ASSET PRESERVATION, STATE COOPERATION AND THE INTERNATIONAL CRIMINAL COURT

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Despite their centrality to the International Criminal Court's reparations and legal assistance schemes, the Court's powers to identify, trace, freeze and seize accused persons' assets have largely been neglected by academics, practitioners and the Court. Jean-Pierre Bemba Gombo's recent compensation application brought the consequences of this neglect sharply into focus. Seeking to address this lacuna in existing scholarship, this article views the Court's jurisprudence and practice through the prism of Prosecutor v Bemba, applies the lenses of both rationalist and constructivist theory to outline the Court's asset preservation regime and explores a range of reforms to strengthen and improve its effectiveness. Rationalist insights support the conventional view that recalcitrant and rejectionist states pose the greatest threat to the effectiveness of the Court's asset preservation efforts. Accordingly, this analysis supports those who argue that stronger enforcement measures, likely involving greater cooperation with the United Nations Security Council, are desirable. Constructivist analysis, however, directs attention to matters of identity and role-attribution, which this article argues can both explain and support a more nuanced, iterative understanding of state cooperation and the relationship between the Court and states parties which may assist in addressing the myriad technical and jurisprudential problems which have plagued the scheme.

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I INTRODUCTION

Unlike most defendants at the International Criminal Court ('ICC'), Jean-Pierre Bemba was 'a man of considerable means'.[1] For this reason, from Bemba's indictment and arrest in May 2008 onwards, the Court issued multiple requests targeting his assets with a view to enforcing a future reparations award against him.[2] Authorities in Belgium, Cape Verde, the Democratic Republic of Congo ('DRC') and Portugal froze and seized numerous assets associated with Bemba and his wife, allegedly including multiple bank accounts, a family home in Brussels, three villas and a boat in Portugal, several DRC properties, a private Boeing 727-100 aircraft, six further aircraft of undisclosed make, a river cruiser and several motor vehicles.[3]

In March 2016, Bemba was convicted of numerous counts of war crimes and crimes against humanity.[4] On 8 June 2018, the Appeals Chamber overturned this conviction.[5] From arrest to acquittal, Bemba's assets were frozen for over a decade. Notwithstanding numerous requests on Bemba's behalf[6] — it appears few steps were taken to preserve or maximise the value of Bemba's assets during this time. Instead, it appears that they were left 'to devalue, dissipate or simply rot'.[7] By way of example, Bemba alleges:

- the Boeing 727-100 was stored improperly at Faro Airport and did not undergo scheduled maintenance, losing its airworthiness and incurring repair and parking bills dwarfing its value;
- the remaining aircraft and vehicles were unlawfully seized and destroyed;
- various properties were sold below market value or declined in worth to such a degree that estimated repair costs exceeded their value; and
- bank accounts were not actively managed and thus were eroded by inflation and currency depreciation.[8]

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1 *Prosecutor v Bemba (Redacted Version of 'Decision on Legal Assistance for the Accused')* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 26 November 2009) [1] ('*Bemba Assistance Decision*').

2 Ibid [9]–[11].

3 *Prosecutor v Bemba (Second Public Redacted Version of 'Claim for Compensation and Damages')* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 19 March 2019) [126]–[130] ('*Bemba Compensation Claim*').

4 *Prosecutor v Bemba (Judgment on the Appeal against Trial Chamber III's 'Judgment Pursuant to Article 74 of the Statute')* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08 A, 8 June 2018) [12]–[13].

5 Ibid [197]–[198].

6 See, eg, *Prosecutor v Bemba (Decision on Request for Measures concerning the Availability of Funds)* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08 A, 4 September 2017) [5].

7 *Bemba Compensation Claim* (n 3) [6].

8 See, eg, ibid [126]–[132]; *Prosecutor v Bemba (Second Public Redacted Version of 'Claim for Compensation and Damages')* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 19 March 2019) annex F ('*Second Public Redacted Annex F*') 13–31; *Prosecutor v Bemba (Public Redacted Version of 'Reply to the Prosecution Response to and Registry Submissions on "Claims for Compensation and Damages"')* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 17 July 2019) annex A ('*Public Redacted Annex A*') 2 [1.1].

Consequently, Bemba sought compensation for economic loss from the Court — valued at €42,842,046.[9] This claim was recently rejected for jurisdictional reasons by the Court[10] and leave to appeal was subsequently refused.[11]

Despite Bemba's compensation claim seemingly coming to an end before the Court, the lessons learned from this saga are only just beginning to emerge. The lost opportunities and dramatic failures laid bare in *Bemba* demonstrate that the ICC's powers to identify, trace, freeze and seize assets of accused persons hold the potential to be amongst the most potent protective measures in the Court's arsenal. Provided they are well crafted and appropriately managed, such measures are also integral to ensuring reparations awarded to victims of crime are more than exercises in futility.

Public records reveal asset preservation requests have been issued in nine cases: *Prosecutor v Bemba* ('*Bemba*'),[12] *Prosecutor v Katanga* ('*Katanga*'),[13] *Prosecutor v Kenyatta* ('*Kenyatta*'),[14] *Kilolo*,[15] *Prosecutor v Lubanga* ('*Lubanga*'),[16] *Prosecutor v Ngudjolo* ('*Ngudjolo*'),[17] *Prosecutor v Ntaganda* ('*Ntaganda*'),[18] *Prosecutor v Yekatom* ('*Yekatom*')[19] and the *Prosecutor v [REDACTED]* ('*[REDACTED]*')

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9 *Bemba Compensation Claim* (n 3) [125]; *Public Redacted Annex A* (n 8) 2 [1.1].

10 *Prosecutor v Bemba (Decision on Claim for Compensation and Damages)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 18 May 2020) [56]–[57], [61] ('*Bemba Compensation Decision*').

11 *Prosecutor v Bemba* (*Decision on the Request for Leave to Appeal the 'Decision on Claim for Compensation and Damages')* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 1 October 2020) [17].

12 *Prosecutor v Bemba (Decisão e Pedido com Vista a Obter a Identificação, a Localização, o Congelamento e a Appreensão de Bens e Haveres, Apresentados à República Portuguesa)* [Decision and Request with a View to Obtaining the Identification, Location, Freezing and Seizure of Goods and Property, Presented to the Portuguese Republic] (International Criminal Court, Pre-Trial Chamber III, Case No ICC-01/05-01-08, 27 May 2008) [3] [tr author].

13 *Prosecutor v Katanga (Request to the Democratic Republic of the Congo for the Purpose of Obtaining the Identification, Tracing, Freezing and Seizure of the Property and Assets)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 6 July 2007).

14 *Prosecutor v Kenyatta (Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11, 5 April 2011) ('*Kenyatta Asset-Freezing Judgment*').

15 See, eg, *Prosecutor v Bemba (Decision on Mr Kilolo's 'Notice of Appeal against the Decision of the Single Judge ICC-01/05-01/13-743-Conf-Exp' Dated 10 November 2014 and on the Urgent Request for the Partial Lifting of the Seizure on Assets Dated 24 November 2014)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/13, 1 December 2014) ('*Kilolo*').

16 *Prosecutor v Lubanga (Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 31 March 2006).

17 *Prosecutor v Ngudjolo (Demande Adressée à la République Démocratique du Congo en Vue d'Obtenir l'Identification, la Localisation, le Gel et la Saisie des Biens et Avoirs)* [Request Addressed to the Democratic Republic of the Congo with a View to Obtaining the Identification, Location, Freezing and Seizure of Property and Assets] (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-02/07, 14 November 2007) [tr author].

18 *Prosecutor v Ntaganda (Decision on the Prosecution Application for a Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-02/06, 6 March 2007) [86]–[88] ('*Ntaganda Warrant Decision*').

19 *Prosecutor v Yekatom (Application for Reclassification of Ex Parte Filings)* (International Criminal Court, Trial Chamber V, Case No ICC-01/14-01/18, 22 May 2020) [21]–[25].

proceedings.[20] Furthermore, although no documents to this effect are publicly available, Prosecutor Luis Moreno-Ocampo advised the United Nations Security Council ('UNSC') in November 2011 of asset preservation requests targeting Saif Al-Islam Gaddafi and Abdullah Al-Senussi.[21] Additional asset freezes are also rumoured in the Sudan and DRC situations.[22]

It is both unfortunate and surprising then that little sustained academic attention has been afforded to these powers. Well known statutory commentaries aside, only two commentators across five articles appear to concentrate specifically upon this issue.[23] This apparent lacuna in existing scholarship becomes even starker when one recalls that financial investigations and asset recovery have engrossed transnational criminal lawyers and UNSC sanctions for decades.[24] This article aims to begin the process of filling that gap.

Part II of this article provides context for the ensuing analysis, outlining the structure and operation to date of the ICC's asset preservation regime. Its conclusions are mixed. Positively, the regime's legal foundations appear adequate and well-adapted to its preservative and reparative functions. Chambers have generally applied these provisions in a pragmatic, common-sense manner, giving fullest effect to the regime. Unfortunately, securing state cooperation remains a continuing challenge, exacerbated by the unwillingness of both the UNSC and Assembly of States Parties ('ASP') to address instances of non-cooperation. Furthermore, technical problems — including confidentiality breaches and the apparent absence of consideration given to asset management — have blighted the Court's practice. Consequently, the ICC's asset preservation regime has failed to realise its potential, allowing accused persons to dissipate their assets and shield

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20 *Prosecutor v [REDACTED] (Judgment on the Appeal of the Prosecutor against the Decision of [REDACTED])* (International Criminal Court, Appeals Chamber, Case No [REDACTED], 15 February 2016) [2] ('*[REDACTED] Appeal*').

21 Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, *Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)* (Statement, 2 November 2011) [13].

22 Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012) 305 n 21; Karel de Meester et al, 'Investigation, Coercive Measures, Arrest, and Surrender' in Göran Sluiter et al (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 171, 297 n 1006 suggests a document filed in *Bemba* revealed asset preservation requests in the Al Bashir, Harun and Abd-Al-Rahman proceedings. However, I have been unable to locate this document or otherwise verify these claims.

23 Carla Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' in Olympia Bekou and Daley J Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff, 2016) 227 ('*Freezing*'); Daley J Birkett, 'Pre-Trial "Protective Measures for the Purpose of Forfeiture" at the International Criminal Court: Safeguarding and Balancing Competing Rights and Interests' (2019) 32(3) *Leiden Journal of International Law* 585 ('*Safeguarding*'); Daley J Birkett, 'Coexistent but Uncoordinated: Asset Freezing Measures at the International Criminal Court and the UN Security Council' (2020) 20(6) *International Criminal Law Review* 983 ('*Uncoordinated*'); Daley J Birkett, 'Asset Freezing at the European and Inter-American Courts of Human Rights: Lessons for the International Criminal Court, the United Nations Security Council and States' (2020) 20(3) *Human Rights Law Review* 502 ('*Lessons*'); Daley J Birkett, 'Managing Frozen Assets at the International Criminal Court: The Fallout of the *Bemba* Acquittal' (2020) 18(3) *Journal of International Criminal Justice* 765 ('*Fallout*').

24 International Criminal Court, Assembly of States Parties, *Report of the Court on Cooperation*, Doc No ICC-ASP/17/16, 17th sess, 29 October 2018, 10 [48] ('*2018 Cooperation Report*').

them from the Court, undermining the Court's credibility and debasing victims' rights to meaningful reparations.

Many of these issues are not unique to this form of state cooperation. Nor are they confined to the ICC, with other international criminal tribunals ('ICTs') describing asset preservation as 'extremely complex and sensitive … disparate, incoherent, and unclear'.[25] Asset preservation thus provides a useful lens through which to consider broader questions regarding ICT structures and the enforceability of international criminal law. Part III explores these problems through a rationalist theoretical lens. Rationalism emphasises that the Court's cooperation regime is inherently vulnerable to subversion by sufficiently powerful non-compliant states. Credible and meaningful enforcement mechanisms are thus essential for ICTs to be effective. At the ICC, this necessitates structural change, deepening its seemingly neglected relationship with the UNSC.

Rationalism, however, fails to fully capture the Court's experience. Part IV complements this explanation by drawing upon social constructivism. Constructivism positions the Court's technical problems both as symptoms, and as causes, of a 'cultural clash' with states parties. Constructivism also explains recent signals towards the adoption of an iterative, 'tripartite' cooperation model as the product of ongoing processes of identity reconstruction amongst the Court's constituent organs and its norm entrepreneurship in international criminal law. As the ICC enters a period of flux, blending insights from both rationalism and constructivism provides a powerful theoretical framework through which anticipated reforms may be more holistically evaluated.

II THE ICC'S ASSET PRESERVATION REGIME

A *Legal Foundations*

Judicial orders providing for asset 'freezing', often also known as 'restraining', 'attachment', 'preservation' or 'blocking' orders, are familiar amongst domestic legal systems in both civil and criminal contexts.[26] Although no universally accepted definition of 'asset freezing' exists, the core of such measures is the judicial restriction of the use of assets in a manner that leaves pre-existing possession and ownership arrangements undisturbed.[27] This is achieved by ordering custodians of property to restrict or prevent the order's 'targets' — accused persons and, often, associated individuals/entities — from dealing with assets under the custodian's control. Specifically, once assets are 'frozen', they may not be dealt with without judicial consent. Alongside measures for the identification, tracing and seizure of assets, asset-freezing orders form a central plank of the ICC's 'asset preservation regime'.

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[25] *Prosecutor v Norman (Decision on Inter Partes Motion by Prosecution to Freeze the Account of the Accused at Union Trust Bank (SL) Limited or at Any Other Bank in Sierra Leone)* (Special Court for Sierra Leone, Trial Chamber, Case No SCSL-04-14-PT, 19 April 2004) [5]–[6] ('*Norman*').

[26] United Nations Office on Drugs and Crime, *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (Manual, September 2012) 2–3.

[27] Ibid 3.

Unlike domestic courts, the ICC lacks any independent enforcement apparatus. Consequentially, it cannot properly speak of asset preservation *orders*.[28] Instead, its asset preservation regime depends upon states' cooperation. Accordingly, it is predominantly governed by Part 9 of the *Rome Statute of the International Criminal Court* ('*Statute*') which outlines how the Court *requests* assistance from states parties. Within Part 9, art 87(1)(a) empowers the Court to 'make requests to States Parties for cooperation'. Developing this general authority, art 93(1)(k) relevantly provides:

> 1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
>
> ...
>
> (k) *The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.*

Although art 93(1)(k) represents the core of the Court's 'asset preservation regime', it does not exhaust the *Statute*'s asset-related powers. Article 93(1)(a) contemplates requests for assistance with 'identification and whereabouts of persons or the location of items'. Such requests may reveal, for example, the physical location of known assets. Similarly, art 93(1)(i) permits requests for 'provision of records and documents', including, for example, transaction histories and currency exchange records. Finally, art 93(1)(l)'s subsidiary, 'catch-all' provision enables the Court to request '[a]ny other type of assistance which is not prohibited by the law of the requested State'. Such broad investigative powers are essential given the complexity of tracing assets extraterritorially and in identifying and attributing 'straw persons', 'shell companies' and '*prête-nom[s]*' to defendants.[29]

B *Asset Preservation's Purposes*

Article 57(1)(e) provides the raison d'être for pre-trial asset preservation: 'for the purpose of forfeiture'. Post-conviction, art 75(4) authorises asset preservation 'to give effect to' reparations orders. Noting that funds collected through fines or

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[28] Bert Swart, 'General Problems' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) vol 2, 1589, 1594–5 ('*Commentary*').

[29] International Criminal Court, Assembly of States Parties, *Report of the Bureau on Cooperation*, Doc No ICC-ASP/11/28, 11th sess, 23 October 2012, annex II [A4], [A7] ('*2012 Cooperation Report*'); Human Rights Law Centre and University of Nottingham, *Cooperation and the International Criminal Court* (Workshop Report, 18–19 September 2014) [54] <https://www.nottingham.ac.uk/hrlc/documents/specialevents/cooperation-and-the-icc-final-report-2015.pdf>, archived at <https://perma.cc/T5TJ-85J3> ('HRLC'); International Criminal Court, *Financial Investigations and Recovery of Assets* (Report, November 2017) 15–16 <https://www.icc-cpi.int/iccdocs/other/Freezing_Assets_Eng_Web.pdf>, archived at <https://perma.cc/7UA9-MXP5> ('*Investigations*').

forfeiture may later be transferred to the Trust Fund for Victims ('TFV'),[30] the *Statute* thus positions such measures as interim preservative tools, preventing defendants from dissipating their assets before conviction. This increases the pool of assets ultimately available to victims, ensuring (theoretically) that reparations orders are 'effective'[31] and not 'just … numbers on paper'.[32]

Prompt asset preservation is also coercive. Asset preservation restricts 'freedom of movement' as it 'deprive[s] the designated persons of … resources'.[33] Consequently, asset preservation curtails a target's ability to continue to perpetrate crimes, to evade arrest and to 'reinvest' criminal proceeds to fund further illicit activities, protecting would-be victims of crime from suffering further offending.[34] At the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), Judge Hunt in *Prosecutor v Milošević* described such benefits as being of the 'utmost importance'.[35] Such measures also gift the Office of the Prosecutor ('OTP') a bargaining chip, enabling negotiation of voluntary surrender of accused persons in return for lifting/varying the freeze.[36] Given the ICC's notorious difficulties in enforcing arrest warrants, this coercive potential appears underexplored.

Lastly, by complementing fines, forfeiture and reparations, asset freezes ensure defendants do not retain the proceeds generated by their crimes. This disgorgement function is both exemplary and deterrent in nature. Put crudely, by ensuring defendants are stripped of ill-gotten gains, asset preservation communicates to would-be offenders that 'crime does not pay'. Future wrongdoing is also disincentivised, as the possibility of profit is removed. Such potential benefits are significant, as the *Statute* criminalises 'a series of crimes that have proven highly profitable for perpetrators' including enslavement, sexual enslavement, enforced

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30 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 79(2) ('*Statute*'); International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) rr 98(1)–(2) ('*RPE*'); International Criminal Court, *Regulations of the Trust Fund for Victims* Doc No ICC-ASP/4/Res.3 (adopted 3 December 2005) rr 21, 33.

31 *[REDACTED] Appeal* (n 20) [53].

32 *Prosecutor v Al Mahdi (Decision on the Updated Implementation Plan from the Trust Fund for Victims)* (International Criminal Court, Trial Chamber VIII, Case No ICC-01/12-01/15, 4 March 2019) [102].

33 *Ahmed v Her Majesty's Treasury (Justice Intervening) [Nos 1 and 2]* [2010] 2 AC 534, 611 [4] (Lord Hope JSC) ('*Ahmed*').

34 See, eg, de Meester et al (n 22) 295–6; Larissa van den Herik, 'The Individualization of Enforcement in International Law: Exploring the Interplay between United Nations Targeted Sanctions and International Criminal Proceedings' in Tiyanjana Maluwa, Max du Plessis and Dire Tladi (eds), *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Brill Nijhoff, 2017) 234, 247–8; International Criminal Court, *Report on Cooperation Challenges Faced by the Court with Respect to Financial Investigations* (Workshop Report, 26–27 October 2015) 1–2 <https://www.icc-cpi.int/iccdocs/other/161027-ICC-Rep-Eng.pdf>, archived at <https://perma.cc/ZQ9P-FSXN> ('*Challenges*'); Sonja Starr, 'Extraordinary Crimes at Ordinary Times: International Justice beyond Crisis Situations' (2007) 101(3) *Northwestern University Law Review* 1257, 1287–8; Manuel Galvis Martínez, 'Forfeiture of Assets at the International Criminal Court: The Short Arm of International Criminal Justice' (2014) 12(2) *Journal of International Criminal Justice* 193, 193–4.

35 *Prosecutor v Milošević (Decision on Review of Indictment and Application for Consequential Orders)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54, 24 May 1999) [26]–[29].

36 Birkett, *Safeguarding* (n 23) 592.

prostitution, appropriation of property, pillaging and hostage-taking.[37] Although quantifying the value of these crimes is nigh impossible, one may confidently presume the amounts are large. Indicatively, global illicit financial flows in 2017 were estimated at USD1.6–2.2 trillion, over USD157 billion of which derived from crimes potentially within the ICC's jurisdiction.[38]

C *Issuing Asset Preservation Requests*

It is against these purposes that the legal framework falls for analysis.

Each of the ICC's constituent organs — Chambers, the OTP, the Presidency and the Registry — are empowered to issue cooperation requests, including asset preservation requests, to states parties. Specifically, the Court's asset preservation regime is invoked by:

- the OTP, to facilitate investigations and prosecutions;
- the Pre-Trial Chamber ('PTC'), upon issuing arrest warrants or summonses;
- the Registry, for legal assistance purposes; and
- the Trial Chamber ('TC'), following conviction.

Defendants (and their representatives) cannot issue cooperation requests themselves but may request that Chambers issue such requests 'as may be necessary' to 'facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the … defence'.[39]

Each of these stages will be explored in turn.

1 *Investigation and Prosecution*

The OTP's power to issue cooperation requests rests upon two statutory bases. First, arts 87(1)(a) and 93(1)(k) of the *Statute* empower 'the Court' to issue cooperation requests. Given art 34 defines 'the Court' as 'composed of' its constituent organs, this general power vests in each organ of the ICC individually. Secondly, the OTP may '[s]eek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate'.[40] These provisions grant the OTP 'clear authority to make independent requests for cooperation'.[41]

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37 See generally Martínez (n 34) 195–204; 'ICC Statute Article 93, Rod Rastan', *Centre for International Law Research and Policy Film* (Rod Rastan, 3 July 2017) <www.cilrap.org/cilrap-film/93-rastan/>, archived at <https://perma.cc/4KPH-HKZ5>.

38 Channing May, *Transnational Crime and the Developing World* (Report, March 2017) xi. The latter figure is the total maximum estimated annual value attributed to human trafficking (USD150.2 billion), organ trafficking (USD1.7 billion) and trafficking in cultural property (USD1.6 billion). However, this is both *under*- and *over*-inclusive, as some profit-generating crimes within the ICC's jurisdiction are absent from this list, and certain profit-generating acts within those categories would fall outside the ICC's jurisdiction.

39 *Statute* (n 30) arts 57(3)(b), 61(11); *RPE* (n 30) r 116(1)(a).

40 *Statute* (n 30) art 54(3)(c); *RPE* (n 30) r 176(2).

41 *Prosecutor v Kenyatta (Decision on Prosecution's Application for a Finding of Non-Compliance Pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 31 March 2014) [24]–[33] ('*Kenyatta First Non-Compliance Judgment*').

Assets preservation requests are of particular value to the OTP as they can generate useful evidence about 'the existence of the crimes themselves; the linkage elements of the crimes; and/or the criminal responsibility and relevant modes of liability of individuals for crimes under the jurisdiction of the Court'.[42] For this reason, the *Regulations of the Office of the Prosecutor* expressly require 'particular attention' be paid throughout the OTP's investigations to the potential use of asset preservation measures.[43]

Experience suggests ICC indictees are frequently connected to criminal activity outside the ICC's jurisdiction;[44] Charles Taylor's role in the 'conflict diamond' trade provides a notable example. Such correlations often arise because 'the crimes under [the ICC's] jurisdiction are either predicate offences to these crimes or are committed in an environment that allows these crimes to happen'.[45] Consequently, OTP investigations may also uncover evidence relevant to domestic criminal prosecutions, which can later be shared with states through the broad 'reverse cooperation' provisions.[46]

Asset preservation requests thus represent powerful prosecutorial tools. However, their 'devastating'[47] consequences for targets and associated persons (commonly spouses, children and third parties with interests in the 'frozen' assets) cannot be overemphasised. Asset preservation is 'draconian', 'remorseless', 'intrusive'[48] and raises many human rights concerns. Such concerns heighten when asset freezes are imposed non-judicially or pre-trial, further engaging the presumption of innocence and freedom from arbitrary punishment.[49] States parties, the *Statute*'s drafters and ICTs in general[50] have demonstrated an acute awareness of such concerns, erecting many safeguards to seek to 'strike a fair balance between the interests of the … primary stakeholders implicated by the pre-trial protective measures process'.[51] Daley Birkett's recent articles clearly and comprehensively address such issues.[52] Accordingly, this article does not address such matters directly.

2 *Pre-Trial Protective Measures*

Once an investigation has been opened by the OTP, art 57(3)(e) of the *Statute* enables the PTC to issue asset preservation requests 'where a warrant of arrest or a summons has been issued … having due regard to the strength of the evidence and the rights of the parties concerned'. Predicating this power upon issuance of a warrant or summons imports significant procedural protections, as the OTP must

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42 *Investigations* (n 29) 5.

43 International Criminal Court, *Regulations of the Office of the Prosecutor*, Doc No ICC-BD/05-01-09 (entered into force 23 April 2009) reg 49 ('*OTP Regulations*').

44 *Challenges* (n 34) 1.

45 *2018 Cooperation Report* (n 24) [52].

46 *Statute* (n 30) art 93(10).

47 *Ahmed* (n 33) 631 [60] (Lord Hope JSC).

48 Ibid 611 [4], 623 [38], 631 [60] (Lord Hope JSC).

49 See generally Melissa van den Broek, Monique Hazelhorst and Wouter de Zanger, 'Asset Freezing: Smart Sanction or Criminal Charge' (2010) 27(72) *Utrecht Journal of International and European Law* 18.

50 See, eg, *Norman* (n 25) [5].

51 Birkett, *Safeguarding* (n 23) 588.

52 See, eg, ibid; Birkett, *Lessons* (n 23).

demonstrate 'reasonable grounds to believe that the person … committed' crimes within the ICC's jurisdiction before any indictment can issue.[53]

Notably, art 57(3)(e) appears to restrict the purposes for which the PTC may issue asset preservation requests to 'the purpose of forfeiture, in particular for the ultimate benefit of victims'. This drafting has generated confusion by eliding the notions of forfeiture and compensation.

Article 77(2)(b) of the *Statute* restricts forfeiture to 'proceeds, property and assets derived directly or indirectly from [the] crime'. Such a 'nexus' is common in domestic criminal asset preservation regimes and is consistent with the ad hoc tribunals' practice.[54] Reparations orders are not so restricted but rather are 'value-based', 'akin to a civil debt … there is no need for the convicted perpetrator to satisfy that judgment through ill-gotten gains'.[55] Enforcement action may thus be taken against assets wholly unconnected to the offending.[56]

Article 57(3)(e) blurs this distinction. By referencing 'the purpose of forfeiture, in particular for the ultimate benefit of victims', this drafting raises questions as to the legitimate purpose of pre-trial protective measures and their scope. The Appeals Chamber — in a case which remarkably remains under seal, known only as '*[REDACTED]*' — confirmed, by majority, '[t]here is no requirement that property and assets subject to a Chamber's request for cooperation under articles 57(3)(e) and 93(1)(k) … be derived from or otherwise linked to alleged crimes within the jurisdiction of the Court'.[57] This expansive approach was subsequently adopted by PTC I in both *Lubanga*[58] and *Ntaganda*[59] and by Judge Schmitt in *Kilolo*,[60] and was accepted without argument by Bemba's defence counsel.[61] Accordingly, the distinction between forfeiture and reparations appears — at least regarding asset preservation — to now be without difference at the ICC.

3 *Legal Assistance*

Throughout proceedings, the *Statute* ensures defendants and victims requesting compensation are entitled to access 'legal assistance' and enables the ICC to assign such assistance 'in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay'.[62] The Registry administers

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53 *Statute* (n 30) arts 58(1)(a), 58(7).

54 *[REDACTED] Appeal* (n 20) [29].

55 Ferstman, *Freezing* (n 20) 234.

56 *Statute* (n 30) art 109(1).

57 *[REDACTED] Appeal* (n 20) [1], [45]–[50].

58 *Prosecutor v Lubanga (Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 10 February 2006) [130]–[138] ('*Lubanga Warrant Decision*').

59 *Ntaganda Warrant Decision* (n 18) [85].

60 *Prosecutor v Bemba (Decision on the 'Requête de la Défense aux Fins de Levée du Gel des Avoirs de Monsieur Aimé Kilolo Musamba')* [Defence Request for the Lifting of the Freezing of the Assets] (International Criminal Court, Trial Chamber VII, Case No ICC-01/05-01/13, 17 November 2015) [17]–[18] ('*Kilolo Lifting Decision*') [tr author].

61 *Prosecutor v Bemba (Public with Confidential Ex Parte (Defence Only) Annexes 1 and 2)* (International Criminal Court, Trial Chamber VII, Case No ICC-01/05-01/13, 1 November 2016) annex 1 [71], [97].

62 *Statute* (n 30) arts 55(2)(c), 67(1)(d).

this scheme.[63] In determining whether to grant legal assistance, the Registrar must consider the applicant's 'means', including their 'direct income, bank accounts, real or personal property, pensions, stocks, bonds or other assets'.[64]

The Registry thus requires information about the financial position of potential beneficiaries of this scheme. Although unlikely to issue asset preservation requests for this purpose, the Registry has demonstrated its willingness to conduct financial investigations to ensure it accurately assesses the financial position of assistance applicants[65] and recovers funds paid to those not entitled to them.[66]

4 *Post-Conviction*

Finally, following conviction, the ICC may 'make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims'.[67] Article 75(4) of the *Statute* empowers the TC to 'determine whether … it is necessary' to issue cooperation requests 'to give effect to' any reparations orders made.

In addition to imprisonment, the Court can impose — by way of sentence — fines and/or 'forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties'.[68] As fines cannot 'exceed 75[%] of the value of the convicted person's identifiable assets',[69] financial investigations are necessary to ensure this limitation is respected.

Furthermore, as *Bemba* makes painfully clear, the Court's asset preservation regime remains relevant even in the event of an acquittal. Whilst it is obvious that funds frozen by the Court may not be put to the above purposes in such a case, the process of 'thawing' the accused's assets is mired in significant difficulty.[70] At the ICC, these difficulties are compounded, as relevant states are often conflict-ridden or undergoing post-conflict transition and thus frequently lack the necessary institutions, resources and infrastructure to facilitate such requests.[71]

D *Compliance, Breach and Enforcement*

Cooperation requests are transmitted by the Registry or the OTP to states 'through the diplomatic channel or any other appropriate channel as may be designated by each State Party'.[72] Further, '[w]hen appropriate [and] without

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63 *RPE* (n 30) rr 20–1; International Criminal Court, *Regulations of the Registry*, Doc No ICC-BD/03-03-13 (adopted 1 August 2018) r 113, 130–9 ('*Registry Regulations*'); International Criminal Court, *Regulations of the Court*, Doc No ICC-BD/01-05-16 (adopted 12 November 2018) rr 83–5 ('*Regulations*').

64 *Regulations* (n 63) r 84(2).

65 See, eg, *Kilolo Lifting Decision* (n 60) [20]–[24].

66 *Regulations* (n 63) r 85(4).

67 *Statute* (n 30) art 75(2).

68 Ibid art 77(2); *RPE* (n 30) r 147(4).

69 *RPE* (n 30) r 146(2).

70 *Fallout* (n 23) 767, 790.

71 Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15(3) *Leiden Journal of International Law* 667, 678–9 ('*Considerations*').

72 *Statute* (n 30) art 87(1)(a); *RPE* (n 30) r 176(2); *Investigations* (n 29) 5–6.

prejudice to' such communications, requests may also be transmitted 'through [INTERPOL] or any appropriate regional organization'.[73]

Cooperation requests are transmitted confidentially, with recipient states bound to maintain that confidence 'except to the extent … disclosure is necessary for execution'.[74] Concomitantly, the ICC must 'ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request'.[75] Although these obligations appear unexceptional, they are highlighted for two reasons.

First, confidentiality is essential to the effectiveness of asset preservation requests. As TC V(B) explains: '[t]he underlying rationale … is to ensure that steps are not taken to frustrate the implementation of the order prior to its execution'.[76] In this sense, 'existing technology' has enabled such steps to be taken rapidly.[77] Furthermore, the 'very rumor' of impending freezes 'may spark potential targets to hide their assets'.[78] For this reason, such measures are usually sought ex parte, without notice to targets.[79]

Secondly, these obligations mean Court documents relating to asset preservation are — by default — filed under seal.[80] These documents, including applications, submissions and judgments, are released only once reclassified by the Court. This generally occurs '[w]here the basis for the classification no longer exists'[81] — usually once an accused learns of a request, after its execution.[82] States have suggested these restrictions frustrate their efforts to understand the Court's evolving practice in this field.[83] Similarly, these provisions limit the material available for academic analysis.[84] It appears reasonable to assume further information relevant to the Court's asset preservation practice exists but is not publicly available.

Despite their name, cooperation 'requests' are not merely precatory but trigger states parties' obligation to 'cooperate fully with the Court in its investigation and prosecution of crimes'.[85] The *Statute* requires cooperation requests to be executed 'in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request'.[86]

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73 *Statute* (n 30) art 87(1)(b).

74 Ibid art 87(3).

75 Ibid art 93(8)(a).

76 *Prosecutor v Kenyatta (Order concerning the Public Disclosure of Confidential Information)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 21 October 2014) [14] ('*Kenyatta Confidentiality Judgment*').

77 *Lubanga Warrant Decision* (n 58) [137].

78 George A Lopez, 'Enforcing Human Rights through Economic Sanctions' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 772, 788.

79 See *RPE* (n 30) r 99.

80 Ibid r 43; *Statute* (n 30) art 64(7).

81 *Regulations* (n 63) r 23*bis* (3).

82 See, eg, *Prosecutor v Kenyatta (Decision on the Reclassification of Documents)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 11 December 2014) [12], [15].

83 *Challenges* (n 34) 5; HRLC (n 29) [85].

84 Ferstman, *Freezing* (n 23) 229.

85 *Statute* (n 30) art 86. See also *chapeau* to art 93(1), which provides that states parties '*shall* … comply with requests' issued under that provision (emphasis added).

86 Ibid art 99(1).

Accordingly, questions of recognition, implementation and enforcement are governed by domestic law, with states parties free to regulate such matters. The central limit upon this freedom is art 88, which requires that states parties 'ensure that there are procedures available under their national law for all of the forms of cooperation'. Although states parties are free to decide how to execute the Court's requests, mechanisms enabling them to do so must exist. This is consistent with the *locus regit actum* principle (the place governs the act) recognised in mutual legal assistance matters.[87]

Notably, art 88 means neither the absence of domestic legal implementation mechanisms nor the incompatibility of cooperation requests with domestic law provide a lawful reason for refusing cooperation.[88] Instead, states parties may deny cooperation requests only 'if the request concerns the production of any documents or disclosure of evidence which relates to its national security'.[89] Otherwise, where problems 'which may impede or prevent the execution of the request' arise, states parties must 'consult with the Court without delay in order to resolve the matter'.[90]

Where non-cooperation with these requests prevents the Court 'from exercising its functions and powers', the Court is empowered to 'make a finding to that effect and refer the matter to the [ASP] or, where the Security Council referred the matter to the Court, to the Security Council' for review and consideration.[91] The Appeals Chamber has confirmed that non-cooperation findings and ASP referrals are both discretionary, requiring the Court to be satisfied not just of the fact of non-cooperation but also that the finding and/or referral is appropriate in the circumstances.[92] This 'appropriateness' criterion means the Court 'will often need to take into account considerations … distinct from the factual assessment of whether the State has failed to comply with a request to cooperate'.[93] At this point, the 'legal finding of non-compliance' transforms into a 'political question'.[94]

The ASP has formalised its response to non-cooperation referrals in a set of 'procedures'.[95] In short, these contemplate the President of the Assembly drafting an open letter to the non-cooperative state, 'reminding [them] of the obligation to cooperate and requesting its views on the matter as part of a formal response procedure within a specified time'.[96] Following this, the ASP's Bureau on Non-

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87 Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) 302–10.

88 *Kenyatta First Non-Compliance Judgment* (n 41) [47].

89 *Statute* (n 30) art 93(4).

90 Ibid arts 96(3), 97.

91 Ibid arts 87(5)(b), 87(7); *Regulations* (n 63) r 109(4).

92 *Prosecutor v Kenyatta (Judgment on the Prosecutor's Appeal against Trial Chamber V(B)'s 'Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute')* (International Criminal Court, Appeals Chamber, Case No ICC-01/09-02/11 OA 5, 19 August 2015) [49]–[53] ('*Kenyatta Non-Compliance Appeal*').

93 Ibid [53].

94 Mark B Harmon and Fergal Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings' (2004) 2(2) *Journal of International Criminal Justice* 403, 418–19.

95 International Criminal Court, Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of State Parties*, Doc No ICC-ASP/17/Res.5, 17th sess, 13th plen mtg, 5–12 December 2018, annex II pt D ('*Assembly Procedures Relating to Non-Cooperation*'). See *Statute* (n 30) art 112(2)(f).

96 *Assembly Procedures Relating to Non-Cooperation* (n 95) [14].

Cooperation convenes a series of meetings, requiring the referred State to explain its conduct.[97] If non-cooperation continues for three further months, a public meeting is convened and the issue is referred to the ASP plenary for discussion.[98] These 'formal' responses are supplemented by informal communications facilitated by the good offices of the ASP's President and states selected as regional 'focal points for non-cooperation'.[99] Where non-compliance is referred to the UNSC, the Council's response is governed by the familiar provisions of Chapters VI–VII of the *Charter of the United Nations* ('*Charter*').

III RATIONALISM AND ASSET PRESERVATION

Against this background, this article now turns to critically assess how this regime operates in practice through the prism of two contrasting, but complementary, theoretical lenses: rationalism and constructivism. Underpinned by a series of self-interested actions by parties driven by a range of exogenous circumstances and pressures, *Bemba* is — on one view — a triumph of rationalism. Scrutinising the ICC's asset preservation regime through this lens exposes the fragility of the scheme and the ease with which it may be subverted by sufficiently powerful non-compliant states. Consequently, rationalist analysis suggests that credible enforcement mechanisms are critical for the Court's asset preservation regime to be effective.

Rationalist international law theories (also dubbed 'rational choice' theories or 'instrumentalism') generally assume states are rational actors.[100] Accordingly, their actions — including the creation, observance and enforcement of international law — are governed by a combination of 'exogenously given preferences and of cost–benefit calculations', factoring in self-interest, material capabilities and global power dynamics.[101] Rationalists generally suggest state cooperation is 'derivative from overall patterns of conflict' and/or primarily motivated by the pursuit of 'reduc[ed] transaction costs' and 'overcoming other collective action problems'.[102] Whilst international law may thus be 'efficient in regulating everyday relations between states' by 'enabl[ing] them to pursue their separate interests in ways that protect order without jeopardising sovereignty', its potential is 'always circumscribed by prevailing power realities'.[103] Although usually analogised to realist international relations theories, which position rationality as responsive to international society's mistrustful, anarchic and unequal nature,[104] rationalism also underpins many liberal theories, with Robert

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97 Ibid [14]–[15].

98 Ibid.

99 Ibid [13]–[23].

100 David Armstrong, Theo Farrell and Hélène Lambert, *International Law and International Relations* (Cambridge University Press, 2nd ed, 2012) 84.

101 Ibid 77–9, 84; Caroline Fehl, 'Explaining the International Criminal Court: A "Practice Test" for Rationalist and Constructivist Approaches' (2004) 10(3) *European Journal of International Relations* 357, 363.

102 Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984) 7, 65–70, 82–104; Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) *Duke Law Journal* 621, 634.

103 Armstrong, Farrell and Lambert (n 100) 16, 29, 87.

104 See generally ibid 76–88.

Keohane notably arguing that cooperation represents a rational method of pursuing states' 'common interests'.[105]

A *Institutional Vulnerability*

Central to most rationalist analyses is the suggestion that '[t]he ultimate authority of law derives from politics' and, therefore, from state consent.[106] Whilst acknowledging states generally comply with 'the great majority of rules of international law', in a 'minority of important and generally spectacular cases … power rather than … law determine[s] compliance and enforcement'.[107] Accordingly, states 'never truly *obey* international law, but only conform' when it is in their interest to do so.[108] On this view, international institutions are inherently vulnerable, being effective only 'when they serve and hence are supported by powerful states'.[109]

Antonio Cassese captured this vulnerability in international criminal law, depicting ICTs as 'giant[s] without arms and legs', needing 'artificial limbs to walk and work'.[110] This analogy vividly emphasises the Damoclean position in which the ICC finds itself. Absent the establishment of independent investigative and enforcement mechanisms capable of being deployed impartially against the interests of all states — a prospect as alien under the prevailing Westphalian paradigm of international law as it is unlikely in the foreseeable future — the Court remains 'practically fully dependent on the cooperation of States'.[111] In this situation, international criminal law's enforceability becomes contingent upon states' 'goodwill'.[112] Pleasingly, the Court enjoys relatively high compliance with its cooperation requests.[113] However, as William Schabas concludes, state cooperation is where the Court is 'most vulnerable', with many states having 'not been particularly cooperative in this area'.[114]

The proceedings against Kenya's President Uhuru Kenyatta demonstrated that sufficiently powerful rejectionist States can frustrate the Court's asset preservation regime. In *Kenyatta*, TC V(B) confronted three distinct but related breaches of the confidentiality obligations attached to cooperation requests, where the Kenyan authorities repeatedly referred in public documentation, media statements and in

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105 Keohane (n 102) 5–17. See also ibid 88–99.

106 EH Carr, *The Twenty Years' Crisis, 1919–1939* (Palgrave Macmillan, 2016) 166.

107 Hans J Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (McGraw Hill, 7th ed, 2006) 302.

108 Howard Hongju Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35(3) *Houston Law Review* 623, 634.

109 Armstrong, Farrell and Lambert (n 100) 99.

110 Antonio Cassese 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9(1) *European Journal of International Law* 2, 13.

111 *Investigations* (n 29) 15.

112 Cassese (n 110) 4.

113 International Criminal Court, Assembly of States Parties, *Report of the Court on Cooperation* 18th sess, Doc No ICC-ASP/18/16, 21 October 2019, [25], [36] ('*2019 Cooperation Report*').

114 William A Schabas, 'Article 86. General Obligation to Cooperate' in William A Schabas (ed), *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2nd ed, 2016) 1265, 1269.

open Court to both the existence of and Kenya's position in relation to an asset-freezing request which, at that time, remained under seal.[115]

TC V(B) 'formally caution[ed]' Kenya for its 'cumulative inattention to the taking of appropriate measures to ensure the confidentiality of the proceedings'.[116] It did not suggest, and I disclaim any suggestion, that Kenya's confidentiality obligations were deliberately breached. Nevertheless, these violations occurred against the backdrop of 'severe … non-compliance' by Kenya throughout the situation.[117] Kenya's non-cooperation ultimately led the OTP to withdraw all charges against the accused, with the Prosecutor declaring she did 'not believe that it [was] possible … to fully investigate and prosecute the crimes charged'.[118]

This stark consequence lays bare the vulnerability inherent in the Court's asset preservation measures and its state cooperation regime more broadly. The Court's relative powerlessness to protect its position exacerbates this vulnerability. By discovering these breaches ex post facto, the Court was disabled from meaningfully acting to prevent the frustration of its orders. The opposite resulted, with the Court compelled to unseal documents regarding the asset-freezing requests, as 'the basis for a classification no longer exist[ed]' once their contents were publicised.[119] *Kenyatta* thus brutally reinforces the fact that recalcitrant or rejectionist states can — recalling Cassese's analogy — hamstring the Court's operations.

B *Essentiality of External Enforcement*

This vulnerability increases pressure upon the *Statute*'s mechanisms to address non-cooperation. Unfortunately, the ASP and UNSC's ineffectual administration of this scheme vindicates rationalist insistence upon credible enforcement mechanisms. Such theories begin by suggesting compliance with international law is 'generally quite good', as ordinarily, 'it is in the interest of the affected states to comply'.[120] Violations ensue where 'the benefits of non-compliance are greater than the costs'.[121] Enforcement thus becomes necessary to '[interfere] with [the

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115 *Prosecutor v Kenyatta (Order for Submissions on the Implementation of the Request to Freeze Assets)* (Trial Chamber V(B), Case No ICC-01/09-02/11, 7 April 2014) [4].

116 *Kenyatta Confidentiality Judgment* (n 76) [12]–[13].

117 This includes a 'substantial unexplained delay' of approximately three years before Kenya communicated its concerns regarding the asset-freezing request, non-compliance with orders requiring the Registry be periodically updated as to the execution of the request and a refusal to produce financial, company, land transfer, tax and vehicle records requested by the Prosecutor. See Office of the Prosecutor, International Criminal Court, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges against Mr Uhuru Muigai Kenyatta' (Statement, 5 December 2014) <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2>, archived at <https://perma.cc/ADN9-QVK4> ('*Kenyatta Withdrawal Statement*'); *Prosecutor v Kenyatta (Decision on the Implementation of the Request to Freeze Assets)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 8 July 2014) [25]–[26].

118 *Kenyatta Withdrawal Statement* (n 117).

119 *Kenyatta Confidentiality Judgment* (n 76) [14].

120 Richard H Steinberg, 'Wanted — Dead or Alive: Realism in International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 146, 163.

121 Derek Beach, 'Why Governments Comply: An Integrative Compliance Model that Bridges the Gap between Instrumental and Normative Models of Compliance' (2005) 12(1) *Journal of European Public Policy* 113, 116–18.

State's] reason for action'.[122] Since rationalism assumes states are self-interested actors, this primarily occurs through measures which 'escalat[e] the benefits of conformity or the costs of nonconformity through material rewards and punishment'.[123] In doing so, 'states and institutions change the behavior of other states not by reorienting their preferences but by changing the[ir] cost–benefit calculations'.[124]

Enforcement is not a 'binary' concept. As Alexander Thompson explains,

> [a]s the requirements of compliance become more onerous, the threat of enforcement must become commensurately more serious … [Consistently,] 'deep' and 'complex' cooperation problems — requiring significant change in behavior and incentives to defect — are associated with more robust monitoring and enforcement mechanisms.[125]

Given the *Statute* requires broad assistance in areas traditionally guarded by states, it appears reasonable to view the ICC as requiring 'deep' cooperation of the sort Thompson describes. Compliance theory thus requires the ICC to possess powerful enforcement mechanisms if it is to compel cooperation from reluctant states. Accordingly, the 'starting point' ought to be 'a firm position and credible enforcement measures upon receipt of findings of non-compliance under Art 87(7)'.[126]

Lacklustre enforcement practice has disappointed this expectation. As the first (and, hitherto, only) determination of non-cooperation unrelated to arrest warrants, *Kenyatta* again represents the primary example.[127] Following Kenya's non-cooperation, the OTP sought a non-compliance finding from the Court.[128] Despite finding that Kenya, inter alia, 'did not act in accordance with' its directions, TC V(B) initially refused to refer this non-compliance to the ASP, citing deficiencies in the OTP's own response to Kenya's breaches and arguing referral was futile as the prosecutions had become unsustainable.[129] The Appeals Chamber quashed this decision, finding TC V(B) erred 'by assessing the sufficiency of evidence and the conduct of the Prosecutor in an inconsistent manner'.[130] Upon remittal, TC V(B)

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122 Jean d'Aspremont, 'The Collective Security System and the Enforcement of International Law: (Or a Catharsis for the Austinian Imperatival Complex of International Lawyers)' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2013).

123 Goodman and Jinks (n 102) 633; Emilie M Hafner-Burton, 'Trading Human Rights: How Preferential Trade Agreements Influence Government Repression' (2005) 59(3) *International Organization* 593, 596–600.

124 Goodman and Jinks (n 102) 634; Hafner-Burton (n 123) 599–600.

125 Alexander Thompson, 'Coercive Enforcement of International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 502, 507–8.

126 Göran Sluiter and Stanislas Talontsi, 'Credible and Authoritative Enforcement of State Cooperation with the International Criminal Court' in Olympia Bekou and Daley J Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff, 2016) 106, 108.

127 *Prosecutor v Kenyatta (Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 3 December 2014) [38].

128 Ibid [22].

129 Ibid [75]–[77], [82]–[90].

130 *Kenyatta Non-Compliance Appeal* (n 92) [90].

made a finding of non-compliance and referred this to the ASP for sanction.[131] Beyond noting the referral in its annual omnibus resolution, the ASP appears to have taken no formal action to sanction or remedy Kenya's non-compliance.[132]

Such apparent indifference is not unusual. The Court has made 17 non-compliance findings, referring most to the ASP/UNSC.[133] As a chorus of commentators observe, none of those referrals have resulted in meaningful action from either body;[134] both institutions have preferred to issue statements condemning non-cooperation and to adopt resolutions reaffirming the referred states' cooperation obligations. Resultantly, the ASP and UNSC have shown themselves to be 'soft touch[es]', failing to force cooperation in 'hard cases'.[135]

This apathy does more than just create 'gaps' in the Court's ability to secure cooperation in specific cases.[136] Enforcement action fulfils functions of general and specific deterrence. The failure to meaningfully address non-cooperation communicates to states that the costs of non-compliance are low, undermining the credibility of the threat of enforcement these institutions theoretically represent.[137] This damages the Court's ability to 'secure cooperation in the future'.[138] As Göran Sluiter and Stanislas Talontsi explain, '[e]ach new instance of judicially established non-cooperation without credible response increases and confirms the impression that there is no harm in refusing cooperation with the Court'.[139] Over time, this 'weakens the authority of cooperation obligations', reducing them to mere exhortations capable of being breached with impunity.[140]

One may readily acknowledge the ASP/UNSC's preferred diplomatic mechanisms produce adverse reputational consequences, which appear to influence states in ways not readily amenable to academic observation. However, rationalism suggests such 'official criticism' and other 'soft strategies' are 'nominal' and 'largely unimportant', 'except in so far as … integrated into some

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131 *Prosecutor v Kenyatta (Second Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 19 September 2016).

132 International Criminal Court, Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, Doc No ICC-ASP/15/Res.5, 15th sess, 11th plen mtg, 24 November 2016, [20].

133 Sluiter and Talontsi (n 126) 81–6; 'Non-Cooperation', *International Criminal Court* (Web Page, 11 March 2021) pt VI <https://asp.icc-cpi.int/en_menus/asp/non-cooperation/Pages/default.aspx>, archived at <https://perma.cc/WHV3-V6QP> ('Non-Cooperation').

134 See, eg, Rod Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities' (2008) 21(1) *Leiden Journal of International Law* 431, 443–4 ('*Testing*'); Annalisa Ciampi, 'Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court' in Olympia Bekou and Daley J Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff, 2016) 7, 45 ('*Realities*'); David Kaye and Kal Raustiala, 'The Council and the Court: Law and Politics in the Rise of the International Criminal Court' (2016) 94(4) *Texas Law Review* 713, 730–1.

135 Michael Ramsden and Tomas Hamilton, 'Uniting against Impunity: The UN General Assembly as a Catalyst for Action at the ICC' (2017) 66(4) *International and Comparative Law Quarterly* 893, 906–7.

136 Claus Kreß and Kimberly Prost, 'International Cooperation and Judicial Assistance' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Bloomsbury, 3rd ed, 2016) 2003, 2013.

137 Sluiter and Talontsi (n 126) 103–5, 108.

138 HRLC (n 29) [38].

139 Sluiter and Talontsi (n 126) 108.

140 Ibid 103.

coercive apparatus'.[141] The ICC's experience supports this analysis, with Sluiter and Talontsi suggesting that '[n]on-cooperative States do not appear impressed at all by the soft and diplomatic initiatives'.[142] Multiple states, including Chad and Sudan, have repeatedly experienced such 'sanctions', without any apparent change in behaviour.[143] In such cases, 'when the rule of law is openly defied and the Council [or the ASP] does nothing to prevent such defiance, the rule of law is undermined'.[144]

Accordingly, the 'best prospects' of securing cooperation necessitate enforcement mechanisms 'with teeth'.[145] Rod Rastan provides one such model, suggesting the Court's enforcement mechanisms will only be effective where non-compliance with cooperation obligations is linked to 'the threat of exclusion from other areas of international life',[146] such as 'trade benefits, foreign aid, and sanctions'.[147] Rastan's analysis typifies much rationalist literature which suggests such 'linkages', whereby 'sanctions from one issue area [are] applied to enforce norms from another', are particularly effective in changing behaviour.[148] This is because, for rationalists, 'traditional notions of power — military and economic — provide the principal machinery for changing state practices'.[149]

As Emilie Hafner-Burton argues, 'linked' sanctions tend to outperform other methods of enforcement, as they do 'not require changing actors' deeply held preferences'.[150] Put simply, '[e]ven governments that are perfectly happy to abuse their citizens can be "forced to be good" when the continuation of trade concessions depends on their respect for human rights'.[151] Linkage logic can also be inverted, justifying inducements 'such as increased aid, trade concessions, and cooperation in other issue areas' to procure cooperation.[152]

Two examples reveal linkages have proven effective in eliciting cooperation with ICTs. *First*, Serbia's 2008 arrest and surrender of Radovan Karadžić to the ICTY 'was motivated by the threat of European Union sanctions and the promise of significant financial incentives'.[153] *Secondly*, Malawi's shift from referral to the

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141 Goodman and Jinks (n 102) 691–2.

142 Sluiter and Talontsi (n 126) 108.

143 HRLC (n 29) [38]; 'Non-Cooperation' (n 133) pt VI(a).

144 *Letter Dated 1 October 2012 from the Permanent Representative of Guatemala to the United Nations Addressed to the Secretary-General*, UN Doc S/2012/731 (1 October 2012) [10] ('Guatemala Letter').

145 Goodman and Jinks (n 102) 690–1.

146 Rastan, *Testing* (n 134) 439–40.

147 Stephanos Bibas and William W Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism' (2010) 59(4) *Duke Law Journal* 637, 675.

148 See, eg, David W Leebron, 'Linkages' (2002) 96(1) *American Journal of International Law* 5, 13–14.

149 Goodman and Jinks (n 102) 690.

150 Hafner-Burton (n 123) 601.

151 Jana von Stein, 'The Engines of Compliance' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 477, 479.

152 Ibid.

153 Bibas and Burke-White (n 147) 675.

UNSC over its refusal to arrest Sudan's ex-President Al Bashir[154] to expressing willingness to enforce the then-outstanding warrant was allegedly procured by donor states signalling crucial financial aid would be withdrawn if Al Bashir were permitted to attend an African Union summit scheduled in Lilongwe in 2012.[155]

C *The UNSC's Role in Asset Preservation*

Given these insights from the 'linkage' literature, this article argues that greater cooperation between the UNSC and ICC in the enforcement of asset preservation measures is necessary, desirable and possible within each institution's existing mandate. The ICC–UNSC relationship has been variously described as a 'turf war',[156] '[c]oexistent but [u]ncoordinated',[157] 'marked by tensions between law, politics, and judicial diplomacy',[158] 'nascent',[159] 'variable and arguably even mercurial', characterised by the Council frequently expressing 'rhetorical support' for the Court to disguise its inclination towards 'ignoring or even damaging the ICC when that stance serves its particular interests'.[160]

This article proposes a further adjective for that list: neglected.

Beyond the UNSC's powers to refer situations to the Prosecutor,[161] defer investigations and prosecutions,[162] and control exercises of jurisdiction over the crime of aggression,[163] the Court's relationship with the Council is predominantly governed by the *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* ('*Agreement*'), concluded pursuant to art 2 of the *Statute*.[164] Although skeletal, this agreement envisions an arms-length relationship with the UN, privileging mutual respect for 'each other's status and mandate'.[165] Under the *Agreement*, the bodies agree to 'cooperate closely, whenever appropriate, with each other and consult … on matters of mutual interest'.[166] Information sharing is also emphasised, with both institutions pledging to 'the fullest extent possible and practicable, arrange for the exchange of information and documents'[167] and to 'make every effort to achieve maximum

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154 See *Prosecutor v Al Bashir (Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 13 December 2011).

155 HRLC (n 29) [38].

156 van den Herik (n 34) 262.

157 Birkett, *Uncoordinated* (n 23) 996, 1024–5.

158 Deborah Ruiz Verduzco, 'The Relationship between the ICC and the United Nations Security Council' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 30, 61.

159 David Kaye, 'The Council and the Court: Improving Security Council Support of the International Criminal Court' (Legal Studies Research Paper Series No 2013-127, School of Law, University of California, May 2013) 5.

160 Kaye and Raustiala (n 134) 720–1.

161 *Statute* (n 30) art 13(b).

162 Ibid art 16.

163 Ibid arts 15*bis* (6)-(8), 15*ter*.

164 International Criminal Court, Assembly of States Parties, *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, Doc No ICC-ASP/3/Res.1, 4 October 2004 ('*Relationship Agreement*').

165 Ibid art 2(3).

166 Ibid art 3.

167 Ibid arts 5(1), 15(1).

cooperation with a view to avoiding undesirable duplication in the collection, analysis, publication and dissemination of information relating to matters of mutual interest'.[168]

UNSC sanctions have evolved such that asset-related measures against individuals now regularly feature in the Council's actions under art 41 of the *Charter*.[169] Peculiarly, such measures appear disconnected from the ICC's asset preservation regime. Two examples demonstrate this proposition.

First, the persons targeted by the two institutions have diverged remarkably. The ICC's 'situation countries' and those states regarding which the UNSC has established sanctions regimes frequently overlap.[170] This is unsurprising, as both organisations claim jurisdiction over the 'most serious crimes of concern to the international community'.[171] Consequently, one would anticipate similar overlap between those persons subject to ICC asset freezes and UNSC sanctions. Some examples of such congruence exist, with Germain Katanga subjected to asset freezes by both institutions.[172]

However, as the Darfur situation most starkly evidences, more often the UNSC's and ICC's targets have differed. The UNSC's Sudan Sanctions Committee designated four persons as subject to sanctions (including asset freezing) pursuant to *UNSC Resolution 1591*.[173] The ICC has indicted seven persons in connection with this situation.[174] *None* of those indictees — including, notably, Al Bashir whose inclusion was recommended by the Panel of Experts but blocked by Council members — appear on the Sanctions Committee's Consolidated List.[175] Given the shared mandate of the institutions, the seniority

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168 Ibid art 5(2).

169 van den Herik (n 34) 235–42.

170 Ferstman, *Freezing* (n 23) 240–1. See also Birkett, *Uncoordinated* (n 23).

171 *Statute* (n 30) Preamble, art 5; *Charter of the United Nations*, Preamble, arts 1(1), 24(1) ('*UN Charter*').

172 SC Res 1596, 5163rd mtg, UN Doc S/RES/1596 (3 May 2005, adopted 18 April 2005); *Prosecutor v Katanga (Review of the 'Decision on the Conditions of the Pre-Trial Detention')* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 18 August 2008) 7.

173 SC Res 1591, 5153rd mtg, UN Doc S/RES/1591 (29 March 2005); 'Narrative Summaries of Reasons for Listing', *United Nations Security Council* (Web Page) <https://www.un.org/securitycouncil/sanctions/1591/materials/summaries>, archived at <https://perma.cc/M4HJ-UJF2>; 'Security Council Sanctions Committee concerning Sudan Removes One Entry from Its Sanctions List' (Press Release SC/14459, United Nations, 5 March 2021) <https://www.un.org/press/en/2021/sc14459.doc.htm>, archived at <https://perma.cc/BX48-QDFU>.

174 See generally 'Darfur, Sudan', *International Criminal Court* (Web Page, 18 June 2019) <https://www.icc-cpi.int/darfur>, archived at <https://perma.cc/KZC3-7SGM>; *Prosecutor v Banda (Corrigendum of the 'Decision on the Confirmation of Charges')* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 7 March 2011).

175 Sluiter and Talontsi (n 126) 104–5; Marina Mancini, 'UN Sanctions Targeting Individuals and ICC Proceedings: How to Achieve a Mutually Reinforcing Interaction' in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff, 2016) 228, 233–5. Cf McCarthy (n 22) 307–8.

and prominence of those indicted by the Court and the UNSC's unopposed referral of this situation to the Court, this 'asymmetry' is somewhat surprising.[176]

Secondly, even when targets align, the UNSC fails to contemplate the ICC's activities when designing its sanctions. This materialised most conspicuously regarding ex-Ivorian President, Koudou Laurent Gbagbo. *UNSC Resolution 1975* imposed both an asset freeze and a travel ban upon Gbagbo.[177] These measures impeded Côte d'Ivoire's ability to execute the arrest warrant against Gbagbo, with the latter prohibiting his transfer to The Hague.[178] Accordingly, the ICC directed the Registry and Prosecution to invite the Dutch and Ivorian Governments to seek an exemption to the travel ban from the UNSC's Sanctions Committee.[179]

As Marina Mancini records, this scenario is common, with 'only the most recent Security Council Resolutions' permitting transfers without approval.[180] Such exemptions are notably absent in both the Darfur and renewed Ivorian sanctions regimes.[181] Fewer resolutions still contemplate lifting travel bans to enable *departure from* The Hague after ICC proceedings conclude — either following acquittal or for transfer into the enforcement state's custody.[182] Although sanctions committees are unlikely to refuse exemption requests facilitating Court-related travel,[183] these issues suggest cooperation between the ICC and UNSC is limited.

For the Court, two features of the Council's status highlight the importance of deepening the ICC–UNSC relationship. First are the Council's unique Chapter VII powers which operate universally and pre-emptively to bind all UN members.[184] Provided it is properly seized of a threat to international peace and security,[185] the UNSC can compel states (including non-states parties to the *Statute* or *all* UN member states) to cooperate with the ICC.[186] It has previously done so, imposing cooperation obligations on non-states parties (for example, Sudan) and when referring these respective situations to the Court.[187] Such UNSC-imposed

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176 Bruno Stagno Ugarte, 'Enhancing Security Council Cooperation with the International Criminal Court' (Working Paper No 6.2, Australian Civil-Military Centre and Centre for International Governance and Justice, 17–18 September 2012) 2 <http://regnet.anu.edu.au/research/publications/2801/working-paper-no-62-enhancing-security-council-cooperation-international>, archived at <https://perma.cc/QC2J-Z5X6>.

177 SC Res 1975, 6508th mtg, UN Doc S/RES/1975 (30 March 2011) [12], annex I.

178 See generally *UN Charter* (n 171) arts 25, 103.

179 *Prosecutor v Gbagbo (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-02/11-01/11, 23 November 2011) 8.

180 Mancini (n 175) 236–8.

181 Ibid.

182 Ibid.

183 Ibid.

184 *UN Charter* (n 171) arts 25, 103.

185 Ibid art 39.

186 Rastan, *Testing* (n 134) 443–4.

187 SC Res 1593, 5158th mtg, UN Doc S/RES/1593 (31 March 2005) [2] ('*UNSC Res 1593*'); SC Res 1970, 6491st mtg, UN Doc S/RES/1970 (26 February 2011) [5] ('*UNSC Res 1970*'). See also *Prosecutor v Hussein (Decision on the Prosecutor's Request for a Finding of Non-Compliance against the Republic of the Sudan)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/12, 26 June 2015) [12]–[15]; Dapo Akande and Talita de Souza Dias, 'Cooperation with the ICC: What the Security Council and ASP Must Do' (Africa Report No 15, March 2019) 4 <https://issafrica.org/research/africa-report/cooperation-with-the-icc-what-the-security-council-and-asp-must-do>, archived at <https://perma.cc/C3MR-FJH3>.

cooperation obligations have the potential to strengthen the Court's asset preservation regime by extending the jurisdictional 'reach' of the ICC's measures beyond states parties.[188] Universality, in this sense, is frequently credited with contributing to the greater cooperation enjoyed by the ad hoc tribunals.[189] Furthermore, in the Sudan referral, the Council also imposed cooperation obligations on *non-state actors*: those armed militia groups deemed as 'other parties to the conflict'.[190] Given the Court can only request cooperation from states, such enhanced cooperation may be the sole means of accessing assets outside state authorities' de facto control.[191]

Moving beyond rationalist emphasis on coercion, the second feature of the Council's position pre-empts the constructivist analyses explored below. Perceived by states as the primary 'regulator of conflict and post-conflict situations',[192] the UNSC enjoys substantial legitimacy amongst states, the vast majority of whom generally understand and accept their obligations vis-à-vis the Council. These understandings have evolved over a history of interactions, stretching back to the UN's formation in 1945.[193] Through this process, the Council has become a 'valued institution', with 'all but a few states believ[ing] it serves a useful purpose for the maintenance of peace and security'.[194]

Accordingly, the Council's actions carry significant normative and persuasive force. As David Kaye argues, Council sanctions 'make a normative statement that such individuals … should lose the privileges they may otherwise enjoy as leaders or officials, state or non-state. They demonstrate to states that such behaviour entails consequences and penalty' which should in turn encourage them to cooperate.[195]

UNSC sanction 'entails loss of reputation, trust, and credibility' for errant states, both internationally and domestically.[196] In that sense, the UNSC enjoys an authoritativeness and legitimacy which the ICC presently lacks. The UNSC's actions generate 'intersubjective meanings that affect the normative climate' of international law in a way which — due to its comparative youth, limited institutional experience, narrower mandate and lack of significant success stories — the ICC's actions do not.[197] UNSC assistance in cooperation matters would therefore enable the Court to 'piggyback' upon the Council's greater normative power. Such assistance would function akin to 'training wheels', supporting states

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188 UN SCOR, 6849th mtg, UN Doc S/PV.6849 (17 October 2012) 5 ('*RoL Debate*').

189 Annalisa Ciampi, 'The Obligation to Cooperate' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) vol 2, 1607, 1610–15 ('*Obligation*'); Kaye and Raustiala (n 134) 736.

190 *UNSC Res 1593*, UN Doc S/RES/1593 (n 187) [2].

191 McCarthy (n 22) 322–3.

192 Kristen E Boon, 'UN Sanctions as Regulation' (2016) 15(3) *Chinese Journal of International Law* 543, 547.

193 Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14(3) *European Journal of International Law* 437, 455–61.

194 Ibid 477.

195 Kaye (n 159) 21.

196 Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887, 903.

197 Johnstone (n 193) 460–1.

and the Court until a culture of institutional authority, experience, reputation and familiarity develops.

One must, however, concede the likelihood of such Council support appears limited, 'aspirational' and 'unlikely'[198] — at least in the short term — with three permanent UNSC members (China, Russia and the United States) not party to the *Statute*.[199] Commentators suggest many Council members fear a 'strong' ICC as a 'possible rival and competitor', threatening the Council's status as international law's peak institution.[200] Such political concerns aside, it is clear that 'together … the Council and the Court can be a formidable force for accountability'.[201] Both institutions seemingly accept this, with each recognising the need for better integrated sanctions and enforcement.[202]

However, once closer cooperation is acknowledged as desirable, Kaye and Kal Raustiala suggest the following questions require immediate consideration:

> For the Court, the question is how to engage the Council in a way that does not fundamentally compromise its essential independence — or perhaps, how to do so in a way that *acceptably* compromises the Court's independence while enhancing its effectiveness. For the Council, the question is how to partner with the ICC to ensure that its primary responsibility — the maintenance of international peace and security — can be more effectively achieved.[203]

These questions fundamentally probe the appropriate 'separation of powers' in international criminal law. Concerns centre upon the compatibility of the Court's judicial functions with the UNSC which, as Judge Schwebel described in his dissenting opinion in *Military and Paramilitary Activities in and against Nicaragua,* is 'a political organ which acts for political reasons'.[204] Closer alignment is feared to compromise the Court's independence and integrity, reducing it to a 'tool of the Council, subject to the political dynamics of the moment'.[205]

Larissa van den Herik captures the essence of these concerns, arguing the institutions are 'incommensurable in terms of their constitution, ethos and guiding principles and can be situated respectively in a law enforcement versus a peace enforcement paradigm'.[206] Drawing upon Hans Kelsen's classical analysis, theorists in this vein suggest that ICC asset preservation measures are 'reactions

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198 Birkett, *Uncoordinated* (n 23) 986, 1024.

199 'The States Parties to the Rome Statute', *International Criminal Court* (Web Page) <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>, archived at <https://perma.cc/QJT3-X8JR>; Akande and de Souza Dias (n 187) 3.

200 Kaye and Raustiala (n 134) 733.

201 Ibid 720.

202 See, eg, International Criminal Court, Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, Doc No ICC-ASP/19/Res.6, 19th sess, 4th plen mtg, 16 December 2020, [20], [45] ('*2020 Omnibus Resolution*'); *Letter Dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the UN Addressed to the Secretary-General*, 69th sess, Agenda Item 115, UN Docs A/69/941–S/2015/432 (12 June 2015) annex ('*Compendium of the High-Level Review of United Nations Sanctions*') 49–50, 57–8.

203 Kaye and Raustiala (n 134) 731.

204 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 290.

205 Kaye and Raustiala (n 134) 727.

206 van den Herik (n 34) 236.

to past wrongs' and 'archetypical law enforcement mechanisms, establishing individual criminal responsibility'.[207] Conversely, UNSC sanctions are 'discretionary',[208] or 'administrative',[209] characterised as 'more present- and future-oriented [as they] try to constrain ongoing behaviour and they are supposed to be preventive rather than punitive in nature'.[210] In that sense, UNSC sanctions are 'peace-enforcement mechanisms, predominantly non-legal in nature … principally imposed to reinforce peace and not primarily to address violations of the law'.[211]

Respectfully, this article rejects this dichotomy. Fundamentally, Kelsen's distinction between the Council's 'peace-enforcement' and the ICC's 'law enforcement' mandates is not as sharp as it once was. The ICC embodies the international community's transition towards a culture of 'upholding the rule of law and accountability'.[212] Central to this transition is increasing recognition that certain criminal conduct can, and does, 'threaten the peace, security and well-being of the world'.[213] By 'securitising' criminality, the dichotomy between peace enforcement and law enforcement dissolves. Instead, as the ASP's omnibus resolution affirms, 'justice and peace' are 'indivisible',[214] and 'the peace, security and well-being of the world … are values protected by the *Rome Statute*'.[215]

It is well established that the UNSC's central function is the 'maintenance of international peace and security'.[216] Through the 'prevention of armed conflicts, the preservation of peace and the strengthening of international security', the Court directly advances this very mandate.[217] This is because international crimes and international criminal activity directly, and by their nature, threaten international peace and security and undermine the circumstances upon which those conditions rest.

Therefore, unlike domestic criminal courts, the ICC cannot be understood as a standalone institution with an independent 'law enforcement' mandate but rather 'part of a larger … legal and political architecture meant to limit and deter atrocity crimes'.[218] Jurisdictional differences aside,[219] the Court's work is 'entirely consistent' with the Council's peace-enforcement activities.[220] The UNSC has

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207 Ibid 235–7.

208 Harry Aitken, 'The Security Council and International Law Enforcement: A Kelsenian Perspective on Civilian Protection Peacekeeping Mandates' (2017) 22(3) *Journal of Conflict and Security Law* 395, 403–5, 407.

209 Birkett, *Lessons* (n 23) 503.

210 van den Herik (n 34) 237.

211 Ibid 235–6; Boon (n 192) 546–7.

212 Guatemala Letter, UN Doc S/2012/731 (n 144) [9].

213 *Relationship Agreement* (n 164) Preamble para 3.

214 See, eg, International Criminal Court, Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, Res ICC-ASP/18/Res.6, 18th sess, 9th plen mtg, 6 December 2019, Preamble ('*2019 Omnibus Resolution*').

215 *2020 Omnibus Resolution* (n 202) Preamble.

216 *UN Charter* (n 171) art 24(1).

217 *2020 Omnibus Resolution* (n 202) Preamble.

218 Courtney Hillebrecht, 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42(4) *International Interactions* 616, 622.

219 Cf Birkett, *Uncoordinated* (n 23) 1014, 1024.

220 Guatemala Letter, UN Doc S/2012/731 (n 144) [2].

acknowledged this alignment, deploying the ICC in pursuit of these ends.[221] Critically, the *Independent Expert Review of the International Criminal Court and the Rome Statute System* ('*Independent Expert Review*') captures this issue, referring to the difficulties caused by the ICC's 'dual nature' as both a 'judicial entity' and an 'international organisation'.[222]

Furthermore, the UNSC's own activities have evolved since Kelsen's examination. As van der Herik recognises, UNSC sanctions have experienced a 'certain incremental juridification, or perhaps formalization', over recent decades.[223] This 'collective security system' which the Council oversees has experienced a 'growing individualization, customization and overall sophistication',[224] typified by the proliferation of 'smart' or 'targeted' sanctions and the ad hoc tribunals. UNSC sanctions now resemble traditional 'law enforcement' activities, functioning as quasi-judicial, penal measures responding to prima facie breaches of international law.[225] Joseph Kony's listing epitomises this transformation, with the Central African Republic Sanctions Committee citing his alleged offending and ICC indictment in justifying his designation.[226]

In these circumstances, it is argued that greater cooperation between the UNSC and ICC in the enforcement of asset preservation measures is essential to address the inherent vulnerabilities and fragility of the Court acting alone. *Kenyatta* validates the insights of enforcement theorists who have long suggested that state behaviour is driven chiefly by self-interest and linkage theory emphasises that altering the inputs into that balancing exercise is the most effective way of altering state behaviour. Under current conditions, it is the UNSC who is best placed to undertake such enforcement activity and, for the reasons set out above, such activities are entirely consistent with its peace and security mandate.

IV CONSTRUCTIVISM AND ASSET PRESERVATION

By positioning material considerations as the primary determinants of state behaviour, rationalism leaves little room for 'softer' factors of norms, values and identity to operate. However, 'concerns about reciprocity and reputation, the operation of domestic courts … clarity and perceived legitimacy of the relevant rules … [and] the reputational cost of non-compliance' evidently impact state cooperation at the ICC.[227] Constructivism offers useful insights by explaining these 'inherently complex social and political processes'.[228]

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221 Verduzco (n 158) 31–2.

222 *Independent Expert Review of the International Criminal Court and the Rome Statute System* (Final Report, 30 September 2020) [26] <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf>, archived at <https://perma.cc/E647-PCRD> ('*Independent Expert Review*').

223 van den Herik (n 34) 235.

224 d'Aspremont (n 122) 21.

225 van den Herik (n 34) 235–42.

226 'Joseph Kony', *United Nations Security Council* (Web Page, 7 March 2016) <https://www.un.org/securitycouncil/sanctions/2127/materials/summaries/individual/joseph-kony>, archived at <https://perma.cc/29TP-LBYM>.

227 Annika Jones, 'Non-Cooperation and the Efficiency of the International Criminal Court' in Olympia Bekou and Daley J Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff, 2016) 185, 194.

228 Peter J Katzenstein and Nobuo Okawara, 'Japan, Asian-Pacific Security, and the Case for Analytical Eclecticism' (2001) 26(3) *International Security* 153, 154, 167, 184–5.

As Caroline Fehl observes, '[i]t is impossible to identify "the" constructivist theory of international institutions' as '[a]ny brief summary … must remain selective and open to the criticism that it misinterprets the "essence" of the constructivist challenge'.[229] So cautioned, one may nevertheless observe most constructivist theories share a Weberian foundation, perceiving international society as a collection of intersubjective understandings which 'endow material realities with meaning and purpose'.[230] These understandings are 'neither external … (ie, purely material) nor are they simply inside the heads of individuals (ie, purely subjective)',[231] but are held by the 'community'.[232]

Constructivists suggest 'neither agents … nor social structures are logically preexistent or determining' but rather each is forged through 'norms, rules, understandings, and relationships [actors] have with others'.[233] Through social interactions, states generate and internalise 'relatively stable, role-specific understandings and expectations about self … and one another and which constitute the structure of the social world'.[234] Broadly defined as 'standard[s] of appropriate behaviour', these norms represent 'collective expectations' of behaviour from actors 'with a given identity'.[235] Having internalised these norms, states feel compelled to act accordingly.[236]

Intersubjective understandings are thus 'constitutive' as 'they constitute, create, or revise the actors or interests which [rationalist] approaches take as given'.[237] As Derek Beach describes,

> [t]hrough processes of social interaction, normative prescriptions for complying with what is legitimately perceived as "the law" are created and internalized by actors. These prescriptions then constitute a normative logic of action that supplements the instrumental motivations of actors … over time, through actor participation and interaction with the legal system, compliance becomes an internalized social practice that makes normative prescriptions for acceptable behaviour, thereby also making behavioural claims upon actors that cannot simply be reduced to the instrumental interests of actors.[238]

Norms are thus *at least* 'as influential as material realities in determining [state] behavior'.[239] Applying a domestic analogy,

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229 Fehl (n 101) 365.

230 Martha Finnemore, *National Interests in International Society* (Cornell University Press, 1996) 128; Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 119, 122.

231 Brunnée and Toope (n 230) 122.

232 Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1, 7.

233 Brunnée and Toope (n 230) 123; Finnemore (n 230) 128.

234 Alexander Wendt, 'Anarchy Is What States Make of It: The Social Construction of Power Politics' (1992) 46(2) *International Organization* 391, 397–8.

235 Finnemore and Sikkink (n 196) 891; Risse and Sikkink (n 232) 7.

236 Finnemore and Sikkink (n 196) 904.

237 Finnemore (n 230) 129.

238 Beach (n 121) 123–4.

239 Finnemore (n 230) 128.

> [w]hile most people choose not to rob banks, we abstain from doing so not only because we rationally weigh the expected take-in versus the risk of going to jail, but also because we are socialized to believe that bank robbing is an 'immoral' and 'illegal' action.[240]

As social constructions, norms undergo a 'continuous and reciprocal' 'dialectic social process' whereby their content is 'created and re-created by agent action'.[241] In consequence, they are inherently and constantly evolving.

Institutions arise where norms are 'structured together and interrelate' to 'create new actors, interests, or categories of action'.[242] International law is one such institution: a collection of norms 'constituted and powered primarily by social practices',[243] which has 'taken a particular form and acquired a particular function in respect of the type of association to which it applies' (namely, interstate interactions).[244] Accordingly, international law's 'exact content, status and efficacy … will depend upon the precise conjuncture of various political, social and economic factors obtaining at that time'.[245] Assessments of its effectiveness must therefore consider 'the role that culture, ideas, institutions, discourse, and social norms play in shaping identity', as these matters are 'inseparable from the reasons and self-understandings that agents bring to their actions'.[246]

Few constructivists argue normative influences operate to exclude material considerations. Instead, most accept that '[a]ctors are still wilful agents, and can choose non-compliance even … where there is a strong normative pull towards compliance'.[247] Rather, the central assertion is that actors 'do not exist independently from their social environment'.[248] Consequentially, by suggesting 'compliance is often based upon *both* instrumental *and* normative motivations',[249] constructivists challenge rationalist suggestions that state behaviour is 'primarily motivated by states' concerns about *ex post* costs'.[250]

Given international law's complexity, one may suggest 'each theory gets a piece of the puzzle right, but none alone accurately captures the entire picture'.[251] Rather than seeking to 'demonstrate which theory is "correct" or inherently "better"',[252] this article employs a form of 'analytical eclecticism', 'drawing selectively' on both theories to uncover 'different layers and connections that parsimonious explanations conceal'.[253] In this vein, it is argued that constructivism adds 'causal depth' to rationalist accounts by positioning them 'within broader

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240 Beach (n 121) 122.
241 Ibid 123–4; Nicholas Onuf, 'Constructivism: A User's Manual' in Vendulka Kubálková, Nicholas Onuf and Paul Kowert (eds), *International Relations in a Constructed World* (ME Sharpe, 1998) 58, 59.
242 Finnemore and Sikkink (n 196) 891.
243 Brunnée and Toope (n 230) 129.
244 Armstrong, Farrell and Lambert (n 100) 21.
245 Ibid 23.
246 Brunnée and Toope (n 230) 121; Alexander E Wendt, 'The Agent-Structure Problem in International Relations Theory' (1987) 41(3) *International Organization* 335, 359.
247 Beach (n 121) 125.
248 Ibid.
249 Ibid 126.
250 von Stein (n 151) 485.
251 Koh (n 108) 635.
252 Fehl (n 101) 359.
253 Katzenstein and Okawara (n 228) 154, 167, 184–5.

social or historical contexts' and revealing 'the underlying structures that make certain choices rational in the first place'.[254]

Constructivism is therefore useful in analysing cases like the ICC's asset preservation regime, 'where effective sanction mechanisms are seldom in place, and the short-term political and economic "costs" of compliance are often very large'.[255] Constructivist analysis is capable of explaining the myriad technical problems which have undermined the implementation and administration of the Court's asset preservation regime in a manner far less spectacularly, but no less significantly, than the issues exposed in *Bemba*. Promisingly, in the second section of this part, it is suggested that seeds of a new, iterative, constructivist-influenced approach to cooperation are beginning to emerge in the Court's jurisprudence. Such seeds ought to be nurtured, as they promise a far more effective and nuanced cooperation regime.

A *Technical Problems*

Beyond the lack of asset management provisions exposed in *Bemba,* the ICC and its stakeholders have identified additional technical problems as plaguing the asset preservation regime. Perceived delays in seeking asset preservation requests and significant delays in their implementation lead to requests devolving into 'ping-pong match[es]',[256] 'being sent back and forth over several months in order to address formalities'.[257] These concerns are exacerbated by an apparent difficulty in designating clear contact points amongst states[258] which causes requests to be 'lost, or … severely delayed'[259] or encounter 'political bottleneck[s]'.[260] Furthermore, broader 'general' cooperation requests issued early in investigations are rejected by states as insufficiently specific,[261] despite domestic authorities retaining control of much of the information which would enable narrower requests to be issued.[262] Problems also emerge from a lack of experience, capacity and expertise amongst both ICC and states parties in

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254 Alexander Wendt, 'Driving with the Rearview Mirror: On the Rational Science of Institutional Design' (2001) 55(4) *International Organization* 1019, 1021.

255 Beach (n 121) 122.

256 Anne-Aurore Bertrand and Natacha Schauder, 'Practical Cooperation Challenges Faced by the Registry of the International Criminal Court' in Olympia Bekou and Daley J Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff, 2016) 152, 163.

257 *Challenges* (n 34) 4.

258 See, eg, *Investigations* (n 29) 13; International Criminal Court, Assembly of States Parties, *Report of the Bureau on Cooperation*, Doc No ICC-ASP/6/21, 6th sess, 19 October 2007, [3]–[4] ('*2007 Cooperation Report*').

259 Anniken Ramberg Krutnes, 'Reflections of the Facilitator for Cooperation in the Hague Working Group, 2012–2015' in Olympia Bekou and Daley J Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff, 2016) 248, 252.

260 Ciampi, *Obligation* (n 189) 1628–9; Bibas and Burke-White (n 147) 675–6.

261 *Investigations* (n 29) 15; Martínez (n 34) 207; Bertrand and Schauder (n 256) 163; REDRESS and Grotius Centre for International Legal Studies, 'Reparations before the International Criminal Court: Issues and Challenges' (Conference Report, 12 May 2011) 15–17 <https://redress.org/wp-content/uploads/2017/12/SUMMARYreport.pdf>, archived at <https://perma.cc/KVL9-X5KZ>.

262 See, eg, Bertrand and Schauder (n 256) 163; *Challenges* (n 34) 4.

implementing asset preservation measures,[263] and from an 'antagonistic approach' between organs of the Court, fostering a 'mentality of "us vs them" which naturally is not conducive to cooperation and coordination'.[264]

All of this leads to stakeholders describing the regime as 'complicated', 'cumbersome', 'not-fit-for-purpose', plagued by 'bottleneck[s]' and 'frustration', and 'considerably slower' than UNSC sanctions.[265]

In circumstances where efficiency, accuracy and universality are critical, these technical problems are anathematic to the success of the Court's asset preservation regime. However, rationalism either obscures these problems or treats them as evidence of lacklustre enforcement, insufficient resources or poorly defined spheres of responsibility. Whilst undoubtedly *relevant*, such factors are insufficiently nuanced to fully explain the Court's experience.

Constructivism contextualises these technical problems as reflecting a broader 'cultural clash'. Returning to constructivist theory, Martha Finnemore and Kathryn Sikkink influentially suggest a norm's 'life cycle'

> may be understood as a three-stage process … the first stage is 'norm emergence'; the second stage involves broad norm acceptance … and the third stage involves internalization … The characteristic mechanism of the first stage, norm emergence, is persuasion by norm entrepreneurs. Norm entrepreneurs attempt to convince a critical mass of states (norm leaders) to embrace new norms. The second stage is characterized more by a dynamic of imitation as the norm leaders attempt to socialize other states to become norm followers ... At the far end of the norm cascade, norm internalization occurs; norms acquire a taken-for-granted quality and are no longer a matter of broad public debate.[266]

From this perspective, norms emerge and are 'diffused' through processes of social interaction, including 'shaming', 'moral consciousness-raising', 'explanation and justification … dissuasion, approval' and 'elite learning'.[267] For legal norms, these interactions occur across fora including 'treaty regimes; domestic, regional, and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities; commissions of international publicists; and nongovernmental organizations'.[268] Through these institutions, states are socialised into norms. However, to influence behaviour, norms must be internalised by actors. As Harold Hongju Koh's transnational legal process theory explains, 'domesticat[ing] international norms' encompasses social, political and legal dimensions, respectively requiring 'widespread general adherence' to the

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263 Ruth A van der Pol, 'Article 75 of the Rome Statute: Reparations and Their Implementation in the Dutch Legal System' (2020) 67(2) *Netherlands International Law Review* 211, 221.

264 *Independent Expert Review* (n 222) [62].

265 Ibid [759]–[760]; HRLC (n 29) [62].

266 Finnemore and Sikkink (n 196) 895.

267 Risse and Sikkink (n 232) 5, 11; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995) 119; Jeffrey T Chekel, 'Norms, Institutions, and National Identity in Contemporary Europe' (1999) 43(1) *International Studies Quarterly* 83, 85–91; Antje Wiener, 'Contested Compliance: Interventions on the Normative Structure of World Politics' (2004) 10(2) *European Journal of International Relations* 189, 196.

268 Koh (n 108) 649–50.

norm, acceptance and promotion by 'elites' (eg, through government policy), and 'incorporat[ion]' into domestic law.[269]

Cultural 'match' facilitates norm diffusion and internalisation. States 'read international law through the prisms of national legal cultures'.[270] Unsurprisingly, norms thus diffuse and internalise 'more rapid[ly]' when an emergent international norm 'resonates with historically constructed domestic norms … as reflected in discourse, the legal system (constitutions, judicial codes, laws), and bureaucratic agencies (organizational ethos and administrative procedures)' of a state.[271] In those circumstances 'domestic actors are [more] likely to treat the international norm as a given, instinctively recognizing the obligations associated with [it]'.[272]

As Part II(D) above explained, states parties are required to establish domestic laws regulating cooperation with the ICC. '[L]ess than half' have done so.[273] Even where implementing legislation exists, such legislation often imperfectly reflects the *Statute*'s requirements.[274] Three areas of divergence frequently emerge. *First*, states' domestic laws commonly restrict freezing orders to only those assets connected to the crime, despite such a requirement having been rejected at the ICC.[275] *Secondly*, states often impose domestic procedural requirements — such as periodic expiry and renewal requirements — which depart from the *Statute* and inhibit enforcement of the Court's requests.[276] *Thirdly*, limited attention appears to have been given to the obstructing effects of municipal corporations, trusts, bankruptcy and banking laws (especially those protecting bank secrecy) on the Court's requests.[277]

Differences in domestic legal cultures impact norm internalisation and adoption, thus explaining many of these variations.[278] Many domestic legal systems restrict asset forfeiture and cooperation with foreign courts — especially in criminal contexts[279] — due to the significant human rights implications of such activities. Civil law systems, for example, frequently require domestic judicial determination that coercive measures against criminal defendants — including asset freezes — be proportional and of 'necessity'.[280] Such restrictions are often constitutional[281] and (in dualist systems, at least) therefore usually enjoy 'a higher

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269 Ibid 642–3.

270 Armstrong, Farrell and Lambert (n 100) 313.

271 Chekel (n 267) 87.

272 Andrew P Cortell and James W Davis Jr, 'Understanding the Domestic Impact of International Norms: A Research Agenda' (2000) 2(1) *International Studies Review* 65, 73–6.

273 *2019 Cooperation Report* (n 113) [14].

274 See *2007 Cooperation Report* (n 258) [19].

275 International Criminal Court, Assembly of States Parties, *Report of the Bureau on Cooperation*, Doc No ICC-ASP/18/17, 18th sess, 29 November 2019, [9] ('*2019 Bureau Report*'); *Challenges* (n 34) 5. Cf Martínez (n 34) 206–7.

276 Claus Kreß and Bruce Broomhall, 'Implementing Cooperation Duties under the *Rome Statute*: A Comparative Synthesis' in Claus Kreß et al (eds), *The Rome Statute and Domestic Legal Orders* (Nomos Verlagsgesellschaft, 2005) vol 2, 515, 526–7; HRLC (n 29) [53].

277 *Investigations* (n 29) 16; Ferstman, *Considerations* (n 71) 677–9.

278 Finnemore and Sikkink (n 196) 893; Wiener (n 267) 196.

279 See generally Ferstman, *Considerations* (n 71) 678–81.

280 *Challenges* (n 34) 3–5; Kreß and Broomhall (n 276) 526, 532.

281 Kreß and Broomhall (n 276) 532; Andreas Paulus, 'A Comparative Look at Domestic Enforcement of International Tribunal Judgments' (2009) 103 *Proceedings of the Annual Meeting (American Society of International Law)* 42, 45–6.

hierarchical rank' within domestic legal orders vis-à-vis international legal norms.[282]

Against this backdrop, the technical problems plaguing the Court appear symptomatic of a lack of 'cultural match' between the nascent cooperation norms and states' domestic legal orders. Domestic and supranational authorities have demonstrated a propensity to perceive their roles either as 'gate-keep[ers]', 'safeguard[ing]' domestic law against perceived 'encroachments' from the Court,[283] or as 'guardians' of values — especially human rights values — and 'protectors' of 'national constitutional identit[ies]' central to domestic constitutional orders.[284] Misalignments between domestic and international law thus reflect states' inability or reluctance to fully internalise the cooperation norms rooted in the *Statute*.

These themes are visible in the Court's dispute surrounding multiple Congolese nationals transferred to The Hague as defence witnesses, detained in Scheveningen Prison's UN Detention Unit and who sought asylum in the Netherlands after giving evidence.[285] One such witness applied to the European Court of Human Rights (ECtHR), asserting his continuing detention was unlawful as it infringed his rights to liberty, security and an effective remedy protected by the European *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*').[286] Critically, to engage the *ECHR*'s protections, the applicant had to establish his detention was 'within [the] Jurisdiction' of the Netherlands as a 'Contracting Part[y]'.[287] In *Djokaba Lambi Longa v Netherlands* ('*Djokaba*'), the ECtHR held the applicant was not detained by the Netherlands, but by the DRC, pursuant to its witness transfer arrangement with the ICC.[288]

In resolving *Djokaba*, the ECtHR addressed a submission that the Netherlands' *ECHR* obligations were engaged because 'the level of human rights protection offered by the [ICC]' was not 'equivalent to that for which the Convention provides'.[289] In doing so, it considered whether the ICC's practice sufficiently respected the *ECHR*'s 'peremptory character' and 'the practical and effective nature of its safeguards'.[290] Perhaps unsurprisingly, it held the ICC's 'powers … to order protective measures, or other special measures' sufficed to protect the

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282 Helle Krunke and Martin Scheinin, 'Introduction' in Martin Scheinin, Helle Krunke and Marina Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing, 2016) 1, 16.

283 Paulus (n 281) 45–6.

284 Helle Krunke, 'Courts as Protectors of the People: Constitutional Identity, Popular Legitimacy and Human Rights' in Martin Scheinin, Helle Krunke and Marina Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing, 2016) 71, 84.

285 *Djokaba Lambi Longa v Netherlands* [2012] IV Eur Court HR 449, 455–7 [1]–[14] ('*Djokaba*'). See generally Tom de Boer and Marjoleine Zieck, 'ICC Witnesses and Acquitted Suspects Seeking Asylum in the Netherlands: An Overview of the Jurisdictional Battles between the ICC and Its Host State' (2015) 27(4) *International Journal of Refugee Law* 573.

286 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) arts 5(1), 5(3)–(4), 13.

287 Ibid art 1.

288 *Djokaba* (n 285) 491–2 [72]–[75].

289 Ibid 490 [66]–[67].

290 Ibid 492–4 [76], citing *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* [2005] VI Eur Court HR 107, 157 [154].

'fundamental rights of witnesses'.[291] Although this conclusion has been questioned,[292] *Djokaba* demonstrates judicial 'guardianship' behaviour, with 'cultural clash' prompting the ECtHR to filter the ICC's cooperation norms through fundamental principles of European Union law.

Constructivism also positions these technical problems as part of a broader process of identity (re)construction occurring within and amongst the Court. In his compensation claim, Bemba alleged that the ICC was negligent and/or acting as 'trustee of [his] assets with all ancillary fiduciary responsibilities' (and breached those duties).[293] Accordingly, Bemba asserted 'the Court considered itself responsible for ensuring that assets frozen at its request did not diminish in value' and this 'was consistent with the understanding of the States'.[294]

For its part, the Registry disclaimed any trusteeship or management obligations. Instead, it characterised its role as merely 'the transmission of the requests for cooperation between the Chamber and the relevant states'.[295] Notably, the Registry employed an analogy to mutual legal assistance matters, suggesting 'the Court performs a role similar to the "requesting" state, and the states receiving the judicial requests are the "requested" states'.[296] On this view, Bemba's compensation claims were governed by, and ought to have been pursued under, the domestic laws of each freezing state.[297] Despite this, in submissions, the OTP rejected as inappropriate any analogies — such as those adopted by the Registry — which analogise 'the relationship between the Court and States Parties … with the relationship between two sovereign States in the cross-border freezing and seizure of assets'.[298]

Finding in *Prosecutor v Bemba (Decision on Claim for Compensation and Damages)* ('*Bemba Compensation Decision*') that 'responsibility for the proper execution of a cooperation request emanating from the Court rests primarily with the requested States and that the role of the Registry is limited to facilitating their communication with the Court', PTC II largely vindicated the Registry's position.[299] Notwithstanding an earlier decision of Judge Trendafilova on PTC III's behalf in *Bemba*, which 'strongly reaffirm[ed] the Chamber's duty and power

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291 *Djokaba* (n 285) 494 [79].

292 Emma Irving, 'The Relationship between the International Criminal Court and Its Host State: The Impact on Human Rights' (2014) 27(2) *Leiden Journal International Law* 479, 484–91; Marko Milanovic, 'Update on the Extraterritorial Application of Human Rights Treaties', *EJIL:Talk!* (Blog Post, 21 May 2013) <https://www.ejiltalk.org/update-on-the-extraterritorial-application-of-human-rights-treaties/>, archived at <https://perma.cc/FGB5-DWBB>.

293 *Bemba Compensation Claim* (n 3) [6], [150]; *Prosecutor v Bemba (Public Redacted Version of 'Decision on Preliminary Application for Reclassification of Filings, Disclosure, Accounts, and Partial Unfreezing of Assets and the Registry's Request for Guidance', 18 October 2018)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 20 November 2018) [4] ('*Bemba Guidance Decision*').

294 *Bemba Compensation Claim* (n 3) [140]–[142].

295 *Bemba Guidance Decision* (n 293) [6].

296 *Prosecutor v Bemba (Public Redacted Version of the 'Registry's Observations on the Defence Compensation Claim')* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 6 May 2019) [18].

297 Ibid [28], [34].

298 *Prosecutor v Bemba (Public Redacted Version of 'Prosecution's Response to Claim for Compensation and Damages', 6 May 2019)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 6 May 2019) [92].

299 *Bemba Compensation Decision* (n 10) [57].

to retain control over any assets and/or financial resources which might be available',[300] PTC II largely absolved all organs of the Court of any responsibility for the ongoing management and preservation of value of assets frozen at its request by simultaneously accepting that 'the Chamber vested with competence for the purposes of the relevant cooperation request … cannot but rely on the Registry's support', and that 'the Registry's role remains confined to acting as a channel of communication'.[301]

In those circumstances, PTC II found any claims for compensation arose 'in connection with or as a result of the conduct of operations of' states parties and thus 'outside the scope of article 85 of the Statute and hence outside of the Chamber's mandate'.[302] Rather, as responsibility for the implementation of the Court's asset preservation requests fell squarely on states parties, the appropriate 'remedy' — in so far as the *Statute* offered one — was to be pursued by way of states parties 'consult[ing]' with the Court 'pursuant to articles 96(3) and/or 97 of the Statute' to address such 'issues under domestic law' as they arose from time to time.[303] Such a remedy is of cold comfort to someone in Bemba's position.

The *Bemba Compensation Decision* has been criticised by commentators, who have suggested — with apparent force — that the Court's analysis is 'perfunctory and evasive' and its conclusions 'legally questionable'.[304] Questions remain about the scope of the Court's decision, with Birkett noting that the terms 'primarily' and 'proper' in the holding that 'responsibility for the *proper* execution of a cooperation report emanating from the Court rests *primarily* with the requested States' both require further elaboration.[305] Uncertainty also surrounds the future of Bemba's compensation claim, with his subsequent applications for leave to appeal from PTC II's decision and for designation of a further PTC to manage the 'unfreezing' of his assets both rejected by the Court.[306]

For present purposes, the *Bemba Compensation Decision* is noteworthy because of what the underlying incident, and the parties' responses thereto, reveal

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300 *Prosecutor v Bemba (Public Redacted Version of ICC-01/05-01/08-339-Conf Decision on the Defence's Urgent Application for Lifting the Seizure Dated 29 December 2008 and Request for Cooperation to the Competent Authorities of Portugal)* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-01/05-01/08, 31 December 2008) [11].

301 *Bemba Compensation Decision* (n 10) [57].

302 Ibid [58], [61].

303 Ibid [57].

304 Owiso Owiso, '"Oops, We Misplaced the Keys … Too Bad!": The International Criminal Court and the Fiasco of Mr Jean-Pierre Bemba's Compensation Claim', *EJIL:Talk!* (Blog Post, 3 June 2020) <https://www.ejiltalk.org/oops-we-misplaced-the-keystoo-bad-the-international-criminal-court-and-the-fiasco-of-mr-jean-pierre-bembas-compensation-claim/>, archived at <https://perma.cc/7L85-6L7D>. Cf Christopher 'Kip' Hale and Santiago Vargas Niño, 'Unexploded Legal Ordnance [Updated]', *Opinio Juris* (Blog Post, 10 April 2019) <http://opiniojuris.org/2019/04/10/unexploded-legal-ordnance/>, archived at <https://perma.cc/YQB9-L7WG>.

305 Birkett, *Fallout* (n 23) 767, 789–90, quoting *Bemba Compensation Decision* (n 10) [57] (emphasis added).

306 *Prosecutor v Bemba (Public Redacted Version of 'Decision on "Request for the Designation of a Pre-Trial Chamber Pursuant to Regulation 46(3) of the Regulations of the Court" Dated 30 October 2020 (ICC-01/05-01/08-3698-Conf-Exp)' (ICC-01/05-01/08-3701-Conf-Exp)* (International Criminal Court, Presidency, ICC-01/05-01/08, 9 December 2020); *Prosecutor v Bemba (Decision on the Request for Leave to Appeal the 'Decision on Claim for Compensation and Damages')* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 1 October 2020).

about the Court's practice and identities. This appears to be the prevailing view amongst commentators who have lamented the decision as a 'cautionary tale',[307] a 'disservice … [and] rather worrying'[308] and as exposing 'lacunae … in the legal framework applicable to the management of frozen assets'.[309] Specifically, the submissions and decision in Bemba's compensation dispute reveal that judges, Chambers, the Registry and the OTP each held competing perceptions of the Court's role in fostering cooperation. The decision thus presents a neat 'constructivist moment' for the Court,[310] offering a forum through which these institutions can engage in formal socialisation processes — dialogue, persuasion and argumentation — seeking to have their preferred norm legitimated via favourable judgment, subsequent reform and implementation thereof.

With judgment now delivered and Bemba's options seemingly exhausted before the Court, optimists may hope that the normative force attached to ICC judgments will implicitly '"bind" the other [organs] to obey the new interpretation as part of [their] internal value set[s]'.[311] This would facilitate identity reconstruction, with the organs now having an 'internal obligation' to act consistently with the clarified norm.[312] Such obedience would be a valuable opportunity to strengthen the Court's 'law-declaring' authority, demonstrating it is capable of 'receiving a challenge to [an actor's] international conduct, then defining, elaborating, and testing the definition of particular norms and opining about their violation'.[313]

This need to establish clear role identities is not merely of theoretical interest. The Court frequently laments states parties' limited 'awareness' of their mandate regarding 'financial investigations and asset recovery'.[314] The lack of clarity as to responsibility within the Court exposed by *Bemba* undermines states parties' ability to comprehend and internalise nascent cooperation norms.[315] It also undermines the Court's ability to engage in norm diffusion. In this regard, as the Court itself recognised, the absence of oversight or management mechanisms pre-*Bemba* left 'no time for strategic planning and engagement with key stakeholders' through which such norms could be communicated.[316] It has frankly acknowledged that '[t]his had a direct negative impact on the effectiveness of judicial proceedings and on the Court's operations', leaving the Registry 'able at best to perform routine tasks in "damage control" mode'.[317]

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307 Hale and Niño (n 304).
308 Owiso (n 304).
309 Birkett, *Fallout* (n 34) 788.
310 Fehl (n 101) 366.
311 Koh (n 108) 644.
312 Ibid.
313 Ibid 649–50.
314 See, eg, *Investigations* (n 29) 13; *2019 Cooperation Report* (n 113) [10].
315 Kreß and Broomhall (n 276) 532.
316 International Criminal Court, *Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court* (Report, August 2016) 137 [432] <https://www.icc-cpi.int/itemsDocuments/ICC-Registry-CR.pdf>, archived at <https://perma.cc/RQR5-QBZ7>.
317 Ibid 14, 139–40 [444].

Since 2007, the Court has sought to remedy these issues through a variety of measures, including reforms to its internal processes,[318] increased cooperation with other international institutions,[319] and encouraging states to centralise and identify more suitable recipients for cooperation requests.[320] The Court sought to develop its own investigative capacity by, for example, obtaining pro bono assistance and secondments from specialised financial investigators and asset managers and, recently, appointing its first specialised Senior Investigator with sole responsibility for managing such requests.[321] The Court has also developed resources to build the cooperation capacity of states parties, including a 'digital platform to reinforce exchange of relevant information'.[322]

The ASP has continuously reaffirmed the Court's mandate to pursue such measures, recognising the asset preservation regime's importance in its annual 'omnibus' resolution.[323]

More substantially, in 2017, the ASP adopted the *Declaration of Paris* ('*Declaration*'): a 'non-legally binding declaration … on [cooperation in the area of] financial investigation and asset recovery'.[324] In that *Declaration*, states parties emphasised the need to review and strengthen domestic cooperation 'laws, procedures and policies' surrounding asset preservation and to '[r]aise awareness' about the Court's asset preservation mandate amongst domestic authorities.[325] For its part, the *Declaration* invites the Court to '[c]reate and strengthen' its partnerships with national authorities and international organisations, and '[c]onduct efficient and effective financial investigations at all stages of investigation and trial'.[326]

Despite its hortatory nature, the *Declaration*, and the ASP's continual references to it,[327] reinforce the strength of the emergent cooperation norms surrounding asset preservation. Promisingly, states parties' pledges to '[c]ontinue to place emphasis on cooperation regarding financial investigations and asset recovery'[328] and directions to the Bureau on Cooperation to 'continue discussions on cooperation on financial investigations and the freezing and seizing of assets

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318 International Criminal Court, Assembly of States Parties, *Report of the Registry on Financial Investigations Conducted by the Registry and the Seizure and Freezing of Assets*, 17th sess, Doc No ICC-ASP/17/26, 29 October 2018, 1 [2]; *OTP Regulations* (n 43) reg 54; de Meester et al (n 22) 295–7; *Independent Expert Review* (n 222) [763]–[765].

319 See, eg, *2012 Cooperation Report* (n 29) [8], annex II [5]; *2019 Cooperation Report* (n 113) [53], [77].

320 Kreß and Broomhall (n 276) 526–7.

321 See, eg, *Independent Expert Review* (n 222) [245]–[246], [765].

322 See, eg, International Criminal Court, Assembly of States Parties, *Resolution on Cooperation*, Doc No ICC-ASP/19/Res.2, 19th sess, 4th plen mtg, 16 December 2020, [15] ('*2020 Cooperation Resolution*'); *2020 Omnibus Resolution* (n 202) [22].

323 See, eg, *2020 Omnibus Resolution* (n 202) [20].

324 International Criminal Court, Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, Doc No ICC-ASP/16/Res.6, 16th sess, 13th plen mtg, 14 December 2017 [24], citing International Criminal Court, Assembly of States Parties, *Resolution on Cooperation*, Doc No ICC-ASP/16/Res.2, 16th sess, 12th plen mtg, 14 December 2017, annex ('*Declaration of Paris*').

325 *Declaration of Paris* (n 324) 28 [1], 29 [12].

326 Ibid 29 [11]–[13].

327 See, eg, *2020 Cooperation Resolution* (n 322) [14].

328 *Declaration of Paris* (n 324) 29 [10].

as set out in the *Declaration*'[329] suggest these commitments are genuine and improvements are likely. In a period of remarkable change for the Court, with the election of a new Prosecutor, ASP President, six new judges in 2020[330] and consideration of the *Independent Expert Review*,[331] the environment for these reforms may be hospitable.

Although detailed examination of potential reforms exceeds this article's scope, three key recommendations warrant specific attention. *First*, automatically applying UNSC sanctions, including asset freezes, against accused persons upon issuance of ICC indictments.[332] This may be achievable either on an ad hoc basis or, preferably, by establishing a general 'ICC Sanctions Committee'.[333] The Court itself has tentatively advanced this suggestion before both the ASP and the UN General Assembly,[334] with Austria and Slovakia expressing 'in-principle' support.[335] Many others (including Argentina, Brazil and Slovenia) support closer integration between the ICC and UNSC sanctions committees.[336]

Secondly, inserting 'ICC forfeiture clauses' in UNSC sanctions resolutions, requiring frozen assets to be transferred to the Court if sanctioned persons are later convicted.[337] Although UNSC asset freezes have historically been temporary and not led, of themselves, to divestment,[338] neither feature is without precedent. *UNSC Resolution 1970*, establishing Libya's 2011 sanctions regime, provided frozen assets 'shall at a later stage be made available to and for the benefit of the people of the Libyan Arab Jamahiriya'.[339]

Thirdly, routinely diffusing asset preservation requests through INTERPOL.[340] This would allow requests to be issued faster and more broadly (including to non-parties to the *Statute*) and decrease the Court's administrative burden, requiring only one general notice rather than individual diplomatic communications. Promisingly, INTERPOL recently piloted a new notice ('Silver Notices') 'devoted

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329 *2020 Omnibus Resolution* (n 202) [165], annex I [3].

330 Mark Kersten, 'What Is the Use of the ICC?', *Justice in Conflict* (Blog Post, 13 January 2020) <https://justiceinconflict.org/2020/01/13/what-is-the-use-of-the-icc/>, archived at <https://perma.cc/FVL9-G4KU>.

331 *Independent Expert Review* (n 222) [43].

332 See, eg, HRLC (n 29) [57]; van den Herik (n 34) 254–7; Ramsden and Hamilton (n 135) 906–7; Kaye (n 159) 20–1.

333 Akande and de Souza Dias (n 187) 6–8.

334 International Criminal Court, Assembly of States Parties, *Report of the Court on the Status of Ongoing Cooperation between the International Criminal Court and the United Nations, Including in the Field*, Doc No ICC-ASP/12/42, 12th sess, 14 October 2013, [49]–[50]; *Report of the International Criminal Court*, UN GAOR, 70th sess, Provisional Agenda Item 79, UN Doc A/70/350 (28 August 2015) [96].

335 *RoL Debate*, UN Doc S/PV.6849 (n 188) 23, 28.

336 *Report of the International Criminal Court*, UN GAOR, 72nd sess, 36th plen mtg, Agenda Item 76, UN Doc A/72/PV.36 (30 October 2017) 14–16, 23–4; *Report of the International Criminal Court*, UN GAOR, 72nd sess, 37th plen mtg, Agenda Item 76, UN Doc A/72/PV.37 (30 October 2017) 2–3.

337 See, eg, Ferstman, *Freezing* (n 23) 240–2; HRLC (n 29) [57].

338 van den Herik (n 34) 260.

339 *UNSC Res 1970*, UN Doc S/RES/1970 (n 187) [17]–[18].

340 *Statute* (n 30) arts 15(2), 54(3)(c)–(d), 87(1)(b), 87(6); *Co-operation Agreement between the Office of the Prosecutor of the International Criminal Court and the International Criminal Police Organization–INTERPOL*, signed 22 December 2004, arts 2(3)–(4), 4 <https://www.interpol.int/en/content/download/11060/file/4-%20ICC.pdf?inLanguage=eng-GB>, archived at <https://perma.cc/VS8G-DQQ8>.

to the tracing and recovery of criminal assets'[341] and regularly assists in enforcing UNSC sanctions, issuing over 700 'Special Notices' to this end since 2005.[342]

B *Reconstructing Cooperation*

Often facilitated by 'norm entrepreneurs' and systemic 'shocks' — of which *Bemba* will likely represent one — constructivism depicts legal change as a 'social process involving state learning and internalisation of new norms'.[343] As Koh describes, 'repeated participation' in this process 'transform[s]' and 'reconstitut[es]' actors' identities, thus altering their behaviour.[344] Similarly, international legal norms evolve, are diffused and then internalised by states in a *Tetris*-like process of accretion and dissolution.

This continuous view of legal change reflects the reciprocal model of cooperation enshrined in the *Statute*, hints of which are visible in the *Bemba Compensation Decision*. Inherent in the notion of cooperation, the *Statute* necessarily draws states parties and the ICC into a 'relationship of trust'.[345] Reciprocity — with duties flowing both *to* and *from* the Court — lies at the core of this relationship. Rather than understanding the ICC's cooperation regime as merely a mechanism formalising communication between actors, this article's examples reveal a gradually increasing recognition of the regime's social nature.

TC III's comments in the *Bemba Guidance Decision* are prescient, suggesting that

> ongoing communications and coordination between the Registry and States in relation to requests for freezing or seizure are necessary throughout the entire proceedings, due to the exceptional continuous nature of these requests, as opposed to other cooperation requests, which are usually executed and closed before the conclusion of a case.[346]

Consequently, the Court cannot 'ask States to engage in significant legal processes on its behalf, and then put its hands over its eyes and ears as to how its requests are carried out'.[347] Instead, cooperation requests commence an ongoing, iterative process of collaboration, discussion and oversight, with obligations borne both by the Court and requested states. Some such obligations, including states parties' consultation duties, are promulgated in the *Statute*. However, the *Bemba Compensation Decision* reveals the Court's reciprocal responsibilities are not yet fully established or understood. Although undoubtedly difficult to square with a reciprocal analysis, PTC II's reasons do betray some understanding of the

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341 INTERPOL, General Assembly, *Resolution No 1*, Doc No AG-2015-RES-01, 84th sess (2–5 November 2015) <https://www.interpol.int/content/download/5917/file/AG-2015–84-RES-01%20-%20Pilot%20project%20concerning%20Silver%20Notice.pdf?inLanguage=eng-GB>, archived at <https://perma.cc/RWR2-Y3K2>.

342 'INTERPOL–United Nations Security Council Special Notices', *INTERPOL* (Web Page) <https://www.interpol.int/en/How-we-work/Notices/INTERPOL-United-Nations-Security-Council-Special-Notices>, archived at <https://perma.cc/777K-9PGM>.

343 Armstrong, Farrell and Lambert (n 100) 104, 116, 309.

344 Koh (n 108) 628–9, 635–42 (emphasis omitted).

345 *Bemba Guidance Decision* (n 293) [16].

346 Ibid [14].

347 *Prosecutor v Bemba (Public Redacted Version of 'Reply to the Prosecution Response to and Registry Submissions on "Claim for Compensation and Damages"')* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 17 July 2019) [29].

importance of these matters, with reference made by the Court to the importance of the 'constant dialogue between the Chamber and … States for the purposes of ensuring the proper implementation' of cooperation requests.[348]

By exposing 'loopholes in the protection of individual rights as a result of the international division of labor in the conduct of the criminal proceedings',[349] *Bemba* also challenges perceptions of cooperation as only concerning states. As Claus Kreß and Kimberley Prost (as her Honour then was) observe, *Bemba* appears to necessitate reconceptualisation of the cooperation relationship as 'triangular', extending to 'the individual … and, most importantly, their human rights'.[350] Such repositioning does not necessarily entail empowering the ICC to issue cooperation requests directly to individuals or private entities.[351] Rather, it highlights that the Court and states parties must *share* responsibility to maintain and protect the rights of individuals affected by cooperation activities.

Broad interpretation of art 21(3) of the *Statute* — requiring the ICC to apply and interpret *all* law consistently 'with internationally recognized human rights' — may provide the necessary textual foundation for such a development.[352] Despite placing little weight on rights-based submissions and the interpretative obligation imposed by art 21(3) of the *Statute* in the *Bemba Compensation Decision*, PTC II was closely attuned to the broader human rights implications of its decision, observing that 'the case for legislative reform could indeed be made and a review of article 85(3) aiming at aligning the Statute to the most progressive systems in this area might be warranted'.[353] Absent such reform, responsibility for management and maintenance of the value of frozen assets risks falling into a 'black hole'.

Such a conclusion would not just have adverse consequences for acquitted defendants but would also deny recourse to victims' representatives in a situation where mismanagement of assets renders a reparations award practically inutile.[354] As Owiso Owiso observes, this is likely to increase in importance '[a]s the Court seeks to expand its practical reach beyond (mainly indigent) non-state actors, to potentially financially capable state actors, such as in Sudan and possibly in Afghanistan, Palestine and Ukraine'.[355]

As *Djokaba* demonstrated, similar questions have arisen in the Court's treatment of detained witnesses, acquitted suspects and asylum applications made by those persons. In *Katanga*, the ICC expressly disclaimed any role in maintaining human rights law, distinguishing

348 *Bemba Compensation Decision* (n 10) [56].
349 Kreß and Prost (n 136) 2011.
350 Ibid.
351 McCarthy (n 22) 317, 322.
352 de Boer and Zieck (n 285) 589, 603–4.
353 *Bemba Compensation Decision* (n 10) [68].
354 Birkett, *Fallout* (n 23) 788.
355 Owiso (n 304).

> measures which the Court may take pursuant to article 68 of the Statute in order to protect witnesses on account of their cooperation with the Court, and those which it is requested to take in order to protect them against potential or proven human rights violations in the broad sense of the term.[356]

Significant progress will thus be required before triangular cooperation can be entrenched, with commentators sharply criticising the Netherlands and ICC's 'buck-passing' in these cases.[357]

Nevertheless, some promise is visible. The Appeals Chamber in *Ngudjolo* confirmed the Court 'should not frustrate The Netherlands' ability to give effect to the [d]etained [w]itnesses' human right to an effective remedy in respect of their asylum claims'.[358] As Tom de Boer and Marjoleine Zieck summarise, this decision means 'the ICC and [the Netherlands] should not merely proceed from their own responsibilities but assume shared responsibility with a view to closing the substantive divide … in which asylum applicants and their protection may be lost'.[359] In doing so, *Ngudjolo* implicitly confirms the *Statute*'*s* cooperation obligations both can, and ought to, be moulded to accommodate states' human rights obligations.[360]

These subtle indications of a reorientation in approach are significant, as the 'relative indeterminacy and "malleability" of international criminal rules' enable the ICC to act as an effective norm entrepreneur.[361] As Finnemore and Sikkink explain,

> [n]orms do not appear out of thin air; they are actively built by agents having strong notions about appropriate or desirable behaviour in their community … Norm entrepreneurs are critical for norm emergence because they call attention to issues or even 'create' issues by using language that names, interprets, and dramatizes them.[362]

Norm entrepreneurs identify issues, propose solutions, and persuade and pressure states to 'redefine their interests … to support the respective norm'.[363] Through their law-creating and legitimating functions, ICTs — including the Court — have long filled this role in international criminal law.[364]

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356 *Prosecutor v Katanga (Decisions on an Amicus Curiae Application and on the 'Requête Tendant á Obtenir Présentations des Témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux Autorités Néerlandaises aux Fins d'Asile' (Articles 68 and 93(7) of the Statute)* [Request to Obtain Presentations of Witnesses DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 to the Dutch Asylum Authorities] (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 9 June 2011) [59] [tr author].

357 Emma Irving, 'Protecting Witnesses at the International Criminal Court from Refoulement' (2014) 12(5) *Journal of International Criminal Justice* 1141, 1142; de Boer and Zieck (n 295) 589, 602–3.

358 *Prosecutor v Ngudjolo (Order on the Implementation of the Cooperation Agreement between the Court and the Demographic Republic of the Congo Concluded Pursuant Article 93(7) of the Statute)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-02/12 A, 20 January 2014) [24], [28].

359 de Boer and Zieck (n 285) 589, 605–6.

360 Ibid.

361 Antonio Cassese et al, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed, 2013) 8.

362 Finnemore and Sikkink (n 196) 896–7.

363 Fehl (n 101) 366.

364 See, eg, Finnemore and Sikkink (n 196) 903.

The ICC's norm-entrepreneurship occurs

> within a structure premised upon Westphalian notions of sovereign equality that are resistant to this vision. This dialectical dynamic, itself a result of compromises struck during the Rome Conference, has embedded power relations within the ICC's function.[365]

In that regard, the biggest impediment to the effective functioning of the Court's asset preservation regime, and its cooperation regime more broadly, is and remains securing state support.

As noted above, international crime is remarkably lucrative. States enjoy significant incentives to facilitate or tolerate the transfer of 'hot money' and assets to their territories.[366] Notably, 'a number of major money-laundering centres are party to the *Rome Statute*'.[367] Naturally, these states, and others whose material interests will be threatened by strong asset preservation measures, are likely to resist reform.

The *Independent Expert Report* reinforces this argument, encapsulating the 'identity crisis' confronting the Court:

> [T]he ICC is both a judicial entity … and an international organisation … As a judicial entity, the Court must benefit from judicial independence. As an international organisation, States Parties reasonably expect to be able to guide and shape the institution. Contradictions can arise between the two attributes of the ICC, and in practice such differences have led to tension between the ICC and the ASP. Whereas the dual nature of the ICC cannot be changed, employing this distinction can improve the clarity of reporting lines and improve cooperation.[368]

As set out above, the structural reforms and broader norms contemplated herein employ this distinction in a manner which is likely to fundamentally challenge the 'separation of powers' under international law. This raises international law's perennial dilemma: reconciling the desire and need to establish effective, robust and powerful international institutions with states' natural tendency to jealously protect their sovereignty. Cassese memorably captures this tension, suggesting non-cooperation at the ICTY

> proves once again the validity of a remark made by a renowned German lawyer, Niemeyer … that international law is an edifice built on a volcano — state sovereignty. By this he meant that whenever state sovereignty explodes onto the international scene, it may demolish the very bricks and mortar from which the Law of Nations is built. It is for this reason that international law aims to build devices to withstand the seismic activity of states: to prevent or diminish their pernicious effect … The tribunal must always contend with the violent eruptions of state sovereignty: the effect of states' lack of cooperation is like lava burning away the foundations of the institution.[369]

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365 Peerce McManus, 'Enemy of Mankind or Just No Powerful Friends Left? Insights from International Relations about the Efficacy of the ICC' (2016) 17(2) *International Criminal Law Review* 302, 303.

366 Tom J Farer, 'Restraining the Barbarians: Can International Criminal Law Help?' (2000) 22(1) *Human Rights Quarterly* 90, 112.

367 Starr (n 34) 1288–9.

368 *Independent Expert Review* (n 222) [26].

369 Cassese (n 110) 11–12 (emphasis omitted) (citations omitted).

Given these tensions appear intractable, questioning the entire enterprise is justifiable. In circumstances where the Court's asset preservation regime encounters significant technical difficulties, jeopardises fundamental rights and threatens the Court's credibility, it would undoubtedly be easier to allow the regime to lie fallow.

This temptation ought to be resolutely rejected. As emphasised above, asset preservation is not an end in itself. Instead, it facilitates the ICC's innovative victim's reparations scheme. Letting the Court's asset preservation powers fall into desuetude would betray the rights, interests and expectations of those victims central to the *Statute*'s vision. PTC I acknowledged this in *Lubanga*, observing 'the success of the Court is, to some extent, linked to the success of its reparation system'.[370]

Such a task is of critical importance to the Court's restorative justice mandate. This is because, as TC VIII explained in *Prosecutor v Al Mahdi*, reparations are

> designed — to the extent achievable — to relieve the suffering caused by the serious crime committed, address the consequences of the wrongful act committed … [to] enable victims to recover their dignity and deter future violations. Reparations may also assist in promoting reconciliation between the victims of the crime, the affected communities and the convicted person.[371]

Although genuine cases of indigence are unavoidable,[372] asset preservation thus ensures the defendant's assets — rather than those donated or bequeathed by others — are used for victim compensation. Where this link is maintained, reparations orders merely represent an inversion of the defendant's 'individual criminal responsibility for the crimes which caused the harm'.[373] For restorative justice, this connection is integral as it ensures that both victims and defendants are restored — as best as possible — to the relative economic positions which they occupied prior to the offending.[374] Asset preservation measures are thus 'indispensable'[375] to the reparations regime's success.

As the ICC President, Judge Chile Eboe-Osuji, recently reminded the ASP, the Court is and remains 'a human institution; for which continual improvement will always be necessary and must be encouraged'.[376] The President's comments recall constructivism's emphasis that international law's institutions are all created by, and contributors to, social practice.[377] Consequently, they are inevitably and

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370 *Lubanga Warrant Decision* (n 58) [136].

371 *Prosecutor v Al Mahdi (Reparations Order)* (International Criminal Court, Trial Chamber VIII, Case No ICC-01/12-01/15, 17 August 2017) [28].

372 However, impecuniosity does not prohibit reparations being ordered or justify their reduction: ibid [113]–[114]; *Prosecutor v Lubanga (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)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 A A 2 A 3, 3 March 2015) [102]–[117] ('*Lubanga Reparations Appeal*').

373 *Lubanga Reparations Appeal* (n 372) [99].

374 See, eg, Ferstman, *Freezing* (n 23) 228–9; Ferstman, *Considerations* (n 71) 668–9.

375 *2020 Omnibus Resolution* (n 202) [110].

376 Chile Eboe-Osuji, 'Remarks at the Opening of the 18th Session of the Assembly of States Parties to the *Rome Statute*' (Speech, International Criminal Court, 2 December 2019) 5 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC%20President%20statement-ASP18.pdf>, archived at <https://perma.cc/9BN3-K5JA>.

377 McManus (n 365) 311.

inherently subject to change. Accordingly, stakeholders ought to deepen their commitment to cooperation and reform, as each interaction assists in developing more effective cooperation norms. Perversely, as Sudan's recent history demonstrates, cooperation's vacillating and oft-unpredictable nature can encourage this process, as the Court's most strident opponents today may be staunch supporters tomorrow.[378]

The preceding pages traverse fundamental questions of institutional design, highlighting those factors which have affected the Court's asset preservation practice. Its conclusions ought to bring some comfort to the Court, as — predominantly — the problems facing the asset preservation regime seem to result neither from the Court's own actions, nor deficiencies in its legal foundations. As the *Independent Expert Review* observes, these matters are only part of the problem.[379] Here, this article parts company with Annalisa Ciampi, who suggests that

> [p]ointing to the lack of *political* will on the part of the States most directly concerned or the scarce political support by the other States … and international organisations alike, also unveils only part of the problem … At the core of the Court's stumbling in the pursuance of its objective to put an end to impunity are some of the policy choices of its organs.[380]

Whether Ciampi's position ever held true in the particular context of asset preservation, the Court's 'policy choices' have evidenced both cognisance of the need for improvement and a willingness to address identified problems. For a Court that is novel, innovative, intensely scrutinised and whose legitimacy is trenchantly challenged, this achievement is significant. Nevertheless, a healthy dose of realism is necessary to manage expectations about the speed, scale or ease of reform.[381] As Conor McCarthy reminds us,

> reparations programmes may be provided in regions still suffering from instability, collapsed governmental institutions and perhaps even violence … for political reasons the assistance that a State Party is prepared to extend to the Court may be limited or entirely non-existent. Ambitions for what the assistance of States Parties can be used to achieve must be tempered by a sense of political and practical feasibility … it is important for the Court to be realistic when requesting cooperation …[382]

In that light, states parties need not necessarily 'rewrite' the *Statute* but must commit to strengthen its existing mechanisms. As Anna Ušacka observes, this necessitates 'multi-layered and inclusive discussion between national judges, international judges and academics working on constitutionalism and international law and practice, as well as international human rights'.[383] It is here that the

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378 Akande and de Souza Dias (n 187) 4; 'Omar al-Bashir: Sudan Agrees Ex-President Must Face ICC', *BBC News* (online, 11 February 2020) <https://www.bbc.co.uk/news/world-africa-51462613>, archived at <https://perma.cc/Q5CF-7CEE>.

379 *Independent Expert Review* (n 222) [769].

380 Ciampi, *Realities* (n 134) 46 (emphasis in original).

381 See, eg, Birkett, *Uncoordinated* (n 23) 1024–5.

382 McCarthy (n 22) 309.

383 Anita Ušacka, 'Constitutionalism and Human Rights at the International Criminal Court' in Martin Scheinin, Helle Krunke and Marina Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing, 2016) 281, 281–2.

insights from the burgeoning literature and jurisprudence on reparations will be of particular value. Although the importance of such efforts cannot be overemphasised, they can also never truly be finished, as 'the justice that animates political community is not one that may be fully attained'.[384]

V CONCLUSION

Bemba's recent compensation application exposed the soft underbelly in the ICC's asset preservation regime and brought the issue squarely to the attention of the Court and the international criminal law community for the first time. As stakeholders begin to distil lessons from this salutary experience, this article seeks to contribute to that conversation.

It may fairly be said that the Court's asset preservation regime represents a powerful legal mechanism, deeply rooted in the *Statute* and central to the delivery of meaningful justice to victims of mass atrocities. The scheme is largely cohesive, conferring an appropriate range of relevant powers in a manner that appears well adapted towards achieving the preservative, coercive, protective, deterrent and disgorgement purposes it pursues. Thus, this article endorses Birkett's conclusion that the Court's jurisprudence on the subject, although limited, has generally been 'praiseworthy'.[385]

However, as *Bemba* spectacularly demonstrated, the regime has failed to reach its potential effectiveness. States have proven reluctant and unable to provide the cooperation required. The ASP and UNSC's general ambivalence towards non-cooperation has exacerbated these difficulties, denuding the scheme of any credible enforcement threat. For this reason, this article seeks to contribute to the institutional learning process following *Bemba* by applying two theoretical lenses to the Court's asset preservation regime, in an effort to extract deeper insights into the issue.

Rationalist theories accurately emphasise the fundamental problem at the heart of the regime: the ICC's inherent vulnerability to non-cooperative actors. For as long as ICTs depend upon state cooperation, questions of state sovereignty, self-interest and realpolitik will pose existential threats to these institutions. Credible and meaningful enforcement mechanisms are therefore necessary for ICTs to be successful. Against that background, this article joins those who encourage deeper ICC–UNSC relations in the monitoring and enforcement of ICC cooperation requests.

Rationalism, however, fails to capture cooperation's ideational, relational and iterative aspects. It fails, for example, to adequately explain why technical problems have stultified the universality and efficiency of the asset preservation regime. By positioning these problems as both products and constituent elements of broader social processes, constructivism reveals states parties' failure to fully internalise the Court's nascent cooperation norms, which have often conflicted with established domestic legal norms. Norm internalisation has also been complicated by ideational conflict within the Court, which has destabilised its role-identity and expectations surrounding cooperation.

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384 Martti Koskenniemi, 'What is International Law For?' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 5th ed, 2018) 28, 47.

385 Birkett, *Safeguarding* (n 23) 602.

In this regard, constructivist insights suggest the Court's concerted efforts to reform its asset preservation regime ought to be welcomed. As a norm entrepreneur, these tentative steps appear to signal the Court's shift towards a more dynamic, 'triangular' cooperation model which positions individuals as key subjects and acknowledges the Court is bound to states parties through a relationship of trust and reciprocity. The precise nature of that relationship and those reforms accompanying it must await inevitable future debate. However, this article demonstrates that supplementing rationalist assumptions with constructivist insights can valuably contribute to the ICC's ability to fulfil its mandates of ending impunity, facilitating international peace and security, and delivering meaningful justice — including reparations — to victims of crimes of international concern.