

**Open Society
Justice Initiative**
224 West 57th Street
New York, NY 10019, USA

p. +1 212-548-0600
f. +1 212-548-4608

Claudia Westerdiek
Registrar
Fifth Section
European Court of Human Rights
Council of Europe
F-67075 Strasbourg CEDEX
France
Fax: +33 3 88 41 27 30

BY MAIL AND FAX

15 October 2018

Re: Third party submission in *Democracy and Human Rights Resource Centre v. Azerbaijan* (Application no 74288/14) and *Mustafayev and Democracy and Human Rights Resource Centre v. Azerbaijan* (Application no. 64568/16)

Dear Ms. Westerdiek,

Pursuant to leave granted by the Court on 26 September 2018, please find enclosed the submission of written comments of the Open Society Justice Initiative in the cases of *Democracy and Human Rights Resource Centre v. Azerbaijan* (Application no. 74288/14) and *Mustafayev and Democracy and Human Rights Resource Centre v. Azerbaijan* (Application no. 64568/16).

Yours sincerely,



James Goldston
Executive Director
Open Society Justice Initiative

IN THE EUROPEAN COURT OF HUMAN RIGHTS
**Application Nos.74288/14 and 64568/16 – Democracy and Human Rights Resource Centre
and Others v. Azerbaijan**

**WRITTEN COMMENTS OF THE
OPEN SOCIETY JUSTICE INITIATIVE**

1. In these written comments the Open Society Justice Initiative provides an analysis of (I) the importance, for associations and human rights lawyers, of having access to funds and to banking facilities and (II) the way in which Article 11 and Article 1, Protocol 1 of the European Convention on Human Rights (ECHR) protect the right to such access.¹ The increasing use of bank account freezing by governments against NGOs and human rights lawyers constitutes a significant interference with the rights to freedom of association and peaceful enjoyment of property protected by the ECHR, and should be carefully scrutinised by this Court.
2. These comments draw upon the jurisprudence of this Court, comparative regional and international standards and authoritative statements on the importance of the rights at issue, noting that this Court takes into account “evolving norms of national and international law in its interpretation of Convention provisions.”²

I. IMPORTANCE OF ACCESS TO BANKING FACILITIES

3. It is widely recognised that non-profit associations need access to banking facilities in order to function effectively.³ The Venice Commission and OSCE/ODIHR consider that such access is an “essential factor for associations’ ability to receive donations and to manage and protect their assets.”⁴ The Charity Commission for England and Wales considers that “[i]n order to operate effectively and transparently when delivering aid or undertaking charitable work, every charity needs access to banking facilities.”⁵
4. Operating on a cash-only basis significantly increases operational risks and costs.⁶ Moreover, bank accounts provide an important “internal control” to improve transparency and to prevent the misappropriation of assets,⁷ as well as facilitating compliance with anti-money laundering regulations. They also enable organisations to keep restricted gifts and grants (such as project-

¹ Written comments provided pursuant to the Court’s grant of permission under Rule 44§3 of the Rules of Court, dated 26 September 2018. The Intervener focuses in these comments on Articles 11 and A1P1, those being the areas in which it considers it can most assist the Court. For completeness, it notes that the freezing of NGO and lawyers’ accounts may also violate other Convention rights, notably Article 18.

² *Demir and Baykara v. Turkey*, 12 November 2008, Application no. [34503/97](#), para. 68.

³ E.g., British Association of Bankers, *Banking for Charities: Information for people who manage the financial affairs of a charity or voluntary organisation in Scotland*, February 2016, p.5; John Howell & Co. Ltd, *Drivers & Impacts of Derisking*, February 2016, p.11 and sources cited therein (“*Drivers & Impacts of Derisking*”).

⁴ European Commission for Democracy (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), *Joint Guidelines on Freedom of Association*, 17 December 2014, CDL-AD(2014)046, para. 195, (“*Joint Guidelines on Freedom of Association*”).

⁵ Charity Commission for England and Wales, *Compliance Toolkit: Preventing Charities from Harm*, 5 January 2011, Chp. 4, p.11.

⁶ *Drivers & Impacts of Derisking*, n 3, p. 11.

⁷ US National Council of Nonprofits, *Internal Controls for Nonprofits*, available at <https://www.councilofnonprofits.org/tools-resources/internal-controls-nonprofits>.

specific donations) separate from general operating funds.⁸ In many jurisdictions, trustees or managers of non-profit entities are legally obliged to protect their organisation's funds, and may be unable to discharge that duty without using a bank account.⁹ Further, in some jurisdictions there are restrictions on what donations or grants NGOs can receive in cash, meaning that a non-profit cannot receive funds at all without an account.¹⁰ In Azerbaijan, the restrictions amount to a "de facto prohibition on NGOs receiving cash donations."¹¹

5. In the past decade, "de-risking" ("the phenomenon of financial institutions terminating or restricting business relationships with clients or categories of clients to avoid, rather than manage, risk"¹²) has increased dramatically, especially in response to terrorism financing and money laundering regulations. This trend has resulted in a growing understanding of the effect of restricting access to banking facilities,¹³ including recognition that without such access, many non-profits are simply unable to operate.¹⁴ It is also recognised that removing banking facilities from an organisation may destroy public trust in it, which may "undermine[...] the charity's entire infrastructure and, could ultimately, lead to its closure."¹⁵
6. For individuals, it can be impossible to access basic services without a bank account.¹⁶ The consensus as to the importance of access to banking services for individuals is demonstrated by its inclusion in the UN Sustainable Development Goals. Goal 8.10 is to "Strengthen the capacity of domestic financial institutions to encourage and expand access to banking, insurance and financial services for all", and one of the accompanying indicators is the proportion of adults with an account at a bank or similar institution.¹⁷ The World Bank's Global Findex (financial inclusion index) database¹⁸ explains that "financial inclusion", including access to bank accounts, improves individuals' income-earning potential, capacity to manage financial risk and ability to accumulate savings.¹⁹ A bank account is also necessary for obtaining other financial services, such as credit.²⁰
7. In that context, numerous actors have expressed concern about the use of account freezing and

⁸ David Renz and Robert Herman (eds), *The Jossey-Bass Handbook of Nonprofit Leadership and Management* (2016, John Wiley & Sons, New Jersey, 4th edition), p. 565.

⁹ The Charity Commission for England and Wales, n 5, p.9; see also British Association of Bankers, n 3, p. 3.

¹⁰ In India, the Foreign Contribution (Regulation) Act 2010 requires NGOs to register if they intend to receive foreign contributions and provides that they must receive any such contribution "in a single account only through one of the branches of a bank as he may specify in his application for grant of certificate", Chp. IV, section 17.

¹¹ United States Department of State, *Country Reports on Human Rights Practices for 2017*, 2017, p. 20. See also Council of Europe, *Bringing the law and practice relating to NGOs in the republic of Azerbaijan into compliance with European standards*, 12 April 2017, p.12 and; Committee on Legal Affairs and Human Rights, *How to prevent inappropriate restrictions on NGO activities in Europe*, 26 September 2014, AS/Jur (2014) 18 Rev, para. 26.

¹² US Financial Action Taskforce definition, available at <<http://www.fatf-gafi.org/publications/fatfgeneral/documents/rba-and-de-risking.html>>.

¹³ See: Sue Eckhart and others, *Financial Access for US Nonprofits* (Charity & Security Network, 2017); Center for Global Development, *Unintended Consequences of Anti-Money Laundering Policies for Poor Countries*, (2015), from p.38; Tracey Durner and Liat Shetret, *Understanding Bank De-Risking and its Effects on Financial Inclusion: An Exploratory Study*, (Global Center on Cooperative Security and Oxfam, November 2015).

¹⁴ See Eckhart and others, n 13, p. 10.

¹⁵ British Association of Bankers, *De-Risking: Global Impact and Unintended Consequences for Exclusion and Stability*, Prepared for use by the October 2014 FATF Plenary and associated working groups, October 2014, p.22.

¹⁶ Financial Conduct Authority, *Access to Financial Services in the UK*, 2017, p.26. See also the Financial Inclusion Commission, *Improving the Financial Health of the Nation*, 2015.

¹⁷ *Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development*, UN Doc. A/RES/71/313, Goal 8.10 and Indicator 8.10.2.

¹⁸ World Bank Group, *The Global Findex Database 2017: Measuring Financial Inclusion and the Fintech Revolution*, 2018.

¹⁹ *Ibid*, p. 1, 80, 2, respectively.

²⁰ Financial Conduct Authority, n 16, p. 27.

restrictions on access to banking services as a tool of repression and/or reprisal by states. The OSCE/ODIHR and Venice Commission refer to the freezing of bank accounts as a tactic that can be used to “effectively extinguish” organisations.²¹ The Council of Europe’s Committee on Legal Affairs and Human Rights has described the closure of the accounts of the Applicants in the instant case, leading to the “de facto closure” of the DHRRC (along with other NGOs), as part of a wider pattern of repression of NGOs in Azerbaijan.²²

8. Asset freezing thus interferes with the rights of associations in the following ways: (i) by preventing them from using the financial assets that they have, (ii) by removing their access to banking facilities, which prevents them from receiving and managing grants and donations, (iii) by reducing the confidence of donors in their organisation, which may have a long-term impact on their ability to operate, and (iv) by dissuading the organisation and its members from continuing to exercise their right to associate.
9. For individual human rights lawyers, having a bank account frozen significantly restricts their ability to practise, *inter alia* because of difficulties in receiving and managing cash payments. Further, freezing a lawyer’s account may act as a powerful disincentive to their continuing to practise, particularly in circumstances where the funds frozen represent funds paid for legal services, and which may be seen as a reprisal for conducting particular types of work.

II. ARTICLE 11: RIGHT TO SEEK, RECEIVE AND USE RESOURCES (INCLUDING FUNDS)

A. ECtHR

10. Article 11 protects the right to act collectively in a field of mutual interest, which this Court has recognised as having particular democratic value.²³ The Court strives to give practical effect to the right,²⁴ recognising that the ECHR seeks to guarantee rights that are not “theoretical or illusory but [...] practical and effective.”²⁵
11. This Court has thus found that restrictions that interfere with the ability of applicants to jointly or individually pursue the objectives of their association interfere with Article 11.²⁶ In particular, the Court has recognised a range of activities that are protected by the right, including the following:²⁷
 - *Right to use assets and resources.* In *Moscow Branch of the Salvation Army v. Russia*,²⁸ the Court found that the refusal to re-register an association, which forced the association to take “complex bureaucratic steps” including transferring assets and property to avoid seizure, and which led to a period in which the association “continuously ran the risk of having its accounts frozen and its assets seized” had “an appreciably detrimental effect on its functioning and religious activities.” The Court found that the situation amounted to a violation of the association’s Article 11 rights.²⁹

²¹ *Joint Guidelines on Freedom of Association*, paras. 120, 268.

²² Committee on Legal Affairs and Human Rights, n 11, para. 32.

²³ *Zhechev v. Bulgaria* (21 June 2007), Application no. 57045/00, paras. 34 – 35.

²⁴ E.g. in the context of trade union rights under Article 11, *Demir and Baykara v. Turkey*, (12 November 2008), Application no. 34503/97 at para. 144.

²⁵ *Airey v. Ireland* (9 October 1979), Application no. 6289/73, at para. 24.

²⁶ *Siriopolous and others v. Greece*, (10 July 1998), Application no. 26695/95, para. 31.

²⁷ This is consistent with the position of the UN Human Rights Committee which has confirmed that the protection afforded by Article 22, ICCPR, extends to all activities of an association: *Viktor Korneenko et al. v. Belarus*, Human Rights Committee Communication No. 1274/2004, UN Doc. CCPR/C/88/D/1274/2004, (31 October 2006), para. 7.2

²⁸ *Moscow Branch of the Salvation Army v. Russia*, (5 October 2006), Application no. 72881/01, para. 73.

²⁹ *Ibid.*, paras. 29 -33, 71-75 and 98.

- *Right to receive and use grants or other financial donations.* In *Ramazanova v. Azerbaijan*,³⁰ significant delays in the state registration of the applicant’s association, which meant that the association could not, *inter alia*, receive grants or donations, amounted to a violation of Article 11: “Without proper financing, the association was not able to engage in charitable activities which constituted the main purpose of its existence.” Similarly, the Court considered that a prohibition on receipt of foreign funding by a political association, in *Parti Nationaliste Basque-Organization Régionale d’Iparralde v. France*, constituted an interference with its freedom of association, having regard to the impact on its financial resources and hence its ability to engage in its political activities.³¹ In *Cumhuriyet Halk Partisi v. Turkey* the Court found that the inspection of the finances of a political association, where it “has the effect of inhibiting its activities”, may amount to interference with the right to freedom of association.³²
 - *Right to form a legal entity in order to exercise associated rights.* The Court has also consistently found that preventing an association from establishing a legal entity interferes with Article 11 because it affects the ability of the association to function properly,³³ including preventing it from “exercising the rights associated with legal-entity status, such as the rights to own or rent property, to maintain bank accounts, to hire employees, and to ensure judicial protection of the community, its members and its assets”,³⁴ without which, the freedom to associate is “deprived of any meaning.”³⁵
12. As the protection of opinions and the freedom to express them is one of the objectives of the freedom of association, Article 11 must be considered in the light of Article 10.³⁶ This is particularly so where the impugned measure appears to have been taken to penalise an association or individual for reasons unrelated to a legitimate aim and has the effect of restricting their ability to operate.³⁷ This Court has also recognised that measures that discourage individuals and groups from exercising their right to associate – i.e. those which create a ‘chilling effect’ – may interfere with Article 11.³⁸

B. International and regional standards

13. In addition to being well established in this Court, the right to access resources, including funds, is recognised internationally as a fundamental element of the right to associate.
14. The Venice Commission and OSCE Joint Guidelines on Freedom of Association state that:
- “The right to freedom of association would be deprived of meaning if groups wanting to associate did not have the ability to access resources of different types, including financial, in-kind, material and human resources, and from different sources, including public or private, domestic, foreign or international.”³⁹
15. The former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has described access to resources as “a vital part of the right to freedom of association”, stressing that the right to freedom of association includes the right to “seek, receive

³⁰ *Ramazanova v. Azerbaijan*, (1 February 2007), Application no. [44363/02](#), para. 59.

³¹ *Parti Nationaliste Basque-Organization Régionale d’Iparralde v. France*, (7 June 2007), Application no. [71251/01](#), paras. 36-38.

³² *Cumhuriyet Halk Partisi v. Turkey* (26 April 2016) Application No. [19920/13](#), para. 71.

³³ *Koretsky and Others v. Ukraine* (3 April 2008), Application no. [40269/02](#), para. 40.

³⁴ *Jehovah’s Witnesses of Moscow v. Russia*, (10 June 2010), Application no. [302/02](#), para. 102, applying Article 9 read in the light of Article 11.

³⁵ *Gorzelik and others v. Poland* (17 February 2004), Application no. [44158/98](#), para. 88.

³⁶ *Christian Democratic People’s Party v. Moldova*, (14 February 2006), Application no. [28793/02](#), para. 62.

³⁷ *Zhechev v. Bulgaria*, para. 36: “Such a link [between Articles 10 and 11] is particularly relevant where – as here – the authorities’ stance towards an association was in reaction to its views and statements.”

³⁸ *Christian Democratic People’s Party v. Moldova*, para. 77; *Yilmaz Yildiz and others v. Turkey* (14 October 2014), Application no. [4524/06](#), para. 33

³⁹ *Joint Guidelines on Freedom of Association*, Principle 7.

and use resources – human, material and financial – from domestic, foreign, and international sources.”⁴⁰ In relation to the freezing of the Applicants’ accounts in the instant case the former Special Rapporteur has recalled that “organizations should be able to use their available resources to undertake their activities and [the Special Rapporteur] views the freezing of accounts as impeding these activities.”⁴¹

16. The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms contains the right of everyone “individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means” (Article 13).⁴² Similarly, the UN Human Rights Council in 2016 and 2018 underlined the importance of the ability of civil society actors to solicit, receive and utilize funds for their work, and called upon States to ensure that domestic provisions are not “misused” to hinder their work or endanger the safety of civil society actors.⁴³
17. The Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights confirm that the right to freedom of association includes the right to seek, receive and use funds freely in compliance with not-for-profit aims,⁴⁴ as endorsed by the African Commission’s former Special Rapporteur on Human Rights Defenders.⁴⁵
18. The Inter-American Commission on Human Rights, considering the rights of human rights defenders, has also stated that the right to freely associate includes a freedom to receive funds (including foreign funds) and that states should allow and facilitate the access to such funds.⁴⁶ The Inter-American Court has specifically recognised that “intervention” with a workers’ union’s bank accounts may interfere with the union members’ right of freedom of association.⁴⁷

C. Interference with freedom to associate

19. As stated above, there are a number of ways in which an account freeze might limit an association’s ability to function; each of those restrictions would constitute an interference with the right to seek, receive and use resources, based on the established principles set out above. In particular, both the frozen funds and the bank account itself are resources to which the association is being denied access. Further, freezing an association’s account, (particularly in the context of other measures being taken against NGOs) is likely to dissuade individuals (both

⁴⁰ UN Human Rights Council, Maina Kiai, Former Special Rapporteur on the rights to freedom of peaceful assembly and of association, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, 24 April 2013, A/HRC/23/39, para. 8. The concept of resources is broad, and includes financial transfers (donations, grants, contracts), material resources (office supplies, IT equipment), human resources (paid staff, volunteers), and the ability to travel without undue interference. Para. 10.

⁴¹ Azerbaijan Communications: May 1, 2011 to February 28, 2017, Communications Report, available at <http://freemassembly.net/reports/azerbaijan-communications/>. See in particular ‘Joint urgent appeal, 15/08/2014’, Case no: *AZE 5/2014*, in relation to the freezing of NGO accounts in Azerbaijan.

⁴² General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 8 March 1999, UN Doc. A/RES/53/144.

⁴³ Human Rights Council, *Resolution on Civil Society Space*, 1 July 2016, UN Doc. A/HCR/RES/32/31, para. 8; *Resolution on Civil Society Space*, 4 July 2018, UN Doc. A/HRC/38/L.17/Rev.1, para. 6.

⁴⁴ *Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights*, May 2017, African Commission. See also African Charter on Human and Peoples’ Rights, Art. 10.

⁴⁵ E.g., African Commission’s former Special Rapporteur on Human Rights Defenders, Reine Alapini-Gansou, *Intersession Activity Report*, November 2011-April 2012, at paras. 34, 43.

⁴⁶ Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas*, 31 December 2011, paras. 179-187.

⁴⁷ *Baena-Ricardo et al. v. Panama*, IACtHR, (2 February 2001), paras. 151(g), 156, 164, 171. The Court found a breach of the right of freedom to associate, based, *inter alia*, on “interference” with the trade union workers’ use of funds and checking accounts containing membership contributions.

current and prospective members of an association) from exercising their right to associate,⁴⁸ and if the confidence of donors in an association is reduced by reason of the account freeze, that is likely to have a further, and long-lasting impact on the organisation's ability to operate.

20. Measures taken against an individual (e.g., the freezing of a lawyer's bank account) are also capable of interfering with their Article 11 rights:⁴⁹ asset freezing and restrictions on access to banking facilities imposed as a result of an individual's involvement with an association, and which prevents or deters them from continuing to associate with that organisation, will constitute an interference with the exercise of their article 11 right.⁵⁰

D. Restrictions under Article 11 must be prescribed by law, have a legitimate aim and be necessary in a democratic society⁵¹

21. *Prescribed by law*. The impugned measure must have a basis in law, be accessible, and enable a person to foresee the consequences which a given action may entail.⁵² For domestic law to satisfy those requirements it must afford a measure of protection against arbitrary interferences by public authorities.⁵³ An absence of proper reasons for initiating proceedings or imposing a measure may suggest arbitrariness.⁵⁴ Where a freezing order is linked to criminal proceedings, there must also be sufficient protection in the domestic law to prevent delays: the government must comply with domestic time limits, and if it does not there must be sufficient and clear consequences. The applicable law must not allow a government to arbitrarily prolong proceedings.⁵⁵
22. *Legitimate aim*. While the "prevention of disorder or crime" is a legitimate aim under Article 11(2), the measure imposed must be rationally connected to the aim and be genuinely intended to prevent crime.⁵⁶ A freezing order against an NGO or lawyer made ostensibly for the prevention of crime, but which is not supported by reasonable grounds for suspecting the commission of the alleged conduct, or evidence justifying the impugned measure, or where the alleged offence is not punishable under domestic criminal law, is unlikely to be pursuant to a legitimate aim.⁵⁷ In *Aliyev v. Azerbaijan* this Court found that a search warrant linked to criminal proceedings did not pursue the legitimate aim of preventing crime because (i) the domestic court "justified the search by merely referring in vague terms to the criminal investigation into "breaches of legislation discovered in the activities of a number of non-governmental organisations" without asserting any specific facts related to the suspected crimes of abuse of power and forgery" and (ii) the crimes of which the applicant was accused did not, in fact, give rise to criminal liability under domestic law.⁵⁸
23. *Necessary in a democratic society*. Because of "the direct relationship between democracy,

⁴⁸ See *Jehovah's Witnesses of Moscow v Russia*, para. 101, in which the Court found that measures affecting the association affected the presidents, founders and individual members of the group as well as the group itself.

⁴⁹ See, for example, *Redfearn v. UK*, (6 November 2012), Application no. [47335/06](#) in which the Court found that dismissing an employee because of his membership of an association interfered with his Article 11 rights.

⁵⁰ See *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, (25 September 2012), Application no. [11828/08](#) in which the Court found that statements made by the Ministry of the Interior could have had a chilling effect by discouraging the applicants from carrying on activities in their trade union (paras. 60 – 61).

⁵¹ See *Ramazanova v. Azerbaijan*, para. 61.

⁵² *Adalı v. Turkey*, (31 March 2005), Application no. [38187/97](#), para. 272.

⁵³ *Ramazanova v. Azerbaijan*, para. 62.

⁵⁴ *Jehovah's Witnesses of Moscow v Russia*, para. 176; *Gülcü v. Turkey*, (19 January 2016), Application no. [17526/10](#), para. 116 (the absence of sufficient and relevant reasons may also go to the proportionality of the measure).

⁵⁵ *Ramazanova v. Azerbaijan*, para. 61.

⁵⁶ The Court's assessment under Article 18 is likely to be relevant to the question of legitimate aim.

⁵⁷ See for example, *Aliyev v. Azerbaijan*, (20 September 2018), Applications nos. [68762/14](#) and [71200/14](#), para 184.

⁵⁸ *Aliyev v. Azerbaijan*, para. 184 -185.

pluralism and the freedom of association”⁵⁹ only “convincing and compelling reasons” can justify restrictions on the right, and the Contracting States have “only a limited margin of appreciation.”⁶⁰ The Venice Commission and OSCE consider that criminal sanctions which amount to effectively suspending the activity of an association, “should only be applied in cases where the breach [of law] gives rise to a serious threat to the security of the state or of certain groups, or to fundamental democratic principles.”⁶¹ The nature and severity of the penalty are relevant to proportionality.⁶²

24. When considering whether a measure is necessary in a democratic society the Court should have regard to the particular importance of associations to the “proper functioning of democracy”.⁶³ Further, the Court should recall the important democratic role played by NGOs acting in the public interest, in strengthening democracy and holding authorities to account.⁶⁴ NGOs that are involved in raising matters of public interest exercise a public watchdog role that has been accorded special protection by this Court.⁶⁵ The “most careful scrutiny” will be applied when assessing measures taken by national authorities which may potentially discourage the participation of watchdogs in the public debate on matters of legitimate public concern⁶⁶ and a narrow margin of appreciation will be afforded to States.⁶⁷ Similar scrutiny should be exercised by this Court in cases where a government takes measures that interfere with the Article 11 rights of an NGO acting in the public interest, acknowledging the particular threat to democratic values that such measures pose. In relation to lawyers, this Court has held that persecution and harassment of members of the legal profession “[s]trikes at the very heart of the Convention system” and that such persecution “in whatever form” will be subject to “especially strict scrutiny” by the Court.⁶⁸

⁵⁹ *Gorzelik and others v. Poland*, para. 88.

⁶⁰ *Tüm Haber Sen and Çinar v. Turkey*, (21 February 2006), Application no. [28602/95](#) at para. 35; *Jehovah's Witnesses of Moscow v Russia*, para. 100.

⁶¹ *Joint Guidelines on Freedom of Association*, para. 239. See also para. 222.

⁶² *Gülcü v. Turkey*, para. 111.

⁶³ *Gorzelik and others v. Poland*, paras. 88 – 92.

⁶⁴ *Steel and Morris v. United Kingdom*, (15 February 2005), Application no. [68416/01](#): “there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest [...]”; *Guseva v Bulgaria*, (17 February 2015), Application no. [6987/07](#), para. 38. For international recognition of the importance of NGOs to democracy see: *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, Article 18; *Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe*, 30 September 2008, recital 3; Human Rights Council Resolution, *The rights to freedom of peaceful assembly and of association*, 11 October 2012, A/HRC/RES/21/16, recitals and para. 4; Venice Commission, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the republic of Azerbaijan*, 19 October 2011, CDL-AD(2011)035, paras 39 – 45.

⁶⁵ *Guseva v. Bulgaria* para. 38; *Társaság a Szabadságjogokért v. Hungary* (14 April 2009) Application no. [37374/05](#), para. 27. While this principle has received particular attention in the context of protecting associations’ rights under Article 10, the rationale applies equally to their associative rights under Article 11, *a fortiori* when Article 11 is read in the light of Article 10.

⁶⁶ *Osterreichische Vereinigung Zur Erhaltung, Stärkung und Schaffung v. Austria*, (28 November 2013), Application no. [39534/07](#) para. 33.

⁶⁷ *Animal Defenders International v. United Kingdom* (22 April 2013), Application no. [48876/08](#), para. 103.

⁶⁸ See *Elçi and others v. Turkey*, (13 November 2003), Applications nos. [23145/93](#) and [25091/94](#), para. 669; see also *Aliyev v Azerbaijan*, para. 181; *Yuditskaya and Others v. Russia*, (12 February 2015), Application no. [5678/06](#), para. 27.

III. ARTICLE 1, PROTOCOL 1: ACCOUNT FREEZING

A. Account freezing is control of use

25. This Court has recognised that freezing a bank account is a control of use of property (under the third rule of A1P1).⁶⁹ Seizure of assets with a view to their forfeiture under proceeds of crime legislation is similarly a control of use of property, in interference with A1P1.⁷⁰ Freezing an individual's assets, even when a temporary, precautionary measure, may constitute a "considerable" restriction on their exercise of the right to property.⁷¹

B. Protection of human rights lawyer and NGO as businesses

26. Denying access to banking facilities (in addition to denying access to the particular funds that are the subject of the freezing order) may constitute a separate interference with A1P1 if it interferes with an individual's or organisation's ability to carry on their business.
27. This is because the marketable "goodwill" of a business may amount to a possession protected by A1P1. In *Van Marle v. The Netherlands*, which concerned accountants who were required for the first time to register in order to continue to practise, the Court reasoned as follows:⁷²

"[...] the right relied upon by the applicants may be likened to the right of property embodied in Article 1 (P1-1): by dint of their own work, the applicants had built up a clientèle; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1). This provision was accordingly applicable in the present case.

The refusal to register the applicants as certified accountants radically affected the conditions of their professional activities and the scope of those activities was reduced. Their income fell, as did the value of their clientèle and, more generally, their business. Consequently, there was interference with their right to the peaceful enjoyment of their possessions."

28. A law practice and its clientele constitute possessions within the protection of A1P1.⁷³ As such, this Court has found that removal of the name of a lawyer from a bar council roll, which forced the lawyer to close down his legal practice, leading to the loss of clientele, was a control of use of the lawyer's property.⁷⁴

C. Interference with peaceful enjoyment of possessions

29. Freezing an NGO or human rights lawyer's accounts would amount to an interference with their property rights.
30. Restricting the ability of a lawyer to practise, or to act for particular clients, by restricting their access to funds and to banking facilities would also amount to an interference. Similarly, a non-profit organisation's business – which although not generating profit, is likely to be a marketable

⁶⁹ *International Bank for Commerce and Development and others v. Bulgaria*, (2 June 2016), Application no. [7031/05](#), para. 123. For the three rules that form A1P1 see, *Beyeler v. Italy* (5 January 2000), Application no. [33202/96](#), para. 98.

⁷⁰ *Raimondo v. Italy* (22 February 1994), Application no. [12954/87](#), para. 27.

⁷¹ See, for example, case law concerning the impact of asset freezing pursuant to sanctions regimes, e.g. *Yassin Abdullah Kadi and Al Barakat International Foundation v Council of the European Union and Commission of the European Communities* Joined Cases C-402/05 P and C-415/05 P, Judgment of the Court (Grand Chamber), (3 September 2008), para. 358; see also analysis in Committee of Legal Advisers on Public International Law (CAHDI), *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Report prepared by Professor Iain Cameron, (September 2006), CAHDI (2006) 2, p. 2.

⁷² *Van Marle v. The Netherlands*, (26 June 1986), Application no. 8543/79; 8674/79; 8675/79; [8685/79](#), paras. 41 – 42.

⁷³ *Wendenburg v. Germany*, (6 February 2003), Application no. 71630/01, p. 23 (decision on admissibility).

⁷⁴ *Lederer v. Germany* (22 May 2006), Application no. 6213/03.

asset (in particular bearing in mind its donors) – should be recognised as a possession under AIP1, and benefit from the same protection as other businesses.

D. Control of use must be lawful, pursue a legitimate aim in the public interest and strike a fair balance⁷⁵

31. *Lawful basis.* The concept of legality is fundamental to the Convention, the rule of law being inherent in all Articles of the Convention, including AIP1.⁷⁶ As observed above, using laws against NGOs or human rights lawyers which do not properly apply to the conduct of which they are accused will amount to a violation.⁷⁷ Any interference with AIP1 must be accompanied by procedural safeguards which allow the individual or entity concerned a reasonable opportunity to present their case to the responsible authorities for the purpose of effectively challenging the measure which interferes with their rights.⁷⁸
32. *Legitimate aim in the public interest.* The Court must intervene when the State's judgement as to what is in the public interest is manifestly without reasonable foundation.⁷⁹ The Court should also have regard to whether the purported aim is in fact the real aim of the measure (consistent with its approach under Article 18). Freezing the accounts of an NGO or human rights lawyer as a reprisal, or with the intention of silencing dissent, cannot be regarded as a legitimate aim.
33. *Fair balance.* An interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the protection of the individual's fundamental rights.⁸⁰ Assessing whether a fair balance has been struck involves (a) undertaking an overall examination of the interests in issue, bearing in mind that the Convention intends to safeguard rights that are practical and effective,⁸¹ and (b) assessing whether the State's action has caused the person to bear "an individual and excessive burden."⁸² In doing so, the Court "must look behind appearances and investigate the realities of the situation complained of", which includes "the conduct of the parties, including the means employed by the State and their implementation."⁸³
34. In considering the general interest of the community, the Court should have regard to the important role played by NGOs in furthering the public interest.⁸⁴ That special status suggests that the Court should exercise particular care in scrutinising State interference with the property of NGOs – particularly when the interference restricts their ability to function. Similarly, there is a strong public interest in protecting the ability of lawyers to practise: "[t]he freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention [...]."⁸⁵ As such, as set out at paragraph 24 above, persecution of lawyers will be subject to "especially strict scrutiny" by the Court.⁸⁶
35. The proportionality of an interference will be affected by, *inter alia*, the extent of the

⁷⁵ *Suljagic v. Bosnia and Herzegovina* (3 November 2009), Application no. [27912/02](#), paras. 38 – 41.

⁷⁶ *Suljagic v. Bosnia and Herzegovina*, para. 40.

⁷⁷ *Aliyev v Azerbaijan*, para. 184 -185.

⁷⁸ *Forminster Enterprises Ltd v Czech Republic* (9 October 2008), Application no. [38238/04](#), para. 69.

⁷⁹ *Suljagic v. Bosnia and Herzegovina*, para. 42; *James v United Kingdom*, (21 February 1986), Application no. 8793/79, para. 46; *Immobiliare Saffi v Italy*, Application no. [22774/93](#) (28 July 1999), para. 49.

⁸⁰ *Immobiliare Saffi v. Italy*, para. 49; *Suljagic v. Bosnia and Herzegovina*, para. 43.

⁸¹ *Suljagic v. Bosnia and Herzegovina*, para. 43.

⁸² *James v. United Kingdom*, Application no. 8793/79, (21 February 1986), para. 50; *Sporrong and Lönnroth v. Sweden*, Application no. 7151/75, (23 September 1983); [7152/75](#); *Immobiliare Saffi v Italy*, para. 59.

⁸³ *Suljagic v. Bosnia and Herzegovina*, para. 44.

⁸⁴ See n 64 above.

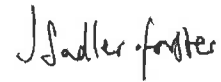
⁸⁵ *Elçi and others v. Turkey*, para. 669.

⁸⁶ *Elçi and others v. Turkey*, para. 669; see also *Aliyev v Azerbaijan*, para 181.

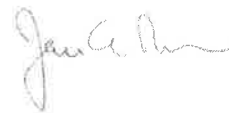
interference, including the impact on the applicant, its duration,⁸⁷ the procedural safeguards available,⁸⁸ the uncertainty or unpredictability of the authorities' actions, including uncertainty as to when the measure might be lifted,⁸⁹ the possibility of using other, less drastic measures to achieve the same purpose,⁹⁰ and the availability or otherwise of compensation.⁹¹ Even where the control of use of property is pursuant to lawful orders made in connection with ongoing criminal proceedings against the applicant, the control may still upset the fair balance between applicant and the general interest.⁹²

IV. CONCLUSION

36. Access to funds and banking facilities for associations and for human rights lawyers is of fundamental importance. The increase in use of bank account freezing as a way to restrict – and ultimately extinguish – their activities, is a matter of significant concern. Asset freezes interfere with rights under Article 11 and A1P1 of the Convention and frequently amount to Convention violations. Contracting States must carefully consider their obligations under the ECHR before imposing such measures on NGOs and lawyers, and should recall their positive obligations to protect Convention rights. Where account freezes are imposed on NGOs and lawyers, they should be carefully scrutinised by this Court, bearing in mind the crucial democratic role played by human rights defenders acting in the public interest.



Jana Sadler-Forster, Legal Officer



James A. Goldston, Executive Director
Open Society Justice Initiative

15 October 2018

⁸⁷ *Luordo v. Italy*, (17 July 2003), Application no. [32190/96](#), para. 70; *Immobiliare Saffi v. Italy*, para. 56.

⁸⁸ *Forminster Enterprises Ltd v Czech Republic* (9 October 2008), Application no. [38238/04](#), para. 69; *Immobiliare Saffi v. Italy*, paras. 54-57.

⁸⁹ *Immobiliare Saffi v. Italy*, para. 56.

⁹⁰ *Central Bank AD v Bulgaria*, (24 November 2005), Application no. [49429/99](#), para. 138.

⁹¹ *Immobiliare Saffi v. Italy*, para. 57.

⁹² *Forminster Enterprises Ltd v Czech Republic*, para. 77: Freezing a company's shares in connection with ongoing criminal proceedings was lawful, but the length of the seizure and value of the assets made the interference disproportionate.