Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/05-01/08**
Date: **6 May 2019**

PRE-TRIAL CHAMBER II

Before: **Judge Antoine Kesia-Mbe Mindua, Presiding Judge**
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF *THE PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO*

Public with public Annex A

Public redacted version of "Prosecution's response to Mr Bemba's claim for compensation and damages", 6 May 2019

Source: **Office of the Prosecutor**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Ms Helen Brady

Counsel for Mr Bemba
Mr Peter Haynes
Ms Kate Gibson

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

INTRODUCTION

1. On 8 March 2019, Jean-Pierre Bemba Gombo asked the International Criminal Court to compensate him with the unprecedented sum of € 68.6 million. He has failed, however, to establish any founded basis in law and fact for why the Court should do so.[1] Mr Bemba's Request does not meet the high threshold under article 85 of the Statute and should be dismissed.

2. Far from establishing a "miscarriage of justice"—let alone a "grave and manifest" one— Mr Bemba presents a series of arguments that must fail.

- *First*, Mr Bemba uses his compensation request to repeat several arguments he has already fully ventilated before the Trial Chamber and the Appeals Chamber in the course of the proceedings against him.[2] Yet, no Chamber has found it necessary to endorse these claims—with several Judges (including the Dissenting Judges on appeal)[3]—actively rejecting them in earlier proceedings. These compensation proceedings are manifestly *not* the appropriate avenue to resurrect them. That the *Bemba* Majority Judges did not address several issues on appeal does not imply that they are now still alive for adjudication.[4] With his acquittal in the case ("*Bemba*" or "Main Case") on 8 June 2018, the outcome of that case against Mr Bemba became final. This acquittal does not give him a *carte-blanche* to raise the same issues again in these proceedings. This would turn these compensation proceedings into a second appeal, contravening the statutory framework, its object and purpose

[1] Request.
[2] *See e.g.*, Request, paras. 14-83, 86-106, 126-132.
[3] *See* Dissenting Opinion, paras. 380-488 (rejecting Mr Bemba's argument that there was a mistrial); paras. 614-690 (rejecting Mr Bemba's procedural errors). *Contra* Request, para. 80 ("[…] However, the errors identified above, having never been the subject of scrutiny other than by the Judges who committed them, are not settled. […]").
[4] *Contra* Request, para. 79 ("[…] In acquitting him, the Appeals Chamber dealt only with two discrete aspects of his appeal. The procedural and substantive errors […] remained unaddressed"); *see* Dissenting Opinion, para. 1 ("[…] In relation to the grounds of appeal that are not addressed by the Majority, we wish to note that the views expressed in this opinion are not necessarily in contradiction with the views the Majority Judges may have.[…]").

and the Court's previous practice, all of which confirm their discrete and *exceptional* nature.

- *Second,* Mr Bemba's submissions are legally incorrect. By misinterpreting article 85(3) (grave and manifest miscarriage of justice), he disregards its plain text and exceptional nature.[5] Moreover, although Mr Bemba refers in passing to article 85(2) (compensation for wrongful conviction),[6] he fails to show why this provision applies to him: article 85(2) does not apply to Mr Bemba's situation since he was, in fact, acquitted on appeal in the Main Case.

- *Third,* many of Mr Bemba's submissions are factually incorrect. For instance, his claim makes sweeping allegations against the Prosecution,[7] the Trial Chamber[8] and the Legal Representative of Victims (LRV)[9] based on an inaccurate view of the record and misunderstands the Court's law and practice. The record speaks for itself and Mr Bemba's claims should be dismissed. Likewise, Mr Bemba's portrayal of his detention (and the duration of the case as a whole) omits the necessary context; in particular, that such detention was subject to regular judicial scrutiny and found necessary in the circumstances.[10] Nor does Mr Bemba acknowledge his own role in committing offences against the administration of justice, while in detention. Mr Bemba's

[5] Request, paras. 10-13.
[6] Request, para. 84 ("Compensation under [a]rticle 85(2) is apparently 'according to law' […]"); para. 85 ("[…] In Mr Bemba's submissions, those heads of damage follow whether a claim succeeds under [a]rticle 85(2) and (3)").
[7] Request, paras. 22-27 (alleging that the Prosecution "jettisoned its original investigation and brought a case it knew to be untrue"); para. 149 (alleging that the Prosecution's conduct led to "substantial damage" to the Boeing 727-100 parked at Faro airport (Portugal)); paras. 115-116 (alleging "[the] impression that the Prosecutor and her staff have expressly sought to continue to damage Mr Bemba's reputation […]").
[8] Request, paras. 14-21 (alleging "errors" in 84 evidence citations out of 1009 in the Trial Judgment), 28-53 (alleging that the Trial Chamber "negligently mismanaged the case"); paras. 69-75 (alleging that the Trial Judgment was "of sub-standard and unacceptable quality and did not respect the presumption of innocence").
[9] Request, paras. 54-63 (alleging that the scope of the LRV involvement led to an unbalanced and unfair trial); paras. 64-68 (alleging an "industrial falsification of victims' applications", but without attributing it to any particular Court organ or participant).
[10] Request, paras. 76-78 (merely stating that "the case should never have taken 10 years"), paras. 89-106 (relating to the "length of his detention").

convictions for these article 70 offences were confirmed on appeal on 8 March 2018[11]—exactly a year before he brought this compensation claim.

- *Fourth*, although he claims the Court was responsible for any purported loss to his seized or frozen assets, Mr Bemba asks the Chamber to rely on his selective assessment of the circumstances.[12] Taken at its highest, Mr Bemba's claim regarding his assets alleges the Court's "negligence", not "malfeasance". Accordingly, even if established, this is unlikely to meet the high threshold for compensation claims under the Rome Statute. Moreover, Mr Bemba's attempt to use these compensation proceedings to launch a "private claim" against the Court for allegedly failing to preserve his assets is misplaced and should be dismissed *in limine*.[13] These proceedings are limited to determining if the criteria of article 85 are met. His effort to sue the Court for "tortious liability"—in the guise of the statutory compensation scheme—is plainly incompatible with the Statute. Likewise, although Mr Bemba characterises his claim as exclusively pertaining to "private law", this is unclear: some aspects of the claim (even assuming that it is founded) may be of a "public law" nature. If this were found to be so, the Court may assert immunity.

3. Compensation is a two-step process. To succeed, Mr Bemba must first show—in sound and compelling terms based on the objective case record—that he has suffered an article 85 violation. It is only then that any discussion on the *amount* of compensation arises. Yet, Mr Bemba fails to discharge his burden under article 85 and his claim fails at the very first hurdle. Notwithstanding Mr Bemba's claims that

[11] *Bemba et al.* AJ, para. 1631 (confirming Mr Bemba's convictions for article 70(1)(a) and 70(1)(c) offences).
[12] On the issue of assets, the Prosecution will respond to claims made regarding its purported conduct, based on information in its possession. Regarding the broader claims on the Court's alleged negligence in managing the assets, the Prosecution does not have all the relevant information and the Registry is better placed to address this set of allegations.
[13] Request, para. 6 ("Mr Bemba alleges that, in any event, the Court acted negligently in seizing and freezing his property but failing properly to manage it or even account for it. This liability arises *irrespective of any consideration of a miscarriage of justice*. […]") (emphasis added); paras. 7-9.

the proceedings against him were "error-strewn",[14] he fails to articulate any such errors[15]—let alone those that may have rendered the proceedings "unprecedented", "remarkable" or "extraordinary".[16] And to the extent that he puts forward a handful of alleged errors, they are based on a selective and incorrect reading of the record. Significantly, although Mr Bemba "seeks to paint an overall picture of the [purported] gap between a fair trial, and what in fact happened",[17] he paints with a very broad brush—providing no details to sustain his claim.

Level of confidentiality

4. This response is filed confidentially pursuant to regulation 23*bis*(2) of the Regulations of the Court as it refers to the contents of a confidential filing. Following the Chamber's order, the Prosecution will file a public redacted version of its response simultaneously. [REDACTED].

[14] *See e.g.*, Request, para. 15 ("[…] Littered with mistakes, and error-strewn on a level never before seen in ICL, the *Bemba* Trial Judgment stands alone.[…]"); para. 82 ("Severally, or cumulatively, these errors are of a gravity and scope never before seen in ICL. The trial record of the *Bemba* case will forever stand as a cautionary tale").
[15] *See e.g.*, Request, para. 69 ("It is not possible, in the context of this filing, to list the evidential errors in the Trial Judgment. They are plentiful"); para. 70 ("Listing every one of the Trial Chamber's errors would fill these 60 pages. […]"); para. 72 ("Many errors were noted")—providing no substantiation.
[16] *See e.g.*, Request, para. 2 ("This case is almost unprecedented; an innocent man lost 10 years of his life. That alone justifies the description 'extraordinary'"); para. 20 ("[..] The Bemba case was utterly remarkable. […]").
[17] Request, para. 21.

I. THE LAW ON COMPENSATION: MR BEMBA FAILS TO DISCHARGE HIS BURDEN

I.A. THE BURDEN UNDER ARTICLE 85

5. Mr Bemba must convince this Chamber that he should be compensated. He bears the burden under article 85 of the Statute to do so. If he fails to meet this burden, the Request must fail. For articles 85(1) and 85(2),[18] he must demonstrate he suffered either an "unlawful detention" or a "miscarriage of justice": only then may the Chamber consider any discussion on the compensation amount. For article 85(3),[19] which is Mr Bemba's preferred legal basis to seek compensation,[20] even if he were to show he suffered a "grave and manifest miscarriage of justice", the Chamber may still consider that paying compensation is not warranted in the circumstances.[21] Therefore, obtaining a finding on "the unlawfulness of the detention", and/or a "miscarriage of justice" and/or a "grave and manifest miscarriage of justice" is a pre-requisite to advancing any compensation request. Without such a finding, no compensation can flow.

6. The plain text of article 85, its negotiating history and legal commentary support this two-stage determination of a compensation request under article 85.

[18] Article 85(1), Statute: Anyone who had been the victim of unlawful arrest or detention shall have an enforceable right to compensation;
Article 85(2), Statute: When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.
[19] Article 85(3), Statute: In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of proceedings for that reason.
[20] Request, paras. 10-13.
[21] *See* Staker/Nerlich in Triffterer *et al.* (Eds.), p. 2000, mn. 6 ("Unlike the first two paragraphs of this article, paragraph 3 confers no right to compensation, but allows for compensation to be awarded in the Court's discretion**.** The requirement that the discretion be exercised only in 'exceptional circumstances' where there has been a 'grave and manifest' miscarriage of justice suggests that ordinarily that no compensation will be paid to persons acquitted by the Court (even if only on appeal), or against whom proceedings are terminated before final judgment*"*) (emphasis removed); Zappalà, in Cassesse *et al* (Eds.), p. 1583 ("This kind of compensation can hardly be considered as amounting to an individual right. Not only [may] compensation under paragraph 3 […] be granted solely in exceptional circumstances, but also the decision to award or not award compensation is left to the wide discretion of the Court").

Indeed, views on this "double procedure" under article 85 are uniform.[22] The Court's previous practice on compensation proceedings is similarly unanimous.[23]

7. *Ad hoc* tribunal case law also accords with this understanding. It establishes that a decision establishing the basis of the compensation must precede any decision awarding any such compensation.[24]

8. Sound policy reasons which protect the Court's time and resources also support the adoption of the "double procedure": interpreting article 85 otherwise would put the cart before the horse. It would negate the intended statutory bulwark against frivolous claims for compensation, and expose this Court to unnecessary and time-consuming proceedings.

9. Finally, the Request conflates the distinct burdens under the various sub-articles of article 85.[25] Although the Request appears to be based on a claim under

[22] *See* Zappalà in Cassese *et al.* (Eds.), p. 1583 ("[r]ule 173, relies by way of principle on the system of the double procedure. First, the interested person must obtain a decision of the Court affirming that the arrest or detention is unlawful (Article 85(1)), or that the conviction has been reversed on the grounds of a new fact (Article 85(2)) or that there was a grave and manifest miscarriage of justice (Article 85(3)). Moreover, the request shall contain all the elements justifying the request and the amount requested"); Bitti in Lee (Ed.), p. 627("[d]elegations acknowledged that the trigger for the presentation of a request for compensation was the existence of a prior decision of the Court stating that the arrest or detention was unlawful, or reversing a previous conviction, or releasing the person from custody because there has been a grave and manifest miscarriage of justice"). *See also* Zappalà (2005), p. 75 ("[t]he Rules have opted for a separation of the proceedings on determination of unlawfulness and the decision on compensation (Rule 173.2 ICC Rules)").

[23] *Ngudjolo* Compensation Decision, paras. 12-16 (where the Chamber first determined "whether the arrest and detention were unlawful and, if appropriate, whether a grave and manifest miscarriage of justice took place. It is only after making that determination that the Chamber will decide whether it is appropriate to award compensation."); *Mangenda* Compensation Decision, paras. 18-20 (concurring with the approach of the *Ngudjolo* Chamber, finding that "[t]he Defence in this case has not identified any prior decision that determined Mr Mangenda's detention to be unlawful, nor does it appear to have sought to obtain any such decision prior to submitting the Request", and noting that "the relief sought in the Request could be dismissed on this basis alone"). Although both the *Ngudjolo* and *Mangenda* Chambers allowed the chambers seised with the compensation requests to also determine whether there was a prior decision establishing an article 85 violation "in the interests of justice", this does not contradict the understanding that there are two steps for a successful compensation proceeding. *See also* *Mangenda* Compensation AD, paras. 19-23 (declining to address the issue framed *proprio motu* by the *Mangenda* Trial Chamber on whether a decision on unlawfulness of detention was a condition precedent to seek compensation).

[24] *See* ICTR: *Rwamakuba* Compensation AD, paras. 23-24, emphasising that "Trial Chamber II recognised the existence of these violations, and the Appeals Chamber indicated that Mr Rwamakuba could "seek reparation" for them; *Zigiranyirazo* Compensation AD, para. 8 (where the Appeals Chamber found that no compensation was warranted because "[n]othing in the Appeals Judgement could be reasonably interpreted as authorising a claim for compensatory damages"); *Nzuwonemeye* Compensation Decision, paras. 15-17 (dismissing a compensation claim when there was no prior finding on a violation).

article 85(3), the Request—and previous submissions—have not been consistent on the precise scope of the Request.[26] Since Mr Bemba fails to argue article 85(1) in its relevant terms and mentions article 85(2) merely in passing, his submissions, to the extent that they may touch on these aspects, may be dismissed *in limine*. In any event, out of an abundance of caution, the Prosecution sets out its understanding of all three aspects of article 85. No aspect applies to Mr Bemba's situation.

I.A.1. Article 85(1): "Unlawful arrest and detention"

10. Mr Bemba does not expressly advance a claim under article 85(1).[27] In any event, a request for compensation under article 85(1) cannot succeed unless the applicant demonstrates that he/she was "unlawfully detained" in violation of either the Statute or internationally recognised human rights law. No "enforceable right to compensation" exists until detention is established as unlawful. The text of article 85(1) is clear.[28] So too are the views of commentators on the Statute.[29] Moreover, as case law and commentary equally show, arrest and pre-trial detention do not automatically become wrongful, and subject to compensation, merely because an accused has been acquitted.[30] Nor should persons be compensated when they have

---

[25] *See e.g.*, Request, paras. 10-13 (arguing the law on article 85(3, but conflating the terms "miscarriage of justice" and "grave and manifest miscarriage of justice"); paras. 84-85 (arguing incorrectly that the tests under article 85(2) and 85(3) are broadly similar).
[26] *See e.g.*, Bemba Extension Request, paras. 2-3, 21 (referring to articles 85(1), 85(2) and 85(3), but mainly arguing the assets issue); Page Time Extension Decision, para. 6.
[27] *See generally* Request.
[28] Article 85(1) of the Statute states that "[a]nyone *who has been the victim of unlawful arrest or detention* shall have an enforceable right to compensation" (emphasis added).
[29] *See* Staker/Nerlich in Triffterer *et al.* (Eds.) p. 2000, mn. 4("[p]aragraph 1 of this article adopts verbatim the wording of article 9 para. 5 of the ICCPR. In the context of the ICC, this provision would apply in cases where a person is arrested or detained in violation of specific provisions of the Statute (in particular, article 55 para.1 (d) of the Rules), and presumably, where the arrest or detention was unlawful under other applicable rules of international law") (emphasis removed); Zappalà in Cassese *et al.* (Eds.), p. 1582 ("[The text of [article 85(1)] reproduces the wording of international provisions, such as Article 9(5) of the ICCPR or Article 5(5) of the ECHR."). *See also* Brady/Jennings in Lee (Ed.), p. 303, ("[d]elegations agreed a person who has been the subject of an unlawful arrest or detention, in violation of either the Statute or internationally recognised human rights law, shall have a right to compensation from the Court. This is reflected in Article 85(1)"). While Ms Brady is currently a member of the Prosecution, this commentary was published in 1999, prior to her employment at the Court and based on her participation in the drafting of the Statute.
See also Article 9(5), ICCPR: Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation; article 5(5), ECHR: Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.
[30] *See Ngudjolo* Compensation Decision, para. 15 ("[A] decision of acquittal does not automatically render an arrest or detention unlawful"); *See also* HRC: *W.B.E v. The Netherlands* (para. 6.5, stating "[t]he author,

been lawfully detained "based on a reasonable suspicion of having committed a crime."[31] As the *Ngudjolo* Chamber succinctly stated:

> "[An] arrest or pre-trial detention does not automatically become unlawful simply because the accused has been acquitted. It is not permissible to seek compensation if the pre-trial detention was based on properly reasoned decisions, in keeping with the provisions of the Statute, including article 58, interpreted in accordance with internationally recognised human rights."[32]

11. Similarly, to obtain a finding under article 85(1), the applicant must show that his allegedly unlawful arrest or detention may be attributed to the Prosecution or any other Court organ.[33] It is insufficient to establish that the actions were merely "connected with Court proceedings": a showing of "concerted action" by the Court is necessary to trigger the provision.[34]

I.A.2. Article 85(2): "Wrongful conviction"

12. Apart from two passing references to article 85(2),[35] Mr Bemba does not argue his claim under article 85(2). Accordingly, any claim under article 85(2) should be

---

however, has not substantiated, for purposes of admissibility [of the compensation claim], his claim that his detention was unlawful. In this connection, the Committee observes that the fact that the author was subsequently acquitted does not in and of itself render the pre-trial detention unlawful." *See also* Schabas (2016), p. 1259.

[31] *See* Schabas (2016), p. 1259 , citing Professor Manfred Nowak, in his Commentary on the International Covenant on Civil and Political Rights, that "article 9(5) does not grant a right to compensation to innocent pre-trial detainees as long as their detention is based on a reasonable suspicion of having committed a crime"; Treschel, p. 497, stating "[a] person who was kept lawfully in detention on remand but was later acquitted is not entitled to compensation […]"; p. 499 ("[I]f compensation is only possible in the event of an acquittal, and he or she *was* indeed acquitted, the Court will leave it at that; the setting aside of a decision will not necessarily affect the lawfulness of the detention").

[32] *Ngudjolo* Compensation Decision, para. 18 (citations omitted).

[33] Kenya article 85(1) Decision, para. 6 ("[a] domestic arrest must breach a provision of the Court's statutory framework and be attributable in some way to the Court"; para. 7 ("Although Article 85(1) is broadly framed […] its meaning and application must be interpreted in light of other relevant provisions of the Statute. […] it would need to be demonstrated, at minimum, that there is concerted action between the Court and national authorities").

[34] Kenya article 85(1) Decision, paras. 9-10 ("[G]iven that the Chamber is not satisfied that Mr Itumbi has been arrested in a manner attributable to the prosecution or any other organ of the Court, the relief requested in the Application must be rejected").

[35] *See* Request, paras. 84-85.

dismissed *in limine* on this basis alone.[36] In addition, Mr Bemba appears to conflate the discrete requirements of articles 85(2) and 85(3)[37]—contradicting legislative intention which foresaw the two provisions applying in two definite and different circumstances.

13. For a Chamber to consider a compensation claim under article 85(2), the applicant must first succeed in a request to revise a final judgment of conviction under article 84.[38] In this sense, article 85(2) is modelled on article 14(6) of the ICCPR.[39]

14. Accordingly, the phrase "miscarriage of justice" in article 85(2) must be viewed through the lens of article 84. Moreover, a "miscarriage of justice" yielding compensation can only occur where there has been some form of State malfeasance, such as police, prosecutorial or judicial misconduct during relevant investigations or

[36] *Ngudjolo* Compensation Decision, para. 17.
[37] *See* Request, para. 12 ("The phrase "grave and manifest miscarriage of justice" is tautologous. By definition, a miscarriage of justice is grave and manifest").
[38] *See* Article 84, Statute (Revision of conviction or sentence): The Appeals Chamber may revise a final judgment of conviction or sentence if
"(a) New evidence has been discovered that: (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making the application; and (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;
(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46."
[39] Staker/Nerlich in Triffterer *et al.* (Eds.), p. 2000, mn. 5 ("Paragraph 2 is in turn materially identical to article 14 paragraph 6 of the ICCPR. This provision could obviously be of potential application in cases where a conviction is reversed as a result of a revision of the final judgement under article 84. Indeed, as this paragraph only applies where a conviction is actually 'reversed', successful proceedings on revision would in fact appear to be a pre-requisite.[…]") (emphasis removed); *see also* article 14(6), ICCPR: When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him; CCPR General Comment No. 32, paras. 52-53.

proceedings.[40] The *Ngudjolo* Chamber endorsed a similar approach regarding claims of grave and manifest miscarriage of justice under article 85(3).[41]

15. Article 85(2) does not apply to a case where a conviction is overturned on appeal. The plain text of article 85(2) requires a person to have been convicted "by final decision", *i.e.,* when a decision at trial convicting is confirmed on appeal.[42] Human rights norms reflect a similarly high threshold for compensation claims brought on grounds of a purported miscarriage of justice. As the United Nations Human Rights Committee has set out, "[n]o compensation is due if the conviction is set aside on appeal, *i.e.,* before the judgment becomes final, or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice."[43] Case law also supports this view.[44]

---

[40] Joseph *et al.*, p. 457 ("It is uncertain whether a 'miscarriage of justice' can occur in the absence of some form of State malfeasance, such as police or prosecutorial mis-behaviour during relevant investigations or proceedings (e.g., framing the suspect, withholding evidence from the defence […]"); Knoops, pp. 174-183 (arguing that the abuse of process doctrine may be used to address potential miscarriage of justice issues).

[41] *Ngudjolo* Compensation Decision, para. 45.

[42] Staker/Nerlich in Triffterer *et al.* (Eds.), p. 1501, mn. 5 ("[…] This paragraph is unlikely to apply in cases where a conviction by a Trial Chamber is overturned on appeal on the basis of new evidence presented in the appeal proceedings, since the conviction in such a case will not have been 'by a final decision' as required by the wording of this paragraph.[…]"); Schabas (2016), p. 1260 ("[…] Subsequently, the conviction must be reversed, through revision proceedings authorised by article 84 of the Statute, on the ground that 'a new or newly discovered facts shows conclusively that there has been a miscarriage of justice'[…]"); *W.J.H. v. The Netherlands*, para. 6.3 (setting out the conditions for the application of article 14(6), ICCPR: (a) a final conviction for a criminal offence; (b) suffering of punishment as a consequence of such conviction; and (c) a subsequent reversal or pardon on the ground of a new or newly discovered fact showing conclusively that there has been a miscarriage of justice).

[43] CCPR General Comment No. 32, para. 53. *See also* Explanatory Report to Protocol No. 7, para. 23 ("[The] article applies only where the person's conviction has been reversed or he has been pardoned, in either case on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice—that is, some serious failure in the judicial process involving grave prejudice to the convicted person. Therefore, there is no requirement under the article to pay compensation if the conviction has been reversed or a pardon has been granted on some other ground. […]"; para. 25 ("[…] The article is not intended to give a right of compensation where all the preconditions are not satisfied, for example, where an appellate court had quashed a conviction because it had discovered some fact which introduced a reasonable doubt as to the guilt of the accused and which had been overlooked by the trial judge"); *See also* *Allen v. United Kingdom*, paras. 64-72 (setting out the human rights standards for "miscarriage of justice"). Although the Grand Chamber found that the Explanatory Report did not constitute an authoritative interpretation of the text of article 3 of Protocol 7 of the ECHR (*Allen v. United Kingdom*, para. 133), this was in the context of noting later case law that no longer required the demonstration of innocence to establish a claim under article 6(2) (presumption of innocence). This does not affect the primary interpretation, *i.e.*, that compensation is not due in cases of acquittals on appeal.

[44] *See e.g.*, Joseph *et al.*, pp. 457-460. For instance, *Muhonen v. Finland*, paras. 11-12 (rejecting a claim for compensation, since the applicant had not established a miscarriage of justice. Although the applicant received a presidential pardon (for declining military service), such pardoning was motivated by considerations of equity,

16. Therefore, article 85(2) is inapposite to Mr Bemba's circumstances: not only have there been no successful revision proceedings that could potentially trigger an article 85(2) claim, his acquittal in the Main Case on appeal was, itself, not based on the presentation of a new or newly-discovered fact presented during those proceedings. Rather, his acquittal was the result of the *Bemba* Majority Judges' review of the existing record in the course of the final appeal. This result falls within the conventional scope of appellate proceedings; it reflects neither the exceptional circumstances prompting revision proceedings at this Court, nor the article 85(2) compensation proceedings that may follow.

I.A.3. Article 85(3): "Grave and manifest" miscarriage of justice

17. Mr Bemba's request for compensation is primarily based on article 85(3). Under article 85(3), compensation is restricted to "exceptional circumstances" and depends on a Chamber recognising, by its decision, that a grave and manifest miscarriage of justice has occurred.[45] These exceptional circumstances are limited to cases of "certain and undeniable miscarriage of justice", following, for instance, wrongful prosecutions.[46] It is axiomatic that such claims arise only when the applicant establishes *mala fides* or, at least, serious misconduct by the Court.[47] Further, such a

---

and not because a "miscarriage of justice" has been established); *W.J.H. v. The Netherlands*, paras. 6.3, 7 (rejecting a claim for compensation, since the "final decision" in the case acquitted the applicant and therefore he did not suffer any punishment as a result of his earlier conviction); *Irving v. Australia*, para. 8.4 (finding a compensation claim to be inadmissible as there was no new or newly discovered fact showing a miscarriage of justice. Two members of the HRC dissented on grounds that given differences between legal systems, there cannot be a single criterion of what constitutes a "final decision". According to them, the HRC should assess this question on a case-by-case basis).

[45] Bitti in Lee (Ed.), p. 629.

[46] *See* *Ngudjolo* Compensation Decision, para. 45 ("[I]t is the view of the Chamber that a grave and manifest miscarriage of justice, within the meaning of [article 85(3)], is a certain and undeniable miscarriage of justice following, for example, an erroneous decision by a trial chamber or wrongful prosecution […] Article 85(3) of the Statute sets a high threshold in this regard and it therefore follows that not every error committed in the course of the proceedings is automatically considered a "grave and manifest" miscarriage of justice"); *See* Brady/Jennings in Lee (Ed.), p. 304,("[t]he final sub-paragraph of the article [85(3)] exceeds current conventional and customary international law. After discussion in informals, it was agreed [a]rticle 85(3) should provide that in exceptional circumstances, where the Court has found there has been a grave and manifest miscarriage of justice, it can award compensation to someone who has been acquitted. This wording was seen to encapsulate the common law requirement for *malafides* on the part of the Prosecutor, and to highlight the fact that it will only be in exceptional circumstances that a Court can award compensation to someone who is released following a decision of acquittal or a termination of the proceedings").

[47] *See* *Ngudjolo* Compensation Decision, fn. 79 (endorsing the Prosecution's view on article 85(3) applying to cases of *mala fide* prosecutions, *Ngudjolo* Compensation Hearing, 21:9-12). Although the *Ngudjolo* Chamber did

miscarriage of justice must give rise to a "clear violation of the applicant's fundamental rights and must have caused serious harm to the applicant."[48]

18. Moreover, the phrase "grave and manifest" significantly limits the scope of this provision.[49] Although the phrase is undefined, the drafting history clearly shows that the test is a high one. Of note, an acquittal *per se* is not automatically grounds for compensation under article 85(3).[50] Indeed, because compensation for acquittals *per se* was controversial at the Rome Conference, it was excluded from the provision's ambit. Furthermore, as commentators have noted:

> "[i]n situations beyond an unlawful arrest/detention and/or a miscarriage of justice, many delegations had difficulty in accepting that a person could obtain compensation. In particular, many delegations had difficulty in accepting that a person could claim compensation if the final verdict was one of acquittal. These delegations were concerned such a provision would greatly hamper the Prosecutor's discretion to bring proceedings, and might prevent or deter him or her from bringing certain charges for fear such proceedings would result in an acquittal and consequently to a large compensation claim by the accused."[51]

---

not define what it meant by "an erroneous decision by a trial chamber", it is clear, from the context, that a chamber must act with *mala fides*, consistent with the requirement of wrongful prosecutions. *See also* *Zigiranyirazo* Compensation Decision, para. 21 (noting, in the context of article 85(3), that Zigiranyirazo did not allege that the Prosecution was malicious or that the Trial Chamber was improperly constituted or motivated).

[48] *Ngudjolo* Compensation Decision, para. 45.

[49] Staker/Nerlich in Triffterer *et al.* (Eds.), p. 2001, mn. 6 ("[t]here is no definition of what would constitute a 'grave and manifest miscarriage of justice' for the purposes of this paragraph, but the words 'grave and manifest' suggest that this expression is narrower in scope than the expression 'miscarriage of justice' in paragraph 2 […]").

[50] *See* Brady/Jennings in Lee (Ed.), p. 303.
See also *Rwamakuba* Compensation AD, para. 25 (stating "[…] there is no right to compensation for an acquittal *per se*[…]").

[51] Brady/Jennings in Lee (Ed.), p. 303. *See also* Bitti in Lee (Ed.), p. 623, fn. 3, citing the report of the Working Group on Procedural Matters at the Rome Conference, Document A/CONF.183/C.1/WGPM/L.2/Add.7 (13 July 1998) noting "[t]here are delegations which believe that there should be an unfettered right to compensation where a person is acquitted or released prior to the end of trial. The text of paragraph 3 is intended to limit the right to compensation to cases of grave and manifest miscarriage of justice. Others (*sic*) delegations considered this text to be too restrictive".

Delegations to the Rome Conference noted that "[t]he final sub-paragraph of the [article 85(3)] exceed[ed] current conventional and customary international law".[52] Undeniably, it was agreed that compensation to someone who is released following a decision of acquittal or termination of proceedings may be awarded exceptionally.[53] The wording of the final adopted text of article 85(3) reflects these views.

19. Similarly, Chambers of the *ad hoc* tribunals have referred to article 85(3) of the Rome Statute to interpret their law. They have underscored the provision's exceptional nature, and firmly rejected the notion that mere acquittals must be compensated.[54] Compensation is therefore not automatic upon acquittal. These Chambers have further rejected any notion of strict liability applying to claims for compensation by acquitted persons. Accordingly, persons are entitled to compensation only if they demonstrate that their rights have been violated.[55]

20. Accordingly, the ICTR Trial and Appeals Chambers in *Rwamakuba* denied Mr Rwamakuba compensation merely because he was arrested, prosecuted and then acquitted. Rather, these Chambers found that Mr Rwamakuba was only entitled to be compensated because his specific right to legal assistance had been violated, resulting from the Registrar's failure to appoint duty counsel during the initial months of his detention.[56] Similarly, the ICTR Trial and Appeals Chamber in *Zigiranyirazo* rejected that any compensation should accrue to all individuals

---

[52] Brady/Jennings in Lee (Ed.), pp. 303-304.
[53] Brady/Jennings in Lee (Ed.), p. 303.
[54] ICTR: *Rwamakuba* Compensation Decision, paras. 26-28, 31 ("What is more, the inclusion of Article 85(3) was not without controversy during negotiations of the ICC Statute. […] Moreover, even if Article 85(3) of the ICC Statute had achieved customary status, the Chamber observes that it remains a narrowly drafted provision. […] customary international law [does not provide] for a right to compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice"); upheld in *Rwamakuba* Compensation AD, paras. 10, 15, 25 (finding the Trial Chamber did not err when it found that "it lacked authority to award compensation to Mr Rwamakuba for having been prosecuted and acquitted" and "[t]here is no right to compensation for an acquittal *per se*[…]."); *See also* *Zigiranyirazo* Compensation Decision, paras. 19-22 ("[i]t is clear that the framers of Article 85(3) of the ICC Statute did not intend the mandatory provision of compensation to all individuals acquitted"; also "[t]he language of [article 85] is permissive rather than compulsory"); upheld in *Zigiranyirazo* Compensation AD, paras. 7-8.
[55] *Zigiranyirazo* Compensation Decision, paras. 49-51; *Zigiranyirazo* Compensation AD, paras. 7-8.
[56] *Rwamakuba* Compensation Decision, paras. 19-31, p. 23; *Rwamakuba* Compensation AD, paras. 10-15.

acquitted, but found that compensation remained appropriate only where there was a clear violation of the claimant's fundamental rights.[57] Indeed, as these Chambers have cautioned, awarding compensation without a clear violation of the accused's rights, "might open the floodgates to an unmanageable host of compensation claims."[58]

21. By obscuring the distinction between a "miscarriage of justice" and a "grave and manifest" one,[59] Mr Bemba's interpretation risks opening exactly these floodgates. Since similar cases should be treated the same, this Chamber should be circumspect about establishing a precedent that would conceivably lead persons being considered eligible for compensation in anything less than exceptional circumstances.[60] Moreover, even if a grave and manifest miscarriage of justice is determined, this Chamber retains its discretion to decide if compensation is due, and in view of the intended purpose of article 85(3), must exercise this discretion to grant compensation stringently and sparingly. Rather than setting out a "virtually insurmountable" threshold for article 85(3),[61] this test—correctly—limits the use of article 85(3) to only those genuine and deserving complaints, preserving the exceptional nature of compensation proceedings.

---

[57] *Zigiranyirazo* Compensation Decision, paras. 19-22; *Zigiranyirazo* Compensation AD, paras. 7-8. The *Zigiranyirazo* Appeals Chamber was unanimous in finding that Mr Zigiranyirazo should not be compensated. Although, at trial, Judge Seon Ki Park dissented from the Trial Chamber's decision to deny Mr Zigiranyirazo compensation, he did not disagree with the principle that mere acquittals should not be compensated. Instead, his disagreement was confined to the gravity of the violation established and what harm ensued. He stated that because the Appeals Chamber had found that the Trial Chamber had "violated the Claimant's most basic and fundamental rights" stemming from its "reversal of the burden of proof", his detention on appeal following his conviction "was entirely unjustified" and needed redress. (Partially Dissenting Opinion—Judge Park, paras. 1-4). On the other hand, the Majority of the Trial Chamber acknowledged that Mr Zigiranyirazo suffered prejudice as a result of the Trial Chamber's errors causing a "miscarriage of justice". However, for the Majority, this prejudice did not constitute a "grave and manifest miscarriage of justice." Equally, Mr Zigiranyirazo did not allege that the Prosecution was malicious or that the Trial Chamber was improperly constituted or motivated. He also delayed in bringing his claim for over two years after his acquittal.

[58] *See e.g.* *Zigiranyirazo* Compensation Decision, para. 21.

[59] Request, para. 12 ("[…] By definition, a miscarriage of justice is grave and manifest. To suggest otherwise is to accept that there can be a 'trivial' or an 'unclear' miscarriage of justice […]").

[60] *See* Zappalà in Cassese *et al.*, (Eds.), p. 1583, stating "[o]f course, it seems correct to argue that the Court will have to respect in its decisions the principles of equality and non-discrimination. Therefore, similar cases will have to be treated in conformity with the same principles. […]."

[61] *Contra* Mulgrew *et al.*, p. 476 (cited in Request, fn. 6).

22. Finally, notwithstanding the nature of the legal test, it remains for Mr Bemba to demonstrate that such test is met. As shown below, he fails to do so. In these circumstances, Mr Bemba has no right to compensation under article 85(3).[62]

II. MR BEMBA FAILS TO SHOW GRAVE AND MANIFEST MISCARRIAGE OF JUSTICE OR CONSEQUENTIAL LOSS AND DAMAGE

23. Mr Bemba's catalogue of complaints—alleging a grave and manifest miscarriage of justice—is unfounded.[63] It is also a study in contrasts. On the one hand, Mr Bemba revives arguments that several judges (namely, the Trial Judges and the Dissenting Judges on appeal) already addressed—and rejected—in the earlier proceedings in this case.[64] Compensation proceedings should not serve as a vehicle to re-litigate issues previously aired and adjudicated.[65] On the other hand, Mr Bemba re-casts other issues as founding a "miscarriage of justice" at this late stage, when he himself had excluded them from his earlier omnibus abuse of process motions[66] and his appeal.[67] Mr Bemba may now consider them germane, but a change in his

[62] *See* Zappalà in Cassese *et al.* (Eds.), p. 1583.
[63] Request, paras. 14-83, 86-118, 129-132. The Prosecution will not address the substance of the claims regarding Mr Bemba's assets (except to the extent that they allege prosecutorial conduct).
[64] For instance, *compare* Request, paras. 36-63 *with* Dissenting Opinion, paras. 380-488 and paras. 614-690.
[65] *Ngudjolo* Compensation Decision, para. 47 ("Ultimately, the wording of article 85(3) of the Statute does not permit the Chamber to act as another level of adjudication or to re-assess the merits of the various decisions which have been adopted—or have not been adopted, as the case may be—by other Chambers in the course of the proceedings").
[66] For instance, Request, paras. 22-27 (alleging a "miscarriage of justice" from the change in the modes of liability from article 25 to article 28); *but see* First Abuse of Process Claim, paras. 1-2 (challenging the admissibility of the case, and alleging "abuse of process" relating to the referral of the situation to the ICC); First Abuse of Process Decision, paras. 250-260 (dismissing Mr Bemba's claims and stating "[t]here is, therefore, no evidential foundation for the suggestion that the Prosecutor, improperly or otherwise, influenced the CAR's "self-referral" under Article 14 of the Statute. […]"); para. 262 ("There has been no material irregularity or impropriety in the proceedings, and the abuse of process challenge is without foundation."); First Abuse of Process AD, p. 3 (dismissing Mr Bemba's appeal, and confirming the First Abuse of Process Decision); Second Abuse of Process Claim, para. 7 (alleging abuse of process relating to the article 70 investigation); Second Abuse of Process Decision, para. 129 (finding that "[the] Defence has failed to substantiate prejudice to the Accused's right to a fair trial […]", and rejecting the Defence request); Abuse of Process ALA, para. 8 (raising 11 issues); Abuse of Process ALA Decision, p. 74 (rejecting the Abuse of Process ALA).
[67] *See generally* Bemba Conviction Appeal Brief; Bemba Sentence Appeal Brief.

strategy—more so, when the primary proceedings against him have concluded—must not extend these compensation proceedings without cause.

24. Mr Bemba's submissions—whether regarding purported prosecutorial, judicial or other conduct—must fail. His claims relating to the Prosecution are limited to three discrete issues:[68] none are founded in the record. Likewise, allegations he now makes against the Trial Chamber and other participants in the proceedings have been previously raised and rejected.[69] All of Mr Bemba's submissions must be rejected.

25. The Prosecution understands, from the structure of the Request, that some of Mr Bemba's claims—namely, relating to his detention, the Prosecutor's statement following the *Bemba* Main Case Appeal Judgment, his legal costs, and the purported damage to his assets—are argued as "losses" or "damages" as a *result* or *consequence* of the alleged miscarriage of justice (Part I.C and Part II), and not as the basis of the alleged "miscarriage of justice" itself (Part I.B). However, Mr Bemba's arguments *assume* that these specific claims (in Part I.C. and Part II) have already been found to constitute article 85 violations or have been found to be inappropriate. They have not, and can be dismissed on this basis alone. However, out of an abundance of caution, the Prosecution addresses these claims in their own right. That said, whether Mr Bemba argues these issues as article 85 violations or as consequential "losses or damages" following from the "miscarriages of justice" set out in Part I of this Request, he still fails to establish an article 85 violation.

[68] *See* Request, paras. 22-27, 129-132, 149, 115-116.
[69] *See* Request, paras. 28-63.

II.A. THE PROSECUTION ACTED PROPERLY

26. All three allegations that Mr Bemba seeks to bring against the Prosecution are misplaced. The first misunderstands the law and practice of this Court,[70] and the latter two are based on Mr Bemba's incorrect and speculative reading of the record.[71]

II.A.1. The Prosecution properly investigated the case

27. Absent a concrete showing of inappropriate conduct, the procedure in article 85 "is not appropriate for conducting a review of the Prosecution's investigations[…]"[72] In alleging that the Prosecution "jettisoned its original investigation and brought a case it knew to be untrue",[73] Mr Bemba fails to substantiate this claim—let alone show that it deserves serious consideration. His submissions are sweeping and speculative.[74] In fact, the gravamen of Mr Bemba's complaint is unrelated to the conduct of the Prosecution's investigation as such, but rather takes issue with the change in the mode of the liability (from article 25(3)(a) to article 28) during the confirmation proceedings.[75] Whatever the case, Mr Bemba's arguments fail to meet the article 85 standard and must be dismissed.

28. *First,* although Mr Bemba declares that the Prosecution was determined "to get their man at all costs",[76] he offers no proof whatsoever. All he provides is his theory—based on a selective reading of materials—that "Mr Bemba was no longer in command of the MLC troops" and that "[the troops] formed part of a new command chain, whereby the troops operating side by side received orders from those

[70] Request, paras. 22-27.
[71] Request, paras. 129-132, 149, 115-116.
[72] *Ngudjolo* Compensation Decision, para. 30.
[73] Request, paras. 22-27.
[74] *See e.g.*, Request, para. 26 ("[…] Rather than an unbiased search for the truth, this shows a determination on the part of the Prosecution to 'get their man at all costs'"); para. 27 ("[The Prosecution] cannot, however, abandon an entire investigation and a wealth of corroborated evidence in favour of a directly contradictory case, simply to avoid a big fish slipping its grasp. This conduct violated the Prosecution's duty to act as impartial minister of justice, and set the scene for the miscarriage of justice which was the *Bemba* trial").
[75] Request, para. 25.
[76] Request, para. 26.

coordinating operations on the ground."[77] Although Mr Bemba had advanced a similar theory on appeal (and was entitled to do so),[78] this premise itself has little to do with the manner in which the Prosecution investigated the case, and whether, in fact, it "violated [its] duty to act as impartial minister of justice […]".[79] The specific issue of purported bias in investigations remains a separate question, one that Mr Bemba raised neither in his abuse of process motions nor in his appeal.[80] Nor can he show that such bias occurred. Mr Bemba's submissions are unfounded and should be dismissed.

29. *Second,* contrary to what Mr Bemba implies, there is nothing unusual for the Pre-Trial Chamber to suggest, before confirming the charges, that the facts and evidence may reflect a different mode of liability.[81] In fact, it is for this precise reason that the confirmation process serves to filter the charges, and that the confirmation decision is said, ultimately, to define the parameters of those charges for the trial.[82] As the Appeals Chamber has recalled, confirmation proceedings are designed "to ensure the efficiency of judicial proceedings and to protect the rights of persons by

[77] Request, para. 23.
[78] Bemba Conviction Appeal Brief, paras. 129-226. *See also* Appeal Judgment, paras. 166-194, 196 (where the Majority found that the Trial Chamber had erred when it found that Mr Bemba had failed to take all necessary and reasonable measures within his power to prevent or repress the crimes, or to submit the matter to the competent authorities for investigation and prosecution. They did not, however, specifically address Mr Bemba's argument on the re-subordination of the MLC troops to the FACA); Judges Van den Wyngaert and Morrison Separate Opinion, paras. 31-56 (Judges Van den Wyngaert and Morrison did not address Mr Bemba's submission on the re-subordination of the troops); Judge Eboe-Osuji Concurring Separate Opinion, paras. 258-269 (Judge Eboe-Osuji addressed Mr Bemba's argument on the re-subordination of the troops, in the context of his effective control); Dissenting Opinion, paras. 111-184 (The Dissenting Judges found that Mr Bemba had effective control over the MLC troops in the CAR).
[79] *Contra* Request, para. 25 ("[…] Knowing that the CAR military and political hierarchy had given statements confirming the re-subordination of the MLC troops to the FACA, the Prosecution could have dropped the case at this point, and pursued those who were responsible for the alleged crimes"). *See* Bemba Conviction Appeal Brief, paras. 224-225 (stating that "[t]he Prosecution never wanted this to be a superior responsibility case" and that "[p]resumably, this reluctance was born from the fact that the superior responsibility case was not a natural fit. […]"), but not arguing that the investigation, as such, was biased).
[80] First Abuse of Process Claim, paras. 1-2; Second Abuse of Process Claim, para. 7; Bemba Conviction Appeal Brief. paras. 13-114.
[81] Request, para. 25; Confirmation Adjournment Decision, paras. 40-49 ("[The] Chamber finds it necessary to adjourn the hearing and request the Prosecutor to consider amending the charges because the evidence submitted appears to establish a different crime (mode of liability), namely the mode of liability under article 28 of the Statute, in the context and within the meaning of article 61(7)(c)(ii) of the Statute").
[82] *Lubanga* AJ, para. 124 ("[…] there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial"); *Bemba et al.* AJ, para. 196 ("[…] it is the confirmation decision that serves as a basis for the trial. […]").

ensuring that cases and charges go to trial only when justified by sufficient evidence."[83] The confirmation process "exists to separate those cases and charges which should go to trial from those which should not, a fact supported by the drafting history."[84] Moreover, regulation 55 allows a Chamber to change the legal characterisation of the facts to accord to specific modes of liability at any time during trial, once the charges have been confirmed.[85] As a matter of law and logic, therefore, it is incorrect to argue that the Pre-Trial Chamber cannot suggest a different characterisation *before* such charges have been confirmed.[86]

30. Much less is it correct, or even tenable, to argue that a change in the mode of liability at confirmation means that the initial investigation itself was in some way flawed.[87] Nor does the record support such a claim. As the Pre-Trial Chamber noted, the Prosecution, although it had relied on article 25(3)(a), had not excluded "any other applicable mode of liability" in its amended document containing the charges ("DCC").[88] Likewise, in the course of their submissions, all Parties and participants—including the Defence—had referred, either explicitly or implicitly, to aspects of article 28 in the course of their submissions before the Chamber.[89] From this, it is clear that the facts investigated at the time also revealed those relevant to Mr

[83] *Mbarushimana* Confirmation AD, para. 39.
[84] *Mbarushimana* Confirmation AD, para. 39.
[85] *See* regulation 55, Regulations of the Court.
[86] *See e.g.*, *Al Hassan* Article 58 Decision, para. 191 ("[…] During the proceedings on confirmation of the charges, following the authority of the Appeals Chamber, the Chamber will first consider whether the person charged is criminally responsible as a perpetrator under article 25(3)(a) of the Statute before contemplating other, accessorial modes of criminal liability […]").
[87] Request, para. 25.
[88] Confirmation Adjournment Decision, para. 41(noting Amended DCC, para. 57 ("Without excluding any other applicable mode of liability, BEMBA is individually criminally responsible pursuant to Article 25(3)(a) […]")). *See also*, para. 42 (noting the Prosecution's statement that "the punishments that were meted out in these sham trials were inordinately small in comparison to the horrific crimes of rape and killing and pillaging that took place" as an indication of article 28 liability).
[89] Confirmation Adjournment Decision, paras. 41-49. *See also*, for instance, Bemba Confirmation Submissions, 36:14-25 ("[Bemba] had an internal investigation launched to the extent that this was possible. […] Mr Bemba made sure that if MLC soldiers had been identified as guilty of committing acts of abuse against civilians in the CAR, he would—they would be arrested and punished"); 37:7-10 ("[Mr Bemba] wrote to the UN Special Representative in the DRC, and in this letter you can clearly see that he did everything that it was possible for him to do to punish the crimes that some MLC soldiers had allegedly committed […]"); 40:4-7 ("The witness adds that there was discipline within the MLC, in particular when the soldiers were in the presence of their superiors. The witness states and confirms that there was a code of military contact in place"); and generally 38:1-44:25.

Bemba's alleged superior responsibility. Therefore, it is hardly feasible to suggest that, following the change in the mode of liability, the Prosecution "abandon[ed] an entire investigation and a wealth of corroborated evidence in favour of a directly contradictory case […]".[90] Nor is it correct to suggest, *as a matter of law*, that it was inherently "contradictory" to first charge indirect co-perpetration under article 25(3)(a) and then superior responsibility under article 28. As the Court's practice shows, the facts of a particular case can fit more than one mode of liability. And the records of several cases at this Court set out different modes of liability (including articles 25(3)(a) and 28) simultaneously.[91]

31. *Third,* in faulting the nature of the Prosecution's evidence,[92] Mr Bemba unduly imposes on the Prosecution an "obligation of result". The Prosecution is obliged to investigate with absolute integrity, and in this sense, one may say that it has an "obligation of means". It discharged this obligation. But it is not obliged, nor can it be expected, to *ensure* a particular outcome for a trial or appeal. A criminal trial or appeal is anything but wholly predictable; its outcome is often uncertain. Moreover, the compensation proceedings are manifestly *not* the appropriate avenue to scrutinise the details of the Prosecution's investigation with the benefit of hindsight.

32. *Fourth*, the procedural history of this case underscores that the Prosecution's investigation was conducted properly. Following this investigation, three Judges of the Pre-Trial Chamber confirmed the charges, three other Judges convicted Mr Bemba at trial. Three Judges composing a Majority of the Appeals Chamber acquitted Mr Bemba based on their views on two discrete issues, while two other Judges of the Appeals Chamber dissented, and would have upheld the convictions. While the Majority's decision on appeal determined the outcome of the case, the

[90] *Contra* Request, para. 27.
[91] *See e.g.*, *Ntaganda* Confirmation Decision, paras. 101-135, 165 (confirming article 25(3)(a) (indirect co-perpetration) and article 28(a), along with other modes of liability); *Ongwen* Confirmation Decision, p. 72, para. 9 (confirming article 25(3)(a) and article 28(a), along with other modes of liability).
[92] Request, para. 26.

result, in no way, implies that the investigation was itself flawed in the manner Mr Bemba describes.

II.A.2. The Prosecution's conduct did not cause "damage to the plane"

33. Mr Bemba's claim that "the Prosecution's possession of the documentation and/or keys" to a Boeing 727-100 (9Q-CMC) parked at Faro airport, Portugal prevented "his attempt to generate an income through the plane"[93] cannot be sustained. The record does not support Mr Bemba's view.

34. *First,* as the record shows, the question of whether the Prosecution had the keys and papers to the plane is immaterial to whether Mr Bemba could proceed to sell the plane or otherwise generate an income through it.[94] In fact, Mr Bemba had the plane's technical documents [REDACTED]. He also had access to the plane's keys. [REDACTED].[95] Moreover, Mr Bemba confirms that a set of keys was returned by the Prosecution in September 2018.[96]

35. *Second,* Mr Bemba's claim that the Prosecution's conduct led to damage to the plane fails to convince. As primary support for this claim he relies on a few sentences in a "statement" of a bank manager ([REDACTED]) whom the Defence interviewed, as late as 12 February 2019, presumably in the context of Bemba's compensation claim.[97] This "statement", if it were admitted, only shows that this bank manager "understood" that seized materials, including the documents and keys to the plane, had been handed over to the Prosecution.[98] Likewise, the "statement" only reflects the bank manager's unexplained view that the Prosecution had been responsible in

[93] Request, paras. 129, 131-132, 149.
[94] *Contra* Request, paras. 129-132, 149 and Request, Annex G, paras. 37-38.
[95] *See* [REDACTED].
[96] Request, para. 131.
[97] Request, para. 149 (stating, in one sentence, "[…] The Prosecution's seizure of the keys and documentation to the Boeing 727-100 is well-documented and lead to substantial damage" and referring to Request, Annex G, para. 19 ("Following this freezing order, the Portuguese authorities searched and seized various items from Mr Bemba's properties in Portugal. These included the keys and all relevant documentation pertaining to the aircraft parked at Faro Airport. *It is my understanding that all materials seized were passed to the ICC Prosecution, including the documents and keys to the plane*") (emphasis added).
[98] Request, Annex G, para. 19.

some way for purported losses in this respect.[99] Yet, this last subjective remark—made well after the events—finds no support in the court record. Opinions of third parties—without access to the Court's official and internal record—should not be considered relevant or persuasive in this context.

36. Mr Bemba's other basis for attributing his inability to sell the plane to the Prosecution likewise does not assist him: the 10 May 2011 email exchange between the Registry and his Counsel does not show "that the Prosecution had been unable to identify the key to the plane and thus it could not be handed over".[100] Rather, it shows [REDACTED].[101] In any event, [REDACTED].[102]

II.A.3. The Prosecutor's public statement following the *Bemba* Appeal Judgment was proper

37. Mr Bemba relies on the fact that the Prosecutor issued a public statement on 13 June 2018 after the *Bemba* Main Case Appeal Judgment as a basis to seek "aggravated damages."[103] However the crux of his cursory complaint is difficult to discern. His submissions are not only unclear; they are incorrect and should be dismissed.

38. *First,* although Mr Bemba expresses his personal view that it was "wholly inappropriate" for the Prosecutor to issue a statement,[104] it was not. The Prosecutor's public statements were made in accordance with her public information role—a role that the human rights courts, the Appeals Chamber and other *ad hoc* tribunals have previously endorsed.[105] Likewise, any such statement needs to be considered in light

[99] *See* Request, Annex G, para. 37 ("[…] the retention of the keys and documents by the Prosecution of the ICC made any attempt to rescue its value, generate an income through it, or mitigate its ongoing losses, impossible. […]").
[100] *Contra* Request, para. 131.
[101] 10 May 2011 Registry Defence Communication (The Prosecution was given access to this on 2 May 2019).
[102] *See* [REDACTED].
[103] Request, paras. 113-116. Mr Bemba has raised a similar issue in his re-sentencing appeal in the Article 70 case, currently pending before the Appeals Chamber. *See* Bemba Re-Sentencing Appeal, paras. 79(l)-(n), 113(i), 114-119.
[104] Request, para. 115.
[105] *See e.g.*, ECtHR, *Allenet de Ribemont v. France*, para. 38 ("[article 6(2) of the ECHR] cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected"); *Gaddafi* Disqualification AD, para. 27 ("[…] Given his responsibility for carrying out investigations

of the broader circumstances[106] and the specific language used.[107] In the circumstances, and mindful of the victims' interests[108] and the Prosecutor's own independence,[109] the Prosecutor acted appropriately in what she said about the *Bemba* Main Case Appeal Judgment including by showing compassion towards the victims who had suffered sexual violence.[110]

39. *Second*, Mr Bemba's comment that the Prosecutor "decried" the *Bemba* Main Case Appeal Judgment is misleading.[111] Rather, the Prosecutor issued a statement, which while conveying her "disappointment" with the outcome and its impact on the victims, accepted and respected the Judgment's finality, in no uncertain terms.[112] The Prosecutor stated that "[as] Prosecutor and an officer of the Court, I must and will respect the decision and its finality. I must uphold the integrity of the Court's processes and accept the outcome."[113]

40. *Third*, Mr Bemba's two examples to claim that the Prosecutor's statement was "factually inaccurate" are themselves factually inaccurate.[114]

---

and collecting evidence, […] the Prosecutor may play an important role in informing affected communities and the public at large about ongoing investigations and prosecutions. In doing so, however, he is constrained by his duty to respect the presumption of innocence."); ICTY, *Haradinaj* Interview Decision, para. 7 ("[…] The Prosecutor, in addition to the normal prosecutorial duties, has the broader task of presenting her office's position both to the public and in forums such as the Security Council. […]"); SCSL, *Sesay* Media Comments Decision, para. 29 ("[T]he wider view is that the Prosecution 'has a duty towards the interests of justice which transcends its role as Party to the proceedings'").

[106] *Gaddafi* Disqualification AD, para. 28.

[107] Schabas (2015), p. 305 ("[I]n particular, the Court will look to the language used by the decision-maker to determine whether the presumption of innocence was breached").

[108] Article 54(1)(b) and article 68(1), Statute (measures for the protection of victims and witnesses).

[109] Article 42(1), Statute and regulation 13, Regulations of the Office of the Prosecutor. *See also* Code of Conduct for the Office of the Prosecutor.

[110] Prosecutor's Statement, p. 1 ("The carnage and suffering caused by [the] crimes were very real").

[111] Request, para. 115.

[112] *See e.g.*, Prosecutor's Statement, p. 1 and Prosecution Reparations Submissions, para. 16.

[113] Prosecutor's Statement, p. 1. *See also* p. 2 ("In the Court's legal framework, the Appeals Chamber is the highest appellate judicial body and its decisions are final. […]").

[114] Request, para. 115, fn. 269. *Compare* Prosecutor's Statement, p. 2 ("The Appeals Chamber was unable to reach unanimity, the ultimate acquittal stemming from a divided Chamber, with two Judges in the Majority deciding to acquit, one Judge in the Majority allowing the appeal, but favouring a new trial, and the two dissenting Judges upholding the conviction") *with* Judge Eboe-Osuji Concurring Separate Opinion, para. 5 ("[…] Although I had initially favoured a retrial instead of an acquittal, I decided in the end to form part of the majority for acquittal, […]"); para. 263 ("It is for reasons such as this, among others, that I was inclined to order a retrial. In the unique circumstances of this case, however, as explained earlier, I am satisfied that the balance of justice impels me to join Judge Van den Wyngaert and Judge Morrison in the outcome of the Majority Opinion, for a judgment of acquittal"); *Compare also* Prosecutor's Statement, pp. 2-3 ("troops that were effectively under the

41. *Fourth,* Mr Bemba's attempt to attribute the social media commentary that followed the *Bemba* Main Case Appeal Judgment to "the Prosecutor's catalytic and inspirational lack of repentance at her own [statement]"[115] is particularly misguided and without cause. It cannot be reasonably said that the Court is responsible for external commentary on social media.[116] Nor are Mr Bemba's comments about the Prosecutor justified. In any event, the commentary contained a robust exchange of different views: Mr Bemba's portrayal of the commentary is one-sided; his own interests were well-represented on social media at the time.

42. *Fifth,* Mr Bemba's argument that his imprisonment was "false"— thus warranting aggravated damages and even an "avowal that the imprisonment was false"[117]—is fundamentally flawed. Mr Bemba's detention was at all times lawfully authorised under the Court's legal framework.[118] As Chambers have held, a decision of acquittal does not automatically render an arrest or detention unlawful.[119] Likewise, the two cases—*Warwick v. Foulkes* and *Walter v. Alltools, Limited,* from 1844 and 1944 respectively—are inapposite.[120] Neither appears to relate to a situation similar to Mr Bemba's.[121]

---

authority and control of Mr Bemba who had knowledge of the crimes during the 2002 to 2003 CAR conflict") *with* Appeal Judgment, para. 194 ("[…] the Appeals Chamber finds, by majority, Judge Monageng and Judge Hofmański dissenting, that the Trial Chamber's conclusion that Mr Bemba failed to take all necessary and reasonable measures in response to MLC crimes in the CAR, was materially affected by the errors identified above. Thus, one of the elements of command responsibility under article 28(a) of the Statute was not properly established and Mr Bemba cannot be held criminally liable under that provision for the crimes committed by MLC troops during the 2002-2003 CAR Operation."). The Appeal Judgment contains no definitive findings on Mr Bemba's alleged lack of knowledge or effective control. *But see* Dissenting Opinion, paras. 111-184 (confirming that Mr Bemba had effective control over the MLC troops in the CAR); paras. 262-318 (confirming that Mr Bemba knew that MLC troops were committing or about to commit acts of murder, rape and pillage).

[115] Request, para. 116.

[116] Request, para. 116 (referring to Annexes D and E).

[117] Request, paras. 113-118.

[118] *See below* paras. 75-81.

[119] *Ngudjolo* Compensation Decision, para. 15. *See above*, paras. 10-11.

[120] *Contra* Request, paras. 113-114.

[121] *See* Request, Annex C, p. 175 (*Warwick v. Foulkes*: To an action of trespass for false imprisonment, the defendant pleaded, by way of justification, that the plaintiff had committed a felony. At the trial, his counsel abandoned the plea and exonerated the plaintiff from the charge. The Court held that the plea, in the circumstances, could be considered as "evidence of malice" and as aggravating the defendant's conduct); p. 172 (*Walter v. Alltools, Limited*: where the plaintiff, carrying a pot of paint, was kept against his will in the head security officer's room for two and a half hours while investigations were made. The Court held that any evidence in a case of false imprisonment which shows or tends to show that the defendant was persevering in the charge which he originally made in bringing about the false imprisonment is evidence to aggravate the damages.)

43. For the reasons above, Mr Bemba's submissions regarding the Prosecution's conduct, whether as part of his claim alleging a "grave and manifest miscarriage of justice" or as part of his claim for "losses" or "damages", must be dismissed.

II.B. THE TRIAL CHAMBER ACTED PROPERLY

44. Mr Bemba's claims against the *Bemba* Main Case Trial Chamber must fail.[122] In his submissions, Mr Bemba has impugned the professionalism of the Trial Chamber Judges, and some of his remarks appear to go beyond respectful professional disagreement.[123] That said, Mr Bemba's submissions largely re-litigate his submissions from earlier proceedings. They should be dismissed.

II.B.1. Mr Bemba's claims regarding the *Bemba* Trial Judgment are unfounded, incorrect and irrelevant

45. Mr Bemba's claim that the *Bemba* Main Case Trial Judgment should be "set aside" is misguided and irrelevant.[124] When the Appeal Judgment was issued on 8 June 2018, Mr Bemba's convictions for crimes against humanity and war crimes were reversed.[125] Mr Bemba's complaints about the quality and content of the Trial Judgment are simply not germane at this stage.[126] Many of his submissions also unrealistically assume that "mistakes in international criminal judgments are rare".[127] Judicial processes are not infallible: otherwise, if this were the case, an appellate

[122] Request, paras. 14-21, 28-53.
[123] *See e.g.*, Request, para. 19 ("[…] They illustrate a pattern of *amateur mismanagement* of the trial process, in which *the Judges regularly demonstrated ignorance of basic principles of criminal law and procedure* […]"); para. 33 ("Of course, this explanation is untenable. *A professional judge* in receipt of internal VWU reports would have returned them […]"); para. 41 ("[…] A *professional trial Judge* in receipt of this request would have immediately directed it to a Pre-Trial Chamber […]"); para. 30 ("[…] *This practice (unique to the Defence case) gives a flavour of Her Honour's approach to criminal procedure, rules of evidence, and rights of the accused.* […]"); para. 35 ([REDACTED]) (emphasis added).
[124] Request, para. 15.
[125] Appeal Judgment, para. 198.
[126] *Contra* Request, paras. 69-75.
[127] Request, para. 14.

process would have no utility. In any event, Mr Bemba's submissions are misplaced and should be dismissed.

46. *First,* in impugning his trial as a "parody of justice", Mr Bemba claims that 84 out of 1009 evidence citations in the Trial Judgment had "errors".[128] This argument, while also raised in his appeal,[129] still remains unsupported. Mr Bemba has never provided an exhaustive list of these purported errors such that they may be scrutinised.[130] In particular, Mr Bemba highlights only *three* out of the purported 84 errors.[131] Of these, when the official English transcript (final CT redacted version) is examined, *two* out of the three stand exactly for the propositions that the Trial Chamber advanced.[132] The third example—only one among a series of otherwise accurate footnotes—appears to be a minor typographical issue.[133] This is relevant, if at all, to corrigenda—not compensation claims.

47. *Second,* to support his exaggerated claim that "the [trial] Judges regularly demonstrated ignorance of basic principles of criminal law and procedure", Mr Bemba provides a solitary—and unconvincing—example concerning whether a

[128] Request, para. 15.
[129] Bemba Conviction Appeal Brief; fn. 4; Prosecution Conviction Appeal Response, para. 4. *See also* T-372-Red3-ENG, 6:9-19.
[130] *Contra* Request, para. 18 (claiming that the figure of 8.3% was never challenged by the Prosecution). *See* Prosecution Conviction Appeal Response, fn. 6, noting that Mr Bemba had alleged "errors" in "84" unidentified footnotes, without explanation.
[131] Request, paras. 15-18. *See also* T-372-Red3-ENG, 6: 9-23.
[132] *See Bemba* TJ, para. 427, fn. 1183 referring, *inter alia,* to P-178's testimony in T-151-Red2-ENG, 68:5-8 ("Q: Did President Patassé give any orders relating to the operations to Mustapha? A: Where would he have the power to do so? He clearly must have acted through Jean-Pierre Bemba. You see, the orders came from the other side, from Gbadolite, from the leader, from Jean-Pierre Bemba."), supporting the finding; *Contra* Request, para. 16 (Court Officer: Just for the record of the case the document being shown on your screens is a public document", cited from a different part of the transcript, T-151-Red2-ENG, 72:19-20); *see also Bemba* TJ, para. 450, fn. 1259 referring, *inter alia,* to P-178's testimony in T-151-Red2-ENG, 22:16 ("So since they were fighting civil clothes –in civilian clothes, the Banyamulenge […]"), supporting the finding that "many dressed in civilian clothing"; *contra* Request, para. 17 ("for you and our interpreters and court reporters to take a break. It's 11 o'clock. We will resume at 11.30", cited from a different part of the transcript, T-151-Red2-ENG, 27:3-5). Mr Bemba appears to base his claim on references in the provisional versions of the transcripts.
[133] Request, fn. 14 (referring to *Bemba* TJ, para. 497, fn. 1458, citing T-192-Red-ENG, 38: 8-9 "(Recess taken at 12.58 p.m.) *(Upon resuming in closed session at 2.39 pm)"). Apart from the references to p. 38 (which are likely to the previous page, p. 37), the other citations in the same footnote are accurate. (*Bemba* TJ, para. 497, fn. 1458, citing P:69's testimony: T-192-Red-ENG, 17:4-10; 31:8-11; 51:11-15; 51:25-52:6; T-193-Red2-ENG, 57:8-10; T-195-Red2-ENG, 12:14-15; T-196-Red2-ENG, 30:14-31:2).

particular question asked of a witness was leading or not.[134] All that the transcript excerpt reflects is a discussion interpreting what a leading question may be in the context. Similar discussions are quite common at this Court—which functions as a hybrid system of both civil and common law principles and practices. Rather than acknowledging this reasonable possibility, Mr Bemba takes issue with the professionalism of the Judges themselves. This is misplaced and unwarranted.

48. *Third,* Mr Bemba fails to appreciate the role of the appellate process and in doing so, over-states the significance of some of the remarks that the Majority Judges made in their various separate opinions.[135] In fact, the Majority Judges were entitled to (and did) express their views as to how the Trial Chamber may have erred. Such remarks form part of the regular fabric of an appeal. Mr Bemba, however, takes them out of context.[136] None of these remarks expressed in separate and concurring opinions are relevant to these compensation proceedings: they *do not* show Mr Bemba suffered a grave and manifest miscarriage of justice.

[134] Request, para. 19, fn. 15. *See* T-178-Red2-ENG, 17:24-18:12 ("Q. Sir, did all of the 40 women go on to the ferry-boat? PRESIDING JUDGE STEINER: Mr Haynes. MR HAYNES: Your Honour, I do protest. The witness has had the opportunity to refresh his memory from his interview with the Office of the Prosecutor. There really is no need for Mr Iverson to continue to put words into his mouth. This could be asked in an open way, and not in a suggestive way. PRESIDING JUDGE STEINER: What is the—what is the question you are objecting? I don't see any leading question here. MR HAYNES: Well, if "Sir, did all of the 40 women go on to the ferry boat" is not a leading question, then I don't know what is. PRESIDING JUDGE STEINER: Mr Haynes, maybe we have different points of view in that respect. You can proceed, Mr Iverson. MR IVERSON: Thank you, Madam President. Q. Sir, where did the 40 women go?"). Prosecution counsel, nonetheless, rephrased his question.

[135] Request, para. 19.

[136] *See* Judges Van den Wyngaert and Morrison Separate Opinion, para. 14 ("[…] We strongly believe that the Appeals Chamber cannot turn a blind eye to such obvious evidentiary problems on the basis of a deferential standard of review […]", in the context of the use of the deferential standard of appellate review); ("We are indeed deeply concerned about the Trial Chamber's application of the 'beyond a reasonable doubt standard'", in the context of applying principles of proof); para. 72 ("[...] Pillaging is indeed a war crime, but not a crime against humanity. Interpreting this notion in the way the Trial Chamber did in this case amounts to an impermissible lowering of the threshold and a trivialisation of the crime against humanity", in the context of interpreting the policy requirement for crimes against humanity); Judge Eboe-Osuji Concurring Separate Opinion, para. 12 ("[…] The Trial Judgment reveals *no* shred of evidence, in my view, pointing to wilfulness on the part of the Appellant in relation to the failures attributed to him in the terms of article 28 […]" (emphasis in original), in the context of Judge Eboe-Osuji's opinion that a commander's failures, under article 28, must be wilful).

II.B.2. Mr Bemba's arguments on "presumption of innocence" are misplaced

49. To claim that the Trial Judgment "did not respect the presumption of innocence", Mr Bemba presents selected judicial remarks from the Majority Judges' separate and concurring opinions.[137] As stated above,[138] none of them sustain his compensation claim.

50. Moreover, Mr Bemba overlooks the clear record of this case, where the Trial Chamber had set out the correct legal standards to assess the evidence[139] and where even some of the Majority Judges agreed that it had done so.[140] If the Majority Judges then differed in their application of those standards, this does not mean that the Trial Chamber "had failed to give Mr Bemba the benefit of the doubt".[141] In any event, Mr Bemba fails to show that he was prejudiced in any way: he was acquitted on appeal.

51. Besides advancing hyperbole,[142] Mr Bemba's submissions fail to satisfy the high threshold for compensation claims.

II.B.3. Mr Bemba's arguments on the Trial Chamber's procedure are incorrect

52. To support his overstated claim that the Trial Chamber "negligently mismanaged the case",[143] Mr Bemba advances several issues. None of them—either individually or cumulatively—meet the article 85(3) test.

---

[137] Request, paras. 72-75.
[138] *See above*, paras. 45-48.
[139] Trial Judgment, paras. 215-218 ("Under Article 66(1), the Accused shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. Pursuant to Article 66(2), the onus is on the Prosecution to prove the guilt of the Accused. […] When a Chamber concludes that, based on the evidence, there is only one reasonable conclusion to be drawn from particular facts, the conclusion is that they have been established beyond reasonable doubt. […]").
[140] Judges Van den Wyngaert and Morrison Separate Opinion, para. 14 ("[…] despite the fact that the Trial Chamber correctly defined the standard when setting it out in the abstract. […]").
[141] *Contra* Request, para. 75. *See Ngudjolo* Compensation Decision, paras. 65-68 (where the Trial Chamber had noted that Mr Ngudjolo had been presumed innocent until proved otherwise).
[142] *See e.g.*, Request, para. 69 ("It is not possible, in the context of this filing, to list the evidential errors in the Trial Judgment. They are plentiful. […]"); para. 70 ("Listing every one of the Trial Chamber's errors would fill these 60 pages […] These are mistakes. And they likely eclipse the total of all the errors in judgments in international criminal trials which preceded Mr Bemba's. […]"); para. 72 ("[…] Many other errors were noted", with no substantiation).

II.B.3.a. Questioning based on information in VWU Reports

53. Mr Bemba's arguments that the Presiding Judge had access to confidential information in VWU Security Assessment Reports fail to show he was prejudiced.[144] They do not properly reflect what transpired, and should be dismissed.

54. *First,* in claiming that the Presiding Judge "sought to impugn and contradict" D-64's testimony with information allegedly from his Facebook account (contained in a VWU report),[145] Mr Bemba presents a partial view. Even if the Judge had initially asked D-64 questions regarding his Facebook account (based on information in the VWU report),[146] and in her role as a "truth-finder",[147] the Chamber immediately announced its intention "to disclose to the parties and participants" the information contained in the VWU report on protective measures.[148] The Chamber also then gave the Defence an opportunity to further question the witness.[149] The Defence chose not to do so.[150] The document was not included in the case-file.[151] Mr Bemba fails to show he was prejudiced in any way, let alone that his rights had been violated in the sense of article 85.

---

[143] Request, p. 11.
[144] Request, paras. 28-30, 32-33.
[145] Request, paras. 28-30.
[146] *See* T-260-Conf-ENG and T-260-Red3-ENG, 31:21-33:9.
[147] T-260-Conf-ENG and T-260-Red3-ENG, 35:12-36:2.
[148] T-260-Red3-ENG, 34:7-35:3 ("[…] As soon as we resume the questioning, the Chamber intends to disclose to the parties and participants some information that is contained in the report by VWU on protective measures. […] So it's not the intention of the Chamber, has never been, to conceal any information from the parties or participants that could be deemed relevant to the case. […]"). *See also* VWU Reports First Decision, para. 4 (making information available to the parties and participants); VWU Reports Second Decision, paras. 8, 10.
[149] T-260-Red3-ENG, 34:25-35:1 ("[…] So if you –if you are satisfied, we can ask the witness to come into the courtroom and we will continue and a proper—a better reference will be given. […]"); 35:20-23 ("And, of course, being the Defence, the last one to take the floor, Defence will have the opportunity if Defence so wishes to go further in questioning on these points for which the Chamber asked or sought a follow-up or clarification, et cetera. So this is the view of the Chamber.")
[150] VWU Reports Third Decision, para. 14 ("[…] the Chamber finds that at this stage the defence has failed to substantiate if and to what extent the testimony was prejudiced as a result of the questioning by the Presiding Judge. In effect, after the relevant information had been shared with the parties and participants, the defence had the opportunity to ask further questions, but chose not to do so. […]").
[151] T-260-Red3-ENG, 35:1-3 ("[…] Although I repeat this is a document directed to the Chamber and will not be part of the case file. This is not evidence.").

55. *Second,* regarding Mr Bemba's claim that internal VWU reports should not have been transmitted to the Chamber,[152] he omits mentioning that the Chamber did not take the information contained in the reports into account in assessing the witness.[153] It remains unclear what "contradiction" Mr Bemba seeks to highlight between the purported positions of the VWU and the Chamber,[154] when the Chamber's position has always been clear.[155]

II.B.3.b. Use of closed session

56. Mr Bemba's submissions on the purported "procedural void" resulting from the use of closed sessions should be dismissed *in limine.*[156] Not only is this claim unsubstantiated, it misunderstands the Court's legal framework which permits the use of closed sessions in certain circumstances, including as protective measures.[157] Insofar as his claim that the trial was conducted "routinely in closed session",[158] Mr Bemba does not acknowledge that he himself asked to use private session on many occasions, several of which were granted.[159]

II.B.3.c. Purported "denials" of leave to appeal requests

57. Similarly, Mr Bemba's argument that save for one instance, the Trial Chamber "never certified any of its decisions"[160] disregards the exceptional nature of the interlocutory appeal remedy under article 82(1)(d). The Trial Chamber entertained

[152] Request, paras. 32-33.
[153] VWU Reports Second Decision, para. 11 (noting the "unfortunate procedural error" in transmitting VWU internal working documents for four witnesses (D-64, D-51, D-55 and D-57) to the Chamber); para. 12 (noting that "information contained in the Protection Report […] should not be used as evidence in the case as it was not given under oath and was obtained from the witness on a confidential basis and under the clear understanding that it would not be used for purposes other than the security assessment. […]").
[154] Request, para. 33.
[155] VWU Reports Third Decision, para. 13 (underlining that the reports had been transmitted to the Chamber in error).
[156] Request, para. 31.
[157] *See* article 68, Statute, and rules 87-88, Rules of Procedure and Evidence.
[158] Request, para. 31.
[159] *See e.g.*, (for Prosecution witnesses) T-62-Red2-ENG, 21:12 ; T-63-Red2-ENG, 4:21; 36:22; T-66-Red-ENG, 26:23; 46:24; 52:21; T-79-Red-ENG, 31:19; T-81-Red2-ENG, 36:12; T-84-Red2-ENG, 24:13; 27:23; 39:2; T-85-Red2-ENG, 3:19; 5:9; 8:18; 18:5; 21:24; 23:19; 27:19; 33:7; (for Defence witnesses) T-236-Red2-ENG, 10:21; T-237-Red2-ENG; 6:18; T-245-Red2-ENG, 41:14; T-248-Red2-ENG, 34:13; T-254-Red2-ENG, 14:5; T-256-Red2-ENG, 15:6; 20:21; T-259-Red2-ENG, 8: 15; T-261-Red2-ENG, 11:22; T-264-Red2-ENG, 37:6; T-270-Red2-ENG, 15:9.
[160] Request, para. 31 (emphasis removed).

all of Mr Bemba's requests for leave to appeal and he cannot now fault the Chamber for rejecting his requests that failed to meet the criteria for leave to appeal. Nor is it correct to state that the Trial Chamber "[sealed] itself off from scrutiny, and [acted] with impunity" when Mr Bemba made full use of his final appeal, and was acquitted as a result.[161]

II.B.3.d. Treatment of witnesses

58. Mr Bemba's claim that "Defence and Prosecution witnesses were treated differently"[162] has been comprehensively addressed. Regarding the arguments on the alleged collusion between P-169 and P-178, the Trial Chamber addressed the issue in no less than *eight* decisions.[163] The Dissenting Judges on appeal also comprehensively addressed Mr Bemba's arguments and rejected them.[164] The Majority Judges on appeal did not consider them necessary to entertain.[165]

59. *First,* to support his theory that "Defence and Prosecution witnesses were treated differently", Mr Bemba advances mere conjecture.[166]

60. *Second,* the one example given by Mr Bemba to show that Prosecution and Defence witnesses were cross-examined differently is incorrect.[167] As the Dissenting

[161] Request, para. 31.
[162] Request, paras. 36-39.
[163] Contacts Information Decision, paras. 9-11 (ordering disclosure of the allegations made by P-169 to the Defence, under rule 77); Contacts Disclosure Decision, para. 38 (ordering further disclosure to the Defence, allowing applications to be made for the further admission of evidence, and rejecting requests to recall P-169 and P-178 since no good cause had been shown); Contacts Documents Admission Decision, para. 33 (allowing the Defence request to admit documents); Contacts Reclassification Decision, para. 31 (partially granting the Defence request for reclassification); Contacts Disclosure and Investigative Assistance Decision, para. 37 (making further orders relating to P-169 and P-178); P-169 Recall Decision, para. 50 (ordering the re-opening of the presentation of evidence to hear P-169 and making other related orders); P-178 Recall Decision, paras. 22, 25 (finding that the Defence allegations on "collusion" were unsubstantiated and rejecting the Defence request to recall P-178); P-178 Recall Reconsideration Decision, para. 34 (rejecting the Defence request to reconsider decision not to recall P-178).
[164] *See e.g.*, Dissenting Opinion, paras. 444, 614-646.
[165] Dissenting Opinion, para. 1 (noting that the views of the Majority Judges were "not necessarily in contradiction" on the grounds of appeal they did not address).
[166] Request, para. 36. *See e.g.*, T-332-Red-ENG, 2:14-6:10 (noting that the Chamber's decision to sit for extended hours was "to facilitate the completion of the presentation of [the] Defence's evidence by the dead-line imposed, to ensure the fairness and expeditiousness of the proceedings and *to guarantee the right of the accused to be tried without undue delay*", that the Defence had not sought leave to appeal the scheduling decision, and that it would decide anew on the sitting arrangement, if there was a significant change in circumstances) (emphasis added).

Judges on appeal found,[168] the Trial Chamber "reprimanded" the Bemba Defence for *the tone* it used to question Prosecution Witness P-178, and not because of its content.[169]

61. *Third,* Mr Bemba only seeks to re-litigate an already definitive record.[170] Not only did the Trial Chamber comprehensively address this issue,[171] the Dissenting Judges on appeal scrutinised Mr Bemba's arguments, before dismissing them.[172] In particular, they would have:

- rejected Mr Bemba's argument that the Trial Chamber "limited its actions to recalling P169" and failed to order "proper investigations";[173]
- rejected Mr Bemba's argument on the Trial Chamber's approach regarding P-169;[174]
- rejected Mr Bemba's arguments challenging the decision not to recall P-178.[175]

In addition, the Dissenting Judges on appeal noted that the Trial Chamber assessed the challenged witness testimony with particular caution[176] and had sufficiently reasoned its conclusions.[177]

---

[167] Request, paras. 37-38.
[168] Dissenting Opinion, para. 444 ("[…] We note that the Presiding Judge's intervention with respect to the Defence's question, following an objection from the Prosecution, indeed focused on the tone of the question, which the Presiding Judge found offensive […] We would therefore have found that the manner in which the Trial Chamber conducted the proceedings during the cross-examination of his witnesses by the Prosecution does not indicate 'disparate treatment'").
[169] *See* Second Abuse of Process Decision, para. 110 ("[…] In ruling that the *tone* used by the Defence in questioning P-178 was 'offensive', the Chamber did not restrict the Defence's questioning or prevent it from pursuing a relevant line of inquiry") (emphasis in original); *See also* T-157-Red2-ENG, 53:10-54:6 (Q: This is my very last question, Witness. Let's set aside the idea of a wage, or compensation. How much money, if applicable, did you get or do you expect to get in the context of your testimony? […] PRESIDING JUDGE STEINER: […] *So the tone in which the question was posed to the witness is offensive* and the Chamber does not accept this kind of question. […]") (emphasis added).
[170] Request, paras. 50-53.
[171] *See* Second Abuse of Process Decision, paras. 54, 119.
[172] Dissenting Opinion, paras. 444, 614-646.
[173] Dissenting Opinion, para. 620; *see also* para. 618 (finding that Mr Bemba's assertion was factually incorrect).
[174] Dissenting Opinion, paras. 621-623.
[175] Dissenting Opinion, paras. 624-628.
[176] Dissenting Opinion, para. 616; *see also* para. 630 ("[…] in the absence of any indication that the witnesses may have colluded to testify falsely or to corruptly claim benefits from the Court, we find that the Trial Chamber

62. Therefore, Mr Bemba fails to show that there has been a grave and manifest miscarriage of justice.

II.B.3.e. "Ex parte allegations"

63. For the third time in the proceedings against him at this Court, Mr Bemba repeats his claim that, from 15 November 2012 to 26 April 2013, the Trial Chamber was seised with the allegations relating to his article 70 conduct before the proceedings were transferred to a separate Pre-Trial Chamber.[178] The Trial Chamber heard similar arguments—in the abuse of process request—and rejected them.[179] The Dissenting Judges on appeal also rejected Mr Bemba's claim that the proceedings were unfair on this basis.[180] The Majority Judges did not express their views on this: however, their views may not have necessarily contradicted those of the Dissenting Judges.[181]

64. In particular, the Dissenting Judges found that although there had been certain technical irregularities in the proceedings,[182] the proceedings remained fair. Moreover, Mr Bemba had not demonstrated any prejudice.[183] The Dissenting Judges

---

did not err in rejecting challenges to the credibility of prosecution witnesses on the basis of it not having enough information to dismiss allegations of witness collusion. While it is correct that the Trial Chamber did not have certainty about certain aspects of the issues raised in the letters sent by P169, these had no significant bearing on the credibility of P169 or P178").

[177] Dissenting Opinion, para. 632.

[178] Request, paras. 40-48.

[179] Second Abuse of Process Decision, paras. 82-90 (finding that Mr Bemba had failed to show any prejudice to the fairness of the trial and that the threshold for the stay of proceedings was not met); paras. 99-115 (finding that Mr Bemba had not shown any objective lack of impartiality on the part of the Chamber).

[180] Dissenting Opinion, paras. 425-450.

[181] Dissenting Opinion, para. 1 (noting that the views of the Majority Judges were "not necessarily in contradiction" on the grounds of appeal they did not address). *See also* T-372-Red3-ENG, 29:11-33:14 ("JUDGE MORRISON: Again, this is a question for Mr Haynes. I think you would probably agree that ex parte hearings are not unfair per se, and I take as an example public interest immunity hearings such as are held in the UK which are necessarily ex parte; […] JUDGE EBOE-OSUJI: […] Mr Haynes, I was not going to ask you a question, but in light of something you said I thought I would return to it. You said that ex parte hearing before a trier of fact must never ever, ever be allowed […] but are you overstating your proposition if we are talking about a bench-alone trial, that a judge who is both the trier of fact and the trier of law must never ever have ex parte hearings? Is that what you're saying?")

[182] *See* Dissenting Opinion, para. 440 (stating that "(i) until the notification of the article 70 arrest warrants, the Trial Chamber does not appear to have considered the question of whether the *ex parte* submissions made by the Prosecutor should be revealed to Mr Bemba or weighed the risk of prejudice to his rights; (ii) given the nature of the investigation conducted by the Prosecutor, she should have addressed her requests to the Pre-Trial Chamber,

- were not persuaded that the article 70 allegations "clouded the Trial Chamber's impression of all further witnesses who would appear for Mr Bemba […]";[184]

- would have found that "the manner in which the Trial Chamber conducted the proceedings during the cross-examination of [Mr Bemba's] witnesses by the Prosecution does not indicate 'disparate treatment'";[185] and

- would have found that "Mr Bemba [had] neither challenged nor demonstrated any error in the Trial Chamber's assessments save to say that the Trial Chamber was influenced by the *ex parte* submissions.[186] The Trial Chamber assessed the credibility of the 14 witnesses implicated in the Article 70 case—not based on the *ex parte* allegations—but based on the trial record.[187]

65. Since, in the view of the Dissenting Judges, Mr Bemba's arguments fell short of demonstrating an error on appeal, it follows that those same arguments (even if permitted to be raised at this stage, which they are not) will *not* now meet the article 85 test, an even higher standard. They should be dismissed.

II.B.3.f. The case took 10 years

66. Mr Bemba's submissions suggesting that it was unreasonable for the case to have taken 10 years should be dismissed *in limine*.[188] The mere duration of a case cannot, in itself, amount to a grave and manifest miscarriage of justice. Indeed, Mr

---

rather than the Trial Chamber, and (iii) the Prosecutor breached rules 77 and 81(2) of the Rules by withholding material from disclosure without the authorisation of the Trial Chamber […]").
[183] Dissenting Opinion, paras. 441-450.
[184] Dissenting Opinion, para. 443.
[185] Dissenting Opinion, paras. 444-445 (*see also* para. 445, noting that during the *ex parte* proceedings, the Trial Chamber "took no decisions, made no assessment—even on a preliminary basis—of the merit of any allegations or information put before it, and reached no conclusions as to the Prosecution's allegations or on any other matter") .
[186] Dissenting Opinion, para. 446.
[187] Dissenting Opinion, para. 446 (*see also* para. 448, noting that even if earlier disclosure had been made to the Defence, the Trial Chamber's assessment of the witnesses would not have changed).
[188] Request, paras. 76-78.

Bemba's numerical account of the case fails to reflect its complexity,[189] which led to its duration. The single example of an ICTY case—*Popović et al*—is inapposite. Unlike the *ad hoc* tribunals, where the cases were often inter-connected and related to the same situation, the Court investigates and prosecutes different situations and the *Bemba* case was the first in the CAR situation to be investigated, prosecuted and adjudicated.

67. Accordingly, Mr Bemba's allegations against the Trial Chamber should be dismissed.

II.C. MR BEMBA'S SUBMISSIONS REGARDING THE LRV AND VICTIM PARTICIPATION SHOULD BE DISMISSED

68. Mr Bemba's allegations against the LRV must be similarly dismissed. He merely re-litigates his one specific claim concerning the scope of the LRV's involvement in the proceedings. This should be dismissed. Apart from this, Mr Bemba generally alleges "falsification" of statements and victim participation forms, but without attributing this to anyone in particular, or substantiating this claim. This should be dismissed *in limine*.[190]

69. *First,* Mr Bemba exhaustively litigated, at trial and on appeal, his arguments relating to the scope of the LRV's involvement in the proceedings.[191] The Dissenting Judges on appeal addressed these issues and were not convinced.[192] Mr Bemba now asks this Chamber to re-visit those same issues and his claim should be considered as falling outside the scope of these compensation proceedings.

---

[189] *See* Trial Judgment, paras. 5-17 (providing a procedural background of the case until the delivery of the trial judgment); Appeal Judgment, paras. 12-28 (providing a procedural background of the appeal).
[190] Request, paras. [REDACTED]; paras. 64-68 (on a purported industrial falsification of victim participation applications).
[191] *See e.g.*, Bemba Conviction Appeal Brief, paras. 521-546.
[192] Dissenting Opinion, paras. 647-690 (rejecting submissions that the questioning by the LRV was unconstrained, that Defence witnesses were cross-examined three times, and that there was prejudice).

70. *Second,* Mr Bemba alleges "falsification" of documents without foundation.

71. Regarding [REDACTED] Witness D-7 [REDACTED], Mr. Bemba's submissions remain vague about why perceived "contradictions" between [REDACTED] would amount to "false statements".[193] Although Mr Bemba is himself non-committal on this point,[194] he had raised it on appeal.[195] It was not addressed. This Chamber need not do so either.

72. Regarding the purported "industrial falsification" of victims' applications forms, it is unclear how Mr Bemba's example of one witness's interaction with one person (named [REDACTED]) could lead to such a conclusion.[196] Likewise, although the result of Mr Bemba's review of a "random sample" of 5229 victim participation forms apparently shows some discrepancies,[197] this—even if accepted—does not show that they were falsified.

73. In this context, Mr Bemba's conclusion that many of the "5000 Central African Republic civilians" were "lying"[198]—especially in light of his statement to provide reparations to "the people of the Central African Republic[199]—is unwarranted.

74. Accordingly, Mr Bemba's arguments must be dismissed.

[193] Request, paras. 34-35.
[194] Request, para. 35 ([REDACTED]).
[195] *See* [REDACTED], paras. 36-39.
[196] Request, para. 64. *See* T-73-Red-ENG, 33:14-18 ("A. But that man, I was not sitting right next to him to dictate what he had to do. I did not tell him anything about my daughter being raped. He told us that he had come to assist us to receive compensation and he told me, 'You see, you have a beautiful daughter. Instead of saying that she was raped by several people, you are only saying that she was taken away and courted," and so on. […]").
[197] Request, para. 65.
[198] "Request, paras. 67-68 (citing from the Prosecution's examination of a Defence witnesses *i.e.*, "[…] You cannot possibly expect us to believe that 5,000 Central African Republic civilians would be lying" (emphasis removed), and stating "Given the content of their application forms, many of them, regrettably, were").
[199] Request, para. 9.

II.D. MISCELLANEOUS ISSUES

II.D.1. Mr Bemba's detention was lawful and proper

75. Although Mr Bemba does not rely on his detention as a basis for his alleged miscarriage of justice,[200] he relies on this aspect to calculate damages, thereby seeking compensation of € 12 million on this basis alone. Yet, Mr Bemba misapprehends the circumstances of his detention. His submissions should be dismissed.

76. *First,* Mr Bemba has not argued that his detention amounted to a violation under article 85. Merely stating—in passing—that it is among the "heads of damage" "whether a claim succeeds under Article 85(2) and (3)"[201] does not suffice. Critically, Mr Bemba has not argued that his circumstances violated article 85(2) or article 85(3); both provisions have different legal requirements. His submissions must be dismissed *in limine.*

77. *Second,* even if the Chamber were minded to consider Mr Bemba's submissions, they do not meet any of the limbs of the article 85 test. Mr Bemba does not argue that his detention was unlawful in the sense of article 85(1). Nor can he: as other Chambers have held, an arrest or pre-trial detention does not automatically become unlawful when an person is acquitted.[202] Nor is detention considered unlawful if the detained person does not himself fulfil the conditions of release.[203] For these same reasons, the circumstances of Mr Bemba's detention do not meet the higher standard of article 85(3). Although Mr Bemba advances several "features" of his personal and social situation,[204] none of these amount to a "grave and manifest miscarriage of

[200] *See* Request, paras. 14-83. Mr Bemba has raised a similar issue in his re-sentencing appeal in the article 70 case, currently pending before the Appeals Chamber. *See* Bemba Re-sentencing Appeal, paras. 2, 78-110, 139-154.
[201] Request, para. 85.
[202] *Ngudjolo* Compensation Decision, para. 18.
[203] *Mangenda* Compensation Decision, paras. 21-26; *Mangenda* Compensation AD, paras. 24-28.
[204] Request, paras. 89-106.

justice". Likewise, article 85(2) is inapposite to Mr Bemba's situation: he was not convicted by final decision but rather was acquitted on appeal.[205]

78. *Third,* Mr Bemba's arguments incorrectly assume that his imprisonment was "false".[206] However, Mr Bemba's arrest was lawful (under article 58) and his subsequent detention was lawful and regularly reviewed (under article 60).

- As at least 18 different decisions in the Main Case record show, his detention was regularly reviewed in that case, confirming its lawfulness. There are at least *five* related decisions at pre-trial,[207] *seven* decisions at trial,[208] and *six* decisions on appeal.[209] That the respective Chambers conducted their review consistently with human rights standards is also apparent.[210]

[205] *See above* paras. 12-16.
[206] Request, paras. 86-88 (using the phrase "false imprisonment"). *But see* Archbold, p. 1900 mn. 19-331 ("False imprisonment consists in the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular place—it is unlawful detention which stops the victim from moving away as he or she should wish to move. […]"); Blackstone's Criminal Practice, p. 1143 ("[…] A deprivation of liberty may amount to false imprisonment if it is unlawful, and it will be unlawful *if it is not based on the proper exercise of a specific legal power*. […]"); Justice KT Thomas *et al.*, p. 812 ("[…] 'wrongful confinement' reflects total suspension of liberty beyond certain prescribed limits. […] When a person is retrained and is prevented from going, where he has a right to go, the restraint becomes wrongful *if such restraint is not in exercise of any right, power or authority under any law*") (emphasis added).
[207] 20 August 2008 Interim Release Decision, paras. 37, 50-60; 16 December 2008 Interim Release Decision, paras. 32-48; 14 April 2009 Interim Release Decision, paras. 36-50; 3 July 2009 Conditional Release Decision, paras. 8-9; 14 August 2009 Interim Release Decision, paras. 43-101 (granting Bemba conditional release, but reversed on appeal).
[208] Trial Chamber III reviewed Bemba's detention, although the Statute expressly only refers to the Pre-Trial Chamber's review of detention, *see* 8 December 2009 Interim Release Decision, 24:10-29:17; 1 April 2010 Interim Release Decision, paras. 25-34; 28 July 2010 Interim Release Decision, paras. 30-39; 17 December 2010 Interim Release Decision, paras. 30-48; 27 June 2011 Interim Release Decision, paras. 43-74; 26 September 2011 Interim Release Decision, paras. 15-42; 23 December 2014 Interim Release Decision, paras. 23-64.
[209] 16 December 2008 Interim Release AD, paras. 51-58, 64-68; 2 December 2009 Interim Release AD, paras. 57-89, 104-109; 19 November 2010 Interim Release AD, paras. 40-57, 68-71, 88-95; 19 August 2011 Interim Release AD, paras. 43-62, 71-74, 82-86; 23 November 2011 Interim Release AD, paras. 33-38, 47-51, 64-67; 20 May 2015 Interim Release AD, paras. 85-95.
[210] *See e.g.,* 20 August 2008 Interim Release Decision, paras. 37 ("[The] right to liberty is of fundamental importance for everyone […] for any deprivation of liberty to be acceptable, it must be on such grounds and in accordance with such procedure as are established by the applicable legal regime. Furthermore, it must not be arbitrary."); para. 50; 16 December 2008 Interim Release Decision, para. 31 ("[W]hen dealing with the right to liberty, one should bear in mind the fundamental principle that deprivation of liberty should be an exception and not a rule. […]"); 14 April 2009 Interim Release Decision, para. 36; 14 August 2009 Interim Release Decision, paras. 35-38.

- Similarly, Mr Bemba's detention in the Article 70 case was lawful. He was detained under a lawful warrant, a fact that Mr Bemba has himself acknowledged.[211] Moreover, for the time common to both warrants, the Main Case record shows that such detention was always reviewed and found reasonable. Further, as the Main Case Appeals Chamber found, the article 70 charges justified Mr Bemba's further detention.[212]

79. Moreover, when detention is properly assessed under the Statute's interim release regime, no claim of "arbitrary detention" or "false imprisonment" arises. As Chambers of this Court have underscored, the interim release regime in articles 58 and 60 of the Statute reflects international human rights norms (both formally and substantively).[213] According to some views, it may even go beyond such norms in terms of protecting an accused's rights.[214] If the conditions set out in article 58(1) are satisfied, detention of a suspect will already be justifiable and consonant with internationally recognised human rights.[215] As the Appeals Chamber has found, whether or not detention is unreasonable must be assessed against the conditions of article 58(1)(a) and the risks under article 58(1)(b).[216]

---

[211] *Bemba et al* Withdrawal Release Request, para. 14.
[212] 20 May 2015 Interim Release AD, paras. 70-71 (finding that the article 70 charges were relevant to maintaining Bemba's detention in the Main Case).
[213] *See e.g.*, 29 May 2015 Bemba Interim Release AD, para. 23 (interpreting the interim release regime in line with "internationally recognised human rights"); *Lubanga* Interim Release AD, Separate Opinion of Judge Pikis, para. 23 ("The provisions of the Statute relevant to the detention of a person prosecuted, pre-trial detention in particular, viewed as a whole, give expression to internationally recognised human rights bearing on the judicial process. *They ensure that detention may only be ordered by a judicial authority and then solely for a valid cause* […]. *Moreover, it must be necessary for the purposes signified in article 58(1)(b) […] the arrestee is assured a right to contest the justification of the warrant of arrest and sequentially his/her detention* […]") (italics added). *See also* Zeegers, pp. 279, 283-285 (noting that the ICC's legal framework is in line with international human rights law and can be justified accordingly).
[214] *See e.g.*, *Katanga* Interim Release Decision, fn. 22 (noting that the interpretation of article 60 "not only meets the *minimum* guarantees provided for by the case law of the Inter-American Court of Human Rights and the European Court of Human Rights […], but establishes a higher standard").
[215] 11 July 2014 Babala Interim Release AD, para. 66; 11 July 2014 Kilolo Interim Release AD, para. 68 ("[P]re-trial detention, whilst to be ordered exceptionally, does not breach internationally recognised human rights or criminal law principles such as the presumption of innocence where it is justified under articles 58(1) and 60(2) […]").
[216] 29 May 2015 Bemba Interim Release AD, para. 23 ("[A]ccordingly, a Chamber may also determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecutor, in its decision pursuant to article 60(2) of the Statute. This determination requires finding that the condition under article 58(1)(a) is met and balancing the risks under article 58(1)(b) of the Statute that are found

80. *Fourth,* none of the "factors" that Mr Bemba relies on to claim damages for detention are attributable to any purported malfeasance on the part of the Court. Indeed, some—such as the inability to secure provisional release—are a consequence of the lawful operation of the Court's legal framework used to assess Mr Bemba's lawful arrest and lawful detention in two cases—the Main Case and the Article 70 case.[217] Others may equally result from Mr Bemba's convictions for committing offences against the administration of justice while he was detained—now confirmed on appeal.[218] Trial Chamber VII similarly found that the negative impact on his professional life—and being disqualified from presidential candidacy in the Democratic Republic of the Congo ("DRC")—was "a natural consequence of the circumstances [Mr Bemba] found himself as a result of the criminal behaviour that he has been convicted for".[219]

81. *Fifth,* Mr Bemba's attempt to "[quantify] in financial terms the loss" is irrelevant:[220] he has not established a violation.

82. Accordingly, Mr Bemba's submissions should be dismissed.

II.D.2. Mr Bemba's claim based on purported loss to his seized or frozen assets is flawed

83. Mr Bemba's claim regarding purported damage to his assets seized or frozen by the Court—which he estimates at € 42.4 million—has, at least, two flawed aspects (raised in the alternative): the *first*—arguing that "the loss arising from the seizure of his property" was itself sufficient to meet the criteria of article 85, *or* the "consequence of the miscarriage of justice he suffered" such that he must be

---

to be met against the duration of detention, 'taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole'").

[217] *Contra* Request, paras. 94-95 (where Mr Bemba argues that the 'refusal to grant provisional release' is grounds for damages).

[218] *Contra* Request, paras. 104-105 (arguing the loss of social standing and damage to reputation as grounds for damages). *But see generally*, *Bemba et al.* DRC Decision; *and* *Bemba et al.* Re-sentencing Decision, para. 119.

[219] *Bemba et al.* Re-sentencing Decision, para. 119.

[220] Request, paras. 107-112.

compensated under article 85;[221] the *second*—alleging that "the Court acted negligently in seizing and freezing his property" and is liable "irrespective of any consideration of a miscarriage of justice".[222] Mr Bemba argues this second aspect as a "private law claim alleging tortious behaviour by the ICC".[223] In light of relevant legal standards, neither aspect (as argued) persuades.

84. On the first aspect relating to article 85, as its plain text and drafting history suggests,[224] the provision may not be intended to cover a claim relating to assets. In any event, Mr Bemba's arguments do not show a "grave and manifest miscarriage of justice" in the sense of showing *malfeasance* on the part of the Court. Nor is Mr Bemba "entitled" to be compensated under rule 175, absent a concrete showing of a grave and manifest miscarriage of justice.[225] Rule 175 must be read in the context of article 85(3):[226] it does not create any automatic right to compensation. Further, any discussion on "inherent powers" is beside the point: article 85 exhaustively regulates the scope of compensation proceedings, and there is no lacuna.[227]

85. Regarding the second aspect relating to his "private claim", Mr Bemba's arguments fall patently outside the limited scope of article 85 proceedings. They should be dismissed *in limine.*

86. The Prosecution is not in a position to comment on the substance of Mr Bemba's claim regarding his assets, except to the limited extent that it relates to its own conduct. As stated above,[228] Mr Bemba's sole claim about the Prosecution that "[its] seizure of the keys and documentation to the Boeing 727-100 is well-documented

---

[221] Request, para. 5.
[222] Request, para. 6.
[223] Request para. 7.
[224] *See above* paras. 17-20.
[225] *Contra* Request, para. 119 ("[…] In addition to compensating him for the non-pecuniary harm of being incarcerated, there are tangible and quantifiable 'consequences' which he is entitled to recover under rule 175.")
[226] *See* rule 175: In establishing the amount of any compensation in conformity with article 85, paragraph 3, the Chamber designated under rule 173, sub-rule 1, shall take into consideration the consequences of the grave and manifest miscarriage of justice on the personal, family, social and professional situation of the person filing the request.
[227] *Contra* Request, paras. 154-160. *See Bemba et al.* SAJ, paras. 75-80.
[228] *See above* paras. 33-36.

and lead to substantial damage"[229] is incorrect and must be dismissed. Other than that, the Prosecution is not privy to the full extent of the Registry's approach in relation to Mr Bemba's assets or to the *ex parte* documents that Mr Bemba cites in support of his allegations against the Registry,[230] or indeed, the entire relevant record. The Prosecution also notes that estimating the financial value of assets to properly assess whether Mr Bemba's claims are accurate is a considerably complex exercise, requiring special financial expertise. Although Mr Bemba has provided the Court with some information in this regard,[231] this is not definitive and could well be self-serving. To engage with the substance of these claims, the Court would need to engage its own financial expertise. This exercise, if considered necessary, would fall outside the scope of the article 85 proceedings.

87. Nevertheless, to assist the Chamber, the Prosecution provides the following observations on the legal framework of Mr Bemba's claim.

II.D.2.a. Mr Bemba must establish a grave and manifest miscarriage of justice

88. *First,* Mr Bemba's claim for compensation for the damage to his assets fails to appreciate that if such claims are brought under article 85(3), they must show *malfeasance* or at the very least, *serious misconduct*. Mr Bemba's broad allegation that the Court acted negligently in seizing or freezing his property by failing to properly manage or account for it[232] would appear to fall short of an allegation of malfeasance or serious misconduct. Mr Bemba himself seems to characterise it as "negligence".[233] Moreover, article 85 exhaustively deals with compensation matters.[234]

[229] Request, paras. 129-132, 149.
[230] *See* Request, fns. 279, 284, 333-334, 336-338.
[231] *See* Request, Annex F (valuation report) and underlying statements—*see* Annex G (statement of Bank Manager); Annex H (statement of Aviation Expert); Annex I (statement of Alexis Lenga Walenga Penze).
[232] Request, para. 6.
[233] Request, paras. 143-150.
[234] *Contra* Request, paras. 154-160 (arguing financial compensation for human rights violations, including the right to property).

89. *Second*, Mr Bemba mistakes the nature of the burden on him.[235] Whatever the nature of the "loss", it remains for Mr Bemba to show that there was a grave and manifest miscarriage of justice—whether raised in Part IB or elsewhere in the Request. At this stage, several of Mr Bemba's arguments remain ambiguous.[236]

90. *Third,* Mr Bemba's interpretation of rule 175, as conferring some sort of "entitlement" to compensation, is incorrect.[237] Rule 175 is inherently linked with the test in article 85(3): the Rules cannot be interpreted to supersede the Statute. Moreover, apart from making unsupported statements on the "consequences of miscarriage of justice",[238] Mr Bemba has not demonstrated that there was *in fact* a violation in terms of article 85(1) or 85(2) or article 85(3).

91. *Fourth,* Mr Bemba's allegations against the Office of the Prosecutor[239] in relation to the keys and documentation of his plane parked at Faro Airport in Portugal have been answered above.[240] His submissions should be dismissed.

II.D.2.b. Mr Bemba misapprehends the cooperation regime in Part 9 of the Statute

92. Mr Bemba erroneously analogises the relationship between the Court and States Parties in the freezing and seizure of assets with the relationship between two sovereign States in the cross-border freezing and seizure of assets in private commercial disputes.[241] Mr Bemba's characterisation misapprehends the nature of the cooperation relationship between the Court and States Parties as set out in Part 9 of the Statute and overlooks the Court's previous jurisprudence regarding the cooperation relationship in this very case.[242] Pursuant to Part 9, the Court relies upon

[235] Request, para. 125 ("The burden upon claimants of proving what financial loss resulted from mismanagement [of] this type is not a high one.")
[236] *See* Request, para. 124 ("Contrary to law, no steps were taken to manage or preserve the value of any of these assets. Mortgages were left unpaid, taxes, parking fees and registration payments were ignored, income streams abandoned […] and houses, cars, boats and other physical property were neglected.")
[237] Request, paras. 119-120.
[238] *See e.g.*, Request, para. 119.
[239] Request, paras. 129-132, 149.
[240] *See above*, paras 33-36.
[241] *See*, Request, para. 139.
[242] *See e.g.*, Assets Unfreezing Decision, paras. 9-12.

States Parties to carry out its mandate by issuing orders to States to execute various requests for cooperation, including in relation to the freezing and seizure of assets.[243] The determination of how a State will meet its obligation to cooperate with the Court is up to the State.[244] Accordingly, as Trial Chamber III held:

> "[T]he Court itself does not order the freezing or seizure of assets, but rather orders that cooperation requests be sent to States for them to do so. The State then decides to either directly enforce the Court's request for freezing or seizure if so permitted under domestic law, or to use the information provided in the Court's request to initiate domestic proceedings to preserve the assets."[245]

93. Trial Chamber III clarified that the lifting of coercive measures, such as the unfreezing of assets, must also be done pursuant to domestic law, it being a matter for the State to determine what action to take once it is no longer obligated to assist the Court through the freezing of assets.[246] To that end, the Chamber confirmed that the Registry should communicate to States that, following Mr Bemba's acquittal, there was no longer any investigation or prosecution against Mr Bemba, such that States were no longer under an obligation to comply with any of the standing requests for cooperation.[247]

94. In this context, it is clear that, at the least, a demarcation of responsibility between the Court and States Parties is appropriate given that it is the States which

[243] Articles 86 and 87(1)(a), Statute; Assets Unfreezing Decision, para. 9 ("The Chamber recalls that the effective functioning of the Court, in terms of *inter alia*, […] the freezing and seizure of assets, is heavily dependent on State cooperation due to the absence of any direct enforcement powers. For that reason, Part 9 of the Statue establishes a unique vertical relationship between the Court and States by imposing an unqualified obligation on States to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court").
[244] Assets Unfreezing Decision, para. 10.
[245] Assets Unfreezing Decision, para. 11.
[246] Assets Unfreezing Decision, paras. 12-13.
[247] Assets Unfreezing Decision, paras. 14-15.

are equipped with the necessary laws, regulations and mechanisms to carry out the freezing and seizure of assets.[248]

95. The authorities Mr Bemba cites on the issue[249] are inapposite given they concern asset freezing orders in *civil* damages claims between two private litigants,[250] or to domestic criminal proceedings[251]—neither of which address the unique situation of asset freezing in *international* criminal proceedings where the Court relies on the cooperation of States Parties pursuant to Part 9 of the Statute.

II.D.2.c. The nature of the assets-related claim must be established

96. Mr Bemba's arguments assume that his claim is exclusively of a private law nature, which is amenable to dispute resolution.[252] Yet, should the Chamber wish to consider this aspect, it must conduct its own analysis of whether Mr Bemba's claim is "private" in nature, or "public", or has aspects of both, based on the facts before it. A number of different issues may arise.

97. The Court may make provisions for appropriate modes of settlement of disputes arising out of contracts and other disputes of a *private law character* to which the Court is a party. If the claim is, however, found to be of a public law nature, the Court has immunity from the jurisdiction of national courts in respect of all forms of legal process.[253] It is a matter for the Court whether it elects to waive immunity in respect of any legal claim against it.

---

[248] *See e.g.* Request, fn. 300, citing UNODC Study, p. 3.
[249] Request, para. 133, fns. 295-298.
[250] U.S.A.: *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*; Canada: *Chitel v. Rothbart*; Australia *Jackson v. Sterling Indus Ltd.*; New Zealand *Chesterfield Preschools Ltd v. Comm'r of Inland Revenue*; Indonesia *Rasu Maritima SA v. Perusahaan Pertambangan*, in Request, Annex C; article by W Tetley in *Lloyds Maritime and Commercial Law*, in Request, Annex C; United Kingdom: *Third Chandris Corp v Unimarine SA*, in Request, Annex C; *Z Ltd v. A-Z and AA-LL*, in Request, Annex C.
[251] Request, para. 134, citing UNODC Study; Transparency International Policy Paper.
[252] Request, para. 164.
[253] Article 48(1), Statute ("The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes"); Article 6(1) of the APIC ("The Court, and its property, funds and assets, wherever located and by whomsoever held, shall be immune from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution"); *see also*, Headquarters Agreement, article 3 ("The Court shall have international legal personality in accordance with article 4,

98. While the matter has not arisen previously in the jurisprudence of the Court, guidance may be sought from the treatment of claims before the United Nations, which has near identical immunity and dispute settlement provisions to the Court.[254]

99. Claims against the United Nations that are of a 'private law character' are considered to arise from matters *incidental* to the performance of the United Nations of its main functions under its constitutional instruments, and not to the *actual performance* of its constitutional functions.[255] Commentators consider that, in this arena, the United Nations acts like a private person within the territory of its host State, subject to the latter's private law and entering on an equal footing into legal relationships with other private persons.[256]

100. In practice, the United Nations has considered the following types of claims to constitute claims of a private law character: claims arising from commercial contracts, purchase orders and lease agreements entered into by the United Nations; claims for personal injury occurring in the United Nations' headquarters in New York; and claims arising from accidents involving motor vehicles owned or operated by the United Nations.[257]

101. By contrast, claims considered to be of a *public law* character are those that are exclusively based on a breach of a general or specific international obligation on the part of the organisation—and therefore an obligation relevant to the organisation's

---

paragraph 1, of the Statute, and shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. It shall, in particular, have the capacity to contract, to acquire and to dispose of immovable and movable property and to participate in legal proceedings"); article 5 ("The Court shall enjoy, in the territory of the host State, such privileges, immunities and facilities as are necessary for the fulfilment of its purposes").

[254] UN Convention on Privileges and Immunities, article II, section 2 ("The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution"), article VIII, section 29 ("The United Nations shall make provision for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; […]").

[255] Schmalenbach, p. 551, mn. 44.

[256] Schmalenbach, pp. 551-552, mn. 45; *see also* Higgins *et al.*, p. 571, mn. 16.30.

[257] UNSG Report, 24 April 1995, pp. 4-6; Schmalenbach, pp. 536-537, mn. 14-8; Miller, p. 104; Boon, p. 348.

mandate.[258] Such claims have included large-scale claims alleging the negligence of peacekeeping forces, which the United Nations considered would involve a review of political and policy matters.[259]

102. Taking into account this guidance, certain aspects of Mr Bemba's property damage claim may be said to distinguish it from the private law sphere, and may indicate a public law character. *First*, in disseminating requests to States Parties to freeze and seize Mr Bemba's assets, the Registry was executing an order of the Chamber pursuant to article 93(1)(k) of the Statute, acting in its public capacity as the administrative arm of the Court.[260] *Second*, the Court did not carry out the freezing or seizure of Mr Bemba's assets—it merely requested that action of States Parties, which complied with the request in accordance with Part 9 of the Statute. The nature of the relationship between the Court and Mr Bemba cannot be analogised to that of two contracting private parties. *Third*, Mr Bemba's own status before the Court was not that of a private third party contracting with the Court; rather, his status as an accused person (at that time) gave the Court certain powers which it could exercise over his assets to protect the interests of victims, of the legal aid fund, to investigate the use of those assets to perpetrate crimes and to prevent the further commission of crimes[261]—matters that directly arise from the Court's mandate.

II.D.3. Mr Bemba's claim for legal costs is misplaced

103. Mr Bemba does not explain on what basis legal costs of € 4.2 million should be paid to him within the scope of these article 85 proceedings.[262] Yet because his

[258] Schmalenbach, p. 552, mn. 46.
[259] Boon, pp. 358-359; Higgins *et al.*, fn 101.
[260] *See for example* [REDACTED]; Portugal Asset Request, pp. 4-5; Assets Freezing AD, para. 63 (underscoring the Court's mandate in terms of requesting cooperation to freeze assets).
[261] *See for example* Arrest Warrant Application, p. 61, para. 130.
[262] Request, para. 169.

compensation claim is patently misplaced and unfounded and he has failed to establish any violation, this claim should also be dismissed.[263]

CONCLUSION AND RELIEF

104. The Request falls manifestly short of the article 85 legal standard. Mr Bemba has failed to show a "miscarriage of justice", let alone a grave and manifest one. For the reasons set out above, the Prosecution respectfully requests the Pre-Trial Chamber to dismiss Mr Bemba's request for compensation and damages.

Fatou Bensouda, Prosecutor

Dated this 6th day of May 2019

At The Hague, The Netherlands

[263] In fact, several national and international jurisdictions discourage frivolous litigation through various procedural measures.