

PANEL II

ACHIEVING JUSTICE AT THE INTERNATIONAL CRIMINAL COURT

DISCUSSION TOPIC

**RESPONSIBILITY FOR PROPERTY AND ASSETS FROZEN OR SEIZED BY STATES UPON  
REQUEST BY THE INTERNATIONAL CRIMINAL COURT**

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**Abstract**

Article 57(3)(e) of the Rome Statute of the International Criminal Court empowers the International Criminal Court 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’ while Article 93(1)(k) imposes an obligation on state parties to the statute to provide assistance to the Court in the ‘identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture’. However, the Court does not yet have sufficient jurisprudence to flesh out the conceptual and practical boundaries of these provisions, including the question of responsibility for the management of the frozen or seized property and assets. If the Court’s very limited relevant jurisprudence is anything to go by, it is urgently necessary to interrogate these provisions and their practical application, as these questions lie at the very core of the Court’s integrity and credibility. This is especially so as the Court seeks to expand its practical reach beyond (mainly indigent) non-state actors to state actors, a situation that is likely to call more attention to the Court’s powers and responsibilities specifically relating to Articles 57(3)(e) and 93(1)(k). This article interrogates the Court’s powers under Article 57(3)(e) and the extent of obligations of the Court and state parties arising from Article 93(1)(k), and the possible implications for the rights of accused persons, the rights and expectations of victims and for state cooperation.

**1 Introduction**

The International Criminal Court (ICC or Court), has authority to take protective measures in relation to the property and assets of an accused person. Article 57(3)(e) of the Rome Statute of the International Criminal Court (Rome Statute) empowers the Pre-Trial Chamber as follows that–

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

Article 93(1)(k) referred to above provides that–

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: 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.

The powers bestowed upon the Court under Article 57(3)(e) and the obligations imposed on state parties under Article 93(1)(k) together raise complex questions relating to international legal obligations; responsibility of states; responsibility of international organisations; shared responsibility between states and international organisations; and state cooperation. This article engages with these questions and explores their possible implications.

Sections 3 and 4 interrogate the nature of the Court's powers under Article 57(3)(e) and the extent of the Court's and state parties' obligations and responsibilities under Article 93(1)(k) from the position of the law of responsibility for internationally wrongful acts. Section 5 engages with the practical application of Articles 57(3)(e) and 93(1)(k) by discussing possible implications of the above powers, obligations and responsibilities for the rights of accused persons, for the rights of victims before the Court and for state cooperation. In so doing, sections 3, 4 and 5 make reference to the Court's limited relevant jurisprudence, specifically *The Prosecutor v Jean-Pierre Bemba Gombo*, the only case before the Court where Articles 57(3)(e) and 93(1)(k) have been litigated post-acquittal. The article concludes that the Court's approach to the interpretation and application of Articles 58(3)(e) and 93(1)(k) has been evasive and narrow and that the Court has failed to provide sufficient guidance on management of assets seized and frozen pursuant to Articles 57(3)(e) and 93(1)(k) of the Rome Statute. Consequently, this state of affairs has exposed accused persons to violations of their rights to fair trial, private and family life and quiet enjoyment of property, and may potentially frustrate victims' right to reparations and potentially dampen state cooperation.

## 2 The Bemba Debacle

The presentation and writing of this article occurred against the backdrop of the legal controversy surrounding assets belonging to Mr Jean-Pierre Bemba Gombo that were frozen or seized by state parties to the Rome Statute upon the request of the ICC. While the article engages in a general discussion of powers and obligations under Articles 57(3)(e) and 93(1)(k) of the Rome Statute, it uses the *Bemba* Case as a reference point.<sup>1</sup> As such, it is proper to briefly highlight the case before proceeding to the general discussion.

In a Claim filed before Pre-Trial Chamber II of the Court (PTC II) in March 2019<sup>2</sup> following his acquittal by the Appeals Chamber of the Court,<sup>3</sup> Mr Bemba sought compensation for the mismanagement and destruction of and damage to his property frozen or seized by state parties (specifically Belgium, Portugal, the Democratic Republic of the Congo and Cape Verde) upon request by the Court pursuant to Articles 57(3)(e) and 93(1)(k) of the Rome Statute. Mr Bemba spent ten years from 2007–2018 in pre-trial and trial detention, and during this time, he did not have access to most of these assets.<sup>4</sup> Mr Bemba alleged that as a result of the acts and omissions of the Court's Office of the Prosecutor (OTP) and Registry and of state parties, his assets valued at millions of Euros (including villas, motor vehicles, aircrafts, boats and bank accounts) had significantly deteriorated, depreciated or been destroyed during the ten years of his detention.<sup>5</sup> He alleged that instead of managing his assets in order to preserve or maximise their value, the responsible Court and/or state organs had instead neglected them leading to disintegration, deterioration and the raking up of debts in the form of fees and taxes. He argued that because these assets were frozen or seized by state parties pursuant to the Court's requests under Articles 57(3)(e) and 93(1)(k) of the Rome Statute, the Court had a responsibility to ensure that these assets were properly managed and preserved. Additionally, Mr Bemba argued that the Court has a responsibility to intervene with the relevant state parties in getting his assets unfrozen after his acquittal. Despite being notified of Mr Bemba's acquittal, most of these states had refused to unfreeze and hand over the property to Mr Bemba, and Mr Bemba's multiple requests to the Court's Registry to assist in getting his assets unfrozen by the concerned states were rebuffed.<sup>6</sup>

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<sup>1</sup> Preliminary observations on the *Bemba* Case were published earlier in the form of a blog post. See Owiso Owiso, "'Oops, We Misplaced the Keys...Too Bad!': The International Criminal Court and the Fiasco of Mr Jean-Pierre Bemba's Compensation Claim" *EJIL:Talk!* (03 June 2020) <https://www.ejiltalk.org/oops-we-misplaced-the-keystoo-bad-the-international-criminal-court-and-the-fiasco-of-mr-jean-pierre-bembas-compensation-claim/> accessed 03 June 2020.

<sup>2</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Second Public Redacted Version of 'Mr. Bemba's claim for compensation and damages', International Criminal Court, ICC-01/05-01/08-3673-Red2 (19 March 2019).

<sup>3</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's 'Judgment Pursuant to Article 74 of the Statute', International Criminal Court, ICC-01/05-01/08-3636-Red (08 June 2018).

<sup>4</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Summary of the Decision on Legal Assistance for the Accused, International Criminal Court, Trial Chamber III, ICC-01/05-01/08-568 (20 October 2009) para 16.

<sup>5</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Second Public Redacted Version of 'Mr. Bemba's claim for compensation and damages', International Criminal Court, ICC-01/05-01/08-3673-Red2 (19 March 2019) paras 123–165. See also *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted Version of Mr. Bemba's Request for the Designation of a Pre-Trial Chamber Pursuant to Regulation 46(3) of the Regulations of the Court', International Criminal Court, ICC-01/05-01/08-3698 (03 November 2020) para 3–35.

<sup>6</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted Version of Mr. Bemba's Request for the Designation of a Pre-Trial Chamber Pursuant to Regulation 46(3) of the Regulations of the Court', International Criminal Court, ICC-01/05-01/08-3698 (03 November 2020) para 4.

In its May 2020 decision, Pre-Trial Chamber II dismissed the Claim, arguing that it did not have jurisdiction under Article 85 of the Rome Statute under which the Claim was filed, or indeed under any other provision of the Rome Statute, to consider the Claim for compensation for spoliation of assets.<sup>7</sup> PTC II argued further that ‘the responsibility for the proper execution of a cooperation request emanating from the Court rests primarily with the requested States’<sup>8</sup> and that ‘[t]o the extent that any damage to Mr Bemba’s assets might have arisen in connection with or as a result of the conduct of operations of those States, the Chamber ... is not competent to adjudicate the matter’.<sup>9</sup> On 01 October 2020, PTC II maintained this position in dismissing Mr Bemba’s request to appeal the 18 May 2020 decision, holding that because it had dismissed the claim based on lack of jurisdiction, ‘the Chamber has never rendered “a final determination of the question of whether [Mr Bemba’s] fundamental human rights have been violated by the seizure and destruction of his property”’ which could qualify as an interlocutory decision appealable under Article 82(1)(d).<sup>10</sup>

PTC II in its May 2020 decision highlighted above appears to have taken its cue from Trial Chamber III (TC III) which, in dismissing an earlier (2018) request by Mr Bemba for the partial unfreezing of his assets, resorted to a rather circular interpretation of Articles 57(3)(e) and 93(1)(k), arguing that—<sup>11</sup>

[A]ctions directed at freezing or seizure are pursued exclusively through the cooperation regime of Part 9 of the Statute, including such action taken under Article 57(3)(e) of the Statute and Article 93(1)(k) of the Statute. Therefore, the Court itself does not order the freezing or seizure of assets, but rather orders that cooperation requests be sent to States for them to do so. The State then decides to either directly enforce the Court’s request for freezing or seizure if so permitted under domestic law, or to use the information provided in the Court’s request to initiate domestic proceedings to preserve the assets. Irrespective of which approach the State applies, the assets are ultimately frozen or seized on the basis of actions taken by that State under its domestic law.

By the same token, the lifting of coercive measures, including the unfreezing of assets, must be done under domestic law. The Chamber thus notes that ... it is not the competent body to order the lifting of any such orders.

Because PTC II had rejected his claim on the basis that it did not have jurisdiction, Mr Bemba subsequently requested the Court’s Presidency on 03 November 2020 specifically to constitute a Pre-Trial Chamber with express jurisdiction ‘to issue Requests for Assistance to the relevant authorities of the States to discharge all remaining freezing, protective or charging orders over Mr. Bemba’s assets and properties that are still in place; and ... to adjudicate a claim for damages resulting from the freezing of Mr. Bemba’s assets’.<sup>12</sup> The Presidency rejected the request, arguing that it had no capacity to constitute a chamber for this specific purpose as it was not a purpose provided for in the Rome Statute<sup>13</sup> and that since TC III and PTC II had already disposed of the issue, Mr Bemba’s request appeared designed ‘to circumvent either the outcome of a leave to appeal decision [or] the failure to pursue such leave to appeal in the first place’.<sup>14</sup> As demonstrated in the discussion in the subsequent section, the above approach by the

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<sup>7</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Mr Bemba’s Claim for Compensation and Damages, International Criminal Court, ICC-01/05-01/08-3694 (18 May 2020) paras 53–64.

<sup>8</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Mr Bemba’s Claim for Compensation and Damages, International Criminal Court, ICC-01/05-01/08-3694 (18 May 2020) para 57.

<sup>9</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Mr Bemba’s Claim for Compensation and Damages, International Criminal Court, ICC-01/05-01/08-3694 (18 May 2020) para 58.

<sup>10</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Request for Leave to Appeal the ‘Decision on Mr Bemba’s Claim for Compensation and Damages’, International Criminal Court, Pre-Trial Chamber II, ICC-01/05-01/08-3697 (1 October 2020) para 16.

<sup>11</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, 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, International Criminal Court, Trial Chamber III, ICC-01/05-01/08-3660-Red2 (20 November 2018) paras 11–12.

<sup>12</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted Version of ‘Mr. Bemba’s Request for the Designation of a Pre-Trial Chamber Pursuant to Regulation 46(3) of the Regulations of the Court’, International Criminal Court, ICC-01/05-01/08-3698-Red (03 November 2020) para 44.

<sup>13</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted Version of ‘Decision on “Mr. Bemba’s Request for the Designation of a Pre-Trial Chamber Pursuant to Regulation 46(3) of the Regulations of the Court” dated 30 October 2020 (ICC-01/05-01/08-3698-Conf-Exp)’, International Criminal Court, Presidency, ICC-01/05-01/08-3701-Conf-Exp (09 December 2020) para 24.

<sup>14</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted Version of ‘Decision on “Mr. Bemba’s Request for the Designation of a Pre-Trial Chamber Pursuant to Regulation 46(3) of the Regulations of the Court” dated 30 October 2020 (ICC-01/05-01/08-3698-Conf-Exp)’, International Criminal Court, Presidency, ICC-01/05-01/08-3701-Conf-Exp (09 December 2020) para 27.

Court (TC III and PTC II) is circular, internally inconsistent and problematic especially when considered in light of the cooperation obligations of state parties under the Rome Statute

### 3 Analysing Articles 57(3)(e) and 93(1)(k) in Light of the Rome Statute's Cooperation Regime

Article 86 of the Rome Statute imposes a general obligation to cooperate, providing that, 'States Parties *shall*, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'<sup>15</sup> While the statute does not define what constitutes 'full cooperation' within the meaning of Article 86, the Appeals Chamber of the Court in *Jordan Referral re Al-Bashir Appeal* clarified that this 'encompasses all those obligations that States Parties owe to the Court and that are necessary for the effective exercise of jurisdiction by the Court'.<sup>16</sup> The general cooperation obligation in Article 86 is couched in mandatory terms, and as TC III itself acknowledges in the above-mentioned *Bemba* decision—<sup>17</sup>

Part 9 of the Statute establishes a unique vertical relationship between the Court and States by imposing an *unqualified* obligation on States to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".

The Court issues requests to States specifying the required cooperation and States implement the request by providing the specified cooperation pursuant to Article 86 of the Statute. The determination of how it will meet its obligation to cooperate with the Court is entirely up to the State.

While indeed, and as recognised by the Court above, the Rome Statute's cooperation regime gives state parties a margin of appreciation to determine the specific methodologies of such cooperation, the statute does not leave any room for state parties to determine whether or not to cooperate with or assist the Court. As the Appeals Chamber of the Court confirmed in *Jordan Referral re Al-Bashir Appeal*, 'The extent of the obligation of States Parties to cooperate fully must be understood in the context of the Statute as a whole and bearing in mind its object and purpose ... to exercise jurisdiction "over persons for the most serious crimes of international concern" and ... "put an end to impunity for the perpetrators of these crimes"'.<sup>18</sup> As such, all relevant provisions of the Rome Statute must be read together in order to fully appreciate the nature and scope of the statute's cooperation regime which is a fundamental element in reinforcing the Court's exercise of its jurisdiction and in discharging its objects and purpose.<sup>19</sup> It follows, therefore, that the terms 'cooperation' and 'request' as used in Articles 57(3)(e) and 93(1)(k) are not to be understood colloquially, but rather as imposing legally binding obligations on state parties.

Seen in this light, the balance of authority tilts in favour of the Court which has the power to issue such binding requests for assistance, and as against state parties who are then bound to assist or cooperate through domestic procedures that they deem appropriate. Contrary to what the Court implies in the *Bemba* Case, the ultimate freezing or seizure of assets is therefore taken on the basis of a binding request for assistance issued by the Court and implemented through domestic procedural law. In other words, states can only move to freeze or seize assets when in receipt of a binding request for assistance directed to them by the Court. It logically follows, therefore, that when the legal basis for the Court's request for assistance ceases to exist, such as in the event of a final acquittal, the Court has a corresponding obligation to communicate this fact to the concerned state in order to facilitate the unfreezing of the frozen assets.

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<sup>15</sup> Emphasis added.

<sup>16</sup> *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, International Criminal Court, Appeals Chamber, ICC-02/05-01/09-397-Corr (06 May 2019) para 143.

<sup>17</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, 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, International Criminal Court, Trial Chamber III, ICC-01/05-01/08-3660-Red2 (20 November 2018) paras 9–10.

<sup>18</sup> *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, International Criminal Court, Appeals Chamber, ICC-02/05-01/09-397-Corr (06 May 2019) para 121.

<sup>19</sup> *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, International Criminal Court, Appeals Chamber, ICC-02/05-01/09-397-Corr (06 May 2019) paras 122–123.

It may very well be the case that this obligation to communicate is discharged, as the Court argues in *Bemba*, when the Registry notifies the concerned state of the closure of investigations or termination of prosecution or acquittal.<sup>20</sup> However, where a state fails to unfreeze assets frozen due to a binding request from the Court upon being notified of the closure of investigations or termination of prosecution or acquittal, it logically follows, and contrary to the Court's conclusion in *Bemba*, that the Court is competent and does indeed have an obligation, in its capacity as the originator of the request that initiated the process of freezing the assets in the first place, to issue a binding request for assistance to the concerned state to unfreeze the assets. This is not an order specifically for the lifting of the restrictions on the assets – which the Court does not in any case have authority to issue. Rather, it is a binding request for cooperation and assistance similar to the one issued by the Court pursuant to which the domestic legal process of freezing or seizing the concerned assets was undertaken. To argue otherwise – as the Court does in *Bemba* – is to shift all responsibility to states while absolving the Court of any responsibility for a process that would never have commenced and pertained were it not for the Court's binding requests for assistance. The question of responsibility for frozen and seized assets and attribution of actions (by the Court and states) in furtherance of the Court's Article 93(1)(k) requests must therefore be analysed from this understanding.

#### 4 Engaging the Responsibility of the Court and of State Parties for Accused Persons' Assets

The powers and obligations under articles 57(3)(e) and 93(1)(k) raise the important question of the responsibility of the Court and of state parties under international law, including attribution of such responsibility. As discussed in Section 4, while the processes and specific actions to freeze or seize accused persons' assets are undertaken in accordance with domestic procedural laws, these processes and actions are initiated pursuant to a binding request for assistance issued by the Court. In other words, these are acts of the state undertaken to execute or implement the Court's binding request. As such, these acts are performed by states at the request of and on behalf of the Court, an international organisation, thereby resulting in complex attribution between the Court and states. In order to avoid 'responsibility for management and maintenance of the value of frozen assets ... falling into a "black hole"',<sup>21</sup> it is important to analyse the question of responsibility in respect of assets frozen or seized pursuant to the Court's requests. Beyond the general power under Article 57(3)(e) and the obligations under Article 93(1)(k), the Rome Statute is largely silent on the allocation of responsibility as between the Court and states in relation to frozen or seized assets. Regardless, this article argues that the question of allocation of responsibility can be approached from two possible angles: from the position of general international law on the question of responsibility of states and responsibility of international organisations; and reading Articles 57(3)(e) and 93(1)(k) alongside other relevant provisions of the Rome Statute.

##### 4.1 Position of General International Law on Responsibility and Attribution

The silence of the Rome Statute on the specific responsibility of the Court and of state parties with respect to accused persons' assets frozen or seized pursuant to the Court's Article 93(1)(k) requests is not unique. As the East African Court of Justice noted in *Hon. Dr. Margaret Zziwa v The Secretary General of the East African Community*, because many '[t]reaties usually do not prescribe the international responsibility of parties thereto or created thereby, or the consequences of breach of that responsibility ... , the principles of law applicable are found in the body of law known as state responsibility or the responsibility of international organizations ... [that is] those expressed by the International Law Commission (ILC) in its Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011'.<sup>22</sup> The ILC's Draft Articles on the Responsibility of International Organisations (ARIO) are therefore instructive.

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<sup>20</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, 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, International Criminal Court, Trial Chamber III, ICC-01/05-01/08-3660-Red2 (20 November 2018) paras 13–15.

<sup>21</sup> Aaron Moss, 'Asset Preservation, State Cooperation and the International Criminal Court' (2021) 22 (Advance Copy) *Melbourne Journal of International Law* 1, 39.

<sup>22</sup> East African Court of Justice, Appeal No. 2 of 2017, Judgment, 25 May 2018, para 38.

#### 4.1.1 Attribution for Acts of an Organ or Agent of the Court

Two lines of responsibility are possible under Article 6 of ARIO which provides as follows–

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.
2. The rules of the organization apply in the determination of the functions of its organs and agents.

Firstly, responsibility would be attributed to the Court for the conduct of its organs, an ‘organ’ being defined under Article 2(c) ARIO as ‘any person or entity which has that status in accordance with the rules of the organization’. The Court’s four organs as listed in Article 34 of the Rome Statute are: Presidency; Chambers (Appeals Division, Trial Division and Pre-Trial Division); Office of the Prosecutor (OTP); and Registry. It would, therefore, be arguably uncontroversial to attribute to the Court responsibility for the conduct of any of these organs in relation to the property of an accused person. For instance, in *Bemba Case*, Mr Bemba claimed that the Registry failed to keep proper records of his assets that were seized and/or frozen pursuant to requests for assistance from the Court.<sup>23</sup> In particular, the Registry confirmed receiving € 2,067,982 from Cape Verde, money belonging to Mr Bemba that had been seized pursuant to an Article 93(1)(k) request.<sup>24</sup> Additionally, Mr Bemba claimed that Portugal grounded and seized his Boeing 727-100 plane in 2008 and handed over its keys and air certificates to the OTP,<sup>25</sup> thereby giving the Court exclusive access to the plane and possession of its relevant documents. However, in 2010 the Registry confirmed that it could not trace the keys, but these keys somehow resurfaced in 2018 after Mr Bemba’s acquittal when the OTP handed them over. During this period, the plane had deteriorated from absolute neglect and had accumulated massive unpaid parking fees at the airport in Portugal where it was grounded in 2008.<sup>26</sup> In such cases where states hand over full control or exclusive (means of) access to and/or possession of accused persons’ property and assets to the Court, Article 6 ARIO would apply and acts of omission and commission in respect of these assets or properties would be attributable to the Court.

Secondly, responsibility could be attributed to the Court for the conduct of its agents, an ‘agent’ being defined under Article 2(d) ARIO as ‘an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts’. Implicated in this regard would be the conduct of organs of state parties through which the state parties implement the Court’s request for assistance. However, this line of attribution is complicated by the ILC’s Commentary to Articles 6 and 7 ARIO, thereby making it unlikely to apply to the Court. While acknowledging that a state organ may indeed be considered an agent of an international organisation if seconded by the state to the organisation,<sup>27</sup> it nonetheless argues for a restrictive understanding of ‘agent’ in relation to states by insisting that attribution of the state organ’s conduct to the organisation would only be possible under Article 6 ARIO if the state organ is fully seconded to the organisation.<sup>28</sup> As I have noted elsewhere, rather than being fully seconded to the Court, state organs implementing the Court’s requests for assistance issued under Articles 57(3)(e) and 93(1)(k) of the Rome

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<sup>23</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted Version of Mr. Bemba’s Request for the Designation of a Pre-Trial Chamber Pursuant to Regulation 46(3) of the Regulations of the Court’, International Criminal Court, ICC-01/05-01/08-3698 (03 November 2020) para 15.

*The Prosecutor v Jean-Pierre Bemba Gombo*, 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’, International Criminal Court, ICC-01/05-01/08-3657-Red (30 October 2018) para 7.

<sup>24</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, 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, International Criminal Court, ICC-01/05-01/08-3656-Red2 (07 December 2018) para 13.

<sup>25</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Second Public Redacted Version of ‘Mr. Bemba’s claim for compensation and damages’, International Criminal Court, ICC-01/05-01/08-3673-Red2 (19 March 2019) para 129.

<sup>26</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Second Public Redacted Version of ‘Mr. Bemba’s claim for compensation and damages’, International Criminal Court, ICC-01/05-01/08-3673-Red2 (19 March 2019) para 131.

<sup>27</sup> ILC Commentary to Article 6 ARIO, para 6.

<sup>28</sup> ILC Commentary to Article 7 ARIO, para 1.

Statute remain at all times the organs of the concerned state and act as organs of that state acting in accordance with domestic procedural law to fulfil that state's international obligations.<sup>29</sup>

#### 4.1.2 Attribution for Acts of State Organs Placed at the Court's Disposal

Attribution to the Court of responsibility for the (mis)management of seized or frozen assets may also be explored based on Article 7 ARIO – and arguably much more strongly than under Article 6 ARIO – particularly for those assets that states retained full or partial control over. Article 7 ARIO provides that–

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

As discussed above, the Court does not itself seize or freeze accused persons' assets. This is done by domestic authorities upon receiving an Article 93(1)(k) request to do so from the Court. Practically, therefore, in implementing Article 93(1)(k) requests, the relevant domestic authorities can be considered to be placed at the disposal of the Court for this specific purpose. While performing such function, it is not the case that the domestic authorities become organs of the Court. Rather, and as confirmed by the Commentary to Article 7 ARIO, they are still organs of the relevant state performing national functions even though the function in question is performed at the behest of the ICC. Article 7 ARIO is reinforced by Article 15 ARIO which provides that–

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

- (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that organization.

Article 7 ARIO read together with Article 15 ARIO therefore suggests that *prima facie*, responsibility for the acts of the relevant national authorities would be attributable to the Court. However, the Article 7 ARIO threshold is very high. For the state organ's conduct to be attributable to the Court under Article 7 ARIO, the Court must have 'exercise[d] effective control over that conduct'. In other words, Article 7 ARIO applies the so-called effective control test in determining an international organisation's responsibility. This test, first formulated by the International Court of Justice (ICJ) in *Case Concerning Military and Para-military Activities in and against Nicaragua (Nicaragua v. United States of America)*<sup>30</sup> and applied consistently since,<sup>31</sup> is very strict, and would require evidence that the Court had effective control over the specific acts resulting in a violation of an international obligation. In other words, it would have to be established that the Court exercised control over the specific acts in relation to the assets which resulted in spoliation. The general action of issuing a legally binding request for assistance to state parties would therefore not suffice for such acts to be attributable to the Court. Admittedly, the question confronting the ICJ in *Nicaragua Case* was that of state responsibility rather than responsibility of an international organisation. However, and as Amerasinghe has argued, because 'much of what applies to a State, in regard to responsibility, could easily apply to a collection of States, even though the collection has its own international personality',<sup>32</sup> it is trite to consider that 'there are some distinct similarities between the law of state responsibility in general and the law relating to the responsibility of international organizations'.<sup>33</sup> Hence, effective control within the meaning of Article 7 ARIO is fundamentally the same as what the ICJ formulated in *Nicaragua Case*.

As discussed above, it is indeed the case that the process of seizing or freezing assets commences as a result of a binding request to a state party from the Court. Therefore, it is arguably uncontroversial to consider that for the

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<sup>29</sup> Owiso Owiso, "Oops, We Misplaced the Keys...Too Bad!": The International Criminal Court and the Fiasco of Mr Jean-Pierre Bemba's Compensation Claim' *EJIL:Talk!* (03 June 2020) <https://www.ejiltalk.org/oops-we-misplaced-the-keystoo-bad-the-international-criminal-court-and-the-fiasco-of-mr-jean-pierre-bembas-compensation-claim/> accessed 03 June 2020.

<sup>30</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p.14, 27 June 1986, paras 114–115.

<sup>31</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, I.C.J. Reports 2007, p. 4326 February 2007, paras 398–400; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Merits, Judgment, I.C.J. Reports 2005, p. 168, 19 December 2005, para 160.

<sup>32</sup> Chittharanjan Felix Amerasinghe, 'Comments on the ILC's Draft Article on the Responsibility of International Organizations' (2012) 9 *International Organizations Law Review* 29, 29.

<sup>33</sup> Chittharanjan Felix Amerasinghe (n 33) 29.

purpose of responsibility, instructions to seize and freeze assets come from the Court, regardless of this being worded as a request to cooperate or assist. However, and with the effective control test in Articles 7 and 15 ARIO in mind, the questions to be answered would be whether the Court exercised control of the implementation of its Article 93(1)(k) requests, the extent of that control, and whether the Court was aware of the effect that the implementation had or was having on the assets. Factual evidence of the Court's role beyond issuing binding requests to the state will therefore be instrumental in determining the nature and extent of control that the Court exercised, including individual roles performed by the Court and states and roles jointly performed.<sup>34</sup> While a full picture of such evidence may not readily be available to the public as much of the relevant material would either be confidential or in possession of states, a glimpse can nonetheless be gleaned from proceedings before the Court, as the *Bemba* Case above illustrates.

#### 4.2 Other Relevant Provisions of the Rome Statute

Section 3 argued that the Court's authority over and responsibility for an accused person's assets does not end with issuing requests for assistance in seizing and freezing assets. Another possible angle within the Rome Statute framework which reinforces the view advanced in Section 3 is to consider Articles 93(1)(l) and 96 of the Rome Statute. Article 93(1)(l) specifically empowers the Court to request from states '[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 the jurisdiction of the Court' and states are obligated to comply with such requests. Additionally, Article 96(3)-(4) empowers the Court, both on its own initiative or upon being requested by a concerned state, to consult with the concerned state regarding the implementation of the Court's requests for assistance. As Birkett has convincingly argued, these provisions can be interpreted to allow the Court to exercise diligence and supervisory functions over the management of assets seized or frozen by states upon the Court's request by (i) issuing further requests for assistance to states requesting them to dutifully and diligently manage the assets in their possession, and (ii) engaging in consultation with these states to ensure that these processes run smoothly.<sup>35</sup> To this argument, this article adds that such interpretation of these provisions would indeed 'facilit[e] the investigation and prosecution of crimes within the jurisdiction of the Court' as envisioned in Article 93(1)(1) since, as argued in subsequent sections, the proper management of an accused person's assets would ensure that they are in a position to properly exercise their right to fair trial including retaining legal representation, a fundamental element in facilitating the investigation and prosecution of crimes within the Court's jurisdiction.

### 5 Why Does This Matter?

From the Court's jurisprudence discussed above,<sup>36</sup> it is evident that the Court has so far not only failed to provide sufficient, clear and convincing guidance (to states) on management of assets seized and frozen pursuant to Articles 57(3)(e) and 93(1)(k) of the Rome Statute and on the attendant question on responsibility, but has also washed its hands of any responsibility. The Court is assertive that its responsibilities end with the issuing of legally binding requests to states for assistance in identifying, freezing and seizing assets. The Court insists that as far as it is concerned, states bear all responsibility for the actions they undertake to effect these requests and for the status of these assets during and after the period of seizure/freezing. As argued in preceding sections, this article considers these positions not only to be erroneous, but also detrimental to the development of sound jurisprudence and practice. This section highlights some of the implications of the position adopted by the Court, specifically in relation to the rights of accused persons, rights and expectations of victims, and cooperation with state parties.

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<sup>34</sup> For an in-depth discussion on allocation of responsibility between multiple actors with varying degrees of contribution, that is, shared responsibility, see André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359; André Nollkaemper, Ilias Plakokefalos and Jessica Schechinger (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014); André Nollkaemper, Ilias Plakokefalos and Jessica Schechinger (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017).

<sup>35</sup> Daley J. Birkett, 'Managing Frozen Assets at the International Criminal Court: The Fallout of the Bemba Acquittal' (2020) 18 *Journal of International Criminal Justice* 765, 784.

<sup>36</sup> Admittedly so far only in the one case of Mr Bemba.

## 5.1 Implications for the Accused Person

As provided in Article 67(1)(d) of the Rome Statute, an accused person has a right to a fair trial which includes the right to be afforded adequate facilities for preparing their defence and to have legal assistance at the Court's expense if they are impecunious.<sup>37</sup> In the event that the assets of an accused person with sufficient means are frozen or seized pursuant to the Court's request, it is therefore imperative that the entity in possession or with access to these assets – be it the Court's organs or state parties – manages them in such a manner that they can be utilised to defray the costs to be incurred by the accused person in preparing their defence. Failure to do so would result in the Court having to cover this cost from its legal aid fund. For instance, because Mr Bemba had no access to his assets during his (pre-)trial and because most of these assets were frozen or seized by state parties at the Court's request, the Court had to advance Mr Bemba money.<sup>38</sup> As claimed in Mr Bemba's 2019 Claim, he was still unable to repay the Court some of the advanced sum after his acquittal because most of his assets had been mismanaged, devalued or destroyed and he still did not have access to them.

A proper framework governing the management of these assets is therefore not only in the interests of the accused person as they would enable them to cover their legal costs, but also in the interests of the already cash-strapped Court as it would not have to cover the legal costs of an accused person who would, were it not for the mismanagement of their assets, be able to cover their own costs. Further, in the event that a person accused of core Rome Statute crimes is convicted of these offences or separately for offences against the administration of justice, the Court may impose a fine in accordance with Articles 77 and 70(3) of the Rome Statute, as was imposed on Mr Bemba in a separate conviction for witness interference. Further still, the Court can order forfeiture of property upon conviction for core crimes. If the person's assets earlier frozen or seized by states pursuant to the Court's requests are properly managed, they can quite easily be used to satisfy the fines or orders for forfeiture.

The consequentialist arguments above aside, it is imperative to emphasise that the purpose of the Article 57(3)(e) protective measures and Article 93(1)(k) requests is not to punish the accused person. Despite their status as persons accused of Rome Statute crimes, these persons remain human beings with obligations to self and possibly to dependants. As such, Article 57(3)(e) measures and Article 93(1)(k) requests should not be such as to unjustifiably deny the accused person their right to a family life or arbitrarily and permanently deprive them of their property and assets. Mismanaging their assets and properties to such an extent that their dependants are deprived of their rightful assistance cannot possibly be what the drafters of the Rome Statute envisaged when drafting Articles 57(3)(e) and 93(1)(k). Further, upon final acquittal, the former accused person should ideally be in a position to resume the *status quo ante* in respect of their property, that is, they should be able to regain control of their assets without unreasonable delay or hurdles. The legal basis for seizing and freezing the former accused person's assets ceases to exist upon their final acquittal. As such, the persistence of circumstances preventing the person from regaining control of their assets and/or the fact that these assets have depreciated or lost value due to mismanagement constitutes a violation of the internationally-recognised right to respect for private and family life<sup>39</sup> and also amounts to arbitrary deprivation of property and denial of peaceful enjoyment thereof.<sup>40</sup> As Article 21(3) of the Rome Statute emphasises, the Court is bound to ensure that its application and interpretation of applicable law is consistent with 'internationally recognised human rights'. The Court has in fact reiterated that the requirements of Article 21(3) apply to its requests to states and the modalities by which states choose to honour those requests, that is, these requests and the measures for effecting them must not be contrary to internationally-recognised human rights.<sup>41</sup>

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<sup>37</sup> See also Rome Statute, art 55(2)(c).

<sup>38</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Summary of the Decision on Legal Assistance for the Accused, International Criminal Court, Trial Chamber III, ICC-01/05-01/08-568 (20 October 2009) para 16.

<sup>39</sup> International Covenant on Civil and Political Rights, arts 17 & 23; International Covenant on Economic, Social and Cultural Rights, arts 10–11; American Convention on Human Rights, art 11; African Charter on Human and Peoples' Rights, arts 18, 27 & 29; European Convention for the Protection of Human Rights and Fundamental Freedoms, art 8.

<sup>40</sup> American Convention on Human Rights, art 21; African Charter on Human and Peoples' Rights, art 14; Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art 1.

<sup>41</sup> *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Public Redacted Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the Decision of Trial Chamber VII Entitled "Judgment Pursuant to Article 74 of the Statute", International Criminal Court, Appeals Chamber, ICC-01/05-01/13 A A2 A3 A4 A5 (08 March 2018) para 319; *The*

Whichever approach one finds convincing, an accused persons' right to have their assets managed responsibly and their value preserved is, as Birkett has noted, 'a highly important yet ostensibly overlooked aspect of the protective measures process under Article 57(3)(e) ICC Statute'.<sup>42</sup> For this reason, and for the reason that there exists no independent mechanism exercising oversight over the handling of human rights of accused persons before international criminal courts,<sup>43</sup> it is all the more pertinent that the Court acts as guarantor, enforcer and guardian of accused persons' rights.

## 5.2 Implications for Victims

The relevant legal provisions make express and implicit reference to the underlying purpose of taking protective measures against accused persons' assets, that is, to be eventually utilised upon final conviction in remedying to the extent possible the harm caused to victims. Article 57(3)(e) expressly states that the measures are 'for the purpose of forfeiture, in particular for the ultimate benefit of victims', while Article 93(1)(k) uses the phrase 'for the purpose of eventual forfeiture'. Article 75 of the Rome Statute which enshrines the Court's power to order reparations in favour of victims and against a convicted person provides that in issuing a reparations order against a convicted person, the Court may order protective measures against the convicted person's property in order to effect the reparations order. From the phrasing of these provisions, it is evident that measures taken against the property or assets of accused persons are so taken to, among other reasons, preserve their value during the pendency of the case against the accused person with the expectation that should the accused person be finally convicted, these assets could be utilised to satisfy victims' reparative needs.<sup>44</sup> While it is perhaps a leap to argue the existence of a right of victims here, it is however reasonable to posit that these provisions gravitate in favour of victims having a legitimate expectation that the value, worth and viability of any assets seized and/or frozen pursuant to the Court's request for assistance should at a minimum be maintained or more ambitiously, should be enhanced, with a possible reparations order in mind.

It is, however, not clear what measures, if any, victims can take to ensure the proper management of these assets. It appears from a reading of Rule 99 of the Court's Rules of Procedure and Evidence that victims may themselves request the TC to take protective measures against an accused person's or convicted person's property. However, once the Court issues these protective measures including the request for cooperation in enforcing them, the only available avenue for victims to raise concerns over the management of these frozen assets is at the reparations stage which only commences upon conviction by the Trial Chamber. Further, Article 75(3) which provides the legal basis for victims' participation in reparations proceedings does not avail this possibility as a matter of right, but as a discretionary power of the Court, that is, victims can only make representations to the Court in this regard upon the court's invitation. While the Court's practice so far points to a consistent pattern of inviting such representations, this remains a discretionary power. Therefore, victims do not apparently have any avenue for intervening over the (mis)management of frozen or seized assets during the (pre-)trial process. They can only intervene, at the discretion of the Court, at the last stage of the judicial process when most of the spoliation of frozen or seized property shall have long occurred.

## 5.3 Implications for State Party Cooperation

Because the Court lacks independent enforcement capability, state cooperation forms the bedrock of the Court's enforcement abilities. As discussed in Section 3, the Court emphatically laid full responsibility (and blame) at states'

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*Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on the "Requête en Appel de la Défense de Monsieur Aimé Kilolo Musamba Contre la Décision de la Chambre de Première Instance VII du 17 novembre 2015", International Criminal Court, Appeals Chamber, ICC-01/05-01/13 OA 12 (23 December 2015) para 16. For a general discussion of the human rights implications of the Court's asset freezing and seizure regime, drawing on experience from the European and Inter-American human rights systems, see Daley J. Birkett, 'Asset Freezing at the European and Inter-American Courts of Human Rights: Lessons for the International Criminal Court, the United Nations Security Council and States' (2020) 20 Human Rights Law Review 502.

<sup>42</sup> Daley J. Birkett (n 22) 780–781.

<sup>43</sup> Joris van Wijk and Barbora Holá, 'Acquittals in International Criminal Justice: Pyrrhic Victories?' (2017) 30 Leiden Journal of International Law 241, 259.

<sup>44</sup> See also Carla Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' in Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill 2016).

door for the proper execution of the Court's requests for the seizure and freezing of an accused person's assets, emphasising that this responsibility primarily lies with states. This position may result in at least three possible scenarios. Firstly, in managing frozen or seized assets in order to preserve their value, prohibitive management costs are likely to be incurred and there is always the possibility of incurring legal liability for management. By absolving itself of much of the responsibility for these assets, the Court has signaled to states that they alone are responsible for the management of these assets. States may not be very enthusiastic by themselves to incur all the costs of management and possible legal liability. Secondly, by insisting that states bear primary responsibility, the Court has effectively opened the door to aggrieved persons, armed with the Court's jurisprudence, to take legal action for spoliation against states in domestic courts or in regional (human rights) courts. Thirdly, it would not be surprising, therefore, if a state whose national is aggrieved either by the spoliation of their property resulting from actions taken by another state pursuant to the Court's Articles 57(3)(e) and 97(1)(k) requests or who is deprived of such property even after final acquittal due to the latter state's failure to release such property (and the Court's failure to issue a request to that state to release such property) were to exercise its right of diplomatic protection on behalf of its national as against the 'offending' state. This may result in unpleasant diplomatic haggling between the concerned states or at worst, inter-state dispute before competent judicial fora.

Indeed, in dismissing Mr Bemba's spoliation claim on the basis of lack of jurisdiction, PTC II emphasised that this 'is without prejudice to Mr Bemba's right to pursue other procedural remedies and avenues which might otherwise be open to him with a view to seeking redress for damages allegedly suffered in connection with his assets targeted by freezing orders and other similar measures undertaken by States in connection with the implementation of the Court's orders'.<sup>45</sup> While the Court did not provide any indication of what it considers these 'other procedural remedies and avenues' to be, it is plausible that domestic litigation and inter-state dispute settlement undertaken on the basis of diplomatic protection are such avenues. The effect of these possibilities – incurring management costs, being exposed to legal liability, being sued domestically or regionally, being subject to inter-state disputes – may be to dampen state parties' appetite for implementing the Court's requests for assistance in tracing, freezing or seizing an accused person's assets, with significant consequences for the Rome Statute's cooperation regime. As Moss aptly observes, state cooperation and support remain 'the biggest impediment[s] to the effective functioning of the Court's asset preservation regime, and its cooperation regime more broadly'.<sup>46</sup> As such, it is manifestly unwise and counterproductive for the Court to exacerbate this already-tenuous situation by purporting to shirk all responsibility in respect of frozen or seized assets and scapegoating states on whose support and cooperation it depends.

## 6 Conclusion

While, as Ferstman has argued, the Court's legal framework regarding asset freezing and seizure is vague particularly on the obligations of states,<sup>47</sup> it is evident from the analysis above that this framework nonetheless provides a point of departure for asset freezing and seizure. However, the article concludes that the problems plaguing the Court's practice in this regard stem partly from the Court's approach to its Rome Statute powers, specifically in its narrow and evasive interpretation of Article 57(3)(e) and 93(1)(k) and failure to provide necessary guidance on the application of these provisions. In this regard, the paper partly disagrees with Moss' conclusion that 'the problems facing the asset preservation regime seem to result neither from the Court's own actions, nor deficiencies in its legal foundations'.<sup>48</sup> It is possible, as Birkett speculates, that the Court's evasiveness in *Bemba* was informed by a desire, on the one hand, to avoid the reputational 'damage' implicit in having to admit liability for spoliation and pay compensation to Mr Bemba, and on the other hand, to avoid harming its cooperation relationship

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<sup>45</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Mr Bemba's Claim for Compensation and Damages, International Criminal Court, ICC-01/05-01/08-3694 (18 May 2020) para 64.

<sup>46</sup> Aaron Moss (n 21) 41. See also Carla Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' in Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill 2016) 230–231.

<sup>47</sup> Carla Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' in Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill 2016) 233–237.

<sup>48</sup> Aaron Moss (n 21) 43. Birkett also concluded that, '[T]he Court's approach to protective measures is praiseworthy'. See Daley J. Birkett, 'Pre-Trial "Protective Measures for the Purpose of Forfeiture" at the International Criminal Court: Safeguarding and Balancing Competing Rights and Interests' (2019) 32 *Leiden Journal of International Law* 585, 602. Notably, however, this article was published in 2019 before the Bemba debacle fully unfolded.

with states.<sup>49</sup> Without prejudice to these and other possible explanations, the Court's evasive and narrow approach in the interpretation and application of Article 57(3)(e) and 93(1)(k) could also be attributed to the dearth of expertise or specific knowledge among ICC judges on asset tracing and seizure. Implicitly acknowledging this shortcoming, the Independent Expert Review Report 2020 recommended training for judges on, *inter alia*, 'law relating to the tracing, seizure and forfeiture of assets'<sup>50</sup> to be designed by taking into account the experiences of domestic courts. Whichever the explanation, the Court's approach leaves a lot to be desired regarding management of frozen or seized assets.

The Court's powers under Articles 57(3)(e) and 93(1)(k), as Moss has aptly observed, 'hold the potential to be amongst the most potent protective measures in the Court's arsenal ... [p]rovided they are well crafted and appropriately managed'.<sup>51</sup> Therefore, without clear guidance and clarification on the question of (division of) responsibility for these assets during the period when the Court's requests are in force, it is likely – and as the *Bemba* Case has shown – that the purpose of Articles 57(3)(e) and 93(1)(k) will be defeated, to the detriment of the accused person, victims of international crimes, the Court's relationship with states, and the Court's integrity and credibility. The urgency of providing solid guidance on Article 57(3)(e) powers and Article 93(1)(k) obligations and the resultant responsibilities cannot be emphasised enough. While the issue of frozen or seized assets may not arise in the Court's current active cases as they relate to indigent accused persons, its currently 'dormant' cases of *The Prosecutor v Saif Al-Islam Gaddafi*, *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, *The Prosecutor v Ahmad Muhammad Harun* and *The Prosecutor v Abdel Raheem Muhammad Hussein*, as well as its current preliminary examinations in Nigeria, The Philippines and Ukraine<sup>52</sup> and ongoing investigations in Afghanistan, Georgia, Palestine, Sudan and Bangladesh/Myanmar<sup>53</sup> are likely to implicate state and non-state actors with considerable financial means. Without proper judicial guidance, the Court is hurtling fast down a cliff that will test its integrity, credibility and efficacy and which will potentially engage the international responsibility of the Court and state parties and have significant adverse impact on accused persons and victims of international crimes.

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<sup>49</sup> Daley J. Birkett, 'Managing Frozen Assets at the International Criminal Court: The Fallout of the Bemba Acquittal' (2020) 18 *Journal of International Criminal Justice* 765, 789.

<sup>50</sup> Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report (30 September 2020) para 346, 763–766 & 778 [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf) accessed 15 May 2021.

<sup>51</sup> Aaron Moss (n 21) 3.

<sup>52</sup> International Criminal Court, 'Preliminary Examinations' <https://www.icc-cpi.int/pages/pe.aspx> accessed 15 May 2021.

<sup>53</sup> International Criminal Court, 'Situations under Investigation' <https://www.icc-cpi.int/pages/situation.aspx> accessed 15 May 2021.