests are executed in accordance with general Belgian criminal procedural law, and no additional court order will be necessary to enforce the request: a) Assets will be seized under the supervision by the public prosecutor or the investigative magistrate, who are in practice assisted by the police authorities. The intervention of an investigate magistrate is required if a house-search needs to be carried out (which is common in the case of identification of physical assets). b) In addition to seizing the evidence of crime, Belgian law also allows for the seizure of the instrumentalities of crime (*instrumentum sceleris*), the subject of crime (*objectum sceleris*), the proceeds of crime (*productum sceleris*) and the fruits of crime (*fructum sceleris*). It is sufficient that there are "indications" that the assets or property fall under these categories, for the assets or property to be seized. It is sufficient that the facts indicate the presence of a crime and it is not necessary, for the purposes of seizure, that the assets are specifically connected to a crime under the Rome Statute. As described below, persons who are prejudiced by the seizure may ask to lift it. i) To tackle fraudulent or false indigence, the Belgian authorities may also seize assets for which no direct link can be demonstrated to the alleged crimes. Assets that are "presumably" connected to a crime may therefore also be seized, but this possibility may only be used in subsidiary order in relation to the direct seizure of assets described under (b) above. In this context, there needs to be serious and specific "indications" that a suspect received property or assets that can be seized (see (b) above), but which can however not be found anymore in the suspect's property. This mechanism can be applied in relation to a wide list of crimes which includes but is not limited to ICC crimes. ii) It is possible to seize claims of a suspect, which for example include claims held by business partners or by financial institutions. In this case, the (legal) person holding the claim is required to satisfy the suspect's claims and release the property or assets. Again, under the same rules as set out below, persons who are prejudiced by the seizure (most often the suspect) may ask to lift it. 2) Certain specific types of assets or other property may not be seized (e.g. evidentiary documents that are covered by attorney client privilege).

		3) In accordance with Article 35*bis* of the BCCP, for immovable property (such as real estate) a bailiff's writ is required. The writ needs to be served to the owner of the immovable property, and the public prosecutor's seizing order should be appended to it. The writ should also be officially registered.
2.	**Rights of complaint or appeal**	1) Under general Belgian criminal procedural law, any person who is harmed by an investigative measure may ask the Belgian public prosecutor or the investigating magistrate (depending on who ordered the investigative measure) to lift it. Accordingly, the accused (or a third party) may challenge the implementation of the request to seize assets by submitting a formal written request, directed to the Belgian public prosecutor or the investigating magistrate which specifies the hardship suffered. If the public prosecutor or the investigative magistrate refuses to lift the measure, it is possible to appeal against this decision before an indictment chamber (which is part of the Belgian Court of Appeal). The Belgian Act is silent on the consequences of a successful appeal in the context of seizure of assets. However, as Article 25 of the Belgian Act provides that execution of requests for assistance is subject to domestic law, a successful appeal would have the effect that assets could not be seized (and thus Belgium would be unable to comply with the request). In practice, it is in most cases difficult to convince the indictment chamber to lift the measure. Nonetheless, various arguments may be used, including for example that the measure breaches fundamental rights; is not proportionate; the seizing order is illegal; or the assets seized are much more extensive than the allegedly illegal proceeds. As it may be difficult to convince an indictment chamber to lift a measure requested by the ICC, it seems more likely that parties would need to request the upliftment before the relevant chambers of the ICC itself, and not before the national authorities. 2) In addition, before seized assets may effectively be transferred to the ICC, a Belgian council chamber (which has a role similar to a pre-trial chamber) will assess the case and confirm whether or not the assets may be transferred to the ICC. Third parties who claim to have property rights may submit their claims and raise their arguments before the council chamber.[7] The manner in which such claims may be treated, however, is unclear in the absence of guiding jurisprudence.
3.	**Management of frozen/seized assets[8]**	1) Once assets are seized, either the public prosecutor or the investigative magistrate (depending on who ordered the investigative measure) is theoretically responsible for managing the assets or funds so that they retain their value. There is no formal guidance as to how such management is to be carried out, and in practice, this task is carried out by the Belgian Central Office for Seizure and Confiscation. In the case of seized claims on bank accounts, money is transferred to the bank account of the Belgian Central Office for Seizure and Confiscation, in line with its general task to manage seized assets such that they retain their value (with no specific guidance in place).

7 Belgian Act, art 26.

8 The standard and most common measure is the seizure of assets (which can also be the seizure of money on a bank account, which is, in Belgium, a seizure of claims of the suspect towards a financial institution, as set out in the response to question B.2). The freezing of bank accounts in Belgium is a conservatory measure used only in a very limited time period to limit the risks that money is transferred away until the seizure is effectively realised.

		2) The assets may be sold at a public auction, or may be returned to the accused person in exchange for a payment of money. The Belgian public prosecutor or the investigative magistrate may only make use of this possibility if the assets are fungible; if their value can easily be determined; and if holding the assets may lead to their depreciation, or to damage or costs that are disproportionate to their value. 3) There are no specific mechanisms to challenge the mismanagement of seized or frozen assets. However, the decision of the Belgian public prosecutor or the investigative magistrate to sell the assets may be challenged before the indictment chamber (which is part of the Belgian Court of Appeal). The mechanism underlying such an appeal is the same as the one for the appeal to obtain the lifting of an investigative measure (see above). If the Belgian Central Office for Seizure and Confiscation (or any other organ of the Belgian State) commits a fault that can be shown to have caused damages, it is possible to lodge a claim for reparation against the Belgian State in case the mismanagement of assets led to loss of value.[9]
4.	**Management of assets at conclusion of ICC proceedings**	1) The law is silent on how assets should be treated at the conclusion of ICC proceedings. In the case of forfeiture, the assets will be transferred to the ICC at its request, following the special procedure before the Belgian council chamber (see above). 2) Where assets are not to be forfeited and need to be released to their owner, the public prosecutor or the investigating magistrate (depending on who took the measure) would issue a new order to effect the release. If they do not do so on their own initiative, again, any person who is harmed by the investigative measure can request to have it lifted.
C. Forfeiting assets of accused persons and handing them over to the ICC		
1.	**Implementing forfeiture requests**	1) Article 40 of the Belgian Act confirms that Belgium will execute forfeiture orders by the ICC. No provision is made for Belgium to attach conditions when handing over forfeited assets. 2) When the ICC requests that Belgium enforce a forfeiture order, the Belgian criminal court of the place where the property to which the forfeiture relates is located shall decide whether to make the order enforceable. Whilst the Belgian Act is not clear on this, it appears that the IHL Service should again act as an intermediary and refer the matter to the Belgian criminal court. Before declaring the order enforceable, the criminal court must hear the Belgian public prosecutor and the convicted person (or their counsel), or at least provide the latter with the opportunity to be heard. If the convicted person does not appear at the court's order, the court can rule in their absence. 3) Further, Article 40 of the Belgian Act confirms that if the ICC confiscation order cannot be carried out, i.e. when the goods to be confiscated mentioned in the ICC confiscation order cannot be located by the Belgian authorities, the Belgian criminal court may, in accordance with Article 109(2) of the Rome Statute and without prejudice to the rights of third parties acting in good faith, forfeit goods that have an equivalent value.

9 Under the general tort provisions of the Belgian Civil Code, art 1382.

		4) The sums of money, movable and immovable property or the proceeds of their sale, obtained pursuant to the execution of such a forfeiture order, shall be transferred in full to the ICC on the initiative of the Belgian public prosecutor. The IHL Service will be notified of such transfers to the ICC. Specifically for the sale of property, the order to proceed with such a sale will be given by the Belgian criminal court and then executed by the Central Office for Seizure and Confiscation. 5) At the request of the Belgian public prosecutor, the Central Office for Seizure and Confiscation shall provide its assistance.
2.	**Timing of cooperation with forfeiture request**	In domestic criminal law cases, it may take considerable time before assets are actually handed over following forfeiture. Whilst the Central Office for Seizure and Confiscation aims to transfer such assets to within two to three months after a conviction, delays are much longer in practice.
D. Other considerations		
1.	**Examples of ICC requests**	On 8 June 2008, the ICC issued a request to Belgium for the arrest and surrender of Mr Jean-Pierre Bemba Gombo. We understand from ICC court records relating to the Bemba case that the ICC may also have issued a request pursuant to Article 93(1)(k) of the Rome Statute regarding the assets of Jean-Pierre Bemba in Belgium, as a result of which his bank accounts and family home in Belgium would have been seized.[10] However, we have not been able to retrieve a publicly accessible copy of the request itself. In a separate request to the Presidency of the ICC dated 3 November 2020, Mr Bemba confirms that some of his assets were seized in Belgium in 2008 to preserve them for the provision of reparations to victims in the Central African Republic in the event of a conviction. In his request, Mr Bemba requested release of assets that remained seized.[11] In its decision of 9 December 2020, the Presidency dismisses the request in its entirety.[12] In addition, on 20 November 2013, the ICC issued a Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido. In this arrest warrant, amongst others the following was requested by the ICC: b. requesting the States which will arrest Aimé Kilolo, Jean-Jacques Mangenda, Fidèle Babala and Narcisse Arido to search their persons and to search the site of their arrest, any vehicle in their possession and any site connected to them (offices at the Court, work-place offices and homes), and to seize and transmit to the Court any relevant evidence;

10 Situation in the Central African Republic: The Prosecutor v Jean-Pierre Bemba, ICC-01-05/01/08, 10 March 2019, Pre-Trial Chamber II (*Mr. Bemba's claim for compensation and damages*), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_01715.PDF, accessed 12 January 2023, p 42.

11 Situation in the Central African Republic: The Prosecutor v Jean-Pierre Bemba, ICC-01-05/01/08, 3 November 2020, The Presidency (*Mr. Bemba's request for the designation of a Pre-Trial Chamber pursuant to Regulation 46(3) of the Regulations of the Court*), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_05975.PDF, accessed 12 January 2023.

12 Situation in the Central African Republic: The Prosecutor v Jean-Pierre Bemba, ICC-01-05/01/08, 3 November 2020, The Presidency (*Decision on 'Mr. Bemba's request for the designation of a Pre-Trial Chamber pursuant to Regulation 46(3) of the Regulations of the Court' dated 30 October 2020*), https://www.legal-tools.org/doc/2k35bv/, accessed 12 January 2023.

		c. requesting the States which will arrest the persons concerned to locate and freeze their assets;[13] On 26 November 2013, the Belgian Federal Public Service of Justice confirmed that they had arrested Aimé Kilolo Musamba and had seized his assets in Belgium.[14] On 17 November 2015, Trial Chamber VII issued a decision on Mr Aimé Kilolo Musamba's request to release seized assets in Belgium, rejecting the request in its entirety.[15]
2.	**Collaboration between government departments** **Collaboration with civil society**	The Belgian Act assigns roles for different organs and institutions, including the IHL Service, the Belgian public prosecutor and the Central Office for Seizure and Confiscation and clarifies where cooperation between these organs and institutions is possible. However, the manner in which such cooperation should take place is not clearly set out by the Belgian Act. Similarly, there is no specific guidance available on the cooperation with financial institutions or authorities such as tax, customs or ports authorities in this context – notwithstanding the range of investigative measures generally available to the Belgian authorities which might, in practice, lead to cooperation with these (and other) bodies. Whilst civil society actors are free to reach out to the authorities to exercise influence, in practice, they will not be able to intervene in criminal investigations or proceedings to formally express their arguments.
3.	**Cross-border cooperation**	No specific provision is provided for cross-border cooperation in the Belgian Act.
4.	**Purposes for seizure and freezing of assets**	The Belgian Act replicates the Rome Statute on almost all points, so further guidance may be sought in jurisprudence and doctrine on the Rome Statute. In addition, whilst nothing on this is specified in the Belgian Act, please note that it is very usual under the general principles of Belgian criminal law to attribute forfeited assets to victims participating in criminal proceedings.
5.	**The effect of sanctions on meeting ICC requests**	The Belgian sanctions regime is dispersed over a multitude of legislative instruments, including: (i) the Decree-law of 6 October 1944 on the control of all transfers of assets and securities between Belgium and other countries; (ii) the law of 11 May 1995 on the implementation of the decisions of the United Nations Security Council; (iii) the law of 13 May 2003 on the implementation of the restrictive measures adopted by the Council of the European Union against States, certain persons and entities; (iv) the Royal Decree of 28 December 2006; and (v) the law of 2 May 2019, including various financial provisions.

13 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, Pre-Trial Chamber II (*Bemba and others Arrest Warrant*), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_10170.PDF, accessed 12 January 2023, pp 13 – 14.

14 Federal Public Service Finance, Arrest of Aimé Kilolo Musamba (26 November 2013), https://justitie.belgium.be/nl/nieuws/persberichten/update_aanhouding_van_aime_kilolo_musamba, accessed 12 January 2023.

15 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, ICC-01-05/01/13, 17 November 2015, Trial Chamber VII (*Decision on the 'Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba'*), https://www.legal-tools.org/doc/bb07bf, accessed 12 January 2023.

		Applicable sanctions are, in principle, monitored and enforced in Belgium by the General Administration of the Treasury, which is also responsible for the freezing of assets in accordance with these sanctions. There is, however, no indication in either the Belgian Act or in the different legislative instruments setting out the Belgian sanctions landscape as to how these different rules interact – nor how the General Administration of the Treasury and IHL Service should resolve any difficulties. In particular, it is not clear whether assets frozen pursuant to sanctions may be released for the purposes of meeting requests from the ICC to recover assets for purposes of fines, forfeiture or reparations.

ANNEXURE 2: France [Readiness rating: 9 – VERY GOOD]

No	Question	Response
1.	**Primary Legislative Instrument**	• France has implemented domestic provisions since 2002 so as to cooperate with the International Criminal Court (Articles 627 to 627-20 of the French Code of Criminal Procedure – the **FCCP**).[16]
2.	**Additional Implementing Legislation**	• N/A
3.	**Competent authority and decision-maker/s**	• Competent authority: The anti-terrorist public prosecutor (*Procureur de la République antiterroriste*) • Decisions to implement requests are made by: the anti-terrorist public prosecutor (*Procureur de la République antiterroriste*) or the Paris investigating judge (*Juge d'instruction de Paris*).
4.	**Key strengths of 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. A bill is currently before the French Parliament to authorise this agreement.[17] • 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. • There are few additional criteria or barriers in place for implementation while rights protections are in place, including for intrusive asset tracing measures, however, these do not create significant additional procedures or hearings which might lead to delays in implementation. In particular, 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 orders are referred to the ICC for resolution. • Provision is made for the transfer of the sums forfeited in favour of the victims.

16 See arts 627 to 627-20 FCCP that came into force on 27 February 2002, although some provisions were slightly amended in 2007, 2010, 2011 and 2020; https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071154/LEGISCTA000006138102/#LEGISCTA000024966854.

17 https://www.assemblee-nationale.fr/dyn/16/dossiers/accord_cour_penale_internationale.

5.	**Notable weaknesses of enforcement framework**	• Implementing provisions remain silent on a number of subjects relating to identification, freezing or seizing of assets. Critically, procedures for management of seized or frozen assets are not expressly contemplated. • 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 the French State cooperation with the ICC, except the website of the Permanent mission of France to the United Nations in New York and of the French Ministry of Foreign affairs which indicate that, in 2021, France helped in relation to thirty mutual assistance requests.[18] • 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.
6.	**Recommendations**	• 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. • Consider mechanisms to enable longer seizure periods and coordinated management of seized or frozen assets to preserve their value. • Provide clear channels for cross-border collaboration in relation to cooperation requests. • Provide a mechanism for resolving conflicts between sanctions obligations and ICC requests include providing for release of assets frozen pursuant to the sanctions regime for purposes of transfer to the ICC.
A. Identifying and tracing assets		
1.	**Requests for Assistance**	1) Law No. 2002-268 of 26 February 2002, which entered into force on 27 February 2002 (most recently modified by Law No. 2020-1672 of 24 December 2020), created a new chapter in the FCCP entitled "*The cooperation with the International Criminal Court*" (Articles 627 to 627-20 FCCP). The first chapter entitled "*On Judicial cooperation*" (Articles 627-1 to 627-3 FCCP) provides the basis for responding to requests for assistance with the identification and tracing of assets.[19]

18 See "*L'engagement constant de la France pour la CPI* ", Mission Permanente de la France auprès des Nations Unis à new York, available online, https://onu.delegfrance.org/cour-penale-internationale-cpi, and https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/justice-internationale/institutions-internationales/cour-penale-internationale-cpi/, accessed 30 November 2022.

19 Art 627-1 FCCP on requests for international assistance addressed to the competent authorities. Art 627-2 FCCP on the execution of requests for mutual assistance by the anti-terrorist public prosecutor or by the Paris investigating judge. Art 627-3 FCCP on the execution of the precautionary measures mentioned in art 93(1)(k) executed according to the methods provided for by the FCCP.

2) Article 627-1 FCCP states that requests from the ICC are sent to the competent authorities under Article 87 of the Rome Statute by way of original or certified true copy accompanied by all supporting documents. The competent authorities forward the documents to the anti-terrorist public prosecutor[20] who initiates all necessary follow-up actions. These actions can be undertaken either by the anti-terrorist public prosecutor or by an investigating judge at the Paris court, depending on the cooperation measures to be undertaken. There is no admissibility test provided for these requests in the FCCP, which shall in any event comply with Article 96(2) Rome Statute.[21]

3) Articles 627-1 *et seq* FCCP do not initially require a French court order or a search warrant. However, once the anti-terrorist public prosecutor or the investigating judge is seized of the request, they can initiate any investigation measures in the FCCP that they deem necessary for the disclosure of the truth (Article 81 FCCP). This can for instance include:

   a) organising police interviews *inter alia* to obtain information regarding targeted assets – this is authorised by the prosecutor or the investigating judge;

   b) carrying out home searches and seizures and making information requests to third parties (financial institutions, telecom companies, etc.) – this requires the prosecutor to request an authorising order from the liberties and detention judge (*Juge des libertés et de la detention*); or

   c) accessing computer systems located on the premises where the search is taking place and requesting technical and scientific expert reports – this is authorised by the prosecutor or the investigating judge.

4) Articles 627-1 *et seq.* FCCP do not provide for any challenge to the decision taken to comply with the request (and we have not identified instances of accused persons challenging the French State's decision to cooperate with the ICC). On the contrary, the specific measures initiated by the prosecutor or investigating judge may be challenged as follows:

   a) As regards to police searches, Article 802-2 FCCP provides that a home search may be challenged by "*any person who has been the subject of a search or a home visit pursuant to the provisions of the FCCP and who has not been prosecuted or indicted at the earliest six months after the completion this search, within a period of one year*". This challenge occurs before the liberties and detention judge. The claimant may seek the annulment of the search by proving that it was not necessary in the course of the investigation (this is a very high standard and as such this challenge is not often successful in practice).

20 The anti-terrorist prosecutor is in charge of prosecuting terrorist crimes and offences, as well as crimes and offences related to the proliferation of weapons of mass destruction, war crimes and crimes against humanity.

21 The anti-terrorist prosecutor has more limited powers than the investigating judge. Therefore, as for general cooperation request, cooperation measures will be implemented by the anti-terrorist prosecutor, except when they require certain procedural acts which can only be ordered or carried out during a judicial investigation (for instance phone tapping measures, see art 694-2 FCCP of the for general cooperation requests).

		b) Other measures cannot be challenged per se, however the targeted individual could theoretically file a claim for damages before French administrative courts for abuse of process, claiming that the prosecutor or the investigating judge exceeded their powers (*action en responsabilité de l'état,* which is required to meet a very high standard of proof, and as such is rather unlikely). 5) The processes described above should not differ depending on the stage of the proceedings, since Article 627 FCCP provides that: "*The following provisions* [i.e. Articles 627-1 to 627-18 FCCP] *are applicable to any person targeted by prosecution before the International Criminal Court or convicted by it for acts which constitute, within the meaning of Articles 6 to 8 and 25 of the Statute, genocide, crimes against humanity or war crimes.*"[22] (underline added). Accordingly, requests for identification and tracing of assets will entail the same procedures whether made at investigation, prosecution (including trial) stage or subsequent to conviction.
2.	**Formal conditions applicable to requests for assistance**	The FCCP has not provided for any formal requirement applicable to requests for assistance. As such, we believe the only formal requirements are those provided for in Article 96(2) of the Rome Statute (i.e. a concise statement of the purpose of the request, detailed information, statement of essential facts, etc.).
3.	**Refusals/ postponement of requests**	1) Articles 627-1 *et seq.* FCCP do not list any restrictions but Article 91(3) of the Rome Statute states that "*Where execution of a particular measure of assistance* […] *is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.*" (underline added) 2) Similarly, for general international cooperation requests, Article 694-4 FCCP provides "*If the enforcement of a request for mutual assistance from a foreign judicial authority is likely to undermine the public order or the essential interests of the Nation, the public prosecutor seized of this request or notified of this application pursuant to the third paragraph of Article 694-1 transfers it to the public prosecutor who determines, if necessary, to refer it to the Minister of Justice and gives, if necessary, notice of this transfer to the judge instruction."* (emphasis added)
4.	**Timing of requests**	There is no deadline specified in the FCCP for responding to or implementing ICC requests. Article 627-3 FCCP only provides that the execution of measures may last up to two years from the date they were implemented. Before the end of this two-year period and upon the ICC's request, the duration of these measures may be extended up to an additional period of two years.

22 Note that the language of art 627 reads "*toute personne poursuivie devant la Cour pénale internationale ou condamnée par celle-ci*". The language used ("*personne poursuivie*") includes persons under investigation.

5.	**Implementing requests for cooperation**	1) As mentioned above, to identify and trace assets a number of actions may be implemented by the anti-terrorist public prosecutor or the investigating judge, such as requesting police officers to run interviews, carrying out home searches or making information requests to third parties. 2) Please also note that there is a legal obligation under French law for financial institutions and other entities listed at Article L. 561-2 of the Monetary and Financial Code (**CMF**) to declare and inform public authorities of all sums entered in their books or transactions relating to sums which they know, suspect or have good reason to suspect derive from an offense punishable by imprisonment of more than one year or are related to the financing of terrorism.
6.	**Constraints on state cooperation**	There do not seem to be non-legal constraints as France has indicated its strong will to cooperate with ICC requests, but it should be noted that implementation of the cooperation measures can take time in France, given the French courts' workload.
B. Seizing and freezing assets		
1.	**Implementing requests for seizing and freezing assets**	1) The primary provisions concerning seizing and freezing assets are described in Article 627-3 FCCP.[23] 2) This provision does not require that the accused or convicted person resides in France but the targeted asset should be located in France in order for the seizing and freezing assets cooperation request to be effective. If this asset is located in France, all acts of seizure and freezing of assets provided by French domestic general principles can be carried out (i.e. freezing or seizing of bank accounts, movable assets, immovable assets, IT systems, etc.).[24] 3) Once the ICC request will have been received, the investigating judge or the anti-terrorist public prosecutor will have the power to take any and all appropriate seizure measures falling under their powers. These measures are available at pre-trial, trial and post-conviction stage and we described the process to implement them in section A. identifying ad Tracing Assets, cell 1, 3). 4) For seizing orders that aim to prevent the accused person from disposing of its assets, the prosecutor must request an authorising order from the liberties and detention judge, which: a) states whether the targeted property represents the object, the means or the proceeds of the offense, or whether the goal behind the seizure is the freezing of all the property owned by the investigated person. In this respect, there is no requirement that assets are linked to or are proceeds of the alleged crime. General principles specifically provide that persons having committed or suspected of having committed crimes against humanity may have all or part of their assets seized (Article 213-1 of the French Criminal Code – the **FCC**);

23 Art 627-3 FCCP provides that: "*The enforcement on French territory of the precautionary measures mentioned in 93(1)(k) of the Rome Statute is ordered by the anti-terrorist public prosecutor, according to the procedures provided for by this code, and related expenses are advanced by the Treasury. The maximum duration of these measures is limited to two years. They may be renewed under the same conditions before the expiry of this period at the request of the International Criminal Court. // The anti-terrorist public prosecutor forwards to the competent authorities, pursuant to Article 87 of the Statute, any difficulty relating to the execution of these measures, so that the consultations provided for in Articles 93, paragraph 3, and 97 of the Statute may be carried out.*"

24 Arts 706-141 to 706-158 FCCP.

		b) indicates the name, address, nationality, place of birth, and all available data regarding the location of the investigated person whose behaviour has led to the issuing of the seizing order; and c) provides all relevant information related to persons with bona fide interests in the targeted property if such is available. If the liberties and detention judge grants the seizing order, the seizure will then become effective by serving an official certified copy of the seizing order to the owner of the asset and, for receivables, to the financial institution where the funds are held. 5) It should be noted that there are no particular provisions requiring that the ICC has made a forfeiture order (section 3 entitled "*On the mutual cooperation on seizures of the product of an offense before its forfeiture*" is the sole section mentioning seizures). However, to execute a seizure in France as per an ICC request, French general provisions governing seizures (*saises*), i.e. Article 706-141 *et seq.* FCCP, specify that because the purpose of a seizure is to guarantee potential forfeiture, the targeted property must be eligible for forfeiture under French law. Consequently, the first step is to determine whether the targeted property benefits from some type of immunity (e.g. diplomatic immunity). It must then be determined whether the targeted property is either the proceeds, subject or instrument of the offence prosecuted or that it is believed to belong to the defendant (please note that for war crimes and crimes against humanity, French law states that any and all property belonging to a defendant may be seized and then forfeited). These considerations do not apply to freezing (*gel*).
2.	**Management of frozen/seized assets**	1) Freezing (*gel des avoirs*) a) Freezing measures are concerned with receivables and taken either at the instance of the Minister of the Economy and Finances or by the specific financial institution in which the funds are held pursuant to its internal risk management system. Thereafter, a financial institution is responsible for management of frozen assets,[25] with banks required to have an action plan for such procedure.[26] b) The DGTRESOR[27] is the main French authority of the financial organisations for the implementation of freezing measures. European regulations[28] and the CMF each provides for, as far as they are concerned, provisions allowing the exchange of information between the financial organisations and the DG-TRESOR.

25 Chapter 2 under Title IV of the MFC: "*Dispositions relatives au gel des avoirs et à l'interdiction de mise à disposition*" arts L562-1 to L562-15.

26 For more information on the subject see sections 1.3 and 2 of the ACPR Guide (published in 2016); https://acpr.banque-france.fr/sites/default/files/media/2021/06/23/20210616_lignes_directrices_gel_des_avoirs.pdf.

27 The DG Trésor is a division within the French central public administration, attached to the Ministry of Economy and Finance (see https://www.tresor.economie.gouv.fr/Institutionnel/our-missions). It publishes the list of persons and entities enduring sanctions and updates the national register of asset freezing measures. In this respect, financial institutions must: (1) Identify all the stakeholders in financial and commercial transactions: customer (and its shareholders), intermediary, logistician, transport company, particular bank; (2) Check across the entire list whether some are sanctioned by asset freezing measures; (3) Keep the traces and results of their research, even if they were unsuccessful; (4) Check regularly the latest version of the list. More information can be found in the DG Trésor's website, provided above.

28 Consolidated list of persons, groups and entities subject to EU financial sanctions: https://data.europa.eu/data/datasets/consolidated-list-of-persons-groups-and-entities-subject-to-eu-financial-sanctions?locale=en and DGTRESOR website listing all sanctions effective in France: https://www.tresor.economie.gouv.fr/services-aux-entreprises/sanctions-economiques.

c) The authority permitted to release the frozen funds is the French Home Secretary (*Ministère de l'Intérieur*) which, as per Article L. 562-11 of the CMF, may decide to release the frozen assets if such a measure does not compromise "public order" and is compatible with the initial freezing order. Additionally, seized assets may be released if a successful challenge is made against the seizure order.

d) It is possible to challenge the mismanagement of assets frozen by initiating an action against the public administration, based on Article L.141-1 of the French Code of Judicial Organisation which states that *"The State is required to repair the damage caused by the defective functioning of the public service of justice. Except for specific provisions, this liability is only engaged by gross negligence or denial of justice*." (emphasis added).

2) Seizures and forfeitures

a) The AGRASC[29] was created in 2010 and is in charge of managing and recovering seized and forfeited assets (but not frozen funds). It will enforce requests, under the supervision of a judicial authority, and can also help when required with international criminal assistance. This agency works closely with another agency, the PIAC,[30] which is in charge of identifying and tracking suspicious assets related to criminal offences.

b) Under domestic law, the AGRASC can carry out the following measures (see articles 706-159 to 706-161 FCCP):

i) manage all forfeited or seized goods (including all administrative measures for their preservation and maintenance);

ii) manage all seized sums during criminal proceedings (which are transferred to the general budget of the State within four years upon their receipt); and

iii) sell, transfer or destroy[31] forfeited or seized goods (including the subsequent allocation of proceeds).

c) Seized assets may be released if a challenge against the seizure has been successful before the Paris court (the *Chambre de l'instruction* of the Paris Court determines whether the conditions for seizure are met or not).

29 The AGRASC was created in 2010 and is an independent public administration, supervised by both the French Ministry of Justice and the Ministry of Finance. The AGRASC ensures the enforcement of a forfeiture order on behalf of the public prosecutor and is in charge of facilitating the management of seized assets when administrative acts are necessary for their preservation. It centralises all criminal seizures and ensures the proper management of these assets from their forfeiture to the payment of the proceeds of their sale.

30 PIAC is the acronym for *Plateforme d'identification des avoirs criminels.*

31 According to art 99-2 FCCP, the destruction of goods is decided by the investigating judge in the following instances: (1) the preservation of the frozen or seized asset is no longer decisive for the full disclosure of the truth either because their owner is unidentified or because they have not claimed their property back in the time frame of a month after receiving formal notice; or (2) the asset is dangerous, harmful, or owned under wrongful possession and its preservation is no longer decisive for the full disclosure of the truth.

3.	**Management of assets at conclusion of ICC proceedings**	1) If the accused person is convicted, the seized assets may be forfeited as a part of their conviction (see the applicable procedure for forfeitures below). 2) If the accused person is not convicted, all seized assets related to the alleged offense(s) are automatically released.[32] If the assets have been managed by the AGRASC, this authority will release them.
C. Forfeiting assets of accused persons and handing them over to the ICC		
1.	**Implementing forfeiture requests**	1) Articles 627-16 to 627-17 FCCP deal with "*the enforcement of fines and forfeitures as well as measures of reparation in favour of the victims*" and describe the procedural steps in this respect.[33] 2) The first step is the transmission of the ICC request: a) the ICC request is transmitted by the ICC to the office of the anti-terrorist public prosecutor; b) the anti-terrorist public prosecutor, in turn, transmits the request to the public prosecutor's office; c) the public prosecutor's office must file a petition with the Paris criminal court; and d) the process for internal transmission is not specified and no time periods are provided by Article 627-16 FCCP. 3) The second step is the hearing before the Paris criminal court: a) the Paris criminal court sets a hearing to authorise the forfeiture procedure under Article 627-16 and general rules of the FCCP; b) there is no specific provision as regard to the legal or evidentiary criteria to be satisfied for this hearing except that the Paris criminal court will check whether the ICC request identifies the assets to be forfeited. Legal authors simply state that "*since it requests the States for their cooperation or the adoption of enforcement measures, the* [ICC] *provides the competent judicial authorities with the information available to it on the whereabouts of the proceeds, property and assets covered by the confiscation order*";[34] c) the Paris criminal court hears the convicted person as well as any person having rights to the property. These persons can instruct a lawyer to represent them. The criminal court may summon these persons to attend the hearing by means of letters rogatory, if necessary (Article 627-16 FCCP, § 2); and

32 If the person is not convicted, the asset is automatically released – see art 484-1 FCCP "*Acquittal decisions or decisions rejecting the forfeiture of the seized goods automatically entail the release of the seized goods at the State's expense, or if the owner so requests, the restitution of the proceeds of their sale*."

33 Last modified on 5 December 2011.

34 Olivier Beauvallet, JurisClasseur Procédure pénale, art 627 à 627-20, Fascicule 20: De la coopération avec la Cour pénale internationale, 3 June 2008, § 177.

		d) when the Paris criminal court finds that the execution of a confiscation or reparation order would have the effect of prejudicing a third party in good faith who cannot challenge the ICC order, they inform the public prosecutor of this for the purpose of referral of the question to the ICC, which will be required to take all appropriate action. 4) The Paris criminal court will render a decision regarding whether or not to order forfeiture of the asset (noting that we have found no precedent of the Paris criminal court regarding ICC forfeiture request). a) While making its decision the criminal court is bound by the ICC's underlying decision (i.e. the decision giving rise to the forfeiture request), including with regard to the provisions relating to the rights of third parties. However, the Paris criminal court "*may order all measures intended to recover the value of the proceeds, property or assets which the Paris criminal court has ordered to forfeit, when it appears that the forfeiture order cannot be specifically enforced*." b) If the Paris criminal court orders the forfeiture, this entails, according to the decision of the ICC, the transfer of the proceeds of the fines and forfeited property or the proceeds of their sale to (a) the ICC; (b) the fund in favour of the victims; or (c) the victims, if the ICC decided to attribute the assets or sums to specific victims. c) Any dispute relating to the allocation of the proceeds of fines or assets or the proceeds of their sale is referred to the ICC, which takes appropriate action. 5) Article 627-16 FCCP appears to contemplate enforcement of fines and forfeiture as one class of ICC order distinct from decisions concerning reparations. The provision thus appears wide enough to permit execution of an order for forfeiture where seized assets will not necessarily be used to compensate victims of international crimes. Similarly, a reparations order is not a pre-requisite for handing over forfeited assets to the ICC (and the Paris criminal court is not empowered to attach conditions or issue reservations when handing over such assets). Further, under Article 627-17 FCCP, the transfer of proceeds of fines and forfeited assets or proceeds of their sale authorised by Article 627-16 FCCP is made to the ICC or to the fund for victims. 6) In effect, the Paris criminal court is not empowered to determine conflicts of rights in assets (a) where the Paris criminal court finds that the enforcement of a forfeiture would have the effect of prejudicing the rights of a *bona fide* third party; and (b) since any challenge "*relating to the allocation of the proceeds of fines, goods or the proceeds of their sale"* needs to be brought before the ICC and not French courts.
2.	**Timing of cooperation with forfeiture request**	1There are no specific provisions regarding the time frame for assets to be handed over to the ICC and there is no publicly available data on the matter.

D. Other considerations		
1.	**Examples of ICC Requests**	We have found no publicly available asset recovery request made by the ICC to France.[35] According to the Permanent mission of France to the United Nations in New York's and French Ministry of Foreign affairs' websites, in 2021, France (1) helped in relation to 30 mutual assistance requests from the ICC; and (2) transferred to the ICC a dozen requests for cooperation from the Unit specialised in crimes against humanity and war crimes within the Paris criminal court.[36]
2.	**Collaboration between government departments** **Collaboration with civil society**	• Specific information regarding cooperation in relation to asset recovery requests is, however, not readily available. • The anti-terrorist public prosecutor in charge of tracing assets to comply with ICC requests may seek to cooperate with the French Tax Authorities as well as French Regulators – we have seen growing cooperation between the Financial Prosecutor of Paris and the French Tax Authorities in French cases in recent years. • Certain NGOs advocating for transparency in the business sector, such as Sherpa, have brought litigation before French courts on a number of matters and could prove useful to ICC investigations by raising public awareness regarding potential human rights violations, putting evidence in the public domain and identifying victims. For instance, as recently as June 2022, Sherpa, along with other NGOs, brought a claim before French courts against French arm companies for their potential responsibility for aiding and abetting war crimes in Yemen.[37]
3.	**Cross-border cooperation**	• There are no specific provisions explicitly mentioning the procedure to follow in order to cooperate with other Member States in responding to ICC recovery requests. • This said, the Permanent mission of France to the United Nations in New York and the French Ministry of Foreign Affairs encourage on their website cooperation with other Member States' requests, and outline that France recalled its engagement to cooperate with the ICC and the ICC member states at the Human Rights Council, the United Nations General Assembly or the United Nations Security Council (**UNSC**).[38]
4.	**Purposes for seizure and freezing of assets**	• Article 627-17 FCCP states that the proceeds of forfeitures, fines and reparation orders should (i) be transferred to the ICC or to the fund for victims; or (ii) be attributed directly to the victims, if the ICC has decided so and designated the victims.

35 See some sources on the cooperation difficulties between States Parties and the ICC: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Freezing_Assets_Eng_Web.pdf; https://www.icc-cpi.int/sites/default/files/iccdocs/other/161027-ICC-Rep-Eng.pdf; and https://academic.oup.com/jicj/article/18/3/765/5896054.

36 Information extracted from a recent article by the Foreign Affairs Ministry: https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/justice-internationale/institutions-internationales/cour-penale-internationale-cpi/

37 https://www.asso-sherpa.org/aiding-and-abetting-war-crimes-in-yemen-criminal-complaint-submitted-against-french-arms-companies.

38 Information extracted from an article updated recently by the Foreign Affairs Ministry: https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/justice-internationale/institutions-internationales/cour-penale-internationale-cpi/#sommaire_3.

5.	**The effect of sanctions on meeting ICC requests**	• EU Sanctions regulations are directly applicable and therefore, once a person is listed on one of the EU sanctions lists, their assets must be frozen (e.g. Regulation No. 2022/336 of 28 February 2022 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine). • In this respect, Ordinance No. 2020-1342 of 4 November 2020 has strengthened the asset freezing mechanism and amended certain provisions of the CMF, in order to facilitate the immediate applicability of these measures by imposing a freezing "*until the entry into force of the European implementing regulation*" (see Article L562-3-1 of the CMF). • Moreover, there is a legal obligation under French law for certain professions (listed in Article L. 561-2 of the CMF) to declare and inform public authorities of all sums entered in their books or transactions relating to sums which they know, suspect or have good reason to suspect derive from an offense punishable by imprisonment of more than one year or are related to the financing of terrorism. • The interaction between these regimes and an ICC cooperation request, however, is not determined by legislation. It is, therefore, unclear whether existing sanctions would prevent compliance with an ICC request if assets were subject to pre-existing freezes or seizure under sanctions regimes.

ANNEXURE 3: Germany [Readiness rating: 7 – GOOD]

No	Question	Response
1.	**Primary Legislative Instrument facilitating asset recovery**	• The Law on Cooperation with the International Criminal Court (**IStGHG**) came into effect on 1 July 2002. It was last amended in 2019 regarding the provisions of the mandatory involvement of defence counsel for defendants. Part 4 of the IstGHG (sections 40-46) deals with "legal assistance through the enforcement of decisions and orders of the ICC" (*Rechtshilfe durch die Vollstreckung von Entscheidungen und Anordnungen des Gerichtshofes*), with section 44 providing for the enforcement of ICC forfeiture orders and section 45 providing for enforcement of ICC reparations orders. Part 5 of the IStGHG (sections 47-63) deals with "other forms of legal assistance" (*Sonstige Rechtshilfe*). Sections 47 to 50 set out the general provisions, whereas sections 51 to 61 deal with specific forms of legal assistance, including "surrender of assets to the ICC" (*Herausgabe von Gegenstaenden*) (section 51), and "seizure of assets" (*Beschlagnahme*) and "searches" (*Durchsuchung*) (section 52).
2.	**Additional implementing legislation**	• Section 72 of the IStGHG provides expressly for the application of specified legislation where the IStGHG is silent. • Of these, the most relevant to asset recovery is the German Code of Criminal Procedure (*Strafprozessordnung*) (**StPO**), which sets out the domestic procedural requirements for implementing and enforcing ICC asset recovery requests. The Criminal Code (*Strafgesetzbuch*) also finds application.
3.	**Competent authority and decision-maker/s**	• The decision as to whether to comply with a request for assistance by the ICC is taken by the German Federal Ministry of Justice and Consumer Protection in agreement with the German Foreign Ministry and other Federal Ministries, whose work or responsibilities might be affected by the provision of assistance according to section 68(1) IStGHG.[39] However, in cases where an authority responsible for implementing a request belongs to the sphere of responsibility of a Federal ministry other than the Ministry of Justice, that Federal Ministry must make the decision to comply in agreement with the Federal Ministry of Justice and Consumer Protection and the Foreign Ministry.[40] (In either case, the Federal Ministry of Justice remains responsible for consultations with the ICC where these are required.)[41] • Section 68(1) also sets out a series of delegations, namely: (1) the responsible federal ministries may transfer the exercise of their powers to subordinate federal authorities in individual cases; and (2) in individual cases, the Federal Government may transfer the exercise of the power to decide on a request from the ICC under Part 5 of the IStGHG to a state government (*Landesregierung*). This authority may be further delegated by state governments to another competent authority under state law.[42] • At the level of implementation, the responsible authority for asset recovery is the Higher Regional Court (*Oberlandesgericht*) in cooperation with the public prosecution office at the Higher Regional Court (*Generalstaatsanwaltschaft*) in accordance with section 49(3) IStGHG.

39 Section 68(1) IStGHG, sentence 1.
40 Section 68(1) IStGHG, sentence 2.
41 Section 68(3) IStGHG.
42 Section 68(1), sentence 4 and sentence 5.

4.	**Key strengths of enforcement framework**	• The 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 Article 93(1)(k) and 96, ensuring greater consistency with, and a strict implementation of, the Rome Statute framework. Further, it clearly distinguishes between requests for assistance 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 introduction to German Criminal Law and cannot be equated with the decisions made in German domestic criminal proceedings by way of adhesion proceedings regarding civil law claims for damages by an injured party. Rather, it is a criminal law sanction of its own kind, 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. • 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 German Basic Law.
5.	**Notable weaknesses of enforcement framework**	• The decision whether to comply with the request is a decision made by the Federal Ministry of Justice and Consumer Protection in agreement with the German Foreign Ministry and other Federal Ministries whose work or responsibilities might be affected by the provision of assistance, essentially affording them discretionary power 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 time frames 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.

		• Finally, there is no publicly available information about previous examples of the German government complying with ICC asset recovery requests. It therefore appears that the provisions of the IStGHG remain untested.
6.	**Recommendations**	• Clear timetables for responding to ICC requests for asset tracing, seizing and forfeiture would improve certainty and efficiency in asset recovery processes and German 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.
A. Identifying and tracing assets		
1.	**Identifying and tracing assets**	1) Section 68 provides that the decision regarding whether to comply with a request by the ICC is taken by the German Federal Ministry of Justice in agreement with German Foreign Ministry (unless the implementation falls within the sphere of responsibility of another Ministry or has been delegated to lower federal agencies as discussed above). 2) Section 47 sets out the principles for providing "legal assistance", commencing with the requirement that it must be provided in accordance with the IStGHG and the Rome Statute. Accordingly, legal assistance must be provided following a request for cooperation from the ICC, provided that the relevant requirements under Articles 93 and 96 of the Rome Statute and section 58(2) IStGHG have been met.[43] Section 47(2) defines "legal assistance" as any form of support which is to be granted to the Court in accordance with the Rome Statute.[44] 3) Section 52(1) IStGHG provides for the seizure of, or the issuance of search warrants in relation to, assets that "might be handed over to the ICC" (*Beschlagnahme und Durchsuchung, Vermoegensbeschlagnahme*). A search can be ordered under section 52(1) even before the ICC has issued a request for the relevant assets to be handed over. Section 52(1) applies to assets which "may be handed over to the ICC" – these assets are defined under section 51 IStGHG which provides that assets may be handed over to the ICC (following an ICC request for legal assistance) if (a) they can be used as evidence during proceedings before the ICC; or (b) these assets have been obtained by a person, or their accomplice, through an act for which they are being investigated or prosecuted by the ICC (i.e. proceeds of crime). However, section 52(4) provides that the limitation on the type of assets that may be seized which is derived from section 51(1) does not appear to apply if the assets concerned belong to a person against whom a charge has been confirmed (Article 61 of the Rome Statute) or an arrest warrant has been issued (Article 58 of the Rome Statute) for an offense under Article 5 of the Rome Statute.[45] It follows that a search for purposes of asset tracing/identification (at least prior to a person being arrested or charged by the ICC) can only be ordered in respect of assets that either can serve as evidence during ICC proceedings or are the proceeds of an ICC crime.

43 Section 47(3), IStGHG (Germany).
44 Note that in exceptional circumstances, section 58(2) IStGHG (Germany) provides for intelligence to be transmitted to the ICC without prior formal request.
45 Section 52(4) IStGhG.

2.	**Prerequisites/ conditions for assistance**	1) In addition to the requirements of Articles 93 and 96 of the Rome Statute and section 58(2) IStGHG, further requirements for the implementation of asset tracing measures are included in sections 94 et seq StPO. This includes the requirement of a search warrant in accordance with sections 102 and 105 StPO. a) Specifically, section 105 StPO provides that searches may be ordered only by the judge and, in urgent circumstances, also by the public prosecution office and its investigators (section 152 of the Courts Constitution Act).[46] b) Section 103 adds that searches in respect of other persons shall be admissible only for the purpose of apprehending the accused or to follow up the traces of an offence or to seize certain objects, and only if certain facts support the conclusion that the person, trace or object sought is located on the premises to be searched.[47]
3.	**Time frames for requests for legal assistance**	No time frames are specified in the IStGHG.
4.	**Implementing requests for assistance**	1) The only form of legal assistance in respect of identifying and tracing assets of accused persons for the eventual purpose of forfeiture is a court ordered search of the specific premises under section 52(1). 2) The search warrant has to be issued by the Higher Regional Court according to section 49(3) IStGHG. It appears that the Federal Ministry of Justice is required to engage with the public prosecution office in order to procure the necessary orders from the Higher Regional Court. In urgent circumstances, the public prosecution office at the Higher Regional Court and its investigators are entitled to order a search according to section 52(3) IStGHG and in accordance with section 105 StPO without first obtaining a court-issued warrant. An "urgent" case may arise where the court order cannot be obtained without jeopardising the purpose of the measure.[48] 3) Section 50(1) IStGHG provides that legal assistance may only be granted under section 52(1) if the Higher Regional Court has issued the required orders for implementing the relevant forms of assistance. The decisions of the Higher Regional Court are final according to section 50(1) IStGHG. However the Higher Regional Court can submit a legal question of fundamental importance[49] to the Federal Court of Justice (B*undesgerichtshof*) in accordance with Section 50(2) read with 33 IStGHG. A successful challenge would result in the matter being referred back to the Higher Regional Court. There is no avenue of appeal on procedural grounds under domestic criminal law. 4) Further, a court decision ordering a search could be challenged under the German Basic Law under the ECHR on the grounds that the search violates basic rights such as *inter alia* the person's right to property; general freedom of action; freedom of occupation; or inviolability of the home.

46 https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.
47 https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.
48 Judicial review of an order under the StPO is possible pursuant to section 98(2) StPO. Under certain circumstances, a constitutional complaint is also possible.
49 Such a question arises, for example, if the clarification of the question has significance beyond the individual legal dispute.

5.	**Constraints on State cooperation**	1) Section 48 IStGHG states that the provision of legal assistance under Part 5 may be postponed if any of the grounds set out under Articles 93(5)-(9)(k), 94 and 95 of the Rome Statute, apply. These include (a) where the execution of a particular measure of assistance detailed in the ICC request is prohibited under domestic law on the basis of an existing fundamental legal principle; (b) if the request concerns the production of any documents or disclosure of evidence relating to national security; or (c) if the request would interfere with an ongoing investigation. 2) The IStGHG does not expressly distinguish between different phases of the procedure, but the basic reference to the StPO (which regulates how to conduct criminal investigations and proceedings) suggests that the measures regulated there as investigative measures may only be carried out for investigative purposes (i.e. prior to indictment).[50] In addition, the scope of assets subject to search and seizure measures appears more restricted prior to the issue of a warrant of arrest or a person being charged, than after these steps have been taken by the ICC. 3) According to section 103 StPO the search of a third party is only permitted if evidence can be produced that suggests that the person traced, or the thing sought, is in the rooms to be searched.
B. Seizing and freezing assets		
1.	**Implementing requests to seize and freeze assets**	1) Section 51(1) IStGHG states that assets shall be handed over to the ICC following an ICC request for assistance, if (a) they can be used as evidence during proceedings before the ICC; or (b) these assets have been obtained by a person, or their accomplice, through an act which is being investigated or prosecuted by the ICC (i.e. the proceeds of crime). 2) Section 51(2) sets out the conditions that need to be satisfied for a handover to take place. Accordingly, (a) a competent court must have made an order, requiring the confiscation or freezing of the assets in question within the meaning of Article 93(1)(k) of the Rome Statute; and (b) it is guaranteed that the rights of third parties remain unaffected and, to the extent that items are handed over subject to reservations, these are to be returned immediately upon request. Section 51(3) adds that insofar as the assets to be handed over to the ICC contain personal data of the accused person, it must be stated expressly that the data contained may only be used to fulfil the tasks assigned to the ICC under the Rome Statute before the handover can take place. If further personal data of a third party is connected to the personal data of the accused person in such a way that separation of data is not possible or only possible with unreasonable effort, the transmission of this data is permissible unless the legitimate interests of the person being pursued, or a third party, in their confidentiality, clearly prevail.

50 The Code of Criminal Procedure (StPO) stipulates that the public prosecutor's office decides whether to indict after the investigation has been completed, see sections 170 et seq StPO.

3) Section 52(1) IStGHG deals with the confiscation and seizure of assets that may be handed over to the ICC. Accordingly, it provides that assets that may be handed over to the ICC under section 51 IStGHG may be confiscated or otherwise seized even before the request for their handover has been received. Section 51(2) adds that items can also be confiscated or seized under the conditions of section 51(1) if this is to complete a request that is not directed towards the surrender of these items.

    a) "Seizure" refers to voluntary handing-over of the relevant property. In this context property means movable and immovable things, since physicality is not important. Rather, everything that can be important for the investigation is included.

    b) "Confiscation" represents the more invasive measure as it allows for a deprivation of custody of an item against the will of the concerned. Confiscation is subject to section 94 *et seq* StPO. These sections require that objectives which may be of importance as evidence for the investigation shall be taken into custody or otherwise secured (section 94(1)), and that seizure can only be ordered by the court and, in exigent circumstances, by the public prosecution office and its investigators (section 98(1) StPO). Section 97 StPO specifies that seizure of certain objects is prohibited where the request for seizure relates, for example, to written correspondence between the accused and a person who may refuse to testify or notes made by those persons concerning confidential information.

4) According to section 52(3) IStGHG, the public prosecution office or investigators (section 152 of the Courts Constitution Act) are authorised to confiscate goods in the event of imminent danger and order the search in accordance with the provisions of the Code of Criminal Procedure.

5) Section 52(4) IStGHG states that all assets located in Germany (irrespective of them being usable as evidence or being proceeds) can be confiscated if a charge against the relevant person regarding an offence under Article 5 of the Rome Statute has been confirmed or an arrest warrant has been issued by the ICC. The confiscation will also apply to assets that later accrue to the accused.

6) The order for seizure and confiscation has to be made by the Higher Regional Court according to section 49(3) IStGHG on application by the public prosecution office. In certain exigent cases, any public prosecution office and its investigators are entitled to seize and confiscate according to section 52(3) IStGHG and in accordance with section 105 StPO. An "*exigent*" case may arise where the court order cannot be obtained without jeopardising the purpose of the measure.

2.	**Rights of complaint or appeal**	1) According to section 111I StPO, the public prosecution office must give the aggrieved person notice of the enforcement of seizure or asset seizure. 2) The decisions of the Higher Regional Court are final according to section 50(1) IStGHG. However, the Higher Regional Court can submit a legal question of fundamental importance to the Federal Court of Justice in accordance with section 50(2) read with 33 IStGHG. A successful challenge would result in the matter being referred back to the Higher Regional Court. There is no avenue of appeal on procedural grounds under domestic criminal law. Further, a court decision ordering a seizure could be challenged under the German Basic Law on the grounds that the search violates basic rights such as the person's right to property, general freedom of action, freedom of occupation, or inviolability of the home.
3.	**Management of frozen/seized assets**[51]	1) The Attorney General's Office is responsible for managing the assets confiscated or seized at the ICC's request (section 111m StPO) and may delegate such administrative tasks to its investigators or a court bailiff. In certain cases, these tasks may also be delegated to another person. The management of the assets can be subject to regulations implemented at the level of German Federal States[52] in which case a department of the public prosecution office is responsible, although the public prosecution office can delegate tasks to investigators, a court bailiff or other persons. 2) An item seized may be sold if there is a danger of its deterioration or of its suffering a significant loss in value, or if its storage, maintenance or upkeep gives rise to significant costs or difficulties (**emergency sale**) (section 111p StPO). The emergency sale should be ordered by the public prosecution office and the person affected by the seizure shall be heard before the order is made. In all other cases (i.e. where such a danger does not exist), the utilisation, rendering useless and destruction of assets is only possible after the final judgment of the ICC. 3) According to section 111m StPO, the person subject to a confiscation order may apply for a decision from a competent court against measures taken by the public prosecution office, or any delegates, with respect to the management of the seized assets.

51 Note that the "freezing" of assets has no exact equivalent under German law. However, the "seizure" of assets is regarded to be the equivalent measure under German law since both measures are aimed at securing objects.

52 See, for example, the evidence regulations for the Hessian police (*Asservatenordnung für die hessische Polizei*).

4.	**Management of assets at conclusion of ICC proceedings**	On handing down of the ICC judgment, a confiscation order issued under section 52 IStGHG loses its effect after the final conclusion of the proceedings. According to section 52(6) IStGHG, the seizure pursuant to section 52(4) IStGHG shall be lifted at the request of the ICC, but no later than after the court ordering the seizure has become aware that the arrest warrant has been lifted or that the proceedings at first instance have ended. The practical implication is that a decision must then be made as to whether the objects seized can either be returned to the aggrieved person or confiscated in accordance with section 44(1) IStGHG. A movable item could be handed over to the last custodian or to the person from whom it was directly taken as a result of a criminal offence according to section 111n StPO. According to section 111of (1) StPO, the public prosecutor's office decides on this after the final conclusion of the proceedings. Alternatively, a forfeiture order could be enforced. Section 44(1) IStGHG provides that orders made by the ICC under Article 77(2) Rome Statute (forfeiture orders) should be enforced if the ICC has submitted a fully legally binding and enforceable ruling and has requested, following a guilty verdict or the issuance of a sentence, specific items that are located in Germany. The competent Higher Regional Court decides on the enforcement under section 46(3) IStGHG. The decision is prepared by the public prosecutor's office at the Higher Regional Court.
5.	**Constraints on implementation of requests for freezing/seizing assets**	As set out above, section 48 IStGHG states that the provision of assistance may be denied or postponed if any of the grounds set out under Articles 93(5)-(9)(k), 94 and 95 of the Rome Statute apply. These include (*inter alia*) where the execution of a particular measure of assistance detailed in the ICC requests is prohibited under domestic law on the basis of an existing fundamental legal principle, if the requests concern the production of any documents or disclosure of evidence relating to national security, or if the requests would interfere with an ongoing investigation.
C. Forfeiting assets of accused persons and handing them over to the ICC		
1.	**Implementing forfeiture requests**	Forfeiting assets following an ICC forfeiture or reparations order 1) Part 4 of the IStGHG deals with all legal assistance provided through execution of ICC decisions and orders. The principle governing assistance under this Part is established in section 40 as requiring enforcement of 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 then dealt with in sections 43, 44 and 45 IStGHG – in each case with specific reference to the equivalent article of the Rome Statute. 2) Sections 44(1) and (2) IStGHG provide that where the ICC has made a forfeiture order pursuant to Article 77(2)(b) of the Rome Statute, and the assets to which the order relate are located in Germany, the domestic court should order the confiscation of the proceeds of crime and that order is to be enforced in accordance with section 73 StGB (in a similar way as a domestic order for confiscation). Pursuant to section 44(3), if the confiscation of the assets of an accused person is ordered, ownership of the asset passes to the ICC upon approval by the responsible body pursuant to section 68(1) IStGHG (i.e. the Ministry of Justice in cooperation with the Foreign Ministry) of the ICC request for assistance provided that, at the time of the order, the relevant assets belong to the person identified in the order. Until the ICC request for assistance has been approved by the relevant ministries under section 68(1), the order acts as a prohibition of disposal in accordance to section 136 German Civil Code (*Bürgerliches Gesetzbuch*) (**BGB**).[53]

53 German Civil Code: https://www.gesetze-im-internet.de/englisch_bgb/.

3) Section 44(4) specifies that the order for confiscation is also binding with regards to the rights of third parties, unless (a) that third party was not afforded the opportunity to defend their rights; (b) the decision is incompatible with a domestic civil judgment dealing with the same matter; or (c) the decision relates to the rights of third parties to a property located in Germany. If one of these situations applies, the ICC is given the "opportunity to comment" during the "approval proceedings of the ICC request" under section 68 IStGHG. Third parties who could assert rights to the relevant assets are given an opportunity to comment (with the right to legal assistance) before a decision to enforce the ICC order is taken, provided that 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.

4) Section 45 IStGHG provides for the enforcement of Reparations Orders where these contemplate payment. Specifically, it states that ICC Reparations Orders will be enforced if (a) the ICC has issued a guilty verdict, sentenced the accused person and made an order under Article 75 Rome Statute for reparations to victims to be paid; and (b) the request states the amount up to which the reparation order is to be enforced domestically if the ICC requests enforcement of the order from several States Parties. The enforcement procedures applicable to fines under section 43 are made applicable. These provisions include details regarding how the exchange rate should be calculated (if the amount is not requested in Euros) as well as how issues pertaining to the interpretation of the request should be dealt with; and the process for transferring collecting funds to the ICC.

5) Finally, section 46(3) IStGHG provides that, in accordance with section 44 IStGHG, the Higher Regional Court in the area where the object is located is responsible for the enforcing an ICC forfeiture/confiscation order. The public prosecution office at that Higher Regional Court (i.e. where the assets are located) prepares the application for enforcement. Section 46(4) IStGHG refers to sections 20(2), (3), 21 (1), (4), 22, 23, 29(4) and 33 IStGHG. According to section 20(3) IStGHG, the Higher Regional Court can question the person being pursued. It can collect other evidence on the admissibility of the transfer and hold an oral hearing. The Higher Regional Court determines the type and scope of the taking of evidence without being bound by applications, waivers or previous decisions. Section 22(1) IStGHG provides that a representative of the public prosecutor's office at the Higher Regional Court and the appointed legal counsel of the person sought shall be present at the hearing. Members of the ICC and counsel for the defendant in the proceedings before the Court may be permitted to be present and to ask questions. If the relevant objects are located in the districts of different Higher Regional Courts, the jurisdiction depends on which Higher Regional Court first dealt with the matter (or where no Higher Regional Court has been involved, which public prosecution office dealt with the matter first). Reparations orders are to be enforced in the same way as fines according to section 43 IStGHG.

6) The decision of the Higher Regional Court is final and not subject to appeal according to section 46(3) IStGHG. However, the Higher Regional Court can submit a legal question of fundamental importance to the Federal Court of Justice in accordance with sections 46(4) and 33 IStGHG. A successful challenge would result in the matter being referred back to the Higher Regional Court. There is no avenue of appeal on procedural grounds under domestic criminal law. Further, a court decision ordering a seizure could be challenged under the German Basic Law on the grounds that the search violates a person's fundamental rights.

		Forfeiting of assets prior to conviction 1) In addition, a release of objects at the request of the ICC under Article 93(1)(k) Rome Statute is possible even prior to conviction and the issuance of a forfeiture order, in accordance with section 51 IStGHG as "other legal assistance", provided that the relevant assets may serve as evidence during the proceedings. As set out above, according to section 51(1) IStGHG, assets may be handed over to the ICC following an ICC request for assistance, if (a) they can be used as evidence during proceedings before the ICC; or (b) these assets have been obtained by person, or their accomplice, through an act for which are being investigated or prosecuted by the ICC (i.e. proceeds of crime). 2) Section 51(2) sets out the conditions that need to be satisfied for a handover to take place: accordingly, (a) a competent court must have made an order, requiring the confiscation or freezing of the assets in question within the meaning of Article 93(1)(k) of the Rome Statute; and (b) it is guaranteed that the rights of third parties remain unaffected and to the extent that items are handed over subject to reservations, these are to be returned immediately upon request. 3) The decisions of the Higher Regional Court are final according to section 50(1) IStGHG. However, the Higher Regional Court can submit a legal question of fundamental importance to the Federal Court of Justice in accordance with sections 50(2) and 33 IStGHG. Further, a court decision ordering a seizure could be challenged under the German Basic Law on the grounds that the search violates the person's fundamental rights.
D. Other considerations		
1.	**Examples of ICC requests**	We have not identified any past examples.
2.	**Collaboration between government departments** **Collaboration with civil society**	As set out above, section 68 IStGHG contemplates the collaboration between several federal ministries and German state governments in deciding whether to respond to, and execute a request for legal assistance made by, the ICC, depending on whose sphere of responsibility has been affected by the request. The IStGHG also regulates the jurisdiction between different regional court and prosecution offices, with the general rule being that the courts (and the relevant prosecution offices) have jurisdiction over assets that are located within their districts (see section 49(1) IStGHG). If assets are located in various districts of different courts or prosecution offices, responsibility depends on which of the public prosecution services has dealt with the matter first. Where responsibility cannot still not be determined, the public prosecution service at the Higher Regional Court in Berlin (i.e. the seat of the German Federal Government) will be responsible.
3.	**Cross-border cooperation**	The IStGHG does not make specific provisions for coordination with other States Parties in responding to ICC asset recovery requests.
4.	**Purposes for seizure and freezing of assets**	The IStGHG does not specify any purpose other than to implement the orders of the ICC either for (a) legal assistance to the ICC; (b) to enforce forfeiture orders depriving accused persons of the proceeds of crime; and (c) enforcing ICC compensation orders to compensate victims of crimes.

5.	**The effect of sanctions on meeting ICC requests**	There is no provision under German law that would facilitate the use of funds frozen in accordance with EU or UN sanctions for the purposes of complying with ICC requests. EU sanctions regulations may provide for specific exceptions or derogations from the freezing of funds and economic resources, for example, for basic needs and humanitarian purposes. In addition, EU sanctions regulations may also allow the competent authorities of the member States or the EU to authorise the use of frozen funds, on a case-by-case basis, for purposes that are not covered by the specific exceptions or derogations, but are consistent with the objectives and policy of the sanctions regime, and do not undermine its effectiveness. As such, the German position will therefore correspond with the legal situation in other EU member States.
6.	**Policy and political considerations**	We are not aware of such wider policy or political considerations. However, the German Government has expressly stated that they are actively supporting the ICC to ensure that the ICC can work as effectively as possible and secure broad support from the international community for their work.[54]

54 https://www.auswaertiges-amt.de/de/aussenpolitik/themen/internationales-recht/voelkerstrafrecht.

ANNEXURE 4: Italy [Readiness rating: 6 - FAIR]

No	Question	Response
Overview		
1.	**Primary Legislative Instrument**	• Italy ratified the Rome Statute by Law no. 232 of 12 July 1999 (in force 20 July 1999). • 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 ICC; and (ii) the enforcement of the decisions of the ICC.[55] Law 237 entered into force on 23 January 2013.
2.	**Additional implementing legislation**	• The Italian Code of Criminal Procedure (**ICCP**), in particular, Article 723 (powers of the MoJ in the case of a request for judicial assistance from a foreign authority);[56] Article 724 (procedure for the execution of request for judicial assistance regarding the acquisition of evidence and seizure of assets);[57] Article 725 (execution and provisions to be observed in case of request for judicial assistance);[58] Article 737 (procedure for the execution of a seizure stated by a criminal foreign ruling pending the procedure for the recognition of the foreign decision);[59] and Article 737-*bis* (procedure for the execution of investigations and seizure for the purposes of forfeiture requested by a foreign judicial authority).[60] • Provisions of the Italian Criminal Code;[61] Legislative Decree no. 159 of 6 September 2011[62] and the Italian Code of Civil Procedure[63] are relevant to certain measures related to the seizing and freezing of assets.[64] The manner of allocation of forfeited assets, property and utilities to the ICC is regulated by Ministerial Decree no.61/2020.[65]

55 C. Meloni, *Il lento adeguamento dell'Italia allo Statuto della Corte Penale Internazionale*, in *La legge sulla cooperazione giudiziaria con la Corte e sull'esecuzione dei suoi provv*edimenti, Diritto *penale contemporaneo*, (2020), at 1.
56 In force on 31 October 2017.
57 Latest version entered into force on 31 October 2017.
58 Latest version entered into force on 31 October 2017.
59 Latest version entered into force on 29 August 1993.
60 Latest version entered into force on 31 October 2017. In addition, see art 316 ICCP, latest version entered into force on 31 December 2022, which provides for the requirements and the effects of the measure of the conservative seizure; art 318 ICCP, latest version entered into force on 24 October 1989, which provides for the re-examination of the decree disposing the conservative seizure; art 321 ICCP, latest version entered into force on 21 August 2015, which provides for what can be object of the conservative seizure; art 322 ICCP, latest version entered into force on 15 February 1991, which provides for the re-examination of the decree disposing the preventive seizure; art 322-*bis* ICCP, latest version entered into force on 21 March 1998, which provides for the appeal of the decree disposing the preventive seizure; and art 325 ICCP, latest version entered into force on 3 August 2017, which provides for the right of the accused person and/or the person whose assets are subject to seizure to challenge the decision related to the seizure before the Supreme Court.
61 See art 349 Italian Criminal Code, entered into force on 1 July 1931, which provides for the crime related to the violation of the seals; and art 351 Italian Criminal Code, entered into force on 1 July 1931, which provides for the violation of the public custody of assets.
62 Legislative Decree no. 159 of 6 September 2011, latest version entered into force on 13 October 2011 – the so-called Anti-Mafia Code; and art 35-*bis* of Legislative Decree no. 159 of 6 September 2011, latest version entered into force on 4 December 2018, for the discipline about the obligations related to the management of the seized assets.
63 Art 67 of the Italian Code of Civil Procedure, latest version entered into force on 4 July 2009, provides for the liability of the custodian.
64 Art 104-*bis* of the provision implementing the ICCP, latest version entered into force on 31 December 2022, provides for: (i) the administration of assets subject to seizure and forfeiture in particular cases; and (ii) protection of third parties in the trial.
65 In force on 5 July 2020.

		• In terms of Ministerial Decree dated 22 March 2022, the Ministry of Justice appointed an internal Commission to prepare a draft of the Code of International Crimes. The Code of International Crimes aims to introduce the necessary provisions to ensure that the crimes described in the Rome Statute become subject to Italian jurisdiction. The draft remains subject to approval and to possible amendments by the Italian Parliament. There is currently no news regarding approval or amendment of the draft of Code of International Crimes. However, from the report of the appointed internal commission, the Code of International Crimes would not provide for any procedural measures that therefore would still be governed by Law 237.[66]
3.	**Competent authority and decision-maker/s**	• The Ministry of Justice (**MoJ**) and the General Prosecutor (*Procuratore Generale*) before the Court of Appeal of Rome[67] (the **General Prosecutor**) play a key role in enforcing the requests of the ICC (**ICC Request**). The MoJ exclusively conducts the relationship between Italy and the ICC.[68] In particular, it receives the ICC Request and provides for its execution, by sending it to the General Prosecutor.[69] The General Prosecutor may execute the requested measures or, in the cases described under Article 99(4) of Rome Statute, assist the Office of the Prosecutor (**OTP**) in the activities the latter has to carry out in Italy. If the ICC Request concerns an investigation or acquisition of evidence, the General Prosecutor requests the Court of Appeal of Rome to execute the ICC Request. The Court of Appeal of Rome, provided that the relevant conditions are met, executes the ICC Request by decree (*decreto*), by which it delegates a member of the same Court of Appeal of Rome or the Judge for the preliminary investigation (the so-called **GIP**) of the place where the ICC Request shall be executed.
4.	**Key strengths of enforcement framework**	• The fact that pursuant to Law 237 the ICC deals exclusively with the MoJ when requesting the enforcement of an ICC Request can reasonably be regarded as the major strength of the Italian legal framework implementing the Statute of Rome. Indeed, from a theoretical point of view (though untested), the central role of the MoJ (and of the General Prosecutor) could make the process smoother and avoid different approaches in handling the ICC Request. These features of the Italian system may render the process more efficient. Moreover, considering that the applicable provisions are usually those set out by the ICCP, the relevant authorities should, reasonably, have a good degree of experience in executing the relevant requests.

66 M. Crippa, *Codice dei crimini internazionali: pubblicata la relazione della Commissione Palazzo-Pocar, Sistema Penale, (2022); Relazione Commissione Crimini Internazionali (June 2022),* https://www.giustizia.it/giustizia/it/mg_1_36_0.page?contentId=COS372730.

67 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: indeed, 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.

68 M. Miraglia, *La cooperazione con la Corte penale internazionale*, in *La Corte penale internazionale, Profili sostanziali e processuali*, Vittorio Fanchinotti, Turin, (2014), at 184.

69 M. Chiavario, *Diritto Processuale Penale*, VIII edition, Wolters Kluvers, Milan, (2019), at 1343.

5.	**Notable weaknesses of enforcement framework**	• The main weakness of the system is that it is, as far as we are aware, untested. Therefore, this determines a certain degree of uncertainty in foreseeing how in practice the Italian Authorities will execute the ICC Request. • Analysis of Law 237 suggests that it is primarily focused on personal precautionary measures, while there are not specific provisions for the implementation of ICC requests for *in rem* precautionary measures. In relation to the *in rem* precautionary measures, it is reasonable that the rules of the ICCP apply by way through express cross-referral in Article 3 Law 237. In this respect, Law 237 does not clearly provide for criteria of coordination between the provisions included in Law 237 and the ICCP. Therefore, the practical coordination mechanism is not straightforward. • 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.
6.	**Recommendations**	• Based on the above analysis and on our interpretation of Law 237, our suggestion would be, to the extent possible, to keep 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 peculiarity 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 an ICC request also in light of the provisions of the ICCP. Moreover, we would suggest 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).
A. Domestic law processes for identifying and tracing assets of accused persons		
1.	**Requests for assistance**	1) Article 3 Law 237 provides that: a) with regard to the delivery, cooperation and execution of an ICC decision, the provisions contained in the eleventh book, titles II, III and IV, of the ICCP are observed, unless otherwise provided for by Law 237 and the Rome Statute; and b) for the fulfillment of the requested acts of cooperation, the rules of the ICCP are applied, without prejudice to the observance of the forms expressly required by the ICC which are not contrary to the fundamental principles of the Italian legal system.[70] 2) Law 237, however, does not provide for any specific measures regarding the assistance in ascertaining whether a person has benefitted from an ICC crime or for identifying property derived from an ICC crime. Therefore, it is reasonable to assume that, pursuant to Article 3(2) of Law 237, the general provisions of the ICCP set out in respect of cooperation with foreign authorities would apply and it is reasonable to infer that the Judicial Authority will carry out the relevant investigation under such general rules (see below in respect of application of Articles 723, 724 and 725 ICCP).

70 M. Miraglia, *supra* footnote 17, at 184.

		3) The duty of cooperation is not intended as mandatory. Therefore, in certain circumstances, the Italian State could refuse to execute an ICC Request.[71] *Pre-trial/Trial* 4) Pursuant to Article 723 ICCP, upon the ICC Request, the MoJ must assess it and decide whether to forward it to the General Prosecutor. The MoJ may refuse to execute the ICC Request if, *inter alia*: a) the ICC Request might threaten the sovereignty, security or other essential interests of the State (Article 723(3) ICCP); or b) if it is evident that the acts requested are contrary to the principles of the Italian legal system or are forbidden by the law. 5) After the positive evaluation of the MoJ (i.e. whenever the adverse conditions referred to in Article 723 ICCP do not apply),[72] the MoJ transmits the request to the General Prosecutor who assesses whether the execution of the ICC Request requires the involvement of the Court of Appeal of Rome. The Court of Appeal of Rome could directly execute the ICC Request by decree or it could involve the GIP of the place where the ICC request shall be implemented (e.g. if the assets to be seized are outside of the competent territory of the Court of Appeal of Rome, the GIP of the place where the assets are located may become involved). 6) Pursuant to Article 724(7) ICCP, the execution of the ICC Request is denied by the General Prosecutor if: a) the acts requested are contrary to the principles of the Italian legal system or are forbidden by Italian Law; b) the facts in relation to which the ICC Request is made do not constitute crime in Italy, unless the accused person itself agrees to the ICC Request itself; or c) there are reasonable grounds for believing that considerations relating to race, religion, sex, nationality, language, political opinions or personal or social conditions may influence the conduct or outcome of the trial and it does not appear that the defendant freely consented to the request for legal assistance.

71 M. Miraglia, *supra* footnote 17, at 184. In particular, please note that, among the circumstances that could prevent the MoJ from implementing the ICC Request, Art 1 Law 237 provides that the Italian State shall cooperate with the ICC "*in compliance with the fundamental principle of the Italian legal system*". Accordingly, if the MoJ deems that the implementation of the ICC Request is contrary to the fundamental principles of the Italian legal system, the MoJ would refuse to execute the ICC Request. Moreover, the MoJ could stay the implementation of the ICC Request if the MoJ has reason to believe that the delivery of certain documents or the performance of certain activities of investigation or acquisition of evidence might threaten national security (art 5 Law 237).

72 Please note that the adverse conditions referred to in art 723 ICCP are the following: (i) when the International conventions in force between Europe Member States or the acts of the European Parliament and Council provide for MoJ intervention, the MoJ may decide not to execute the requested act in the cases and within the limits provided by those conventions and acts (art 723 (2) ICCP); (ii) in case of relationship with States other than European Member States, the MoJ could deny the execution of the requested measures in case of danger for the sovereignty, the national security or other essential interests of the State (art 723 (3) ICCP); (iii) if the acts requested are manifestly unlawful or contrary to the fundamental principles of the Italian legal system (art 723 (5) ICCP); (iv) if there are 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 their consent to the rogatory (art 723 (5) ICCP); and (v) in cases in which the request of assistance regards the summon of a witness, a technical expert or an accused person before the foreign authority, if the foreign State does not offer suitable guarantee in relation to the immunity of the summoned person; the MoJ also has the right not to process the request for legal assistance when the requesting State does not give suitable guarantees of reciprocity (art 723 (6) ICCP).

		7) Article 725 ICCP provides that the measures set out by the ICCP shall apply to the execution of the ICC Request, without prejudice to the formalities requested by the ICC (e.g. secrecy or confidentiality), which shall in any case not be contrary to the principles of Italian legal system. 8) In cases of an ICC Request for tracing of assets, it is reasonable to assume that the General Prosecutor would entrust the Judicial Police (i.e. *Polizia Giudiziaria*) to conduct investigations into the assets belonging to the investigated/accused person. Generally speaking, Article 55 ICCP empowers the Judicial Police to carry out any investigation and activities ordered or delegated by the Public Prosecutor. Such activity entails retrieving information, investigation and protection of the relevant evidence retrieved in the context of the investigation. The Judicial Police includes, *inter alia*, the tax police (*Guardia di Finanza*). By relevant decree, the General Prosecutor may also order the inspection when it is necessary to ascertain the evidence and other material effects of the crime and/or the search regarding the assets pertaining to the crime. 9) There does not appear to be any right to challenge the decision of the MoJ or the General Prosecutor to enforce the ICC Request. It seems only possible to challenge the single acts of execution of the ICC request. *Post-conviction* 10) If the ICC Request requires investigating assets that could be subject to forfeiture, even if not yet ordered, or in seizing certain assets, based on the interpretation described above of Article 3 Law 237, Article 737-*bis* ICCP could apply. In particular, Article 737-*bis* ICCP provides for the application of Articles 723, 724 and 725 ICCP, described above. Pursuant to Article 737-*bis* (6) ICCP, the seizure ordered pursuant to Article 724 ICCP becomes ineffective – and the assets should be returned to the person who has rights on the relevant assets – if the forfeiture is not ordered within one year. This deadline could be extended for a maximum of further six months. The competent judicial authority decides on the relevant extension's request. 11) Note that Article 737-*bis* ICCP could be relevant if no freezing/seizure measures have been adopted during the investigation and/or the trial so that, after the ICC decision is issued, it would be necessary to identify the assets to be forfeited. Once the assets are identified, their forfeiture is performed pursuant to Article 21 Law 237 (see below).
2.	**Refusals of requests**	According to the principle of complementarity, the ICC has no jurisdiction when an international crime is or has been the subject of criminal proceedings before the judicial authorities of the State that can exercise jurisdiction over that crime, unless the lack of a national criminal procedure depends on the absence of will or the actual inability of the State to investigate and prosecute.[73] Therefore, in the event a crime can be prosecuted/is being prosecuted in Italy, it is reasonable to assume that the Italian proceedings and related activities will prevail on the ICC Request.

73 M. Crippa, *Sulla (perdurante) necessità di un adeguamento della legislazione interna in materia di crimini internazionali ai sensi dello Statuto della* Corte penale internazionale, Diritto Penale Contemporaneo, (2016), at 6-7.

3.	**Time frames for requests**	Law 237 does not provide for any specific time frames for the execution of the ICC Request. Article 2 of Law 237 states that once the MoJ receives the ICC Request, it shall ensure its execution in a timely fashion. By interpreting this provision in light of Article 723 ICCP, it could be inferred that the MoJ has 30 days to decide on the ICC Request once received. Please note that this is not a mandatory deadline so it is possible that the MoJ will take longer to decide the ICC Request.
4.	**Constraints on State cooperation**	We are not aware of any specific political or non-legal constraints on cooperation with ICC's requests. Italy has expressed its willingness to cooperate and fully comply with the obligations of the Rome Statute in the report to the draft of the Code of International Crime. However, the lack of time periods for processing ICC's Requests and lack of general experience of the receiving Italian Authorities regarding such requests may be considered a possible weakness.
B. Seizing and freezing assets of accused persons		
1.	**Deciding requests for seizing and freezing assets**	1) As is the case with asset tracing requests, the MoJ receives the ICC Request and provides for its execution by sending it to the General Prosecutor. The General Prosecutor may request the Court of Appeal of Rome to enforce the ICC Request or, in the cases described under Article 99(4) Rome Statute, assist the OTP in the activities to be performed in Italy. If the ICC Request regards an investigation or acquisition of evidence, the General Prosecutor requests the Court of Appeal of Rome to enforce the ICC Request. Provided the relevant conditions are met, the Court of Appeal of Rome executes the ICC Request by decree, by which it delegates a member of the same Court of Appeal of Rome or the GIP of the place where the ICC Request shall be executed. 2) Law 237 does not expressly provide for any measure to be adopted in relation to assistance in freezing and seizing the assets of persons accused of an ICC crime. Therefore, it is reasonable to assume that, pursuant to Article 3 Law 237 and based on the process described above, the relevant provisions of the ICCP described below would apply.
2.	**Implementing requests for seizing and freezing assets**	*Pre-trial/trial* 1) Law 237 does not include specific provisions on freezing and seizure, pending the investigation or the proceedings. Therefore, it is reasonable to assume that, pursuant to Article 3 Law 237 and based on the process described above, the relevant provisions of the ICCP apply in respect of conservative seizure pursuant to Article 316 ICCP and preventive seizure pursuant to Article 321 ICCP. From a general Italian law perspective, conservative seizure may be ordered by the Judge upon application of the Public Prosecutor or the civil party to the criminal proceedings and preventive seizure may be ordered by the Judge upon application of the Public Prosecutor or by validating the motivate decree issued by the Public Prosecutor or Judicial Police in case of urgency. However, in the context of the execution of an ICC Request, it is reasonable to infer that the relevant seizure is requested by General Prosecutor to the Court of Appeal of Rome, which gives execution to the request by delegating with a decree one of its members or the GIP.

2) Conservative seizure is a precautionary measure aimed at guaranteeing the satisfaction of the payment of procedural expenses, sums due to the Italian State or civil claims arising from criminal proceedings.[74] All the assets that, under the Italian law, could be subject to an attachment (*pignoramento*) could be seized pursuant to Article 316 ICCP. A conservative seizure is granted in the event that:

   a) there is, among others, *prima facie* evidence that the crime has been committed (so-called *fumus commissi delicti*);

   b) prosecution has been started; and

   c) there is a risk of losing the economic guarantees for the payments of sums due to the State or civil party.

3) Preventive seizure is a precautionary measure aimed at (i) preventing the free availability of assets pertaining to the crime from aggravating or extending the consequences of the crimes or facilitating the commission of other crimes and (ii) ensuring the effectiveness of any subsequent forfeiture. Preventive seizure is granted if:

   a) there is *prima facie* evidence that the crime has been committed (so-called *fumus commissi delicti*); and

   b) there is the risk that other crimes will be committed if the assets pertaining to the crime remain at the disposal of the person accused of the crime or that pending the proceedings, any subsequent forfeiture could become impracticable.[75]

4) Generally, the GIP grants preventive seizure upon the request of the Public Prosecutor. In cases of urgency,[76] the Public Prosecutor can order preventive seizure by a motivated decree, which is immediately enforced but subject to a subsequent validation by the GIP. Pursuant to Article 321(3-*bis*) ICCP, in the same situations in which the Public Prosecutor may order a preventive seizure by decree (thus not waiting for the order of the GIP), the Judicial Police could seize the relevant assets and then draft the report of the activity carried out. This report has to be transmitted to the Public Prosecutor and then to the GIP to be validated.

5) If conservative or preventive seizure is granted, the person accused of a crime will be deprived of the assets. Pursuant to Article 317 ICCP, conservative seizure is executed by way of attachment pursuant to the relevant rules set out in the Italian Code of Civil Procedure. Preventive seizure is executed in the form provided under Article 104 of the provision implementing the ICCP. Article 22 Law 237 provides that in case of issues arising in the execution of the ICC Request related to, *inter alia*, seizure, the General Prosecutor informs the MoJ in order to start the consultation procedures with the ICC.

74 E. Aprile, F. D'Arcangelo, *Le misure cautelari nel processo penale*, III edition, Milan, (2017), at 709.
75 *Id.*, at 737.
76 Please note that the urgency is assessed on a case-by-case basis. In general terms, if the delay in the execution of the seizure may cause prejudice, the seizure might be carried out as a matter of urgency: by way of example, if in the context of an inspection, weapons are found, they could be immediately seized, as leaving them available to the investigated/accused person might aggravate the crime/lead to the commission of additional crimes.

		Post-conviction 6) Following the conviction, if: a) the ICC has ordered a forfeiture;[77] and b) pending the investigation and/or the trial, a seizure/freezing had occurred, the General Prosecutor could enforce the forfeiture order on the seized/frozen assets of the convicted person (see Section C below). 7) In addition, even lacking conditions under (b) above, we cannot exclude that the General Prosecutor could seize the assets of the convicted person pursuant to Article 737-bis ICCP in order to comply with the ICC Request of forfeiture (see Section A(1)(11)).
3.	**Rights of complaint and appeal**	1) Law 237 does not include specific provisions on the right to challenge the request or order to have assets frozen or seized, however, as explained above, it is reasonable to assume that the relevant provisions of the ICCP described below would apply. 2) Re-examination a) Articles 318 and 322 ICCP provide for a request for the re-examination of the conservative/preventive seizure granted by the GIP provided that the measures were granted for the first time and on the grounds that the seizure did not meet the requirements set out by Article 316ff and Article 321ff ICCP. b) Article 318 ICCP permits anyone who has an interest in the seized assets to request the re-examination of a decree of conservative seizure while, pursuant to Article 322 ICCP, re-examination of a decree of preventive seizure can be requested by the person under investigation/the defendant, by their legal counsel, by the person whose assets were seized, or by the person who is entitled to the restitution of the assets that have been seized. c) The request of re-examination does not stay the execution of the seizure (Article 322(2) and Article 318(2)). 3) Appeal a) Pursuant to Article 322-*bis* ICCP the Public Prosecutor, the person accused of a crime/the defendant, their legal counsel, the person whose assets are subject to seizure and the person who is entitled to the restitution of the assets that have been seized can appeal the decisions concerning the preventive seizure (except for the decision that grants preventive seizure for the first time) and the Judge's decree that revokes seizure which was ordered by the Public Prosecutor. b) The appeal does not stay the execution of the seizure (Article 322-*bis* paragraph 2 ICCP).

77 Please note that the forfeiture is considered an economic security measure pursuant to art 240 of the Italian Criminal Code.

		4) <u>Supreme Court</u> a) Pursuant to Article 325 ICCP, the Public Prosecutor, the accused person/the defendant, their legal counsel, the person whose assets are subject to seizure, and the person who is entitled to the restitution of the assets that have been seized could challenge before the Supreme Court the decisions regarding (i) the conservative/preventive seizure, (ii) the re-examination and (iii) the appeal. The challenge before the Supreme Court is based only on the ground of a breach of law.
4.	**Management of frozen/seized assets**	1) When an application for freezing or seizure is successful, usually a judicial administrator or a custodian is appointed, depending on the nature of the assets seized and the kind of seizure.[78] Different provisions apply to govern the duties and the obligations of the judicial administrator or custodian (e.g. see below, 4) for liabilities. 2) The custodian is empowered to carry out ordinary acts of administration, however, judicial authorisation is necessary to carry out the acts of extraordinary administration (for example structural activities on building, exercising the voting rights connected to shares etc.). The judge may include specific modalities and guidelines for the judicial administrator or custodian in the order granting seizure. By such order, the judge could also regulate the use, if any, of the seized assets; in specific cases, depending on their nature, the judge could order the sale or the destruction of the seized assets. 3) If the seized assets are ongoing business, entities or assets that shall be managed, other than those that should be included in the *Fondo Unico Giustizia* (i.e. a public fund including e.g. the financial and insurance assets subject to criminal seizures), the managing of the seized assets is regulated by Article 104-*bis* of the provision implementing the ICCP. In this event, a judicial administrator is appointed and its obligations and duties are set out by Legislative Decree no. 159 of 6 September 2011 (i.e. the Anti-Mafia Code). 4) As to the liability of the judicial administrator/custodian: a) Article 67 of the Italian Code of Civil procedure provides for the liability of the custodian. In particular, pursuant to Article 67 of the Italian Code of Civil procedure, without prejudice to its criminal liability, a custodian in breach of its obligations could be ordered to pay a pecuniary sanction and to compensate for damages due to its lack of diligence in performing its duties. b) Article 35-*bis* of the Anti-Mafia Code provides for the civil liability of the judicial administrator. Pursuant to Article 35-*bis* of the Anti-Mafia Code, the judicial administrator can be held liable only in case of wilful misconduct or gross negligence in performing their duties.

78 Please consider that, if the assets to be seized are bank funds, the bank could be appointed as custodian.

		c) Article 349 of the Italian Criminal Code (**ICC**) provides for the punishment of anyone (including both the custodians appointed pursuant to Article 317 ICCP and Article 104 of the provisions implementing the ICCP and the judicial administrators appointed pursuant to Article 104-*bis* of the provisions implementing the ICCP) who violates the seals affixed by any Authority[79] after the execution of a seizure. The penalty for violating the seals is imprisonment from six months up to three years and fine from EUR 103 up to EUR 1,032. Pursuant to Article 349, para. 2, ICC, if the person who commits the crime is the one to whom the seized assets were entrusted, the penalty is higher and in particular could consist of imprisonment from three to five years and a fine of EUR 309 to EUR 3,098. Pursuant to Article 350 ICC, if the violation of the seals is made possible, or facilitated, by the fault (*colpa*) of the person having custody of the assets, the latter is punished with a pecuniary administrative sanction from EUR 154 up to EUR 929. d) Article 351 ICC punishes the conduct of anyone who removes, suppresses, destroys, disperses or deteriorates acts, documents, or any other assets kept in a public office, or at the premises of a public official or individual performing a public service (according to the available case law: (i) the duties of the individual entrusted with the seized assets are considered as having a public nature[80]; and (ii) the concept of "custody of a public official" exists when the assets, wherever deposited, even in a place other than that in which the public official works, are still in the sphere of possession subject to their custody, as in the case of a deposit in a private place, placed at the direct and exclusive disposal of the public official).[81]
	Management of assets at conclusion of ICC proceedings	Depending on the outcome of the criminal proceedings, the seized assets could be returned to whoever has the relevant rights or made available to the ICC by the MoJ pursuant to Article 21 of Law 237. No specific procedures are provided by Law 237 in relation to return of assets. In the ordinary course, Article 323 ICCP provides in the case of acquittal that the judge issuing the decision provides for restitution of seized assets.[82] For this reason, it is reasonable to assume that in the case of an ICC acquittal, the Court of Appeal of Rome, upon request of the General Prosecutor, would order restitution.
C. Forfeiting assets of accused persons and handing them over to the ICC		
1.	**Implementing forfeiture requests**	1) Italian law understands forfeiture (*confisca*) as an economic security measure consisting in the expropriation of the assets connected to the crime. In other words, the forfeiture is a penalty which might be imposed by Italian Courts in case of conviction of an accused person.

79 While not specified, and potentially any public authority (including a court), in the case of seizures considered here, the "Authority" would likely be the Court of Appeal of Rome, General Prosecutor or Judicial Police.

80 See Supreme Court no. 25161 of 24 April 2002, Supreme Court no. 49057 of 26 September 2013.

81 See Supreme Court no. 8163 of 14 May 1979.

82 Note that pursuant to art 240 par. 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.*"

2) Pursuant to Article 21 Law 237, the Court of Appeal of Rome, upon request of the General Prosecutor, orders the forfeiture of profits, assets or goods as ordered by the ICC by means of a final decision (i.e. that all appeals on conviction and sentencing have been exhausted). If it is not possible to enforce the forfeiture orders on the identified assets, the Court of Appeal of Rome orders the forfeiture of amounts of money and assets of equivalent value, available to the convicted person, also through interposed natural or legal person. No express reference is made permitting (or prohibiting) use of forfeited assets for purposes of fulfilling fines or reparation orders.

   a) Article 21(1) Law 237[83] provides for the enforcement of ICC final decision that provides for one of the penalties set out by Article 77(2) of the Rome Statute, which includes forfeiture of assets in Italy (as well as fines). Because a final decision is no longer subject to any appeal and as the forfeiture is a penalty included in the conviction judgment of the ICC, the convicted person would not have any right to appeal the consequent order of forfeiture issued by the Court of Appeal of Rome.[84]

   b) *Bona fide* third parties with a right or interest in the forfeited assets can challenge the measures before the Judge competent for the enforcement of the forfeiture (*incidente di esecuzione*), claiming the property of the relevant assets.

3) Pursuant to Article 21(5) of Law 237, the forfeited amounts and assets are made available to the ICC by the MoJ, through the modalities identified in the ministerial decree issued by the MoJ along with the Ministry of Economy and Finance to be adopted pursuant to Article 17(3), Law no. 400/1988 (which is Ministerial Decree no. 61/2020 (**MD 61/2020**)). For these provisions to apply, an irrevocable conviction decision of the ICC is required.

4) Once the procedure described under Article 21 Law 237 is concluded, transfer to the ICC is regulated by MD 61/2020.

   a) Pursuant to Article 1 MD 61/2020, the sums collected by the Court of Appeal of Rome by means of execution of the ICC request are paid to the Italian State Budget, Section XI chapter no. 3530 – Article 5, in order to be assigned by Ministerial Decree to specific chapter of the estimated expenses of the MoJ.

   b) Those amounts are transferred to the ICC. The custody expenses and the costs of the forfeiting procedure are deducted from the sums collected.

5) In the event the forfeited assets:

   a) are other than money, they could be subject to sale in accordance with the procedure set out by Article 152 of the decree of the President of the Republic 30 May 2002 no. 115 and in particular also with the assistance the judicial sales institutes (*IVG – istituto vendite giudiziarie*); and

   b) remain unsold or cannot be transferred to the ICC,

83 Please note that art 21(1) Law 237 provides that "*the irrevocable decisions of conviction to one of the penalties set out by Art. 77(2) of the Statute of Rome are enforceable in Italy in compliance with their contents*".

84 Pursuant to art 81 of the Statute of Rome, the convicted person has the right to appeal the ICC Decision. Once the ICC Decision is final (i.e. no longer subject to appeal), art 21 Law 237 applies.

		c) the General Prosecutor at the Court of Appeal of Rome must inform the MoJ who must start the consultation procedure with the ICC. 6) If the forfeited assets pertain to the Italian cultural heritage,[85] they cannot be sold or transferred and specific provisions related to the nature of these assets (e.g. cultural or landscape assets) apply. Accordingly, it is reasonable to assume that those assets would remain with the Italian government. Article 21(3) Law 237 provides that "*When it is not possible to execute the measures referred to in paragraph 2* [i.e. forfeiture order], *the Court of Appeal of Rome orders the forfeiture by equivalent of sums of money, goods or other utilities, of which the convicted person has the availability also through a natural or legal person*". In light of these provisions, it is reasonable to infer that if the forfeiture order concerns assets subject to Italian cultural heritage and therefore the request could not be executed, the Court of Appeal of Rome would forfeit other assets of the convicted person, if any. In the absence of alternative assets being forfeited, consultations may be initiated.
2.	**Timing of cooperation with forfeiture request**	Based on the only case available mentioned below in section D, this could take more than a year.
D. Other considerations		
1.	**Examples of ICC Requests**	According to the Italian press, in March 2012 the Court of Appeal of Rome executed an ICC Request for seizure in May 2011 in relation to the arrest warrant issued for Muammar Gaddafi and two others, pending the investigation for their crimes against humanity.[86] At the time of the request, Law 237 had not yet entered into force, so the asset-freezing measures were adopted pursuant to the ICCP. The seizure regarded the Italian assets of Mr Gaddafi, such as, *inter alia*, shares in major companies, real estate and motorcycles.[87] The Libyan Investment Authority (**LIA**) appealed the seizure, claiming that the assets subject to such measure did not belong to Gaddafi. The Court of Appeal of Rome upheld the challenges of LIA on the grounds that those assets could not be traced back to the person against whom the ICC intended to proceed; therefore the Court of Appeal of Rome guaranteed the right of one *bona fide* third party.[88] It is possible that arguments such as those raised by the LIA would still find application as Article 21 Law 237 provides that "*the rights of third parties in good faith are protected. The provisions of the article 676 of the criminal procedure code apply*". Accordingly, rights of a *bona fide* third party could still affect the effectiveness of the cooperation, reasonably both in the context of a seizure and a forfeiture order.

85 Pursuant to art 2 of Legislative Decree no. 42/2004, Italian cultural heritage is made up of cultural assets and landscape assets. Cultural assets are immovable and movable assets which, pursuant to arts 10 and 11 of Legislative Decree 42/2004, have artistic, historical, archaeological, ethno-anthropological, archival and bibliographic interest and other assets identified by law or on the basis of the law as evidence of civilisational value. Landscape assets are the buildings and areas indicated in art 134 of Legislative Decree 42/2004, constituting an expression of the historical, cultural, natural, morphological and aesthetic values of the territory, and the other assets identified by law or on the basis of the law. The assets of the cultural heritage belonging to the public are intended for the use of the community, compatible with the needs of institutional use and provided that there are no reasons for protection.

86 See *Il Sole 24 ore*, 29 March 2012, at 7-8.

87 G. Sacerdoti, P. Acconci, *The Security Council's asset freeze against Gaddafi's Libya and its implementation in Italy*, *The Italian Yearbook of International Law Online*, (2011), at 83.

88 D. Birkett, D. Sejko, *Challenging UN Security Council – and International Criminal Court-Requested Asset Freezes in Domestic Courts: Views from the United Kingdom and Italy*, (2021), the Chinese University of Hong Kong Faculty of Law Research Paper No. 2022-11, Israel Law Review, at 17-19.

2.	**Collaboration between government departments** **Collaboration with civil society**	The MoJ plays a key role, including acting in conjunction with other Ministries, institutions or State bodies or Authorities if MoJ deems it necessary. As clarified above, the institutions or State bodies or Authorities also include the Criminal Courts, the Public Prosecutors and the Italian Police (i.e. all the police bodies, though not expressly mentioned e.g. Judicial Police, Coast Guard, Post Police, Tax Authorities etc.). Law 237 expressly refers to the Ministry of the Defence in the event the activities required to cooperate with an ICC Request are subject to the jurisdiction of the Military Courts and to the Ministry Economy and Finance in providing for the modalities pursuant to which the forfeited assets are transferred to the ICC. For completeness, please note that we cannot exclude the possibility that implementation of an ICC request could involve: (i) Interpol, Europol and S.I.RE.N.E. (*Supplementary Information Request at the National Entries*); and (ii) the Financial Intelligence Unit, constituted within the Bank of Italy (i.e. a surveillance authority). The Financial Intelligence Unit has access to the Italian Banks database, held by the Italian Tax Authority, which contains information on the existence of banking and financial relationships held by individuals, entities and organisation with Italian financial intermediaries. The main purpose of the Financial Intelligence Unit is international cooperation in fighting money-laundering and terrorism financing. Certain NGOs are recognised by the Italian government and it is possible that such NGOs might have scope for involvement in certain steps relating to cooperation with ICC, though this might be approached by Italian Authorities on a case-by-case basis (e.g. ONG which carries out activities of search and rescue of migrants in Italian seas).
3.	**Cross-border cooperation**	Italian law does not provide for any specific provision regarding the coordination with other States parties in responding to ICC Requests. Article 729-*bis* ICCP establishes the possibility for spontaneous exchange of documentation and information with authorities of other States in the context of domestic proceedings. It cannot be excluded that this provision could apply also in the context of an ICC proceedings.
4.	**Purposes for seizure and freezing of assets**	Law 237 does not specifically require that assets must be seized or forfeited for the ultimate benefit of the victims of the accused person. However, Article 316 ICCP provides that the conservative seizure could be granted to guarantee the satisfaction of pecuniary or civil claims arising from the crime, thus including the claim for compensation of the victims of the crime.
5.	**The effect of sanctions on meeting ICC requests**	Please note that we are not aware of any specific provisions that coordinate the UN Sanctions or domestic sanctions regime with the execution of the ICC Request. However, Legislative Decree no. 109 of 22 June 2007, that regulates the measures against the financing of terrorism and the activities of States threating peace and international security, provides that the freezing issued by the UN or the EU does not prejudice the effects of potential seizure or forfeiture adopted in the context of national criminal or administrative proceedings and related to the same assets. Accordingly, we would conclude that the UN and EU Sanctions would not interfere with the ICC request.

ANNEXURE 5: Portugal [Readiness rating: 4 - FAIR]

No	Question	Response
Overview		
1.	**Introduction to legislative scheme**	• The Rome Statute has been adapted to the Portuguese legislation through (1) Parliament Resolution No 3/2002 of 18 January 2002 (in force on 19 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 (in force on 19 January 2002) having ratified the Rome Statute; and (3) Law No 31/2004 of 22 July 2004 (generally in force on 21 July 2004) having established the crimes against the international humanitarian law as foreseen in the Rome Statute. • In terms of PR 3/2002, Portugal expressed (1) its intention to exercise jurisdiction over persons found in the Portuguese territory who are indicted for the crimes referred to in Article 5(1) of the Rome Statute, in accordance with its criminal tradition, its constitutional rules and other domestic criminal legislation; and (2) under the terms and for the purposes of Article 87(2) of the Rome Statute, that any request for cooperation 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 Code of Criminal Procedure (Decree-Law No. 78/87) (**CCP**). • These provide the key mechanisms for obtaining evidence which may be used in criminal proceedings and which may help to identify and locate assets of certain persons as well as preventing dissipation of assets for the duration of criminal proceedings and providing for forfeiture of instruments, products or advantages of a crime is provided in applicable Portuguese law. The sole means of guaranteeing the handover of assets for victim's reparation, in Portugal, is by filing an enforcement action.
2.	**Primary Legislative Instruments**	• Law on International Judicial Cooperation in Criminal Matters (**Law No. 144/99**), in particular Article 145(2)[89] (means of taking evidence, personal searches and asset searches, seizures and expert reports); Article 160[90] (ascertaining whether proceeds, objects, or instrumentalities of crime are in Portugal); and Articles 150-152 and 23 (relevant to international assistance).[91] • Code of Criminal Procedure (**CCP**)[92] establishing the procedural rules applicable to any request for international assistance including provisions relating to searches (Article 174(2); 176 and 177); seizures (Article 178-187); and consultations and requests for information made by the Public Prosecutor (Article 26, 263 and 267).

89 In effect on 1 October 1999.
90 In effect on 1 October 1999.
91 In effect on 1 October 1999.
92 In effect on 1 June 1987.

3.	**Additional implementing legislation**	• The Cybercrime Law[93] provides for expedited data preservation (Article 12); injunctive relief to produce or grant access to data (Article 14); the obtaining of specific computer data (Article 15); seizure of computer data (Article 16); and interception of email and similar communication (Article 17).
4.	**Competent authority and decision-maker/s**	• Ministry of Foreign Affairs; • Minister of Justice; • Public Prosecutor's Office; • judges; and • criminal police bodies.
5.	**Key strengths of 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, this general law applies. • Strong rights protections with reference to the ECHR are built into the relevant Portuguese procedures. • There is a general political and social willingness to cooperate with the ICC.
6.	**Notable weaknesses of 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. 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 not Portuguese or is not a habitual resident of Portugal. • There is a lack of experience in complying with ICC requests in Portugal, as there is only one precedent of cooperation with the ICC. • There is a lack of ability to release assets for purposes of fulfilling forfeiture or reparations orders where they are subject to restrictive measures under Portugal's sanctions obligations.

93 Law no. 109/2009, which came into effect on 15 October 2009. The Cybercrime Law establishes criminal substantive and procedural provisions, as well as provisions on international cooperation in criminal matters, with respect to cybercrime and the taking of electronic evidence.

	Recommendations	• Approving specific domestic legislation on cooperation with the ICC which establishes specific guidelines and providing adequate training on the execution of such requests. Such legislation should: • provide fast-track mechanisms for responding to an ICC request; • clarify that the requirements to be met are those in Article 96(2) Rome Statute • specify the competent bodies to respond and comply with the request, so that there is no uncertainty as to the correct procedure; • allow for the direct enforcement of an ICC judgment, without the need for the confirmation and review procedure provided for foreign judgments; • provide specific mechanisms for the handover of assets to the ICC (instead of applying the general legal dispositions applying to seizure of assets); and • be mindful of the objectives of the EU and ONU sanctions regimes and provide for release of assets subject to sanctions restrictions for purposes of fulfilling forfeiture or reparations orders of the ICC.
A. Identifying and tracing assets		
1.	**Requests for assistance**	1) The ICC request must be delivered through diplomatic channels and addressed to the Ministry of Foreign Affairs (Article 87 of the Rome Statute). Thereafter, it is forwarded to the Public Prosecutor's Office. The Public Prosecutor's Office forwards the application to the Minister of Justice, who examines and decides on the admissibility of the application (Article 24 of Law No. 144/99). 2) The decision on the admissibility of a request for cooperation is the responsibility of the Minister of Justice (Article 21 of Law No. 144/99). The assessment of admissibility entails an analysis of the compliance of the request with the legal requirements and steps established in the Rome Statute (cf. Article 87, 93 and 96) as well as the legal requirements described below (see paragraph 3 below). a) Should the request be found inadmissible by the Minister of Justice, the decision refusing the request must include reasons and will be communicated to the requesting authority. Such decision is not appealable (Articles 24(2) and (3) of Law No. 144/99). b) Should the Minister of Justice consider the ICC request admissible, he or she returns the request to the same Public Prosecutor's Office (Article 24(1) of Law No. 144/99). The decision on the admissibility of the request taken by the Minister of Justice does not bind the judicial authorities (including the Public Prosecutor's Office), which may, once again, verify the compliance with the legal requirements indicated below.

		3) The Public Prosecutor's Office (in particular the Department of Judicial Cooperation and International Relations) acts as the central authority for international judicial cooperation in criminal matters and it is responsible for coordinating and responding to the request (Article 21 of Law No. 144/99 and Article 54 of the Public Prosecutor's Statute). Within the scope of this coordination, the Public Prosecutor's Office refers the case to the competent authority,[94] under Portuguese law, to carry out the required actions. 4) In urgent cases, according to Article 29 of Law No. 144/99, the ICC may communicate directly with the Portuguese judicial authorities or through international bodies competent for urgent police cooperation (including INTERPOL or central bodies for international police cooperation designated for that purpose), in order to adopt a precautionary measure or to carry out a measure which cannot be delayed, stating the reasons for urgency and observing certain formal requirements set out in Article 23 of Law No. 144/99 – these requirements will be analysed below. 5) There are no specific provisions regulating the capacity of the accused to oppose the decision of Portugal to cooperate with the ICC nor the request of the ICC to locate their assets. The accused may only challenge whether the execution of the request was made in compliance with Portuguese law. 6) These measures apply at all stages where there is a need for the taking of evidence (i.e. the pre-trial and trial stages).[95] At post-conviction stage, it may still be possible to trace assets, however, only to ascertain whether a person has benefitted from an ICC crime or for identifying property derived from an ICC crime.
2.	**Formal and substantive requirements applicable to requests**	1) Any request for assistance in terms of the general requirements of Article 23 of Law No. 144/99 which is applicable to MLA requests (and would need to be adapted to ICC requests) should: a) identify the emanating authority as well as of the authority to whom the request is addressed; b) specify the subject matter and reasons for the request; c) identify the legal provisions on which the request for cooperation is based; d) identify the suspect, defendant or convicted person; e) contain a description and evidence of the relevant facts related to the steps to be complied with; and

94 As a general rule, the competent authority to receive and execute requests for cooperation is the Public Prosecutor's Office. In the case of requests for which a court order (e.g. searches and seizures of people's homes, lawyers' offices, banks, doctors' offices and correspondence) is required, as indicated below, the competent authority is the investigating judge.

95 We note that Portuguese law recognises criminal proceedings as including the investigative, pre-trial and trial stages. This does not necessarily align with the distinction between pre-trial and trial stages under the Rome Statute. In Portugal there are three stages in criminal proceedings: (1) the investigation stage, which is led by the Public Prosecutor's Office with the purpose of investigating a crime, detecting its perpetrators and collecting evidence. At the end of this stage, the Public Prosecutor either charges the suspect(s) with a particular crime or issues a decision to close the proceeding if not enough evidence was found or the perpetrator was not identified; (2) the pre-trial stage, which is optional and may be requested by the defendant or by the offended party, by invoking the formal, factual or legal reasons that they oppose the Public Prosecutor's decision or by asking for specific investigative steps to be taken. The pre-trail judge supervises this stage and issues a decision on whether or not the case should be prosecuted or dismissed; and (3) the trial stage is where the case is tried before one or more judges, depending on the crime. Evidence is brought forth and discussed and the judge(s) issue a final, although appealable, decision of conviction or acquittal. The means of taking evidence described in section B are applicable to the Portuguese investigation and pre-trial stages.

f) include any specifications of the proceedings or special requirements that might be requested by the emanating State or by the relevant emanating judicial authority, including confidentiality and deadlines to comply with the request for assistance.

2) Law No. 144/99 defines several general requirements applicable to the requests for judicial cooperation and, accordingly, regulates procedures whenever the rules provided for in the Rome Statute are insufficient. Accordingly, in addition to the requirements of Article 96 of the Rome Statute, and as per a strict interpretation of Law No. 144/99, it is arguable that a request for cooperation from the ICC could be subject to (i) legal prohibitions under Law No. 144/99, (ii) formal requirements under Law No. 144/99 and (iii) specific requirements considering the object of the request for cooperation at stake.

a) Legal prohibitions (Article 6 of Law No. 144/99):

i) if the process does not meet or comply with the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and other international instruments of relevance with regard to human rights that have been ratified by Portugal;

ii) if there are reasonable grounds to believe that the cooperation is being requested for the purpose of prosecuting or punishing a person on account of their race, religion, sex, nationality, language, political or ideological beliefs or membership of a particular social group;

iii) if there is a risk of aggravating the procedural situation (e.g. through limiting defence rights; conviction or increasing a sentence) of a person for any of the reasons listed in (ii) above;

iv) if the cooperation may lead to trial by a court of exception or if such cooperation relates to the execution of a sentence issued by a court of exception;[96]

v) if the conduct in question is punishable by death penalty or any other penalty which may result in irreversible damage to the integrity of the person (a general requirement, unlikely to find application in the case of ICC requests);

vi) if the offence corresponds to a life sentence or a lifetime or indefinite probation measure; and

vii) international cooperation is also not admissible if such cooperation violates the *ne bis in idem* principle (Article 8 of Law No. 144/99) (a requirement unlikely to find application in the context of ICC requests).

96 A court of exception, in the Portuguese context, is a court established on a temporary and/or exceptional basis. In principle, it does not apply to ICC requests, but it is a general requirement for refusing any request for cooperation.

		b) Formal requirements under Article 151(c) of Law No. 144/99: Article 151(c) provides that the request must indicate the particularities of the case or specific compliance requirements of the ICC including confidentiality and deadlines. c) Specific requirements: i) the request to ascertain whether any proceeds, object or instrumentalities of the crime allegedly committed are in Portugal must state the reasons for believing that such products may be found in Portugal (Articles 160(1), (2) and (5) of Law No. 144/99); and ii) the request for conduct of a search, seizure, examination or expert opinion must be accompanied by a declaration stating that the *demarche* is admissible under the ICC's statute (Article 151(b) of Law No. 144/99). 3) Where a request is communicated by way of letters rogatory (and outside of a situation of urgency), Article 152(1) of Law No. 144/99 provides that the decision to comply with letters rogatory addressed to Portuguese authorities is taken by the judge or the Public Prosecutor's Office, within the scope of their respective powers, and the Public Prosecutor's Office is responsible for promoting their execution. a) Execution of letters rogatory must be refused in the following cases (Article 152 (4) of Law No.144/99): i) when the requested authority is not competent to perform the act, notwithstanding the transmission of the letter to the competent judicial authority, if the latter is Portuguese; ii) when the request is for an act prohibited by law or is contrary to Portuguese public order; iii) when the execution of the letter rogatory is against the sovereignty or security of the State; and iv) when the act implies execution of a foreign court decision subject to revision and confirmation and the decision is not revised and confirmed (note that, as set out in section C below, it is possible that Portuguese law might require an ICC sentence to be reviewed and confirmed in Portugal before it becomes enforceable). b) According to Article 152(6) the grounds of refusal are applicable to every request even when not in the form of rogatory letter. Accordingly, these provisions apply to requests transmitted by the ICC in terms of Article 29 of Law No. 144/99.
3.	**Time frames for requests**	There are no stipulated legal deadlines for compliance with requests for international cooperation, however, the ICC may specify the deadlines for compliance which the ICC wishes to be observed (Article 151 of Law No. 144/99).

4.	**Implementing requests for cooperation**	1) The need for a court order or a search warrant will depend on the means of collecting evidence and/or the type of evidence ICC would like to obtain. As a general rule, the Public Prosecutor's Office has the competence to request important information for the investigation from public and private entities. This competence of the Public Prosecutor's Office may be delegated to criminal police bodies provided that a specific investigatory act does not fall within the exclusive competence of the investigating judge (e.g. seizure of objects or assets in a person's domicile). 2) For certain searches a search warrant is required, while investigatory measures must be ordered by a judge where fundamental rights could be implicated. i) A search warrant is required to conduct a search and also a computer data search (Articles 174(2), 176 and 177 of the CCP and Article 15 of the Cybercrime Law). Generally, it may be issued by the Public Prosecutor, whenever there are any signs or suspicions that any animals, items or objects related to a crime or that could serve as evidence of a crime are located in a private place. ii) A Court order is required, in cases of: (1) domicile search (Article 177(1) and 269(1)(c) of the CCP); (2) lawyer's office search (Articles 177(5) and 268(1)(c) of the CCP); (3) bank search (Articles 177(5) and 268(1)(c) of the CCP); and (4) medical facility (Articles 177(5)(6) and 268(1)(c) of the CCP). 3) To perform a seizure (*apreensão*), a seizure warrant is required whenever any instrumentalities, proceeds or benefits of a crime, or any animals, items of objects left behind by a perpetrator in the crime scene or any others that could be used as evidence are found. Generally, it may be issued by the Public Prosecutor. Note that this form of seizure is specific to investigations and the collection of evidence and distinct from provisional seizure (*arresto preventivo*) or seizures in enforcement actions (*penhora*) described below. 4) A Court order is required to: i) seize objects or assets in a person's domicile (Articles 177 and 269(1)(c) of the CCP); ii) seize objects or assets in lawyers' offices (Articles 180 and 268(1)(c) of the CCP), so as to preserve attorney-client privilege; iii) seize documents, valuable objects, amounts and any other items in banks and other credit institutions even if in individual safes (Articles 181 and 268(1)(c) of the CCP), so as to assess whether there are reasonable grounds to suspect that they are related to the crime and are of major interest to discover the truth or to evidence the crime, even when they do not belong to the defendant or are not deposited on the defendant's behalf;

		iv) seize objects or assets in medical facilities (Articles 180 and 268(1)(c) of the CCP), so as to preserve medical secrecy; v) seize correspondence (Articles 179 and 268(1)(d) of the CCP), so as to assess whether there are reasonable grounds to suspect that: (1) the correspondence was sent by the suspect or is addressed to it, even if under a different name or through a different person; (2) the crime at stake is punishable with imprisonment for three years (maximum limit); or (3) the seizure is of major interest to discover the truth or to the evidence the crime; and vi) seize email and other similar communications (Article 17 of the Cybercrime Law), in order to assess whether the emails or any other similar messages found during a computer data search or any other legitimate access to an informatics system are of major interest to discover the truth or to the proof of facts. 2) Requests for an expedited data preservation apply whenever there is any fear that specific informatics data, stored in an informatics system, including traffic data, may be lost, altered or not available. Such requests require an order from the Public Prosecutor (Article 12 of the Cybercrime Law). 3) An injunction to produce or grant access to data requires an order from the Public Prosecutor to produce evidence and to discover the truth to obtain specific informatics data, stored in an informatics system (Article 14 of the Cybercrime Law).
5.	**Constraints on State cooperation**	1) There are no obvious constraints only applicable to Portugal apart from the lack of specific domestic legislation for cooperation with the ICC, as well as insufficient precedents, insufficient training and information, and inability of agencies to respond to requests within the required time frame.
B. Seizing and freezing assets		
1.	**Implementing requests for seizing and freezing assets**	1) Admissibility of requests for seizing and/or freezing assets are determined in the same way as for requests for identification and tracing of assets. The processes described in this section B apply only to the investigative, pre-trial and trial stages (excluding post-conviction seizure or freezing measures). In the absence of implementing legislation, it is likely that it would be necessary to have recourse to Article 160(4) of Law No. 144/99 which provides that where a foreign authority (in this case, the ICC) declares its intention of requesting the enforcement of a forfeiture decision, the Portuguese authorities may take any measure to the extent permitted by law to prevent any transaction, transmission or disposal of the assets that are targeted or may be targeted by such decision. 2) The available measures to freeze or seize assets for the purpose of potential forfeiture (as a penalty) are: a) seizure or freezing of funds in terms of Article 178 of the CCP (described above) where assets or funds are identified and directly linked to the crime; or

b) through a provisional seizure in terms of Article 228 of the CCP[97] which can only be launched in the context of pending criminal proceedings.

3) Both these mechanisms are available at pre-trial and trial stage only (with post-conviction seizure requiring forfeiture or enforcement proceedings set out in section C below).

4) To comply with the ICC's request, the Public Prosecutor may request that the judge order a provisional seizure, in accordance with the civil law, to guarantee the forfeiture of instrumentalities, products and benefits of the crime in terms of Article 228 of the CCP and Article 391 of the Code of Civil Procedure.

   a) While an ICC forfeiture order is not necessary (as these are pre-trial proceedings), it would support the granting of a provisional seizure which requires:

      i) proof that procedural delay could jeopardise the enforcement of the forfeiture, due to a lack or significant decrease of the assets (*periculum in mora*); and

      ii) sufficient evidence to support measures (*fummus boni iuris*).

   b) The procedure for granting provisional seizure is governed by the Code of Civil Procedure which requires the Public Prosecutor to present the facts that make the existence of the amount owed probable,[98] justify the alleged fear of dissipation, and list the assets that must be seized, with all the necessary indications for the diligence to be carried out (Article 392(1) Code of Civil Procedure). If these facts are present and if the Public Prosecutor can also show that the requirements of *periculum in mora* and *fummus boni iuris* are satisfied, the court will issue the decree of provisional seizure without hearing. (Article 393(1) of the Code of Civil Procedure).

   c) The person whose assets are seized may not be deprived of income which is strictly necessary to maintain themselves and their family (Article 393(3) of the Code of Civil Procedure). The persons subject to seizure may request the judge to fix a limit. The necessary income is set by the agreement of all parties, or, where there is no agreement, set by the judge upon submission of relevant evidence (Article 385 of the Code of Civil Procedure).

5) At the post-conviction stage, Article 112 of Law No. 144/99 provides that, upon request of the Public Prosecutor, the judge may order the necessary precautionary measures for preserving and maintaining seized assets, to ensure the enforcement of a confiscation penalty. This decision can be appealed; however, it does not have suspensory effect on the measures applied. Since the applicability of this article presupposes that the enforcement of judgments is in progress, the requirements for enforcing sentences, detailed below, must be met.

97 Regulated by the Code of Civil Procedure, Law No. 41/2013 which came into effect on 1 September 2013.

98 The purpose of this requirement is to safeguard the principle of proportionality and, accordingly, in principle would not allow: (1) provisional seizure of assets without previously identifying the amount that could possibly become due; and (2) provisional seizure of assets far beyond the amount due. art 393(1) of the Code of Civil Procedure provides that, where seized assets exceed the amount owed, the judge must reduce the seizure to reasonable limits. While not necessarily a barrier to fulfilling ICC seizure/freezing requests, this would require requests to include an estimation of value and does not appear to be suited to blanket requests to seize and/or freeze any identified assets (which has been the practice of the ICC in those requests which are in the public domain).

2.	**Rights of Complaint/ appeal**	1) The person subject to provisional seizure may: a) lodge an opposition within 10 days (Article 105(1) of the Code of Civil Procedure) if they wish to submit facts or evidence not taken into account by the court that may refute the grounds for the order or reduce it (Article 372(1)(b) of the Code of Civil Procedure). This opposition has no suspensory effect (Article 228(3) of the CCP). The court will assess whether, taking into account these new arguments, the decision shall be maintained; b) appeal from the provisional seizure (Articles 399 and 411(1) of the CCP) in case they wish to challenge the decision of freezing and seizing the assets. The appeal is submitted before the court which issued the decision within 30 days from the accused person being notified of the court decision; c) present an economic guarantee, in which case the provisional seizure will be revoked (Article 229(5) of the CCP); 2) Successful opposition or appeal would result in the provisional seizure not being granted and Portugal not being able to comply with the ICC's request concerning that specific provisional seizure measure.
3.	**Management of frozen/seized assets**	1) Amounts/assets seized in bank accounts must be registered and managed by the relevant bank (Article 756 Code of Civil Procedure). There are no specific provisions regarding management of frozen bank accounts (including under anti-money laundering codes), however, the beneficiary of the assets may request that specific measures are taken. There are no specific reporting or investment obligations imposed on the depositary to avoid loss of value beyond the general duty of care and diligence. According to Article 738(5) of the Code of Civil Procedure, in the context of a seizure of bank balances, the amount corresponding to the national minimum wage, which in 2023 is EUR 76,000, cannot be seized. 2) In all other cases (e.g. real estate, vehicles, art, etc.), a legal depositary shall be appointed (Article 756 Code of Civil Procedure). The depositary may be the owner of the assets (in principle the suspect, accused or convicted person) or a third party appointed by the enforcement agent, with the agreement of the party seeking enforcement (and which may include companies that store assets in exchange for compensation). a) The law provides that the depositary will be the suspect/accused/convicted person where the property is their primary residence and that in all other cases, the court will determine the depositary's identity. b) The legal depositary has the duty to manage the assets with care and diligence, being liable for the breach of the said duty, notably if the assets are lost (Article 760 of the Code of Civil Procedure). In case the owner of the assets and the entity beneficiary of the seizure disagree on how the assets shall be managed, the court must decide. In cases of assets subject to registry duties (including real estate), the seizure will be inscribed in the property register with encumbrance or alienation prohibited. Attempting to dissipate seized assets constitutes a crime. 3) At the request of any interested party (likely the Public Prosecutor) after engagement by the ICC with Portugal or on the initiative of the court, a depositary who fails to fulfil their obligations may be removed (Article 761(1) and (2) of the Code of Civil Procedure). Where a depositary fails to fulfil its duties and causes damage to the seized property, civil liability in terms of general legal principles may apply.

		4) A depositary may request to be excused from their duties provided there are legitimate grounds for such a request (Article 761(3) of the Code of Civil Procedure).
4.	**Management of assets at conclusion of ICC proceedings**	1) In case of acquittal, Article 186 of the CCP provides for automatic return of frozen assets to their respective owners. 2) In case of conviction and of a forfeiture decision, such decision shall be enforced prior to the delivery of the assets to the ICC.
C. Forfeiting assets of accused persons and handing them over to the ICC		
1.	**Implementing forfeiture requests**	1) There is no specific legislation on cooperation with the ICC in respect of procedural rules. Therefore, procedures for forfeiture requests are unclear. For purposes of the procedures set out here, we have assumed that forfeiture is requested by the ICC pursuant to a forfeiture decision as an ancillary penalty, under Article 77(2) (b) of the Rome Statute concerning the specific assets seized in Portugal and that the forfeiture of those assets is to be executed in Portugal. a) In this scenario, Article 110 of the Criminal Code provides that a court's final order may declare forfeiture of the proceeds and economic advantages of crime[99] even when, for any reason, the crime is not punishable. Forfeiture as described here is thus only possible after the final decision has been handed down. b) We have assumed that forfeiture rests on an ICC order (and will, in effect, be execution of that order). Therefore, no additional requirements appear in relation to the necessary use of forfeited assets to compensate victims of international crimes. 2) Without clear provisions regarding how the ICC decision should be treated in Portugal, there are two possible legal grounds on which it may become enforceable. a) International law principles suggest that the ICC's decision would be directly applicable and binding in the Portuguese legal system with no need for domestic court review (Article 8 of the Portuguese Constitution and Articles 99 and 103 of the Rome Statute). b) Alternatively, the more conservative possibility would require the ICC's decision to be recognised using the proceedings and requirements for the execution of foreign judgements set out in Law No. 144/99, under which the effect of the decision would depend on the revision of the same. In the absence of specific legislation or precedent and given that Law No. 144/99 applies to other matters of judicial cooperation, this appears to be the more likely route. At the same time, the provisions of Law No. 144/99 would need to be applied by analogy since their wording clearly shows that they are intended to be applied to the enforcement of final decisions issued by courts of foreign countries (rather than international bodies). c) The process below is therefore described with reference to Title IV of Law No. 144/99 (Article 95 *et seq*.) read with Article 234 et seq of the Criminal Procedural Code and Article 978 et seq of the Civil Procedural Code.

99 Items, rights or advantages that directly or indirectly derive from the criminal conduct for the perpetrator or to others.

3) Once the ICC's request for cooperation in executing its decision is received, it is subject to the decision of the Ministry of Justice. The request needs to be accompanied by a certificate or an authenticated copy of the decision to be enforced (Article 99(2) of Law No. 144/99). The same legal prohibitions and requirements applicable to requests for assistance with identifying and tracing of assets (above) would need to be complied with as well as the requirements of Article 96 of Law No. 144/99.[100] A key requirement it that the facts give rise to a crime in Portuguese criminal law. However, all ICC crimes were recognised by Portugal through Law No. 31/2004, which came into effect on 22 July 2004. A more difficult requirement is that the offender must either be Portuguese or has their habitual residence in Portugal.[101]

Revision and confirmation proceedings

4) Provided that the Ministry of Justice considers the request admissible, the request is sent, via the General Public Prosecutor Office, to the Public Prosecutor of the Court of Appeals with jurisdiction over the case, to proceed with the terms to obtain the revision and confirmation of the decision. Ordinarily, a foreign judgment must be revised and confirmed in Portugal under the CCP and Law No. 144/99 in order to be enforceable (Article 100 of Law No. 144/99).

   a) Under the CCP (Article 234 et seq.), the Public Prosecutor shall submit to the Court of Appeals located where the defendant had it last domicile or where they have been found or where the higher number of defendants have their domicile or have been found. In case the defendant does not have domicile in Portugal nor had been found in Portugal, the request shall be submitted to the Court of Appeals of Lisbon (Articles 235 and 236 of the CCP).

   b) For a sentence to be confirmed (including in the case of the ICC),[102] requirements provided for in Article 237 of the CCP and Article 980 of the Civil Procedural Code, *ex vi* Article 237(2) of the CCP, need to be met.[103] As above, it is necessary for the fact to also be provided for as a crime in Portuguese criminal law, which, as stated above, should always be the case, seen as all ICC crimes were recognised by Portugal through Law No. 31/2004. It should be noted that a further requirement in this case is that the decision is final i.e. that the decision in final and definitive under the governing law, would mean. In case of ICC requests for forfeiture, this would mean that the ICC sentencing procedure were either not subject to appeal or the appeal had been decided.

100 Namely: (1) a crime for which the courts of the ICC had jurisdiction; (2) if the sentence results from a trial *in absentia*, the convicted person has had the opportunity to request a retrial or appeal the sentence; (3) the sentence should not contain any provisions contrary to the fundamental principles of the Portuguese legal system; (4) the matter is not also subject to criminal prosecution in Portugal; (5) the fact is also provided for as a crime in Portuguese criminal law; (6) the offender is either Portuguese or has their habitual residence in Portugal; (6) the execution of the sentence in Portugal is justified in the interest of the better social rehabilitation of the convicted person or the reparation of the damage caused by the crime; (7) the ICC guarantees that, once the sentence has been served in Portugal, the convicted person's criminal liability will be considered extinguished; (8) the length of the penalty or security measure imposed in the sentence is not under one year or, in the case of a pecuniary penalty, the amount is not less than the equivalent of 30 procedural units (at present, each unit of account is valued at EUR 102); and (9) the convicted person consents, in the case of a criminal penalty involving deprivation of freedom. (Note that this is a general admissibility requirement for any request for cooperation relating to enforcement of a foreign sentence – however, it would not, in principle, apply to ICC asset recovery requests.)

101 We note that 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.

102 Note that this would not be the case if an ICC decision were considered to be directly enforceable in Portugal as discussed in section C below. However, we have included these requirements as the question of direct enforceability is not settled under Portuguese law.

103 Namely that: (1) under the law or under any international treaty or convention, such sentence may ultimately be enforceable in Portugal; (2) the facts punished are also punishable under the Portuguese Law; (3) the sanction or the security measure imposed is not prohibited by the Portuguese Law; (4) the defendant has been assisted by an attorney and, if they do not understand the language of the proceedings, also by an interpreter; (5) there are no doubts on the authenticity of the document nor on the intelligence of the decision; (6) the decision is final and definitive under the law governing the same; (7) the decision has been issued by a foreign court which jurisdiction has not been established in evasion to the law nor it refers to matters of exclusive jurisdiction of the Portuguese courts; (8) the matter has not been the object of a Portuguese court decision that has the force of res judicata: (9) the defendant has been duly notified under the law governing the decision and the principles of contradictory and equality of the parties has been complied with; and (10) the result of confirming the decision is not incompatible with the international public order principle binding the Portuguese State.

c) The Public Prosecutor shall request the Court of Appeals to notify the convicted person or its attorney to be heard on the request (Article 99(5) of Law No. 144/99). The convicted person has an opportunity to present a defence (based on failure to meet requirements for confirmation of the decision). This must be presented within 15 days and the Public Prosecutor is entitled to reply within the 10 subsequent days. After that, the rapporteur judge may take any *demarches* he deems relevant to decide the matter. Once they are concluded, the file is presented to the parties for 15 days, for preparation of final arguments, to be presented in a Court hearing.

d) When deciding on the revision and confirmation of the decision, the Court of Appeals (Article 100(2) of Law No. 144/99): (i) is bound by the matter of facts considered in the foreign decision; (ii) cannot convert a deprivation of liberty penalty in a pecuniary penalty; and (iii) cannot aggravate, in any case, the reaction defined in the foreign decision.

e) When all the requirements above are fulfilled, but, under Portuguese Law, the criminal proceedings or the penalty has expired due to the Portuguese statute of limitations or have been extinct for amnesty or any other cause, the confirmation is granted but the sentence will not be enforceable. The decision on the revision and confirmation of the decision is, in certain cases, appealable to the Supreme Court. In case of rebutting of the request, the Public Prosecutor is always entitled to appeal (Article 240 of the CCP). If the Supreme Court decides against revision and confirmation of the ICC decision, the Portuguese State will not be able to enforce it (or comply with the request for forfeiture).

f) Ordinarily, even if the decision is revised and confirmed, the execution will not proceed until the execution of any penalties or security measures applied by the Portuguese State has concluded. However, we see little direct application of this provision in the case of ICC requests.

g) After the decision of the Court of Appeals confirming the ICC's decision is final and definitive, the Court of Appeals will send the file to the first instance court with jurisdiction on the domicile (or last known domicile) of the convicted person or, if that is not possible, to the first instance Court of Lisbon.

<u>Executing the forfeiture decision</u>[104]

5) The enforcement of a forfeiture decision will be subject to the provisions of the Civil Procedural Code (Article 510 of the CCP). Enforcement proceedings differ depending on whether the forfeiture refers to (i) specific assets and items (*entrega de coisa certa*); or (ii) the value of the proceeds, property and assets (*pagamento de quantia certa*).[105]

6) In the first case (*entrega de coisa certa*), and following Article 859 of the Civil Procedural Code, the person against whom the proceedings has been launched is given notice to deliver the asset or to oppose the enforcement proceedings (see further below in respect of "challenging enforcement").

104 In case the items and assets subject to the forfeiture decision have not yet been seized, their seizure should be promoted in the context of the proceedings to be launched in the court mentioned in the previous paragraph. We will not elaborate on those proceedings, since the assumption of the question is that the assets at stake had already been seized.

105 Art 109 of the Rome Statute provides that if a State is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property and assets ordered by the court to be forfeited, accordingly, both methods of enforcement are applicable.

a) To execute the delivery of assets and items, provisions relating to seizure apply subject to the necessary adaptations, followed by searches and other necessary measures, should the person against whom the proceedings have been launched fail to deliver such assets and items voluntarily. (Article 861(1) of the Civil Procedural Code).

b) In the case of movable property to be determined by counting, weighing or measuring, the enforcement agent shall order all indispensable operations to be carried out in their presence and shall deliver the quantity due to the party seeking enforcement (Article 861(2) of the Civil Procedural Code).

c) In cases relating to real estate, the enforcement agent grants the ownership to the party seeking enforcement by giving them the necessary documents and keys, and notifies the person against whom the proceedings have been launched, the tenants and anyone on possession for them to respect and recognise the rights of the party seeking enforcement (Article 861(3) of the Civil Procedural Code).

d) Should the property be owned jointly by other interested parties, the party seeking enforcement shall be vested with ownership of their share (Article 861(4) of the Civil Procedural Code).

e) Once the property has been handed over, if the decision that decreed it is revoked or if, for any other reason, the previous possessor regains the right to it, they may request that it be restored (Article 861(5) of the Civil Procedural Code).

f) Where the enforcement proceedings concern the main dwelling of the person against whom the proceedings have been launched or property that is rented, the enforcement agent shall suspend the proceedings if it is shown, by a medical certificate stating a reasonable period of time during which the enforcement should be suspended, that the proceedings endanger the life of the person staying on site for reasons of acute illness. In such cases, the enforcement officer shall draw up a report (*auto de penhora*), attach the documents exhibited and warn the person that the enforcement shall continue unless, within 10 days, they request the judge to confirm the suspension. Within five days, the enforcement judge, after hearing the party seeking enforcement, shall decide to maintain the suspension of enforcement or order the lifting of the suspension and the immediate resumption of the proceedings (Articles 861(6), 862 and 863(3), (4) and (5) of the Civil Procedural Code).

7) In the second case (*pagamento de quantia certa*), and pursuant to Article 726(6) of the Civil Procedural Code, the person against whom the proceedings have been launched is notified to deliver, pay or oppose to the enforcement proceedings within 20 days.

a) According to Article 727 of the Civil Procedural Code, the party seeking enforcement may request that the seizure be carried out without prior summons of the person against whom the proceedings have been launched, provided that they invoke facts justifying the fear of loss of patrimonial guarantee (*garantia patrimonial*) of their credit and immediately offer means of proof.

b) The execution of the seizure shall be preceded by any steps the enforcement agent deems useful for the identification or location of seizable assets, to be carried out within 20 days. Whenever necessary, the enforcement agent shall search the databases of the tax administration, social security, real estate, commercial and vehicle registries and other similar registries or archives for all information on the identification of the person against whom the proceedings have been launched, as well as the identification and location of their assets (Article 749(1) of the Civil Procedural Code).

c) If no attachable assets are found within three months, the enforcement agent shall notify the party seeking enforcement to specify which assets are to be seized in the execution. Simultaneously, the person against whom the proceedings have been launched shall be notified to indicate assets to be seized and informed that failure to do so or failure to indicate assets to be seized may result in a penalty of 5 per cent of the debt per month, with a global minimum limit of EUR 1,020, if there is a subsequent renewal of the enforcement proceedings and the existence of seizable assets is verified (Article 750(1) of the Civil Procedural Code).

d) If neither the party seeking enforcement nor the person against whom the proceedings have been launched indicates any seizable assets within 10 days, the enforcement shall be terminated without further action (Article 750(2) of the Civil Procedural Code).

e) With regard to the order in which the seizures are to be carried out, Article 751(1) of the Civil Procedural Code states that they shall commence with property the pecuniary value of which is more easily obtained and appropriate to the amount of the credit pursued.

f) The indications of the assets which the person seeking the enforcement wishes to be seized as a priority must be respected (Article 751(2) of the Civil Procedural Code).

g) It is important to note that there are seizure limits regarding salary and non-disposable assets (Article 737 of the Civil Procedural Code).

8) The manner in which the seizure is carried out will differ depending on the type of asset at stake (e.g. real estate, bank accounts, stocks, jewelry, works of art). The details appear in Article 755 *et seq* and Articles 764; 768; and 773 of the Civil Procedural Code. The form of sale of assets is also prescribed by the terms of the Civil Procedural Code. Decisions regarding the sale rest with the enforcement agent after hearing the person seeking enforcement, the person against whom the proceedings have been launched, and creditors with guarantees on the assets being sold (Article 812 of the Civil Procedural Code).

a) The enforcement agent must promptly deliver the sums they hold, which includes the proceeds of the sale, to the party seeking the enforcement (Article 168(1)(c) of the Statute of the Association of Solicitors and Enforcement Agents).

b) According to Article 796(1) of the Civil Procedural Code, the steps required for payment must be taken within three months of the seizure.

Challenging enforcement

9) Both *entrega de coisa certa* and *pagamento de quantia certa* proceedings may be opposed by the convicted person by invoking Article 729 of the Code of Civil Procedure to claim: (i) that the enforceable title does not exist or its not enforceable; (ii) falsity of the proceedings with impact on the enforcement of the decision; (iii) lack of any procedural requirement of the enforcement proceedings; (iv) lack of the defendant's intervention in the main proceedings; (v) uncertainty, unenforceability, or illiquidity of the obligation to be enforced; (vi) previous *res judicata*; (vii) any event with possible extinctive or modificative effect on the obligation, supervenient to the decision to be enforced and provided it is proven by document. The statute of limitation of the obligation, however, can be proved by any means; (viii) counter-credits over the creditor party to operate a clearing of debts; or (ix) where the decision has been taken based on the defendant's confession or on a transaction, based on any cause that could lead to the voidness (nullity or annullability) of those acts.

10) In *entrega de coisa certa* proceedings, the convicted person may also invoke improvements made in the asset at stake (which could prevent the delivery of the same asset, considering its present value). In addition, these enforcement proceedings may be suspended whenever it concerns property that is rented.

    a) In such cases, the enforcement agent shall suspend the proceedings if it is shown, by a medical certificate stating the justified period of time during which the enforcement should be suspended, that the proceedings endanger the life of the person staying on site for reasons of acute illness. The enforcement officer shall draw up a certificate of the occurrences, attach the documents exhibited and warn the person that the enforcement shall continue unless, within 10 days, they request that the judge confirm the suspension. Within five days, the enforcement judge, after hearing the party seeking enforcement, shall decide to maintain the suspension of enforcement or order the lifting of the suspension and the immediate resumption of the proceedings (Articles 863 (2) and (3) of the Civil Procedural Code).

    b) According to Articles 864 and 865 of the Civil Procedural Code, the convicted person may request the postponement of the delivery in case the property is rented as a dwelling, for imperative social reasons, and the tenant must immediately provide the necessary evidence. The deferment of the eviction is decided by a judge, taking into account the requirements of good faith, whether the tenant has another dwelling immediately available, amongst others, and may only be granted if specified grounds are met.[106]

11) In the context of *pagamento de quantia certa* proceedings, the party may invoke specific arguments against the seizure and selling of the assets.

12) Depending on the grounds, if the opposition of the convicted person succeeds, the enforcement of the ICC decision may be compromised. For instance, if the opposition is reasoned in the arguments mentioned in paragraph 9 (i), (ii), (iv), (vi), (vii) and (ix) above, it is possible that the Portuguese State would not be able to enforce the decision.

106 Namely: (1) in case of termination due to non-payment of rents, the lack of the same being due to the lack of means of the tenant, which is presumed in relation to the tenant in receipt of unemployment benefit, earnings of a value equal or inferior to the minimum wage, or social integration income; (2) that the tenant has a disability with a proven degree of incapacity above 60 per cent; (3) the petition for the postponement of the eviction is considered urgent; and (4) the deferment cannot exceed a period of five months counted from the date of the transit in *rem judicatum* of the decision that granted it.

2.	**Handing assets to the ICC**	1) Handover of assets to the ICC is only possible in the context of enforcement proceedings (which in turn depend on the revision and confirmation of the final ICC decision in Portugal). However, in this context, a judicial decision is not required unless the convicted person opposes delivery of the assets to the ICC. 2) There is no provision for Portugal to impose conditions when handing over assets to the ICC.
3.	**Timing of cooperation with forfeiture request**	1) The proceedings to obtain the confirmation and revision of the decision are urgent (which means that: (a) they are not suspended, for instance, in judicial holidays; and (b) these procedural acts and hearings take precedence over other matters which are not urgent). 2) The request for confirmation and revision of the decision shall be decided (Articles 100(4) to (7) of Law No. 144/99): a) within six months from the date when the case entered the court in case the convicted person is under custody; b) within 2 months in case the request refers to a decision applying a penalty of deprivation of liberty that exceptionally could be inferior to one year due to extraordinary circumstances, for instance related to the health conditions of the convicted person or any other familiar or professional reasons; and c) in case of appeal, the deadlines mentioned in (i) and (ii) above increase to nine and three months, respectively. Under Portuguese law, when there is a civil decision (i.e. relating to financial compensation) issued in connection to the criminal proceedings, both decisions may be confirmed and revised together. The timings stated above will apply to the civil decision insofar as it is related to the criminal decision. 3) Once the decision is confirmed, it would be subject to proceedings for its enforcement. It is difficult to provide a time frame for the conclusion of the same proceedings, since we have not identified publicly available statistical data regarding enforcement periods.
D. Other considerations		
1.	**Examples of ICC Requests**	There has only been one instance in which cooperation with Portugal was requested by the ICC, namely in connection with *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01). The Pre-Trial Chamber addressed a request to Portugal for the identification, tracing, freezing and seizure of Mr Bemba's assets. The request was followed through by the Portuguese authorities. However, given that Mr Bemba was acquitted, there was no forfeiture of such assets. The documentation available provides little insight into the practical avenues taken in order to implement the request.

2.	**Collaboration between government departments** **Collaboration with civil society**	No specific mechanisms are provided for cooperation between government authorities and civil society (equally there is no express bar to cooperation). Interdepartmental cooperation and coordination in Portugal is commonly and frequently utilised in the course of criminal proceedings, however, there is no specific cooperation requirement for the purposes of ICC requests. Articles 262, 263 and 267 CCP provide that the Public Prosecutor in charge of a criminal investigation phase may request information from public and private entities. Key authorities would likely include the Real Estate Registry Office; Commercial Registry Office; Vehicle Registry Office; Bank of Portugal;[107] and Tax Authorities. As regards the management of assets, the depositary of the property will have to co-operate with the various entities in order, for example, to record the seizure in the applicable registries or to give orders to those entitled to carry out the seizure.
3.	**Cross-border cooperation**	There are no specific mechanisms for encouraging coordination with other States Parties specifically in responding to ICC asset recovery requests in Portugal.
4.	**Purposes for seizure and freezing of assets**	Portuguese domestic law provides that items seized as a result of a confiscation order shall revert to the State enforcing the sentence, but may be returned to the convicting State, at its request, if they are of particular interest to the latter and if reciprocity is guaranteed (Article 110 (4) of Law No. 144/99). This rule must be interpreted in combination with Article 75 (and 109) of the Rome Statute, and thus the reciprocity requirement would not apply to requests made by the ICC.
5.	**The effect of sanctions meeting ICC requests**	There is no legal stipulation in Portuguese law under which the assets frozen in accordance with UN or any other sanctions (namely EU sanctions) may be used for any purpose, in particular to be confiscated or sold as to pay debts or indemnify victims or crimes, including victims of crimes prosecuted by the ICC. It may even be argued that the fact that assets are frozen under restrictive measures might hinder the seizure or attachment of such assets, given that, in these instances, there is an absolute ban on handling the assets.

107 The General Framework for Credit Institutions and Financial Companies (Decree Law N.º 298/92) provides exceptions to the duty of secrecy and the obligation to cooperate with judicial authorities in criminal proceedings.

ANNEXURE 6: Kingdom of Spain [Readiness rating: 5 – FAIR]

No	Question	Response
1.	**Primary Legislative Instrument**	Organic Law 18/2003, 10 December 2003, on Cooperation with the International Criminal Court (**Organic Law 18/2003**)[108] entered into force on 11 December 2003. It regulates the systematic and procedural aspects that allow the application of the Rome Statute and the legal incorporation of Spain into the procedural and judicial system of the International Criminal Court.
2.	**Additional implementing legislation**	For the matters not regulated in Organic Law 18/2003, organic and procedural domestic laws will be applicable. In this sense, the most relevant are: • Organic Law 10/1995, 23 November, which regulates the Criminal Code (**Spanish Criminal Code**),[109] in particular Articles 127 to 127 *septies*. • The Criminal Procedure Act,[110] in particular the Sixth Additional Provision, 5 October 2015, introducing provisions under the rubric "*Office for Asset Recovery*". • Law 50/1981, of 30 December 1981, which regulates the Organic Statute of the Public Prosecutor (**Law 50/1981**).[111] • Royal Decree 948/2015 of 23 October, regulating the Office for Asset Recovery and Management (**RD of the Office for Asset Recovery**).[112] • Circular 4/2010, of 30 December 2010, on the functions of the Prosecutor in the investigation of assets in the field of criminal proceedings (**Circular 4/2010**).[113]
3.	**Competent authority and decision-maker/s**	• Competent authority who decides to implement requests: Ministry of Justice (*Ministerio de Justicia*). • Decision-maker in case of challenges to a request: Council of Ministers (*Consejo de Ministros*).
4.	**Key strengths of enforcement framework**	• Spain is well prepared to search for, manage and liquidate assets. In this regard, there is an institution solely dedicated to this purpose (Asset Recovery and Management Office (the **OAPM**)); • 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); and • Additionally, in a post-conviction scenario, executing the order made by the ICC to forfeit assets is a straightforward process.

108 https://www.boe.es/buscar/act.php?id=BOE-A-2003-22715; see English translation: https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Organic_Act_18_2003_of_10_December_on_Cooperation_with_the_Intenational_Criminal_Court_%28Ley_de_coop.PDF.

109 In force on 24 May 1996. https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf.

110 In force on 3 January 1883. https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal%20Procedure%20Act%202016.pdf.

111 In force on 2 February 1982. https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-7184.

112 In force on 24 October 2015. https://www.boe.es/buscar/act.php?id=BOE-A-2015-11427.

113 https://www.boe.es/buscar/doc.php?id=FIS-C-2010-00004.

5.	**Notable weaknesses of enforcement framework**	• Although the Spanish legal jurisdiction and authorities are committed to cooperating with ICC requests, the procedure to agree to collaboration may become burdensome (especially noting that it has to go through various Ministries and institutions that might work at a slower pace). • The pre-trial precautionary measures are heavily influenced by the "innocent until proven guilty" (*presunción de inocencia*) principle. Therefore, there has to be a convincing evidentiary component to have precautionary measures, or seizure or freezing of assets prior to a conviction. Additionally, certain conditions have to be met by law in order to grant precautionary measures. • There is no specific regulation that provides for a procedure to hand over assets to the ICC.
6.	**Recommendations**	• In order to improve the overall process for cooperating with the ICC, 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.
A. Identifying and tracing assets		
1.	**Requests for assistance**	Article 20 of Organic Law 18/2003[114] requires Spanish judicial bodies as well as other competent authorities to comply with the requests for cooperation made by the ICC in relation to Article 93 of the Rome Statute. The procedure can be summarised as follows: 1) The Ministry of Justice (*Ministerio de Justicia*) receives the ICC cooperation request. This request must be complied with provided it is not contrary to Spanish national law and has the objective of facilitating ICC proceedings.[115] 2) The Ministry of Justice requests urgent information from the Public Prosecutor office on whether Spanish jurisdiction has been/is being exercised or if an investigation has been initiated in Spain.[116] 3) The Public Prosecutor responds to the Ministry of Justice. 4) If, in light of the information from the Public Prosecutor, there appears to be no bar to admissibility, the Ministry of Justice informs the ICC that Spain will comply with the request and informs the ICC of the Spanish body to which the request has been transmitted.[117]

114 For a more detailed explanation of the ramifications of this particular Article, please see Kai Ambos/Ezequiel Malarino/Gisela Elsner, "*Cooperación y Asistencia Judicial con la Corte Penal Internacional*" (Cooperation and Judicial Assistance with the International Criminal Court) pp. 337 *et seq*.
115 Organic Law 18/2003, arts 6.1, 8.4 and 20.
116 Organic Law 18/2003, art 8.1.
117 Organic Law 18/2003, arts 8.5 and 20.

		5) If, the information provided by the Public Prosecutor indicates that Spanish jurisdiction has been/is being exercised or that an investigation has been initiated in Spain, the Ministry of Justice consults with the Minister of Foreign Affairs to generate a proposal on admissibility (or challenge or deferral).[118] Thereafter, the Council of Ministers makes the decision regarding whether to accept or defer the request.[119] 6) If a request is determined not to be admissible by the Council of Ministers, the Ministry of Justice will formulate the request for inhibition or deferral to the ICC and carry out the remaining actions to comply with the decision made by the Council of Ministers. While lacking precedent, it appears logical that Spain and the ICC will then engage in consultations to resolve the issue. In summary, the Ministry of Justice makes the decision regarding whether to accept the request to cooperate with the ICC. However, if the admissibility is challenged by the Minister of Justice and the Minister of Foreign Affairs, the Council of Ministers must make the decision. In all cases, the Ministry of Justice will be the body responsible for notifying the ICC of acceptance/rejection of a request.
2.	**Formal conditions applicable to requests**	1) A request must be presented in writing and in urgent cases may be carried out through any means which allow for a reliable written record.[120] 2) The request must include information required by Article 96(2) of the Rome Statute, including as much information as possible on the location or identification of the assets that must be found, identified or registered; a brief description of the facts that give rise to the request; the description of any procedural particularity that must be followed in the practice of the requested diligence (as well as the reasons for it); and any other information that may be necessary for the performance of the requested diligence.[121] Note that Article 96(2) is not specifically incorporated into the Organic Law 18/2003.
3.	**Refusals/ postponements of requests**	1) National Security or confidentiality: When the request of the ICC could affect the national defence or the State's security, or it concerns documents that have been transmitted to Spain confidentially by another State, an international organisation or an intergovernmental organisation, the Ministry of Foreign Affairs (*Ministerio de Asuntos Exteriores*) will carry out internal consultations (as well as with the affected parties),[122] and will later inform the ICC of the result of such consultations.[123] a) The purpose of these consultations is to try to establish how best to assist the ICC.

118 Organic Law 18/2003, art 8.2.
119Organic Law 18/2003, art 7.1.
120 Rome Statute, art 96. For a more detailed explanation of the ramifications of this particular Article, please see Kai Ambos/Ezequiel Malarino/Gisela Elsner, "*Cooperación y Asistencia Judicial con la Corte Penal Internacional*" (Cooperation and Judicial Assistance with the International Criminal Court) pp. 337 *et seq*.
121 For a more detailed explanation of the ramifications of this particular Article, please see Kai Ambos/Ezequiel Malarino/Gisela Elsner, "*Cooperación y Asistencia Judicial con la Corte Penal Internacional*" (Cooperation and Judicial Assistance with the International Criminal Court) pp. 337 *et seq*.
122 Note that these consultations are restricted to the affected party/parties. Organic Law 18/2003 does not include provisions as to how these consultations should be carried out. The mechanism will depend on the other party/parties (if it is another State or international organisation).
123 Organic Law 18/2003, art 20.2.

b) Once consultations have been carried out, the Ministry of Foreign Affairs will: (i) explain to the ICC why the requested assistance cannot be provided; (ii) together with the ICC, consider the possibility of dealing with the request in another way; (iii) develop its modification or withdrawal; or (iv) ensure, together with the ICC, the protection of the confidential or restricted information.[124]

2) Jurisdiction or admissibility: Article 9 of the Organic Law 18/2003 provides that only the Council of Ministers at the instance of the joint proposal of the Minister of Justice and the Minister of Foreign Affairs may challenge the jurisdiction of the Court or the admissibility of the case.

a) This challenge applies when the Spanish courts have heard or are hearing the matter due to it implicating Spanish territory or Spanish citizens, when a judgment has been handed down, or when the dismissal of the case has been decreed.

b) The Ministers' agreement enables the Ministry of Justice to carry out the challenge, which will be formalised as soon as possible before the start of the ICC trial or, in exceptional circumstances at the start of the ICC trial and, only in cases of the matter being *res judicata* in Spain, at a later time after the ICC trial has begun.[125]

c) If, despite the request for inhibition made to the ICC Prosecutor, the competent ICC Chamber authorises the ICC Prosecutor to proceed with the investigation or maintains its jurisdiction, the Spanish jurisdictional body will disqualify itself in favour of the Court and, at the Court's request, will send to the ICC all the documentation regarding the proceedings.[126] Such documentation may include information regarding assets if they have been identified at this stage.

d) In order to facilitate the process before the Court, once the admissibility of the case and the jurisdiction of the Court have been confirmed and provided that they are not prohibited by Spanish law, the judicial bodies and the other authorities involved will comply with the requests for cooperation formulated by the Court provided for in Article 93 of the Rome Statute.[127]

e) The Ministry of Justice will acknowledge receipt of the cooperation request, determine which is the relevant internal authority or judicial body to which the request should be transmitted[128] and inform the ICC of this decision. Organic Law 18/2003 does not indicate the specific bodies to which the request must be submitted; therefore, national law must be applied to establish which authority is competent.

124 Organic Law 18/2003, art 20.4.
125 Organic Law 18/2003, art 9.2.
126 Organic Law 18/2003, art 10.
127 Organic Law 18/2003, art 20.1.
128 Organic Law 18/2003 does not indicate the specific bodies to which the request must be submitted; therefore, national law must be applied to establish which authority is competent. In this sense, according to the Sixth Additional Provision of the Spanish Criminal Procedure Act, the OAPM will be competent to carry out the ICC request.

		f) In the event that the relevant internal authority considers that the ICC request cannot be carried out, it should submit its reasons to the Ministry of Justice, which must carry out the procedure set forth in section 2).[129] Ultimately the decision to carry out a request lies with the Council of Ministers. A challenge brought through the Minister of Justice and Minister of Foreign Affairs is the only procedure for challenging the jurisdiction of the ICC or the admissibility of the case contained in Organic Law 18/2003. 3) It does not appear that the accused may oppose the decision of Spain to cooperate with the ICC or the request of the ICC to locate their assets.
4.	**Timing of requests**	1) There are no prescribed time periods for implementing authorities to comply with a request or complete investigations. 2) The sole time limit provided in Organic Law 18/2003 applies to the deferrals of requests resulting from Spain already being seized of jurisdiction. In terms of Article 8 Organic Law 18/2003, if the Ministry of Justice receives notification from the Prosecutor of the ICC of the initiation of an investigation into offences which occurred in Spanish territory or where alleged to be perpetrated by Spanish nationals,[130] it will request urgent information from the General Public Prosecutor on the existence of criminal proceedings or investigations in Spain.[131] If the information provided indicates that Spanish jurisdiction has been exercised/is being exercised or, as a result of the notification received, an investigation has been initiated by the Spanish authorities, the Ministers of Justice and Foreign Affairs have 20 days from receipt of the request to submit a joint proposal to the Council of Ministers to request the inhibition of the ICC.[132]
5.	**Implementing Requests**	1) Implementation of a request must be carried out according to the common asset location procedure established in Spanish legislation, as there is no specific procedure to ascertain whether a person has benefitted from an ICC crime or to identify property derived from an ICC crime. 2) The OAPM is the authority ordinarily in charge of the search and location of assets and proceeds of crime located either within or outside national territory, as well as their safeguarding and management.[133] Accordingly, the office responsible for managing such assets would be the OAPM,[134] in collaboration with the corresponding judge in charge of the investigation and the Public Prosecutor's Office. a) The OAPM may act when entrusted to do so by the competent judge or court as well as directly at the request of the Public Prosecutor[135] in the scope of investigative proceedings; international legal cooperation; or an autonomous confiscation procedure. The judge or court may designate the OAPM to act, either *ex officio*, at the request of the Public Prosecutor's Office or the OAPM itself.[136]

129 Organic Law 18/2003, arts 20.3 and 20.4.
130 Organic Law 18/2003, art 8.1.
131 Organic Law 18/2003, art 8.1.
132 Organic Law 18/2003, art 8.2.
133 Art 3 of RD of the Office for Asset Recovery.
134 As defined above, the Asset Recovery and Management Office. See the website here: https://www.mjusticia.gob.es/es/areas-tematicas/oficina-recuperacion-gestion.
135 Art 1 of RD of the Office for Asset Recovery.
136 Art 367 *septies* of Criminal Procedure Act.

		b) The regulatory provisions of the OAPM (and more specifically, the General Sub-directorate for the location and recovery of assets[137]) provide that this body will coordinate with the State Security Forces and Agencies (*Fuerzas y Cuerpos de Seguridad del Estado*) for the location and recovery of assets.[138] It may also seek the collaboration of any other public or private entities, which will be obliged to provide it in accordance with its specific regulations.[139] c) Note that the location or management of assets whose sole purpose is the payment of a fine does not fall within the authority of the OAPM.[140] Similarly, the OAPM is not responsible for identifying assets at post-conviction stage (a function performed by the Public Prosecution). However, an essential function of the OAPM is the technical advice to the courts, tribunals and prosecutors who request it, regarding the execution of embargoes and seizures.[141] 3) The Public Prosecutor's Office may carry out, by itself, with the technical assistance of the OAPM or through other authorities or officers of the Judicial Police, the investigative steps that are necessary to locate the assets or rights owned by the person in relation to whom the forfeiture had been agreed (i.e. at post-conviction stage).[142] a) The authorities and officials from whom the Public Prosecutor seeks collaboration are obliged to provide it under penalty of incurring a crime of disobedience.[143] The Public Prosecutor may also contact financial entities, public bodies and registries and natural or legal persons to facilitate the list of assets or rights of a convicted party of which they have evidence.[144] b) The competent court may also collect data from these institutions within enforcement proceedings (i.e. post-conviction). 4) Furthermore, in the field of locating assets, the Intelligence Center against Terrorism and Organized Crime of the Ministry of the Interior (**CITCO**) may, through the established international police channels, carry out the exchange of international police information related to the location of goods.[145]
B. Seizing and freezing assets		
1.	**Deciding requests for seizing and freezing assets**	1) As is the case with requests for identification and tracing of assets, Article 20 of Organic Law 18/2003[146] requires Spanish judicial bodies as well as other competent authorities to comply with the requests for cooperation made by the ICC in relation to Article 93 Rome Statute once the initial request has been submitted to the Ministry of Justice and provided that the request is compliant with Spanish national law and has the objective of facilitating ICC proceedings.[147]

137 Art 6.1. a) of RD of the Office for Asset Recovery.
138 Art 6.1. a) of RD of the Office for Asset Recovery.
139 Sixth Additional Provision of the Criminal Procedure Act.
140 Art 3.1 of RD of the Office for Asset Recovery.
141 Art 3.3 of RD of the Office for Asset Recovery.
142 Art 803 *ter* q of the Criminal Procedure Act.
143 Art 803 *ter* q of Criminal Procedure Act.
144 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.
145 Third Additional Provision of RD of the Office for Asset Recovery.
146 For a more detailed explanation of the ramifications of this particular Article, please see Kai Ambos/Ezequiel Malarino/Gisela Elsner, "*Cooperación y Asistencia Judicial con la Corte Penal Internacional*" (Cooperation and Judicial Assistance with the International Criminal Court) pp. 337 *et seq*.
147 Art 20.1 of Organic Law 18/2003.

		2) The Ministry of Justice will acknowledge receipt and inform the ICC of the relevant internal authority or judicial body to which the request has been transmitted.[148] The decision regarding whether the ICC's request can be honoured in accordance with Spanish law will, however, ultimately be made by the Council of Ministers. 3) In the event that the competent body considers that the ICC request cannot be carried out, it must submit its reasons to the Ministry of Justice, which must carry out the procedure set forth in the previous section.[149] This is the only procedure for challenging the jurisdiction of the ICC or the admissibility of the request contained in Organic Law 18/2003. Organic Law 18/2003 does not provide scope for challenge by the accused or third parties. Any such challenge can only be raised once these parties have been notified and in the course of the asset seizure/freezing processes set out below pursuant to the Spanish Criminal Code and Criminal Procedure Act. 4) There is no specific time frame when the ICC request for assistance in freezing or seizing the assets of accused persons needs to be responded to.
2.	**Implementing requests for seizing and freezing assets**	1) The Spanish Criminal system offers two routes for preventing dissipation of assets (both of which entail a judicial order). 2) According to Article 127 *octies* of the Spanish Criminal Code the assets can be seized, as well as placed in deposit by the judicial authority, from the moment of the first proceedings. This decision shall be taken at the judge's discretion. a) <u>Investigative/pre-trial stage seizure/freezing</u>: The seizure and freezing of assets, in accordance with Spanish Law, and more specifically, Article 127 *octies* can only be done in an investigative or pre-trial stage within the ICC proceedings, either as per Article 27 *octies* from the moment of the first proceedings or as a precautionary measure. Seizure or freezing of assets as a precautionary measure can be requested by the Public Prosecution or at a party's request (or even adopted *ex officio* during the investigative phase of proceedings or during the trial, to ensure the effectiveness of final forfeiture in case of conviction). However, for precautionary measures to be adopted the following requirements have to be met (in application of the *fummus boni iuris* and *periculum in mora* principles): i) There must be indications that suggest the commission of a crime that would entail final forfeiture of assets. ii) There must be a causal or instrumental relationship between the assets and the crime (that is, that the assets come directly or indirectly from criminal activity or that they have been used or intended to facilitate a crime, or represent the benefits, product or price of the crime). iii) There must be a risk that the assets will be hidden, destroyed, deteriorated or disposed of, or that their location, identification, recovery or definitive forfeiture will be made difficult or prevented, if the precautionary measures are not adopted.

148 Organic Law 18/2003 does not indicate the specific bodies to which the request must be submitted; therefore, national law must be applied to establish which judicial body is competent. In this sense, according to Arts 303 and 306 of the Spanish Criminal Procedure Act, the Instruction Judge (*Juez de Instrucción*) where the assets are located will be competent to decide on the ICC request.

149 Art 9 of Organic Law 18/2003.

iv) There must a proportionality and need for the precautionary measure, depending on the seriousness of the crime, the amount or value of the assets, the affectation of the rights and legitimate interests of third parties in good faith, or the protection of public or social interest.

b) Post-conviction forfeiture: In a post-conviction scenario, Article 127 of the Spanish Criminal Code would be applicable. The aforementioned Article provides that any penalty imposed for an intentional crime shall entail the forfeiture of the effects deriving therefrom. Thus, assets would not be frozen or seized, but rather forfeited.

3) Additionally, Article 803 *ter* l of the Criminal Procedure Act, which provides for forfeiture of assets outside of criminal proceedings (for instance, against third parties or accused persons that are deceased, are missing or cannot stand trial (as further detailed below)), allows the seizure or confiscation of assets as a precautionary measure to assure asset recovery in case forfeiture proceedings are successful.

a) The request must be implemented through legislative provisions dealing with forfeiture proceedings (which, as will be explained below, are different from the proceedings where criminal responsibility is determined). The request must justify the convenience or need to adopt the relevant precautionary measures to guarantee the effectiveness of asset recovery in the event of a success of the forfeiture proceedings.[150]

b) The request must include essential formal information[151] and also, in accordance with Article 803.3 *ter* I (which makes a reference to Spanish general procedure law[152]) must comply with the three essential assumptions that condition the adoption of precautionary measures under Spanish Law:[153]

i) *periculum in mora* (asset recovery in case of success of forfeiture proceedings may be endangered due to procedural delay);

ii) *fummus boni iuris* (the precautionary measures must be requested with sufficient evidence to support them, and, thus, must be linked to or be the profits of an alleged crime with a reasonable degree of legitimacy); and

iii) a petition for precautionary measures requires the petitioner to provide sufficient and adequate security, correlative to the limitation or difficulty that their application is likely to cause the person whose assets will be seized or frozen. Additionally, the security should guarantee any damages that may arise from the seizure of assets of the accused person. This requirement may be dispensed with by a judge in a specific case.[154]

150 Art 803 *ter* l of Criminal Procedure Act.

151 This information in particular is listed in art 803 *ter* I of the Criminal Procedure Act: (a) the persons against who the request is directed and their respective addresses; (b) the asset or assets whose confiscation is intended; (c) the punishable act and its relationship with the asset or assets; (d) the criminal classification of the punishable act in accordance with the Spanish Criminal Code; (e) the situation of the person against whom the request is directed with respect to the asset; (f) the legal basis for the confiscation; (g) the evidence; and, of course, (h) the request for precautionary measures.

152 Title VI of Book III of Law 1/2000, of 7 January, on Civil Procedure (the Civil Procedure Act), specifically art 72.

153 Art 764 of Criminal Procedure Act in relation to art 729 of the Civil Procedure Act.

154 There is jurisprudence in this regard, such as the decision of the Regional Court of Seville, Section 6, of 25 December March 2004, JUR 2004, 135603.

		4) The above possibilities for seizing/freezing of assets require either proof or a link between the seized/frozen assets or proceeds and a criminal activity (in the case of an ICC request, this would mean, a link with the ICC charges). On the other hand, however, while a forfeiture order from the ICC is not necessary, it could construe a strong argument towards the granting of precautionary measures.[155]
3.	**Rights of complaint or appeal**	1) Spanish legislation contemplates a specific procedure for an accused person to challenge freezing/seizure orders. 2) If the seizure of assets has been requested/ordered by the Court's discretion in accordance with Article 127 *octies* from the moment of the first proceedings. a) In accordance with Articles 217 of the Criminal Procedure Act, any decision or order granted by a court may be challenged before the judicial body that granted the order (*recurso de reforma*). However, only decisions which are specifically contemplated in the law are subject to appeal to a higher court. b) Spanish law is silent as to the possibility of challenging the order to seize assets and have them placed in deposit from the moment of the first proceedings. Accordingly, the defendant could challenge the decision against the court issuing the order, but not to the court of second instance.[156] 3) If the freezing or seizure of assets has been requested/ordered as a precautionary measure: a) As a general rule, the Court will grant the request of the prosecution after providing the accused person with the opportunity to make representations. b) Article 764 of the Criminal Procedure Act establishes that although precautionary measures can be adopted in criminal proceedings, the rules that must be followed for such precautionary measures are those of Law 1/2000, 7 January of Civil Procedure (the **Civil Procedure Act**). c) Article 734 of the Civil Procedure Act provides that, within five days from receipt of the prosecution's request for precautionary measures, the court will set a date for a hearing, in which the parties involved (including the accused and third parties affected by the adoption of the relevant precautionary measures) will be able to allege and make the representations and bring the evidence they deem necessary. d) Upon finalisation of the hearing, the court, within five days, will decide by means of a resolution on the adoption of the precautionary measures. An appeal against the decision may be lodged within 20 days from the issuance of the resolution by any of the parties to proceedings.[157]

155 It can be inferred from the spirit of the law by giving the ICC precedence over the Spanish jurisdiction (art 10 of Organic Law 18/2003).
156 Arts 217, 219 and 220 of Criminal Procedure Act.
157 Art 764 of Criminal Procedure Act in relation to art 735 of Civil Procedure Act.

4) Granting of precautionary measures without hearing the defendant:

   a) If the requesting party proves that there are reasons of urgency, or that any prior hearing may compromise the success of the precautionary measures, the court will hand down the order without further formalities (including a hearing) within five days.[158] In accordance with Article 739 of Civil Procedure Act, in case precautionary measures were adopted without previously hearing the defendant, the latter will be able to oppose them within 20 days from the issuance of the order.

   b) The opposition will be transferred to the requesting party, and the court will set a date for a hearing (following the provisions set out above).[159] Within five days of the hearing, the court will hand down its decision. The court's decision will be subject to appeal within 20 days from the order.

   c) Additionally, precautionary measures can be modified alleging and proving facts and circumstances that could not be taken into account at the time of their granting.[160] Any modifications shall be subject to the procedure described in point (a) above.

5) The grounds on which a possible challenge may be based are that the ICC request is not compliant with Spanish Law (to avoid cooperation with the Court, in accordance with Article 20 of Organic Law 18/2003, which establishes that any request must be compliant with domestic provisions). In order to have the precautionary measures overturned, it would grant the measures set forth above (*fummus boni iuri*, *periculum in mora* and security). Additionally, noting that in this case the measures have been adopted *inaudita parte*, the accused person could argue that the adopted measure is unfit for the purposes it intends, and may even provide further security to have the precautionary measure revoked.

6) Note that a possible challenge could also be based on the infraction of fundamental rights and freedoms recognised in the Constitution[161] (any rules related to such rights must be interpreted in accordance with the Universal Declaration of Human Rights as well as other international treaties).[162]

158 Art 764 of Criminal Procedure Act in relation to art 733.2 of Civil Procure Act.
159 Art 764 of Criminal Procedure Act in relation to art 741 of Civil Procedure Act.
160 Arts 764 and 766 of the Criminal Procedure Act in relation to arts 743 and 745 of Civil Procedure Act.
161 These rights are recognised in arts 14 through 29 (both inclusive) and art 30.2 of the Spanish Constitution and they are the following: (i) non-discrimination based on birth, race, sex, religion, opinion or any other condition or personal or social circumstance; (ii) right to life and physical and moral integrity, without, in any case, being subjected to torture or inhuman or degrading punishment or treatment; (iii) right to ideological, religious and worship freedom of individuals and communities without more limitations than necessary for the maintenance of public order. No one may be forced to declare their ideology, religion or beliefs; (iv) right to liberty and security. No one can be deprived of their freedom, except with the observance of what is established in this art and in the cases and in the manner provided by law (preventive detention and informing the detainee of his rights); (v) right to honour, to personal and family privacy and to one's own image. Inviolability of the home. Communications secret. Limitation of the use of information technology to guarantee honour and personal and family privacy; (vi) freedom of residence and movement in Spanish territory; (vii) freedom of expression/ban on censorship; (viii) freedom of assembly; (ix) right of association; (x) right to participate in public affairs, directly or through representatives; (xi) effective judicial protection; (xii) principle of legality (no one can be convicted or penalised for actions or omissions that at the time of their occurrence do not constitute a crime, misdemeanour or administrative infraction, according to the legislation in force at that time); (xiii) prohibition of courts of honour; (xiv) right to education; (xv) right to organise and strike; (xvi) right of individual and collective petition; and (xvii) objection of conscience (for compulsory military service and abortion).
162 Art 10.2 of the Spanish Constitution.

a) The Spanish legal system provides for a specific challenge named "*recurso de amparo*" (appeal for protection), before the Constitutional Court, to challenge judicial decisions (and other State or institutional acts or omissions) that might infringe constitutionally recognised fundamental rights (these are the rights recognised in Articles 14 through 29 and 30.2 of the Spanish Constitution). There are certain points regarding this challenge that should be considered:

   i) To file an appeal for protection, it is necessary to have previously exhausted the judicial route (in other words, the decision to be challenged must be final), as well as to have invoked the violation of the fundamental right that it intends to assert before the Constitutional Court from the beginning of judicial proceedings. An appeal for protection should not act as an additional instance of proceedings.

   ii) In general, filing an appeal for protection does not suspend the effects of the challenged decisions or actions. However, the Constitutional Court, *ex officio* or at the request of a party, may order its total or partial suspension when the execution of the challenged act or decision would cause the plaintiff a damage that would render the appeal itself purposeless.

   iii) Any natural or legal person who invokes a legitimate interest, as well as the Public Prosecutor, is entitled to file an appeal for protection. Additionally, any person favoured by the challenged proceedings may also participate in the process, as a defendant.

b) If there has been an infringement of any of the rights protected in the European Convention of Human Rights, a challenge before the European Court of Human Rights can also be filed. To do that, the Spanish domestic judicial system must have been exhausted first. The plaintiff must invoke before the national judicial bodies, clearly and precisely, the right or freedom which is considered to have been violated as well as the pertinent evidence and arguments to support the claim, and they must do so in all available domestic instances, and challenging every unfavourable decision (unless there is consolidated jurisprudence contrary to the basis of the claim or the appeal is manifestly inadmissible).

It is important to note that if the challenge before the European Court of Human Rights were to be successful, it does not automatically annul or modify the decisions made by the Spanish Court. In this sense, the European Court only makes a declaration of whether there has been a violation of the rights provided for in the European Convention of Human Rights and, where appropriate, it can grant fair reparation to the plaintiff, which may consist of compensation for moral or material damages, the restoration of the situation prior to the violation, or in the adoption of general or individual measures by the State to prevent a repetition of the violation.

4.	**Management of frozen/seized assets**	1) If an application for asset freezing/seizure is successful, the office responsible for managing such assets is the OAPM.[163] The OAPM's sub-directorate general for asset preservation, administration and realisation is responsible for the conservation, management and administration of any asset obtained or recovered from crime.[164] In addition, this sub-directorate is in charge of the management of the consignments account, as well as the realisation of assets. In addition, it offers technical advice to judicial bodies (as well as to the Public Prosecution). 2) As part of its functions, this sub-directorate is responsible for deciding on the use to be given to the seized goods and on the protection measures to be adopted, provided that its provisional use is previously authorised by the judicial body.[165] 3) The OAPM is guided by the RD of the Office for Asset Recovery (see definition above), as well as by the Order JUS/188/2016 of 18 February, which determines its scope of action. In this regard, the aforementioned provisions allow the OAPM to use protection methods and to destroy the assets under certain circumstances[166], provided that the relevant judicial authority previously authorised it.[167]
5.	**Management of assets at conclusion of ICC Proceedings**	1) If the accused person is acquitted, assets frozen or seized should return to the relevant accused person.[168] In ordinary circumstances, a court would order the return of assets to the owner in an acquittal order and require that OAPM transfer the assets to the owner (where these are held by the OAPM). It is also possible for an acquitted party to request the return of assets in terms of Article 635 of the Spanish Criminal Procedure Act (which may be the case where an ICC order of acquittal does not specifically contemplate release of Spanish-seized/frozen assets). 2) If there is a conviction, the assets will be forfeited by the OAPM. In this regard there are no regulations stating a specific procedure to hand those assets over to the ICC. 3) If there were no victims, or the civil responsibility owed to the victims had been fulfilled, in accordance with Article 127 *octies* of the Spanish Criminal Code, the proceeds would be transferred to the State (again, in accordance with RD of the Office for Asset Recovery).
C. Forfeiting assets of accused persons and handing them over to the ICC		
1.	**Implementing forfeiture requests**	1) In the case of an enforcement request, the Ministry of Justice will transfer the documentation to the Public Prosecutor (*Fiscal General del Estado*) so that they may request the enforcement before the competent court and make the assets obtained available to the Ministry of Justice and to the ICC.[169] The competent court will then notify the involved parties.

163 See the website here: https://www.mjusticia.gob.es/es/areas-tematicas/oficina-recuperacion-gestion.
164 Art 6.1. b) of RD of the Office for Asset Recovery.
165 Art 6.1. b) of RD of the Office for Asset Recovery.
166 According to art 40 of the RD of the Office for Asset Recovery assets will be destroyed when the Court decrees as much. In this sense, in accordance with art 367 *ter* of the Criminal Procedure Act, the Court could decide to have the assets destroyed if: (i) destruction is either necessary or convenient due to the very nature of the seized assets; (ii) there is a real or potential danger involved in the storage or custody of the assets.
167 Art 6.1.(b) 1º of RD of the Office for Asset Recovery.
168 Art 635 of Criminal Procedure Act.
169 Art 22.7 of Organic Law 18/2003.

2) Spanish law permits forfeiture of assets derived from the commission of the crime, but also the means or instruments with which the crime has been prepared or executed and profits of the crime (Article 127.1 of the Spanish Criminal Code). Forfeiture requires a court order and, as a general rule, must be post-conviction. The latter derives from Article 127 *septies* of the Spanish Criminal Code, in terms of which a person cannot be deprived of their assets, nor have them forfeited, unless there is a conviction against them or,[170] at least *prima facie* evidence that the goods or effects came from a criminal activity in relation to certain crimes.[171] Therefore, in most cases, the main caveat in order to begin the process or asset forfeiture is to have a prior conviction for a punishable crime. All the crimes over which the ICC has jurisdiction are considered "punishable crimes".

3) Article 22.7 of Organic Law 18/2003 provides that upon obtaining any sums or assets as a result of confiscation or forfeiture in accordance with domestic law, the assets or sums obtained will be made available to the Ministry of Justice for their transfer to the Court. However, there is no specific procedure for having forfeited assets handed to the ICC. The following reflects the relevant forfeiture procedures and certain domestic provisions that might be relevant to their provision to the ICC.

<u>Guidelines and presumptions in respect of proceeds of crime and dissipation of assets</u>

4) The Spanish Criminal Code[172] provides the following guidelines to identify the proceedings of crime (applicable where the accused person has obtained, from his/her alleged criminal activity, a profit of more than EUR 6,000.):[173]

   a) The disproportion between the value of the goods/effects and the lawful income of the accused person.

   b) The concealment of ownership or any power of disposal over the goods/effects through the utilisation of persons or entities, in tax shelters or zero-tax territories that conceal or hinder the true ownership of the property.

   c) The transfer of goods or effects through operations that hinder or prevent their location or destination and that lack a valid legal or economic justification.

5) In addition, the following presumptions will apply:[174]

   a) All the assets acquired by the convicted person within the period of time six years prior to the date of the opening of the criminal procedure are deemed to have been derived from their criminal activity. For these purposes, it is presumed that the goods have been acquired on the earliest date on which it is stated that the subject has disposed of them.

170 This is a reflection of the "innocent until proven guilty" principle (*principio de presunción de inocencia*) that governs the Spanish criminal law system.
171 Art 127 *bis* 1 of the Spanish Criminal Code.
172 Art 127 *bis* 2 of the Spanish Criminal Code.
173 Art 127 *quinquies* of the Spanish Criminal Code.
174 Art 127 *sexies* of the Spanish Criminal Code.

b) All expenses incurred by the convicted person during this period of time were paid with funds from the criminal activity.

c) All the goods were acquired free of charges.

6) However, the court may agree that the foregoing presumptions are not applied in relation to certain assets when, in the specific circumstances of the case, they are revealed to be incorrect or disproportionate.[175]

Confiscation of assets without a conviction

7) Article 127 *ter* of the Spanish Criminal Code provides that the relevant Spanish Court may order the confiscation of a person's assets without a conviction when the asset's criminal origin or background has been proven in an adversarial process and one of the following situations takes place:[176]

a) the accused person has died or suffers from a chronic illness that prevents prosecution;

b) the accused person has not appeared in the proceedings and therefore the crimes cannot be prosecuted in a reasonable time frame;

c) the accused will not incur a penalty (due to exemption from criminal responsibility) or because criminal responsibility has been extinguished.

Note that the confiscation situations referred to above may only be directed against the person who has been formally accused and there must be reasonable indications of criminality.[177]

Once the confiscation claim has been filed, it will be forwarded to the defendant, so that they can proceed to answer it within 20 days of notification.[178] Lack of an answer to the claim by the defendant who has previously appeared is equivalent to their *ficta confessio* and, consequently, to the acceptance of the confiscation.[179]

Forfeiture of assets transferred to third parties

8) The forfeiture of the assets may also be ordered in relation to those assets that have been transferred to third parties in the following cases.[180]

a) In the case of effects/profits acquired deliberately knowing (or a diligent person would have had reasons to suspect) that they came from an illegal activity.

b) In the case of other assets acquired deliberately knowing (or a diligent person would have had reasons to suspect) that this would make their forfeiture difficult.

175 Art 127 *sexies* of the Spanish Criminal Code.
176 Art 127.1 *ter* of the Spanish Criminal Code.
177 Art 127.2 *ter* of the Spanish Criminal Code.
178 Art 803 *ter* I of the Criminal Procedure Act.
179 Art 803 *ter* m 2 of the Criminal Procedure Act.
180 Art 127 *quater* of the Spanish Criminal Code.

It is presumed, unless there is evidence to the contrary, that the third party has known or has had reason to suspect the illicit origin of the assets or that they were transferred to avoid confiscation, when the effects had been transferred for free or for a price lower than the real market price.[181]

9) Taking into account the foregoing, to forfeit assets, autonomous confiscation proceedings have to be initiated in accordance with Article 803 *ter* e of the Criminal Procedure Act. This a separate adversarial proceeding (where the person affected by the forfeiture can make representations) from the one where criminal responsibility is prosecuted. As a general rule, it is initiated post-conviction; however, as mentioned earlier, it can also be initiated prior to conviction with view to obtain precautionary measures.

   a) The action in the forfeiture procedure will be exclusively brought by the Public Prosecutor.[182] The judge or court with jurisdiction to hear the autonomous forfeiting proceedings will be either the one that passed the final judgment, the one hearing the criminal case or the one with jurisdiction to hear the criminal case that has not yet opened.[183]

   b) The judge (*ex officio* or at the request of a party) will ensure the intervention in the proceedings of any person that may be affected by the forfeiture of assets (the owner or the holder of any different right over the asset that might be affected).[184]

   c) The intervention of the affected third parties may be foregone in the proceedings where it has not been possible to identify or locate the holder of the rights over the assets or where there are facts which suggest that ownership does not attach to the alleged owners.[185] Nonetheless, this decision can be appealed.[186] The intervention of the owner can also be foregone in the event that the owner declares that they do not oppose the forfeiture.[187] The intervention of affected third parties is limited to such aspects as directly affect their assets or rights and may not be extended to matters relating to the criminal liability of the accused person.[188]

   d) Once the claim is admitted, the defence has 20 days to file their statement of defence.[189] If the defendant does not file their statement of defence in this period, the forfeiture of the assets will be ordered.[190]

181 Art 127 *quater* 2 of the Spanish Criminal Code.
182 Art 803 *ter* h of the Criminal Procedure Act.
183 Art 803 *ter* f of the Criminal Procedure Act.
184 Art 803 *ter* a of the Criminal Procedure Act.
185 Art 803 *ter* a 2 of the Criminal Procedure Act.
186 Art 803 *ter* a 3 of the Criminal Procedure Act.
187 Art 803 *ter* a 4 of the Criminal Procedure Act.
188 Art 803 *ter* b 1 of the Criminal Procedure Act.
189 Art 803 *ter* l 2 2º of the Criminal Procedure Act.
190 Art 803 *ter* m of the Criminal Procedure Act.

		e) The trial will be carried out in accordance with the provisions of Article 433 of the Civil Procedure Act, and the competent body will pass judgment within 20 days of its conclusion, ruling whether to uphold the claim and order definitive confiscation of the assets, partially uphold it and order confiscation for the relevant amount or alternatively dismiss the claim altogether.[191] The judgment in which the confiscation is agreed upon will be notified to the person affected by it, even if the person did not participate in the process.[192] f) If the claim is upheld, and the forfeiture is ordered, the Public Prosecution Service may, on its own or through other authorities (such as the OAPM), undertake the necessary steps to locate the assets or rights to fulfil the order.[193] 10) Forfeiture proceedings are subject to appeal through "fast-track criminal proceedings" (*procedimiento abreviado*) which entail that the decisions adopted by the judicial authority within the scope of these proceedings shall be subject to appeal within five days from their issuance (instead of the usual 20 days).[194] Specific grounds of appeal are not legislated, however, they would need to demonstrate that the legal and factual requirements for forfeiture have not been met.
2.	**Timing of cooperation with forfeiture request**	1) The time period for complying with a forfeiture request from the ICC is not regulated. Accordingly, it is not possible to make an accurate assessment on the timeframe in which the request would be attended to and executed. However, once the request has reached the competent court, and has been determined to be admissible by it, the court will notify the defendant/s, who would have a period of 20 days to appear in the process and present a written response to the forfeiture demand.[195] 2) The court must decide within a period of 20 days from the finalisation of proceedings in accordance with Article 803 *ter* of the Criminal Procedure Act (however, it is not unusual in Spanish proceedings to not strictly follow the timeframes provided for in the law).
D. Other considerations		
1.	**Examples of ICC Requests**	We have not identified examples of ICC requests issued to Spain.

191 Art 803 *ter* o 1 of the Criminal Procedure Act.
192 Art 803 *ter* c of Criminal Procedure Act.
193 Art 803 *ter* q of the Criminal Procedure Act.
194 Art 803 *ter* r of the Criminal Procedure Act.
195 Art 803 *ter* l 2 of the Criminal Procedure Act.

2.	**Collaboration between government departments** **Collaboration with civil society**	Although Spanish domestic law does not specifically require inter-governmental cooperation in relation to ICC asset recovery processes, it does promote broad collaboration between the different State bodies with respect to asset identification and recovery more generally. The regulatory provisions of the OAPM provide that it is required to coordinate with the State Security Forces and Agencies (*Fuerzas y Cuerpos de Seguridad del Estado*) for the location and recovery of assets.[196] It may also seek the collaboration of any other public or private entities, which will be obliged to cooperate in accordance with their specific regulations.[197] In addition, several formal collaboration agreements have been concluded to support the OAPM's functions. The first is the agreement between the General Public Prosecutor's Office and the Ministry of Justice for the development of the functions entrusted to the OAPM which facilitates the collaboration in the location of investigated assets and the management of seized assets.[198] The second is incorporated into a resolution dated 5 April 2018, of the Secretary of State for Justice which includes an agreement between the General Council of the Judiciary (*Consejo General del Poder Judicial*) and the Ministry of Justice, regarding collaboration and support for the operation of the OAPM.[199] Objectives of this agreement include developing a process that allows assets seized or confiscated by court order to be managed efficiently and promoting the disposal of seized assets and their early realisation in the cases provided by law.[200] The collaboration of the Bank of Spain is also expected in terms of support for the OAPM. In this sense, there is a collaboration agreement between the Bank of Spain and the Secretary of State for Justice, by virtue of which the parties agree to coordinate in developing those actions aimed at the location, recovery, conservation, administration and realisation of effects, goods, instruments and profits from criminal activities.[201] Collaboration between the OAPM and Tax Administration is also contemplated. There is an agreement between the Ministry of Justice and the State Tax Administration Agency on the transfer of information and for cooperation in customs surveillance.[202] The objective of this agreement is to facilitate the transfer of information of a tax nature from the Tax Agency to the ORGA, with the aim of developing the functions of locating and managing assets. This transfer of information does not require the consent of the affected party, in accordance with article 11 of Organic Law 15/1999, of 13 December, on the Protection of Personal Data.[203]

196 Art 6.1. (a) of RD of the Office for Asset Recovery.

197 This is regulated in the sixth Additional Provision of the Criminal Procedure Act.

198 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, available online https://ssweb.seap.minhap.es/docconvenios/rest/descargaFicheros/v4/52177, accessed 30 November 2022.

199 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, available online https://www.boe.es/boe/dias/2018/04/13/pdfs/BOE-A-2018-5022.pdf, accessed 30 November 2022.

200 Art 367 *quater* LEC.

201 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), available online https://www.boe.es/boe/dias/2017/04/06/pdfs/BOE-A-2017-3803.pdf, accessed 30 November 2022.

202 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*) available online https://ssweb.seap.minhap.es/docconvenios/rest/descargaFicheros/v4/21282, accessed 30 November 2022.

203 Second clause section 2, 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*) available online https://ssweb.seap.minhap.es/docconvenios/rest/descargaFicheros/v4/21282, accessed 30 November 2022.

		The OAPM has also signed collaboration and support agreements with the Ministry of Defence;[204] General Directorate of Fine Arts and Cultural Assets;[205] General Council of Notaries,[206] Spanish Union of Insurance and Reinsurance Entities (**UNESPA**);[207] Spanish Association of Property and Mercantile Registrars;[208] Reina Sofia National Art Museum;[209] State Vehicle Fleet;[210]and State Aviation Safety Agency.[211] No specific provision is made for engagement with civil society. Preamble II of the OAPM[212] specifies 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.

204 See Agreement between the Ministry of Justice and the Ministry of Defence regarding collaboration and support for the operation of the General Directorate for the Modernization of Justice, Technological Development and Asset Recovery and Management of the Ministry of Justice (*Acuerdo entre el Ministerio de Justicia y el Ministerio de Defensa en material de colaboración y apoyo al funcionamiento de la Dirección General de Modernización de la Justicia, Desarrollo Tecnológico y Gestión y Recuperación de Activos del Ministerio de Justicia*) of 18 February 2019, available online https://ssweb.seap.minhap.es/docconvenios/rest/descargaFicheros/v4/35066, accessed 28 December 2022. Please note that the validity of this agreement is up to four years from its signing (14 February 2019), that is, until 14 February 2022, and it may be extended for four additional years, without such extension yet being recorded.

205 See Interministerial Cooperation Agreement between the General Dictatorate of Legal Security and Public Faith of the Ministry of Justice and the General Directorate of Cultural Heritage and Fine Arts of the Ministry of Culture and Sports, in relation to the management of cultural heritage assets (*Acuerdo Interministerial de Cooperación entre la Dirección General de Seguridad Jurídica y Fe Pública del Ministerio de Justicia y la Dirección General de Patrimonio Cultural y Bellas Artes del Ministerio de Cultura y Deporte, en relación con la gestión de bienes del Patrimonio cultural*), of 22 July 2022, which objective is to provide technical assistance to the ORGA in the exercise of its powers related to cultural heritage assets, available online https://ssweb.seap.minhap.es/docconvenios/rest/descargaFicheros/v4/52236, accessed 30 November 2022.

206 See Collaboration agreement between the Ministry of Justice and the General Council of Notaries regarding access to notarial information by the Asset Recovery and Management Office (*Convenio de colaboración entre el Ministerio de Justicia y el Consejo General del Notariado en material de acceso a la información notarial por parte de la Oficina de Recuperación y Gestión de Activos*), of 27 July 2016 (addendum for extension and modification on 21 June 2019 and 17 July 2022), which aims to collaborate with the OAPM in the development of asset location and recovery functions, available online <https://ssweb.seap.minhap.es/docconvenios/rest/descargaFicheros/v4/20187, accessed 30 November 2022.

207 See Agreement with the Spanish Union of Insurance and Reinsurance Companies regarding insurance information involved in investigations or judicial decisions (*Convenio de la Unión Española de Entidades Aseguradoras y Reaseguradoras, en material de información de seguros implicada en investigaciones o decisiones judiciales*), (addendum for extensión and modification on 18 April 2022), available online https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-5023, accessed 30 November 2022.

208 See Agreement between the Ministry of Justice and the Illustrious Association of Registrars of Property, Mercantile and Movable Goods of Spain regarding access to registry information by the Asset Recovery and Management Office (*Convenio entre el Ministerio de Justicia y el Ilustre Colegio de Registradores de la Propiedad, Mercantiles y Bienes Muebles de España en material de acceso a la información registral por parte de la Oficina de Recuperación y Gestión de Activos*), of 21 June 2021, which aims to provide access to the OAPM to the registry information with the purpose of collaborating in the functions of locating and managing assets in matters of seizure and confiscation, available online https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-11004, accessed 30 November 2022.

209 See Agreement between the Secretary of State for Justice and the Museo Nacional de Centro de Arte Reina Sofía, regarding collaboration and coordination in the management of works of art entrusted to the General Directorate of Modernization of Justice, Techonological Development and Recovery and Management of Assets (*Convenio entre la Secretaría de Estado de Justicia y el Museo Nacional Centro de Arte Reina Sofía, en materia de colaboración y coordinación en la gestión de obras de arte encomendadas a la Dirección General de Modernización de la Justicia, Desarrollo Tecnológico y Recuperación y Gestión de Activos)* of 9 December 2019, wich aims the conservation, administration and realization of the effects, assets, instruments and proceeds from criminal activities, specifically works of art and assets of cultural interest, available online https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-17690, accessed 30 November 2022.

210 See Resolution of 15 September 2020, of the Under-Secretarym, which publishes the Agreement between the Secretary of State for Justice and the State Vehicle Fleet, regarding the stay of vehicles in support of the operation of the Recovery and Management Office of Assets (*Resolución de 15 de septiembre de 2020, de la Subsecretaría, por la que se publica el Convenio entre la Secretaría de Estado de Justicia y el Parque Móvil del Estado, en material de estancia de vehículos en apoyo al funcionamiento de la Oficina de Recuperación y Gestión de Activos*) of 15 September 2020, which aims to collaborate in the development by the OAPM of the powers of conservation, administration and realization of the effects, goods, instruments and proceeds from criminal activities, in relation to seized vehicles, or judicially confiscated, defining the characteristics of the vehicles to house and the conditions and procedures that must govern.

211 See Agreement between the Ministry of Justice and the State Aviation Safety Agency, on access to information from the registration of civil aircraft by the Asset Recovery and Management Office (*Convenio entre el Ministerio de Justicia y la Agencia Estatal de Seguridad Aérea, sobre acceso a la información del registro de matrícula de aeronaves civiles por la Oficina de Recuperación y Gestión de Activos),* of 28 January 2022, which aims to collaborate in the location, recovery and management of assets in relation to the scope of competences of the State Aviation Safet Agency (AESA) and, in particular, the terms, conditions and procedures under which AESA grants you access to its Civil Aircraft Registry Database. Available online https://boe.es/buscar/doc.php?id=BOE-A-2022-1760, accessed 30 November 2022.

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

3.	**Cross-border cooperation**	Spanish legislation on confiscation does not refer specifically to the ICC. However, it does address collaboration between States in matters of jurisdictional cooperation. Article 277 of Organic Law 6/1985, 1 July 1985, on the Judicial Power (**Organic Law 6/1985**)[213] provides that the Spanish courts and tribunals will provide foreign authorities with the cooperation that they request for the performance of their jurisdictional function, in accordance with the provisions of the international treaties and conventions to which Spain is a party, the rules of the European Union and the Spanish laws on this matter. Requests for international cooperation will be processed in accordance with the provisions of international treaties, European Union regulations and applicable Spanish laws.[214] Spanish courts and tribunals may only refuse to provide this international cooperation for established reasons:[215] (1) when the object or purpose of the requested cooperation is manifestly contrary to public order; (2) when the process from which the cooperation request arises falls under the exclusive jurisdiction of the Spanish jurisdiction; (3) when the content of the act to be carried out does not correspond to the powers of the required Spanish judicial authority (in which case, it will forward the request to the competent judicial authority, informing the requesting judicial authority thereof); or (4) when the request for international cooperation does not meet the content and minimum requirements demanded by the laws for its processing. On the other hand, the government of Spain reiterated, through a statement in 2018, its commitment to fully support the ICC.[216] Noting the foregoing, Spanish legislation denotes a willingness to cooperate with other States and with the ICC.

213Organic Law 6/1985, 1 July 1985, on the Judicial Power, available online: https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666.
214 Organic Law 6/1985, art 276.
215 Organic Law 6/1985, art 278.
216 "Spain reiterates its full support for the International Criminal Court", Statement 121, 13 September 2018, Ministry of Foreign Affairs, European Union and Cooperation. Available online: https://www.exteriores.gob.es/gl/Comunicacion/Comunicados/Paginas/2018_COMUNICADOS/20180913_COMU121.aspx.

4.	**Purposes for seizure and freezing of assets**	In accordance with article 22.7 and 23.3 of Organic Law 18/2003, when the Court's request for enforcement refers to a fine or forfeiture order, the Ministry of Justice will transmit the pertinent documentation to the Public Prosecutor to request enforcement before the competent judicial body and, where appropriate, put at the disposal to the Ministry of Justice the assets or sums obtained for their transfer to the Court. This law does not specify the purposes for which these assets or amounts obtained from an ICC order should be used. Then, as an interpretation and according to the principle of specialty (*lex specialis*), we consider the possibility that the provisions of the Criminal Procedure Act for the purposes of the realisation of the effects, goods, instruments and profits would apply. Thus, Article 367 *et seq* of the Criminal Procedure Act indicates that proceeds received from the realisation of assets shall go towards the expenses of the proceedings, and any excess will be deposited in the court's consignation account. Such amount will be added to the payment of the civil responsibility owed to the victims as a result of the criminal act. The remaining amount, as well as the product obtained from the management of the assets during the process, will be transferred to the Treasury (*Tesoro*) as income under public law. From such amount, once the operating and management expenses of the OAPM have been deducted, endowed in the budget of the Ministry of Justice, up to 50 per cent will be utilised towards the satisfaction of the purposes indicated below. Once the amounts specified above have been paid, Article 2 of the RD of the Office for Asset Recovery, establishes a series of priority objectives to which the proceeds of the realisation of the assets will be used, these being social purposes, mainly to help victims and to fight against organised crime.[217] These objectives contained in the RD are not established as absolute or mandatory objectives, rather they are *priority* objectives that serve the purposes provided by the Criminal Procedure Act (Article 367 *quinquies*). For this reason, and considering the duty to cooperate with the ICC, these objectives do not limit the basis on which a request for identification, tracing, anti-dissipation, or forfeiture requests from the ICC can be fulfilled. In accordance with Article 8 of the RD of the Office for Asset Recovery, an adjudication committee within the institution (*Comisión de Adjudicación*) will be the one in charge of the distribution of the economic resources obtained. There is no special provision in the regulation that indicates how the Adjudication Commission acts in case of a request from the ICC. In any case, this is the body in charge of managing the funds obtained by the realisation of goods for the purposes outlined above. Thus, we understand that, in case of an ICC request, this body would be responsible for the distribution of the resources obtained.

217 Art 2 of RD of the Office for Asset Recovery. These are not "imposed" objectives, but rather priority objectives or purposes for which the OAPM would assign the proceeds. Thus, it does not limit the basis on which a request for identification, tracing, anti-dissipation, or forfeiture requests from the ICC can be fulfilled.

5.	**The effect of sanctions on meeting ICC requests**	National regulations do not provide a specific response in the event of how to resolve priorities between an ICC forfeiture request and Spain's sanctions regime (whether relating to domestic sanctions or sanctions imposed by international organisations such as UN, UE and OSCE). Concerning the sanctions imposed by the UN, Article 42 of Act 10/2010 of 28 April, on the prevention of money laundering and terrorist financing (**Act 10/2010**), provides that the financial sanctions established by the United Nations 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 the community regulations or by agreement of the Council of Ministers.[218] However, according to Article 43.3 of Law 10/2010, asset recovery organisations, including the OAPM, may access the Financial Ownership File (*Fichero de Titularidades Financieras*)[219] 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 European Union or institutions of third States, whose purpose is the seizure or confiscation of assets in the framework of a criminal proceeding and in the case of crimes related to money laundering or the financing of terrorism. Thus, we believe that in the case of an ICC request, there would be no legal restriction to attend to this request and to cooperate with the ICC.

218 Art 42 of Law 10/2010 of 28 April, on the prevention of money laundering and terrorist financing, available online https://www.boe.es/buscar/act.php?id=BOE-A-2010-6737.

219 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.

ANNEXURE 7: Switzerland [Readiness rating: 9 – VERY GOOD]

No	Question	Response
Overview		
1.	**Primary Legislative Instrument**	• When ratifying the Rome Statute in 2001, Switzerland simultaneously enacted the necessary legal foundation for the cooperation with the ICC. • The Federal Act on Cooperation with the International Criminal Court (**ICCA**[220]) was therefore 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 in an exclusive manner (including all relevant procedures).[221]
2.	**Additional implementing legislation**	Not applicable.
3.	**Competent authority and decision-maker/s**	• The Central Office within the Swiss Federal Office of Justice (**FOJ**) 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 the federal or cantonal authority responsible for carrying out the request.[222] • The Central Office within the FOJ examines the ICC request and issues a first ruling on whether the matter should be considered (*entrée en matière*). Such ruling is briefly substantiated and is not subject to appeal.[223]
4.	**Key strengths of enforcement framework**	• The ICC's request for assistance shall be granted if the facts in question fall within the ICC's jurisdiction.[224] There are only few exceptions to this rule, with the risk of harming national security the only ground for refusing cooperation.[225] • Individuals who are accused in proceedings before the ICC are not entitled to lodge an appeal against the closing order of the Central Office.[226] From the perspective of effective reparations, this allows for a quick and simple procedure. • Relatively flexible regime which is designed to support ICC processes. For example, upon the ICC's request, the objects or values seized as a precautionary measure can be transmitted to the ICC for confiscation, allocation to the Trust Fund for Victims or restitution to the beneficiaries.[227] The handing over may take place at any time.

220 RS 351.6 - Loi fédérale du 22 juin 2001 sur la coopération avec la Cour pénale internationale (LCPI) (admin.ch) (https://fedlex.data.admin.ch/eli/cc/2002/237).
221 Art 2 ICCA.
222 Art 3 § 2 (a), (b) and (c) ICCA. 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 art 70(4)(b) of the Statute; (g) to decide, at the request of the ICC, to take over the enforcement of sentences; and (h) recovering fines.
223 Art 43 § 1 ICCA.
224 Art 29 § 1 ICCA.
225 Art 44 § 3 ICCA.
226 Art 50 ICCA.
227 Art 41 § 1 and § 2 ICCA.

		• If the ICC has issued a confiscation order, it can be enforced directly in Switzerland.[228] • The ICCA does not contain any provision that would imply a different treatment depending on when the ICC request is made (during the ICC's investigative, pre-trial or post-conviction stage).
5.	**Notable weaknesses of enforcement framework**	• The ICCA does not provide any time frames (except for the appeal deadline and a time frame in proceedings regarding the surrender of persons prosecuted or convicted by the ICC). • 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 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 a lack of clarity regarding the effect of sanctions on compliance with ICC requests.
6.	**Recommendations**	• The ICCA should expressly indicate the regime applicable to the question of the management of the assets frozen and/or seized at the ICC's request, in particular, that 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. Although the sanctions seem to prevail, it would have been preferable if the interaction of an ICC request with the sanction's regime had been expressly clarified. • It would have been appropriate to make an express reference, in the ICCA, to the fact that the protection of the secret domain is regulated in accordance with the provisions on the right to refuse to testify (as was done in Article 9 IMAC [Federal Act on International Mutual Assistance in Criminal Matters]).
A. Identifying and tracing assets		
1.	**Requests for assistance**	1) According to Article 30 ICCA, cooperation "*may include any procedural act not prohibited by Swiss law, which facilitates the investigation and the prosecution of offences within the jurisdiction of the Court or to recover the proceeds of such offences*". 2) The procedural acts include locating property (Article 30 § a ICCA), the execution of searches and seizures (Article 30 § g ICCA) and the identification, tracing, freezing or seizure of the proceeds of crime as well as assets and instruments related to the offences, in view of their potential forfeiture (Article 30 § j ICCA). (We deal with Article 30 § j ICCA in relation to freezing and seizing requests at (B) below.)

228 Art 58 ICCA.

		3) The Central Office is responsible for receiving ICC requests; determining the scope and details of cooperation; challenging ICC jurisdiction if necessary; for ordering other forms of cooperation (the recording of evidence, including witness statements, hearing of suspects, searches and seizures, service of documents, etc.); and designating the federal or cantonal authority responsible for carrying out the request (Article 3 § 2 (c) ICCA). The procedures adopted by the Central Office are the same, whether the ICC request is made at a pre-trial, trial or post-conviction stage (at least, the ICCA does not contain any provision that would imply a different treatment depending on when the ICC request is made (i.e. during the ICC's investigative, pre-trial or post-conviction stage)). 4) The first step, on receipt of the ICC request, is for the Central Office to examine the request and issue a first ruling on whether the matter should be considered (*entrée en matière*). Such ruling is briefly substantiated and is not subject to appeal (Article 43 § 1 ICCA). In carrying out this task, the Central Office must also decide on the scope and details of the cooperation, order other forms of cooperation and designate the federal or cantonal authority responsible for carrying out the request. If necessary, at this stage, the Central Office must challenge the jurisdiction of the ICC (Article 3 § 2 (a) and (b) ICCA).
2.	**Formal conditions applicable to requests for assistance and Central Office approval**	1) ICC requests must be transmitted in writing and in German, French or Italian.[229] The ICC request must contain specific information listed under Article 42 § 1 ICCA which gives effect to Article 96(2) of the Rome Statute by requiring: i) a brief statement of the essential facts which justify the request, and their legal characterisation; ii) as detailed and complete information as possible on the person against whom the criminal proceedings are directed; iii) a brief statement of the purpose of the request and the nature of the cooperation required, including the reasons for the request and the legal basis; iv) where appropriate, as much detail as possible about the person or place to be identified or located, so that the required cooperation can be provided; and v) where appropriate, a statement of reasons and a detailed explanation of the procedures or conditions to be met. a) In terms of Article 42 § 2 ICCA, if a request does not meet the requirements of paragraph 1, the Central Office may require that it be corrected or supplemented, without prejudice to interim measures. 2) In view of the ratification by Switzerland of the Rome Statute, Switzerland has the obligation to provide all the necessary assistance to the ICC. Therefore, the ICC's request for assistance shall be granted if the facts in question fall within the ICC's jurisdiction (Article 29 § 1 ICCA).

229 Art 10 § 1 and art 10 § 2 ICCA.

3.	**Refusals/ postponements of requests**	1) There are only few exceptions to this rule, where the request may be postponed, any act necessary for the execution of the request may be suspended, or the request may be refused. a) Postponement: If the immediate execution of the request would be detrimental to the proper conduct of an investigation or prosecution in Switzerland, in a case other than that to which the request relates, the Central Office may postpone the execution of the request for a period agreed with the ICC (Article 43 § 2 ICCA). b) Suspension: If the Central Office has serious reasons to believe that the execution of the request could affect national security, it must immediately inform the Federal Department of Justice and Police (**FDJP**), and the latter may suspend any action necessary for the execution of the request (Article 44 § 1 and § 2 ICCA). c) Refusal: In addition, on the proposal of the FDJP, the Swiss Federal Council must refuse the request for cooperation from the ICC if it considers that the cooperation may jeopardise national security (Article 44 § 3 ICCA). Therefore, the risk of harming national security is the only ground for refusing cooperation. 2) An additional scenario in which execution of a request is suspended is where a jurisdictional challenge arises. Article 29 § 2 ICCA mentions that when the ICC considers a challenge to its jurisdiction under articles 17 to 19 of the Rome Statute, the Central Office may postpone the execution of the request until the ICC rules on this matter, without prejudice to any interim measures.[230]
4.	**Time frames for requests**	1) The ICCA does not provide any time frames (except for the appeal deadline and a time frame in proceedings regarding the surrender of persons prosecuted or convicted by the ICC). 2) It should nevertheless be noted that the Swiss Federal Council indicated in its note regarding the draft bill preceding passing of the ICCA,[231] that the cooperation procedure with the ICC is characterised by the fact that the time between the first ruling on whether the matter should be considered (*entrée en matière*) and the closing order (outlined below) should be reduced to a minimum.
5.	**Implementing requests for cooperation**	1) The Central Office must designate the federal or cantonal authority responsible for execution and orders the actions that are permissible within the framework of cooperation between Switzerland and the ICC. The cantonal and federal offices of the Attorney General, responsible for execution of the request, carry out the measures ordered by the Central Office, without carrying out any procedural acts that would relate to the merits of the case (Article 5 § 1 ICCA).[232] At federal level, the entity responsible for execution of a request is the taskforce established in 2012 within the Swiss Office of the Attorney General which specialises in the field of international criminal law.[233]

230 Note that art 7 § 1 ICCA provides that where the ICC claims jurisdiction to conduct proceedings, the Central Office may, in agreement with the authority competent to conduct the proceedings in Switzerland, assert the jurisdiction of the Swiss court in accordance with art 18 of the Statute or, if necessary, challenge the jurisdiction of the ICC under art 19 of the Statute. In addition, if the Central Office does not contest the jurisdiction of the ICC or if the ICC, after its own examination of the case, comes to the conclusion that it has jurisdiction, all documents relating to the proceedings in Switzerland shall be transmitted to the ICC. The competent Swiss authority shall suspend the proceedings (art 7 § 2 ICCA). Finally, the decision to contest the jurisdiction of the ICC shall not be subject to appeal (art 7 § 3 ICCA).

231 https://fedlex.data.admin.ch/eli/fga/2001/133

232 Note that in war time, or when the accused person or the victim is a Swiss soldier, the military tribunal is the competent authority, rather than the Attorney General's offices.

233 Note that the FOJ may also authorise ICC prosecutors to conduct independent investigations (as defined in art 99 § 4 of the Rome Statute) (such as the taking of witness statements) on Swiss territory (art 38 ICCA).

a) Insofar as the ICC includes procedural requirements in its request, Article 32 ICCA provides that these must be adhered to.

b) The acts carried out by the enforcement authorities are not subject to appeal (Article 5 § 2 ICCA), since the acts carried out and the decisions taken at different stages of the proceedings can be challenged within the appeal against the final decision.

2) In addition, Section II ICCA contains specific procedural provisions for different forms of cooperation (e.g. principles governing questioning of individuals). Of these, the most relevant to tracing or identification of assets appear in Article 40 concerning "Handing over of evidence".

a) Transmission of evidence is expressly contemplated in respect of evidence, objects, documents or assets seized for evidentiary purposes, as well as files and decisions, shall be transmitted to the ICC at its request (Article 40 § 1 ICCA). There is no time frame provided.

b) Where a *bona fide* third party purchaser, an authority or an injured party with his or her usual place of residence in Switzerland asserts rights to those objects, documents or assets as defined in Article 40 § 1 ICCA, they may only be handed over to the ICC if the latter guarantees to return them free of charge at the end of the proceedings before the ICC (Article 40 § 2 ICCA).

c) In addition, subject to the ICC's agreement, the transfer of objects, documents or assets may be postponed as long as they are required for criminal proceedings pending in Switzerland (Article 40 § 3 ICCA). In this case, the Central Office must agree on a deadline with the ICC.

3) In addition, Article 8 ICCA admits the voluntary provision of information and evidence that a Swiss authority has collected during its own criminal investigation. The FOJ may therefore volunteer information and evidence to the ICC to enable investigations to commence or to assist in pending legal proceedings. This rule goes above and beyond the standard required by the Rome Statute.

<u>Closing order and appeal</u>

4) When the Central Office considers that it has processed the request in full or in part, it issues a closing order on the granting and scope of the cooperation (Article 48 ICCA). The closing order of the Central Office is subject to appeal before the Federal Criminal Court (Article 49 ICCA) on grounds of violation of federal law, including excess or abuse of discretionary power (Article 51 § 1 ICCA).

a) It is in the context of the appeal against the closing order that arguments relating to the execution of the request can be raised (since the acts carried out by the enforcement authorities are not subject to appeal, according to Article 5 § 2 ICCA). Moreover, the orders made by the Central Office in application of the decision to proceed with the case may be examined in the context of such appeal (since the decision of the Central Office to proceed with the case is not subject to appeal, according to Article 43 § 1 ICCA).

		b) 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) (Article 51 § 2). c) An appeal may be filed by a person who: (i) has not been charged in the proceedings before the ICC; (ii) is personally and directly affected by a measure; (iii) has a legitimate interest in having the contested decision quashed or amended; and (iv) who is unable to assert his or her rights before the ICC or who would not reasonably be expected to do so (Article 50 ICCA). Accordingly, individuals who are accused in proceedings before the ICC are not entitled to lodge an appeal (Article 50 ICCA). The right of appeal is also denied to shell companies behind which the accused persons is hiding as directors. d) Executing authorities and the Central Office must notify persons with a right of appeal who are ordinarily resident or have a service address in Switzerland (Article 45 § 1) and appeals must be lodged within ten days of notification (Article 51 § 3).
6.	**Constraints on cooperation**	1) Banking secrecy should not be a barrier to an ICC request because of the position under domestic criminal matters and with regard to MLAT requests: a) Position in respect of Swiss domestic criminal matters: Banks may not invoke banking secrecy to refuse to hand over the requested documents when called upon to collaborate in the context of domestic criminal proceedings. i) The violation of the banking secrecy is criminally punishable, according to Article 47 of the Banking Act (**LB**[234]). Nevertheless, Article 47 § 5 LB provides an exception when there is a duty to inform and testify ("*The provisions of federal and cantonal legislation on the obligation to inform the authorities and to testify in court are reserved*"). ii) Article 171 CrimPC contains a list of professions benefitting from a right to refuse to testify (i.e. attorney client privilege); the banking secrecy is however not covered by this provision. iii) Therefore, the banking secrecy does not apply within criminal proceedings. b) Position in respect of MLAT requests: The Swiss Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters expressly indicates, in Article 9, that during the execution of the MLAT request, the protection of the secret domain is regulated in accordance with the provisions on the right to refuse to testify. This provision is not applicable to ICC requests, however, it would have been appropriate to make such an express reference in the ICCA.

234 https://fedlex.data.admin.ch/eli/cc/51/117_121_129.

B. Seizing and freezing assets		
1.	**Implementing freezing and seizing requests**	1) The same processes for considering and implementing requests for freezing and seizing of assets applies as for identification and tracing. It is not a requirement to establish that the ICC has made a forfeiture order (see below part C), but it is a requirement to establish that the ICC has reasonable grounds for believing that a forfeiture order may be made (Article 30 § j ICCA). Because Article 30 § j ICCA provides for identification, tracing, freezing or seizure of the proceeds of crime as well as assets and instruments related to the offences, in view of their potential forfeiture, assets to be seized or frozen must be linked to, or be proceeds of, the alleged crimes. The expansive case-law of the ICC regarding the range of assets and objects subject to precautionary measures and which may be transferred to the ICC for purposes of forfeiture, reparations or payment to the TFV is taken into consideration by the Central Office when dealing with an ICC request.[235] 2) Article 31 § 1 ICCA provides that, at the express request of the ICC, the Central Office may order interim measures to maintain the existing situation, to protect threatened legal interests or to preserve evidence. In addition, according to § 2, if time is of the essence (*péril en la demeure*), the Central Office may also order interim measures immediately after the ICC has notified it of the submission of an application. If it has sufficient information to examine whether all the conditions are fulfilled; it shall lift the measures if the ICC does not submit the request within the time limit set by the Central Office. 3) According to Article 41 § 1 and § 2 ICCA, upon the ICC's request, the objects or values (rewards, instruments, proceeds, results of the offence and their replacement value) seized as a precautionary measure can be transmitted to the ICC for confiscation, allocation to the Trust Fund for Victims or restitution to the beneficiaries. These objects/assets are described as including the instruments used to commit an offence; product/result of the office (including replacement value and illicit benefit); and gifts/other benefits used to reward the offender (and their replacement values).
2.	**Management of frozen/seized assets**	1) The ICCA does not contain specific rules on this topic. In the absence of such explicit guidance, national principles would likely apply. However, the ICCA should expressly indicate the regime applicable to the question of the management of the assets frozen and/or seized at the ICC's request. This could include a reference to the regime provided by the Swiss Criminal Procedural Code (**CrimPC**) read with the Federal Ordinance on the management of seized assets. 2) In the context of national criminal proceedings, the following principles apply: a) Assets frozen and/or seized are managed according to the Federal Ordinance on the management of seized assets.[236] b) To the greatest extent possible, the assets are invested in such a way that the investment is secure, does not depreciate and produces a return (Article 1). It will thus be up to the prosecuting authority in charge to restructure the frozen portfolio in a conservative manner, at least when the procedure seems likely to last some time.

235 https://fedlex.data.admin.ch/eli/fga/2001/133 (p. 424).

236 RS 312.057 - Ordonnance du 3 décembre 2010 sur le placement des valeurs patrimoniales séquestrées (www.admin.ch) (https://fedlex.data.admin.ch/eli/cc/2010/863)

		c) There is an exception to this principle, by allowing the criminal authority to proceed with the early liquidation of frozen assets, when the objects are subject to rapid depreciation or expensive maintenance, or when securities are quoted on the stock exchange or market (Article 266 § 5 CrimPC). d) The authority's decisions concerning management in general and early realisation in particular may be appealed (Article 393 § 1 lit. a CrimPC). Under national law, such appeal would likely be to a cantonal or federal authority (depending on the authority responsible for prosecution). In this case, it is not clear whether or not an appeal could be lodged, since the ICCA does not contain, on this matter, a direct reference to an application by analogy of the CrimPC.
3.	**Management of assets at conclusion of ICC proceedings**	1) Article 41 § 3 ICCA provides that the objects or values seized shall remain seized until they have been transmitted to the ICC or until the ICC has informed the Central Office that it will no longer request their transmission. 2) By contrast, we understand that where the ICC does not request forfeiture of assets, and if Article 41 § 4 and 5 ICCA (see below) do not apply, the seizing orders may be lifted.
C. Forfeiting assets of accused persons and handing them over to the ICC		
1.	**Implementing forfeiture requests**	1) According to Article 41 § 1 and § 2 ICCA, upon the ICC's request, the objects or values (rewards, instruments, proceeds, results of the offence and their replacement value) seized as a precautionary measure can be transmitted to the ICC for confiscation, allocation to the Trust Fund for Victims or restitution to the beneficiaries. These objects/assets are described as including the instruments used to commit an offence; product/result of the offence (including replacement value and illicit benefit); and gifts/other benefits used to reward the offender (and their replacement values). While the ICCA does not expressly provide for use of seized assets for purposes of payment of fines, it seems likely that ICC fines would also be recoverable through the same expedited process and without requiring exequatur proceedings. However, this is an area where clarity would be welcomed.[237] 2) The objects or values seized remain seized until they have been transmitted to the ICC or until the ICC has informed the Central Office that it will no longer request their transmission (Article 41 § 3 ICCA). 3) The handing over may take place at any time. However: a) Assets may be retained in Switzerland if any of the following applies (Article 41 § 4 ICCA):

237 In national proceedings, the CrimPC expressly provides that assets can be seized when they will be used to guarantee the payment of procedural costs, pecuniary penalties, fines and indemnities (art 263 § 1 let. b CrimPC). The ICCA only indicates that assets can be seized in view of their possible forfeiture (art 30 § j ICCA) while art 41 ICCA indicates that objects or values seized as a precautionary measure can be transmitted to the ICC for confiscation, allocation to the Trust Fund for Victims or restitution to the beneficiaries. In its note regarding the draft bill, the Swiss Federal Council indicated: "*as fines imposed by the Court are enforceable against States under the Statute, para. 2 provides that such fines may be recovered in Switzerland if the convicted person has assets there. These fines are enforced by the central office (Art. 3, para. 2, letter g). In accordance with the objectives of the remedy, the power of disposal must be interpreted broadly. It is important to prevent criminals from evading enforcement by creating legal entities from execution by creating legal entities in a non-State Party*". Although not expressly indicated, it therefore appears that assets seized may be used for purposes of enforcing fines (we would not understand how, otherwise, the fines would be enforced by the Central Office).

		i) the injured party has his or her residence in Switzerland and they must be returned to him or her; ii) an authority asserts rights over them; iii) a person not involved in the offence makes it probable that he or she has acquired rights to them in good faith, provided that he or she acquired them in Switzerland or, if he or she acquired them abroad, that he or she has his or her residence in Switzerland; and iv) assets are required for criminal proceedings pending in Switzerland or if they are liable to be confiscated in Switzerland, assets will be retained in Switzerland. b) In the event of a claim asserted by the injured party, an authority or a *bona fide* third party according to Article 41 § 4 §§ a to c ICCA, the transfer of the objects or values to the ICC will be suspended until the legal situation is resolved (Article 41 § 4 ICCA). Where a third party claim is raised (according to § 4), the objects or assets in dispute may only be handed over to the entitled party: (i) if the ICC agrees; or (ii) if, in the case where an authority asserts a claim on them, the authority consents; or (iii) if the validity of the claim is recognised by a Swiss authority (Article 41 § 5 ICCA). 4) Finally, if the ICC has issued a confiscation order, it can be enforced directly in Switzerland. Article 58 ICCA provides that Article 41 ICCA applies by analogy to the execution of confiscation orders, when the ICC, in application of Article 75 or 79 of the Rome Statute, has already decided to allocate the objects or assets and requests Switzerland to carry out the necessary enforcement measures. 5) No rights are provided to accused persons to challenge the order to have their assets forfeited in Switzerland (Article 50 ICCA). Article 45 § 1 ICCA provides that the enforcement authorities and the Central Office shall notify the persons entitled to appeal in accordance with Article 50 ICCA who are domiciled in Switzerland or have a domicile for notification.
2.	**Timing of cooperation with forfeiture request**	No time frame is prescribed.
D. Other considerations		
1.	**Examples of ICC Requests**	There is no publicly available information confirming whether Switzerland has granted legal assistance to the ICC in respect of asset recovery requests. Statistics for assistance (without specifying what it entailed) reflect that it was granted to the ICC three times in 2021; seven times in 2020; ten in 2018; and four in 2017. It should also be noted that Switzerland regularly funds the Trust Fund for Victims. Since 2004, Switzerland has made regular contributions to the Victims' Fund amounting to approximately EUR 30,000-50,000 per year. In 2012, it doubled this amount and contributed EUR 100,000.[238]

238 See https://trialinternational.org/wp-content/uploads/2016/06/La-lutte-contre-limpunite-en-droit-suisse-publication.pdf at p 81, fn 63.

2.	**Collaboration between government departments** **Collaboration with civil society**	To ensure optimal cooperation, the ICCA established the Central Office which is the interlocutor of the ICC. This service will play the main role in terms of internal procedure. However, there is no express legal provision encouraging collaboration between relevant government departments or engagement with civil society beyond the differentiation of functions in the ICCA.
3.	**Cross-border cooperation**	Article 33 ICCA provides that when the ICC intends to transmit to another State documents and other evidence which Switzerland has, and requires the agreement of Switzerland, the Central Office shall: (a) grant the request if the request relates to an offence that falls within the jurisdiction of the ICC; and (b) conduct proceedings in accordance with the Swiss Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters, if the crime is a serious one under the domestic law of the requesting State.
4.	**Purposes for seizure and freezing of assets**	The ICCA refers to assets being frozen or seized in view of their potential forfeiture (Article 30 § j ICCA), and the objects or values seized as a precautionary measure can be transmitted to the ICC for confiscation, allocation to the Trust Fund for Victims or restitution to the beneficiaries (Article 41 § 1 and § 2 ICCA).
5.	**The effect of sanctions on meeting ICC requests**	Switzerland's sanctions regime (which in principle replicates UN and EU sanctions) does not expressly provide an order of precedence. However, guidance can be sought in the regime governing mutual legal assistance in criminal matters (**MLAT requests**). 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 EmbA,[239] the executing authority may only order an interim measure. At the time of 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. Authors consider that, in general, the sanctions regime has priority over mutual assistance, in view of the higher interests pursued by the international sanctions system. This is the case notwithstanding a freeze of assets in terms of the EmbA not having the effect of suspending the freezing ordered within the framework of mutual assistance; the two measures coexist. Thus, the objects or values frozen under mutual assistance cannot be returned to the requesting State as long as the sanctions are maintained. It is very likely that these principles are also applicable in the case of an ICC asset recovery request over assets that have already been frozen in accordance with sanctions. However, the Swiss Federal Council indicated in its note regarding the draft bill[240] that the enforcement of confiscation measures ordered by the ICC is mandatory for States Parties. Although the sanctions regime seems to prevail, it would have been preferable that the interaction of an ICC request with the sanction's regime be expressly clarified.

239 https://fedlex.data.admin.ch/eli/cc/2002/564.
240 https://fedlex.data.admin.ch/eli/fga/2001/133 (p. 412).

ANNEXURE 8: United Kingdom [Readiness rating: 9 – VERY GOOD]

No	Question	Response
1.	**Primary Legislative Instrument**	• In England and Wales (and Northern Ireland), the Rome Statute is implemented by the International Criminal Court Act 2001[241] (the **UK Act**), which came fully into force on 1 September 2001. • The corresponding act of the Scottish Parliament is the International Criminal Court (Scotland) Act 2001 (asp 13).[242]
2.	**Additional Implementing Legislation**	• The International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations 2001[243] (the **Regulations**) make provision for the enforcement in England, Wales and Northern Ireland of fines, forfeitures and reparations ordered by the International Criminal Court.
3.	**Competent authority and decision-maker/s**	• **Competent authority**: The Secretary of State (or the Scottish Ministers) • **Decisions to implement requests are made by**: Upon receipt of the request, the Secretary of State (or the Scottish Ministers) has a discretionary power to direct a "person" to apply to the Courts of England, Wales and Northern Ireland (or Scotland) for an order, implementing the ICC requests.
4.	**Key strengths of enforcement framework**	• The UK Act, together with the International Criminal Court (Scotland) Act 2001, enables the UK to fulfil its obligations under the Rome Statute and sets out clear steps for the relevant UK authorities to follow when assisting with ICC investigations. The Secretary of State and the courts of England, Wales and Northern Ireland are afforded considerable power to assist the ICC in investigating and recovering the proceeds of crime, as set out in Schedules 5 and 6 of the UK Act. • Clear provision is made in the UK Act for production and access to material for purposes of investigation – including with clear time periods for production and the contemplation of future production of documentation within a 28-day period of a court order. While under court supervision, this mechanism may be made without notice/hearing (preventing delays and the risk of destruction of material). Moreover, it may include information held by the State. • Clear provisions regarding search warrants including with respect to links to ICC crimes, proceeds of crimes and grounds for warrants providing for varying degrees of conclusiveness in information available to officers (and guidelines to judicial officials in determining whether to issue warrants without recourse to general legislation).

241 International Criminal Court Act 2001.

242 Although the UK is a signatory to the Rome Statute, for the purposes of the UK Act, the 'UK' includes England, Wales and Northern Ireland. As Scotland has its own distinct judicial system 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.

243 The International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations 2001 (the **Regulations**).

		• The UK Act is supported by the Regulations, which provide clear guidance for the enforcement of forfeitures ordered by the ICC and the ICC orders for reparations to, or in respect of, victims. • 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 assistance in investigating the proceeds of crime. • The UK framework provides for strong safeguards, protecting the rights of the accused persons from unlawful interference, through the incorporation of the European Convention of Human Rights into domestic law. Accordingly, the UK has a strong legislative framework that should enable the UK, in principle, to comply with requests from the ICC for assistance. This framework is supported by a judiciary with experience in interpreting international criminal law[244] and applying it in the domestic context. In addition, there is some guidance provided by the Supreme Court on the application of provisions of the UK Act in the case of *R v TRA v Redress* (albeit outside the area of asset recovery).[245] • 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, the framework is untested and the interplay between the UK's system of precedent and dualist framework could create challenges for the effective enforcement of ICC orders.
5.	**Notable weaknesses of enforcement framework**	• The UK Act provides for specific pre-conditions that need to be satisfied before asset tracing, and freezing orders or search warrants can be granted, which are stricter than the Rome Statute framework itself and require some level of proof of wrongdoing by the accused person. For example, to grant a production order (in response to request for asset tracing/identification 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 other material) to the investigation for the purposes of which the application is made. Further, the courts can only freeze the assets of an accused person where an ICC forfeiture order has been made. • Despite the strengths of the legislative framework, there do not appear to be any examples of compliance with an ICC asset recovery request (as we have not found any publicly available examples of asset recovery requests made by the ICC to the UK). 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, essentially affording them with a wide discretionary power to cooperate (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). In addition, the UK Act does not specify the time frames that should apply for responding to ICC requests for cooperation nor provide for formal mechanisms for handing over forfeited assets to the ICC. The UK Act also does not specify any formal mechanisms for engagement with civil society.

244 See for example *R. v. Jones and others* [2006] UKHL 16; *R. v Bartle and the Commissioner of Police for the Metropolitan and Others (Appellants), Ex Parte Pinochet*, Judgment of 24 March 1999 reported as *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte* No. 3 [1999] A All E.R 97; *R v Zardad* [2007] EWCA Crim 279; and *R v Payne* [2007] H DEP 2007/411.

245 See for example *R v TRA v Redress* [2019] UKSC 51 where the court considered the meaning of 'crimes against humanity' under sections 50 and 51 of the UK Act.

		• It appears that the greater problem might be enforcement rather than the legislative framework. For instance, domestic legal routes to confiscate assets can be slow and inflexible, which has resulted in a general downward trend in the value of confiscation order impositions since peaking at GBP 457 million in financial year 2015 to 2016.[246] The UK Home Office has observed that, especially in high-value cases, specialist financial investigators are often engaged too late, bodies do not collaborate or share information effectively and quick action to "restrain" (freeze) assets is often not undertaken.[247]
6.	**Recommendations**	• A greater degree of transparency surrounding the UK's approach to ICC requests for assistance would enhance accountability and facilitate civil society engagement. • Although the UK's Asset Recovery Action Plan (2019-2022)[248] provides an overarching strategy for asset recovery, the UK government should develop a more specific strategy for assisting with ICC requests for asset recovery. • Provisions should be included in the UK Act that provide that "*in interpreting and applying the provisions of Article 37 and 38 as well as Schedules 5 and 6, the court should take into account any relevant judgement decision or guidance of the ICC*". Equivalent provisions have already been included in sections 54, 61 ("*Offences in relation to the ICC*") and 65 ("*Responsibility of commanders and other superiors*") of the UK Act. • 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 improve enforcement and increase value of recoveries, the Criminal Prosecution Service should prioritise the recovery of assets from serious crimes (such as crimes under the Rome Statute) and dedicate further resources to strengthen its asset tracing abilities as well as collaboration with specialist financial investigators trained in investigating individuals who have profited from serious human rights violations.

246 UK Home Office, Asset recovery statistical bulletin: financial years ending 2016 to 2021 (published 9 September 2021), available at https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2016-to-2021/asset-recovery-statistical-bulletin-financial-years-ending-2016-to-2021, accessed 5 January 2023

247 *Ibid.*

248 UK Home Office, *Asset Recovery Action Plan* (updated 13 September 2019), available at https://www.gov.uk/government/publications/asset-recovery-action-plan/asset-recovery-action-plan, accessed 5 January 2023.

		• It might also be helpful for the Law Commission of England and Wales to publish recommendations and/or official guidance in respect of the UK Act. For example, in the context of confiscation orders made under POCA, the Law Commission of England and Wales made a series of proposals in 2020 which aimed to strengthen each stage of the confiscation process by introducing new, clear processes and frameworks specified in legislation, rules of procedure and in official guidance as to how courts should approach confiscation.[249] 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. Similar recommendations for the UK Act would be beneficial and 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". Similarly, clear timetables for responding to ICC requests for asset tracing, seizing and forfeiture would improve certainty and efficiency in asset recovery processes and UK cooperation with the ICC.
A. Identifying and tracing assets		
1.	**Requests for Assistance**	1) Sections 37 and 38 of the UK Act make provisions for responding to requests for cooperation from the ICC pursuant to Article 93(1)(k) of the Rome Statute, however, these only apply where an investigation has been initiated by the ICC and the investigation and proceedings arising out of it have not been concluded.[250] Section 38 (dealing with freezing orders) is addressed at Part B below. 2) Section 37 provides that, where the ICC requests assistance in ascertaining whether a person has benefitted from an ICC crime or in identifying property derived from an ICC crime, the Secretary of State may direct a constable (police officer) to apply for an order or warrant under Schedule 5 of the UK Act.[251] The UK Act does not include any criteria regulating the Secretary of State's discretion under section 37 and the requirements of Article 96 of the Rome Statute are not expressly domesticated.[252] 3) Nevertheless, the Secretary of State's discretion is not without guidance. The Crime (International Cooperation) Act 2003 is the main domestic legislation that enables the UK to provide mutual legal assistance in criminal matters, and sets out the procedures, powers, and safeguards for dealing with them.

249 Law Commission, *Confiscation of the proceeds of crime after conviction: a final report* (Law Com No 410, 2022).

250 The UK Act, s 27 states that "*(1) The powers conferred by this Part on the Secretary of State are exercisable for the purpose of providing assistance to the ICC in relation to investigations or prosecutions where – (a) an investigation has been initiated by the ICC, and (b) the investigation and any proceedings arising out of it have not been concluded*".

251 The UK Act, s 37 states that "*(1) Where the Secretary of State receives a request from the ICC for assistance – (a) in ascertaining whether a person has benefited from an ICC crime, or (b) in identifying the extent or whereabouts of property derived directly or indirectly from an ICC crime, the Secretary of State may direct a constable to apply for a n order or warrant under Schedule 5*".

252 The Secretary of State's discretion is to be exercised as an executive act. Whilst in theory, the exercise of this discretion could be subjected to judicial review, in practice a large degree of deference is offered in a national security context and the courts will rarely interfere in cases invoking national security grounds.

4) **Production/Access Orders**: A production order typically requires a person to provide access to, or hand over, material in their possession that is useful to an investigation into their legal and financial affairs. A production order can be enforced by the police.

a) Part 1 of Schedule 5 sets out the provisions which govern the making of a court order or warrant for the production of, or access to, material. It is substantially based on the powers which already exist under section 93H of the Criminal Justice Act 1988. That section allows a constable, for the purposes of an investigation into whether any person has benefitted from any criminal conduct or into the extent or whereabouts of the proceeds of such conduct, to apply to a Circuit judge for an order for the production of, or access to, particular material. Provision is made for a production/access order to be without notice or a hearing.

b) The grounds for obtaining an access/production order are that a judge must be satisfied that there are reasonable grounds for suspecting that: (i) a specified person has benefitted from an ICC crime; and (ii) that the material to which the application relates is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purposes of which the application is made. These requirements therefore add specific pre-conditions that need to be established before requests for asset tracing, and identification can be implemented in the UK. Legal privilege is the sole ground for resisting production/access to material[253] with express provision made for production/access orders taking precedence over obligations of secrecy or other restrictions imposed by statute or otherwise.[254]

c) Two types of orders may be made: (i) a standard production/access order; or (ii) a special production/access order – both with the effect of an order of the Crown Court.[255] In both cases, the UK Act provides specific guidance regarding computer information.[256]

i) Standard orders: require a named individual to: (A) produce material which is detailed in the order to a constable for the constable to remove (production order); or (B) give the constable access to this material (access order). In either case, the order will include specified time periods for production/access which are normally seven days from the date of the order, unless the judge determines that a shorter or longer period is required based on the circumstances of the case. Access orders may also include an order for persons on the relevant premises to allow entry to the constable in order to obtain access to the material.[257]

253 The UK Act, Schedule 5, para 2.
254 The UK Act, Schedule 5, para 6(3)-(4).
255 The UK Act, Schedule 5, para 5(1).
256 The UK Act, Schedule 5, para 6(2).
257 The UK Act, Schedule 5, para 3.

ii) Special orders: apply to persons who are likely to have material to which an application relates in their possession within 28 days of the date of making of the order. This provision allows for quick access to information that will in the future come either into a person's possession or into existence. The specific material must be described, and the order includes for a requirement that the named person notify the constable as soon as reasonably practicable after the specified material comes into their possession, custody or power.[258]

d) Significantly, production/access orders may be made in respect of material in the possession, custody or power of a government department of England, Wales or Northern Ireland.[259]

5) Search Warrants: A search warrant is a written authorisation that allows the police to enter premises to search for material or individuals (and seize such material – dealt with further in (B) below).

a) Part 2 of Schedule 5 sets out the provisions governing the issuance of search warrants by a circuit judge (or county court judge in Northern Ireland) for the purposes of identifying whether a person has benefitted from an ICC crime. Part 2 is substantially based on the provisions in section 93I of the Criminal Justice Act 1988.

b) The grounds for obtaining a search warrant are that a judge is satisfied that:

i) a production/access order has not been complied with;[260]

ii) there are reasonable grounds for suspecting that person has benefitted from an ICC crime; there are grounds for making a production/access order; and it would be inappropriate to make a production order or access order in relation to the material because: (A) it would not be practicable to communicate with any person entitled to produce, or grant access to the material; or (B) the investigation for the purposes of which the application is made would be seriously prejudiced unless a police officer could secure immediate access to the material;[261] or

iii) there are reasonable grounds for suspecting a person has benefitted from an ICC crime; there is material on premises that cannot be particularised but which relates to the person/issue of benefit from an ICC crime and is likely to be of substantial value. In this particular case, it is also necessary that it is impracticable to communicate with any person entitled to grant access/entry will not be granted without a warrant/prejudice to the investigation.[262]

258 The UK Act, Schedule 5, para 4.
259 The UK Act, Schedule 5, para 7.
260 The UK Act, Schedule 5, para 10(2).
261 The UK Act, Schedule 5, para 10(3)-(4).
262 The UK Act, Schedule 5, para 10(5)-(6).

2.	**Rights to Challenge/Appeal**	**1) Applications to vary or discharge the orders or warrant**: a) Schedule 5 states that production/access orders made under this schedule have the same effect as if they were an order of the Crown Court and that "*provision may be made by*" the Criminal Procedure Rules (**CPR**) (or in Northern Ireland, Crown Court Rules) in respect of the discharge and variation of production/access orders. However, no specific provisions have been promulgated and these also do not appear to be covered by the "general" provisions for varying or discharging production/access orders under CPR section 47.4. There is therefore a gap in the domestic regime, with the CPR failing to make specific provision for production orders under the UK Act (however, it is likely that the CPR nevertheless applies). b) With respect to search warrants, the relevant "general" provisions for warrants under CPR section 47.24 contain a "catch-all provision" noting that these provisions apply to "*warrant under other Acts, comparable warrants*" which could encompass those made under the UK Act. However, unlike for production/access orders, the UK Act does not specify whether the CPR (or in Northern Ireland, Crown Court Rules) are to apply in respect of the discharge and variation of search warrants – in which case the common law applies. c) Because neither the UK Act nor the CPR provide clear grounds under which search warrants under the UK Act may be varied or discharged, it is likely that recourse would be had to the common law (such as by way of judicial review). **2) Appeal routes under domestic English law**: A challenge to the lawfulness of a production/access order or search warrant may be brought under domestic English law: (a) via an application to the Crown Court under section 59 of the Criminal Justice and Police Act 2001 (**CJPA**); (b) in the High Court by way of judicial review; or (c) in the High Court through a claim under the Human Rights Act 1998 (**HRA**): **a) Appeals under the CJPA**: A person subject to a production/access order or search warrant made at the request of the ICC may be able to appeal the order under Section 59 of the CJPA, which gives any person with a relevant interest in property seized the right to apply to the appropriate judicial authority for it to be returned. The UK Act does not expressly state whether this appeal would be available to orders made under schedule 5 of the UK Act, however section 59 applies where anything has been seized in the exercise of "*any power of seizure conferred on a constable by or under any enactment, including an enactment passed after this Act*" (see section 59(10)). Such powers possibly include the seizure powers created under the UK Act. i) The grounds on which an application can be made include *inter alia* that there was no power to make the seizure, or that the seized property contains an item subject to legal privilege (see CJPA section 59(3)). ii) Once the application is made to the Crown Court, the court has jurisdiction either to order the return of the seized property, if satisfied that any of the grounds are made out, or otherwise dismiss the application.

iii) Even where a challenge is successful and the warrant has been quashed, section 59(7)(a) allows the police to make a subsequent application to the Crown Court to retain material "unlawfully" held. The court is allowed to do this in circumstances where, if the seized material was returned, it would be immediately appropriate to issue a warrant under which it would be lawful to seize the property. The purpose of section 59(7)(a) is to prevent the collapse of a criminal investigation as a consequence of the unlawful seizure of evidence. The effect of this provision is that the authorities get a second chance to get the application right

b) Judicial review: A person subject to a production/access order or search warrant issued by the Crown Court may apply for permission for judicial review of the court's decision to grant such an order/warrant on grounds of illegality (where the decision-maker did not have the legal power to make that decision), procedural unfairness (if the process leading up to the decision was improper) and irrationality (if the decision was so unreasonable that no reasonable person, acting reasonably, could have made it).[263] Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. The High Court has the power to judicially review decisions of the Crown Court under section 29(3) of the Senior Courts Act 1981. The High Court has jurisdiction to make mandatory, prohibiting or quashing orders except in matters relating to trial on indictment.

i) As set out above, when applying for a production/access order or search warrant under Schedule 5, the applicant (i.e. the police acting on the instructions of the Secretary of State) must provide sufficient information to satisfy the court that there are reasonable grounds for suspecting that a specified person has benefitted from an ICC crime and that the material to which application relates is likely to be of substantial value. If these criteria are not satisfied, the person who is the subject of the production/access order or search warrant may argue that the warrant should not have been granted at all and the Court's decision is therefore unlawful.

ii) However, even if a judicial review is successful and the order or warrant is quashed, the police may be able to apply to the High Court for permission to retain the material for a short time whilst it applies to the Crown Court under section 59(7) CJPA.[264]

263 For example, in *R. (on the application of British Sky Broadcasting Ltd) v Central Criminal Court* [2014] UKSC 2017, the police sought a production order under POCA. The application was heard at the Old Bailey (Crown Court) and during the hearing, the judge agreed to hear further evidence from the police in secret, with BSkyB and its lawyers excluded. Sky sought a judicial review of the decision to grant a production order, on the grounds that the procedure adopted at the hearing was unlawful, and that in any event there was an insufficient basis for the order to be made. The Supreme Court rejected the Metropolitan Police Commissioner's appeal against the decision to overturn the production order.

264 See for example, *R (on application of Mallik) v Manchester and Salford Magistrates' Court* [2016] EWHC 3723 (Admin) in relation to material seized as a result of unlawful search warrants, the High Court held that the authority which had executed the warrants would be permitted to examine the material before issuing the application which it intended to make under section 59 of the CJPA for permission to retain the material.

		c) **Human rights challenge**: The person subject to a search warrant may also bring a claim under the Human Rights Act 1998 (**HRA**) against either the police or the courts for enforcing or granting the production/access order and warrants in question.[265] The HRA incorporates the rights set out in the European Convention on Human Rights (**ECHR**) into domestic English laws and allows claims for breaches of rights protected under the ECHR to be brought in domestic courts. Section 2 of HRA provides that the domestic courts "*must take into account*" the judgments and decisions of the European Court of Human Rights (**ECtHR**) that are relevant to the proceedings before the court in question. Section 6(1) provides that, "*it is unlawful for a public authority to act in a way which is incompatible with a Convention right*". By virtue of section 6(3), a public authority includes "*a court or tribunal*" and "*any person certain of whose functions are functions of a public nature*". Sections 7 and 8 give individuals whose rights have been violated the right to bring proceedings and obtain remedies in domestic courts from the government/responsible public body. i) The article of greatest relevance in the context of production/access orders or search warrants is Article 8 ECHR, which provides that "*Everyone has the right to respect for his private and family life, his home and his correspondence*" and Article 1 to Protocol 1 which protects the right to peaceful enjoyment of one's possessions. For example, a defective search warrant or failure to follow key safeguards may make all or part of the entry and search unlawful and therefore a trespass to property which can be pursued as a violation of Article 8 ECHR in the High Court. A production order, on the other hand, may deprive the accused person of their lawful possession. Accordingly, the applicant may bring a challenge under Article 6 HRA, claiming that in enforcing and/or granting a production/access order or search warrant, the police and/or the courts acted in a way which is incompatible with a Convention right (i.e. Article 8 EHCR or Article 1 of Protocol 1). ii) The ECtHR has in the past held that a search warrant issued by an investigating judge against a newspaper constituted a breach of Article 8 ECHR because it had not been reasonably proportionate to the aim pursued, namely to verify the identity of the journalist who had written the article, and that it had been insufficiently limited in scope to prevent possible abuse by the investigating officers. A UK court would be required under Article 2 HRA to take such case law into account when considering applications concerning the lawfulness of production/access or search warrants granted under the UK Act.
3.	**Formal conditions applicable to requests for assistance**	As set out above, the UK Act does not include any criteria regulating the Secretary of State's discretion under section 37. However, Schedule 5 sets out specific grounds that need to be satisfied prior to a court being able to grant a production/access order or search warrant (as set out above). For example, there need to be reasonable grounds for suspecting that: (a) a specified person has benefitted from an ICC crime; and (b) the material to which application relates is likely to be of substantial value to the ICC investigation at hand.

265 Human Rights Act 1998.

4.	**Refusals/ postponements of requests**	While the UK Act does not include any criteria regulating the Secretary of State's discretion under section 37, it provides that the Secretary of State may refuse to cooperate on the grounds of national security. Section 39 of the UK Act provides that nothing under the UK Act shall require the disclosure of information that would be prejudicial to the security of the United Kingdom. The provision is quite broad, and a certificate signed by or on behalf of the Secretary of State to the effect that it would be prejudicial to the security of the United Kingdom for specified documents to be produced, or for specified information to be disclosed, is conclusive evidence of that fact.[266] This is consistent with Article 72 of the Rome Statute which states that State assistance may be denied on the basis that its assistance would impact negatively on national security information. Article 93(4) of the Rome Statute grants the State concerned to determine for itself what constitutes "national security". Moreover, in general, policy considerations play a significant role in the UK's interactions with the ICC. For example, the UK refused to ratify the crime of aggression amendments introduced by the ICC ASP in 2017 on the grounds that there was need for "greater clarity" before it came into force. It is thought that it did so as part of a move to protect British officials from the risk of future prosecution in relation to the Iraq War. Finally, the constitutional principle of parliamentary sovereignty means that the UK parliament remains legally entitled to amend or repeal any of its obligations under the Rome Statute, depending on the political preferences of the majority in Parliament.
5.	**Timing of requests**	The UK Act does not state any specific time frame by when a request for cooperation needs to be satisfied. However, as set out above, once a production/access order has been made, the material requested should be produced within a specified period (normally seven days, although this can be shortened or lengthened by the judge if this is deemed appropriate in the circumstances). In addition, a special production or access order may be made in relation to a person who the judge thinks is likely to have material to which an application relates in their possession within 28 days of the making of the order.
6.	**Implementing requests for cooperation**	As set out above, the ICC request for cooperation with respect to the identification and tracing of assets of accused persons should be addressed to the Secretary of State who "may" direct a constable to apply to the court for a production or access order or a search warrant. A production/access order will require the specified person to hand over the material sought (failure to comply may be deemed to be a contempt of court for which an individual may be fined or imprisoned) and a search warrant authorises the police to enter premises to search for material or individuals.
7.	**Constraints on state cooperation**	As set out above, pursuant to section 39 of the UK Act, the Secretary of State may refuse to disclose any information what would be prejudicial to the security of the United Kingdom. However, the UK has indicated its strong will to cooperate with the ICC generally. In June 2022, the UK's ambassador at the UN Security Council Arria meeting on the Rome Statute noted that "*the UK remains a strong supporter of the Court's work. In this spirit, we note the obligation of States Parties to cooperate with the Court under the Rome Statute, and we also call on all States to cooperate with the Court*".[267]

266 The UK Act, s 39(2).

267 James Kariuki, Deputy Permanent Representative, UK Mission to the UN, 'Reflecting on our relationship with the International Criminal Court after 20 years of the Rome Statute – UK National Statement delivered by Ambassador James Kariuki at the UN Security Council Arria meeting on the Rome Statute' (Speech at the UN Security Council, New York, 24 June 2022) https://www.gov.uk/government/speeches/reflecting-on-our-relationship-with-the-international-criminal-court-after-20-years-of-the-rome-statute, accessed 5 January 2023.

B. Seizing and freezing assets		
1.	**Implementing requests for seizing and freezing assets**	1) Section 38 of the UK Act is intended to give effect to the UK's cooperation obligations in respect of seizing and freezing of assets as contemplated by Article 93(1)(k) of the Rome Statute.[268] Section 38 provides that, where the ICC requests assistance in the freezing or seizure of property for possible forfeiture, the Secretary of State may direct a person to apply for a freezing order in accordance with the provisions of Schedule 6. Section 27 of the UK Act specifies that the powers conferred by section 38 on the Secretary of State are exercisable for the purpose of providing assistance to the ICC in relation to investigations or prosecutions where (a) an investigation has been initiated by the ICC, and (b) the investigation and any proceedings arising out of it have not been concluded. It is not clear whether "forfeiture" in Section 38 is intended to be construed narrowly, or whether it might be interpreted to include the broader purposes of for which seized/frozen assets might be used (including reparations) as contemplated in the ICC's jurisprudence. There is, moreover, no clear indication of the status of such jurisprudence in the law of England and Wales, and Northern Ireland from the face of the UK Act itself. **2) Application for freezing order**: Schedule 6 sets out the procedures for the making, variation and discharge of freezing orders. It also provides a power to appoint a receiver, seize property to prevent its removal from England & Wales/Northern Ireland and sets out the interaction of freezing orders with existing legislation. A freezing order would prohibit anyone from dealing with property specified in the order, except by methods and under conditions defined in the order itself. If the ICC makes a request, the Secretary of State may direct a person to apply for a freezing order from the High Court.[269] The term "*person*" is not defined by the UK Act but could include a constable. This application may be made without notice and granted without hearing in England and Wales.[270] According to Schedule 6, paragraph 2, the court must make the order if it is satisfied that: a) a forfeiture order has been made in proceedings before the ICC, or that there are reasonable grounds for believing that a forfeiture order may be made in such proceedings; and b) the property to which the order relates consists of or includes property that is or may be affected by the order. Accordingly, the freezing of assets is only possible in the UK where an ICC forfeiture order has been made or where there is sufficiently robust evidence suggesting that the accused person will be convicted by the ICC and their personal circumstances and financial capacity are such as to warrant the imposition of a forfeiture order (see Articles 77 and 78(1) Rome Statute and RPE Rule 146). Anybody affected by the freezing order shall be notified. The schedule also allows for the variation or discharge of the order on the application of a person affected by it, or on conclusion of the relevant ICC proceedings (see further below).

268 The UK Act, s 38 states that: "*Where the Secretary of State receives a request from the ICC for assistance in the freezing or seizure of proceeds, property and assets or instrumentalities of crime for the purpose of eventual forfeiture, he may – (a) authorise a person to act on behalf of the ICC for the purposes of applying for a freezing order, and (b) direct that person to apply for such an order under Schedule* 6".
269 The UK Act, Schedule 6, para 1(1).
270 The UK Act, Schedule 6, para 1(2)(a).

		3) **Power to appoint receiver**: Schedule 6 also provides for the possibility of the High Court appointing a receiver when a freezing order is in force. If appointed, the receiver should take possession of the specified property and manage it in accordance with the directions of the court with a view to ensuring that the property specified in the order is available for satisfying the forfeiture order or, as the case may be, any forfeiture order that may be made in the ICC proceedings in relation to which the order was made. **4)** **Seizure to prevent removal from jurisdiction**: If a freezing order is in force, a constable may seize property specified in order to prevent its removal from England and Wales or Northern Ireland. **5)** **Freezing order in respect of registered land**: In relation to freezing orders made in respect of registered land, the UK Act makes specific provision for how these orders interact with the land registration frameworks in England, Wales and Northern Ireland. The ICC (being the person with the benefit of the freezing order) will accordingly be treated as a person with an interest in the land to which the order applies and may apply for a restriction to give effect to a freezing order on a registered estate (which is an entry on the title deed, preventing someone from selling the property, transferring the equity, or getting a new mortgage). **6)** **Freezing order where the order relates to a person adjudged to be bankrupt/ insolvent company**: Paragraph 9 provides that where a person is rendered bankrupt in England and Wales, any property that is subject to a freezing order made under the UK Act (which was made before they were made bankrupt) and any proceeds of that property realised by a receiver in bankruptcy are excluded from the bankrupt's estate for the purposes of Part 9 of the Insolvency Act 1986 and are therefore excluded from any claims made by debtors. Similarly, where an order for winding up of a company has been made under the Insolvency Act 1986, the property that is subject to the freezing order under the UK Act made before the relevant time (or any proceeds realised from it) cannot be collected, realised or distributed by the appointed liquidator. Accordingly, in both circumstances, the assets frozen pursuant to an ICC request (and any proceeds realised from it) are protected under the relevant insolvency regimes and cannot be used to discharge claims by any debtors.
2.	**Rights of Complaint/ Appeal**	**1)** **Application to vary/discharge a freezing order**: Under paragraph 4 of Schedule 6, a freezing order may be discharged or varied in relation to any property on the application of any person affected by the order. a) However, the Schedule does not set out a specific procedure for applying to have a freezing order varied or discharged. b) Under English common law, a court will not allow freezing orders if the grounds for granting one are not satisfied or if the order is to be used oppressively. For example, a common term within a freezing order is that the respondent should be able to meet his ordinary living expenses as well as his reasonable legal costs or business expenses. Freezing orders that fail to include these terms can be seen as oppressive and as such, are open to challenge by a respondent.

c) A court may therefore discharge or vary the freezing order, if the applicant can show that: (i) the order did not meet the criteria set out above (e.g. no forfeiture has been made by the ICC or there are no reasonable grounds to believe that such an order will be made and the property to which the order relates does not include property that is or may be affected by the order); or (ii) the order is oppressive (e.g. the level of the assets frozen is too high; or the level of your ordinary living, business and/or legal expenses is too low). The court may discharge or vary the freezing order on the application of either the individual or organisation against whom a freezing order has been made (i.e. the respondent) or a party other than the respondent who is affected by the order. This could include family members as well as banks that hold funds on behalf of the respondent, and companies owned by the respondent.

2) Human Rights Claim: A freezing order may also be challenged on the basis that it infringes Article 1 of the First Protocol to the ECHR,[271] which is incorporated into UK law by the HRA and protects the right to the peaceful enjoyment of one's possessions.[272] In addition, the freezing and seizure of assets could also implicate the accused person's right to private and family life under Article 8 of the ECHR and right to a fair trial under Article 6 ECHR (should the freezing order impact their ability to be adequately represented during the proceedings). For example, in *R. (on the application of Javadov) v Westminster Magistrates' Court*, the High Court confirmed that in the context of applications for freezing orders, "*it may be necessary for the court to consider various competing Convention rights and particularly article 8*".[273] Accordingly, a challenge could be brought under Article 6(1) HRA, claiming that in granting the freezing order, the courts acted in a way which is incompatible with a Convention right. If the challenge is successful, the applicant may be able to claim damages under section 8 HRA.

3) Judicial Review: As set out above, the person subject to the freezing order may bring a judicial review challenging the High Court's decision to grant the freezing order including on the ground that it was unlawful to do so because the criteria set out in the UK Act for granting a freezing order were not met (i.e. there are no reasonable grounds for believing that a forfeiture order may be made in the relevant ICC proceedings to which the request for asset freezing relates). The accused person may also be able to bring a judicial review challenge alleging that the High Court failed to consider all submissions in granting the freezing order.

271 Art 1 of the First Protocol of the ECHR provides that: "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*."

272 D. J. 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, 502–525, available at https://academic.oup.com/hrlr/article/20/3/502/5903910, accessed 5 January 2023.

273 [2021] EWHC 2751 (Admin).

3.	**Management of frozen/seized assets**	1) As set out above, under Schedule 6, para 5, the Court has the power to appoint a receiver when a freezing order is in force to take possession of and manage the specified property in accordance with the order. 2) Paragraph 5(5) of Schedule 6 provides that "*a receiver appointed under this paragraph shall not be liable to any person in respect of any loss or damage resulting from any action taken by him which he believed on reasonable grounds that he was entitled to take, except in so far as the loss or damage is caused by his negligence*". As such, there is the option to bring a claim for damages against a receiver in whom the frozen or seized assets have been vested, should any damage to, or loss of, these have been caused by their negligence. The cause of action for this claim would lie in the tort of negligence and the claim would be governed by English tort law. 3) There is no specific guidance in the UK Act about management of these assets. Whilst the UK has promulgated some guidance on management of seized/frozen assets in the form of a code of practice concerning the search, seizure and detention of property, that is in the context of the exercise of certain powers under the POCA 2002,[274] and may not be applicable to powers exercised under the UK Act.
C. Forfeiting assets of accused persons and handing them over to the ICC		
1.	**Implementing forfeiture requests**	1) Section 49 of the UK Act empowers the Secretary of State to make regulations to enforce forfeiture orders issued by the ICC against a convicted individual.[275] Forfeiture can therefore only occur post-conviction. The Regulations make provision for the enforcement in England, Wales and Northern Ireland of fines and forfeitures ordered by the International Criminal Court and of orders by that court against convicted persons specifying reparations to, or in respect of, victims. It should be noted that section 49(1) (and regulation 1) distinguishes between "*fines or forfeitures ordered by the ICC*" and "*orders by the ICC against convicted persons specifying reparations to, or in respect of, victims*". 2) The Regulations empower the Secretary of State to appoint a person to act on behalf of the ICC for the purposes of enforcing the ICC forfeiture/reparations order (see regulation 3).[276] The person appointed must apply to a court for registration of the ICC forfeiture/reparations order for enforcement and the court must register that order as a pre-condition of enforcement (see regulation 4).[277] An application to the High Court to register an order of the ICC for enforcement, or to vary or set aside the registration of an order, may be made to a judge or a Master of the King's Bench Division and will not require a separate hearing on the merits of the order.

274 Code of Practice Issued under The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (England and Wales) (No 2) Order 2016, ST 2016/2017.

275 The UK Act, s 49 states that: "*(1) The Secretary of State may make provision by regulations for the enforcement in England and Wales or Northern Ireland of – (a) fines or forfeitures ordered by the ICC, and (b) orders by the ICC against convicted persons specifying reparations to, or in respect of victims*".

276 Regulations, reg 3 states that: "*On receipt of the Order the Secretary of State may, (a) appoint a person to act on behalf of the ICC for the purposes of enforcing the Order, and (b) give such directions to the appointed person as appear to him necessary*". Section 2 defines "Order" as "*(a) a fine or forfeiture ordered by the [ICC], or (b) an order by the ICC against a person convicted by the ICC specifying a reparation to, or in respect of, a victim*".

277 Regulations, reg 4 states that: "*(1) If the Secretary of State so directs, the person appointed under regulation 3(a) shall apply to a court in England and Wales or Northern Ireland for registration of the Order for enforcement. (2) On the application of the person so appointed the court shall register the Order as a pre-condition of enforcement. (3) The registration of the Order under this regulation shall be cancelled if the Order is satisfied by other means*".

		3) For the purposes of enforcement, once the ICC forfeiture/reparations order is registered: (a) it has the same force and effect; (b) the same powers are exercisable in relation to its enforcement; and (c) the same proceedings for its enforcement may be taken, as if the order were an order of a court in England, Wales or Northern Ireland (see regulation 5).[278] 4) Finally, regulation 6 provides that the court may, on the application of the person appointed, vest in them any property to which the ICC forfeiture/reparations order relates, to be disposed of in accordance with the directions of the Secretary of State. The appointed person must account to the Secretary of State for the proceeds of disposal, who in turn must transmit the proceeds to the ICC.[279] No detail is provided regarding the manner/timing of how such transmission should occur.
2.	**Rights of Challenge/Appeal**	**1) Rights of Third Parties**: Section 49(5) of the UK Act provides safeguards in respect of persons with an interest or rights in property affected by a forfeiture order. A court in England and Wales or Northern Ireland cannot exercise its powers of enforcement in relation to any property unless it is satisfied that: a) a reasonable opportunity has been given for persons holding any interest in the property to make representations to the court; and b) the exercise of the powers will not prejudice the rights of bona fide third parties. Neither the UK Act nor the Regulations, however, specify whether "*making representations to the court*" includes the right to be heard in front of a court during a hearing (however, it is likely that they will have a right to be heard under the common law). **2) Rights of the Accused**: The UK Act and the Regulations do not set out any processes for the person subject to a forfeiture or reparations order to challenge its enforcement in the UK. Appeal provisions apply at the level of the ICC. However, given that pursuant to section 49, the ICC forfeiture/reparations order is meant to be enforced in the same way as domestic orders, it is possible that avenues for challenge or appeal under the common law are available (such as by way of judicial review).

278 Regulations, reg 5 states that: "*For the purposes of enforcement of the Order when registered, (a) the Order has the same force and effect; (b) the same powers are exercisable in relation to its enforcement, and (c) proceedings for its enforcement may be taken in the same way, as if the Order were an order of a court in England and Wales or Northern Ireland*".

279 Regulations, reg 6 states that: "*(1) A court may, on the application of the person appointed under regulation 3(a), vest in him any property to which the Order relates, to be disposed of in accordance with the directions of the Secretary of State. (2) That person shall account to the Secretary of State for the proceeds of disposal. (3) The Secretary of State shall transmit the proceeds to the ICC*".

		3) Human Rights Claims: National measures aimed at forfeiting or confiscating the assets of persons convicted of an ICC crime implicate that person's right to family life, right to a fair trial and the peaceful enjoyment of their possessions and therefore need to be justified. By way of analogy, the compatibility of the UK's asset recovery regime under POCA regime (which contains similar powers) with Article 1 of the First Protocol to the ECHR was addressed in *R v Waya* [2012] UKSC 51 and *R v Ahmad & Fields* [2015] AC 299. These cases require that any order must bear a proportionate relationship to the legislative aim. In the context of the Rome Statute, these objectives include "*put*[ting] *an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole*"[280] and "*delivering victim-centred justice through reparations*."[281] A person subject to an ICC forfeiture order that has been registered by the courts upon the direction of the Secretary of State may rely on these cases to assert that the courts and/or the Secretary of State acted in breach of Article 6 HRA by giving effect to an order that is incompatible with their rights under Article 1 of the First Protocol to the ECHR and does not bear a proportionate relation to the legislative aim pursued, e.g. to compensate the victims of the ICC crimes. If the challenge is successful, the applicant may be awarded damages from the courts or the Secretary of State under Article 8 HRA.
3.	**Timing of cooperation with forfeiture request**	• There are no specific provisions regarding the time frame for assets to be handed over to the ICC and there is no publicly available data on the matter.
4.	**Management of assets at conclusion of ICC proceedings**	1) As set out above, regulation 6 provides that the court may, on the application of the person appointed, vest in them any property to which the ICC forfeiture/reparations order relates, to be disposed of in accordance with the directions of the Secretary of State. The appointed person must account to the Secretary of State for the proceeds of disposal, who in turn must transmit the proceeds to the ICC. No further details are provided and there are no details regarding return of seized assets on acquittal by the ICC. 2) Paragraph 5(5) of Schedule 6 of the UK Act states that "*a receiver appointed under this paragraph shall not be liable to any person in respect of any loss or damage resulting from any action taken by him which he believed on reasonable grounds that he was entitled to take, except in so far as the loss or damage is caused by his negligence*". As such, there is the possibility to bring a claim for damages against a receiver in whom the frozen or seized assets have been vested, should any damage to, or loss of, these have been caused by their negligence. The cause of action for this claim would lie in the tort of negligence and the claim would be governed by English tort law.
D. Other considerations		
1.	**Examples of ICC Requests**	We have found no publicly available asset recovery request made by the ICC to the UK.

280 International Criminal Court, 'Understanding the International Criminal Court' (2020), ICC-PIOS-BK-05-009/20_Eng https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf, accessed 12 January 2023.

281 Moffett L and Sandoval C, 'Tilting at Windmills: Reparations and the International Criminal Court' (2021) 34 Leiden Journal of International Law 749.

2.	**Collaboration between government departments** **Collaboration with civil society**	The UK Act and the Regulations contain certain provisions specifying the roles of the Secretary of State, the person they appoint and the courts in sections 37-38 and Schedules 5-6 of the UK Act. There are no specific provisions in the UK Act or Regulations in respect of collaboration with civil society. However, we note that the Foreign, Commonwealth and Development Office (**FCDO**) regularly holds ministerial meetings with representatives from civil society, including on human rights issues.[282]
3.	**Cross-border cooperation**	The UK Act expressly provides for cooperation between England, Wales, Northern Ireland and Scotland, for instance in relation to proceedings for a delivery order (section 5), transfer of prisoner to give evidence or to assist in investigation (section 32) or the detention of a person in pursuance of an ICC sentence all envisage cooperation between the relevant authorities (section 42). However, the UK Act does not specifically require or encourage cooperation between the UK and other Rome Statute State Parties with respect to the identification, freezing or forfeiture of the assets of accused persons.[283]
4.	**Purposes for seizure and freezing of assets**	Section 49(1) empowers the Secretary of State to make regulations to enforce "*fines or forfeitures ordered by the ICC*" and "*orders by the ICC against convicted persons specifying reparations to, or in respect of, victims*" (see also regulation 2 of the Regulations). It is not clear, however, whether the UK Act can be interpreted to allow forfeiture for purposes of reparations – and these provisions do not apply to seizure and freezing of assets. Orders to freeze or seize assets under Schedule 6 can only granted where a forfeiture has been made or where there are reasonable grounds for believing that a forfeiture order may be made in such proceedings and the property to which the order relates consist of or includes property that is or may be affected by the order (see Schedule 6, para 1(1)). The relevant provision of the UK Act does not include (future) orders for reparations among the grounds upon which such orders may be based. It is therefore unclear whether the UK Act permits seizure or freezing of assets for ultimate purposes of fulfilling reparations orders.

282 For instance, please see the list of FCDO's ministerial meetings from April to June 2022. Details can be found here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1107991/FCDO-ministers-meetings-April-June-2022.csv/preview, accessed 5 January 2023.

283 We note for completeness that section 79(2) states that the UK Act extends to Northern Ireland and according to s 79(3), "*Her Majesty may by Order in Council make provision for extending the provisions of this Act* […] *to any of the Channel Islands, the Isle of Man or any colony*". Similarly, a number of statutory instruments under the UK Act extend certain provisions to other jurisdictions (specifically Guernsey, the Isle of Man, Jersey and the British Overseas Terrories) – see the International Criminal Court Act 2001 (Guernsey) Order 2022, SI 2022/865, International Criminal Court Act 2001 (Isle of Man) Order 2004, SI 2004/714, International Criminal Court Act 2001 (Jersey) Order 2014, SI 2014/2706 and International Criminal Court Act 2001 (Overseas Territories) Order 2009, SI 2009/1738, as amended by International Criminal Court Act 2001 (Overseas Territories) (Amendment) Order 2010, SI 2010/763, which extends the UK Act to the following overseas territories: Anguilla, Bermuda, Cayman Islands, Falkland Islands, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena, Ascension and Tristan da Cunha, Sovereign Base Areas of Akrotiri and Dhekelia, Turks and Caicos Islands and Virgin Islands. Note however that it is only the International Criminal Court Act (Overseas Territories) Order which has extended a number of provisions of the UK Act, including sections 37 and 38, to overseas territories.

5.	**The effect of sanctions on meeting ICC requests**	The UK implements sanctions imposed autonomously (in accordance with its foreign policy objectives) and UN sanctions (which it is obliged to do as a UN Member State). The Sanctions and Anti-Money Laundering Act 2018 provides the main legal basis for the UK to impose, update and lift sanctions. Sanctions measures can include travel bans or asset freezes imposed against persons designated or specified by the UK government. Accordingly, certain sanctions measures will require the financial assets of certain individuals to be frozen. However, there is nothing specific in the UK Act or Regulations (or in the Sanctions and Anti-Money Laundering Act) in respect of how ICC asset recovery requests interact with assets frozen pursuant to domestic sanctions or UN sanctions – including whether assets frozen pursuant to sanctions may be released for purposes of fulfilling reparations orders. It is, therefore, unclear whether existing sanctions would prevent compliance with an ICC request if assets were subject to pre-existing freezes/seizure under sanctions regimes.

ANNEXURE 9: United States of America [Readiness rating: 1 – Poor]

No	Question	Response
1.	**Primary Legislative Instrument**	• While the U.S. is not a party to the ICC and therefore does not have a specific law in place relating to a request made by the ICC, the U.S. does have Treaties on Mutual Legal Assistance in Criminal Matters (**MLATs**) (which deal with requests between the relevant signatory states but would not directly cover a request from the ICC). MLATs "*enable law enforcement authorities and prosecutors to obtain evidence, information, and testimony abroad in a form admissible in the courts of the Requesting State.*"[284] • In addition to MLATs, there are also multilateral conventions and U.S. laws, such as 18 U.S. Code § 3512, which apply when executing foreign requests for assistance. The multilateral conventions only apply to State parties and thus would not cover an ICC request. Laws such as 18 U.S.C. § 3512 or 28 U.S.C. § 1782 either establish those treaty obligations as a matter of domestic law or empower U.S. executive or judicial authorities to respond to proper requests for foreign legal assistance outside of the MLAT context, such as letters rogatory. However, 22 U.S. Code § 7423 prohibits assistance when this would support ICC investigations/processes.
2.	**Additional implementing legislation**	**N/A**
3.	**Competent authority and decision-maker/s**	• Office of International Affairs (**OIA**) is an office in the Criminal Division of the U.S. Department of Justice (**DOJ**). OIA is legally designated as the Central Authority of the U.S. As the U.S. Central Authority responsible for implementing MLATs, OIA assists foreign authorities to secure information and evidence located in the U.S. for use in criminal investigations, trials, and related proceedings in the foreign country. • The Money Laundering and Asset Recovery Section (**MLARS**) executes incoming requests for forfeiture assistance under 28 U.S.C. § 2467 in consultation and coordination with OIA.
4.	**Key strengths of enforcement 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 have been on the books for many years. 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 tends to work in practice. The criminal justice system routinely confronts the issue, so it is unlikely that a prosecutor or judge would be unfamiliar with the relevant issues or grossly misapply the law.

284 U.S. Department of Justice, *Mutual Legal Assistance Treaties of the United States* (April 2022) https://www.justice.gov/criminal-oia/file/1498806/download, accessed 24 October 2022.

		• 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 malefactors. • Clear mechanisms and guidance are in place for seized/frozen 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 restraint of assets after initiation of foreign forfeiture proceedings and prior to forfeiture being ordered – allowing for preservation of assets and value. Provision is also made for non-conviction-based (**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). • 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.
5.	**Notable weaknesses of enforcement framework**	• The key weakness is that the United States is not a party to the Rome Statute, and indeed, provisions of U.S. law 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, U.S. legal standards for implementing requested measures may add requirements beyond those contemplated in the Rome Statute, for example, the requirement of dual criminality and probable cause in ordering warrants for seizure of assets. Similarly, 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, RICO conspiracies 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.
6.	**Recommendations**	• It is unlikely that the U.S. will join the ICC, due to domestic political constraints.
A. Identifying and tracing assets		
1.	**Requests for assistance**	1) There does not appear to be a U.S. law that expressly allows U.S. authorities to ascertain whether a person benefitted from a crime under a foreign law. However, upon request by a foreign State, the U.S. may assist in a request for evidence to assist that State in ascertaining whether a person has benefitted from a crime or derived property from a crime. 2) The specific process for assistance with a request, and the information needed to effect the request, will be dependent on whether there is an MLAT in place with the Requesting State and the terms of such MLAT.

		3) Where an MLAT is in place a) Generally, MLATs require the Requested State to provide the Requesting State with assistance or evidence based on the requirements of the treaty between the two States. Any requests for assistance are made to the Requested State's Central Authority (in the U.S., the OIA). The OIA will then make a determination on whether the request is factually and legally sufficient and should be executed.[285] Thereafter, the OIA may either take steps to give effect to the request or designate another U.S. authority to do so as contemplated in 18 U.S. Code § 3512[286] (Foreign requests for assistance in criminal investigations and prosecutions) which reads: "*Upon application, duly authorized by an appropriate official of the Department of Justice, of an attorney for the Government, a Federal judge may issue such orders as may be necessary to execute a request from a foreign authority for assistance in the investigation or prosecution of criminal offenses, or in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing, and restitution*". b) The right to challenge the decision to accede to the request and effect of a successful challenge will depend on the provisions of the relevant MLAT. For example, many MLATs state that the Requested State, "*may require that the Requesting State agree to terms and conditions deemed to be necessary to protect third-party interests in the item to be transferred*". 4) Where there is no MLAT in place a) The OIA may execute non-treaty requests for assistance based on comity and reciprocity. The requests are accepted in the form of letters rogatory and letters of request.[287] b) Further, a United Nations or regional convention can often be used if the Requesting and Requested States have ratified the convention and the conduct is covered by the convention.[288]
2.	**Requirements for requests**	1) The typical requirements for a request for assistance, whether through a MLAT or letter rogatory, include: a) Identification of the competent authority conducting the investigation or proceeding to which the request for assistance relates, including the name, official position, and contact information of that authority; b) The description of the offence to which the request relates, including the text of the relevant laws and the applicable penalty; c) A description of the facts that are alleged to constitute the offence;

285 *Ibid*.

286 18 U.S. Code § 3512 (U.S.) https://www.law.cornell.edu/uscode/text/18/3512#:~:text=%C2%A7%20351218%20U.S.%20Code%20%C2%A7%203512%20%2D%20Foreign%20requests%20for,in%20criminal%20investigations%20and%20prosecutions, accessed 24 October 2022.

287 U.S. DOJ, *Frequently Asked Questions Regarding Legal Assistance in Criminal Matters* https://www.justice.gov/criminal-oia/file/1498811/download, accessed 24 October 2022.

288 U.S. DOJ and U.S. State Department, *U.S. Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation*, https://star.worldbank.org/sites/default/files/2020-12/booklet_-_english_final_edited%20%281%29.pdf, accessed 3 December 2022.

		d) A statement of the purpose for which the evidence, information, or other assistance is sought, including the nexus between the assistance sought and the offence; e) Information on the identity and location of any person from whom evidence is sought; f) The identity and location of a person to be served with notice or legal documents, the person's relationship to the proceeding, and a description of how service is to be made; g) The identity and whereabouts of a person to be located; h) A precise description of the place or person to be searched and of the items to be seized; i) A description of how testimony or statements are to be taken and recorded; j) A list of questions to be asked of a witness; k) A description of the procedures to be followed in executing the request; l) The allowances and expenses to which a person asked to appear in the Requesting State will be entitled; and m) Any other information that may facilitate OIA's execution of the request.[289]
3.	**Refusals of requests**	1) The OIA will not proceed with the foreign assistance request if it: a) does not comply with the MLAT (if one is in place); b) does not contain all of the required information to allow identification and location of the assistance or evidence requested; c) is subject to a ground for refusal; and d) contains insufficient information to meet the U.S. legal standards for execution. 2) If the requirements are not met, OIA may send a request for additional information or clarification to the foreign Central Authority.[290] 3) The U.S. legal standard that must be satisfied when executing a request depends on the type of legal process that must be issued to produce the evidence or assistance requested. The U.S. legal process needed to provide the assistance or evidence requested must be followed and the U.S. legal standard for that specific process must be applied.[291] For example, if a foreign entity were to request assistance with a search and seizure of an item, the process to obtain a search warrant from a U.S. court must be followed and the U.S. legal standard for receiving such a warrant, which is dual criminality and probable cause, must be satisfied.[292]

289 *Ibid*.
290 *Ibid*.
291 *Ibid*.
292 *Ibid*.

4.	**Time frames for requests**	1) Time frames (if any) are solely dependent on the MLAT in place with the Requesting State. However, requests appear to average approximately 10 months to fulfil, with some requests taking considerably longer. 2) Letters rogatory are the customary method of obtaining assistance from abroad in the absence of a treaty or executive agreement. A letter rogatory is a request from a judge in a foreign country to the judiciary of the U.S. requesting the performance of an act which, if done without the sanction of the U.S., would constitute a violation of that country's sovereignty. The Department of Justice assumes that the process will take a year or more, and even urgent cases may take over a month to execute.
5.	**Constraints on State cooperation**	1) Constraints on U.S. cooperation include delays in processing the request as well as political issues surrounding the grounds for refusing a request. Under certain MLATs, political offences are a potential ground for refusal of mutual legal assistance. In addition, there are human rights considerations which must also be taken into account. This may cause friction where States have differing ideals of what may constitute a political offence or place different priorities on human rights considerations.
B. Seizing and freezing assets		
1.	**The context for seizing/ freezing assets (distinguished from forfeiture)**	1) The U.S. is not a party to the Rome Statute and, therefore, the U.S. does not have any obligations in relation to the Rome Statute. However, the U.S. has laws in place that address freezing and seizing the assets of persons accused of a crime which become relevant where a foreign entity makes a request for the seizing or freezing of assets. 2) A foreign State's request to seize assets in the U.S. would have to follow the U.S. federal rules on seizure and then, if that is achieved, the foreign State can benefit from the seizure through international sharing mechanisms (see D below). Or in the alternative, under the commencement of a non-conviction-based (**NCB**) forfeiture (see C below), a foreign State can request that the DOJ commence a NCB forfeiture action to recover the property under U.S. federal law. 3) Under federal law, "seizure" (or "freezing") involves the restraint of an asset or its transfer from the owner or possessor to the custody or control of the government. This is distinguished from "forfeiture" which is the legal process of transferring title in an asset to the government without compensation because that asset was derived from, used to facilitate, or was involved in criminal conduct in a manner that subjects it to forfeiture under an applicable asset forfeiture statute.[293] The government obtains title to the asset upon obtaining a declaration of forfeiture in an administrative forfeiture proceeding, a judgment of forfeiture in a civil forfeiture proceeding, or a final order of forfeiture in a criminal case.[294] This section concerns seizure; section C addresses forfeiture.

293 U.S. DOJ Criminal Division, *Asset Forfeiture Policy Manual* (2021) https://www.justice.gov/criminal-afmls/file/839521/download, accessed 1 December 2022.
294 *Ibid*.

2.	**Implementing requests for seizing/ freezing assets**	1) This section describes generally the U.S. federal rules on seizure, please refer to Section C – Commencement of a NonconvictionBased Forfeiture Action and Section D – International Sharing and 18 U.S. Code § 981(i) for how these laws operate when dealing with a foreign State's request. 2) U.S. prosecutors may request U.S. courts to order a temporary (renewable) 30-day restraint of assets subject to confiscation located within the U.S. based upon evidence of an arrest or charge in the foreign State. However, this type of relief is seldom authorised because there must be a strong factual and legal basis to believe that sufficient information will quickly be available to restrain and forfeit the asset under U.S. law.[295] a) A seizure is ordinarily made pursuant to a warrant under the Federal Rules of Civil Procedure. To obtain a seizure warrant, an officer of the law must typically prove to a magistrate or judge that probable cause exists for the proposed seizure, based upon direct information (i.e. the officer's personal observation) or other reliable information. The government must then notify anyone with an interest in the property and provide an opportunity to request judicial forfeiture proceedings. At any point after seizure, an owner or anyone else with an interest in the property may petition for remission or mitigation. Remission is a petition for the return of all of the property seized or its entire value; mitigation for return of only a portion. Affected persons, or third parties, with an interest in the property, and thus standing to contest the seizure, may oppose the enforcement of the seizure order either on their own or through representation. Third parties who did not appear in the U.S. proceedings may still be permitted to challenge enforcement of the U.S. seizure orders under foreign law. b) A seizure may be made without a warrant if: i) a complaint for forfeiture has been filed in the U.S. district court and the court issued an arrest warrant *in rem*; ii) there is probable cause to believe that the property is subject to forfeiture and the seizure is made pursuant to a lawful arrest or search; and iii) the property was lawfully seized by a U.S. State or local law enforcement agency and transferred to a federal agency.[296] c) Warrantless seizure may be challenged in the same way as seizure pursuant to a warrant through petition for remission or mitigation. 3) Seizure, and subsequent forfeiture, is classified as civil forfeitures or criminal forfeitures according to the nature of the judicial procedure which ends in confiscation. Relevant statutes for these purposes include: a) 18 U.S. Code § 981: Under this provision, any personal or real property constituting, derived from, or traceable to any proceeds obtained directly or indirectly from any qualifying offence is subject to seizure (and/or forfeiture) by the federal government. 18 U.S.C. 981(a)(1)(B) provides:

295 U.S. DOJ and U.S. State Department, *U.S. Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation*, https://star.worldbank.org/sites/default/files/2020-12/booklet_-_english_final_edited%20%281%29.pdf, accessed 3 December 2022.

296 18 U.S. Code § 981 (U.S.) https://www.law.cornell.edu/uscode/text/18/981, accessed 27 October 2022.

"*The following property is subject to forfeiture to the United States ... (B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense—(i) involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, or the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act), or any other conduct described in section 1956(c)(7)(B); (ii) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and (iii) would be punishable under the laws of the United States by imprisonment for a term exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States*".

b) 18 U.S.C. 1956(c)(7)(B): for seizure related to an offense against a foreign State, the crimes involved included, "*(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act); (ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16[297]); (iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978); (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) smuggling or export control violations involving—(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or (II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); (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; or (vii) trafficking in persons, selling or buying children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts*".

c) 18 U.S. Code § 1963: permits seizure for racketeering, a broad offense which can include for example: kidnapping, trafficking in firearms, obstruction, slavery and human trafficking, money laundering, trafficking in chemical or biological weapons, etc. Additionally, federal law permits the confiscation of property located in the U.S. derived from or used to facilitate various crimes committed in violation of foreign law overseas. The qualifying felonies include public corruption, crimes of violence, drug trafficking, gun running, bank fraud, and child prostitution.

297 18 U.S. Code § 16 (*Crime of violence defined*) (U.S.) https://www.law.cornell.edu/uscode/text/18/16, accessed 1 December 2022. The term "crime of violence" means (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

3.	**Management of frozen/seized assets**	1) Numerous agencies within the DOJ may be involved in the freezing/seizure of assets, depending on the type of assets and where the assets are located, but they are all expected to coordinate with the U.S. Marshals Services (**USMS**), which is responsible for the management and disposal of most assets seized by DOJ agencies.[298] The DOJ has a robust policy in place governing the USMS management of these assets.[299] The USMS employs best practices from private industry to ensure that assets are managed and sold in an efficient and cost-effective manner, and where necessary may appoint a trustee or custodian to handle complex assets.[300] a) Prior to an order of forfeiture, a frozen or seized asset may generally not be used by the USMS, but in some limited circumstances, such as where the seized asset is a business or otherwise requires maintenance, the USMS may obtain a court order to do so.[301] b) The USMS may sell frozen or seized assets by obtaining a court order for interlocutory sale. In most cases, the DOJ favours pre-forfeiture sale to preserve asset value and mitigate expenses. Proceeds from any pre-forfeiture sale are deposited into a Seized Assets Deposit Fund (**SADF**) managed by USMS.[302] 2) The Department of the Treasury and Department of Homeland Security separately may seize assets, particularly where the assets were used in relation to terrorism, illicit finance, or relate to international sanctions.[303] Assets seized by agencies within these departments are managed by the Treasury Executive Office of Asset Forfeiture (**TEOAF**), which, like the USMS, maintains a robust set of policy directives governing the management of seized assets.[304] a) TEOAF policy generally aligns with that of the USMS. Use of seized assets is not permitted prior to forfeiture, but exceptions may be granted where use is necessary to maintain the value of the property.[305] And pre-forfeiture sales are preferred to preserve asset value and mitigate costs.[306]
C. Forfeiting assets of accused persons and handing them over to the Foreign Entity		
1.	**Implementing forfeiture requests**	1) The U.S. has laws in place relevant to, responding to and executing a foreign jurisdiction's forfeiture or confiscation judgment. As a general practice, the DOJ "*assigns high priority to requests by foreign countries for assistance in restraining, forfeiting, and repatriating assets found in the United States that are forfeitable under foreign law*".[307]

298 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 (ATF).

299 U.S. DOJ Criminal Division, *Asset Forfeiture Policy Manual* (2021) https://www.justice.gov/criminal-afmls/file/839521/download, accessed 1 December 2022.

300 18 U.S.C. § 983(j) (civil forfeiture); 18 U.S.C. §§ 1963(d) & (e) (criminal forfeiture).

301 Fed. R. Crim P. 32.2(3); *See also* U.S. DOJ Criminal Division, *Asset Forfeiture Policy Manual* (2021), Ch. 10.II.B <https://www.justice.gov/criminal-afmls/file/839521/download> accessed 1 December 2022.

302 Fed. R. Crim P. 32.2(3); Ch. 10.II/.C.

303 18 U.S.C. § 981(b).

304 U.S Department of the Treasury, *TEOAF Policy Directives*, https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/asset-forfeiture/teoaf-policy-directives, last visited 3 December 2022.

305 USTEOAF Directive No. 8 (7 Jan. 2016).

306 USTEOAF Directive No. 27 (18 Feb. 2015).

307 U.S. DOJ Criminal Division, *Asset Forfeiture Policy Manual* (2021) https://www.justice.gov/criminal-afmls/file/839521/download, accessed 1 December 2022.

		International Forfeiture 2) 28 U.S.C. § 2467,[308] (Enforcement of Foreign Judgement) (in force since 2000) permits the U.S. to bring an action on behalf of a foreign country before a U.S. court where that foreign country has entered into a treaty or other formal international agreement providing for mutual forfeiture assistance. 3) Before the U.S. can enforce a foreign forfeiture judgment under 28 U.S.C. § 2467, the "*Attorney General or the designee of the Attorney General*" must certify that enforcing the order is "*in the interest of justice*".[309] *a)* The foreign nation[310] seeking to have a forfeiture or confiscation judgment[311] registered and enforced in the U.S. must submit a request to the Attorney General which must include: i) A summary of the facts of the case and a description of the proceeding that resulted in the forfeiture or confiscation judgment; ii) Certified copy of the forfeiture or confiscation judgment; iii) An affidavit or sworn declaration establishing that the foreign nation took steps in accordance with the principles of due process i.e. that notice was given of the proceedings to all persons with an interest in the property in sufficient time to allow the person to defend against the charges, and that the judgment is not subject to appeal; and iv) Any additional evidence as requested by the Attorney General.[312] *b)* The Attorney General will determine whether it is "*in the interest of justice*" to certify the request.[313] Any decision by the Attorney General is final and not subject to judicial review.[314] Primarily, the crime that gave rise to the foreign forfeiture or confiscation judgment must be based on either: (i) an offence that would give rise to forfeiture under U.S. federal law; or (ii) is an offence listed in 18 U.S.C. § 1956(c)(7)(B).[315]

308 28 U.S.C. § 2467, https://www.law.cornell.edu/uscode/text/28/2467 last visited 24 October 2022.

309 28 U.S.C. § 2467(b)(2) & (d)(3)(B)(ii).

310 "*Foreign nation*" is defined to mean any country with which the United States has a bilateral treaty or other formal international agreement for mutual forfeiture assistance or is a party to the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. 28 U.S.C. § 2467(a)(1).

311 "*Forfeiture or confiscation judgment*" is defined to mean "*a final order of a foreign nation*" compelling a person or entity "*to pay a sum of money representing the proceeds of any violation of foreign law that would constitute a violation or an offense for which property could be forfeited under Federal law if the offense were committed in the United States, or any foreign offense described in section 1956(c)(7)(B) of title 18, or property the value of which corresponds to such proceeds; or to forfeit property involved in or traceable to the commission of such offense.*" 28 U.S.C. § 2467(a)(2).

312 28 U.S. Code § 2467(b)(1), https://www.law.cornell.edu/uscode/text/28/2467, last visited 25 October 2022.

313 28 U.S. Code § 2467(b)(2), https://www.law.cornell.edu/uscode/text/28/2467, last visited 25 October 2022.

314 *Ibid.*

315 18 U.S.C. § 1956(c)(7)(B). 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.

4) Once the request is certified, the Attorney General may file an application on behalf of the foreign nation in a district court of the U.S.[316] seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the U.S.[317]

5) This statute does not permit the U.S. court to relitigate the merits of the case that lead to the foreign judgment.[318] Accordingly, the relevant district court will enter orders necessary to enforce the judgment unless the court finds:

   a) "*the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law;*

   b) *the foreign court lacked personal jurisdiction over the defendant;*

   c) *the foreign court lacked jurisdiction over the subject matter;*

   d) *the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property of the proceedings in sufficient time to enable him or her to defend; or*

   e) *the judgment was obtained by fraud*".[319]

6) It does not appear that the accused person has the right to be notified and/or to make representations prior to an order for forfeiture being made. Particularly because, in this case, the U.S. is merely registering and enforcing a foreign State's forfeiture or confiscation judgment, not making its own determination. However, the affidavit or sworn declaration filed by the foreign State must establish that the foreign State took steps in accordance with the U.S. principles of due process (failing which a judgment may be found unenforceable). This means, at a minimum, that notice was given of the foreign proceedings to all persons with an interest in the property in sufficient time to allow the person to defend against the charges.

7) Once the court gives the foreign judgment full force and effect, the MLARS handles the repatriation of the property. The process for repatriation is dependent on the treaty in place with the relevant State.[320]

8) In circumstances where a foreign forfeiture proceeding has not yet taken place, a request can be made for a restraining order. Under 28 U.S. Code § 2467(3)(A),[321] the Attorney General may apply for a restraining order at any time before or after the initiation of forfeiture proceedings by a foreign State, in order to preserve the availability of property subject to civil or criminal forfeiture under foreign law.

316 The relevant jurisdictional rule states, "*Venue shall lie in the district court for the District of Columbia or in any other district in which the defendant or the property that may be the basis for satisfaction of a judgment under this section may be found*".
317 28 U.S. Code § 2467(c)(1), https://www.law.cornell.edu/uscode/text/28/2467, last visited 25 October 2022.
318 28 U.S. Code § 2467(e); *See Enforcement of Philippine Forfeiture Judgment*, 442 F. Supp. 3d at 762 (S.D.N.Y. 2020).
319 28 U.S. Code § 2467(d)(1), https://www.law.cornell.edu/uscode/text/28/2467, last visited 25 October 2022.
320 DOJ Asset Forfeiture Manual, https://www.justice.gov/criminal-afmls/file/839521/download, last visited 26 October 2022.
321 28 U.S. Code § 2467(3)(A), https://www.law.cornell.edu/uscode/text/28/2467#:~:text=to%20forfeit%20property%20involved%20in,the%20commission%20of%20such%20offense.&text=such%20additional%20information%20and%20evidence,designee%20of%20the%20Attorney%20General, last visited 26 October 2022.

		9) There is no requirement that the seized assets be used to compensate the victims of international crimes. Non-conviction-based forfeiture action 10) If, for some reason, a foreign State is not able to obtain a foreign forfeiture or confiscation judgment that can be enforced in the U.S., and therefore cannot rely on 28 U.S.C. § 2467, the foreign State can request that the DOJ commence an NCB forfeiture action to recover the property under U.S. federal law.[322] An NCB is an action filed in a U.S. federal court and is a civil action brought to obtain title over particular assets.[323] 11) An NCB forfeiture action may be based on the violation of a foreign law that is an offence listed in 18 U.S.C. § 1956(c)(7)(B), or upon proof that by transferring the property to the U.S., a violation of U.S. law was committed.[324] 12) An action is commenced when the U.S. government seizes the asset and names it in a complaint filed in the U.S. federal court in the district in which that asset is located. Any parties with a legal interest will then have the opportunity to contest the seizure and forfeiture of the property and may claim the "innocent owner defence" i.e. that even if the property was used to commit a crime, or was the proceeds of the crime, the "innocent owner" was not aware of the crime or that they took all reasonable steps to prevent the crime and must state the reason for contesting and the reasons for doing so. If there is no contention, the property is forfeited to the government. 13) For the government to be successful, two things must be proven: *a)* a crime was committed; and *b)* the property was derived from or used to commit that crime. 14) The Comprehensive Crime Control Act of 1984 established the Department of Justice Assets Forfeiture Fund are to receive the proceeds of forfeiture. These funds can go to third-party interests which include equitable sharing payments to foreign governments for assistance in forfeiture cases. Equitable sharing payments must reflect the degree of direct participation in law enforcement efforts resulting in forfeiture.[325]

322 *See* Stefan D. Cassella, *Nature and Basic Problems of Non-Conviction-Based Confiscation in the United States*, 16 VEREDAS DO DIREITO [RTS. OF L.] 41, 59 (2019).
323 *Ibid*.
324 28 U.S. Code § 1355, https://www.law.cornell.edu/uscode/text/28/1355, last visited 26 October 2022. Note that this would cover international crimes as understood in the Rome Statute.
325 The Department of Justice, *Assets Forfeiture Fund*, https://www.justice.gov/afp/fund, last visited 2 December 2022.

2.	**Timing of cooperation with forfeiture request**	1) International Forfeiture: Under 28 U.S.C. § 2467, the U.S. is required to make an application to enforce the foreign judgment within five years of receiving the request.[326] 2) Non-conviction-based forfeiture: The Civil Asset Forfeiture Reform Act of 2000[327] imposes the following deadlines: • a 60-day deadline to issue a notice of seizure to all interested parties; or • a 90-day deadline to file a complaint for forfeiture after the demand for court action is filed.
D. Other considerations		
1.	**Examples of Foreign Cooperation Requests**	We have not identified examples of the U.S. complying with an ICC request; however, the following reflect instances of international cooperation in relation to forfeiture requests. **International Forfeiture**: • *In re One Prinz Yacht Named Eclipse*, No. 12-MC-162 (RCL), 2022 WL 4119773 (D.D.C. 9 Sept. 2022) ▪ This case involved U.S.-based properties, a yacht, and bank accounts included in two final forfeiture orders issued by the High Court of Justice of the Autonomous Community of Valencia, Spain. The court found that the government satisfied the statutory requirements for an entry of final forfeiture. • *In re Enforcement of Philippine Forfeiture Judgment*, 442 F. Supp. 3d 756 (S.D.N.Y. 2020) ▪ The U.S. brought an action on behalf of the Republic of the Philippines to enforce a Philippine forfeiture judgment. The question before the court was whether the five-year statute of limitations governing foreign judgment enforcement actions had expired. The court held that the five-year statute of limitations began to run on the date the Philippines requested that Attorney General commence enforcement action, not when the crime at issue took place.

326 *See In re Enforcement of Philippine Forfeiture Judgment*, 442 F. Supp. 3d 756, 760 (S.D.N.Y. 2020).
327 Pub. L. 106-185, 25 Apr. 2000, 114 Stat. 202.

		• *USA v. PetroSaudi Oil Services (Venezuela) Ltd*., No. 21-56228 (9th Cir. 2022) ▪ In the past, the state of California has cooperated with the Federal government to repatriate millions of dollars of laundered funds to the people of Malaysia, as part of the 1Malaysia Development Berhad seizures. The Government contended that the funds held in escrow in fulfilment of an arbitral award were subject to forfeiture as the proceeds of "*a foreign offense involving the misappropriation of public funds by or for the benefit of a public official*", "*wire fraud*", and "*international transportation or receipt of stolen or fraudulently obtained property*", among other things. However, the Ninth Circuit Court of Appeal has since ruled that the order allowing prosecutors to seize the award was barred under sovereign immunity. This may present a challenge to cooperation with ICC asset recovery requests in the U.S. **<u>Commencement of a Non-conviction-Based Forfeiture Action</u>**: • *United States v. Prevezon Holdings Ltd.*, 122 F. Supp. 3d 57, (S.D.N.Y. 2015): ▪ An NCB forfeiture action was filed seeking a portion of USD 230 million that was stolen in a Russian fraud scheme and was eventually laundered through Eastern European bank accounts and invested in real estate in New York. • *United States v. All Funds on Deposit with R.J. O'Brien & Assoc.*, 783 F.3d 607(7th Cir. 2015): ▪ An NCB forfeiture action was filed seeking the forfeiture of USD 6.7 million held in futures trading accounts in Chicago that belonged to an affiliate of Al-Qaeda.
2.	**Collaboration between government departments** **Collaboration with civil society**	There is collaboration between different U.S. government departments. For example, agencies like the Federal Bureau of Investigation (**FBI**), the Department of Homeland Security, Homeland Security Investigations (**HSI**), and U.S. Internal Revenue Service (**IRS**) all assist in the process of responding to foreign requests.[328] There is no formal scope for civil society involvement.
3.	**Cross-border cooperation**	The U.S. has stated its commitment to the global fight against corruption. To that end, the U.S. has expressly committed to creating close working relationships with its international colleagues "*so that affected parties can timely and efficiently share the information necessary to successfully collect evidence of corruption, and locate, seize, and confiscate ill-gotten gains*".[329] As discussed above, formal cooperation with other State parties is through requests for Mutual Legal Assistance. In addition, informal information-sharing requests through police-to-police or prosecutor-to-prosecutor requests are possible. An informal request can be made to the U.S., for example, to undertake routine investigative measures such as witness interviews, visual surveillance, and public record searches, such as corporate formation data or real estate records.[330] Confirming information through informal requests can be helpful to prepare a formal request. Further international sharing permits transfer of forfeited assets to a foreign State.

328 U.S. DOJ and U.S. State Department, *U.S. Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation*, https://star.worldbank.org/sites/default/files/2020-12/booklet_-_english_final_edited%20%281%29.pdf, accessed 3 December 2022.
329 *Ibid*.
330 *Ibid*.

International Sharing:

The Attorney General (or a designee) may transfer any forfeited assets, as authorised by statute, to a foreign country that participated directly or indirectly in the seizure or forfeiture of those assets.[331]

- 18 U.S.C. § 981(i):332 Civil Forfeiture
- 21 U.S.C. § 881(e)(1)(E):333 Forfeitures
- 31 U.S.C. § 9705(h)(2):334 Department of the Treasury Forfeiture Fund

Additional considerations: Forfeiture may be guided by a standing international sharing agreement or may be the subject of bilateral case-specific forfeiture sharing arrangement negotiated by MLARS and approved by the Department of State.

The Procedure:

18 U.S.C. § 981(i):

"*Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—*

A. has been agreed to by the Secretary of State;

B. is authorised in an international agreement between the United States and the foreign country; and

C. is made to a country which, if applicable, has been certified under section 481(h) 4 of the Foreign Assistance Act of 1961.[335]

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set."

331 Department of Justice, *The Attorney General's Guidelines on the Asset Forfeiture Program*, Management and Disposition of Seized and Forfeited Assets, International Sharing (July 2018), page 5, https://www.justice.gov/criminal-mlars/file/1123146/download, last visited 24 October 2022.
332 18 U.S.C. § 981(i), https://www.law.cornell.edu/uscode/text/18/981, last visited 24 October 2022.
333 21 U.S.C. § 881(e)(1)(E), https://www.law.cornell.edu/uscode/text/18/981, last visited 24 October 2022.
334 31 U.S.C. § 9705(h)(2), https://www.law.cornell.edu/uscode/text/31/9705, last visited 24 October 2022.
335 Section 481(h) 4 of the Foreign Assistance Act of 1961, https://www.law.cornell.edu/uscode/text/18/481#h, last visited 24 October 2022.

		21 U.S.C. § 881(e)(1)(E): *"Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—* *A. has been agreed to by the Secretary of State;* *B. is authorised in an international agreement between the United States and the foreign country; and* *C. is made to a country which, if applicable, has been certified under section 2291j(b) of title 22."*[336] **31 U.S.C. § 9705(h)(2)**: *"(1) The Secretary may, with respect to any property forfeited under any law enforced or administered by the Department of the Treasury—* *A. retain any of the property for official use; or* *B. transfer any of the property to—* *i. any other Federal agency; or* *ii. any State or local law enforcement agency that participated directly or indirectly in the seizure or forfeiture of the property.* *(2)The Secretary may transfer any forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure of [4] forfeiture of the property, if such a transfer—* *A. is one with which the Secretary of State has agreed;* *is authorised in an international agreement between the United States and the foreign country; and is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961 (22 U.S.C. 2291(h)).*"[337]
4.	**Purposes for seizure and freezing of assets**	U.S. law does favour using funds from forfeited assets to remunerate victims of crime. However, this is not an absolute requirement (and would not limit the basis on which the U.S. would cooperate with a seizure or freezing MLA request).

336 Section 2291j(b) of title 22, https://www.law.cornell.edu/uscode/text/22/2291j#b, last visited 24 October 2022.
337 22 U.S.C. 2291(h), https://www.law.cornell.edu/uscode/text/22/2291#h, last visited 24 October 2022.

5.	**The effect of sanctions on meeting foreign State asset tracing/ recovery requests**	As discussed above, foreign entities may use MLAT requests to seek assistance from U.S. agencies to obtain evidence related to forfeitable assets, and MLARS executes incoming requests for forfeiture assistance under 28 U.S.C. § 2467 in consultation and coordination with OIA. Disposition of forfeited assets generally is managed at the discretion of the Attorney General or the Secretary of the Treasury (depending on which department seized the assets),[338] and both departments favour using funds from forfeited assets to remunerate victims of crime. However, assets that are blocked due to U.S. sanctions, such as assets belonging to individuals identified pursuant to Executive Order 14024 (Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation) or assets belonging to individuals sanctioned under the Magnitsky Act or Global Magnitsky Act,[339] are not necessarily forfeitable. Indeed, OFAC regulations include procedures for the unblocking of assets by individuals with an ownership interest in the assets, where they contest the validity of the blocking backed on mistaken identity but these regulations do not contemplate remission of such assets to victims of crime or human rights violations.[340] That said, 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,[341] and the U.S. has discretion to unblock assets to remit funds to victims.

338 See, e.g., 18 U.S.C. § 981(d).
339 All such individuals are incorporated into OFAC's Specially Designated Nationals list, which can be viewed on the website www.treasury.gov/sdn.
340 See, e.g., 31 C.F.R. §§ 501.806–07.
341 See, e.g., 31 C.F.R. § 587.201; EO 14024 § 11 (15 April 2021).

6.	**Policy and political considerations**	• The U.S. participated in the negotiations of the Rome Statute, but ultimately voted against its final adoption at the diplomatic conference.[342] 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. The U.S. nevertheless signed the treaty on 31 December 2000, but President Clinton did not submit the treaty to the U.S. Senate for ratification. On 6 May 2002, the United States informed the UN Secretary-General that it "[did] not intend to become a party to the treaty".[343] The import of this communication is that the treaty could not be provisionally applied to the U.S. pending ratification.[344] 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".[345] The law also prohibits responding to "a request for cooperation", "any letter rogatory", or providing "support" to the ICC, but does allow the president to waive the application of certain provisions.[346] 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.[347] In 2013, the U.S. expanded its War Crimes Reward Program 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).[348] The current Biden Administration has taken a conciliatory tone, accepting the political constraints but nonetheless trying to facilitate the ICC's work. For instance, the administration repealed sanctions placed upon ICC personnel;[349] and began an internal policy review on the U.S. position with respect to the ICC.[350]

342 See 22 U.S.C. § 7421 (Congressional findings).
343 See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en#12, last accessed 24 October 2022.
344 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).
345 Pub. L. 107-206, 116 Stat. 820 (2002), codified at 22 U.S.C. Chapter 81.
346 22 U.S.C. § 7423(b) (request for cooperation), (c) (letters rogatory), (e) (support); *ibid*. § 7422(c) (waiver).
347 See U.N.S.C. Res. No. 1593 (2005) (Darfur); U.N.S.C. Res. No. 1970 (2011) (Libya).
348 See 22 U.S.C. § 2708; see also U.S. Department of State, 'War Crimes Rewards Program' https://www.state.gov/war-crimes-rewards-program/, accessed 24 October 2022.
349 E.O. 13928 of June 11, 2020, 85 Fed. Reg. 36139, repealed by E.O. 14022 of 1 Apr. 2021, 86 Fed. Reg. 17895.
350 Colum Lynch, 'America's ICC Animus Gets Tested by Putin's Alleged War Crimes' (*Foreign Policy*, 15 March 2022) https://foreignpolicy.com/2022/03/15/us-icc-russia-invasion/, accessed 20 January 2023.