

The enforcement of fines and forfeiture measures ordered by the International Criminal Court: the critical role of States

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Abstract

This paper aims at analyzing the legal regime for the enforcement of fines and forfeiture measures as provided by the Rome Statute of the International Criminal Court (ICC). The institution of this category of penalties and measures is unprecedented in international criminal law and has as major ambition of ensuring reparations for victims. The success of the restorative justice system under the Statute is dependent on the efficiency of the enforcement of fines and forfeitures ordered by the Court. Such success is actually based on domestic legal systems. Analysis of enforcement mechanisms of fines and forfeitures shows that the assistance of State authorities is vital in the enforcement of ICC decisions. To ensure effective enforcement of fines and forfeiture, the Statute enshrines the application of national legislation; which implicitly requires States Parties otherwise to adopt appropriate legislation, at least to undertake the adaptation of existing legislation. The satisfaction of this substantial requirement enables the States Parties to serenely execute their major obligations in this area (the obligation to give effect to fines or forfeitures ordered by the Court and the obligation to protect the rights of bona fide third parties).

Keywords: *Fine, forfeiture, forfeiture order, lex fori, Enforcement measures, cooperation.*

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1. Introduction

The operationalization of the restorative justice system² established by the Rome Statute depends on the effectiveness of enforcement of fines and forfeiture measures decided by the ICC. Indeed, effective redress is financed not only by goods and products from enforcement of fines, but mainly by contributions that benefited the Trust Fund for Victims (TFV). The Statute empowers the latter to order the forfeiture of property and assets considered as directly or indirectly

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² Before the adoption of the Rome Statute, international criminal justice always had this unfortunate trend of neglecting victims, as the priority is most often their perpetrators. Although any efficient criminal justice cannot be only *retributive* but shall better compensate victims for the damage suffered. Julian FERNANDEZ therefore talk of “*le passage d’une justice rétributive axée sur la condamnation de l’accusé à une justice restorative qui pose la victime au cœur de l’action judiciaire*”; see Julian FERNANDEZ, *Variations sur la victime et la justice pénale internationale*, “Amnis (Revue de civilisation contemporaine Europes/Amériques)”, No. 6, 2006, document available online at <http://amnis.revues.org/890> (consulted on 18 September 2015).

related to crimes under its jurisdiction. The Court may therefore, in addition to the prison sentence, add the following: “a) [a] fine under the criteria provided for in the Rules of Procedure and Evidence; 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.”³ Thus, ICC is the first international criminal tribunal explicitly given the power to impose fines against individuals. The International Military Tribunal at Nuremberg, although it had a wide discretion in sentencing, it never imposed a fine⁴. Neither the ICTY nor the ICTR are entitled to impose fines, even though both *ad hoc* tribunals have adopted rules on fines for misconducts like contempt of Tribunals⁵.

Article 77-2 of the Rome Statute gives the impression that fine and forfeiture « *ne peuvent être prononcées exclusivement qu’au titre de peine accessoire.* »⁶ In this regard, even if the Rules of Procedure and Evidence (RPE) can leave the debate open, the strict interpretation of the Statute shall permit to exclude them from being delivered as main one in a case. In order to determine the amount of the fine, the Court must take into consideration the financial capacity of the convicted, reparations to victims pursuant to Article 75 of the Statute, as well as the fact that personal gain was or not a motive for the crime and, if so, to what extent⁷. The Court shall especially take into consideration, in addition to the above considerations, damages and injuries caused and related profit obtained by the author. However, under no circumstances may the total amount exceed 75 per cent of the value of the convicted person’s identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants⁸.

As far as forfeiture is concerned, one should note that the properties used to commit the crime are excluded from the list of Article 77-2-b)⁹. These are excluded from forfeiture procedures.

One will undertake to demonstrate that as all decisions by international criminal tribunals, fines and forfeiture measures cannot be executed without the

³ Rome Statute, article 77-2.

⁴ Agreement between the temporary government of the French Republic and USA, United Kingdom of Great Britain and Northern Ireland governments and Union of Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 R.T.N.U. 279, art. 27; see Valerie OOSTERVELD, Mike PERRY and John MCMANUS, *The Cooperation of States with the International Criminal Court*, “Fordham International Law Journal”, vol. 25, No. 3, 2001, pp. 767-839 (spec. p. 822).

⁵ Rules 77-A and 91-D of RPE of ICTR; rules 77-H, 77 bis and 91-E of RPE of ICTY.

⁶ See Damien SCALIA, *Article 77 – Peines applicables*, in Julian FERNANDEZ and Xavier PACREAU (dir.), *Statut de Rome de la Cour pénale internationale, Commentaire article par article*, Pedone, Paris, 2012, pp. 1677-1684 (spec. p. 1681).

⁷ RPE of ICC, rule 146-1.

⁸ *Ibid.*, rule 146-2.

⁹ Rolf Einar FIFE, *Article 77*, in Otto TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s notes, Article by Article*, Baden-Baden, Nomos, 1999, pp. 1419-1432 (spec. p. 1430).

assistance of States Parties to the Rome Statute. In fact, for the forfeiture of property or assets to be effective, the Court is entitled to seek for the cooperation of States Parties for identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes¹⁰, and which are within their territory. It is the same for the enforcement of fines. This study aims at examining legal regime of the enforcement of these fines and measures. The major interrogation is to know how ICC relevant texts help supervising the enforcement. This concern is justified especially by the innovative nature of fines and, to a lesser extent, of forfeiture in international criminal law.

It is therefore interesting to understand the role of States Parties and their national legislation in this domain. The enforcement of fines and forfeiture measures legal regime gives an important place to national legislation and States Parties. This will be demonstrated by examining firstly the applicable law and the substantive obligations of States parties (2) and, secondly the enforcement modalities (3) of ICC fines and forfeiture measures.

2. Applicable law and substantive obligations in enforcement of fines and forfeiture measures

It shall be recalled that in Rome, delegations had to choose between obligations “to ensure the enforcement” of fines and forfeiture measures or penalties based on “their national law” or on that of “the procedure under their national law.” The compromise found was to replace the obligation of States parties “to ensure the enforcement” of fine and forfeiture penalties, by that of “shall give effect”¹¹ those penalties or measures. In addition, the obligation to enforce them “in accordance with their national law” was replaced by the formula “in accordance with the procedure of their national law”¹². The regime established by

¹⁰ Rome Statute, article 93-1-k. It was suggested that the expression “*instrumentalities of crimes*” in this provision “*was an error, and meant to be omitted when the similar phrase was admitted from the text of Article 77(2) (b) of the Statute.*” See William A. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, p. 1021. See also *The Prosecutor vs. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-931, Decision on the implementation of the request to freeze assets (08 July 2014) (ICC, Trial Chamber V (B)), note 34, pp. 9-10.

¹¹ Michael STIEL and Carl-Friedrich STUCKENBERG are not right when they believe that the formula “*faire exécuter*” (in the French version) is stricter than its equivalent “give effect” in the English version ; see these authors, *Article 109 - Enforcement of fines and forfeiture measures, The Rome Statute*, Mark KLAMBERG (ed.), *The Commentary on the Law of the International Criminal Court*, document available online at www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc (consulted on 10 November 2015). To explain, they forgot the auxiliary verb “shall” preceding the formula “give effect”, which emphasises on the binding nature of the mission given to States parties.

¹² See the Report of the Working Group on enforcement, 7 July 1998, U.N. Doc. A/CONF.183/C.1/WGE/L.14, p. 4. See also Faustin Z. NTOUBANDI, *Article 109 – Exécution des peines d’amende et des mesures de confiscation*, in Julian FERNANDEZ and Xavier PACREAU (dir.), *Statut de Rome de la Cour pénale internationale...*, op. cit. pp. 1989-1993 (spec. p. 1991).

the Rome Statute on enforcement of fines and forfeiture measures ordered by the Court provides the primacy of national legislation (2.1) and imposes on States Parties a double substantial obligation (2.2).

2.1 The primacy of national legislation

When conducting enforcement of fines and forfeiture measures, States Parties shall apply their national legislation (2.1.1). This implicitly gives rise against them the obligation to adopt appropriate legislative measures (2.1.2).

2.1.1 The principle of national law application in enforcement of fines and forfeiture measures

As defined in Paragraph 1 of Article 109 of the Statute, States Parties shall apply their *lex fori* when giving effect to fines and forfeitures imposed by ICC. This is certainly, as for the enforcement of sentences of imprisonment, the result of negotiators' concern to encourage States Parties to cooperate fully with the Court. Because of this provision, orders by the Court in this sense are not directly enforceable in States Parties' territory¹³, as opposed to sentences of imprisonment imposed by the Court. Paragraph 1 above remembers national legislation application to the enforcement of sentences of imprisonment and conditions of imprisonment under Paragraph 2 of Article 106 of the Statute; the only difference being that, as far as the enforcement of fines and forfeiture measures is concerned, there is no alternative to the extent that there is not an international legal regime on the subject¹⁴. Indeed, during the enforcement of fines and forfeiture measures, States Parties are not obliged to comply with any international standard or rule. One can therefore affirm that in this context, the flexibility margin of States Parties is greater than in the enforcement of sentences of imprisonment. Indeed, Paragraph 1 of Article 109 does not explicitly require adaptation by States parties of their legislation if it seems to be inadequate for effective enforcement of fines and forfeiture measures ordered by the Court. However, it is recognised that this provision must be interpreted in the sense of such a requirement, that is in terms of its object and purpose¹⁵, which are clearly stated in Chapter IX by Articles 86, 88 and 89¹⁶, these provisions simply clarifying the applicability of the existing

¹³ Faustin Z. NTOUBANDI, *ibid.*

¹⁴ Michael STIEL and Carl-Friedrich STUCKENBERG, *Article 109 - Enforcement of fines and forfeiture measures, op. cit.*

¹⁵ Article 31 (1) of the Vienna Convention on the Law of Treaties of 23 May 1969, is stated as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

¹⁶ See Michael STIEL and Carl-Friedrich STUCKENBERG, *Article 109 - Enforcement of fines and forfeiture measures, op. cit.*

national procedure according to most of the authors¹⁷. According to Faustin Ntoubandi, the link between judicial cooperation in Chapter IX and enforcement addressed in Chapter X is highlighted by Article 93-1-k) of the Statute¹⁸, which provides that States parties shall use procedures provided by national legislation for the cooperation with ICC in “[the] identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.” Rule 217 of the RPE reinforce the relevance of this point of view by allowing the Presidency to request from States Parties cooperation and enforcement measures pursuant to provisions of Chapter IX, for enforcement of fines and forfeiture measures.

Reference to Chapter IX closes the gap between the cooperation regime and that of the enforcement¹⁹ and leads to the conclusion that the Presidency of the Court shall take all necessary steps in order to ensure effective enforcement of fines and forfeiture measures. According to Michael Stiel and Carl-Friedrich Stuckenberg, if one was to consider that Article 109 only requires States Parties already having a relevant legislation, this would make the provision largely ineffective, since at least minimal implementation legislation shall be required in most cases²⁰. The principle of national legislation application therefore aims at obliging States Parties to adopt legislative measures for the enforcement of fines and forfeiture measures ordered by the Court.

2.1.2 *The implicit obligation to adopt appropriate legislative measures*

As stated in Paragraph 1 of Article 109, States Parties shall give effect to fines or forfeitures ordered by the Court (...) “in accordance with the procedure of their national law”; it is possible to argue that this provision also imposes on States Parties an obligation to adopt the necessary laws for the enforcement of such sentences²¹. This recalls the obligation on States Parties under Articles 86 and 88 of the Statute on judicial cooperation with the Court. However, it shall be noted that the duty to accommodate or to make legislation especially taken from Article 88

¹⁷ See also Irene GARTNER, *The Rules of Procedure and Evidence on Co-operation and Enforcement*, in Horst FISCHER, Claus KREß et Sascha Rolf LÜDER (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423-445 (spec. p. 443); Claus KREß and Göran SLUITER, *Fines and Forfeiture Orders*, in Antonio CASSESE, Paola GAETA and John R. W. D. JONES (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 1823-1838 (spec. p. 1829); Faustin Z. NTOUBANDI, *Article 109*, *op. cit.*, p. 1991; William A. SCHABAS, *The International Criminal Court : A Commentary...*, *op. cit.*, p. 1098. *Contra*: Manuel Galvis MARTÍNEZ, *Forfeiture of Assets at the International Criminal Court*, “Journal of International Criminal Justice”, vol. 12, 2014, pp. 193-217 (spec. p. 209).

¹⁸ Faustin Z. NTOUBANDI, *ibid.*

¹⁹ Claus KREß and Göran SLUITER, *Fines and Forfeiture Orders*, *op. cit.*, p. 1831.

²⁰ Michael STIEL and Carl-Friedrich STUCKENBERG, *Article 109 - Enforcement of fines and forfeiture measures*, *op. cit.*

²¹ Faustin Z. NTOUBANDI, *Article 109*, *op. cit.*, p. 1991.

only concerns the procedural criminal law of States Parties²². Faustin Ntoubandi emphasizes on the fact that « [l]a question abordée par l'article 109 se situe [...] à mi-chemin entre la coopération judiciaire prévue au Chapitre IX et l'exécution traitée au Chapitre X du Statut. »²³

According to Amnesty International, States Parties shall review their laws and procedures on interstate judicial assistance in the enforcement of sentences - if such laws and procedures effectively exist - in order to cooperate fully and timely with the Court to enforce fines and forfeitures measures²⁴. If this is not the case, they shall adopt laws and procedures necessary for this cooperation. In fact, the need to adopt legislative measures is mainly due to the issue of providing a domestic legal framework for the implementation of relevant ICC orders. This is to solve the problem of ineffectiveness of fines and forfeiture measures ordered by the said Court. This state obligation is the compensation of the application of national legislation. The principle of this application would not actually make sense if States Parties were not obliged to adopt procedural measures in this regard.

However, it is important to underscore the freedom enjoyed by States Parties concerning the implementation of this requirement of the Rome Statute. As for the (general) obligation to adapt national criminal law to the Statute, States Parties also keep their procedural autonomy here²⁵ and especially their legislative sovereignty. It shall also be pointed that the obligation to adopt appropriate legislation is an obligation of result. In fact, the Statute does not require State Parties to adopt specific measures or procedures. Means or methods used to fulfil this obligation are therefore subject to legislative sovereignty of each State concerned.

It would not be strange to notice a semantic diversity and lack of uniformity in national practices concerning enforcement of fines and forfeiture measures ordered by the Court. The impact of all these factors on ICC relevant orders could be very negative. In fact, as aforementioned, the discretion given to States Parties could have as consequence, in worst cases, refusal to execute or, in the best case, minimal enforcement of fines and forfeiture measures.

One should however note that under Article 26 of the Vienna Convention on the Law of Treaties, States Parties must implement the Statute in general; especially Paragraph 1 of Article 109 in good faith, that is, the expected result through this provision, namely the effective implementation of targeted penalties

²² See Olympia BEKOU, *A Case for Review of Article 88, ICC Statute: Strengthening a Forgotten Provision*, "New Criminal Law Review", vol. 12, No. 3, 2009, pp. 468-483 (spec. p. 469).

²³ Faustin Z. NTOUBANDI, *Article 109, op. cit.*, p. 1991.

²⁴ Amnesty International, *Liste actualisée des principes à respecter en vue d'une mise en œuvre efficace de la Cour pénale internationale*, public document, IOR 53/009/2010, ÉFAI, May 2010, p. 24.

²⁵ Isabelle FICHET-BOYLE and Marc MOSSÉ, *L'obligation de prendre des mesures internes nécessaires à la prévention et à la répression des infractions*, in Hervé ASCENCIO, Emmanuel DECAUX and Alain PELLET (dir.), *Droit international pénal*, 2nd edition revised, Pedone, Paris, 2012, pp. 1055-1070 (spec. p. 1063).

and measures must be attained. In addition, States Parties must refrain from adopting measures that may change judgements imposing fines.

Besides, even if the obligation is merely implicit, it is important to recall that a State Party cannot justify its refusal or inability to enforce fines or forfeiture measures by the lack or the insufficiency of necessary procedures in its national legislation. It is not useless to remind here the *dictum* of the Permanent Court of International Justice which, in its Advisory Opinion of 21 February 1925, recognized as a “principle which is self-evident” that “a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.”²⁶

Only the adoption of necessary legislation or their adaptation to the Statute will enable States Parties to fulfil other obligations in the enforcement of fines and forfeiture measures ordered by the Court.

2.2 A double substantial obligation on states parties

States parties have the duty not only to enforce fines and forfeiture measures ordered of the Court (2.2.1), but also to protect the rights of *bona fide* third parties (2.2.2).

2.2.1 The duty to enforce fines and forfeitures ordered by the Court

Article 109-1 of the Statute imposes on States Parties the obligation to enforce fines and forfeitures measures ordered by the Court pursuant to the procedure under their national legislation. At the opposite side of the consensual nature of the enforcement of sentences of imprisonment imposed by the Court, Article 109 therefore sets up a mandatory regime for the enforcement of fines and forfeiture measures. This is apparently a residue of the rejected general recognition clause contained in earlier drafts²⁷. According to some authors, one could agree to the present provision could be agreed upon as the Court depends on the cooperation of a specific State in such cases²⁸. This approach renders the “dual enforcement regime”²⁹ of the ICC inconsistent; however, the compulsory nature of Article 109 is to be welcomed³⁰.

²⁶ PCIJ, Advisory Opinion of 21 February 1925 on *Exchange of Greek and Turkish Populations*, series B, No. 10, p. 20.

²⁷ See Michael STIEL and Carl-Friedrich STUCKENBERG, *Article 109 - Enforcement of fines and forfeiture measures*, *op. cit.* For the negotiations history of this Article, See Claus KREß and Göran SLUITER, *Fines and Forfeiture Orders*, *op. cit.*, pp. 1826-1828; William A. SCHABAS, *The International Criminal Court : A Commentary...*, *op. cit.*, pp. 1094-1096.

²⁸ Claus KREß and Göran SLUITER, *ibid.*, p. 1831.

²⁹ See HIRAD ABTAHI and STEVEN ARRIGG KOH, *The Emerging Enforcement Practice of the International Criminal Court*, “Cornell International Law Journal”, vol. 45, 2012, pp. 1-23 (spec. p. 3). The “dual enforcement regime” refers to sentences of imprisonment on the one hand and fines and forfeitures measures on the other hand, which can be ordered by the Court in a cumulative manner or not, pursuant to Article 77 of the Rome Statute.

³⁰ Claus KREß and Göran SLUITER, *Fines and Forfeiture Orders*, *op. cit.*, p. 1831.

As previously indicated, in Rome, discussions focused on whether the Statute should provide direct recognition and enforcement of fines and forfeiture measures or whether States Parties should give effect to the Court's decisions in accordance with their national legislation³¹. In fact, the implication of "direct enforcement" is not clear (except the elimination of a separate recognition procedure such as *exequatur* procedures or a transformation requirement). Providing that enforcement as such requires a legally elaborated procedure, either the Statute and the RPE shall provide a type of uniform law to be used³² - this would have been a very "demanding and ambitious task" - or, unless national *lex loci executionis* is applied, possibly under some conditions³³. In the final version of Article 109, the latter approach adopted was which is in line with the sparse inter-State practice in this domain³⁴.

The expression "shall give effect" in Paragraph 1 of Article 109 was understood as excluding any modification of fines amounts and forfeiture measures³⁵. In this regard, Rule 220 of RPE provides that: "[w]hen transmitting copies of judgements in which fines were imposed to States Parties for the purpose of enforcement in accordance with article 109 and rule 217, the Presidency shall inform them that in enforcing the fines imposed, national authorities shall not modify them." A similar interdiction can be found under rule 219 concerning reparations orders of the Court³⁶. According to Irene Gartner, rule 220 is simply a restatement of Paragraph 1 of Article 109 of the Statute³⁷. However, some delegations considered that integrating rule 220 was necessary in order to avoid an opposite conclusion drawn from Rule 219 dealing exclusively with reparations orders³⁸. Consequently, only sentences of imprisonment can be reduced by the Court; fines cannot as there is no statutory or regulatory provision related thereto.

States parties are limited only by rights of *bona fide* third parties when enforcing their obligations under Paragraph 1 of Article 109. The rights in question

³¹ Report of the *Ad hoc* Committee on the creation of an international criminal court, 6 September 1995, U.N. Doc. A/50/22, § 237, p. 44. See Michael STIEL and Carl-Friedrich STUCKENBERG, *Article 109 - Enforcement of fines and forfeiture measures*, *op. cit.*

³² William A. SCHABAS, *The International Criminal Court. A Commentary...*, *op. cit.*, p. 1098.

³³ See Michael STIEL and Carl-Friedrich STUCKENBERG, *Article 109 - Enforcement of fines and forfeiture measures*, *op. cit.*

³⁴ See Claus KREß and Göran SLUITER, *Fines and Forfeiture Orders*, *op. cit.*, pp. 1824-1826.

³⁵ Report of the Working Group on Enforcement, 14 July 1998, U.N. Doc. A/CONF.183/C.1/WGE/L.14/Add.1/Corr.1. See Claus KREß & Göran SLUITER, *ibid.*, p. 1827.

³⁶ Rule 219 of RPE states as follows: "[t]he Presidency shall, when transmitting copies of orders for reparations to States Parties under rule 217, inform them that, in giving effect to an order for reparations, the national authorities shall not modify the reparations specified by the Court, the scope or the extent of any damage, loss or injury determined by the Court or the principles stated in the order, and shall facilitate the enforcement of such order."

³⁷ Irene GARTNER, *The Rules of Procedure and Evidence on Co-operation and Enforcement*, *op. cit.*, p. 443.

³⁸ Kimberly PROST, *Enforcement*, in Roy S. LEE (ed.), *International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 673-702 (spec. p. 696).

thus constitute *a priori* the only ground for refusal to execute fines and forfeiture penalties. Indeed, States Parties have the obligation to protect the said rights.

2.2.2 *The obligation to protect the rights of bona fide third parties*

The obligation to protect the rights of *bona fide* third parties is imposed both to the Court and to national authorities as far as the enforcement of fines and forfeiture measures is concerned. Many provisions of the Statute are dedicated to this obligation³⁹. However, neither the Statute nor the RPE specify the meaning of “rights of *bona fide* third parties”. Consequently, national courts shall identify which are relevant rights and when a person can be granted the quality or the title of “*bona fide* third parties.” The latitude that relevant texts of ICC seem to give to national courts does not only deviate from inter-State practice but may result in an uneven application⁴⁰. Indeed, the risk of a heterogeneous practice is very high, as courts of each State Party would decide according to its national legislation. For some commentators, the Presidency of Court should be competent to determine that a national jurisdiction has misused in a given case the argument related to the existence of rights of *bona fide* third parties⁴¹. William Schabas even thinks that the Court itself could intervene in national proceedings to challenge the priority given to a third party creditor⁴². Even though these interpretations are interesting, they are only suggestions in reality. One can indeed imagine that Article 109 or, at least, the RPE of ICC shall be revised in this regard. Without such a revision, one could face the refusal of some States Parties to enforce Court’s orders because there are rights of *bona fide* third parties; without giving on the contrary the possibility to the Court to contest. Furthermore, there should probably be some mechanism to provide guidance and enhance uniformity on this issue, assuming that in the future large sums could be at stake⁴³.

Moreover, considering that, the application of Article 109-1 is stricter than the enforcement of provisional measures under Article 93-1-k) where a “fundamental legal principle of general application” represents an additional ground for refusal pursuant to Article 93-3, commentators have, for the sake of consistency, suggested to interpret Article 109-1 accordingly⁴⁴. Such a proposal is

³⁹ See Articles 93-1-k) and 109 of the Rome Statute.

⁴⁰ See Claus KREß and Göran SLUITER, *Fines and Forfeiture Orders*, *op. cit.*, pp. 1830-1828; William A. SCHABAS, *The International Criminal Court: A Commentary...*, *op. cit.*, p. 1098. See also Michael STIEL and Carl-Friedrich STUCKENBERG, *Article 109 - Enforcement of fines and forfeiture measures*, *op. cit.*

⁴¹ Claus KREß and Göran SLUITER, *ibid.*, p. 1830, note n° 25. See Michael STIEL and Carl-Friedrich STUCKENBERG, *ibid.*

⁴² William A. SCHABAS, *The International Criminal Court. A Commentary...*, *op. cit.*, pp. 1098 and ff.

⁴³ See Michael STIEL and Carl-Friedrich STUCKENBERG, *Article 109 - Enforcement of fines and forfeiture measures*, *op. cit.*

⁴⁴ Claus KREß and Göran SLUITER, *Fines and Forfeiture Orders*, *op. cit.*, p. 1829.

underscored by Rule 217 of the RPE in a subtle way⁴⁵. Alternatively, it could be argued that the “fundamental legal principle of general application” can sometimes have already been taken into account in determining the rights of *bona fide* third parties⁴⁶.

The RPE provides a procedure to preserve those rights before the Court. It is therefore imposed to Chambers to inform *bona fide* third parties when considering forfeitures measures for proceeds, property or assets on which they could have rights. Under its rule 147-2, if before or during hearing, a Chamber is aware of any *bona fide* third party, who may have a right on such proceeds, property or assets, it shall inform that third party. The information provided by the later has as objective to permit that person to “submit relevant evidence”⁴⁷. It is after considering the evidence submitted that “a Chamber may issue an order of forfeiture in relation to specific proceeds, property or assets if it is satisfied that these have been derived directly or indirectly from the crime.”⁴⁸ Therefore, one may think that as it has in mind the protection of the rights of *bona fide* third parties, a Chamber may refrain from issuing a forfeiture order that would result in the violation of such rights. In fact, can the Court decide to forfeit property and later on decide to ensure the right to reparation for victims, making along the way other victims such as *bona fide* third parties? Certainly not because we would enter a vicious cycle. In fact, one cannot claim to provide reparations to victims by damaging innocent people. Confronted to evidence of *bona fide* third parties and in order to demonstrate the relevance of their rights on property subject to forfeiture procedure, the Court will strongly need the cooperation of the authorities of the States concerned. Indeed, only the latter can help the Court to validate the evidence that third parties may submit. One can for example imagine the hypothesis of hiding, through sale⁴⁹, of proceeds, property or assets directly or indirectly derived from the crime. A third party may have acquired them in good faith. Therefore, national authorities shall help to protect the rights of a *bona fide* purchaser of criminal assets. One may therefore cancel the sale⁵⁰ and recover criminal assets acquired while granting damages to the *bona fide* purchaser.

The obligation to protect the rights of *bona fide* third parties is constant in the decisions of the Court requesting assistance to States Parties in the framework

⁴⁵ Irene GARTNER, *The Rules of Procedure and Evidence on Co-operation and Enforcement*, *op. cit.*, p. 443.

⁴⁶ See Michael STIEL and Carl-Friedrich STUCKENBERG, *Article 109 - Enforcement of fines and forfeiture measures*, *op. cit.*

⁴⁷ RPE., rule 147-3.

⁴⁸ *Ibid.*, rule 147-4.

⁴⁹ Sale is defined as a contract by which a party, the seller, transfer an asset property and is committed to supply to the other, the buyer or purchaser who is obliged to pay the price; see Gérard CORNU, *Vocabulaire juridique*, 9th Ed., Quadrige/PUF, Paris, 2011. See also Article 1582 of the Civil Code applicable in Cameroon.

⁵⁰ French civil Case Law provides action in nullity to the purchaser. See in this regard, Cass. Civ. 8 December 1999, *RJDA* 3/00, No. 254 ; Bull. III, No. 241, p. 160; D.2001, 269, note Albiges.

of measures under Article 93-1-k)⁵¹. In those decisions, the expression “without prejudice to the rights of *bona fide* third parties” is used to mark the commitment of ICC to the preservation of rights of this category of people. However, as the nature or the content of these rights is not specified by the Rome Statute, one can infer that the task shall be performed by national legislation of States Parties⁵².

3. Modalities for enforcement of fines and forfeiture measures

The effectiveness of enforcement of fines and forfeiture measures ordered by the Court entirely depends on the assistance of States Parties. At the end of the enforcement procedures, they must, either transfer assets or products concerned to the Court or pay to TFV by order of the Court. Analysis of practical enforcement of fines and forfeiture measures therefore requires special consideration of the cooperation regime between States Parties and ICC (3.1). This cooperation may be unfruitful if a State Party is unable to seize property or assets (3.2). One will also focus on the destination of the property or products from the enforcement (3.3).

3.1 *The regime of cooperation between states parties and the Court*

States Parties have the obligation to cooperate fully with ICC as stated in Article 86 of the Rome Statute. That obligation if it does not include the enforcement of sentences ordered by the Court⁵³, also involves forfeiture procedure, likely to begin even before a final judgement. This work will make a demonstration of this possibility by analysing forfeiture procedure of property and assets (3.1.1) and the request for assistance from the Court to States (3.1.2).

3.1.1 *Forfeiture procedure of property and assets*

The guarantee not only of the possibility to order for reparation payable by the accused but also his solvency justifies the forfeiture of its property or assets when they are directly or indirectly related to crime. The forfeiture phase itself is preceded by financial and asset investigations. The forfeiture mechanism highlights a certain number of restrictions on which it seems important to focus on.

Financial and Asset Investigations. Financial and asset investigations directly start as soon as the suspect is arrested and surrendered to the Court. Authorisation to open this procedure is given by the Registry⁵⁴. This means that the

⁵¹ See for example, *Prosecutor vs. Lubanga*, ICC-01/04-01/06-62, Request to the Democratic Republic of Congo identification, tracing and freezing or seizure of proceeds, property and assets of Mr. Thomas Lubanga Dyilo (9 March 2006) (ICC, Pre-Trial Chamber I), p. 4; *Prosecutor vs. Lubanga*, ICC-01/04-01/06-62-tEN, Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Lubanga Dyilo (31 March 2006) (Pre-Trial Chamber I), p. 4.

⁵² See Faustin Z. NTOUBANDI, *Article 109, op. cit.*, p. 1992.

⁵³ Evelise PLÉNET, *Vers la création d'une prison internationale : l'exécution des peines prononcées par les juridictions pénales internationales*, L'Harmattan, Paris, 2010, pp. 295 and ff.

⁵⁴ See Arnaud M. HOUEJISSIN, *Les victimes devant les juridictions pénales internationales*, PhD Thesis, University of Grenoble, 2011, p. 227.

said procedure to be initiated may depend upstream on the assistance of the State in the territory where the suspect was. Indeed, the Rome Statute obliges States parties to comply with requests for arrest and surrender to the Court. However, the efficiency requirement will mostly encourage the Court to open financial and asset investigations even before the accused is arrested in order to ensure that there are goods that can be object of forfeiture measures do exist and can be localised⁵⁵. In fact, this is actually a long and difficult process and therefore requires acting quickly in order to avoid that the suspect hide his targeted property and assets before any arrest procedure. Nevertheless, preventive investigations of property seizure shall follow an internal procedure at ICC. If the Office of the prosecutor is in charge of financial assets trafficking of the accused, within the Registry there is a service called “Financial and Asset Investigations for the Registry” headed by a financial investigator whose mission is targeting the said property and financial assets on the field⁵⁶.

The financial investigator can seek the assistance of a State party in the conduct of its investigations pursuant to Article 93-1-k) of the Statute, namely for identification and tracking of property and assets of an accused. At the end of its investigations, he or she shall transmit results to the Registrar who shall refer to the competent Chamber to determine whether it is appropriate to make an order of forfeiture. This decision shall be made within fifteen days following the transmission of the file by the Registrar. If an order for forfeiture of property or assets is made, the process of placing those properties under seal is initiated. For this reason, the competent Chamber shall be convinced of the fact that they are directly or indirectly derived from the crime⁵⁷.

Technical and Legal Issues related to Property and Assets Forfeiture.

Although it is relatively new in international criminal law, property and assets forfeiture procedure is already raising a certain number of problems.

First of all, at the legal level, property and assets forfeiture raises the issue related to the fundamental principle of the presumption of innocence⁵⁸ that must benefit any person charged until his final conviction. As indicated by Arnaud Houedjissin, nevertheless, it seems that at the beginning of first property and

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, pp. 227 and 228.

⁵⁷ Rule 147-4 of RPE of ICC.

⁵⁸ For a study on this principle in international criminal law, also see Brusil Miranda METOU, *De la présomption d'innocence dans le procès pénal international*, in Société Africaine pour le Droit International, *L'Afrique et le droit international pénal*, Proceedings of the third annual Colloquium, Pedone, Paris, October 2015, pp. 37-50. Many international instruments are dedicated to this principle. See for example Article 11 of the Universal Declaration of Human Rights of 10 December 1948 stating as follows: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” Statutes of all international criminal jurisdictions do the same. See Article 20-3 of ICTR Statute, Article 21-3 of ICTY Statute, Article 66-1 of ICC Statute. However, Brusil Miranda METOU notes that « [l]es expressions et termes employés pour désignés [sic] les personnes poursuivies devant les juridictions pénales internationales ne laissent pas présager de leur innocence », *ibid.*, p. 44.

financial investigations, the targeted person is simply “suspected” and remains considered as such even when a warrant of arrest has been issued until indictment where he becomes “accused”⁵⁹. And even when he becomes accused, he will remain presumed innocent until the decision proving he is guilty. It is from that decision, subject to become convicted, that forfeiture is thereby justified. If one is decided to raise some interrogations about the fact that forfeiture shall be decided before the decision on the conviction and therefore “*en contradiction avec le principe de la présomption d’innocence*”⁶⁰, it shall be noticed that without provisional measures, restorative justice would have no meaning and would certainly be considered as ineffective. Without provisional measures, accused persons would have time to hide proceeds, property and assets directly or indirectly derived from crimes. Furthermore, the issue related to the respect of presumption of innocence seems to be of less importance when taking little consideration to guarantees set out in the Rome Statute and the RPE of the Court. The first Paragraph of Article 85 states that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” As mentioned before, according to Rule 147-4 of RPE, the competent Chamber may make a forfeiture order of proceeds, property or assets only if it is convinced that they are directly or indirectly derived from the crime. Thus, in reality, the principle of presumption of innocence is not threatened by the forfeiture mechanism when taking a look at its management.

At the technical level, forfeiture gives details on difficulties related to the market value of proceeds, property and assets to be seized and the difference between criminal property and honest property of the accused as well⁶¹. It is therefore clear that evaluating and making a distinction between the said properties seems not to be easy task. Therefore, assistance of States parties according to Article 93-1-k) of the Statute is for a vital importance at this level. Forfeiture orders only make sense if the Court can count on the support of national authorities for their implementation. William Bourdon indicated that “[l]a fonction de juger implique, pour être efficace, que l’État délègue le monopole de la contrainte et que certains de ses agents aient la possibilité d’appréhender et de perquisitionner”⁶². Forfeiture measures are part of this aspect of the constraint that only national authorities can exercise within the framework of procedures initiated by the Court. If the Prosecutor is authorised to be directly competent within the national territory, this intervention can only target non-compelling measures such as the interview of or taking evidence from a person on a voluntary basis and the examination without modification of a public site or other public place⁶³. The necessity of States

⁵⁹ See Arnaud M. HOUEDJISSIN, *Les victimes devant les juridictions pénales internationales*, *op. cit.*, p. 229.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² William BOURDON, *La Cour pénale internationale*, Seuil, Paris, 2000, p. 240.

⁶³ Article 99-4 of the ICC Statute.

cooperation on forfeiture is without doubt, as there are hypotheses in which national authorities can be unable to enforce a forfeiture order.

3.1.2 *The request for assistance of the Court to States*

Rule 217 of the RPE gives the Presidency of the Court the power to seek from States parties' cooperation and enforcement measures pursuant to provisions of Chapter IX, for enforcement of fines and forfeiture measures or reparation orders. In doing so, the Presidency shall transmit relevant decisions of the Court to any State with which the convicted person may have direct link because of his nationality, domicile, permanent residence or place where his or her assets and property were localised. It therefore appears that States Parties are not strictly the only ones targeted by the cooperation in the enforcement of fines and forfeiture measures or reparation orders. One can also interpret Rule 217 as giving to the Presidency the right of initiative of taking enforcement measures, States Parties not being obliged to act *proprio motu*⁶⁴. At this point, the Court should therefore facilitate cooperation of States in charge of the enforcement, assuming that they have provided upstream, appropriate procedures in their national legislation.

First, forfeiture order shall include elements or information permitting States to give effect to it. These elements are: (i) the identity of the person against whom the order is issued, and (ii) the income, property and assets for which the Court has ordered forfeiture⁶⁵. Pursuant to Paragraph 2 of Article 109 of the Statute, the order shall also indicate that if a State Party is not able to enforce the forfeiture order, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited⁶⁶.

Then, when the Court seek the cooperation of States or the adoption by them of enforcement measures, it must give them information at its disposal concerning the location of proceeds, property and assets targeted by the relevant order⁶⁷. Paragraph 1 of Rule 147 of the RPE provides that:

In accordance with article 76, paragraphs 2 and 3, and rules 63, sub-rule 1, and 143, at any hearing to consider an order of forfeiture, Chamber shall hear evidence as to the identification and location of specific proceeds, property or assets which have been derived directly or indirectly from the crime.

Finally, the Presidency shall assist the State as far as any notification is concerned or for any other enforcement measure as indicated in Rule 222 of RPE. Under this provision, the President has a general duty to assist the State of enforcement of fines, forfeiture or reparation orders, which so requests, to notify the convicted person or any other person concerned any relevant act and give the State assistance for any other measure necessary for the implementation of the decision pursuant to the procedure provided by the national law of the said State.

⁶⁴ See Claus KREß and Göran SLUITER, *Fines and Forfeiture Orders*, *op. cit.*, p. 1828.

⁶⁵ RPE of ICC, rule 218-1.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, rule 218-2.

It is therefore the responsibility of the Court to facilitate the enforcement of its relevant orders. This opens the way to the non-enforcement of such orders on the grounds of insufficiency both of information provided and of the assistance of the Court to the State in charge of the enforcement. The Court shall therefore avoid opening the breach to such a pretext. Furthermore, it should be noted that under Article 93-1-k) of the Statute, States Parties shall give effect to Court requests for assistance related to an investigation or prosecutions and concerning “the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture.” Article 57-3-e) provides for its part that the Trial Chamber may:

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

This means the Court has the discretion to request for the above information from States Parties too, even if it is in principle an upstream cooperation, that is, before the enforcement phase. At the same time, if for example such property or asset is in a State Party other than the requested State, it is obvious that the Court will first try to obtain the assistance of that other State in order to permit the requested State to give effect to its relevant order. No matter what happens, only the requested State will finally take appropriate measures in order to assist the Court in enforcing its decisions on fines and forfeiture.

The various requests for assistance from the Court highlight this situation⁶⁸. The content of those Court’s requests for assistance to States highlights the key role which should be played by them in enforcing its decisions. If they are ultimately those to identify, localise, freeze and seize property and assets of the accused or persons definitely convicted by the Court, pursuant to Article 93-1-k) of the ICC Statute, they also have the responsibility to safeguard such property and

⁶⁸ For example, in its request of 9 March 2006 to the Democratic Republic of Congo, the Pre-Trial Chamber I asked to this State Party: “[...] to take, in accordance with its national legislation, all necessary measures in order to identify, localise, freeze and seize property and assets of Mr. Thomas Lubanga Dyilo in its territory, including his real and personal property, bank accounts or common shares, subject to bona fide third party rights” [author’s translation], cf. *Prosecutor vs. Lubanga*, ICC-01/04-01/06-62, Request to the Democratic Republic of Congo identification, tracing and freezing or seizure of proceeds, property and assets of Mr. Thomas Lubanga Dyilo (9 March 2006) (ICC, Pre-Trial Chamber I). In the matter *Prosecutor vs. Jean Pierre Bemba*, the Pre-Trial Chamber III requested the assistance of Portugal as follows : “requests the competent judicial authorities of the Republic of Portugal to urgently initiate an investigation into the alleged disappearance of money frozen in the seized bank accounts belonging to Jean-Pierre Bemba Gombo in the Republic of Portugal in order to determine if the alleged disappearance did indeed occur and under which circumstances”, cf. *Prosecutor vs. Bemba*, ICC-01/05-01/08-254, Request for cooperation to Initiate an Investigation Addressed to the Competent Authorities of the Republic of Portugal (17 November 2008) (ICC, Pre-Trial Chamber III).

assets for a reparation procedure to be possible. However, there are situations where requested States may legitimately be unable to enforce a forfeiture order.

3.2 Cases of legitimate inability to enforce a forfeiture order

The Rome Statute considers inability to enforce forfeiture order of the Court while providing the solution. According to Paragraph 2 of Article 109 of the Statute, the order shall also indicate that if a State party is not able to enforce the forfeiture order, it shall take measures to recover the value of proceeds, property or assets for which the Court ordered the forfeiture. This is obviously an obligation. This provision is intended to ensure as far as possible the effectiveness of the enforcement of the Court's forfeiture orders; an alternative solution being designed thereto⁶⁹. It should also be noted that inability here is not the lack of appropriate procedures available under domestic law as States Parties are obliged to adapt their legislation as per the Statute⁷⁰. The inability here shall instead be due to legal or factual factors or obstacles such as: (i) the existence of rights of *bona fide* third parties on the relevant property or assets, (ii) the impossibility, under Paragraph 3 of Article 109, of the transfer of real estate property to the Court and, (iii) the existence of internal immunities protecting some property against legal proceedings or seizures⁷¹.

In addition to these obstacles, some authors mentioned two other factors of inability to enforce a forfeiture order. Firstly, there is the hypothesis of property or assets affected by the sanctions ordered by the United Nations Security Council. Secondly, is the case where inability may be due to the fact that costs for preservation or maintenance of property or assets concerned exceed their value⁷².

The impact of all these factors or obstacles does not have the same magnitude on the enforcement of forfeiture order. In fact, if the solution to inability to transfer real estate property to the Court is to recover its value, other obstacles can lead to an absolute inability to enforce a forfeiture order. For example, in the event that rights of *bona fide* third parties are preventing the forfeiture of property or assets to which they are related, it is difficult to consider the feasibility of a

⁶⁹ See Faustin Z. NTOUBANDI, *Article 109, op. cit.*, p. 1992.

⁷⁰ See Claus KREß and Göran SLUITER, *Fines and Forfeiture Orders, op. cit.*, pp. 1829 and s. Faustin Z. NTOUBANDI has the same view as he thinks paragraph 2 of Article 109 provides an underlying obligation requiring States Parties to have a legislation permitting to recover the value of products, property or assets which cannot be forfeited; see the same author, *Article 109, op. cit.*, p. 1992.

⁷¹ See William S. SCHABAS, *Enforcement of fines and forfeiture measures, in: Otto TRIFFTERER (ed.), Commentary on the Rome Statute..., op. cit.*, pp. 1677-1681 (spec. p. 1681); Claus KREß and Göran SLUITER, *Fines and forfeiture orders, op. cit.*, p. 1830; William S. SCHABAS, *The International Criminal Court: A Commentary..., op. cit.*, p. 1100; see also Faustin Z. NTOUBANDI, *Article 109, op. cit.*, p. 1992.

⁷² See Manuel Galvis MARTÍNEZ, *Forfeiture of Assets at the International Criminal Court, op. cit.*, pp. 211 and ff. See also Michael STIEL and Carl-Friedrich STUCKENBERG, *Article 109 - Enforcement of fines and forfeiture measures, op. cit.*

judicial sale. However, one can underscore that for the interest of victims⁷³, the Court will seek the assistance of the States Parties for the elimination of some of these barriers

One can regret the fact that Article 109 does not also consider the inability to enforce fines. The failure of all enforcement measures concerning fines sentence imposed by the Court was part of a controversial issue during negotiations in Rome⁷⁴. That may justify the silence of the Statute in this regard. This gap was however filled by the RPE of the Court. Rule 146 of this text provides the solution in case of difficulty in the enforcement of a fine. Thus, if the convicted person does not pay the fine, the Court shall seek cooperation and enforcement measures for enforcement in accordance with provisions of Chapter IX and Article 109 of the Statute. However, when facing persistent refusal of the convicted person to pay, if the Presidency, acting on its own motion or at the request of the Prosecutor, considers that all necessary enforcement measures have been exhausted, it may as matter of last resort extend the term of imprisonment for a period not to exceed a quarter of such term or five years, whichever is less.

In the determination of the period of extension, the Presidency shall take into account the proportion of the fine already paid. Such an extension is not possible in case of life imprisonment. The extension, when applicable, cannot have the effect of increasing the total period of imprisonment to more than 30 years⁷⁵. In order to rule on the possibility of an extension of prison sentence and decide on the duration, as appropriate, the Presidency shall sit *in camera* and receive observations of the convicted person - who may enjoy the assistance of a counsel - and the Prosecutor⁷⁶. Furthermore, the Presidency can also seek for observations from States in which attempts to enforce fines have failed and those of the State in which the convicted person is serving his or her sentence of imprisonment⁷⁷.

When a sentence of imprisonment has been extended pursuant to Paragraph 5 of Rule 146 of the RPE and the convicted person then pays all or part of the fine, the Presidency shall cancel the originally ordered extension or, in case of payment of part of the fine, the Presidency reduces the term of imprisonment proportionately⁷⁸. The solution provided by Rule 146 to solve the issue of non-payment of fines is, according to Hiram Abtahi, another aspect of the originality of ICC concerning enforcement⁷⁹.

⁷³ The main objective of the enforcement of fines and forfeiture measures ordered by the Court is the reparation to victims in accordance with Paragraph 2 of Article 79 of the Rome Statute and Paragraph 2 of Rule 221 of RPE of the ICC.

⁷⁴ See Claus KREß and Göran SLUITER, *Fines and Forfeiture Orders*, *op. cit.*, p. 1827 and ff.

⁷⁵ RPE of ICC, rule 146-5.

⁷⁶ *Ibid.*, rule 146-6.

⁷⁷ Regulations of ICC, regulation 118-1.

⁷⁸ *Ibid.*, regulation 118-2.

⁷⁹ Hiram ABTAHI, *L'exécution de la peine*, in Hervé ASCENSIO, Emmanuel DECAUX and Alain PELLET (dir.), *Droit international pénal*, *op. cit.*, pp. 989-992 (spec. p. 991).

3.3 *The destination of property or proceeds from enforcement of fines and forfeiture measures*

The principle concerning property or proceeds from enforcement of a judgement of the Court is that of their transfer to the Court (3.3.1). At least, it is the decision of the Court on whether to order payment to the Fund for Victims (TFV) (3.3.2).

3.3.1 *Transfer of property or proceeds to the Court*

According to Paragraph 3 of Article 109 of the Statute “property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.” This provision makes ICC the main recipient of property or proceeds from the enforcement of fines and forfeitures ordered by that Court. However, according to Paragraph 2 of Article 79 of the Statute, the Court may order that fines and any other asset from forfeiture shall be transferred to the TFV⁸⁰. The obligation to transfer property or proceeds in question to the Court is “absolute”⁸¹ since State Party concerned has been able to enforce fines and forfeiture measures. In fact, when a State has seized or sold property or assets pursuant to a Court order, there is no valid ground that can justify its refusal to transfer property or proceeds of the sale to the Court. It should be reminded that pursuant to Article 77-2-b) of the Statute, forfeiture concerns proceeds, property and assets directly or indirectly derived from the crime⁸².

The Presidency of the Court is the entity in charge of receiving property or assets transferred. It is especially competent to decide on all matters relating to the allocation of property or assets transferred to the Court. Indeed, under Paragraph 1 of regulation 116 of the Regulations of Court:

For the purposes of enforcement of fines, forfeiture orders and reparation orders, the Presidency, with the assistance of the Registry as appropriate, shall make the arrangements necessary in order to, *inter alia*: (a) Receive payment of fines as described in article 77, paragraph 2 (a); (b) Receive, as described in article 109, paragraph 3, property or the proceeds of the sale of real property or, where appropriate, the sale of other property; (c) Account for interest gained on money

⁸⁰ For discussion on this possibility, see *infra*.

⁸¹ Faustin Z. NTOUBANDI, *Article 109, op. cit.*, p. 1992.

⁸² However, according to Article 41 of the Swiss Federal Law on the cooperation with ICC of 21 June 2001, proceeds or values that are subjected to seizure in order to be transferred to the Court are: a) tools used to commit offence; b) proceeds or result of the offence, its replacement value and the illicit benefit; c) donations and other advantages which have served or which should serve to decide or reward the author of the offence as well as their replacement value. See TRIAL, *La lutte contre l'impunité en droit suisse*, under the supervision of Philip Grant, 2003, p. 128. The incorporation of “tools which have served to commit an offence” in the Swiss Law seems to simply be the consequence of a mistake in the letter of Article 93-1-k) which is different from that of Article 77-2-b) of the Statute.

received under (a) and (b) above; (d) Ensure the transfer of money to the Trust Fund or to victims, as appropriate.

After transferring or depositing assets or any other property obtained in application of an order of the Court, to the TFV, the Presidency, subject to Paragraph 2 of Article 75 and Rule 98 of the RPE, shall decide on the disposition or allocation of property or assets in application of rule 221 of the RPE⁸³. Paragraph 1 of this rule states that, after consulting the Prosecutor, as appropriate, the sentenced person, the victims or their legal representatives, the national authorities of the State in charge of enforcement, any third party or representatives of TFV, the Presidency shall decide on all matters concerning the disposition or allocation of property or assets realized through enforcement an order of the Court.

3.3.2 Payment of property or proceeds to the trust fund for victims

One of the objectives of forfeiture of property and assets is to make sure the Court can order reparation to victims if the accused person is convicted⁸⁴. Even if the truth is that it is not new in international criminal law, forfeiture was not considered in *ad hoc* tribunals as a means to guarantee reparation process. Reparation to victims is an innovation of the Rome Statute. One can remember that in 1999, the ICTY ordered and obtained freezing of bank accounts of Slobodan Milosevic in Switzerland⁸⁵, without however using these assets to pay reparations to his victims.

Under Article 79-2 of the Rome Statute, “[t]he Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.” It is generally accepted that this provision establishes the priority of the interests of victims in the disposition or allocation of property or proceeds from the enforcement of fines and forfeiture measures. This is clearly the case of Paragraph 2 of Rule 221 of the RPE which provides that when the Presidency decides of the disposition or allocation of property or assets belonging to the sentenced person; it “it shall give priority to the enforcement of measures concerning reparations to victims.” Article 79-2 organises the financing of the TFV on orders of the Court. There are two types of resources that can be drawn from an order of the Court.

⁸³ Paragraph 2 of regulation 116 of the Regulations of ICC.

⁸⁴ In a Court’s decision, one can read the following: “Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Lubanga Dyilo is necessary for the supreme interest of victims in order to guarantee that, if Mr Thomas Lubanga Dyilo is found guilty of crimes against him, these victims can, in application of Article 75 of the Statute, obtain reparation for injuries that may have been caused” [author’s translation], cf. *Prosecutor vs. Lubanga*, ICC-01/04-01/06-62, Request to the Democratic Republic of Congo identification, tracing and freezing or seizure of proceeds, property and assets of Mr. Thomas Lubanga Dyilo (9 March 2006) (ICC, Pre-Trial Chamber I), pp. 2-3.

⁸⁵ Pierre HAZAN, *CPI, Guide pratique à l’usage des victimes*, Reporters Sans Frontières – Réseau Damoclès, 2003, p. 84.

The first category is that of Article 79-2 above. The Court has under this provision a genuine discretion on the destination of resources in question. Esther Saabel notes however that “legislative history” of Article 79 and the general summary of the Statute “*plaident en faveur de l’utilisation de ces ressources pour le seul intérêt des victimes et non pas aux fins de financer le fonctionnement de la Cour*”⁸⁶. In fact, it was considered at a certain moment the possibility to transfer the fines either to a State or to the Registrar or even to the TFV. If the first two alternatives have been eliminated in favour of the Fund, it is a sign of the express waiver of the States Parties to the said resources for the functioning of the Court⁸⁷. This conclusion is reinforced by the absence of those resources on the list of Article 115 of the Statute⁸⁸. According to the doctrine, using the auxiliary verb “may” (in Article 79-2) corresponds “*au souci de ne pas obliger la Cour à transférer les produits au Fonds et de permettre dans certains cas une restitution immédiate aux victimes.*”⁸⁹. The relevance of these resources will depend on several parameters. Firstly, we have the extent of fines and forfeitures that the Court will order. In this regard, a realistic estimation invites to expect a relatively small amount, given the experience of ICT, where most of the accused persons benefited legal assistance⁹⁰. Furthermore, in order to collect and transfer funds, one should rely on the States cooperation, which, pursuant to Article 109 of the Statute, are responsible of enforcing fines and forfeiture measures. Rule 148 of the RPE provides that before making an order under Paragraph 2 of Article 79, the Chamber may invite representatives of the TFV to submit their written or oral observations.

The second category of resources resulting from the Court order is rather provided by the resolution creating the TFV, which provides among the Fund’s resources the proceeds of reparations ordered by the Court under [Rule] 98 of the RPE⁹¹. In fact, the Court may order that the reparations amount imposed to the person found guilty shall be deposited to the TFV if, during the decision, it is impossible for the Court to order an amount for each victim individually. The amount of reparation thus deposited is separated from other resources of the Fund and is given to each victim as soon as possible⁹². The deposit of the reparation

⁸⁶ Esther SAABEL, *Article 79 – Fonds au profit des victimes*, in Julian FERNANDEZ et Xavier PACREAU (dir.), *Statut de Rome de la Cour pénale internationale...*, *op. cit.*, pp. 1693-1715 (spec. p. 1702).

⁸⁷ *Ibid.*

⁸⁸ Article 115 states as follows: “[t]he expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources: (a) Assessed contributions made by States Parties; (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.”

⁸⁹ Esther SAABEL, *Article 79*, *op. cit.*, p. 1702; in the same perspective, see William A. SCHABAS, *The International Criminal Court: A Commentary...*, *op. cit.*, pp. 910-911.

⁹⁰ Esther SAABEL, *ibid.*

⁹¹ Resolution ICC-ASP/1/Res.6 (§ 2-c), adopted by consensus at the 3rd plenary session of ASP, on 9 September 2002.

⁹² RPE of ICC, rule 98-2.

amount to the Fund is therefore simply an exception⁹³. As a matter of consequence, if the Court has the possibility of granting an amount to each victim individually, it will not order a deposit to the Fund. The solvency of the convicted person will be crucial, as it is the case for fines. This is a condition for the possibility of imposing reparations⁹⁴, although it is still possible to issue an order for reparations against an indigent convicted person⁹⁵.

4. Conclusion

As one has noticed, the success of restorative justice established by the Rome Statute finally depends on the full cooperation of the state authorities. In order to maximize chances of such assistance, the Statute provides the application of national law in the enforcement of fines and forfeiture measures. This not only permits to avoid issues related to “*coopétition*”⁹⁶ of national laws as well as international law and to ensure the respect of the principle of legality, but most often, this obliges States Parties to take appropriate legislative measures or adapt existing national enforcement procedures. It is only when this requirement is fulfilled that States Parties are able to enforce penalties and measures concerned. This enforcement and the transfer of property or proceeds obtained to the Court are therefore the guarantee of the reparation for victims.

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⁹³ Esther SAABEL, *Article 79, op. cit.*, p. 1703.

⁹⁴ *Ibid.*

⁹⁵ Édith-Farah ELASSAL, *Le régime de réparation de la Cour pénale internationale : analyse du mécanisme en faveur des victimes*, “*Revue Québécoise de Droit International*”, vol. 24, No. 1, 2011, pp. 259-308 (spec. pp. 305 and ff.).

⁹⁶ According to Damien SCALIA, the neologism “*coopétition*” can be defined as an opportunistic collaboration between various stakeholders (here between different legislations) which are, besides, in competition. The term “*coopétition*” is a coinage of two words: cooperation and competition (taken as concurrence). See Damien SCALIA, *L'exécution des peines en droit international pénal : une coopétition de droits*, “*Annales de Droit de Louvain*”, vol. 73, No. 2, 2013, pp. 301-320 (spec. p. 302).

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