



Report on cooperation challenges faced by the Court with respect to financial investigations

Workshop 26-27 October 2015, The Hague, Netherlands

Forward-looking conclusions

Strengthening financial investigations - why now?

Over the past decade great strides have been made in international cooperation regarding financial investigations, including for the purpose of tracing, freezing, seizing and recovering stolen assets or assets otherwise linked to the commission of international crimes or to those persons accused of international crimes (“asset tracking”). This can be attributed, in particular, to the success of international and regional conventions such as the UN Convention against Corruption (UNCAC), which dedicates an entire chapter to the recovery of stolen assets, the UN Convention against Transnational Organised Crime (UNTOC), and other regional or sub-regional conventions, such as those of the OECD, the EU, the AU and the OAS.

Although the International Criminal Court (“the Court”) has no jurisdiction over the crimes of corruption or money laundering, efforts in this connection are of increasing relevance to the fight against impunity for Rome Statute crimes. Indeed, Rome Statute crimes are often linked to forms of transnational or organized crime and the perpetrators themselves are in many instances involved in financial crimes, as an output of or as an input to their own activities, or otherwise linked to perpetrators of financial crimes.

In addition to the obvious areas of activity of the Court, including the core investigative work and strategies of the Office of the Prosecutor (OTP) and the efforts associated with identifying assets for the purpose of reparations for victims, much synergy can be achieved by linking the Court to these financial investigation and asset-tracking efforts, including domestic efforts by States and international mechanisms and networks. The strengthening of financial investigations is also relevant as the Court enters its first reparation phase in the *Lubanga* case.

In general, the benefits of improving the effectiveness of the Court’s financial investigations are manifold, especially as a way of implementing the OTP’s core investigative role and its strategy to diversify its sources of evidence, as a way of identifying assets for the benefit of victims’ reparations, and as a way of preventing the misuse of legal aid. Although asset recovery is typically a lengthy and complex endeavour, the Rome Statute puts particular emphasis on financing victims’ reparations

through assets recovered from the suspects, and efforts are being made in this respect by both the OTP and the Registry. Most importantly, “going after the money” has the potential to significantly reduce Rome Statute crimes: depriving the perpetrators of their illegally obtained assets will deprive them of the means they need to sustain their criminal operations and networks.

These potential benefits were also highlighted by panellists and participants at an event organized by the Court, in cooperation with the Principality of Liechtenstein and the Basel Institute on Governance’s International Centre for Asset Recovery (ICAR), with the financial support of the European Commission. The two-day workshop on challenges faced by the Court with respect to financial investigations and international cooperation took place on 26/27 October 2015. A panel discussion on the same set of topics was subsequently organized by the Principality of Liechtenstein on the margins of the Assembly of States Parties on 19 November 2015. These events underlined the considerable practical relevance of these issues for the Court and identified a set of challenges faced by both the Court and States Parties in improving financial investigations in the context of the investigation of Rome Statute crimes.

The following is a brief informal summary of the main findings of these events, including a set of recommendations on how best to overcome the challenges faced by the Court in relation to financial investigations and international cooperation.

Financial investigation and the Court

When considering the freezing of assets, the possibility of securing assets for potential reparations awards for victims of the crimes under the jurisdiction of the Court immediately springs to mind. Less obvious are the other dimensions covered by financial investigations and the processes within the Court necessary for the successful identification, freezing and seizure of assets.

Various organs of the Court already conduct financial investigations as part of their mandate under the Rome Statute. The **OTP** conducts financial investigations as a means of (i) identifying financial flows that can provide evidence of the crime or linkages of crimes, thereby determining the criminal responsibility of individuals and leading to decreased reliance on witnesses, which in turn can reduce highly resource-intensive protection issues; and (ii) identifying assets which could form the basis for possible future forfeiture orders and reparations awards (article 93(1)(k) of the Rome Statute).

Once an arrest warrant or a summons to appear has been issued, the **Chambers** may issue requests for the “identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes” as protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims (articles 57(3)(e) and 93(1)(k) of the Rome Statute).

Subsequently, the **Registry** will coordinate with the OTP to obtain the relevant information in its possession, pursuant to an internal Memorandum of Understanding in place between the two organs. It will then liaise with relevant States to implement such requests. The Registry also conducts financial investigations for the purpose of assessing the indigence of a suspect claiming legal aid paid by the Court.

Applicable articles of the Rome Statute include, in particular, article 54 on the duties and powers of the Prosecutor with respect to investigations; article 57 on functions and powers of the Pre-Trial Chamber; article 75 on reparations to victims; and article 93 on other forms of cooperation, as well as rule 21(5) of the Rules of Procedure and Evidence which concerns legal aid.

Main challenges and forward-looking suggestions

In performing the above-mentioned activities, the Court encounters at least two sets of **challenges**. First – and here the challenges facing the Court are no different from any other authority conducting financial investigations – there are challenges linked to the **complexity of financial investigations** as compared to criminal or other non-financial investigations. The nature of this type of investigation is such that the use of some common investigative methodologies aimed at securing direct evidence for use at trial is often not an option. Instead, financial investigations, particularly those that aim to prove the illicit nature or origins of assets, usually require elements such as knowledge, intent or purpose to be inferred from objective factual circumstances. The tools at the disposal of the person of interest to **disguise ownership** of the assets in question are also becoming increasingly sophisticated, making it more difficult still to trace financial flows to prove their illicit nature. Lastly, financial investigations are almost invariably international in nature.

This leads to the second set of challenges faced by the Court, where parallels can be drawn with other jurisdictions, but where the Court is also exposed to particular difficulties. Typically for the Court, all information necessary to conduct a financial investigation is located in a foreign jurisdiction. As the Court does not have its own police force or investigative powers in other jurisdictions, it is almost entirely dependent on the cooperation of States Parties. **States Parties are legally required to “cooperate fully”** (article 86 of the Rome Statute), including, as necessary, through adjustments to their domestic legal and institutional frameworks (article 88 of the Rome Statute). In practice, however, the Court experiences major difficulties when it comes to cooperation with State Parties for the purpose of receiving and sharing information as part of investigations.

These two sets of challenges, faced by the organs of the Court in the context of financial investigations and which were identified during the course of the two events, elicited the following suggestions in respect of (1) States Parties, (2) the Court and (3) State Parties and the Court jointly:

(1) States Parties

(a) Review and, if necessary, adjust domestic cooperation laws, procedures and policies.

States Parties have an obligation to adopt procedures that facilitate the implementation of *all* forms of cooperation requests, including in the area of financial investigations (article 93(1)(k) of the Rome Statute). As financial investigations are becoming an increasingly important part of the Court’s work, States Parties should ensure that they are able to “fully cooperate” in this area.

Domestic cooperation laws may contain gaps and obstacles that are incompatible with this obligation to cooperate (some participants referred in this context to an “obligation de résultat”),

and they may more generally not take into account the Court's procedures. An example was given of a State that would be unable to implement a request for the freezing of assets (as a conservatory measure for reparations), since this would require a decision by a civil judge, for which there was currently no domestic legal avenue in the context of a Court request. Additional useful feedback from one of the States concerned the different channels to be used at the domestic level with respect to requests for "identification and tracing" that do not require coercive measures and may be easier to implement, and requests for "freezing and seizure" that have broader legal ramifications.

(b) Raise awareness among relevant domestic authorities and officials. States Parties' law enforcement agencies and central authorities in charge of international judicial cooperation often have only limited awareness of the **mandate** of the Court in relation to financial investigations and asset recovery. They may also lack awareness of the **roles and responsibilities of the different organs of the Court** (OTP, Chambers, Registry) and the **nature and extent of the obligation to cooperate**.

Domestic authorities may not fully appreciate the differences between judicial cooperation with the Court and with another State. In particular, the Court cannot be held to the same standards as another State, as its ability to gather primary information is mostly limited to what is available in the public domain (and to what individuals volunteer). This lack of awareness at the domestic level may also lead to inadequate and highly heterogeneous interpretation of applicable laws and regulations, and far too great a range of requirements imposed by States Parties on the Court in relation to judicial cooperation (e.g. the criminal nexus requirement).

(c) Instruct domestic authorities and officials to be proactive and constructive in cooperating with the Court in financial investigations. In particular, domestic authorities and officials should be available for informal contact with the Court and give concrete and meaningful suggestions to help prepare formal requests for cooperation effectively and efficiently. Ideally, States Parties would designate contact points specifically for the purpose of cooperation with the Court's financial investigations.

Initial informal communication between the Court and States Parties could help remove obstacles to cooperation at an early stage. For instance, it was mentioned that the Court often does not know whether a given individual has assets in the State Party in question in the first place. If such information were more easily accessible to the Court, cooperation requests could be tailored accordingly. This would allow for speedier cooperation and would reduce the risk of assets being transferred to another jurisdiction. An example was given of such a request being sent back and forth over several months in order to address formalities.

(d) Open domestic investigations into possible financial crimes based on information received through cooperation requests by the Court. Such investigations, e.g. regarding money-laundering, could lead to information being collected at the domestic level (and through cooperation with third States) that may be also useful for the Court.

Requesting assistance from a State in tracing the proceeds of crime can be a frustrating experience for the Court for a number of reasons. However, that frustration can be averted if – as in the case of any domestic investigation with an international dimension – when it receives a request, the State uses its own money laundering legislation to open an investigation into the individual or financial institution believed to be holding the financial assets. This procedure may give rise to a situation in which the State investigator would have to request information from the Court. To support this second request, the State investigator would have to consider offering information to the Court. The information, contained in the second (“reversed”) request can translate into important leads to feed the original Court investigation.

(e) Place greater emphasis on cooperation regarding financial investigations in the context of the Assembly of States Parties. Beyond the brief reference to financial investigations in the annual omnibus resolution, States Parties should make greater use of the Assembly of States Parties to raise awareness and to share best practice and lessons learnt.

It was suggested that the Assembly of States Parties focus its next plenary discussion on cooperation in financial investigations.

(2) The Court

(a) Raise awareness of the mandate of the Court and the obligations of States Parties. The Court should continue to explain its mandate regarding financial investigations, which remains poorly understood. A **manual** explaining the mandate and process at the Court could be developed and distributed to partners.

An example was given of a State that would only share financial information regarding an individual once an indictment had been issued, despite the inclusion of no such restriction in the Rome Statute, and despite the fact that the sharing of such information may be required to produce an indictment in the first place.

(b) Promote understanding of and clarity in the applicable rules of the Rome Statute. Given the broad and sweeping language of the Statute’s provisions on cooperation, it might be useful to make the Court’s case law on the scope of cooperation required, in particular that of the Appeals Chamber, publicly available.

The point was made that several States Parties would not be able to freeze the entirety of a suspect’s wealth, but only those assets having a nexus to the alleged crimes. The Rome Statute does not provide clear guidance on this point. It was also noted that the issue is currently under consideration by the Court

- (c) Create an overview of domestic systems** to better understand implementation challenges and to better tailor requests. Consider developing standard operating procedures with relevant national entities.

The Registry indicated that it would start working on such an overview in coordination with the OTP based on the questionnaires submitted by States during the course of the seminar.

- (d) Establish informal contact with domestic authorities and informally consult with them before sending a formal Request for Assistance (RFA).** Such informal contact should include, as appropriate, a designated domestic point of contact (see 1(c) above), the Central Authority (i.e. the authority in charge of cooperation with the Court) as well as officials at the operational level (e.g. investigators, police and prosecutors). This dialogue should help determine the specific assistance that is available and any obstacles that would prevent cooperation.

The lack of experience in using informal contact before submitting formal requests in this specific area, compared to the practice at the Court with regard to general requests for assistance, was identified as an area for improvement. The idea of establishing a secure network for the Court to access financial databases in States Parties was proposed. This would allow the Court to quickly identify a State in which a person under investigation holds assets.

- (e) Produce sound draft RFAs containing, to the extent possible, all relevant information** to enable the authorities to implement them. Specifically, the RFAs should include the legal basis for the request; the facts of the case; identifying information on the individual; and the potential connection to the State requested and the concrete action sought.

While detailed RFAs are desirable, States Parties should be aware that cooperation requests from the Court do not follow the same procedures as State-to-State cooperation (see 1(b) above), and that the obligation to cooperate cannot be contingent on whether the Court provides certain information requested by States. The Court strives to meet these requirements in its requests but is sometimes structurally unable to do so.

- (f) Create or strengthen relationships with new international partners.** The Court has developed partnerships with existing law enforcement networks such as the Egmont Group (see 3(h) below) and CARIN, as well as other international organizations that possess relevant tools or expertise (UNODC, STAR, Interpol). These could be further strengthened and other partners identified. Possible synergies could be harvested, provided that the Court is able to foster a good understanding of its mandate regarding financial investigations.

(3) States Parties and the Court

- (a) Collaborate, for example through joint training, technical assistance and continuing to hire qualified personnel to improve internal capacities to conduct complex international financial investigations** and to trace assets across multiple (sometimes offshore or secretive) financial centres.

It was noted that relevant expertise and experience within the Court, but also within domestic jurisdictions, was currently rather limited. Specifically, it was pointed out that there are not enough financial investigators at the Court to conduct such complex investigations and that many national authorities suffer from a similar lack of capacity and resources. Several partners could provide training and resources (e.g. ICAR, Institute for International Criminal Investigations). Existing rosters of financial experts could be used for the short-term recruitment of investigators, as the need arises (e.g. Justice Rapid Response). Organizing joint training for Court personnel and investigators from State Parties would not only improve capacity but also contribute to strengthening the informal network of contacts and enhancing understanding of the respective needs and challenges and how each party operates.

- (b) Improve use of alternative sources of information**, such as Financial Intelligence Units (FIUs) and law enforcement networks (e.g. the CARIN network).

It was noted that it was currently unclear to what extent the Court was able to access such sources and networks. Access could possibly be facilitated via interested domestic partners, e.g. the FIU of a specific State Party. That FIU could then request information from other FIUs within the Egmont Group and, to the extent permissible, share such information with the Court. A specific procedure might be required to maintain confidentiality and to ensure that information received through such channels is managed in line with standards applicable to State-to-State sharing of intelligence. Information gathered by FIUs from financial institutions and other private entities could be extremely valuable for the Court's investigations.

The Court would like to thank all the experts who participated in the workshop and those States which attended the side event, as well as the European Commission for its financial support. It would also like to thank, in particular, the Principality of Liechtenstein and the Basel Institute on Governance's International Centre for Asset Recovery (ICAR) for their operational and substantive contributions.