

# Managing Frozen Assets at the International Criminal Court

The Fallout of the *Bemba* Acquittal

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## Abstract

*On 8 June 2018, more than 10 years after his arrest, the Appeals Chamber of the International Criminal Court (ICC) reversed Jean-Pierre Bemba Gombo's conviction by the Trial Chamber for crimes against humanity and war crimes, acquitting him of all charges. Soon after the start of his time in detention in The Hague, assets belonging to Bemba were frozen by states across a number of jurisdictions at the request of the ICC. Many of these assets remain frozen, more than 18 months after his acquittal. This article examines the consequences of prolonged asset freezes by the ICC through the lens of the Bemba case, demonstrating the existence of gaps in the legal framework applicable to the management of frozen assets under the ICC Statute system and suggesting possible responses thereto at the domestic and international levels.*

## 1. Introduction

The International Criminal Court (ICC) is empowered by its constituent instrument to request its states parties to identify, trace, freeze and seize the property and assets of accused persons, '[w]here a warrant of arrest or a summons has been issued'.<sup>1</sup> More precisely, Article 57(3)(e) ICC Statute authorizes pre-trial

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1 Art. 57(3)(e) ICCSt.

chambers to ‘seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims’.<sup>2</sup> To the extent that such requests, or decisions discussing such requests, have been made publicly available, the ICC can be seen to have exercised this power seven times in respect of persons accused of committing crimes under its jurisdiction since the entry into force of the ICC Statute. Such requests have been issued with respect to (i) Thomas Lubanga Dyilo;<sup>3</sup> (ii) Germain Katanga;<sup>4</sup> (iii) Mathieu Ngudjolo Chui;<sup>5</sup> (iv) Bosco Ntaganda;<sup>6</sup> (v) Jean-Pierre Bemba Gombo;<sup>7</sup> (vi) Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali;<sup>8</sup> and (vii) Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala

- 2 *Ibid.*, Art. 93 ICCSt., which falls under Part IX ICCSt., titled ‘International cooperation and judicial assistance’, provides, in relevant part, as follows: ‘(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’. On the ICC’s law and practice in the execution of ‘protective measures’, see D.J. Birkett, ‘Pre-Trial “Protective Measures for the Purpose of Forfeiture” at the International Criminal Court: Safeguarding and Balancing Competing Rights and Interests’, 32 *Leiden Journal of International Law (LJIL)* (2019) 585–602.
- 3 See Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of property and assets belonging to Mr. Thomas Lubanga Dyilo, *Lubanga Dyilo* (ICC-01/04-01/06-22-tEN), Pre-Trial Chamber I, 9 March 2006; Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Lubanga Dyilo, *Lubanga Dyilo* (ICC-01/04-01/06-62-tEN), Pre-Trial Chamber I, 31 March 2006.
- 4 See Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of the property and assets of Germain Katanga, *Katanga* (ICC-01/04-01/07-7-tENG), Pre-Trial Chamber I, 6 July 2007.
- 5 See 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 de Mathieu Ngudjolo Chui (Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of the property and assets of Mathieu Ngudjolo Chui), *Ngudjolo Chui* (ICC-01/04-01/07-266), Pre-Trial Chamber I, 14 November 2007.
- 6 See Decision on the Prosecution Application for a Warrant of Arrest, *Ntaganda* (ICC-01/04-02/06-1-Red-tENG), Pre-Trial Chamber I, 6 March 2007, at 35 and 36 (instructing the Registry to prepare and transmit cooperation requests to the competent authorities in the DRC, Uganda and Rwanda ‘to identify, trace and freeze or seize the property and assets belonging to Bosco Ntaganda at the earliest opportunity, without prejudice to the rights of third parties’).
- 7 See Decision et demande en vue d’obtenir l’identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République portugaise (Decision and Request to the Republic of Portugal for the purpose of obtaining the identification, tracing, freezing and seizure of property and assets), *Bemba Gombo* (ICC-01/05-01/08-8), Pre-Trial Chamber III, 27 May 2008 (‘*Bemba Freezing Request*’).
- 8 See 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 of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-42), Pre-Trial Chamber II, 5 April 2011.

Wandu and Narcisse Arido.<sup>9</sup> Additionally, in November 2011, the then ICC Prosecutor reported to the United Nations (UN) Security Council that the ICC had transmitted 'requests for assistance to Libya, State Parties, and five UN Security Council non-State Parties to identify, trace, seize and freeze all the personal assets belonging to [Saif Al-Islam Gaddafi and Abdullah Al-Senussi]'.<sup>10</sup>

The assets frozen by states pursuant to requests issued by the ICC under Article 57(3)(e) ICC Statute can be put to a number of uses during the course of proceedings and in the event of a conviction. These purposes include the payment of defence fees and, if the Prosecutor secures a conviction, the payment of fines, orders for forfeiture and reparations to victims.<sup>11</sup> But these assets cannot be used for the latter three purposes where the ICC acquits an accused person,<sup>12</sup> who ought to be able to regain control over the frozen assets. Therefore, regardless of whether the proceedings lead to a conviction or an acquittal, there is a clear interest in maintaining the value of the assets while they are frozen, for the benefit of the accused if he or she is acquitted or for the benefit of victims in the event of a conviction and consequent reparations order.

If not properly managed, frozen assets can lose value, thus thwarting the purposes behind the application of protective measures under Article 57(3)(e) ICC Statute. This potential decrease in value is arguably a greater threat in the ICC Statute system than at the national level, where many state authorities possess similar powers to the ICC with respect to asset freezing.<sup>13</sup> This is because criminal proceedings on the international plane generally take

9 See Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, *Bemba Gombo, Kilolo Musamba, Mangenda Kabongo, Babala Wandu and Arido* (ICC-01/05-01/13-1-tENG), Pre-Trial Chamber II, 20 November 2013, 17 ('requesting the States which will arrest the persons concerned, and any other relevant State which may be identified, to locate and freeze their assets').

10 Prosecutor's statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), 2 November 2011, § 13.

11 Decision on the 'Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba', *Bemba Gombo, Musamba, Mangenda Kabongo, Babala Wandu and Arido* (ICC-01/05-01/13-1485-Red), Trial Chamber VII, 17 November 2015 ('Kilolo Lifting Decision'), §§ 17–20. For analysis, see Birkett, *supra* note 2; C. Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations', in O. Bekou and D.J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff, 2016) 234–237, at 227 (analysing the *Lubanga* and *Kenyatta* cases).

12 Pursuant to Arts 75(2) and 77 ICCSt., the ICC can only order fines, forfeiture of property and assets and/or reparations directly against a convicted person. See also Final decision on the reparations proceedings, *Situation in the Central African Republic* (ICC-01/05-01/08-3653), Trial Chamber III, 3 August 2018 ('Bemba Reparations Decision'), § 3 ('The Chamber agrees with the submissions made that no reparations order can be made against Mr Bemba under Article 75 of the Statute. The Chamber must respect the limitations of this Court and recalls that it can only address compensation for harm suffered as a result of crimes when the person standing trial for his or her participation in those crimes has been found guilty.').

13 See Part 3.

significantly longer than those conducted at the domestic level.<sup>14</sup> The ICC acknowledges this prospective problem in a booklet published in 2017 on financial investigations and asset recovery: '[b]ecause assets are frozen during the entirety of ICC proceedings, their value could significantly decrease by the time they can be sold. Therefore, consultation with States at the very early stage is crucial to avoid the devaluation of assets frozen on behalf of the Court.'<sup>15</sup> But the ICC-issued booklet provides no guidance on what such bilateral consultations might involve.

This article examines the implications of prolonged asset freezes by the ICC through the lens of the proceedings in the *Prosecutor v. Jean-Pierre Bemba Gombo*. The *Bemba* case provides a suitable case study through which to conduct the present analysis because, at the time of his arrest, Bemba was in possession of a broad portfolio of assets, some of which were frozen by states at the request of the ICC in accordance with the Article 57(3)(e) ICC Statute procedure. The article demonstrates that gaps exist in the legal framework applicable to the management of assets under the ICC Statute system and suggests possible responses thereto at the domestic and international levels. In order to realize these aims, the article is subdivided into five parts. Part 2 elaborates the importance of the meticulous management of assets in view of the *Bemba* case, providing a procedural history of the case from his arrest in 2008 to his acquittal in 2018 as it pertains to the freezing of his assets. Part 3 turns to the procedures available under several States' national implementing legislation for the proper management of assets frozen or seized at the request of the ICC. Part 4 examines possible steps that could be taken at the international level to respond to certain issues identified in Part 2 as concerns the management of Bemba's assets. Finally, Part 5 offers some concluding remarks on the management of accused persons' frozen assets at the behest of the ICC in view of its first comprehensive experience thereof in the *Bemba* case, questioning, *inter alia*, whether sufficient use is being made of the provisions in the ICC Statute that provide for (urgent) consultations between states and the Court.

14 For data, see A. Smeulers, B. Hola, and T. van den Berg, 'Sixty-five Years of International Criminal Justice: The Facts and Figures', 13 *International Criminal Law Review* (2013) 7–41, at 16–18; J. Galbraith, 'The Pace of International Criminal Justice', 31 *Michigan Journal of International Law* (2009) 79–143, at 112–127. For further discussion of the length of proceedings at international(ized) criminal tribunals, see A. Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered', 50 *Harvard International Law Journal* (2009) 323–364, at 323–330 (and footnotes thereto).

15 ICC, 'Financial Investigations and Recovery of Assets', November 2017, available online at [https://www.icc-cpi.int/iccdocs/other/Freezing\\_Assets\\_Eng\\_Web.pdf](https://www.icc-cpi.int/iccdocs/other/Freezing_Assets_Eng_Web.pdf) (visited 1 June 2020), at 13.

## 2. The Bemba Case

### A. (Un)freezing Bemba's Assets

On 24 May 2008, Belgian authorities executed an arrest warrant by the ICC,<sup>16</sup> arresting Jean-Pierre Bemba Gombo near Brussels.<sup>17</sup> At the time of his arrest, Bemba was reported to be a 'millionaire',<sup>18</sup> in control of a 'large business empire',<sup>19</sup> and owning luxury assets in a number of states. These were reported to include a villa in the Alarve in southern Portugal,<sup>20</sup> and a private jet previously belonging to Mobutu Sese Seko, the former President of the Democratic Republic of the Congo (DRC).<sup>21</sup> Indeed, Bemba was characterized by ICC Trial Chamber III as follows: 'clearly a man of considerable means, in the sense that he appears to "own", or to have a proprietary interest in, various kinds of property (e.g. buildings, cars, companies), and there are bank accounts held in his sole name, in a number of different countries'.<sup>22</sup> According to a claim for compensation filed by Mr Bemba, to which the author will return,<sup>23</sup> among the assets frozen by states following his arrest at the request of the Court were bank accounts and properties in Belgium, the DRC and Portugal, as well as a boat in the latter.<sup>24</sup>

Three days after Bemba was apprehended, taking into consideration arguments raised by the Prosecutor in his application for an arrest warrant for Bemba,<sup>25</sup> and

16 See Warrant of Arrest for Jean-Pierre Bemba Gombo, *Bemba Gombo* (ICC-01/05-01/08-1-ENG), Pre-Trial Chamber III, 23 May 2008; Decision to Unseal the Warrant of Arrest for Mr Jean-Pierre Bemba Gombo, *Bemba Gombo* (ICC-01/05-01/08-5-ENG), Pre-Trial Chamber III, 24 May 2008.

17 Agence France-Presse, 'Congo Ex-Official Is Held in Belgium on War Crimes Charges', *The New York Times*, 25 May 2008, available online at [www.nytimes.com/2008/05/25/world/africa/25congo.html](http://www.nytimes.com/2008/05/25/world/africa/25congo.html) (visited 1 June 2020).

18 *Ibid.*

19 M. Simons, 'Jean-Pierre Bemba, Congolese Politician, Appears in Hague court', *The New York Times*, 4 July 2008, available online at [www.nytimes.com/2008/07/04/world/africa/04iht-05hague.14247286.html](http://www.nytimes.com/2008/07/04/world/africa/04iht-05hague.14247286.html) (visited 1 June 2020).

20 See B.F. Pires, 'Last Stop Faro?' *Algarve 123*, 15 March 2012 (copy on file with the author). See also 'Written Question by Ana Maria Gomes (PSE) to the Commission, Subject: Jean-Pierre Bemba's Residence in Portugal', *European Parliament*, 3 June 2008, P-3176/08 ('According to the 26.5.2008 issue of the daily newspaper *Diário de Notícias* ... Bemba, former Vice-President of the CAR, principal political rival of President Kabila, and leader of the MLC, had been living since April 2007 in a luxurious refuge in the Quinta do Lago in Faro').

21 See Pires, *ibid.*

22 Redacted version of 'Decision on legal assistance for the accused', *Bemba Gombo* (ICC-01/05-01/08-567-Red), Trial Chamber III, 26 November 2009 ('*Bemba Assistance Decision*'), § 1.

23 See Part 2.B.

24 Public Redacted Version of 'Mr. Bemba's claim for compensation and damages', *Situation in the Central African Republic* (ICC-01/05-01/08-3673-Red), Pre-Trial Chamber II, 11 March 2019 ('*Bemba Claim for Compensation and Damages*'), § 127. Mr Bemba also notes the freezing, 'apparently without judicial order', of aircraft and vehicles in the DRC and Portugal, a boat in the DRC, and a property in Portugal. See § 128.

25 See *Bemba Freezing Request*, *supra* note 7, at §§ 1 and 5. See also Prosecutor's Application for Warrant of Arrest under Art. 58, *Situation in the Central African Republic* (ICC-01/05-01/08-26-Red), Pre-Trial Chamber III, 9 May 2008.

observing Article 57(3)(e) ICC Statute and Article 93(1)(k) ICC Statute, among other provisions, Pre-Trial Chamber III called on ‘the Republic of Portugal to take, in accordance with the procedures provided for in its domestic legislation, all necessary measures to identify, locate, freeze or seize the property and assets of Mr Jean-Pierre Bemba Gombo located on its territory, including his movable or immovable property, accounts or shares, subject to the rights of bona fide third parties’.<sup>26</sup> The ICC delivered similar requests to other states, which are not (yet) publicly available.<sup>27</sup> It has, however, been made evident in later filings that Belgium and Cape Verde each received such requests for cooperation from the ICC under Article 93(1)(k) ICC Statute. It is to these filings, in which Bemba brings the issue of the devaluation of his assets because of the ICC-requested freeze to the attention of the Court, that the present discussion now turns.

As a result of the execution of the freezing requests, Bemba was unable to access his property and assets in order to meet his defence expenses, among other costs. Trial Chamber III found that he consequently did not have ‘sufficient means to pay for his defence’<sup>28</sup> and ordered the Registry ‘[t]o provide funding in the sum of €30,150 a month’ to allow him to pay such fees.<sup>29</sup>

On 8 June 2018, more than 10 years after his arrest, the Appeals Chamber of the ICC reversed Bemba’s conviction by ICC Trial Chamber III for crimes against humanity and war crimes,<sup>30</sup> acquitting him of all charges.<sup>31</sup> On 17 July 2018, Trial Chamber III issued an order instructing Bemba to repay the fees, totalling more than €1.8 million, which had been advanced to him by the Court to fund his defence expenses.<sup>32</sup> Bemba subsequently filed an application before the same Trial Chamber,<sup>33</sup> requesting, *inter alia*, that: (i) the ICC reclassify all filings concerning his frozen assets so as to make them available

26 See *Bemba Freezing Request*, *supra* note 7, at Disposition (‘demande à la République portugaise de prendre, conformément aux procédures prévues par sa législation nationale, toutes les mesures nécessaires afin d’identifier, localiser, geler ou saisir les biens et avoirs de M. Jean-Pierre Bemba Gombo qui se trouvent sur son territoire, y compris ses biens meubles ou immeubles, ses comptes bancaires ou ses parts sociales, sous réserve des droits des tiers de bonne foi’) (author’s translation).

27 *Bemba Assistance Decision*, *supra* note 22, § 10. The states to which requests were issued are redacted.

28 *Ibid.*, § 105.

29 *Ibid.*, § 111. This sum was increased in 2010 to €42,701 per month. See Redacted Version of Decision on the Defence Application for Review of the Registrar’s Decision of 15 October 2010 on the Application for Adjustment of the Expenses and Fees of the Defence (ICC-01/05-01/08-1007-Conf), *Bemba Gombo* (ICC-01/05-01/08-1007-Red), Trial Chamber III, 7 December 2010, § 39. After the trial phase ended, the amount was reduced to €24,750 per month. See Public redacted version of ‘Order in relation to advanced legal assistance fees’, *Bemba Gombo* (ICC-01/05-01/08-3651-Red), Trial Chamber III, 17 July 2018 (‘*Bemba* Order for Repayment’), fn. 4.

30 Judgment pursuant to Art. 74 of the Statute, *Bemba Gombo* (ICC-01/05-01/08-3343), Trial Chamber III, 21 March 2016.

31 Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’, *Bemba Gombo* (ICC-01/05-01/08-3636-Red A), Appeals Chamber, 8 June 2018.

32 *Bemba* Order for Repayment, *supra* note 29, § 7. The exact sum was €1,886,736.87.

33 Public Redacted Version of ‘Preliminary application for reclassification of filings, disclosure, accounts and partial unfreezing of Mr. Bemba’s assets’, *Situation in the Central African*

to him and (ii) order the states in which assets belonging to him had been frozen to supply him with an account thereof.<sup>34</sup> In the application, Bemba argued that he required such an account because of the ‘deterioration, depreciation or destruction [of his property] during its time in the custody of other states or institutions, whilst held on trust by them for its rightful owner’.<sup>35</sup> The application continues: ‘[t]he orders should be made expeditiously, to mitigate the losses Mr. Bemba continues to suffer as a result of the freezing of his assets.’<sup>36</sup> Importantly, Bemba argued that, following his acquittal, the statutory basis for the freeze ceased to exist and that, in order to repay money borrowed from the ICC’s Registry for the partial payment of his legal fees, the freezing orders should be lifted.<sup>37</sup> Bemba also contended that, with the freezing orders having been given effect by states as a result of judicial decisions, a judicial decision was required ‘to reverse the effects of those orders’.<sup>38</sup>

Trial Chamber III noted Bemba’s application and ordered the Registry to file observations on the requests therein,<sup>39</sup> to which the Registry duly responded.<sup>40</sup> In its observations, the Registry opposed the application for the reason that, in its opinion, reclassifying the documents would have no impact on Bemba’s capacity to repay the fees owed to the ICC.<sup>41</sup> The Registry further observed that, in the absence of a determination on the matter by the Appeals Chamber, if the legal basis for the execution of the freezing requests ceased to exist, as Bemba had argued in his original application, ‘the protective measures taken at the national level would be null and void’<sup>42</sup> and that reclassification

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*Republic* (ICC-01/05-01/08-3654-Red), Trial Chamber III, 30 October 2010 (‘Bemba Unfreezing Application’).

34 *Ibid.*, § 54. See also § 53 (‘... freezing another person’s property creates fiduciary duties to account for it. It is not, nor was it, Mr Bemba’s obligation to trace and identify his own property, nor to point out and protest about the continuing illegality involved in the freezing of his assets.’).

35 *Ibid.*, § 4.

36 *Ibid.*, § 5.

37 *Ibid.*, §§ 25–37. Mr Bemba also observed that his contractual situation with the Registry concerning the fees advanced to him thereby had no bearing on the question of discharging the freezing orders and that there was no reason to doubt that his cooperation would be forthcoming in this regard. See *ibid.*, §§ 38–44.

38 *Ibid.*, § 1.

39 Public redacted version of ‘Decision on the Defence’s preliminary application for reclassification of filings, disclosure, accounts and partial unfreezing of Mr Bemba’s assets’, 24 August 2018, *Situation in the Central African Republic* (ICC-01/05-01/08-3655-Red), Trial Chamber III, 16 November 2018. Trial Chamber III noted ‘that the outstanding legal assistance debt is based on a contractual obligation between the Court and Mr Bemba, ... [and] consider[ed] the Registry to be the competent body to conduct and arrange the repayment process in the way it sees fit, in consultation with Mr Bemba’. *Ibid.*, § 9. The Trial Chamber, therefore, instructed Mr Bemba to ‘direct further communication with respect to the repayment, if any, to the Registry’. *Ibid.*

40 Public Redacted Version of ‘Registry’s Observations on the Defence Request for Reclassification of Information relating to Mr Jean-Pierre Bemba Gombo’s Assets’, 3 September 2018, *Situation in the Central African Republic* (ICC-01/05-01/08-3656-Red2), Trial Chamber III, 7 December 2018.

41 *Ibid.*, §§ 5 and 6.

42 *Ibid.*, § 7. The Registry also observed that consulting with all relevant states would be ‘tremendously time-consuming’. *Ibid.*, § 8.

would be of no import. Finally, the Registry noted that it had transferred more than €2.2 million to Mr Bemba, with over €2 million of this amount deriving from a cooperation request issued by the ICC to Cape Verde in 2014.<sup>43</sup> Bemba filed a response to the Registry's observations, in which he argued as follows:

Those who take possession of other people's property, thereby hold that property on trust for that other person, the beneficiary or legal owner of the property. As trustees, they have duties to account for the property they have taken (which cannot be derogated), and to protect and preserve it until it is returned. Those basic and fundamental principles are reflected in the rules and protocols that apply to prosecuting authorities who take possession of property within the context of criminal proceedings. ... The same principles apply to all property effectively taken from Mr. Bemba ... Those who freeze and seize assets thereby become trustees of those assets for the lawful owner of them with all the ancillary fiduciary responsibilities to account for what has been seized and to preserve and protect it.<sup>44</sup>

Mr Bemba also observed that the ongoing freezing of his assets, including items of which the Registry was unaware,<sup>45</sup> had rendered his family members unable to exercise their rights over real property and to access bank accounts.<sup>46</sup> Mr Bemba also submitted that, with the Registry having conceded that the orders are without any legal basis and therefore 'null and void',<sup>47</sup> it ought to inform interested states thereof.<sup>48</sup> Further, Mr Bemba reiterated that the relationship between the value of his frozen property and the funds advanced to him by the ICC to finance his defence expenses has 'no bearing on the classification of filings or the duty to account for his property'.<sup>49</sup> In its submissions filed in response to Mr Bemba's observations, the Registry restated that the Appeal Chamber made no pronouncement as regards the protective measures against Bemba's assets in its judgment acquitting Mr Bemba, nor did it order the Registry to alert states 'with pending cooperation requests' of the judgment.<sup>50</sup> Nonetheless, the Registry confirmed that it would inform the relevant states of the end of the proceedings in the cases<sup>51</sup>

43 *Ibid.*, § 13. The exact amount that the ICC had transferred to Mr Bemba was €2,277,270.61, with €2,067,982 stemming from the May 2014 transfer from the Cape Verdean authorities to the Court.

44 Public Redacted version of 'Response to Redacted version of the Registry's Observations on Mr. Bemba's Request for Reclassification of Information relating to Mr Jean-Pierre Bemba Gombo's Assets', *Situation in the Central African Republic* (ICC-01/05-01/08-3657-Red), Trial Chamber III, 30 October 2018, §§ 1 and 3 (footnotes omitted).

45 *Ibid.*, § 8. Mr Bemba observed that the Registry's records were insufficient for him to identify which of his assets were frozen. *Ibid.*, § 7. Mr Bemba further contended that he 'cannot be expected to trace his own assets ... It is the duty of the Court to undo what it has done'. *Ibid.*, § 9.

46 *Ibid.*, § 10.

47 *Ibid.*, § 11.

48 *Ibid.*

49 *Ibid.*, § 17. See also *Bemba* Unfreezing Application, *supra* note 33, §§ 38–41.

50 Public Redacted Version of 'Registry's Submissions in relation to Protective Measures imposed on Mr Bemba's Assets', 21 September 2018, *Situation in the Central African Republic* (ICC-01/05-01/08-3658-Red2), Trial Chamber III, 7 December 2018 ('Registry Submissions'), § 5.

51 In separate proceedings, Mr Bemba was convicted of offences against the administration of justice and fined €300,000. See Decision on Sentence pursuant to Art. 76 of the Statute,



against Mr Bemba.<sup>52</sup> The Registry also sought guidance from Trial Chamber III as to whether such notification of Bemba's acquittal 'would mean that the protective measures taken on the basis of the Chamber's requests would be null and void'.<sup>53</sup> Mr Bemba filed a further response to the Registry's submissions on 8 October 2018,<sup>54</sup> in which he reiterated several of his earlier submissions. Of particular note for the purposes of the present analysis, Bemba submitted that the Registry's suggestion that his assets should remain frozen because of his contractual debt to the ICC is 'unfortunate, unfair and illegal'<sup>55</sup> and conflated the jurisdiction of Trial Chamber III, which is seized of the instant proceedings, and Trial Chamber VII, which ordered his fine for offences against the administration of justice.<sup>56</sup> Mr Bemba also contended that the impact of ongoing asset freeze 'is becoming cruel and inhumane and potentially interfering with his right to family life'.<sup>57</sup> Mr Bemba thus requested an expeditious resolution by the ICC.<sup>58</sup>

Trial Chamber III issued its decision on 20 November 2018.<sup>59</sup> Having first confirmed that the ICC cooperation regime is structured such that 'the Court itself does not order the freezing or seizure of assets, but rather orders that

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*Bemba Gombo, Kilolo Musamba, Kabongo, Babala Wandu and Arido* (ICC-01/05-01/13-2123-Corr), Trial Chamber VII, 22 March 2017, at Disposition. The fine was confirmed in Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo, *Bemba Gombo, Kilolo Musamba, Mangenda Kabongo, Babala Wandu and Arido* (ICC-01/05-01/13-2312), Trial Chamber VII, 17 September 2018, at Disposition.

- 52 Registry Submissions, *supra* note 50, § 8. According to the Registry, 'It is the Registry's understanding that the judicial authority that lies with a Chamber, pursuant to articles 57(3)(e) and 93(1)(k) of the Statute, to issue requests for cooperation to impose protective measures on assets at the domestic level necessarily also includes the authority to lift such protective measures. Unless otherwise instructed, the Registry understands its role in this context to be limited to the transmission of the requests for cooperation between the Chamber and the relevant states, in accordance with rule 176(2) of the Rules.' *Ibid.*, § 6.
- 53 Registry Submissions, *supra* note 51, § 9.
- 54 Public Redacted version of 'Mr. Bemba's response to the "Redacted version of Registry's Submissions in relation to Protective Measures imposed on Mr Bemba's Assets"', *Situation in the Central African Republic* (ICC-01/05-01/08-3659-Red), Trial Chamber III, 30 October 2018.
- 55 *Ibid.*, § 7. According to Bemba, '[t]he frozen property and assets in question were frozen in order to preserve them so they could be used, in the event of a conviction, for a reparations process.' *Ibid.*
- 56 *Ibid.*, § 6.
- 57 *Ibid.*, § 11.
- 58 *Ibid.*, § 15 ('States and institutions continue to execute freezing orders imposed at the request of the ICC four months after Mr. Bemba's acquittal, amounting to an unlawful interference with his personal property, and the personal property of an unknown number of third parties. Mr. Bemba's original request for the reclassification of all material relevant to the freezing orders and an order to the relevant states for a full accounting of seized and frozen property has now been pending for seven weeks. With every day that passes, the financial and economic loss resulting from the freezing of this property necessarily increases.').
- 59 Public redacted version of 'Decision on Mr Bemba's preliminary application for reclassification of filings, disclosure, accounts, and partial unfreezing of Mr Bemba's assets and the Registry's Request for guidance', 18 October 2018, *Situation in the Central African Republic* (ICC-01/05-01/08-3660-Red2), Trial Chamber III, 20 November 2018 ('*Bemba Unfreezing Decision*').

cooperation requests be sent to States from them to do so’,<sup>60</sup> Trial Chamber III found that ‘the lifting of coercive measures, including the unfreezing of assets, must be done under domestic law’.<sup>61</sup> Trial Chamber III also emphasized that, in the aftermath of Bemba’s acquittal by the Appeals Chamber, ‘there is no longer any investigation or prosecution against [him] . . . and States are thus under no obligation to comply with *any* of the standing requests for cooperation’.<sup>62</sup> The Trial Chamber therefore confirmed that it would be for the Registry to inform interested states of the consequences of the acquittal, which, in turn, ought to lead to appropriate action by national authorities under domestic law.<sup>63</sup> Having dismissed Mr Bemba’s application for the reclassification of documents,<sup>64</sup> Trial Chamber III confirmed that the repayment of his fine ought to be addressed by the Registry in consultation with Trial Chamber VII.<sup>65</sup> Trial Chamber III made no explicit findings as concerns the claims made by Mr Bemba regarding the depreciation of his assets and his right to family life.

On 10 December 2018, counsel for Mr Bemba filed a request to Trial Chamber III to partially reconsider its decision,<sup>66</sup> in which he argued, *inter alia*, that the relevant states had refused to respond to his requests as regards his frozen assets.<sup>67</sup> ‘In Mr. Bemba’s submission, especially given the urgency of the current situation, the effective *impasse* in the unfreezing of his assets, and the fact that almost five months have now lapsed since his acquittal’,<sup>68</sup> Trial Chamber III ought to partially reconsider its decision and/or grant the relief sought in this request.<sup>69</sup> At the time of writing, there have been no further submissions concerning the frozen assets.<sup>70</sup>

60 *Ibid.*, § 11.

61 *Ibid.*, § 12. The Trial Chamber continued: ‘an acquittal or other cessation of proceedings does not render the original cooperation requests nor the coercive measures invalid, null or void. The cooperation requests issued in this case remain, but cease to have effect in the sense that States are no longer required to comply with them, for instance by keeping any assets frozen. This, however, does not mean that assets are automatically released in the requested State. It is rather for the State to determine what action to take under domestic law as a result of the conclusion of its obligation to assist the Court through the freezing of assets.’ *Ibid.*, § 13.

62 *Ibid.*, § 15. (Emphasis in original).

63 *Ibid.*

64 *Ibid.*, §§ 16–18. The Trial Chamber observed that it ‘does not have the power to order States to, for instance, “provide a full accounting of the property frozen,” as requested by [counsel for Mr Bemba]’. *Ibid.*, § 18.

65 *Ibid.*, § 21. Trial Chamber III added that ‘the Court’s legal framework does not prohibit the Registry from seeking States’ *voluntary* cooperation in securing the repayment of the advanced legal assistance fees’ (emphasis in original). *Ibid.*, at § 20. The Trial Chamber did, however, caution ‘that States must at all times be made aware that the cooperation obligation under Article 86 of the Statute would not be applicable to such requests’. *Ibid.*

66 Public Redacted Version of ‘Urgent request for partial reconsideration and associated orders’, *Situation in the Central African Republic* (ICC-01/05-01/08-3663-Red), Trial Chamber III, 10 December 2018.

67 *Ibid.*, § 33. In his request, Mr Bemba also provided ‘with greater specificity the information and documents for which reclassification is being sought’. *Ibid.*, § 32.

68 *Ibid.*, § 2.

69 *Ibid.*

70 This article was completed on 1 June 2020. All information is current as of this date.

## B. Bemba's Claim for Compensation and Damages

On 11 March 2019, counsel for Mr Bemba filed a claim for compensation and damages under Article 85 ICC Statute, which governs compensation to an arrested or convicted person.<sup>71</sup> Part of this claim pertains to his assets.<sup>72</sup> In short, Mr Bemba claims that the ICC acted negligently in seizing and freezing his assets, as well as in managing them after their freezing.<sup>73</sup> The total amount of damages sought by Mr Bemba is €42.4 million.<sup>74</sup> In his submission, after detailing the assets seized and/or frozen at the Court's request,<sup>75</sup> Bemba claims that frozen assets ought to be properly managed in order to avoid deterioration in their value<sup>76</sup> and that the ICC had a duty as concerns his assets.<sup>77</sup> Bemba further alleges that the Court was negligent in executing this duty,<sup>78</sup> that he has suffered loss as a consequence of the Court's negligence (or breach of fiduciary duty)<sup>79</sup> and that, for this reason, the ICC must provide him with a remedy.<sup>80</sup>

On 6 May 2019, the Prosecutor filed her response to Mr Bemba's claim for compensation and damages.<sup>81</sup> In her response, only a small part of which addresses the alleged loss to his seized or frozen assets,<sup>82</sup> the Prosecutor refutes Bemba's claim that the purported loss resulting from the seizure of his assets at the Court's request is sufficient to satisfy the criteria of Article 85 ICC Statute.<sup>83</sup> The Prosecutor also challenges Bemba's private law claim against the ICC for the allegedly negligent management of his assets.<sup>84</sup> Notably, the Prosecutor also contests Mr Bemba's understanding of the ICC cooperation regime as it concerns the freezing and seizure of assets.<sup>85</sup> In short, the

71 Art. 85 ICCSt.

72 Bemba Claim for Compensation and Damages, *supra* note 24, §§ 123–165.

73 *Ibid.*, § 6. See also *ibid.*, §§ 123–165.

74 *Ibid.*, § 125.

75 *Ibid.*, §§ 126–132.

76 *Ibid.*, §§ 133–138.

77 *Ibid.*, §§ 139–142.

78 *Ibid.*, §§ 143–150.

79 *Ibid.*, §§ 151–153.

80 *Ibid.*, §§ 154–165.

81 Public redacted version of 'Prosecution's response to Mr Bemba's claim for compensation and damages', 6 May 2019, *Bemba Gombo* (ICC-01/05-01/08-3680-Red), Pre-Trial Chamber II, 6 May 2019.

82 *Ibid.*, §§ 83–102. The Prosecutor confines the majority of her response to arguments concerning Mr Bemba's failure to discharge his burden under Art. 85 ICCSt., the conduct of her office and that of Trial Chamber III, the role of the Legal Representative of Victims and the legality and propriety of his detention.

83 *Ibid.*, § 84, arguing that Bemba fails to demonstrate a 'grave and manifest miscarriage of justice', as required by Art. 85(3) ICCSt., and that, absent such a determination, Bemba cannot rely on Rule 175 ICC RPE as a ground upon which a claim for compensation can be founded. See also *ibid.*, §§ 88–90.

84 *Ibid.*, § 85, submitting that Mr Bemba's arguments as concerns a private law claim are beyond the scope of proceedings under Art. 85 ICCSt. and ought to be dismissed *in limine*. See also *ibid.*, §§ 96–102, contesting the private law nature of Bemba's claim that the Court negligently managed his assets.

85 *Ibid.*, §§ 92–95.

Prosecutor endorses the opinion of Trial Chamber III as articulated in the proceedings concerning the unfreezing of Bemba's assets, namely that the Court transmits requests for cooperation to states, who then decide how to proceed in the execution and lifting of coercive measures pursuant to their respective domestic law.<sup>86</sup> According to the Prosecutor, '[in] this context, . . . a demarcation of responsibility between the Court and States Parties is appropriate given that it is the states which are equipped with the necessary laws, regulations and mechanisms to carry out the freezing and seizure of assets.'<sup>87</sup>

On the same day, the Registry submitted its observations on Bemba's claim for compensation and damages.<sup>88</sup> Among other submissions:

[t]he Registry observes that, notwithstanding that there may be follow-up to the execution of cooperation requests on freezing or seizure of assets, a duty to manage or "fiduciary duty to preserve assets", is not supported by the Court's legal framework. The Defence appears to confound any such "follow-up" on the execution of its cooperation requests with the states' responsibility in connection with the execution of these requests under their respective national laws.<sup>89</sup>

The Registry further emphasized its limited role as a facilitator in the execution of cooperation requests between the Court's judiciary and the requested state(s).<sup>90</sup> The Registry also stressed the dependence of the ICC on state authorities and their national implementing legislation in the context of the Rome Statute cooperation regime<sup>91</sup> and noted that the requested states were cognizant of their obligation to manage the assets they were asked to freeze or seize on behalf of the ICC in the instant case.<sup>92</sup> Notably, the Registry specified that the Portuguese authorities responsible for managing some of Bemba's frozen assets, including his Boeing 727-100 plane that was parked at Faro airport at the time of his arrest, have 'never consulted the Court under articles 96(2) or 100 of the Statute to explain any difficulties [they] may have encountered to manage the said assets located in Portugal once frozen or seized'.<sup>93</sup>

On 9 May 2019, at the request of counsel for Mr Bemba,<sup>94</sup> Pre-Trial Chamber II convened a hearing between the parties to the compensation proceedings, namely the Prosecutor and Mr Bemba.<sup>95</sup> Counsel for Mr Bemba emphasized the indiscriminate nature of the freezing orders implemented at the

86 *Ibid.*, §§ 92 and 93. See also *Bemba Unfreezing Decision*, *supra* note 59, §§ 11 and 12.

87 *Ibid.*, § 94.

88 Public Redacted Version of the 'Registry's Observations on the Defence Compensation Claim', *Bemba Gombo* (ICC-01/05-01/08-3681-Red3), Pre-Trial Chamber II, 6 May 2019.

89 *Ibid.*, § 15.

90 *Ibid.*, §§ 17–23. See also Rule 176 ICC RPE.

91 *Ibid.*, §§ 27–30.

92 *Ibid.*, §§ 31–33.

93 *Ibid.*, § 33.

94 See *Bemba Claim for Compensation and Damages*, *supra* note 24, §169. For the order convening the hearing, among other issues, see Order on the conduct of the proceedings related to 'Mr Bemba's claim for compensation and damages', *Bemba Gombo* (ICC-01/05-01/08-3675), Pre-Trial Chamber II, 14 March 2019.

95 Hearing on Mr Bemba's claim for compensation, *Bemba Gombo* (ICC-01/05-01/08-T-376-ENG), Pre-Trial Chamber II, 9 May 2019 ('Compensation Hearing').

Court's request,<sup>96</sup> the decimation of his assets<sup>97</sup> and the serious nature of freezing orders, noting the limited recourse made thereto by other international(ized) criminal tribunals.<sup>98</sup> In reply, the Office of the Prosecutor largely confined its submissions to disputing the legal basis of Bemba's claim, stressing that he had failed to satisfy the 'grave and manifest miscarriage of justice' criterion set forth in Article 85(3) ICC Statute.<sup>99</sup>

On 20 June 2019, Mr Bemba filed his reply to the responses submitted by the Prosecutor and the Registry to his claim for compensation,<sup>100</sup> in which he reiterates that his claim does indeed satisfy Article 85(3) ICC Statute,<sup>101</sup> that he is entitled to a resolution of his private law claim<sup>102</sup> and that the Registry mischaracterizes, *inter alia*, the value of his frozen assets and his ability to manage them.<sup>103</sup> Bemba also requests that the concerned states, namely Belgium, Portugal and the DRC, should be joined as participants to the proceedings, or invited to submit written observations thereon.<sup>104</sup> On 26 June 2019, the Prosecutor filed a redacted response to Bemba's reply.<sup>105</sup> As with the submissions made by her Office at the hearing, the Prosecutor's response was limited to repudiating Mr Bemba's arguments in support of his claim that he suffered 'a grave and manifest miscarriage of justice'.<sup>106</sup> Finally, on 25 July 2019, the Registry submitted its observations on Mr Bemba's reply.<sup>107</sup> Much of its observations as concerns specific assets are redacted.<sup>108</sup> This said, the Registry underscores that 'most of the assets claimed had either deteriorated before Mr Bemba's arrest or were not frozen or seized on behalf of the Court, or

96 *Ibid.*, at 6, line 11 *et seq.*

97 *Ibid.*, at 10, line 8 *et seq.*

98 *Ibid.*, at 11, line 1 *et seq.* The author disputes the argument by counsel for Mr Bemba that the ICTY, ICTR and SCSL did not request the freezing of the assets of those under their jurisdiction. The ICTY did so with respect to Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić and Vlatko Stojiljković; the ICTR Prosecutor did so with respect to Félicien Kabuga; and the SCSL did so with respect to Sam Hinga Norman. For a detailed discussion of these freezing requests, see D.J. Birkett, 'Asset Recovery at International(ized) Criminal Tribunals: Fines, Forfeiture, and Orders for Reparations', in N.H.B. Jørgensen (ed.), *The International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press, forthcoming).

99 Compensation Hearing, *supra* note 95, at 18, line 4 *et seq.*

100 Public Redacted Version of 'Mr. Bemba's reply to the Prosecution Response to and Registry Submissions on "Mr. Bemba's claim for compensation and damages"', *Bemba Gombo* (ICC-01/05-01/08-3687-Red), Pre-Trial Chamber II, 20 June 2019.

101 *Ibid.*, §§ 12–24.

102 *Ibid.*, §§ 25–26.

103 *Ibid.*, §§ 27–43.

104 *Ibid.*, §§ 44–46.

105 Public redacted version of 'Prosecution's response to Mr Bemba's reply on compensation and damages', 26 June 2019, ICC-01/05-01/08-3690-Conf, *Bemba Gombo* (ICC-01/05-01/08-3690-Red2), Pre-Trial Chamber II, 21 November 2019.

106 *Ibid.*, §§ 7–33.

107 Public Redacted Version of the 'Registry's Observations on Mr Jean-Pierre Bemba Gombo's Lawyers' Reply ICC-01/05-01/08-3687-Conf', *Bemba Gombo* (ICC-01/05-01/08-3689-Red3), Pre-Trial Chamber II, 25 July 2019.

108 *Ibid.*, §§ 23–41.

both'.<sup>109</sup> As for assets belonging to Mr Bemba that were or remain frozen and/or seized at the Court's request, the Registry claims that their management has been carried out in accordance with the procedures applicable thereto under the pertinent domestic legislation.<sup>110</sup> Lastly, the Registry opposes Bemba's request to invite the submissions of the states concerned.<sup>111</sup>

In sum, Mr Bemba and the Registry interpret the Court's statutory framework as concerns the freezing of assets in different ways. Bemba is of the view that the ICC ought to retain a central role in the management of assets frozen at its request, while the Registry expresses the opinion that it is for the requested state(s) to discharge this responsibility in the Rome Statute system. There is no judicial guidance as concerns the management of assets frozen in accordance with requests for cooperation issued by the ICC. If Trial Chamber III's view of the ICC cooperation schema, namely that it is for domestic law to regulate the (un)freezing of assets frozen at the Court's request, also applies to their management, then it is domestic law that must be probed for direction as to how their value can be preserved during often lengthy proceedings.

### 3. Domestic Approaches

The ICC Statute is clear that states ought to execute cooperation requests in accordance with procedures of their respective national laws.<sup>112</sup> ICC states parties are therefore free to legislate as they deem appropriate to enable their domestic authorities to fulfil requests for cooperation transmitted thereto by the ICC. In other words, although Article 88 ICC Statute provides that 'States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation' specified under Part IX thereof,<sup>113</sup> the treaty provides no guidance as to what these procedures should entail. In the following section, it will be shown that there are procedures already available under certain states' domestic law that could offer guidance for other states in the management of assets seized and/or frozen at the Court's behest. Much of this legislation is analysed by the Open-ended Intergovernmental Working Group on Asset Recovery (hereinafter: IWG), a subsidiary body of the Conference of the States Parties to the UN Convention against Corruption,<sup>114</sup> in a 2017 study.<sup>115</sup> One of the aims of this study is to enable those responsible for managing seized and frozen assets 'to learn from the experiences of others and avoiding and/or managing some of the risks and

109 *Ibid.*, § 42.

110 *Ibid.*

111 *Ibid.*

112 Art. 93(1) ICCSt.

113 Art. 88 ICCSt.

114 *Report of the Conference of the States Parties to the United Nations Convention Against Corruption on Its First Session, Held in Amman from 10 to 14 December 2006*, UN Doc. CAC/COSP/2006/12, 27 December 2006, at 5–7.

115 *Study Prepared by the Secretariat on Effective Management and Disposal of Seized and Confiscated Assets*, UN Doc. CAC/COSP/WG.2/2017/CRP.1, 23 August 2017 ('IWG Study').

challenges involved'.<sup>116</sup> Part 2 of the present article has identified some of the risks inherent to the Rome Statute framework for the management of assets frozen at the request of the Court. It is hoped that the legislation analysed in the following paragraphs might provide useful guidance for the mitigation of these risks in the execution of future requests for cooperation from states in the freezing of assets.

At this stage, it is important to elaborate the distinction between freezing and seizure of assets by states at the request of the ICC. First, it is noteworthy that the terms are not defined in the ICC Statute or the ICC RPE. Guidance can, however, be found in the UN Convention Against Corruption, which adopts the following definitions of the terms: “Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.<sup>117</sup> The following section will discuss tools that could be of use to states during both the freezing and seizure phases of the asset recovery process, regardless of whether the legislation in question limits their application to one particular stage.

### A. Third-Party Management of Seized or Frozen Assets

Pursuant to the legislation enacted by the UK to give effect to its obligation to cooperate with the ICC, among other aspects of the ICC Statute regime, applications for asset freezing ought to be made before the High Court ‘in pursuance of a direction given by the Secretary of State under section 38’.<sup>118</sup> In turn, the High Court is empowered to appoint a receiver to manage the assets. According to Schedule 6, section 5(4) International Criminal Court Act 2001: ‘[t]he powers conferred on a receiver ... shall be exercised with a view to securing that the property specified in the order is available for satisfying the forfeiture order or, as the case may be, any forfeiture order that may be made in the ICC proceedings in relation to which the order was made.’<sup>119</sup> In other words, the High Court may appoint a third party — the ‘receiver’ — to manage the frozen assets with a view to preventing their depreciation. Australia,<sup>120</sup> Kenya<sup>121</sup> and New Zealand<sup>122</sup> adopt similar approaches in their respective national implementing legislation, albeit with the third party bearing different designations in each of the three common law jurisdictions.<sup>123</sup>

116 *Ibid.*, at 4.

117 Art. 2(f) UN Convention Against Corruption.

118 International Criminal Court Act 2001, Schedule 6, § 1. See also § 38. For analysis of this legislation, see R. Cryer and O. Bekou, ‘International Crimes and ICC Cooperation in England and Wales’, 5 *Journal of International Criminal Justice (JICJ)* (2007) 441–459.

119 International Criminal Court Act 2001, Schedule 6, § 5(4).

120 International Criminal Court Act 2002, § 82; Proceeds of Crime Act 2001, § 38.

121 International Crimes and International Criminal Court Act 2000, § 130; Criminal Proceeds (Recovery) Act 2009, § 80.

122 International Crimes Act 2008, Schedule 2, § 10 *et seq.*

123 The third party is labelled ‘the Official Trustee’ in Australia, the ‘Official Assignee’ in New Zealand and the ‘Public Trustee’ in Kenya.

It ought to be noted that, despite possessing legislation to give effect to their obligation under Article 88 ICC Statute, none of the above-mentioned states parties include (future) orders for reparations among the grounds upon which orders to freeze or seize assets may be based. This can be contrasted with Ireland’s national implementing legislation, the International Criminal Court Act 2006, which also provides for the appointment of a receiver with the power to take measures to preserve the value of assets.<sup>124</sup> In view of the consistent interpretation by the ICC of Article 57(3)(e) ICC Statute, namely that protective measures can be taken for the purpose of the enforcement of future reparations orders,<sup>125</sup> this ground ought to be explicitly listed by states in their domestic procedures facilitating the identification, tracing, freezing and seizure of assets on behalf of the Court. The Irish national implementing legislation clearly articulates the rationale behind the exercise of the powers of the High Court or a receiver in giving effect to Article 57(3)(e) ICC Statute, as follows:

[T]he powers shall be exercised with a view to—

1. securing that the property covered by an order . . . is available to satisfy any order of the International Criminal Court imposing a fine or forfeiture or providing for reparation to, or in respect of, victims,
2. in the case of realisable property held by a person to whom the defendant has directly or indirectly made a gift . . . , realising no more than the value for the time being of the gift,
3. allowing any person, other than the defendant or the recipient of any such gift, to retain or recover the value of any property held by him or her.

In other words, third-party management of assets seized or frozen at the request of the ICC is designed to protect the interests of victims and bona fide third parties. At the same time, even though not overtly noted in the foregoing provision, such procedures also enable third parties to take measures to preserve the value of assets in the interests of the accused person(s) in the event of an acquittal. In the view of the present author, this is a highly important yet

124 International Criminal Court Act 2006, § 38(4). (. . . the High Court may make an order (in this Part referred to as a “freezing order”) prohibiting any person from dealing with the property of the person to whom the request relates if the Court is satisfied — (i) that this section applies in relation to the property, and (ii) either — (I) that the International Criminal Court has imposed a fine, or made a *reparation* or forfeiture order, in the proceedings concerned, or (II) that there are reasonable grounds for believing that that Court may impose a fine, or make such an order, in those proceedings’.)

125 See Decision on the Prosecutor’s application for a warrant of arrest, Art. 58, *Lubanga Dyilo* (ICC-01/04-01/06-1-Corr-Red), Pre-Trial Chamber I, 10 February 2006, § 134 (“The Chamber considers that in light of rule 99 of the Rules, the contextual interpretation of article 57 (3) (e) of the Statute makes clear that the Chamber may, pursuant to article 57 (3) (e) of the Statute, seek the cooperation of States Parties to take protective measures for the purpose of securing the enforcement of a future reparation award”); Decision on the implementation of the request to freeze assets, *Kenyatta* (ICC-01/09-02/11-931), Trial Chamber V(b), 8 July 2014, § 16; *Kilolo* Lifting Decision, *supra* note 11, §§ 17 and 18; Judgment on the appeal of the Prosecutor against the decision of [REDACTED], [REDACTED] (ICC-ACRed-01/16), Appeals Chamber, 15 February 2016, § 63. For analysis, see Birkett, *supra* note 2; Ferstman, *supra* note 11, at 234–237 (discussing the *Lubanga* and *Kenyatta* cases).



ostensibly overlooked aspect of the protective measures process under Article 57(3)(e) ICC Statute.

### *B. Use or Sale of Frozen Assets*

In addition to the involvement of court-appointed third parties in the management of assets seized and/or frozen at the request of the ICC, certain states have also adopted (both legally binding and non-legally binding) instructions for those responsible for the management of such assets. For example, in the UK, section 296(1) Proceeds of Crime Act states, in relevant part, as follows: '[i]f cash is detained . . . for more than 48 hours . . . , it is at the first opportunity to be paid into an interest-bearing account and held there; and the interest accruing on it is to be added to it on its forfeiture or release'.<sup>126</sup> In respect of depreciable assets, further guidance, in the form of a code of practice concerning the search, seizure and detention of property, provides:

An appropriate officer should consider the proportionality of detention. This includes the calculation of the likely costs of storage and insurance as against the value of the property (particularly depreciating assets) in order to assess whether it is reasonable to continue to detain the property rather than seek a consent order for its sale or to take steps to release it. Conversely, this also includes calculating the value of the property against the likely amount to be found under any confiscation order — steps should be taken to release property should it exceed the probable value of such a future order.<sup>127</sup>

One issue raised by Bemba in his claim against the ICC for compensation and damages is the failure of those responsible for managing his frozen assets to earn an income from, or to sell, his aircraft.<sup>128</sup> It could be beneficial for the accused (should there be an acquittal) and victims (in the event of a conviction and consequent reparations order) for certain categories of assets to be actively utilized, or sold, rather than remaining frozen, and therefore unprofitable, if not lossmaking, for long periods of time. The IWG identifies a number of kinds of such assets.<sup>129</sup> These include perishable goods, 'rapidly depreciating' assets, property whose maintenance or storage costs are disproportionate to its value, and assets whose management needs expertise that is not readily available to the responsible authority.<sup>130</sup> Bemba's Boeing jet, as well as his other frozen vehicles, whether for use on land, air or sea, would appear to fall into the 'rapidly depreciating' category of assets. Additionally, in view of the costs incurred by parking at Faro airport, there would only have been a short window of time during which it would have been viable to contend that the storage costs of this asset were proportionate to its anticipated value. Other assets that could fall into one of the foregoing categories include live animals

126 Proceeds of Crime Act 2002, § 296(1).

127 *Code of Practice Issued under Section 47S of the Proceeds of Crime Act 2002: Search, Seizure and Detention of Property (England and Wales)*, March 2016, § 130.

128 Bemba Claim for Compensation and Damages, *supra* note 24, at §§ 129–132.

129 IWG Study, *supra* note 115, at 21–24.

130 *Ibid.*, at 22 and 23.

(such as racehorses), foodstuffs, fuel, building materials and hazardous substances.<sup>131</sup>

Certain ICC states parties legislate for the interim use, or sale, of frozen assets in this manner. For example, Canada's Seized Property Management Act grants the Minister of Public Works and Government Services the following powers with respect to seized assets:

- a. ... to make an interlocutory sale of perishable or rapidly depreciating property;
- b. ... to destroy ... property that has little or no value; and
- c. ... to have property, other than real property or a conveyance, forfeited[.]<sup>132</sup>

Similarly, in the Netherlands, the Public Prosecutor's Office is permitted to authorize the sale, destruction, disposal of or use for purposes other than investigative purposes of objects:

- a. which are not suitable for storage;
- b. whose storage costs are not in reasonable proportion to their value; [and]
- c. which are replaceable and whose value can be easily determined.<sup>133</sup>

According to the IWG, the Netherlands' dual-pronged approach of: (i) establishing a 'central registration system that allows for swift action to be taken when costs exceed the value of the asset' and (ii) adopting 'an aggressive strategy of selling off assets pre-confiscation' permitted the Dutch authorities to cut the costs of managing movable seized and confiscated assets from €23 million per year to €9 million per year.<sup>134</sup> Additionally, such an approach is in accordance with legislation enacted by the European Union<sup>135</sup> and non-binding principles adopted by the Organization of American States<sup>136</sup> and the G8 Group of States.<sup>137</sup> Without speculating as to the redacted content in the

131 *Ibid.*

132 Seized Property Management Act 1993, § 7(2).

133 Art. 117(2) Code of Criminal Procedure. See also Art. 117(1) Code of Criminal Procedure.

134 IWG Study, *supra* note 115, at 21.

135 *Ibid.* See Art. 10 Directive 2014/42/EU, OJ L127/39, 3 April 2014 ('1. Member States shall take the necessary measures, for example by establishing centralised offices, a set of specialised offices or equivalent mechanisms, to ensure the adequate management of property frozen with a view to possible subsequent confiscation. 2. Member States shall ensure that the measures referred to in paragraph 1 include the possibility to sell or transfer property where necessary.').

136 *Ibid.* See Organization of American states, *Asset Management Systems in Latin America and Best Practices Document on Management of Seized and Forfeited Assets* (2011) at 17 ('There should be a law that regulates proceedings that, under conditions established in domestic legislation, allow the sale of perishable assets or assets that lose their value quickly, such as boats, airplanes, vehicles, animals and farms with crops. States should also evaluate the possibility of authorizing the advanced sale of assets that are too costly to maintain.').

137 *Ibid.* See G8 Lyon/Roma Group, Criminal Legal Affairs Subgroup, 'Best Practices for the Administration of Seized Assets', 27 April 2005, at 3 ('Legal proceedings should be possible to permit, under conditions laid down in national law, pre-judgment sale of assets pending the outcome of the confiscation/forfeiture proceeding for wasting assets that are perishable or rapidly declining in value, such as vessels, aircraft, cars, animals and farms with growing crops. States should further consider authorising pre-judgment sale of assets which are too

multiple documents filed in support of and in response to Bemba's claim for compensation and damages, it is sufficient to say that following such guidelines (or, in the case of European Union (EU) member states, applying the provisions of their legislation transposing the pertinent EU Directive into their respective domestic legal frameworks) ought to diminish the likelihood that further such claims might be brought before the Court in future. The following section briefly discusses possible steps that could be taken on the international plane to avoid or to remedy the mismanagement of assets frozen or seized at the request of the ICC.

#### 4. International Responses

André Nollkaemper and Dov Jacobs term shared responsibility as 'ex post facto responsibility for contributions to injury', with a particular focus on 'situations where collaboration between two or more actors leads to harmful outcomes'.<sup>138</sup> Göran Sluiter further delineates this concept as it applies in the context of international(ized) criminal tribunals, arguing that, in the context of institutions, like the ICC, established to deliver international criminal justice, 'the emphasis lies on the prevention of harm', i.e. (serious) human rights violations.<sup>139</sup> Having analysed the problem of sharing responsibility between the (often multiple) relevant actors in three phases of international criminal proceedings, Sluiter concludes, *inter alia*, that a 'number of scenarios were insufficiently anticipated and regulated' when framing the ICC Statute and other sources of applicable law before the Court.<sup>140</sup> It is argued here that the modalities of and responsibility for managing assets frozen at the request of the ICC should be added to that list. Mismanaging such assets has the potential to (seriously) violate the human rights of the person whose assets are frozen as well as those of bona fide third parties.<sup>141</sup> The following paragraphs probe three provisions of the Rome Statute which could offer routes through which the risk of committing such violations might be mitigated.

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burdensome to maintain. The resulting proceeds should be secured in accordance with national law (and the action notified to the court and other affected parties) pending a final determination of confiscation or forfeiture.').

138 A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', 34 *Michigan Journal of International Law* (2013) 359–438, at 365.

139 G. Sluiter, 'International Criminal Tribunals and their Relation to States', in A. Nollkaemper and I. Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017) 212–235, at 215.

140 *Ibid.*, at 232.

141 Nollkaemper and Jacobs explicitly identify the example of 'infringing the rights of third parties' in describing what they mean by 'the term *responsibility*'. See Nollkaemper and Jacobs, *supra* note 138, at 365.

### A. Utilizing Article 96(3) ICC Statute

Simply because Article 88 ICC Statute does not dictate a particular method that states parties should follow in ensuring the availability of procedures under their domestic law for all forms of cooperation detailed in Part IX of the Court's constituent instrument, this is not to say that the ICC cannot request states to properly manage assets frozen or seized at its request. Article 93(1)(k) ICC Statute, read together with Article 93(1)(l) and Article 96 ICC Statute, appears to provide a sound legal basis for such requests inasmuch as these provisions not only empower the ICC to request its states parties to assist in freezing and seizing assets, but also with '[a]ny other type of assistance which is not prohibited by the law of the requested state, with a view to facilitating the investigation and prosecution of crimes' within its jurisdiction.<sup>142</sup> Should the requested state(s) face problems in executing the Court's demand(s) because of domestic law requirements, Article 96(3) ICC Statute provides for an avenue through which these obstacles could be surmounted, namely consultations between the concerned state(s) and the ICC.<sup>143</sup> A document issued by the UN Security Council Al-Qaida Sanctions Committee provides useful guidance in this context: 'Whatever ... body is responsible for regulating frozen assets should make reasonable efforts to do so in a manner that does not result in their undue deterioration, provided that this does not conflict with the overall intention behind the freezing action'.<sup>144</sup> In the Rome Statute system, the body responsible for the daily administration of assets frozen at the request of the ICC is the pertinent authority (or authorities) within the requested state. But this state of affairs need not prevent the ICC, whose officials establish the intention(s) behind the freezing action, from acting in concert with the responsible domestic authorities to ensure that the aims(s) intended are not thwarted by misunderstandings and/or mismanagement.<sup>145</sup>

### B. Lessons from Article 106 ICC Statute

Article 106 ICC Statute specifies how the enforcement of ICC-determined sentences and the conditions of imprisonment applicable thereto are overseen. Specifically, Article 106(1) ICC Statute provides that '[t]he enforcement of a sentence of imprisonment shall be subject to the supervision of the Court'.<sup>146</sup> It is argued that a similar arrangement could be particularly well suited to the management of assets frozen by states following receipt of a cooperation request from the Court. In other words, the ICC could play a more prominent role in supervising how frozen assets are managed after the responsible

142 Art. 93(1)(l) ICCSt.

143 Art. 96(3) ICCSt.

144 Al-Qaida Sanctions Committee, 'Assets Freeze: Explanation of Terms', 24 February 2015, available online at <https://www.un.org/securitycouncil/sanctions/1267> (visited 1 June 2020), § 11.

145 For examples, see *Bemba* Claim for Compensation and Damages, *supra* note 24, §§ 147–149.

146 Art. 106(1) ICCSt.

authorities of the requested state(s) have taken enforcement action pursuant to the procedures available under their respective national laws. Article 106(2) ICC Statute could also serve as a guideline in terms of clarifying the standards against which the state authorities' management of assets frozen at the Court's request ought to be held. The provision stipulates that the 'conditions of imprisonment shall be governed by the law of the state of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners'.<sup>147</sup> The Rome Statute already provides that the freezing of assets in accordance with an ICC-issued cooperation request ought to be done under the pertinent provisions of national law.<sup>148</sup> As for international standards governing the management of frozen assets, it is acknowledged that widely accepted treaty standards might be more difficult to identify than those applicable to the treatment of prisoners. This said, the European Court of Human Rights and the Inter-American Courts of Human Rights have each developed principles relevant to the application of asset freezing measures, a number of which could be germane to the supervision of the management of assets frozen by states at the ICC's request.<sup>149</sup> The legislation analysed in the IWG Study and discussed in Part 3 could also offer a useful starting point for determining the standards applicable to managing such assets.

### *C. Amending Article 85(3) ICC Statute?*

As Stuart Beresford has reasoned, 'in many criminal jurisdictions innocent persons who have been prosecuted ... may be compensated for the ... economic losses they have suffered as a direct result of the proceedings against them'.<sup>150</sup> Dave Michels has further observed that such compensation may be made available to those who are accused and subsequently acquitted in a number of national jurisdictions.<sup>151</sup> Compensation to acquitted accused also

147 Art. 106(2) ICCSt.

148 Art. 93(1) ICCSt. See also Art. 88 ICCSt.

149 ECtHR, *Džinić v. Croatia*, Appl. No. 38359/13, Judgment, 17 May 2016, §§ 59-82 (finding that asset freezing measures must be: (i) of an impermanent nature; (ii) lawful; (iii) executed in pursuit of a legitimate aim and (iv) proportional; IACtHR, *Case of Chaparro Álvarez and Lapo Íñiguez v Ecuador*, Judgment, 21 November 2007, §§ 183-218 (holding that such measures must: (i) be adopted and supervised by a judicial body; (ii) not result in acquitted persons having to pay fees arising from the management of their seized or frozen assets and (iii) allow for the prompt release of seized or frozen assets when the reason(s) for the application of the measures no longer apply). For a more detailed analysis, see D.J. Birkett, 'Asset Freezing at the European and Inter-American Courts of Human Rights: Lessons for the International Criminal Court, the United Nations Security Council, and States', *Human Rights Law Review* (forthcoming).

150 S. Beresford, 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals', 96 *American Journal of International Law* (2002) 628-646, at 628.

151 See J.D. Michels, 'Compensating Acquitted Defendants for Detention before International Criminal Courts', 8 *JICJ* (2010) 407-424, at 413 (listing Austria, Denmark, Germany, Iceland, Italy, Latvia, the Netherlands, Norway and Sweden as having procedures available for such compensation).

forms part of the Rome Statute system, Article 85(3) of which reads: ‘In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.’<sup>152</sup> It has been convincingly shown elsewhere<sup>153</sup> that Mr Bemba’s prospects of securing compensation under Article 85(3) ICC Statute are slim, not least because the provision makes no reference to the mismanagement of assets. Indeed, according to Kip Hale and Santiago Vargas Niño, to agree with Bemba’s view that Rule 175 ICC RPE ‘warrants compensation for damage, devaluation or destruction of property under Article 85(3) would stretch the “ordinary meaning” of these provisions to the point of breaking’.<sup>154</sup> Article 85(3) ICC Statute would therefore seem not to offer an especially suitable avenue for recourse for those alleging the mismanagement of their assets frozen at the Court’s request. But the narrowness of this provision has been challenged in the academic literature, albeit outside the context of the management of frozen assets.

Dave Michels has proposed the addition of the following provision, among others,<sup>155</sup> to follow Article 85(3) ICC Statute: ‘Compensation may be awarded by a Chamber, where it considers such compensation consistent with the interests of justice, to a person who has been released from detention following a final decision of acquittal.’<sup>156</sup> Róisín Mulgrew has made a similar plea for amendment of the provision, arguing in favour of the removal of the terms ‘grave and manifest’ and ‘exceptional circumstances’.<sup>157</sup> These suggestions are

152 Art. 85(3) ICCSt. Rules 173–175 ICC RPE also form part of the system governing compensation to an arrested or convicted person, but remain subordinate to the Rome Statute.

153 See K. Hale and S. Vargas Niño, ‘Unexploded Legal Ordnance’, *Opinio Juris*, 10 April 2019, available online at <http://opiniojuris.org/2019/04/10/unexploded-legal-ordnance/> (visited 1 June 2020); K.J. Heller ‘Bim, Bam, Bem-Boom!’, *Opinio Juris*, 12 March 2019, available online at <http://opiniojuris.org/2019/03/12/bim-bam-bemb-oom/> (visited 1 June 2020). On the high threshold required by Art. 85(3) ICCSt., see Decision on the ‘Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome’, *Ngudjolo Chui* (ICC-01/04-02/12-301-tENG), Trial Chamber II, 16 December 2015, § 45; S. Zappalà, ‘Compensation to an Arrested or Convicted Person’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 1577, at 1583; Beresford, *supra* note 150, at 643 (discussing the burden of establishing ‘a grave and manifest miscarriage of justice’, albeit outside the context of the Art. 85(3) ICCSt. regime); J. van Wijk and B. Holá, ‘Acquittals in International Criminal Justice: Pyrrhic Victories?’ 30 *IJIL* (2017) 241–262, at 257.

154 Hale and Vargas Niño, *supra* note 153. Rule 175 ICC RPE provides as follows: ‘In establishing the amount of any compensation in conformity with article 85, paragraph 3, the Chamber designated under rule 173, sub-rule 1, shall take into consideration the consequences of the grave and manifest miscarriage of justice on the personal, family, social and professional situation of the person filing the request.’

155 Michels, *supra* note 151, at 423.

156 *Ibid.*

157 R. Mulgrew, ‘The Costs of Suspicion: A Critical Analysis of the Compensation Scheme Established by Article 85(3) of the Rome Statute’, in R. Mulgrew and D. Abels (eds),

not confined to academic debate, with the delegations to the 1998 Rome Conference expressing disagreement as to the breadth of this provision, as follows: '[i]here are delegations which believe that there should not be an unfettered right to compensation where a person is acquitted or released prior to the end of the Trial. ... Other delegations considered this text to be too restrictive.'<sup>158</sup> There might therefore be some appetite for amending this provision, although it is acknowledged that few changes have been made to the treaty since its adoption in the Italian capital.

What, then, can be done to rectify this unfortunate situation? Hale and Vargas Niño argue that the ICC ought to use the occasion to 'consider cross-organ supervision over frozen assets and like matters, as well as developing methods to maintain transparent two-way communication with relevant state authorities'.<sup>159</sup> As proposed in the present article, the Rome Statute already contains a means through which the latter might be realized, namely Article 96(3) ICC Statute. It is also argued that the division of labour between the Court and requested states should be clarified as far as the management of seized and frozen assets is concerned. Is the involvement of the ICC limited to an oversight role after the cooperation request has been issued? Or ought the Court, through the Registry, play a more proactive role in the management of frozen assets in view of the various competing interests (which include those of the accused, bona fide third parties, potential victims and the prosecution) concerned in the protective measures process? It is the view of the present author that, at a minimum, the ICC must share responsibility with the requested states for the management of assets frozen pursuant to the Rome Statute.<sup>160</sup> As argued in the preceding paragraphs, the regime governing the supervision of the enforcement of ICC-determined sentences could serve as inspiration for establishing such a framework. If, like the International Criminal Tribunal for the former Yugoslavia, the ICC can be said to be 'like a giant without arms and legs ... [which] needs artificial limbs to walk and work',<sup>161</sup> the state authorities that act as those limbs are part of a wider body, which includes the Court.

## 5. Conclusion

In his claim for compensation and damages, Mr Bemba notes that he was acquitted on 8 June 2018 and advocates that, '[i]n a perfect world, the

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*Research Handbook on the International Penal System* (Edward Elgar Publishing, 2016) 476–477, at 445.

158 Working Paper on Art. 84, A/CONF.183/C.1/WGPM/L.74, 11 July 1998, fn. 3. See also Hale and Vargas Niño, *supra* note 153; Mulgrew, *supra* note 157, at 477.

159 Hale and Vargas Niño, *supra* note 153.

160 For a similar opinion, see Heller, *supra* note 153.

161 A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998) 2–17, at 13.

Appeals Chamber should have made orders relating to the freezing of . . . assets *eiusdem generis* to those sought herein'.<sup>162</sup> Clarity on the part of the Court in this regard could have avoided the need for further filings on behalf of Mr Bemba. In the absence of such orders, this article has sought to shed light on the fallout of the *Bemba* acquittal as far as his frozen assets are concerned. In so doing, it has been shown that lacunae exist in the legal framework applicable to the management of frozen assets under the Rome Statute system. At the very least, the filings issued in the aftermath of Bemba's acquittal show that the division of labour between the (organs of) the Court and the states parties to its constituent instrument could be made clearer in this crucial sphere of its operations.

The risk that assets will depreciate in value during the pre-trial, trial and appeal processes at the ICC and, indeed, at other international(ized) criminal tribunals, is arguably greater than at the domestic level because of the average length of these processes. This could render states' national legislation as concerns the freezing and management of assets less than ideally suited for application in response to requests for cooperation from the Court under the Rome Statute. This article has sought to identify procedures available under certain states' domestic law that might provide stimulation for those states in the process of adopting legislation allowing their national authorities to cooperate with the ICC. It is conceivable that, in deciding on Bemba's claim for compensation and damages, Pre-Trial Chamber II will follow the reasoning adopted by Trial Chamber III in determining Bemba's application to have his assets partially unfrozen, i.e. that states' national legislation governs the freezing of assets at the behest of the ICC. If Pre-Trial Chamber II is of the opinion that this relationship also applies to the management of assets frozen at the Court's request, then states should ensure that their national implementing legislation allows their responsible domestic authorities to preserve the value of any frozen or seized assets throughout the routinely protracted proceedings at the international level. At the same time, there are avenues through which the ICC and the Assembly of states parties to the Rome Statute could work to ameliorate the present state of affairs, namely by maximizing the opportunity provided by Article 96(3) ICC Statute, by learning from the regime established by Article 106 ICC Statute and by considering amendments to Article 85(3) ICC Statute.

Had Mr Bemba been convicted on appeal, it is entirely plausible that victims' representatives could have made similar representations to those filed by Bemba in the instant case, claiming instead that his frozen assets should have been better managed with a view to their being used to secure the enforcement of a reparations award against him. Equally, having been acquitted on appeal of all charges of crimes against humanity and war crimes levied against him by the ICC Prosecutor, Bemba ought to be put in a position resembling that which he occupied prior to his (arrest and) assets being frozen, minus any expenses incurred during proceedings. It is only by

162 *Bemba Unfreezing Application*, *supra* note 33, § 51.



acting in concert that the ICC and its states parties can ensure that the value of assets frozen pursuant to the Rome Statute is preserved, regardless of who the ultimate beneficiaries of adopting such an approach may be.

## 6. Postscript

Pre-Trial Chamber II rendered its decision on Mr Bemba's claim for compensation and damages on 18 May 2020.<sup>163</sup> Consistent with the focus of most of the filings submitted throughout the litigation discussed in this article, much of the Pre-Trial Chamber's analysis focused on whether the claim at hand satisfied Article 85(3) ICC Statute,<sup>164</sup> with only a few paragraphs dedicated to Mr Bemba's claim that the ICC mismanaged his frozen assets.<sup>165</sup> In short, Pre-Trial Chamber II concluded that it had no jurisdiction over this component of Mr Bemba's request because the claim fell outside the scope of its mandate under Article 85 ICC Statute.<sup>166</sup> The Pre-Trial Chamber did, however, explicitly note that this decision was 'without prejudice to Mr Bemba's right to pursue other procedural remedies' in connection with this element of his claim.<sup>167</sup> Mr Bemba has since sought leave to appeal the Pre-Trial Chamber's decision under Article 82(1)(d) ICC Statute.<sup>168</sup>

In reaching its decision it is conceivable that Pre-Trial Chamber II might have found itself between a rock and a hard place. On the one hand, if it had found the Court to be at fault in managing Mr Bemba's assets, not only might he have been entitled to a large sum of money by way of compensation, but the accompanying reputational damage to the ICC could also have been significant. On the other hand, if the Pre-Trial Chamber had found that the blame for the diminished value of Mr Bemba's assets lay at the feet of the three states responsible for their freezing, this might have resulted in negative consequences for the Court's relationship with these states, thereby rendering cooperation less forthcoming in the future. In the end, by finding that the second component of Mr Bemba's claim fell beyond the scope of Article 85 ICC Statute, the Pre-Trial Chamber did neither, although it did appear to absolve the Registry of any fault in 'in acting as a channel of communication between the Court and the requested Three States'.<sup>169</sup> If Mr Bemba's application for leave to appeal succeeds, it is the hope of the present author that the Appeals Chamber is able to shed some much-needed further light on the division of labour between the Court and cooperating States as far as managing frozen assets is concerned. For example, although Pre-Trial Chamber II observed that 'the responsibility

163 Decision on Mr Bemba's claim for compensation and damages, *Bemba Gombo* (ICC-01/05-01/08-3694), Pre-Trial Chamber II, 18 May 2020 ('*Bemba* Pre-Trial Chamber Decision').

164 *Ibid.*, §§ 18–52.

165 *Ibid.*, §§ 53–64.

166 *Ibid.*, § 61.

167 *Ibid.*, § 64.

168 Request for leave to appeal the 'Decision on Mr Bemba's claim for compensation and damages', *Bemba Gombo* (ICC-01/05-01/08-3695), Pre-Trial Chamber II, 25 May 2020.

169 *Bemba* Pre-Trial Chamber Decision, *supra* note 163, § 58.

for the proper execution of a cooperation request emanating from the Court rests primarily with the requested States',<sup>170</sup> it is argued that the terms 'proper' and 'primarily' are both in need of elaboration, not least in view of the rights of the accused at stake in this process.

If clarification is not forthcoming on this front, whether because Mr Bemba's request for leave to appeal is not granted or if it succeeds but the Appeals Chamber reaches a similar conclusion to that of Pre-Trial Chamber II on the question of jurisdiction, then it is for the states parties to the ICC Statute to act. In its decision on Mr Bemba's claim for compensation, the Pre-Trial Chamber laudably draws attention to the arguably excessive length of proceedings (and Mr Bemba's time in custodial detention) in the present case and even intimates that the Court's constituent instrument, including but not limited to Article 85(3) ICC Statute, should be reviewed in order to better protect the rights afforded to accused persons therein.<sup>171</sup> If such a review is undertaken and, in the words of the Pre-Trial Chamber, 'if the Court's aim is to serve as a beacon at the forefront of all matters pertaining to individual human rights',<sup>172</sup> then surely the issue of who bears responsibility for the proper management of assets frozen at the ICC's request, and the modalities of their unfreezing after an acquittal, is deserving of attention.

170 *Ibid.*, § 57.

171 *Ibid.*, §§ 67–68.

172 *Ibid.*, § 68.