Asset Recovery at International(ised) Criminal Tribunals: Fines, Forfeiture, and Orders for Reparations

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1. Introduction

International(ised) criminal tribunals (ICTs) have traditionally had two tools at their disposal with which to recover assets, whether ill-gotten or otherwise, belonging to persons convicted of international crimes: fines and orders for forfeiture as penalties additional to imprisonment. However, following the establishment of the permanent International Criminal Court (ICC), increasingly victim-oriented ICTs have been equipped with a third tool for asset recovery in international crimes cases: orders for reparations. This tool provides a vehicle through which victims of international crimes might be awarded compensation, among other forms of reparation.

This chapter critically analyses the availability and use of these three asset recovery mechanisms at ICTs from Nuremberg until the post-ICC era. It will be shown that, while the majority of ICTs have been empowered to order fines and forfeiture measures, such procedures have been scarcely utilised in practice. An additional aim of the chapter is to show that the Rome Statute system has influenced the approach toward fines, forfeiture (including protective measures), and orders for reparations taken by a number of ICTs established following its adoption in 1998.

2. The Post-World War II Military Tribunals

The International Military Tribunal (IMT) was explicitly empowered to order asset forfeiture measures. However, although Article 28 of the IMT Charter afforded the Tribunal 'the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany',[1] this provision was never utilised by the

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Judges sitting in Nuremberg.[2] The Tribunal found the accused Alfred Rosenberg guilty of war crimes and crimes against humanity based in part upon his 'responsib[ility] for a system of organized plunder of both public and private property throughout the invaded countries of Europe',[3] but it made no orders for restitution against him or other convicted persons under Article 28 of the IMT Charter.[4]

Conversely, the International Military Tribunal for the Far East (IMTFE) had no such explicit power. The IMTFE Charter contains no comparable provision to Article 28 of the IMT Charter, despite the fact that these two ICTs' constituent instruments share several common elements, including with regard to punishment.

As for fines, although neither ICT was explicitly granted the power by its constituent instrument to order fines, it has been suggested that Article 27 of the IMT Charter and Article 16 of the IMTFE Charter did not exclude the possibility of the imposition of financial penalties.[5] These near-verbatim provisions conferred upon the IMT and IMTFE the power to impose upon a convicted person 'death or such other punishment as shall be determined by it to be just.'[6] Although perhaps more likely to refer to 'the most serious forms of punishment, such as imprisonment',[7] Article 27 of the IMT Charter could arguably have allowed for the imposition of fines by the IMT. Further, Article 16 of the IMTFE Charter could have enabled the IMTFE to order fines as well as asset forfeiture measures akin to those provided for in Article 28 of the IMT Charter. In other words, the main focus was on the death penalty or imprisonment, and if fines had ever been in question, the two military tribunals could have asserted the power to impose them even though no such power was explicitly conferred by their constituent instruments. Despite this possibility, no such measures were imposed by either ICT.

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[1] Charter of the International Military Tribunal (adopted 8 August 1945, entered into force 8 August 1945) 82 UNTS 279 (IMT Charter) Art 28.
[2] For an argument in support of postponing restitution claims, see Stephen Weil, 'The American Legal Response to the Problem of Holocaust Art', (1999) 4 Art, Antiquity & Law 285, 287.
[3] IMT, *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 American Journal of International Law 172 (IMT Judgment) 287.
[4] ibid, 332. Rosenberg was sentenced to death by hanging.
[5] Rebecca Young, 'Fines and Forfeiture in International Criminal Justice' in Róisín Mulgew and Denis Abels (eds) *Research Handbook on the International Penal System* (Edward Elgar 2016) 102, 103.
[6] IMT Charter (n 1) Art 27; Charter of the International Military Tribunal for the Far East (adopted 19 January 1946, entered into force 19 January 1946) TIAS No 1589 (IMTFE Charter) Art 16.
[7] Young (n 5) 104.

Control Council Law No. 10, which was promulgated by the victorious Allied powers after World War II to enable the prosecution of those who were not in the category of major war criminals tried in the main proceedings at Nuremberg, contains more extensive fine and asset forfeiture procedures than those contained in the IMT Charter and IMTFE Charter.[8] Under Article II(3) of Control Council Law No. 10, the tribunals established thereby were able to order the following punishments:

> (c) Fine […].
> (d) Forfeiture of property. [and]
> (e) Restitution of property wrongfully acquired.
> (f) […]
> Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.[9]

Notably, fine and forfeiture procedures are not listed in Control Council Law No. 10 as available 'in addition to imprisonment'.[10] Rather, these measures are listed as forms of punishment in their own right. Control Council Law No. 10 also provides for the first *pre-conviction* asset forfeiture procedures in the history of international criminal justice. At this time, however, there was no express provision that the forfeited assets were ultimately to be put to use for the benefit of victims. Article III(1) of Control Council Law No. 10 provides as follows:

> Each occupying authority, within its Zone of Occupation,
>
> (a) shall have the right to cause persons within such Zone suspected of having committed a crime […] to be arrested and shall take under control the property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.[11]

[8] Control Council Law No. 10 (adopted 20 December 1945, entered into force 20 December 1945) 3 Official Gazette Control Council for Germany 50-55 (Control Council Law No. 10).
[9] Control Council Law No. 10 (n 8) Art II(3).
[10] cf IMT Charter (n 1) Art 28.
[11] Control Council Law No. 10 (n 8) Art III.

Turning to the case law, of the 142 convicted persons in the twelve trials carried out in the American zone of occupation, only the industrialist Alfred Krupp was ordered to forfeit property under Control Council Law No. 10.[12] Moreover, the United States High Commissioner for Germany, John McCloy, later rescinded this forfeiture order,[13] as recommended by the Advisory Board on Clemency for War Criminals.[14] McCloy reasoned as follows:

> This is the sole case of confiscation decreed against any defendant by the Nuremberg courts. Even those guilty of personal participation in the most heinous crimes have not suffered confiscation of their property and I am disposed to feel that confiscation in this single case constitutes discrimination against this defendant unjustified by any considerations attaching peculiarly to him. General confiscation of property is not a usual element in our judicial system and is generally repugnant to American concepts of justice[.][15]

The reasons given by McCloy in support of his decision to rescind the forfeiture order against Krupp are unconvincing. As to his first ground, i.e. the discrimination between Krupp and other convicts, although 'literally correct, […] it conveniently overlooked the difference between confiscating the property of an industrialist and confiscating the property of a soldier or government official.'[16] As to the second ground provided by McCloy, Article II(3) of Control Council Law No. 10 explicitly allowed the tribunals to order the penalty of forfeiture. In addition, American law did not apply to the trials conducted under Control Council Law No. 10. As a result, according to Kevin Heller, McCloy's invocation of American law "to trump a specific provision of Law No. 10 was […] *ultra vires*.'[17]

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[12] US Military Tribunal Nuremberg, *Judgment of 31 July 1948*, in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. IX, 1449-50. See also Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2011) 313.

[13] McCloy had the power to do so having created the Advisory Board on Clemency for War Criminals, with the support of then Secretary of State, Dean Acheson. See Heller (n 12) 344, describing Acheson's support as 'reluctant'.

[14] See *Landsberg: A Documentary Report* (Office of the US High Commissioner for Germany 1951) 10. See also Heller (n 12) 355.

[15] ibid.

[16] Heller (n 12) 355.

[17] ibid.

The post-World War II military tribunals consequently did not lack the power under their constituent instruments to order fines and forfeiture measures. Nor, as Conor McCarthy has maintained, did those convicted under Control Council Law No. 10 want for wealth;[18] indeed, several affluent industrialists and financiers were convicted of international crimes by the Control Council Law No. 10 tribunals.[19] Instead, these tribunals either focused on sentencing convicted persons with the death penalty and periods of imprisonment or other interests prevailed, as in the case of the decision by John McCloy to revoke the forfeiture order issued against Alfred Krupp. Nonetheless, the inclusion of reasonably broad fine and asset forfeiture measures at this nascent stage of development of the project of international criminal justice is notable.

3. The *Ad Hoc* International Criminal Tribunals

After the Cold War, the UN Security Council (UNSC) established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in response to the commission of mass atrocities in the former Yugoslavia[20] and Rwanda,[21] respectively. As for asset forfeiture procedures, Article 24(3) of the ICTY Statute permits the Trial Chamber, at the sentencing phase of proceedings, to order forfeiture of assets as follows:

> In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.[22]

Article 23(3) of the ICTR Statute is identical to Article 24(3) of the ICTY Statute.[23] The *ad hoc* tribunals were therefore empowered by their constituent instruments to order post-conviction forfeiture measures – but not fines – as a penalty additional to

[18] Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press 2012) 44-45.
[19] ibid.
[20] See UNSC Res 827 (18 May 1993) UN Doc S/RES/827.
[21] See UNSC Res 955 (8 November 1994) UN Doc S/RES/955.
[22] Statute of the International Tribunal, UN Doc S/25704, Annex (ICTY Statute) Art 24(3).
[23] See Statute of the International Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/1995, Annex (ICTR Statute) Art 23(3) ('In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.')

imprisonment, similar to the powers afforded to the IMT.[24] However, Rule 61 of the Rules of Procedure and Evidence of the ICTY and ICTR extends the power of Trial Chambers to order pre-conviction asset freezing measures more akin to those granted to the military tribunals established under Control Council Law No. 10:

> (D) […] Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.[25]

This Rule was implicated in 1999 in respect of former Serbian President, Slobodan Milošević, and his four co-accused – Milan Milutinović, Nikola Šainovic, Dragoljub Ojdanić, and Vlajko Stojiljković.[26] In response to the application for the freezing of assets by the ICTY Prosecutor, Judge David Hunt ordered 'all States Members of the United Nations [to] make inquiries to discover whether the accused (or any of them) have assets located in their territory and, if so, adopt provisional measures to freeze such assets, without prejudice to the rights of third parties, until the accused are taken into custody.'[27] Shortly after Judge Hunt's Decision, Switzerland took steps to freeze assets in the possession of Milošević and his co-accused located on its territory.[28]

Ruling on two applications by African NGOs to appear as *amicus curiae*, ICTR trial chambers have confirmed that orders for restitution could only have been made if the accused person(s) had been charged with the unlawful taking of property.[29] No forfeiture order was granted by the ICTR. As for pre-conviction measures, in 1999, the

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[24] cf IMT Charter (n 1) Art 28.
[25] ICTY, Rules of Procedure and Evidence, as amended on 8 July 2015 (adopted 11 February 1994, entered into force 14 March 1994) UN Doc IT/32/Rev. 50 (ICTY RPE) Rule 61; ICTR, Rules of Procedure and Evidence, as amended on 13 May 2015 (adopted 29 June 1995, entered into force 29 June 1995) UN Doc ITR/3/Rev.23 (ICTR RPE) Rule 61.
[26] ICTY, *Prosecutor v Slobodan Milošević and others* (Decision on Review of Indictment and Application for Consequential Orders) IT-02-54 (24 May 1999).
[27] ibid, para 38.
[28] See Décision de l'Office fédéral de la police dans l'affaire *Milosevic Slobodan* et autres (23 June 1999) <www.admin.ch/opc/fr/federal-gazette/1999/4796.pdf> accessed 1 May 2017. The freezing measures against Milošević's assets were lifted following his death in March 2006. See McCarthy (n 18) 47.
[29] See ICTR, *Prosecutor v Alfred Musema* (Decision on an Application by African Concern for Leave to Appear as Amicus Curiae) ICTR-96-13-T (17 March 1999) paras 12-14; ICTR, *Prosecutor v Théoneste Bagosora and others* (Decision on Amicus Curiae Request by African Concern) ICTR-98-41-T (23 March 2004) paras 5-11.

ICTR Prosecutor requested the French Ministry of Justice to freeze bank accounts in the name of Félicien Kabuga,[30] who is accused of genocide and crimes against humanity, but remains at large at the time of writing. The French authorities complied with the request,[31] while the Prosecutor has also sought the cooperation of Kenya in adopting such measures against Kabuga.[32]

The Statute of the International Residual Mechanism for Criminal Tribunals (MICT) largely reverts to the approach of the ICTY and ICTR toward the forfeiture of assets (including protective measures).[33] However, as the MICT was established to conduct some of the remaining tasks of the ICTY and ICTR at the time of their closure,[34] its approach to forfeiture is arguably best regarded as a continuation of that adopted by its predecessors rather than a departure from the post-Rome Statute approach.

The inclusion of asset forfeiture powers, including pre-conviction measures, in the legal frameworks of the two *ad hoc* tribunals created by the UNSC in the mid-1990s represents continuity in the approach adopted in the establishment of the post-World War II military tribunals. These powers were used more extensively by the ICTY and ICTR than their predecessors. At the same time, however, the ICTY and ICTR lacked the power to order fines and neglected to utilise the asset forfeiture measures at their disposal, despite clear indications that certain accused persons possessed property and proceeds susceptible to such measures. This underuse can be imputed, at least in part, to the absence of a holding related to the unlawful taking of property, as indicated in the decisions by ICTR trial chambers in *Musema* and *Bagasora and others*.

[30] See ICTR, *Miscellaneous–Kabuga Family* (Appeal of the Family of Felicien Kabuga against Decisions of the Prosecutor and President of the Tribunal) 01-A (22 November 2002).
[31] ibid.
[32] See 'Statement by Justice Hassan B. Jallow Prosecutor of the ICTR, to the UN Security Council' (4 June 2009) <http://ictr-archive09.library.cornell.edu/ENGLISH/speeches/jallow090604.html> accessed 7 April 2017.
[33] Statute of the International Residual Mechanism for Criminal Tribunals, UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966, Annex 1 (MICT Statute) Art 22(4); MICT, Rules of Procedure and Evidence, as amended on 26 September 2016 (adopted 8 June 2012, entered into force 8 June 2012) UN Doc MICT/1/Rev/2 (MICT RPE) Rule 63(D).
[34] UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966, preamble ('*reaffirming* the need to establish an *ad hoc* mechanism to carry out a number of essential functions of the Tribunals […] after the closure of the Tribunals') (emphasis in original).

4. The Rome Statute System

4.1 Fine and Forfeiture Measures

The Rome Statute provides for the imposition of fines and forfeiture as penalties in addition to imprisonment. Under Article 77(2) of the Rome Statute:

> In addition to imprisonment, the Court may order:
>
> (a) A fine under the criteria provided for in the [RPE];
>
> (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.[35]

The Rome Statute definition of proceeds, property, and assets prone to forfeiture is noteworthy when compared with that employed at the *ad hoc* ICTs. In contrast to the terminology adopted in the Statutes of the ICTY and ICTR, 'property and proceeds acquired by criminal conduct',[36] the ICC is also able to order forfeiture of proceeds, property, and assets derived *indirectly* from the Rome Statute crime(s) of which the convicted person is found guilty.[37] According to Conor McCarthy:

> In sum, Article 77(2)(b) permits the Court to order the forfeiture of property obtained as part of the *actus reus* of the offence; property for the acquisition of which the crime was committed; property purchased with or pursuant to the sale of property directly deriving from the offence in one of the two foregoing ways; and profits from property obtained in any of these ways.[38]

Moreover, the Court's asset freezing powers are much wider than those afforded to earlier international criminal justice mechanisms. Pursuant to Article 93(1)(k) of the Rome Statute, the ICC can request States Parties to identify, trace, freeze, and seize

[35] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) Art 77(2).
[36] ICTY Statute (n 22) Art 24; ICTR Statute (n 23) Art 23.
[37] Rome Statute (n 35) Art 77(2)(b).
[38] McCarthy (n 18) 202.

assets, proceeds, property, and/or instrumentalities of crimes 'in relation to investigations or prosecutions'.[39] The Pre-Trial Chamber can request such measures, under Article 57(3)(e) of the Rome Statute, 'after a warrant of arrest or a summons has been issued'.[40] In other words, the ICC can request an asset freeze at the pre-trial phase of proceedings, before an accused person has been arrested.

The first fines to be ordered by the Court were those against Jean-Pierre Bemba Gombo, a former Vice President of the Democratic Republic of the Congo, and his co-accused, Aimé Kilolo Musamba. Having been convicted by Trial Chamber VII of offences against the administration of justice, Bemba and Kilolo were fined 300,000 and 30,000 Euros, respectively.[41]

Given the relatively few cases to have reached the sentencing phase at the ICC,[42] it is perhaps unsurprising that the Court had issued only two fines by late 2018 – and, moreover, in the context of proceedings concerning offences against the administration of justice, not international crimes. In the *Bemba and others* Sentencing Decision, Trial Chamber VII took into consideration not only 'Bemba's culpability', but also his 'solvency'[43]. On the other hand, Trial Chamber III, in sentencing Bemba for crimes against humanity and war crimes, offences of which he was acquitted on appeal,[44] did not order fine or forfeiture measures, 'noting that the parties and Legal Representative

[39] Rome Statute (n 35) Art 93(1)(k).
[40] Rome Statute (n 35) Art 57(3)(e).
[41] See ICC, *Prosecutor v. Jean-Pierre Bemba Gombo and others* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/13-2123-Corr (22 March 2017) (*Bemba and others* Sentencing Decision) Disposition. The fines were confirmed in ICC, *Prosecutor v. Jean-Pierre Bemba Gombo and others* (Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo) ICC-01/05-01/13-2312 (17 September 2018) (*Bemba and others* Re-sentencing Decision) Disposition.
[42] As of December 2018, the cases against Thomas Lubanga Dyilo, Germain Katanga, and Ahmad Al Faqi Al Mahdi are at the reparations phase.
[43] *Bemba and others* Sentencing Decision (n 41) para 261.
[44] The ICC Appeals Chamber acquitted Bemba of war crimes and crimes against humanity on 8 June 2018, thereby vacating his sentence of imprisonment for these crimes. See ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08-3636-Red (8 June 2018); ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 21 June 2016 entitled "Decision on Sentence pursuant to Article 76 of the Statute") ICC-01/05-01/08-3637 (8 June 2018) para 8 ("As a result of the Appeal Judgment on Conviction, there is no basis for any sentence to be imposed on Mr Bemba in the present case and the Sentencing Decision therefore ceases to have effect.").

do not request the imposition of a fine or order of forfeiture'.[45] The lack of enthusiasm for the imposition of fines and asset forfeiture measures for international crimes seen in the practice of the ICTY, ICTR, and the post-World War II military tribunals appears to have resurfaced in the sentencing practice of the ICC, despite Bemba's wealth.

In the *Bemba and others* Sentencing Decision, the Trial Chamber observed that the contents of Bemba's bank account had been transferred to the Court in order to meet his Defence expenses.[46] In addition, in the *Bemba and others* Re-sentencing Decision, issued following a partially successful appeal by the Prosecutor against the original decision on sentencing handed down by Trial Chamber VII,[47] the same Trial Chamber held that 'Mr Bemba may use his frozen assets to pay his fine, and once it is paid the asset freezing order issued in this case ceases to have effect with respect to him.'[48] Trial Chamber VII held similarly with respect to Kilolo's frozen bank account.[49]

Seized assets can thus be used to pay legal fees,[50] but also, if a convicted person is not considered to be indigent, to provide reparations to victims, even if the conviction is for an offence against the administration of justice rather than an international crime. Indeed, one of the principal functions of the fines and forfeiture system in the Rome Statute is to serve as a mechanism facilitating the enforcement of reparation awards. This purpose is confirmed by Article 57(3)(e) of the Rome Statute, which provides that pre-trial protective measures requested by the Court for the purpose of eventual forfeiture are intended 'in particular for the ultimate benefit of victims'.[51]

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[45] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/08-3399 (21 June 2016) para 95.
[46] *Bemba and others* Sentencing Decision (n 41) para 241.
[47] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo and others* (Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute") ICC-01/05-01/13-2276-Red (8 March 2018) paras 359, 361. See also *Bemba and others Re-sentencing Decision* (n 41) para 3.
[48] *Bemba and others* Re-sentencing Decision (n 41) para 128.
[49] ibid, para 109.
[50] See *Bemba and others* Sentencing Decision (n 41) para 241. See also, generally, ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on the Defence's Application for Lifting the Seizure of Assets and Request for Cooperation to the Competent Authorities of Portugal) ICC-01/05-01/08-251-Anx (10 October 2008); ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on the Second Defence's Application for Lifting the Seizure of Assets and Request for Cooperation to the Competent Authorities of the Republic of Portugal) ICC-01/05-01/08-249 (14 November 2008).
[51] Rome Statute (n 35) Art 57(3)(e).

This is also evidenced by the Court's case law. In its 2012 'Decision establishing the principles and procedures to be applied to reparations',[52] the first decision on reparations issued by a Chamber of the ICC,[53] Trial Chamber I expressed the following view:

> The Statute and [RPE] introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims.[54]

Further, in the *Bemba and others* Sentencing Decision, Trial Chamber VII ordered that the proceeds of the fines were to be transferred to the Court's Trust Fund for Victims (TFV),[55] which underscores the reparative nature of the Rome Statute.[56]

4.2 Orders for Reparations

If ultimately forfeited after conviction, Article 79 of the Rome Statute provides that assets collected through fines and forfeiture can be transferred to the TFV.[57] Article 75(2) of the Rome Statute further provides as follows:

> The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.[58]

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[52] ICC, *Prosecutor v. Thomas Lubanga Dyilo* (Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) (*Lubanga* Reparations Decision).
[53] ibid, para 20.
[54] ibid, para 177, referring to UNGA 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UN Doc A/RES/60/147 (21 March 2006).
[55] *Bemba and others* Sentencing Decision (n 41) paras 199, 262. See also *Bemba and others* Re-sentencing Decision (n 41) paras 109, 128.
[56] On reparative justice, see Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3 International Journal of Transitional Justice 250.
[57] Rome Statute (n 35) Art 79(2).
[58] ibid, Art 75.

Again, as relatively few cases before the ICC have reached the reparations phase of proceedings,[59] the Court has issued orders for reparations[60] directly against convicted persons under Article 75(2) on only three occasions at the time of writing, in the cases against Thomas Lubanga Dyilo, Germain Katanga, and Ahmad Al Faqi Al Mahdi. The first order for reparations issued by the ICC was directed against Thomas Lubanga on 3 March 2015,[61] without specifying his individual financial liability, which was later set at ten million US dollars.[62] On 24 March 2017, Trial Chamber II issued an order for reparations against Germain Katanga, finding that, despite his indigence, he was liable for the sum of one million US dollars.[63] Because of Katanga's inability to pay, the Trial Chamber directed the TFV to consider using the resources at its disposal to implement the order.[64] As for Ahmad Al Faqi Al Mahdi, Trial Chamber VIII issued a reparations order against him on 24 March 2017, setting his total individual financial liability at 2.7

[59] See n 42.

[60] ICC Trial Chamber I established that '[r]eparations fulfil two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts.' *Lubanga* Reparations Decision (n 52) para 179. An 'order for reparations' gives effect to this procedure.

[61] ICC, *Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations) ICC-01/04-01/06-3129-AnxA (3 March 2015).

[62] ICC, *Prosecutor v. Thomas Lubanga Dyilo* (Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable") ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017).

[63] ICC, *Prosecutor v. Germain Katanga* (Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 264. Although Katanga was found to be indigent, Trial Chamber II observed that, because of the potential future identification and freezing of his property and assets and the continued monitoring of his financial situation, 'Katanga's current financial situation cannot be regarded as material to the determination of the size of the reparations award for which he is liable'. ibid, para 246. See also ICC, *Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2) ICC-01/04-01/06-3129 (3 March 2015) paras 102-105.

[64] ibid, para 342. The TFV is funded from four sources: '(a) Voluntary contributions from governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties; (b) Money and other property collected through fines or forfeiture transferred to the Trust Fund if ordered by the Court pursuant to article 79, paragraph 2, of the Rome Statute […]; (c) Resources collected through awards for reparations if ordered by the Court pursuant to rule 98 of the Rules of Procedure and Evidence; [and] (d) Such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund.' Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3 (3 December 2005) Regulation 21. According to Sara Kendall, compared with the Court's four organs, the 'material resources [of the TFV] are arguably the most tenuous given their voluntary nature, as the Fund relies heavily on annual pledges from interested states'. Sara Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court' (2015) 13 Journal of International Criminal Justice 113, 124.

million euros.[65] Although the reparations order was partially amended by the Appeals Chamber in March 2018,[66] the total amount remained undisturbed.

The evident turn toward reparative justice in the Rome Statute has been attributed to a 'growing attention to victims within national criminal justice systems and […] a reaction to criticism of the manner in which victims' concerns were considered by the ICTY and the ICTR'.[67] Further, Shuichi Furuya points to the attention to victims in 'universal and regional human rights systems'.[68] But this turn can also arguably be ascribed to a shift toward more inquisitorial proceedings – which generally provide for more extensive victim reparation (and participation) rights – on the international plane. Several ICTs, discussed in the following section, are based, at least partly, in national jurisdictions with civil law legal traditions. Such a development is likely to lead to a more prominent role for victims in proceedings in view of the more active participation of victims (or their legal representatives) in a number of civil law systems.[69]

5. ICTs Established after the Adoption of the Rome Statute

It is not the aim of this chapter to demonstrate uniformity in the approach of ICTs to the issue of fines and forfeiture; rather, it seeks to demonstrate that while most ICTs have been able to order such measures, they have been barely utilised in practice. This said, after the adoption of the Rome Statute, a more victim-oriented approach to asset forfeiture was followed in the legal instruments of number of ICTs.

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[65] ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 134.

[66] ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Public redacted Judgment on the appeal of the victims against the "Reparations Order") ICC-01/12-01/15-259-Red2 (8 March 2018).

[67] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 87-88. See also Anne-Marie de Brouwer and Mikaela Heikkilä, 'Victim Issues: Participation, Protection, Reparation, and Assistance' in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 1299, 1300.

[68] Furuya Shuichi, 'Victim Participation, Reparations and Reintegration as Historical Building Blocks of International Criminal Law' in Morten Bergsmo and others (eds), *Historical Origins of International Criminal Law: Volume 4* (Torkel Opsahl Academic EPublisher 2015) 837, 839.

[69] See e.g. Charles P Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29 Michigan Journal of International Law 777, 778 ('In these countries, the victim (or often the victim's legal representative) can request investigatory measures, review the evidence against the accused, submit declarations, present evidence, cross-examine witnesses, and make closing arguments'); Salvatore Zappalà, 'Comparative Models and the Enduring Relevance of the Accusatorial – Inquisitorial Dichotomy' in Sluiter and others, *International Criminal Procedure: Principles and Rules* (n 67) 44, 51.

5.1 The Special Court for Sierra Leone

There is no provision for fines in the governing documents of the Special Court for Sierra Leone (SCSL), which was established in 2002. However, Article 19(3) of the SCSL Statute provides for the forfeiture of assets as follows:

> In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.[70]

Rule 104 of the SCSL RPE also allowed the tribunal to order provisional measures as follows:

> (A) After a judgement of conviction […] the Trial Chamber, at the request of the Prosecutor or at its own initiative, may hold a special hearing to determine the matter of property forfeiture, including the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.
>
> (B) The determination may extend to such property or proceeds, even in the hands of third parties not otherwise connected with the crime, for which the convicted person has been found guilty. […].[71]

The limited SCSL case law on this issue, limited to one decision on a request for the freezing of bank accounts,[72] demonstrates an approach akin to that at the ICTY and ICTR, requiring 'clear and convincing evidence that the targeted assets have a nexus with criminal conduct or were otherwise illegally acquired.'[73] The Prosecutor having

[70] Statute of the Special Court for Sierra Leone (adopted 16 January 2002, entered into force on 12 April 2002) 2178 UNTS 138 (SCSL Statute) Art 19.
[71] SCSL, Rules of Procedure and Evidence, as amended on 31 May 2012 (adopted 16 January 2002, entered into force 12 April 2002) (SCSL RPE) Rule 104.
[72] See SCSL, *Prosecutor v Sam Hinga Norman and others* (Norman – Decision on *Inter Partes* Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at Union Trust Bank (Sl) Limited or at Any Other Bank in Sierra Leone) SCSL-04-14-PT (19 April 2004).
[73] ibid, para 13.

failed, in the opinion of the Trial Chamber, to adduce sufficient evidence to establish this nexus,[74] the motion to freeze the accounts of Sam Hinga Norman was rejected.[75]

The SCSL did not impose asset forfeiture as a penalty against any convicted person, despite making several findings of guilt in respect of the war crime of pillage,[76] a conspicuously profitable offence,[77] and also hearing evidence that civilians were forced to mine diamonds.[78] But bank accounts belonging to persons accused of crimes under the jurisdiction of the tribunal were frozen at the request of the SCSL. In 2003, Switzerland froze assets amounting to approximately two million Swiss francs in the name of former Liberian President, Charles Taylor, his relatives, members of his regime, and his company.[79] However, in 2006, the SCSL Principal Defender determined Taylor to be "partially indigent"[80] and no order for forfeiture was ultimately made against him.[81]

Similar to the *ad hoc* ICTs, the SCSL does not allow for orders for reparations to be made directly against convicted persons. However, Rule 105 of the SCSL RPE does provide that victims of crimes for which persons were found guilty at the SCSL may attempt to seek compensation in a national court 'or other competent body'.[82] Rather than establishing reparation mechanisms similar to those in the Rome Statute, as will be further discussed below, the drafters of the constituent instruments of several ICTs preferred victims to claim reparations under the relevant provisions of national law. This might be indicative of another trend, namely that reparations procedures at ICTs have developed based on individual experience and that there is no single model.

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[74] ibid, para 16.
[75] ibid, para 18.
[76] See SCSL, *Prosecutor v Issa Hassan Sesay and others* (Judgement) SCSL-04-15-T (2 March 2009) (*Sesay and others* Judgment) paras 679 (in respect of Issa Hassan Sesay), 683 (in respect of Morris Kallon), 686 (in respect of Augustine Gbao).
[77] See Manuel Galvis Martínez, 'Forfeiture of Assets at the International Criminal Court: The Short Arm of International Criminal Justice' (2014) 12 Journal of International Criminal Justice 193, 199-201.
[78] See e.g. *Sesay and others* Judgment (n 76) paras 945, 1415, 1433.
[79] See Swiss Confederation, Federal Office of Justice, 'Taylor's accounts blocked as provisional measure: Legal assistance requested by Special Court for Sierra Leone' (Press Release, Bern, Switzerland, 23 June 2013) <https://www.bj.admin.ch/bj/en/home/aktuell/news/2003/2003-06-230.html> accessed 2 April 2017.
[80] SCSL, *Prosecutor v Charles Ghankay Taylor* (Principal Defender's Determination of Mr. Charles Ghankay Taylor's Indigence) SCSL-03-01-I-85 (3 April 2006). This was a provisional finding.
[81] See SCSL, *Prosecutor v Charles Ghankay Taylor* (Sentencing Judgement) SCSL-03-01-T (30 May 2012).
[82] SCSL RPE (n 71) Rule 105.

5.2 The Special Panels for Serious Crimes

The Special Panels for Serious Crimes (SPSC) in East Timor were empowered by their constituent instrument to impose fines and asset forfeiture measures against persons convicted of international and serious domestic offences falling under their jurisdiction. Section 10.1 of Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences empowered the SPSC to impose the following penalties:

> (b) A fine up to a maximum of US$ 500,000.
> (c) A forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fide* third parties.[83]

The UN Transitional Administration in East Timor (UNTAET), which promulgated the constituent instrument of the SPSC, also legislated for the possible formation of a Trust Fund. Section 25 of Regulation No. 2000/15 provides as follows:

> 25.1 A Trust Fund may be established […] for the benefit of victims of crimes within the jurisdiction of the panels, and of the families of such victims.
>
> 25.2 The panels may order money and other property collected through fines, forfeiture, foreign donors or other means to be transferred to the Trust Fund.
>
> 25.3 The Trust Fund shall be managed according to criteria to be determined by an UNTAET directive.[84]

This provision reflects Article 79 of the Rome Statute, which establishes the TFV.[85] In practice, such a Trust Fund was never established by UNTAET.

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[83] Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (6 June 2008) UN Doc UNTAET/REG/2000/15 (Regulation 2000/15) Section 10.
[84] ibid, Section 25.
[85] Rome Statute (n 35) Art 79 ('1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. 2. The Court may order money and other property collected through fines or forfeiture

5.3 The Iraqi High Tribunal

The influence of the Rome Statute can also be seen in Article 24(f) of the Statute of the Iraqi High Tribunal (IHT), which was established under Iraqi law in 2005 to try Iraqi nationals and residents for international crimes and other violations of Iraqi law. Article 24(f) of the IHT Statute provides as follows with regard to forfeiture:

> The Trial Chambers may order the forfeiture of proceeds, property or assets derived directly or indirectly from that crime, without prejudice to the rights of the bona fide third parties.[86]

The IHT was not empowered by its constituent instrument or Rules of Procedure and Evidence to impose fines as a penalty or to order protective, pre-conviction measures. Additionally, similar to the approach at the ICTY, ICTR, and SCSL, the governing documents of the IHT do not allow orders for reparations to be made directly against convicted persons. Of course, each ICT does not, and is not expected to, replicate the institutional design of its predecessors. Where there are discrepancies, these can be attributed to various factors, including but not limited to the tribunal's applicable law.

5.4 The Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (ECCC), established jointly by the UN and the Government of Cambodia, is also able to order forfeiture of assets as a penalty in addition to imprisonment, but cannot order fines. According to Article 39 of the ECCC Law, one of the tribunal's constituent instruments:[87]

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to be transferred, by order of the Court, to the Trust Fund. 3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.')

[86] Law of the Supreme Iraqi Criminal Tribunal (adopted 18 October 2005, entered into force 18 October 2005) Official Gazette of the Republic of Iraq, No. 4006, 18 October 2005 (IHT Statute) Art 24(f).

[87] The ECCC were established jointly by the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006 (ECCC Law) and the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (adopted 6 June 2003, entered into force 29 April 2005) 2329 UNTS 117. The tribunal is governed by these documents and the ECCC, Internal Rules as amended on 16 January 2015 (adopted 12 June 2007, entered into force 19 June 2007) (ECCC Internal Rules). See David Scheffer,

> In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct. The confiscated property shall be returned to the State.[88]

This resembles the approach in the constituent instruments of the ICTY, ICTR, and SCSL. At the time of writing, the ECCC has yet to order forfeiture as a penalty, although inquiries were made into the assets of KAING Guek Eav alias Duch,[89] with the Trial Chamber ruling that no assets susceptible to forfeiture were identified.[90]

In addition to allowing for the forfeiture of illicitly gained assets in this manner, the ECCC Internal Rules also provide for an extensive civil party participation – and, of particular note for purposes of the present chapter – reparations regime.[91] According to this schema, civil parties can apply for 'collective and moral reparations', which may not consist of 'monetary payments'.[92] The ECCC, in part as a result of its civil law foundations,[93] perhaps reflects more than any other tribunal the turn towards a more victim-centred internationalised criminal justice after the adoption of the Rome Statute.

5.5 The Special Tribunal for Lebanon

The Special Tribunal for Lebanon (STL) is also rooted in the civil law tradition. Rule 82 of the STL RPE provides as follows:

> (C) Upon request of the Prosecutor or the Registrar, or *proprio motu* after having heard the Defence, the Pre-Trial Judge or the Trial Chamber may request

'The Extraordinary Chambers in the Courts of Cambodia' in M Cherif Bassiouni (ed) *International Criminal Law Volume III: International Enforcement* (3rd edn, Martinus Nijhoff 2008) 219, 239.

[88] ECCC Law (n 87) Art 39.

[89] ECCC, *Co-Prosecutors v KAING Guek Eav alias Duch* (Inquiry into income and assets of the Accused) E175 (15 October 2009).

[90] ECCC, *Co-Prosecutors v KAING Guek Eav alias Duch* (Judgement) E188 (26 July 2010).

[91] ECCC Internal Rules (n 87) Rule 23.

[92] ECCC Internal Rules (n 87) Rule 23 *quinquies*.

[93] The ECCC is housed in the Cambodian court structure and legal system. See Scheffer (n 87) 239.

a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.[94]

Although the STL is not permitted to order fines and forfeiture of assets as penalties additional to imprisonment unlike the majority of ICTs, victims are able to apply to national courts or 'other competent bod[ies]' for compensation pursuant to Article 25 STL Statute.[95] This measure is similar to that in the SCSL RPE, according to which victims may, after a decision by the tribunal confirming the guilt of the accused, seek compensation in accordance with the relevant national procedures. The STL and SCSL therefore provide an avenue at the national level, at least in principle, through which victims might seek redress for international crimes.

5.6 The Extraordinary African Chambers

The Extraordinary African Chambers (EAC) were established by the African Union and the Republic of Senegal to try international crimes committed in Chad between 7 June 1982 and 1 December 1990. The EAC are housed within the Senegalese court system, which, like the ECCC and STL, has its basis in the civil law legal tradition.

The EAC is authorised to order fines in accordance with Senegalese law.[96] Under Article 24(2) EAC Statute, the EAC is also able to order, as a penalty in addition to imprisonment, forfeiture of proceeds, property, and assets derived directly or indirectly from crime(s) for which a person is convicted.[97] Moreover, according to Article 87 *bis* of the Senegalese Code of Criminal Procedure, the EAC may request protective, pre-conviction measures in respect of the assets of an accused person.[98]

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[94] STL, Rules of Procedure and Evidence as amended on 3 April 2017 (adopted 20 March 2009, entered into force 20 March 2009) STL-BD-2009-01-Rev.8 (STL RPE) Rule 82.
[95] Statute of the Special Tribunal for Lebanon, UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757, Annex (STL Statute) Art 25.
[96] *Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990* (Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990) (adopted 30 January 2013, entered into force 8 February 2013) (2013) 52 ILM 1028 (EAC Statute) Art 24(1).
[97] EAC Statute, Art 24(2).
[98] *Code de Procédure Pénale Sénégalais* (Senegalese Code of Criminal Procedure) Art 87 *bis* ('*Lorsqu'il est saisi d'un dossier d'information, le juge d'instruction peut d'office ou sur demande de la partie civile ou du ministère public, ordonner des mesures conservatoires sur les biens de l'inculpé*.')

As it concerns reparations measures, the EAC is able to order restitution, compensation, and rehabilitation under Article 27 of the EAC Statute.[99] In regard to compensation, the EAC can request that such measures be implemented by a trust fund,[100] which is established by Article 28 of the EAC Statute for the benefit of victims of the crimes within the tribunal's jurisdiction as well as their beneficiaries.[101]

Notably, however, the EAC Statute does not include provisions akin to Article 79(2) of the Rome Statute, which permits the ICC to order the transfer of the proceeds of fines and orders for forfeiture to the TFV, [102] or Article 44 of the KSC Law,[103] which allows the KSC to request the sale of forfeited assets to fund reparation awards.[104]

In the case against former President of Chad, Hissène Habré, the EAC did not order the forfeiture of assets or a fine as a penalty. A fine was not requested by the EAC's Prosecutor and the EAC Trial Chamber rejected the Prosecutor's request to impose asset forfeiture,[105] despite assets belonging to Habré having been frozen earlier in the proceedings. The Trial Chamber held that the Prosecutor had failed to show that the assets resulted, directly or indirectly, from the commission of Habré's crimes.[106] The failure to charge Habré with the war crime of pillage – a potentially profitable offence – may have caused difficulties for the Prosecutor in meeting this forfeiture threshold, which closely resembles the Rome Statute.[107]

The EAC also ordered significant reparations to Habré's victims. The EAC Appeals Chamber set the total amount of reparations due at more than 82 billion CFA francs,

[99] EAC Statute (n 96) Art 27(1).
[100] EAC Statute (n 96) Art 27(2).
[101] EAC Statute (n 96) Art 28(1).
[102] See Rome Statute (n 35) Art 79(2).
[103] Law on Specialist Chambers and Specialist Prosecutor's Office (adopted 3 August 2015, entered into force 15 September 2015) Official Gazette of the Republic of Kosova, No. 27, 31 August 2015 (KSC Law).
[104] ibid, Art 44(6).
[105] *Ministère Public c. Hissein Habré* (Jugement) (30 May 2016) para 2329.
[106] ibid, para 2330.
[107] Rome Statute (n 35) Art 77(2)(b). On the failure of the EAC Prosecutor to charge Habré with pillage, see also Daley J Birkett, 'Victims' Justice? Reparations and Asset Forfeiture at the Extraordinary African Chambers' Journal of African Law (forthcoming).

equivalent to over 140 million US Dollars, and ordered Habré to pay this sum.[108] At the same time, the Appeals Chamber held that, at the time it issued its judgment, Habré's assets were not sufficient to meet the totality of the reparations awarded.[109] Although financing orders for reparations is – and will continue to be – undoubtedly challenging for ICTs in view of their limited resources and reliance on voluntary donations from States,[110] the finding that Habré is individually liable for this amount of compensation, as with Germain Katanga at the ICC, is vital in recognising the harm suffered by the victims of the serious crimes for which these two men were convicted.

5.7 The Kosovo Specialist Chambers

The most recently established ICT, the Kosovo Specialist Chambers (KSC), adopts an approach to fines, asset forfeiture, and orders for reparations similar to that in the Rome Statute. The KSC are permitted to order forfeiture of assets as a penalty and orders for reparations under Article 44 of the KSC Law, as follows:

> 6. In addition to imprisonment, the Specialist Chambers may order only the convicted person to make restitution or pay compensation to a Victim or to Victims collectively, or may order the forfeiture of property, proceeds and any assets used for or deriving from the commission of the crime and their return to their rightful owner or sale and share between Victims under Article 22 ("a Reparation Order").[111]

Turning to fines, the KSC Law does not allow for their imposition for international crimes.[112] However, the KSC can order such measures for the failure to comply with witness summonses. Under Article 42 of the KSC Law, failure to appear and refusal to testify as a witness, respectively, are punishable by a fine of up to 250 Euros.[113]

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[108] *Le Procureur Général c. Hissein Habré* (Arrêt) (27 April 2017) 226. The exact figure was 82 billion and 290 million CFA francs.
[109] ibid, 226.
[110] On which, see Nader Iskandar Diab "Challenges in the Implementation of the Reparation Award against Hissein Habré: Can the Spell of Unenforceable Awards across the Globe be Broken?" (2018) 16 Journal of International Criminal Justice 141.
[111] KSC Law (n 103) Art 44.
[112] This approach is similar to that adopted at the MICT. See MICT Statute (n 33) Art 22(1).
[113] KSC Law (n 103) Art 42.

As for protective measures, Article 39 of the KSC Law provides as follows:

> 11. The Pre-Trial Judge may, where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons and national security information or the preservation of assets which may be subject to a forfeiture under this Law and the Rules of Procedure and Evidence, including temporary freezing orders, temporary confiscation orders or other temporary measures.[114]

This victim-oriented provision provides the Pre-Trial Judge of the KSC with similar powers to those available to Pre-Trial Chambers at the ICC under the Rome Statute. Likewise, Article 53(1)(l) of the KSC Law, which concerns cooperation and judicial assistance, is similar to Article 93(1)(k) of the Rome Statute:

> 1. Subject to the rights of the accused provided for in Article 21, all entities and persons in Kosovo shall co-operate with the Specialist Chambers and Specialist Prosecutor's Office and shall comply without undue delay with any request for assistance or an order or decision issued by Specialist Chambers or Specialist Prosecutor's Office, including, but not limited to, those concerning: […]
> l. the identification, tracing and freezing or seizure of proceeds, property and assets or instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of *bona fide* third parties[.][115]

Matthew Cross identifies a subtle difference between the Rome Statute asset freezing regime and that embraced by the drafters of the KSC Law.[116] Cross contends that the wording of the latter, 'proceeds, property and assets *or* instrumentalities of crimes',[117] instead of 'assets *and* instrumentalities of crimes' found in the Rome Statute,[118] 'may broaden the scope of the assets which may be frozen prior to trial'.[119]

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[114] KSC Law (n 103) Art 39.
[115] KSC Law (n 103) Art 53(1)(l).
[116] Matthew E Cross, 'Equipping the Specialist Chambers of Kosovo to Try Transnational Crimes: Remarks on Independence and Cooperation' (2016) 14 Journal of International Criminal Justice 73, 92.
[117] KSC Law (n 103) Art 53(1)(l) (emphasis added).
[118] Rome Statute (n 35) Art 93(1)(k).
[119] Cross (n 116) 92.

In sum, therefore, the KSC have at their disposal a victim-oriented asset freezing and forfeiture regime akin to the Rome Statute system. The KSC are empowered to order both pre- and post-conviction measures to freeze the assets of accused and convicted persons, respectively. Such assets may subsequently be used to provide reparations to victims. That the drafters of the KSC Law included such a regime demonstrates that reparation is viewed as a vital component of the institution's restorative mandate.

6. Some Suggested Reasons behind ICTs' Failure to Order Asset Recovery Measures

It has thus far been demonstrated that, although a number of ICTs have been invested with the power to order fines, forfeiture of property, proceeds of crimes and/or assets, and, more recently, to orders reparations against convicted persons, these powers have barely been invoked in practice. A key question is therefore why ICTs have appeared to be reluctant to employ the asset recovery tools at their disposal. Three options will be presented in turn.

6.1 Theoretical Basis

First, the caution on the part of those ICTs empowered to do so to order fines or asset forfeiture measures could arguably be attributable, at least in part, to the grave nature of international crimes. In other words, penalties of a financial corrective nature could seem ill-fitting when imposed for the commission of, in the words of the preamble to the Rome Statute, "the most serious crimes of concern to the international community as a whole".[120] This can be contrasted with orders for reparations, which appear to be more readily used by ICTs than fines and forfeiture measures. It is suggested that the former, which find their basis in the law of civil responsibility, do not suffer from this perception. It therefore seems reasonable to assume that the ICC, and other ICTs with the capacity to order reparations directly against convicted persons, will employ such powers more readily that fines and forfeiture measures for this reason. Indeed, such a willingness to issue reparations orders is already borne out in the early practice of the

[120] Rome Statute (n 35) preambular para 4.

ICC, which has found that all three individuals guilty of crimes under its jurisdiction are also liable to make reparations pursuant to Article 75 of the Rome Statute.

6.2 Dearth of Assets

A second possible reason behind ICTs' reluctance to make use of fines and forfeiture measures is practical: despite certain persons convicted of international crimes having (had) access to substantial assets, ICTs have struggled to have them traced and frozen. For example, although Charles Taylor and Hissène Habré were reported to have held vast sums of money and other assets accumulated during their presidencies of Liberia and Chad, respectively, investigators have not been able to identify, trace, seize, and freeze them. This could be because the assets have been located beyond the reach of financial investigators by the suspect (or, depending on the phase of the proceedings, accused person or convicted person) or their ownership disguised.

At the other end of the financial spectrum, it must be acknowledged that many of the persons convicted of international crimes are indigent, meaning that they do not have sufficient assets to fund their defence. When faced with this reality, coupled with the frequently high number of victims potentially eligible for reparations in international crimes cases, the limited use by ICTs of fines and forfeiture measures, with a view to using their proceeds to fund reparation awards, appears rather more justifiable.

6.3 Other Reparations Paradigms

Although not necessarily a reason behind the lack of enthusiasm shown by a series of ICTs for the imposition of fines and forfeiture measures for the commission of crimes under their jurisdiction, the availability and use of other reparations paradigms ought to be taken into account. For example, it was noted above that only one order for forfeiture of assets, against industrialist Alfred Krupp, was made by the post-World War II military tribunals. It was also observed that the constituent instrument of the IMT, as well as Control Council Law No. 10, failed to provide for the imposition of measures akin to orders for reparations. However, although reparations were not awarded in the course of the *criminal proceedings* before ICTs, this does not mean that victims received no reparations whatsoever for harm suffered. Indeed, post-World War

II West Germany developed a reparations programme as a political-administrative tool complementing the criminal process. The measures sought, *inter alia*, to address the responsibility of the German State to individual victims, as opposed to intra-State reparations, although the latter were also paid.[121] Through a series of federal reparations laws,[122] Germany aimed to indemnify victims of persecution suffered under the Nazi regime.[123]

It is beyond the scope of this chapter to discuss the advantages of different reparations models, within and beyond the criminal process, in respect of the extent to which they meet the need to make restitution to (groups of) victims of war. Nonetheless, it is worth noting that paradigms akin to the foregoing German national reparations scheme, as a political-administrative mechanism designed to complement the criminal process, could function alongside reparations under the ICC system, but only where there is State involvement in the commission of offences, as was the case with Nazi Germany. These mechanisms are therefore limited and operate to meet the responsibility of the State, as opposed to that of individuals, *i.e.* convicted persons in the ICC system, to make reparations to individual (or groups of) victims. Fines, asset forfeiture, and particularly orders for reparations consequently retain an important role in funding reparations made to the victims of international crimes.

7. Conclusion

This chapter has sought to demonstrate, first, that most ICTs have been permitted by their constituent instruments to order fines, forfeiture of assets (including protective measures for the purpose of eventual forfeiture), and/or reparations directly against convicted persons. However, despite possessing these powers, and despite evidence that a number of persons found guilty of international crimes had significant wealth,

[121] See Ariel Colonomos and Andrea Armstrong, 'German Reparations to Jews after World War II: A Turning Point in the History of Reparations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 390, 391.
[122] This series of laws began with the Federal Supplementary Law for the Compensation of Victims of National Socialist Persecution of 18 September 1953 (*Bundesergänzungsgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung (BEG) vom 18. September 1953*), which was subsequently modified, most pertinently for the purposes of the present chapter, on 29 June 1956 (amending, *inter alia*, residency and deadline requirements) and 14 September 1965 (amending, *inter alia*, requirements relating to the burden of proof and eligibility). See Colonomos and Armstrong (n 121) 402-408.
[123] See Colonomos and Armstrong (n 121) 402-408.

ICTs have seldom invoked such measures in proceedings other than those involving offences against the administration of justice. In addition, the chapter has also aimed to show that the inclusion in the Rome Statute of more victim-centred procedures in respect of fines and forfeiture, targeted at the provision of reparations, has led to the adoption of similar measures in the law (if not the practice) of certain subsequently-established ICTs.

In order to recover the proceeds of international crimes, and to finance reparations to the victims of such atrocities, ICTs' prosecutors could more readily utilise fines and forfeiture measures. This approach could be especially advantageous in cases where convicted persons (or, in respect of protective, pre-conviction, measures with a view to forfeiture, accused persons) have access to substantial assets. The adoption of an extensive reparations system in the Rome Statute demonstrates a turn toward a more reparative international criminal justice, which is also reflected in the law governing a number of ICTs established after 1998. Most ICTs have at their disposal at least some tools with which they are able to locate and recover assets belonging to those (accused or) convicted of international crimes. Not least to secure the funds required to finance awards for reparations, prosecutors at ICTs could devote greater attention to these tools, for which procedural structures are largely already in place.