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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

Daley J. Birkett*

ABSTRACT

This article examines the human rights implications of the asset freezing processes available to the International Criminal Court and the United Nations Security Council. It does so through the lens of the case law of the European Court of Human Rights and the Inter-American Court of Human Rights, from whose jurisprudence, although not uniform, a number of principles can be distilled. By scrutinising a series of cases decided under the European Convention on Human Rights and American Convention on Human Rights, respectively, the article demonstrates that the rights to the peaceful enjoyment of property and to respect for one's private and family life, home and correspondence are necessarily implicated by the execution of asset freezing measures in criminal and administrative contexts. The article concludes that, considering the human rights constraints placed on the exercise of their powers, both the International Criminal Court and United Nations Security Council, as well as States acting at their request, must pay attention to this case law with a view to respecting the human rights of those to whom asset freezing measures are applied.

KEYWORDS: right to property, right to family life and home, asset freezing, European Court of Human Rights, Inter-American Court of Human Rights, International Criminal Court, United Nations Security Council

1. INTRODUCTION

Both the International Criminal Court (ICC or 'Court') and United Nations Security Council (UNSC) have the power to ask States to freeze assets. The former has the

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authority to do so with respect to the States Parties to its constituent instrument, the Rome Statute of the International Criminal Court ('the Rome Statute').¹ ICC States Parties are obliged to cooperate with the Court in this area,² while the Court is also able to issue requests for the freezing of assets to non-party States. The latter have no duty to cooperate with the ICC unless the UNSC imposes such an obligation in accordance with the referral power granted to it by Article 13(b) of the Rome Statute³ or if a duty exists 'on the basis of an ad hoc arrangement [between the ICC and a non-party State], an agreement with such State or any other appropriate basis.'⁴ As for the UNSC's capacity to compel States to freeze assets, this power stems from Chapter VII of the Charter of the United Nations ('the UN Charter'), Article 41 of which empowers the UNSC to take measures short of authorising the use of armed force to enforce its decisions.⁵ Pursuant to Article 25 of the UN Charter, all United Nations (UN) member states are obliged to 'accept and carry out' UNSC decisions.⁶ Both procedures involve individuals' assets being frozen by States. To this extent, therefore, both also necessarily implicate human rights on the part of the individuals subjected to the asset freezing measures, whether the assets are frozen in accordance with a request by the ICC or a decision made by the UNSC.

Although there is a difference between the asset freezing powers available to the ICC and UNSC, with the former being part of a criminal process and the latter consisting of administrative measures, both bodies are constrained by human rights in the exercise of their respective powers. As for the ICC, whose asset freezing powers are tied to the question of the criminal responsibility of the accused and therefore subject to the checks and balances applicable to criminal procedures, including fair trial considerations, Article 21(3) of the Rome Statute stipulates that the application and interpretation of its applicable law must be 'consistent with internationally recognised human rights.'⁷ Sluiter has therefore argued that Article 21(3) should occupy a 'prominent place as a systematic and obligatory human rights review standard for each and every activity of

1 Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

2 Article 86 Rome Statute ('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'). See also Article 93(1)(k) Rome Statute regarding the explicit obligation for States Parties to cooperate with respect to '[t]he 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.'

3 Article 13 Rome Statute ('The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if . . . (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'). In such situations, the obligation for non-party States to cooperate with the ICC would stem not from the Rome Statute, but from the UN Charter.

4 Article 87(5) Rome Statute.

5 Article 41 Charter of the United Nations 1945, 1 UNTS 16.

6 Article 25 UN Charter.

7 Article 21(3) Rome Statute. The full provision reads 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'

the Court and activity that is of benefit to the proceedings before the Court.⁸ In a similar manner, Article 24(2) of the UN Charter requires that the UNSC ‘act in accordance with the Purposes and Principles of the United Nations’ in discharging its duties.⁹ Article 1(3) of the UN Charter, which lists three of the four purposes of the organisation, includes ‘promoting and encouraging respect for human rights.’¹⁰ UNSC-requested asset freezing measures, which are ordered at the behest of the UNSC, albeit subject to the legal constraints on UNSC action detailed in Article 24(2) of the UN Charter and by peremptory norms of international law,¹¹ must consequently also be constrained by human rights. This article examines the principal human rights implicated by both processes through the lens of a series of cases decided by the European Court of Human Rights (ECtHR or ‘Strasbourg Court’) and the Inter-American Court of Human Rights (IACtHR or ‘San José Court’) under the European Convention on Human Rights (ECHR)¹² and the American Convention on Human Rights (ACHR),¹³ respectively.

Further to the relationship between the application of ICC-requested and UNSC-ordered asset freezing measures and human rights, the ECtHR also provides an especially apt lens through which to conduct the present enquiry because the ICC regularly refers to the legal findings of the Strasbourg court in its own case law.¹⁴ At the same time, although certain international(ised) criminal tribunals (ICTs) established before the entry into force of the Rome Statute were authorised by their constituent instruments to order provisional and/or post-conviction asset freezing measures,¹⁵ such measures

8 See Sluiter, ‘Human rights protection in the ICC pre-trial phase’ in Stahn and Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2008) 459 at 475.

9 Article 24(2) UN Charter.

10 Article 1(3) UN Charter.

11 Article 24(2) UN Charter (‘In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII’). See also de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) at 187–91 (on *jus cogens* as a substantive limit to UNSC discretion), 191–5 (on the purposes and principles of the UN as substantive limits to the powers of the UNSC), 219–26 (on human rights limitations to economic sanctions); de Wet, ‘Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the UN Charter and the Iraqi Sanctions Regime’ (2001) 14 *Leiden Journal of International Law* 284 at 286–9; Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* (2001) at 172, 202; Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011) at 31–2; Orakhelashvili, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions’ (2005) 16 *European Journal of International Law* 59 at 63–7 (for fundamental human rights as constraints, see 64–6); Whittle, ‘The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action’ (2015) 26 *European Journal of International Law* 671.

12 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 221.

13 American Convention on Human Rights 1969, 1144 UNTS 123.

14 On this practice, see Croquet, ‘The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights’ Jurisprudence?’ (2011) 11 *Human Rights Law Review* 91; Jones, ‘Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court’ (2016) 16 *Human Rights Law Review* 701; Lobba and Mariniello (eds), *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals* (2017).

15 The International Military Tribunal was explicitly empowered to order post-conviction forfeiture, the International Military Tribunal for the Far East was arguably authorised to do so, the tribunals established under Control Council Law No. 10 were permitted to order fines as well as provisional and post-conviction forfeiture measures, while the International Criminal Tribunal for the Former Yugoslavia and

were barely used in practice.¹⁶ As a result, there is limited discussion of the relationship between the application of these measures and their consequent impact on fundamental human rights in the jurisprudence of the ICTs that predate the ICC. In addition, because the Court has seen relatively few cases proceed to the sentencing phase, while other accused and/or convicted persons have been found to be indigent and many filings remain confidential, the ICC has developed only a relatively limited jurisprudence on the execution of asset freezing measures.¹⁷

This is not to say that this issue is not of significant import for the Court's activities in the future. As will be demonstrated in this article, the application of such measures has been contested before the ICC's pre-trial, trial and appeals chambers, with the impact of these measures on the human rights guaranteed under the Rome Statute regularly under discussion. Why then might the case law of the ECtHR and IACtHR be relevant for the UNSC? As will be discussed in this article, the execution of UNSC-ordered asset freezing measures has been determined to have violated the ECHR in certain cases. The efficacy of these measures, at least in the territories of the High Contracting Parties to the ECHR, therefore, depends upon their compatibility with the rights protected therein. As to the IACtHR, its case law sheds light on a subject of immediate relevance to the operations of the ICC, namely the impact upon human rights caused by the mismanagement of assets frozen at the Court's request.

The article demonstrates that the case law of the ICC has, by and large, complied with the human rights principles identified but could benefit from clearer reasoning as to why the ICC elected to rely upon the jurisprudence of a particular regional human rights court. As for UNSC-ordered asset freezes, the article shows that the UN organ vested with 'primary responsibility for the maintenance of international peace and security'¹⁸ is given a wide margin of appreciation in framing such measures. At the same time, however, there is a risk that UN Member States, in executing UNSC-requested measures, could be found to have violated the human rights protected in regional instruments to which they are parties.

2. ASSET FREEZING IN THE LAW AND PRACTICE OF THE STRASBOURG AND SAN JOSÉ COURTS

At the outset, it is important to note the difference between provisional measures with a view to possible forfeiture and post-conviction forfeiture measures, both of which require assets to be frozen by States. The former are protective measures, explicitly designed to safeguard any assets that might later be subject to an order for forfeiture

the International Criminal Tribunal for Rwanda had similar powers, without the capacity to order fines as a penalty.

16 Ibid.

17 On which, see Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' in Bekou and Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (2016) 227 at 233–7; 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 at 593–601.

18 Article 24(1) UN Charter.

(or, in the Rome Statute system, an order for reparations to victims),¹⁹ while the latter constitute a penalty imposed by a criminal court following a guilty verdict. Both types of measures have been brought to the attention of the ECtHR,²⁰ from which a series of principles useful to the work of the ICC, chiefly as concerns the application and interpretation of its applicable law consistent with internationally recognised human rights, can be gleaned. Similarly, the execution of UNSC sanctions, including asset freezing procedures, has been challenged in Strasbourg. In addition, the IACtHR has also examined the human rights implications of the mismanagement of assets frozen at the request of responsible domestic authorities.

The principles developed by the two human rights courts in this context will also be examined with a view to identifying their potential for promoting and encouraging respect for human rights by the UNSC and, more specifically, by UN Member States in their national implementation of the administrative asset freezing measures requested at the international level. This is because UNSC resolutions ordering UN Member States to freeze the assets of individuals (and entities) included on sanctions lists are not self-executing.²¹ Nor are ICC-issued cooperation requests for the freezing of assets capable of self-execution.²² Rather, such requests, whether they originate from the UNSC or the Court, require (legislative) action by the receiving States to give effect to the measures in their national legal orders.

Another important difference that ought to be acknowledged is that between the purpose of asset freezing measures executed by States based on a request from the Court and the aims of asset freezing under the auspices of UNSC sanctions regimes. At the Court, one can identify several such purposes, including the prevention of ongoing or future criminal conduct under ICC jurisdiction, the preservation of assets for the payment of future fines, orders for forfeiture, or orders to make reparations to victims and the payment of defence fees. While the UNSC has also requested States to give effect to asset freezing measures against individuals under the guise of so-called targeted sanctions,²³ some of which could be said to premised on similar purposes to those of the Court in seeking to put an end to impunity for the perpetrators of mass atrocities,²⁴ the

19 Article 75(2) Rome Statute ('The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'). On the development of the ICC's case law concerning the request of provisional asset freezing measures to safeguard assets for the enforcement of possible future reparations orders, see Ferstman, *supra* n 17 at 233–6; Birkett, *supra* n 17 at 594–7.

20 For protective measures, see the discussion of *Džinić v Croatia*, *infra* Section 2A(i); for post-conviction forfeiture measures, see, for example, *Varvara v Italy*, *infra* n 37.

21 See Gowlland-Debbas, 'Implementing Sanctions Resolutions in Domestic Law' in Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions: A Comparative Study* (2004) 33 at 35.

22 See Article 88 Rome Statute ('States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part'). For discussion of this important provision, see Bekou, 'A Case for Review of Article 88, ICC Statute: Strengthening a Forgotten Provision' (2009) 12 *New Criminal Law Review* 468.

23 See Biersteker, Eckert and Tourinho (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (2016).

24 The measures, which have included asset freezes, have been labelled 'crime-based targeted sanctions': see Roskam, 'Crime-Based Targeted Sanctions: Promoting Respect for International Humanitarian Law by the Security Council' in 19 *Yearbook of International Humanitarian Law* 2016 89. The UNSC has ordered such measures in a number of situations, including in Côte d'Ivoire, the Democratic Republic of the Congo, the

freezing of assets pursuant to UNSC resolutions can also serve other varied purposes. These have included, among others, deterring the proliferation and alleged testing of nuclear weapons,²⁵ denouncing a military coup²⁶ and condemning repeated violations of ceasefire arrangements by armed groups.²⁷ This distinction might be relevant in determining whether the measures comply with the human rights principles applicable to asset freezing, particularly in the appraisal of whether the implementation of such measures satisfies the 'general interest' or 'legitimate aim' criterion.²⁸

It is also important to note the differences between the freezing of assets on the one hand and the identification, tracing, seizure and (forms of) forfeiture and confiscation thereof on the other.²⁹ Distinguishing these types of measures ought to clarify the terminology employed in the ensuing analysis of the case law of the ECtHR and IACtHR as regards asset freezing and its implications for the ICC, the UNSC and the States party to the Rome Statute and UN Charter. According to guidance approved by the UNSC Al-Qaida Sanctions Committee:³⁰

*Freeze of funds and other financial assets and economic resources includes preventing their use, alteration, movement, transfer or access Freeze of economic resources also includes preventing their use to obtain funds, goods, or services in any way, including, but not limited to, by selling, hiring or mortgaging them. The term 'freeze' does not mean confiscation or transfer of ownership.*³¹

The identification and/or tracing of assets are steps that may need to be taken preliminary to their freezing. After freezing, assets may, but need not necessarily, be seized, forfeited and/or confiscated. As the foregoing Al-Qaida Sanctions Committee guidance stipulates, UNSC-requested asset freezes do not require the confiscation or transfer of ownership of the assets by UN Member States.³² In the Rome Statute system, the ICC can only request the forfeiture of assets in the event of a conviction³³ and the 'identification, tracing and freezing or seizure of proceeds, property and assets and

Central African Republic and Libya. This said, it ought to be noted that the UNSC measures, although arguably 'crime-based', remain administrative.

25 See UNSC Sanctions Committee established pursuant to SC Res 1718, 14 October 2006, S/RES/1718 (2006) (concerning the Democratic People's Republic of Korea).

26 See UNSC Sanctions Committee established pursuant to SC Res 2048, 18 May 2012, S/RES/2048 (2012) (concerning Guinea-Bissau).

27 See UNSC Sanctions Committee established pursuant to SC Res 2374, 5 September 2017, S/RES/2374 (2017) (concerning Mali).

28 See *infra* Section 2A(i).

29 Cf. Article 93(1)(k) Rome Statute.

30 UNSC Sanctions Committee established pursuant to SC Res 1267, 15 October 1999, S/RES/1267 (1999), SC Res 1989, 17 June 2011, S/RES/1989 (2011) and SC Res 2253, 17 December 2015, S/RES/2253 (2015) (concerning the Islamic State in Iraq and the Levant (ISIL) (Da'esh), Al-Qaida, and associated individuals, groups, undertakings and entities) (Al-Qaida Sanctions Committee).

31 Al-Qaida Sanctions Committee, 'Assets Freeze: Explanation of Terms', 24 February 2015, at paras 9–11 (emphases in original).

32 *Ibid.* at para 11.

33 Cf. Article 75(2) Rome Statute ('In addition to imprisonment, the Court may order . . . (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties').

instrumentalities of crimes'³⁴ can be requested 'for the purpose of eventual forfeiture.'³⁵ In other words, where an acquittal is entered, there is no legal basis for an order for forfeiture of assets by the Court.

Much of the ECtHR's case law concerning asset freezing has developed in the context of challenges brought in the context of forfeiture proceedings, which take a number of forms at the domestic level.³⁶ But this does not mean that the ECtHR has necessarily developed a thorough approach thereto. In the words of Judge Pinto de Albuquerque:

Under the *nomen juris* of confiscation, the States have introduced *ante delictum* criminal prevention measures, criminal sanctions (accessory or even principal criminal penalties), security measures in the broad sense, administrative measures adopted within or outside criminal proceedings, and civil measures *in rem*. Confronted with this enormous range of responses available to the State, the Court has not yet developed any consistent case-law based on principled reasoning.³⁷

The following section analyses this case law in respect of two rights protected under the ECHR and ACHR frameworks with which the imposition of asset freezing measures necessarily interferes, namely the right to the peaceful enjoyment of one's possessions and the right to respect for one's private and family life, home and correspondence. A second justification for focusing on these rights is that both have been subject to judicial scrutiny in cases brought before the ECtHR and IACtHR by applicants challenging the implementation of asset freezing measures by State authorities. This is not to say

34 Article 93(1)(k) Rome Statute.

35 Ibid.

36 See Simonato, 'Confiscation and fundamental rights across criminal and non-criminal domains' (2017) 18 *ERA Forum* 365 at 366 ('Assets may be confiscated even if they are not proceeds of the crime for which the offender has been convicted (extended confiscation), if they belong to persons other than the offender (third party confiscation), or if they are the proceeds of an offence which has not been proven at trial (non-conviction based confiscation); in some cases, even if criminal proceedings against the suspect have not started at all (civil asset forfeiture)'). On 'extended confiscation', see Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (2017); Boucht, 'Extended Confiscation: Criminal Assets or Criminal Owners' in Ligeti and Simonato (eds), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (2017) 117; Simonato, 'Extended Confiscation of Criminal Assets: Limits and Pitfalls of Minimum Harmonisation in the EU' (2016) 41 *European Law Review* 727. On 'third party confiscation', see Blanco Cordero, 'Modern Forms of Confiscation and Protection of Third Parties' in Ligeti and Simonato (eds), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (2017) 139. On 'non-conviction-based confiscation', see Rui and Sieber (eds), *Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction* (2016); King, 'Civil Forfeiture and Article 6 of the ECHR: Due Process Implications for England & Wales and Ireland' (2014) 34 *Legal Studies* 371; Hendry and King, 'How far is too far? Theorising non-conviction-based asset forfeiture' (2015) 11 *International Journal of Law in Context* 398. On 'civil asset forfeiture', see Boucht, 'Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) ECHR', (2014) 5 *New Journal of European Criminal Law* 221.

37 *Varvara v Italy* Application No 17475/09, Merits, 29 October 2013, at Partly Concurring and Partly Dissenting Opinion of Judge Pinto De Albuquerque, 14. See also Simonato, 'Confiscation and fundamental rights across criminal and non-criminal domains', *ibid.* at 366 ('Human rights law . . . has not yet provided a firm answer to all questions arising about the compatibility of new forms of confiscation with fundamental rights').

that these are the only relevant rights in this context. Indeed, the right to a fair trial, particularly as it concerns the presumption of innocence, is also implicated and will be considered alongside the analysis of the two principal rights under examination where relevant. A further reason behind focusing on these rights is that both have been discussed by the ICC in its case law on the execution of asset freezing measures. The analysis therefore also aims to distil principles from the Strasbourg and San José Courts' case law relevant to the execution of asset freezing measures by States at the request of the ICC and UNSC, respectively.

A. Protection of Property

One human right that is evidently implicated by the imposition of asset freezing measures can be found in the (first) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ('Protocol 1'):³⁸

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.³⁹

This right is also enshrined in Article 21 of the ACHR in the following terms:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

(i) *Džinić v Croatia*

The impact of protective (that is, pre-conviction) asset freezing measures on the right to the peaceful enjoyment of one's possessions came to the attention of the ECtHR in *Džinić v Croatia*,⁴⁰ a case involving the provisional seizure of the applicant's property with a view to securing the enforcement of a potential future order for forfeiture.⁴¹ The applicant had been charged with the misappropriation of shares and the misuse of company assets and facilities, which allegedly led to a pecuniary gain of approximately one million EURO.⁴² This gain was later found to be roughly 240,000 EURO,⁴³ but the

38 1952, 213 UNTS 262.

39 Article 1 Protocol 1 ECHR.

40 *Džinić v Croatia* Application No 38359/13, Merits and Just Satisfaction, 17 May 2016.

41 *Ibid.* at para 14.

42 *Ibid.* at para 9.

43 *Ibid.* at para 31.

domestic court refused to lift the seizure order,⁴⁴ despite the total value of the property seized from the applicant being closer to 10 million EURO.⁴⁵ The applicant brought his complaint to the ECtHR, with the matter for determination by the Strasbourg Court being whether the disproportionate asset seizure infringed his Protocol 1 right to the peaceful enjoyment of his possessions.⁴⁶

It is notable that the parties did not dispute whether the seizure of the applicant's property constituted an interference with his possessions.⁴⁷ On the contrary, both parties were of the view, confirmed by the ECtHR,⁴⁸ that Article 1 of Protocol 1 was necessarily implicated by the seizure of property in his possession—that is, assets of which he was the lawful owner—'by prohibiting its alienation or encumbrance.'⁴⁹ In the words of the ECtHR: 'the seizure of property for legal proceedings normally relates to the control of the use of property, which falls within the ambit of the second paragraph of Article 1 of Protocol No 1 to the Convention.'⁵⁰ In addition, the ECtHR expressed the following view in relation to protective, pre-conviction asset seizure measures:

[T]he seizure of the applicant's property did not purport to deprive him of his possessions but placed a *temporary restriction* on its use . . . which, in circumstances where the disposition of the property was associated with the applicant's lawful business, also inevitably affected the capacities of his business activity [It is also] important to note that the seizure of the applicant's property was applied as a *provisional measure* aimed at securing enforcement of a possible confiscation order imposed at the outcome of the criminal proceedings in relation to the obtained proceeds of crime . . .⁵¹

The freezing of individuals' assets by States at the request of the ICC and UNSC therefore infringes upon the ECHR protected right to the peaceful enjoyment of one's possessions and, as a result, must be justified. It is important to reiterate here that UNSC decisions that States must freeze assets need not be taken with a view to their eventual forfeiture during criminal proceedings.⁵² Nevertheless, it is argued that the principles that can be deduced from the case law of the ECtHR might also have consequences for the implementation of freezing measures executed under the auspices of UNSC targeted sanctions and therefore ought to be analysed alongside their application to the Rome Statute system. For example, the ECtHR could find a High Contracting Party to the ECHR, all of whom are also UN Member States, to have violated the ECHR in attempting to give domestic effect to UNSC-requested asset freezing measures, if the State's national implementing legislation fails to adhere to the principles detailed in the

44 Ibid. at para 32

45 Ibid. at para 27. The total value of the property seized from the applicant (ten plots of land, two houses, and a commercial building) was estimated at 9,887,084 EURO: see *ibid.* at para 12.

46 Ibid. at para 42.

47 Ibid. at para 59.

48 Ibid.

49 Ibid.

50 Ibid. at para 60.

51 Ibid. at para 61 (emphases added).

52 See *supra* nn 23–27.

ECtHR's jurisprudence.⁵³ It is to these principles, grouped under four headings, namely (i) time limits; (ii) legality; (iii) legitimate aim; and (iv) proportionality, that the focus of analysis now shifts.

Time limits. In *Džinić v Croatia*, the ECtHR stressed that protective, pre-conviction measures carried out with a view to the prospective forfeiture of the assets in question are of an impermanent nature. Both ICC and UNSC-requested asset freezing measures are customarily time limited and are thus comparable with the seizure under discussion. As for the UNSC, although the body has broad discretion in deciding on which measures are to be employed to give effect to its decisions under Chapter VII and, more specifically, Article 41 of the UN Charter,⁵⁴ the UNSC has rarely imposed targeted financial sanctions without specifying an end date or, at least, 'a commitment to review' the measures.⁵⁵ Boon compares UNSC sanctions to counter-terrorism legislation adopted in states of emergency because they are aimed at addressing security related situations.⁵⁶ In her view, as 'derogations from the norm of co-existence and State sovereignty, there is a powerful argument that coercive measures must be inherently time bound and departures from this premise must be supported by [the UNSC] in the form of renewals'.⁵⁷ Should the UNSC be of the opinion that the situation to which it had responded by imposing asset freezing measures no longer merits their application, that body can, of course, terminate the measures under Chapter VII.

As for the ICC, protective asset freezing measures are given effect by States following a request for cooperation issued thereto by the Court, which has discussed their termination in the following terms:

[A]n 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

53 As de Wet, From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions' (2013) 12 *Chinese Journal of International Law* 787 at 806, notes: 'the *Nada* decision of the ECtHR has indicated that even where the language of a UNSC resolution leaves no apparent scope for interpretation, States remain under an obligation to find a way to give some effect to international human rights standards'.

54 See Orakhelashvili, *Collective Security* (2011) at 189–91; *Tadić* ICTY-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, at para 31 ('Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action').

55 Boon, 'Timing Matters: Termination Policies for UN Sanctions' in van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (2017) 236 at 239–42 (discussing three termination methods for UNSC sanctions: (i) resolutions with sunset clauses; (ii) resolutions with no expiry date; and (iii) resolutions with a commitment to review). Boon observes (at 240) that the third option is the most frequently used option by the UNSC in the 41 resolutions forming the subject of her analysis, with the second option the least frequently employed.

56 *Ibid.* at 247.

57 *Ibid.*

under domestic law as a result of the conclusion of its obligation to assist the Court through the freezing of assets.⁵⁸

Asset freezing measures, whether implemented by States at the request of the ICC or the UNSC, consequently ought to be provisional restrictions.

This is not to say that the temporary asset freezes imposed at the respective request of the ICC and UNSC cannot endure for many years. For example, at the ICC, assets belonging to Jean-Pierre Bemba Gombo were frozen in the weeks after his arrest on 24 May 2008.⁵⁹ Following his acquittal on 8 June 2018, counsel for Mr Bemba submitted that ‘[t]here is no legal basis to continue to freeze [his] assets.’⁶⁰ According to a recent filing lodged at the ICC by counsel for Mr Bemba, all of these assets remained frozen as of December 2018, more than 10 years after his arrest and almost 5 months following his acquittal.⁶¹ The application of long-term asset freezing measures can also be seen at the UNSC, where, by way of example, the asset freeze by States at the behest of the UNSC against a number of the children of former Libyan leader Muammar Gadhafi, as a result of their association with their father’s regime, has endured since 26 February 2011.⁶² These measures remain in force as of December 2019,⁶³ despite their father’s death, and the overthrow of his regime, on 20 October 2011.

The protracted application of asset freezing measures could potentially call into question their classification as temporary or provisional restrictions. Such a concern was expressed by the European Union (EU) General Court in *Yassin Abdullah Kadi v*

58 *Situation in the Central African Republic* ICC-01/05–01/08–3660-Red2, 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, Trial Chamber III, 20 November 2018, at para 13.

59 See *Situation in the Central African Republic* ICC-01/05–01/08–3654-Red, Public Redacted Version of ‘Preliminary application for reclassification of filings, disclosure, accounts and partial unfreezing of Mr Bemba’s assets’, Trial Chamber III, 30 October 2018, at paras 7–9.

60 *Ibid.* at para 25.

61 See *Situation in the Central African Republic* ICC-01/05–01/08–3663-Red, Public Redacted Version of ‘Urgent request for partial reconsideration and associated orders’, Trial Chamber III, 10 December 2018, at para 1 (‘In the 22 days since Trial Chamber III’s [20 November 2018] “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”, not one of the assets (whether in the name of Mr Bemba or somebody else) in Portugal, Belgium, or the Democratic Republic of Congo (“the States”) has been returned to its owner. Mr Bemba has received no direct communication from the States, nor indeed are any of them apparently prepared to entertain such communication.’ Footnote omitted).

62 For example, the asset freezes (and travel bans) imposed at the request of the UNSC Sanctions Committee established by SC Res 1970, 26 February 2011, S/RES/1970 (2011) (concerning Libya) with respect to Muammar Gadhafi’s daughter, Aisha, and two of his sons, Mohammed Muammar and Hannibal, remain in force as of October 2019. See UNSC, ‘Consolidated United Nations Security Council Sanctions List’, available at: sancs.un.org/consolidated/ [last accessed 22 June 2020]. All three were listed by the UNSC Sanctions Committee because of their proximity to their father’s regime, rather than any alleged involvement in the perpetuation of the civil war. See UNSC, ‘Narrative Summaries of Reasons for Listing’, available at: www.un.org/securitycouncil/sanctions/narrative-summaries [last accessed 22 June 2020]. Compare the reasons for the listing two of Gaddafi’s other sons, Khamis and Saadi, who, in addition to their closeness to the regime, were listed because of their ‘Command of military units involved in repression of demonstrations.’ *Ibid.*

63 *Ibid.*

European Commission,⁶⁴ which, in turn, cited a report by the UN High Commissioner for Human Rights for the UN General Assembly.⁶⁵ According to the General Court, it might be asked whether,

given that now nearly 10 years have passed since the applicant's funds were originally frozen—it is not now time to call into question the finding . . . according to which the freezing of funds is a temporary precautionary measure that, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. . . . In the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one.⁶⁶

This human rights concern could have implications for the length of ICC proceedings, to which the duration of protective measures is tied, as well as UNSC ordered asset freezes, which may be (and, indeed, have been) subjected to challenges on the domestic, regional and international planes, should they be renewed consecutively over many years.⁶⁷

Having found that the asset seizure implicated Article 1 of Protocol 1, the ECtHR turned to consider the questions whether the measure was lawful,⁶⁸ whether it was executed 'in accordance with the general interest'⁶⁹ or, in other words, pursuant to a legitimate aim,⁷⁰ and whether it was proportionate—that is, 'whether there existed a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'⁷¹ In turn, the Strasbourg Court found that the measure was conducted in accordance with domestic law permitting their use⁷² and that 'the application of provisional measures in the context of judicial proceedings, aimed at

64 Case T-85/09 *Yassin Abdullah Kadi v European Commission* [2010] ECR II-5177.

65 UNHCHR, 'Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism', 2 September 2009, A/HRC/12/22, at para 42 ('Because individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment due to the severity of the sanction. This threatens to go well beyond the purpose of the United Nations to combat the terrorist threat posed by an individual case'). See also para 41: 'The freezing of assets has an impact on several human rights including the right to property. It impacts directly on the right to work and the right to freedom of movement associated with it.'

66 *Kadi*, supra n 64 at para 150. See also de Wet, 'From *Kadi* to *Nada*', supra n 53 at n 42.

67 On the judicial review of UNSC sanctions and its human rights implications, which is beyond the scope of the present article, see de Wet, 'Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection' in Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (2011); Ginsborg and Scheinin, 'You Can't Always Get What You Want: The *Kadi* II Conundrum and the Security Council 1267 Terrorist Sanctions Regime' (2011) 8 *Essex Human Rights Review* 7.

68 *Džinić v Croatia*, supra n 40 at paras 63–64.

69 Article 1 Protocol 1 ECHR.

70 *Džinić v Croatia*, supra n 40 at paras 65–66.

71 *Ibid.* at paras 67–82.

72 *Ibid.* at paras 63–64.

anticipating a possible confiscation of property, was in the “general interest” of the community.⁷³

Legality. As regards the legality of asset freezing measures requested by the ICC and UNSC, both require the requested States to give domestic effect thereto. Any ECHR based challenge stemming from the application of ICC- or UNSC-requested measures at the national level will therefore require an assessment of whether the national asset freezing measures were adopted in accordance with the domestic legislation enacted to give effect to the measures requested by the Court or decided upon by the UNSC on the international plane. In *Nada v Switzerland*, the ECtHR observed that ‘the impugned measures were taken pursuant to the Taliban Ordinance [that is, Swiss legislation], adopted to implement the relevant Security Council resolutions . . . [and] therefore had a sufficient legal basis.’⁷⁴ In a similar vein, measures adopted by States at the domestic level to give effect to ICC requests for cooperation in the freezing of assets pursuant to Article 93(1)(k) of the Rome Statute ought to satisfy this principle.⁷⁵

Legitimate aim. As for what might constitute the ‘general interest’, in the Rome Statute system there are several stakeholders with rights and interests invested in the pre-trial protective measures process. These include the Prosecutor, the accused and *bona fide* third parties.⁷⁶ Further, Article 57(3)(e) of the Rome Statute provides that protective measures for the purpose of forfeiture are to be taken ‘in particular for the ultimate benefit of victims.’⁷⁷ ICC pre-trial chambers must therefore take into account the interests of all four groups of stakeholders, which frequently fail to neatly align, when ordering or renewing such measures.

Turning to UNSC-requested asset freezing measures, what might constitute the ‘general interest’ or ‘legitimate aim’ will necessarily relate to the purpose of the UNSC resolutions implemented by the domestic legislation in question. For example, in *Nada v Switzerland* the ECtHR found that

as the relevant Security Council resolutions had been adopted to combat international terrorism under Chapter VII of the United Nations Charter (“Action with respect to threats to the peace, breaches of the peace, and acts of aggression”), they were also capable of contributing to Switzerland’s national security and public safety.⁷⁸

The responsibility of the UNSC to maintain or restore international peace and security under Article 24(1), Article 39 and Article 41 of the UN Charter will always provide

73 Ibid. at paras 65–66.

74 Application No 10593/0856, Merits and Just Satisfaction, 12 September 2012, at para 173.

75 For discussion of whether the ICC has taken the legality of measures into account when examining their continued application, see *infra* n 133.

76 On which, see Birkett, ‘Protective Measures for the Purpose of Forfeiture’, *supra* n 17.

77 Article 57(3)(e) Rome Statute. See also Birkett, *supra* n 17.

78 *Supra* n 75 at para 174.

the legal basis for the adoption of sanctions measures, whatever their specific aim might be.⁷⁹ The Strasbourg Court also held that seeking to prevent crime constituted a legitimate aim of the UNSC sanctions under examination.⁸⁰ This finding could also have consequences for ICC-requested asset freezes, given that their aims include the cessation and deterrence of the commission of ongoing or prospective crimes under its jurisdiction.

Proportionality. Turning to its proportionality assessment, which represented the majority of the analysis by the ECtHR in *Džinić v Croatia*, the Strasbourg Court noted the margin of appreciation granted to States under paragraph 2 of Article 1 of Protocol 1.⁸¹ The ECtHR then stressed that the execution of such measures, because of their potentially significant impact on the ability of the applicant to manage his assets, should be constrained by ‘certain procedural safeguards’.⁸² Additionally, ‘while any seizure or confiscation entails damage, the actual damage sustained should not be more extensive than that which is inevitable, if it is to be compatible with Article 1 of Protocol No. 1’.⁸³ After analysing whether the national court had struck a fair balance, the ECtHR concluded that the measures, although justifiable in principle, infringed Article 1 of Protocol 1 because they were executed and remained in force without the domestic authorities having determined whether the value of the seized assets corresponded with the potential value of a future order for confiscation.⁸⁴

This principle ought to be relatively straightforward to apply in the ICC context: the value of frozen and/or seized assets ought to correspond with the expected value of a future fine, order for forfeiture or order to make reparations to victims. The ICC has yet to issue a fine or forfeiture order outside of proceedings involving offences against the administration of justice,⁸⁵ but it has issued a small number of orders for reparations. The sums ordered against convicted persons have been significant, despite the indigence of each of the accused: Thomas Lubanga Dyilo was found liable for ten

79 See Article 24(1) UN Charter (‘In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf’). See also Article 39 UN Charter (‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’).

80 *Nada v Switzerland*, supra n 75 at para 174.

81 *Džinić v Croatia*, supra n 41 at para 68.

82 *Ibid.*

83 *Ibid.*

84 *Ibid.* at paras 80–81.

85 *Bemba, Kilolo, Kabongo, Babala and Arido* ICC-01/05-01/13-2123-Corr, Decision on Sentence pursuant to Article 76 of the Statute, 22 March 2017, at 98–9 (imposing fines of 30,000 EURO and 300,000 EURO on Aimé Kilolo Musamba and Jean-Pierre Bemba Gombo, respectively). Both fines were subsequently confirmed in *Bemba, Kilolo, Kabongo, Babala and Arido* ICC-01/05-01/13-2312, Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo, Trial Chamber VII, 17 September 2018, at 50–1.

million US dollars⁸⁶ Germain Katanga for one million US dollars,⁸⁷ and Ahmad Al Faqi Al Mahdi for 2.7 million EURO.⁸⁸ These sums could provide useful yardsticks against which future requests for the freezing of assets could be measured in cases where the accused person is not deemed to be indigent.

As for UNSC-requested asset freezes, proportional application of such measures might be somewhat less concrete. This is because of the diverse purposes served by the freezing of assets in accordance with UNSC resolutions.⁸⁹ In such cases, it is not unreasonable to suggest that the State(s) acting at the request of the UNSC to give effect to the assets freeze ought to be afforded a wider margin of appreciation in their application of the measures because of the difficulties in quantifying their potential value.

The following section surveys another crucial aspect of the asset freezing process, namely the (mis)management of assets after they have been frozen and seized by the responsible domestic authorities, an issue of immediate practical relevance to the ICC.

(ii) *Chaparro Álvarez and Lapo Íñiguez v Ecuador*

The right to the use and enjoyment of property was brought to the attention of the IACtHR in the case of *Chaparro Álvarez and Lapo Íñiguez v Ecuador*.⁹⁰ This case arose as a result of the seizure and subsequent mismanagement by Ecuadorian authorities of a factory belonging to Mr Chaparro and a vehicle owned by Mr Lapo.⁹¹ According to Ecuador, the seizure was performed because of the alleged involvement of the two individuals in narcotics trafficking offences.⁹² In its judgment, the IACtHR elucidated the ambit of Article 21 of the ACHR (read together with Article 1(1) ACHR⁹³ and Article 2 ACHR).⁹⁴ Several of the principles articulated by the San José court are

86 *Thomas Lubanga Dyilo* ICC-01/04–01/06–3379-Red-Corr-tENG, Corrected version of the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, Trial Chamber II, 21 December 2017, at 111. The sum was confirmed on appeal: see *Thomas Lubanga Dyilo* ICC-01/04–01/06–3466-Red, Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, Appeals Chamber, 18 July 2019.

87 *Germain Katanga* ICC-01/04–01/07–3728-tENG, Order for Reparations pursuant to Article 75 of the Statute, Trial Chamber II, 24 March 2017, at 118. The amount was confirmed on appeal: see *Germain Katanga* ICC-01/04–01/07–3778-Red, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled ‘Order for Reparations pursuant to Article 75 of the Statute’, Appeals Chamber, 9 March 2018.

88 *Ahmad Al Faqi Al Mahdi* ICC-01/12–01/15–236, Reparations Order, Trial Chamber VIII, 17 August 2017, at 60.

89 See *supra* nn 24–27.

90 IACtHR Series C 170 (2007).

91 *Ibid.* at para 173.

92 *Ibid.*

93 Article 1(1) ACHR provides as follows: ‘The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.’

94 Article 2 ACHR provides as follows: ‘Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.’

relevant to the practice of the ICC and UNSC as concerns the freezing of assets. It is these principles, that is to say (i) judicial supervision; (ii) management fees and the presumption of innocence; and (iii) prompt release, to which the article now turns.

Judicial supervision. At the outset, it is important to note that the IACtHR did not find the adoption of provisional (or, in its words, precautionary) asset freezing measures to inherently constitute a violation of Article 21 of the ACHR.⁹⁵ This said, the San José Court stressed the potential for a violation of the right to the use and enjoyment of property if the responsible domestic authorities fail to ensure adequate judicial supervision of such measures in the following terms:

[T]hese measures must be adopted and supervised by judicial officials, taking into account that, if the reasons that justified the precautionary measure cease to exist, the judge must assess the pertinence of maintaining the restriction, even before the proceedings are concluded. This point is extremely important, given that if the property ceases to fulfil a relevant role in continuing or promoting the investigation [as required by the pertinent Ecuadorian laws], the material precautionary measure must be lifted, because they run the risk of becoming an anticipated punishment. The latter would constitute a manifestly disproportionate restriction of the right to property.⁹⁶

Management fees and the presumption of innocence. A second principle pronounced by the IACtHR in *Chaparro Álvarez and Lapo Íñiguez v Ecuador* stems from the presumption of innocence, to which an accused is entitled not only under the ACHR,⁹⁷ but also under a range of international human rights instruments⁹⁸ and the statutes of international (ised) criminal tribunals,⁹⁹ including the Rome Statute.¹⁰⁰ In the view of the IACtHR, this presumption entitles an accused to protection from the application of measures that are disproportionate, including the requirement to pay fees incurred in the management of the assets while frozen at the behest of the State

95 *Case of Chaparro Álvarez and Lapo Íñiguez v Ecuador*, supra n 91 at para 187 ('The Court finds that the adoption of these measures does not constitute per se a violation of the right to property, if it is considered that they do not signify a transfer of the ownership of the right to legal title. In this regard, the property cannot be disposed of definitively and such disposal is restricted exclusively to its administration and conservation and to the respective acts of investigation and management of the evidence').

96 *Ibid.* at para 188.

97 Article 8(2) ACHR.

98 See Article 6(2) ECHR; Article 14(2) International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR); Article 7(1)(b) African Charter on Human and Peoples' Rights 1981, 1520 UNTS 217; Article 7 Arab Charter on Human Rights 2004, reprinted in (2005) 12 *International Human Rights Reports* 893 (Arab CHR); Article 11(1) Universal Declaration of Human Rights 1948, GA Res 217A (III), A/810 (1948) at 71.

99 See Article 19(3) Statute of the International Residual Mechanism for Criminal Tribunals 2010, SC Res 1966 22 December 2010, S/RES/1966 (2010) at 13; Article 17(3) Statute of the Special Court for Sierra Leone 2002, 2178 UNTS 138; Article 16(3) Statute of the Special Tribunal for Lebanon 2007, SC Res 1757, 30 May 2007, S/RES/1757 (2007) at 17.

100 Article 66 Rome Statute.

following an acquittal. In the words of the Court in *Chaparro Álvarez and Lapo Íñiguez v Ecuador*:

[T]he Court emphasises that material precautionary measures are adopted with regard to the property of a person who is presumed innocent; hence, these measures should not prejudice the accused disproportionately. The charges that a person whose case has been dismissed is required to pay, with regard to the property of which he was provisionally dispossessed, constitute a burden that is tantamount to a sanction. This requirement is disproportionate for those persons whose guilt has not been proved.¹⁰¹

Prompt release. A third principle expressed by the IACtHR concerns the length of time allowed between the end of proceedings against accused persons and the release of their frozen and/or seized assets before their right to the use and enjoyment of property is violated. In the case of *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, the IACtHR held that a one-year delay between the provisional stay of the proceedings against Mr Chaparro and the return of his property was too protracted. According to the IACtHR:

[T]he property confiscated from Mr. Chaparro should have been returned when the reasons had disappeared that made the material precautionary measures necessary. . . . The Court finds that this [one-year] delay in complying with the order to return the property, which was no longer affected by a precautionary measure, aggravated Mr. Chaparro's situation when he was attempting to remedy, to some extent, the impediment to the use and enjoyment of his property, and this constitutes a violation of Article 21(1) of the Convention, in relation to Article 1(1) thereof, to his detriment.¹⁰²

It is argued that, if asset freezing measures are subject to satisfactory judicial supervision in line with the first principle articulated by the IACtHR in this case, then the prompt release of assets at the conclusion of proceedings against the accused ought to follow as a consequence thereof. By the same token, it is not unreasonable to propose that the timely release of frozen assets after the proceedings against the accused person have concluded is less likely to take place in cases where the freezing measures are inadequately supervised by the responsible domestic authorities.

The principles expressed by the IACtHR in its discussion of Article 21 of the ACHR in the case of *Chaparro Álvarez and Lapo Íñiguez v Ecuador* are of particular import for the ICC, which, at the time of writing,¹⁰³ remains seised with a claim for compensation and damages filed by counsel for Jean-Pierre Bemba Gombo.¹⁰⁴ In this filing, Mr Bemba claims a total of 42.4 million EURO from the ICC because

101 *Case of Chaparro Álvarez and Lapo Íñiguez v Ecuador*, supra n 91 at para 193.

102 *Ibid.* at paras 203–204.

103 This article was completed on 16 December 2019, by which time Pre-Trial Chamber II had yet to rule on the claim.

104 *Situation in the Central African Republic* ICC-01/05–01/08–3673-Red, Public Redacted Version of 'Mr. Bemba's claim for compensation and damages', Pre-Trial Chamber II, 11 March 2019 ('Bemba Claim').

of the alleged mismanagement of his assets frozen at the Court's request.¹⁰⁵ Indeed, Mr Bemba cites the IACtHR's conclusions in the case of *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, namely that 'property confiscated by the State . . . is placed in its custody; consequently, the State assumes a position of guarantor of its good use and conservation, particularly taking into account that precautionary measures are not of a punitive nature',¹⁰⁶ in support of his submission that the '[f]ailure to preserve the value of frozen property gives rise to a claim for damages'.¹⁰⁷ In view of the ICC's obligation to apply and interpret its applicable law in a manner consistent with internationally recognised human rights,¹⁰⁸ it is the view of the present author that the Court ought to seriously consider the discussion of Article 21 of the ACHR by the IACtHR in its adjudication of Mr Bemba's claim. Indeed, a strict application of the IACtHR's approach might require the ICC and/or the State(s) responsible for failing to preserve the value of Mr Bemba's assets while frozen to award him damages, if his claims are found to have merit. This argument finds further support in the fact that the findings of the ECtHR in *Džinić v Croatia* are congruent inasmuch as both human rights courts emphasise the threat posed to the right to the peaceful use and enjoyment of one's property by the protracted application of asset freezing measures. Without explicitly alleging a violation thereof, another right implicated¹⁰⁹ in Mr Bemba's claim is that of respect for private and family life. The following section addresses the constraints placed on the exercise of the asset freezing powers afforded to the ICC and UNSC under the Rome Statute and UN Charter respectively by this ECHR and ACHR-protected right.

B. Right to Respect for Private and Family Life

Article 8 of the ECHR provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 of the ECHR finds its equivalent provision in Article 11 of the ACHR, titled 'Right to Privacy'. This provision provides as follows:

1. Everyone has the right to have his honor respected and his dignity recognised.

105 Ibid. at paras 123–165.

106 Supra n 90 at para 211.

107 Bemba Claim, supra n 104 at para 136. In citing the case decided under the ACHR, Mr Bemba compares his situation to those of Mr Chaparro and Mr Lapo in that he alleges that the value of his assets significantly decreased while they were frozen. See also *Case of Chaparro Álvarez and Lapo Íñiguez v Ecuador*, supra n 90 at paras 211–214.

108 Article 21(3) Rome Statute.

109 See Bemba Claim, supra n 104 at paras 2, 89–106, 117.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

(i) *Nada v Switzerland*

Article 8 of the ECHR, among other rights, was implicated in *Nada v Switzerland*.¹¹⁰ This case concerned the domestic implementation of UNSC sanctions by Switzerland, leading to a ban on the applicant, an Italian and Egyptian national who lived in an Italian exclave surrounded by the Swiss canton of Ticino, from travelling through Swiss territory. At the same time, the measures agreed by the UNSC Sanctions Committee established by UNSC Resolution 1267 (1999),¹¹¹ later incorporated by Switzerland into its domestic law,¹¹² also led to the freezing of the applicant's assets.¹¹³ The ECtHR recognised the potential impact of such measures on the applicant's right to respect for private and family life:

[T]he Court considers that the applicant could not reasonably have been required to move from Campione d'Italia, where he had been living since 1970, to settle in another region of Italy, especially as it cannot be ruled out that, as a result of the freeze imposed by paragraph 1(c) of Resolution 1373 (2001) . . . , he could no longer dispose freely of all his property and assets. Regardless of whether a request for authorisation to move house would have had any chance of success, it should be pointed out that the right to respect for one's home is protected by Article 8 of the Convention¹¹⁴

Referring to, among other factors, 'the duration of the measures imposed',¹¹⁵ the ECtHR ultimately concluded that Switzerland's implementation of the UNSC sanctions had violated the applicant's Article 5 right.¹¹⁶ The applicant brought his complaint

110 *Supra* n 74.

111 SC Res 1267, 15 October 1999, S/RES/1267 (1999). The sanctions regime was extended by SC Res 1333, 19 December 2000, S/RES/1333 (2000).

112 On 2 October 2002, Switzerland passed the *Ordonnance instituant des mesures à l'encontre de personnes et entités liées à Oussama ben Laden, au groupe «Al-Qaïda» ou aux Taliban* (Ordinance on Measures against Persons and Organisations with Ties to Osama Bin Laden, the 'Al-Qaida' Group or the Taliban). See *Nada v Switzerland*, *supra* n 74 at paras 16, 66.

113 The applicant was added to the UNSC sanctions list on 9 November 2001: see *Nada v Switzerland*, *ibid.* at para 21.

114 *Nada v Switzerland*, *ibid.* at para 190.

115 *Ibid.* at para 195. The ECtHR further found (*ibid.*) 'that the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order should have allowed some alleviation of the sanctions regime applicable to the applicant, having regard to [his specific situation], in order to avoid interference with his private and family life, without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein.' Reflecting on this approach, de Wet, in 'From *Kadi* to *Nada*', *supra* n 53 at 806, argues that '[t]he presumption that the UNSC did not intend to deviate from human rights standards seems to be almost non-rebuttable, even where it would amount to a distortion of the text of a UNSC decision.'

116 *Ibid.* at para 199.

to the Strasbourg Court largely because of the impact of the UNSC-imposed travel ban on his ability to exercise his rights under Articles 5, 8 and 9 of the ECHR.¹¹⁷ The ECtHR made no further findings with respect to the effects of the asset freeze on the applicant's Article 8 right to respect for private and family life. Nevertheless, the limited *dictum* from the Strasbourg Court on the potential impact of asset freezing measures on the human right to respect for one's private and family life, which encompasses the right to respect for one's home, is significant not only for the UNSC, and States executing asset freezing measures requested thereby, but also for the ICC.

The ICC has requested States to freeze the assets of individuals, including real property. Pre-Trial Chamber I issued an arrest warrant for Mr Germain Katanga on 2 July 2007.¹¹⁸ Four days later, the same Pre-Trial Chamber requested the national authorities of the Democratic Republic of the Congo (DRC) 'to take, in accordance with the procedures provided for in its national legislation, all necessary measures to identify, trace, freeze or seize the property and assets of Germain Katanga on its territory'.¹¹⁹ Additionally, further to the Prosecutor's application for a warrant of arrest for Katanga, Pre-Trial Chamber I issued another order on 5 November 2007,¹²⁰ in which it observed as follows:

[I]n its application, the Prosecution informed the Chamber that Germain Katanga reportedly had two residences in Aveba at the time of the events . . . and that he also [could have] be[en] expected to have retained at least some of the fruits of the crimes in which his combatants frequently engaged; that these assets potentially could be used to satisfy a reparation award, if such an award is entered; and that, moreover, Germain Katanga ha[d] the means to place his property and assets beyond the reach of the Court.¹²¹

The human rights infringed by the freezing of real property therefore has implications for the Court,¹²² which must be prepared to justify any such infringement.¹²³

117 *Ibid.* at para 3. The applicant also alleged a violation of Article 13 ECHR.

118 *Katanga* ICC-01/04-01/07-1-tENG, Warrant of Arrest for Germain Katanga, Pre-Trial Chamber, 2 July 2007.

119 *Katanga* ICC-01/04-01/07-7-tENG, 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, Pre-Trial Chamber I, 6 July 2007, at para 3.

120 *Katanga* ICC-01/04-01/07-54-tENG, Order on the execution of the warrant of arrest against Germain Katanga, Pre-Trial Chamber I, 5 November 2007.

121 *Ibid.* at 5.

122 In filings issued during the course of proceedings requesting to have an ICC-requested asset freeze lifted following his acquittal for crimes against humanity and war crimes, Jean-Pierre Bemba Gombo alleged that 'houses' belonging to him had been frozen at the request of the Court: see *Situation in the Central African Republic* ICC-01/05-01/08-3657-Red, 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', Trial Chamber III, 30 October 2018, at para 4. See also *Situation in the Central African Republic* ICC-01/05-01/08-3663-Red, Public Redacted Version of 'Urgent request for partial reconsideration and associated orders', Trial Chamber III, 10 December 2018, at paras 5–6, expressly making reference to Bemba's lack of contemporary 'knowledge of where [frozen] houses are located' and 'property in the DRC'.

123 Pre-Trial Chamber I offered such a justification in the same order in respect of the warrant for the arrest of Mr Katanga, noting that, 'for the purpose of awarding reparations to persons with victim status in a

(ii) *The need for clear reasoning at the International Criminal Court*

The ICC has explicitly referred to the law and practice of the ECtHR as regards the right to respect for private and family life under Article 8 of the ECHR in applying Article 21(3) of its constituent instrument to the execution of asset freezing measures. According to this provision, the Court must interpret and apply its sources of applicable law ‘consistent with internationally recognised human rights.’¹²⁴ Albeit not in the context of asset freezing, in its application of this key provision ICC Trial Chamber VII acknowledged ‘[t]he fact that international human rights law affords a right to privacy is beyond question and the Chamber is duty bound to respect this right pursuant to Article 21(3) of the Statute.’¹²⁵ In the ensuing paragraphs, Trial Chamber VII determined whether the violations alleged by Aim Kilolo Musamba of his right to respect for private and family life were effected ‘in accordance with the law’,¹²⁶ having confirmed that infringements upon the exercise of this right may only occur without violating the ECHR under such circumstances.¹²⁷

The same Trial Chamber, albeit with Judge Bertram Schmitt sitting as a single judge, affirmed this approach in response to a further filing by Kilolo regarding his bank account, which had been frozen by Belgium at the request of the Court.¹²⁸ Kilolo had alleged that the measure infringed his right to respect for private and family life because he was unable to provide for his family financially.¹²⁹ After applying the ECtHR’s criteria concerning the circumstances in which the right can be interfered with, Judge Schmitt rejected Kilolo’s request that his account be unfrozen.¹³⁰ Consequently, in its limited (publicly available) decisions on the application of asset freezing measures, the Court appears to have adopted and applied the ECtHR’s criteria as determinative of whether the freezes were executed ‘consistent with internationally recognised human rights’ under Article 21(3) of the Rome Statute.¹³¹

case, if property and assets are not identified, located and frozen or seized at the time of the execution of a cooperation request for arrest and surrender of the person, or very soon thereafter, it is likely that the subsequent efforts of the Chamber, the Prosecution or the victims participating in the case will be fruitless because existing technology makes it possible for a person to place most of his assets and moveable property beyond the Court’s reach in only a few days.’ See Order on the execution of the warrant of arrest against Germain Katanga, supra n 120 at 5.

124 Article 21(3) Rome Statute.

125 *Bemba, Kilolo, Kabongo, Babala and Arido* ICC-01/05–01/13–1257, Decision on Kilolo Defence Motion for Inadmissibility of Material, Trial Chamber VII, 16 September 2015, at para 16, citing Article 17 ICCPR; Article 8(1) ECHR; Article 11 ACHR; Article 21(1) Arab CHR.

126 *Ibid.* at paras 16–21. Trial Chamber VII also acknowledged (at n 22) that ‘Interference with this right is subject to other requirements, such as the interference being “necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country”, but [stated that] there [was] no argument in the Request that Mr Kilolo’s rights have been violated in these respects.’

127 *Ibid.* at para 16, citing Article 8(2) ECHR.

128 *Bemba, Kilolo, Kabongo, Babala and Arido* ICC-01/05–01/13–1485-Red, Decision on the ‘Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba’, Trial Chamber VII, 17 November 2015, at paras 21–23.

129 *Ibid.* at para 21.

130 Judge Schmitt (*ibid.* at para 22) considered whether the freeze of Kilolo’s bank account ‘was taken in accordance with the law and for a legitimate aim’. Judge Schmitt also took into account whether it was ‘proportionate vis-à-vis the legitimate aim pursued’. For an analysis of Judge Schmitt’s application of the ECtHR’s case law, see Birkett, ‘Protective Measures for the Purpose of Forfeiture’, supra n 17 at 599–601.

131 Article 21(3) Rome Statute.

References to regional human rights jurisprudence, which at the ICC most often focus on judgments of the ECtHR,¹³² although understandable and offering a number of benefits for the ICC's case law,¹³³ should be treated with caution.¹³⁴ As Jones observes:

The risk that reference to regional human rights jurisprudence could be used . . . to the detriment of the accused . . . highlights the importance of clear reasoning on the part of judges. To counter the risk of unfairness, it is important that judges demonstrate awareness of the different functions of the ICC and regional human rights courts in their reasoning, ensure compliance with the ICC's provisions on fair trial standards and provide a clear explanation of how human rights jurisprudence is being used . . .¹³⁵

Judge Schmitt could have more explicitly followed this final recommendation in deciding on the violations alleged by Mr Kilolo. Although the ECtHR's approach to balancing the application of protective measures with the right to respect for private and family life was plainly followed, and the multiple reasons provided by Judge Schmitt for his rejection of Kilolo's request were clearly articulated, a more thorough explanation of how the case law of the ECtHR (and, by reference, the IACtHR)¹³⁶ was used would have been beneficial to the parties in facilitating their understanding of the Court's reasoning. Adopting clear reasoning in this context could also serve to assist, in a similar manner, future parties to proceedings concerning the (un)freezing of assets. The reasons for relying upon the jurisprudence of a particular regional human rights court (for example, its expertise in international human rights issues),¹³⁷ ought therefore to

132 See Jones, supra n 14 at 724 (analysing 'the Court's disproportionate number of references to the case law of the ECtHR vis-à-vis other international, regional and domestic mechanisms'). Jones notes that during the proceedings in *Lubanga* the 46 references made by the ICC to the case law of the ECtHR was 'almost double the number of references' made to that of the IACtHR. Jones (at 725) justifies the ICC's preference as follows: 'The length of the ECtHR's operation and the quantity of relevant case law that it had produced explains the disproportionate number of references to the ECtHR vis-à-vis the IACtHR.'

133 See Jones, *ibid.* at 704–6 (identifying benefits concerning the coherence of international law, the quality of the Court's case law, and the perceived legitimacy of the Court).

134 See *ibid.* at 706–8 (discussing the potential for the import of cultural bias and possible undesirable consequences for the rights of the accused); Nerlich, 'Article 21 (3) of the ICC Statute: Identifying and Applying "Internationally Recognized Human Rights"' in Lobba and Mariniello (eds), *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals* (2017) at 84–5 (noting the case and jurisdiction specific nature of the ECtHR's case law).

135 Jones, *ibid.* at 708.

136 See Decision on the 'Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba', supra n 128 at n 37, referring to 'further references to human rights case law [including that of the IACtHR] in related footnotes' in Decision on Kilolo Defence Motion for Inadmissibility of Material, supra n 125 at para 16.

137 See Geneuss, 'Obstacles to Cross-fertilisation: The International Criminal Tribunals' 'Unique Context' and the Flexibility of the European Court of Human Rights' Case Law' (2015) 84 *Nordic Journal of International Law* 404 at 425–6.

be made clear,¹³⁸ not least ‘to allow the defence to make effective challenges where the rights of the accused are at stake.’¹³⁹

3. CONCLUSION

This article has sought to demonstrate that the freezing of individuals’ assets necessarily infringes their fundamental human rights. Using the law and practice of the ECtHR and IACtHR as a lens through which to ascertain the human rights implications of asset freezing measures, the article shows that two specially affected rights are the right to the peaceful enjoyment of one’s possessions and the right to respect for one’s private and family life, home and correspondence. The article has also demonstrated that the human rights repercussions of such measures have consequences for the ICC and UNSC, both of which have the power to request States to freeze the assets of individuals. These States are also impacted by the Strasbourg and San José based Courts’ findings because it is their national authorities who carry out the asset freezes requested by the ICC and UNSC. This is done in accordance with their respective domestic implementing legislation. Council of Europe States, whose members constitute the High Contracting Parties to the ECHR, and States Parties to the ACHR are particularly impacted. This is because their national implementation of ICC or UNSC-requested asset freezes could form the subject of a challenge before the Strasbourg Court, as in the case of *Nada v Switzerland*, or the San José Court, respectively. It is not difficult to envisage a similar complaint being brought with respect to a freeze requested by the ICC. Indeed, the domestic execution of ICC-requested asset freezing measures has been challenged in the domestic courts of at least one Council of Europe Member State: Italy.¹⁴⁰

The article has shown that a strict application of the human rights principles identified in the case law of the ECtHR and IACtHR could have implications for the length of proceedings at, or at least the duration of asset freezing measures requested by, the ICC. As for the UNSC, which rarely imposes open-ended targeted financial sanctions, to strictly apply the principles developed in the jurisprudence of these two regional human rights courts would require that all asset freezes it imposes under Chapter VII of the UN Charter be time limited. Other hurdles, namely that such measures are lawful, taken in accordance with a legitimate aim and are proportionate, should not pose too high a hurdle for States to overcome in executing ICC and UNSC-requested asset freezes in their domestic legal orders. The same conclusion is applicable to the need for judicial

138 Geneuss (ibid.) proposes a two-step approach in this context, as follows: ‘Whenever faced with a human rights issue [international criminal tribunals (ICTs)] . . . are obligated to consult ECtHR jurisprudence. And only after a thorough review can ICTs decide whether they are persuaded by the ECtHR’s reasoning or whether they want to deviate from and re-interpret the human rights standard. . . . In a second step, ICTs look at the contents of ECtHR case law and can decide whether and how they want to translate the ECtHR standard into their own context and whether the balance between, for example, fair trial and public interest must be different, because of the different context in which ICTs operate. However, . . . ECtHR case law carries the weight of “directory authority” [it ought to be followed, but can be outweighed] and any deviation and differences in meaning must carefully be explained and justified.’

139 Jones, supra n 14 at 708.

140 See *Corte di Appello di Roma* (Rome Court of Appeal), *Sezione Quarta Penale, Ordinanza*, N4/12 RGIE, 19 July 2012 (copy on file with author). Thanks to Dini Sejko for his assistance in finding this decision and translating it from Italian into English.

supervision of such measures and the requirement that management fees not be charged to the individual who is subjected to the measures in question. This is because of the wide margin of appreciation given to States when executing measures that infringe upon the rights under examination. As for prompt release, this principle has already proved problematic at the ICC and could continue to do so if the division of labour between it and the States responsible for freezing individuals' assets is not clarified by the Court in the course of adjudicating Jean-Pierre Bemba Gombo's claim for compensation and damages for, *inter alia*, the alleged mismanagement of his frozen assets.

In its limited (publicly available) case law on the (continued) execution of asset freezing measures requested by the ICC, the Court has given weight to the case law of the ECtHR (and, to a noticeably lesser extent, that of the IACtHR) in determining the compatibility of such measures with 'internationally recognised human rights' in accordance with Article 21(3) of its constituent instrument. This practice, albeit justifiable in view of the authority of the Strasbourg and San José courts, nonetheless presents certain challenges, particularly in terms of the concerns raised about the lack of clear reasoning provided by the ICC when referring to the case law of regional human rights courts. Consequently, while advocating that both the ICC and its States Parties acting at its request ought to pay close attention to this case law with a view to respecting the human rights of those to whom asset freezing measures are applied, it is equally important that the reasons behind such reliance are clearly expressed to the parties. To adopt such an approach could serve to render the legal framework applicable to ICC-requested asset freezing measures more 'accessible and foreseeable'¹⁴¹ and, in turn, more 'consistent with internationally recognised human rights'.

141 *Huwig v France* Application No 11105/84, Merits and Just Satisfaction, 24 April 1990, at para 26 ('The expression "in accordance with the law", within the meaning of Article 8 § 2 (art. 8-2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.'). See also Sluiter, *supra* n 8 at 466.