

**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 Under seal *EX PARTE* Annex I only available to the Registry, Under seal *EX PARTE* Annex II only available to the Registry and the Prosecution and Confidential *EX PARTE* Annex III only available to the Registry and the Defence

Public Redacted Version of the “Registry’s Observations on the Defence Compensation Claim”

Source: Registry

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Helen Brady

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III

Mr Ennis McBride, Registry Financial
Investigator

I. Introduction

1. The Registry submits the present observations following Pre-Trial Chamber II (“Chamber”)’s order of 14 March 2019 on the conduct of the proceedings¹ related to “Mr. Bemba’s claim for compensation and damages” (“Claim”).² In line with its mandate pursuant to article 43(1) of the Rome Statute (“Statute”), the Registry explains, including by providing examples, how the Registry performed its statutory role in transmitting to states requests for cooperation issued by relevant Chambers with regard to freezing and/or seizing of assets in the case *The Prosecutor vs. Jean-Pierre Bemba Gombo* (“Main Case” and “Mr Bemba”, respectively). In performing so, the Registry did its utmost to discharge its obligation to follow-up with states on their execution in accordance with the applicable legal framework and under judicial oversight. This cooperation work includes no Court’s “obligation” to manage assets as the Defence seems to submit,³ as assets are domestically seized or frozen on a conservatory basis under national laws.

II. Classification

2. In accordance with regulation 23 *bis*(2) of the Regulations of the Court (“RoC”), the present observations are classified as under seal *ex parte* only available to the Registry because they refer to information with the same level of classification.⁴ Under seal and confidential redacted versions of these observations are filed *ex parte* available to the Office of the Prosecutor (“Prosecution”) and lawyers for Mr Bemba (“Defence”), respectively.

¹ Pre-Trial Chamber II, “Order on the conduct of the proceedings related to ‘Mr Bemba’s claim for compensation and damages’”, 14 March 2019, ICC-01/05-01/08-3675.

² Defence, “Mr. Bemba’s claim for compensation and damages”, 8 March 2019, ICC-01/05-01/08-3673-Conf and annexes. A second public redacted version of the Claim was filed on 19 March 2019: Defence, “Second Public Redacted Version of ‘Mr. Bemba’s claim for compensation and damages’”, 19 March 2019, ICC-01/05-01/08-3673-Red2 and annexes.

³ Defence, Claim, para. 151 referring to a “breach of fiduciary duty in failing to preserve (...) assets”.

⁴ A public redacted version is filed simultaneously pursuant to the Chamber’s clarifications and orders related to the “Order on the conduct of the proceedings related to Mr Bemba’s claim for compensation and damages”, email from the Chamber’s Legal Officer to the participants on 29 March 2019 at 10:04.

3. Annex I is classified under seal *ex parte* only available to the Registry as it refers (1) to information given by states following the execution of judicial cooperation requests with the same level of classification and (2) to information neither party has access to. Annex II is an under seal redacted version of Annex I available to the Registry and Prosecution as it contains under seal information relating to cooperation and classified as such in the Main Case. The Registry cannot disclose this information to the Defence without prior consultations of and/or authorisation from the concerned states and Trial Chamber III (“TCIII”), respectively. Redactions are only applied to information relating to legal assistance issues the Prosecution is not privy to. Annex III is a confidential redacted version of Annex I available to the Registry and the Defence, as it contains information relating to legal assistance issues the Prosecution is not privy to.

III. Observations

4. As a preliminary remark, the Registry notes that the Defence request for UNCITRAL arbitration⁵ concerns the Court as an international organisation, rather than a criminal court governed by the Rome Statute subject to the jurisdiction of the judiciary. Therefore, considering the relief requested with respect to arbitration would fall beyond the Chamber’s jurisdiction.

Scope of the Registry submissions

5. To best assist the Chamber for it to take an informed decision on the Claim, the Registry provides it with (A) information it received from states on specific assets which have been frozen and/or seized by the Court and that are mentioned in the Claim. The Registry will further limit its submissions to (B) the alleged “consequential financial losses” as described by the Defence in Part I C.(3) and Part II of the Claim. This is regardless of considerations on whether the Claim is

⁵ Defence, Claim, paras. 8, 165 and 169(2)(b).

admissible under article 85 of the Statute or, alternatively, based on inherent powers as the Defence proposes.⁶

6. The Registry, dealing with non-judicial aspects of the Court's proceedings, makes no submissions on the claimed damages for incarceration and aggravating features, which would allegedly amount to €22 million.⁷ Nor will it address the legal issues raised in the Claim relating to the application of articles 85(3) of the Statute and rule 175 of the Rules of Procedure and Evidence ("RPE").⁸ In particular, the Registry will not respond to the issue of whether there are "exceptional circumstances", whether there has been "miscarriage of justice" and whether the threshold of "grave and manifest" has been reached in the Main case. The Registry will not address the Defence argument on whether the alleged losses are indeed "consequential" losses within the meaning of rule 175 of the RPE.⁹ Further, the Registry will not analyse the merit of the Defence argument insofar as it relies on the Court's "inherent powers" pursuant to article 21 of the Statute – be it to determine whether the Claim is receivable before the Court, or to establish any alleged Court's "negligence" in the preservation of assets.¹⁰ This notwithstanding, the Registry notes that prior judicial determinations on these crucial legal issues would be required before making any further submissions on the amount of the related losses claimed.

A – Information on specific assets the Registry received from states:

7. Based on, to the extent possible, information already disclosed to the Defence in the Main Case, including a list of Mr Bemba's assets shared with the Defence,¹¹ the Registry appends in annex relevant information gathered in the context of the freezing/seizure requests on behalf of the Court and relating to the [REDACTED] assets that would have allegedly been mismanaged. The Registry limits its

⁶ Defence, Claim, para. 121.

⁷ Defence, Claim, paras. 107-118.

⁸ Defence, Claim, para. 119.

⁹ Defence, Claim, para. 119-122.

¹⁰ Defence, Claim, paras. 121, 154-160.

¹¹ Defence, Claim, para. 127 and fn 284, [REDACTED].

observations to information relevant to the assets for which Mr Bemba claims to have suffered losses of 42.4 million euros, as evaluated in the [REDACTED] Report.¹²

8. The Registry notes that claimed damages for the [REDACTED] assets mentioned in the [REDACTED] Report mainly relate to, (1) only [REDACTED] assets that have been reported in writing by relevant states as seized or frozen following a Court's request,¹³ (2) [REDACTED] assets that have not been frozen/seized at the domestic level upon a Chamber's judicial cooperation requests or (3) [REDACTED] assets for which the Court, in spite of follow-up with states concerned, received no confirmation in writing from states on whether they were frozen/seized at the national level and, if so, the circumstances thereof.¹⁴ Therefore, in any event, among the claimed damages to [REDACTED] assets, only [REDACTED] assets are with certainty related to any cooperation work the Court may have done. As an example of category (1) asset, the Defence has submitted in the past that, contrary to the Claim,¹⁵ [REDACTED].¹⁶ Subject to the accuracy of the valuation of losses in the [REDACTED] Report and noting that some assets were not valued, the alleged losses to the [REDACTED] assets under category (1) above may amount to [REDACTED].¹⁷ This represents around 12% of the total Claim.¹⁸
9. This notwithstanding, the Registry notes that Mr Bemba claims losses for assets in categories (2) and (3) above.¹⁹
10. As an example of category (2) assets, the Defence mentions in particular the plane Boeing 727-100 parked in Faro, Republic of Portugal ("Portugal"),²⁰ for which he

¹² Defence, Claim, [REDACTED].

¹³ [REDACTED] assets when excluding the seized bank account in [REDACTED] and addressed below in the present observations.

¹⁴ See annexed table.

¹⁵ Defence, Claim, [REDACTED].

¹⁶ See annexed table, [REDACTED].

¹⁷ Values in the Defence, Claim, [REDACTED].

¹⁸ [REDACTED].

¹⁹ See annexed table, [REDACTED].

is claiming around [REDACTED].²¹ In this respect, the Registry recalls that, in the context of discussions with Mr Bemba [REDACTED].²² However, the Defence argues that the loss is, *inter alia*, due to the Prosecution's withholding of the keys and documentation of the plane. Without prejudice to the Prosecution's submissions in this respect, the Registry recalls that it served as a channel of communication between the Defence and the Prosecution to relay information regarding the keys and documentation. An illustration of this role was the Registry's stated readiness to further assist the Defence [REDACTED].²³

11. Further, in addition to information in annex, an example of category (3) assets is the claimed losses relating to six planes located in the Democratic Republic of the Congo ("DRC"): [REDACTED]. Therefore, the Registry is not in a position to make any submissions on the claimed losses. The Registry is only able to share information it received on the circumstances [REDACTED], which are as follows: [REDACTED].²⁴[REDACTED].²⁵[REDACTED]²⁶ [REDACTED]²⁷. [REDACTED] not by the Court as the Defence submits²⁸ [REDACTED].²⁹ In spite of these events, Mr Bemba is holding the Court liable for [REDACTED]³⁰ due to the [REDACTED] unrelated to the Court's action.

B – The “Consequential financial losses” as identified by the Defence

12. The Defence submits that some losses would qualify as “consequential financial losses” under rule 175 of the RPE, and would consist of (1) the legal costs claimed and (2) the damages and related losses in relation to Mr Bemba's frozen or seized assets.

²⁰ Defence, Claim, paras. 129-132.

²¹ See item 21 in the annexed table: [REDACTED].

²² [REDACTED][REDACTED].

²³ [REDACTED][REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ Defence, Claim, para. 144 and fn 335.

²⁹ [REDACTED].

³⁰ [REDACTED].

(1) Legal costs claimed by the Defence

13. The Registry recalls that Mr Bemba was never considered indigent in the Main Case and his legal costs, throughout the proceedings, consisted of advances paid by the Court.³¹ The total amount advanced to Mr Bemba is €4,132,412.42,³² as opposed to €4.2 million.³³ Part of this amount has been recovered, namely €2,232,102.99.³⁴ The remaining amount of €1,900,309.43 million consists of his outstanding legal assistance debt due at 30 June 2018³⁵ and a final advance of fees paid [REDACTED],³⁶ [REDACTED].³⁷ Mr Bemba himself further acknowledged this debt.³⁸ Following TCIII's order,³⁹ consultations between the Registry and the Defence for the repayment of this debt are still ongoing.

14. Among the recovered funds, the Defence submits that €2,067,982 million were received from a [REDACTED] bank account upon Mr Bemba's request.⁴⁰ Part of this amount was initially blocked as of 2008 by [REDACTED] on account of money-laundering suspicions⁴¹ and the full amount [REDACTED].⁴² The Defence is well aware of this fact.⁴³ It follows that, contrary to the Claim made that:⁴⁴ Mr Bemba could not have invested these funds because they had already been blocked by [REDACTED] authorities for reasons unrelated to Mr Bemba's case before the Court. [REDACTED].⁴⁵ [REDACTED].⁴⁶ The Assembly of States Parties

³¹ TCIII, "Redacted version of 'Decision on legal assistance for the accused'", 26 November 2009, ICC-01/05-01-08-567-Red, paras. 94, 110 and 111(1).

³² According to Registry records: €4,019,839.86 (for period: 2008 – 28/02/2018) + €99,000 (fees from 03/2018 to end 06/2018) + €13,572.56 (pro rata fees for period from 01/07/2018 to 18/07/2018).

³³ Defence, Claim, para. 122.

³⁴ According to Registry records: [REDACTED]+ €2,067,982.25.

³⁵ Defence, Claim, para. 122 and fn 276.

³⁶ TCIII, "Public redacted version of 'Order in relation to advanced legal assistance fees'" ("Order of Contribution"), 17 July 2018, ICC-01/05-01/08-3651-Red, p. 5 and fn 11. [REDACTED].

³⁷ TCIII, Order of Contribution, paras. 2-3. [REDACTED].

³⁸ TCIII, "Public Redacted version of 'Decision on Mr Bemba's preliminary application for reclassification of filings, disclosure, accounts, and partial unfreezing of Mr Bemba's assets and the Registry's Request for guidance'", 20 November 2018, ICC-01/05-01/08-3660-Red2, para. 19 and fn 63.

³⁹ *Ibid.*, paras. 19-21.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED]. Defence, Note Explicative, 21 January 2016, ICC-01/05-01/08-1563-Red, paras. 40-46.

⁴⁴ Defence, Claim, [REDACTED].

⁴⁵ [REDACTED]. [REDACTED].

⁴⁶ [REDACTED]. [REDACTED].

decided to use the “reimbursed defence costs from Mr Bemba amounting to 2,068,000 euros” to further adjust the level of assessed contributions by states parties.⁴⁷ In addition to the recovered amount of €2,067,982 million, the Defence submits that €180 900 were transferred to the Court and used to pay for Mr Bemba’s legal costs.⁴⁸ In this regard, the Registry has recorded [REDACTED] transfers amounting to €164 120, 74 in total and not €180.900 as now claimed.

(2) Alleged damages to Mr Bemba’s assets

15. In support of its claim for financial costs corresponding to property damaged, devalued or destroyed amounting to €42.4 million,⁴⁹ the Defence submits that the Court has a duty to “follow-up” on the execution of the judicial cooperation requests⁵⁰ and, in doing so, it has been either negligent or breached a “fiduciary duty to preserve [...] assets”.⁵¹ The Registry observes that, notwithstanding that there may be follow-up to the execution of cooperation requests on freezing or seizure of assets, a duty to manage or “fiduciary duty to preserve assets”, is not supported by the Court’s legal framework. The Defence appears to confound any such “follow-up” on the execution of its cooperation requests with the states’ responsibility in connection with the execution of these requests under their respective national laws.

16. Accordingly, the above-mentioned Defence submission overlooks the legal framework applicable to (a) the freezing and seizing orders issued as protective measures by a Chamber or the Prosecution and (b) the cooperation relationship between the Court and the cooperating states. Both aspects of that legal framework are set forth next, mainly from the perspective of the Registry.

⁴⁷ Resolution ICC-ASP/13/Res.1, ICC-ASP/13/20, Annex I, pp. 149-150.

⁴⁸ Defence, Claim, fn 276.

⁴⁹ Defence, Claim, paras. 121 and 125.

⁵⁰ Defence, Claim, paras. 139-142.

⁵¹ Defence, Claim, paras. 143-151.

a) Registry's role and legal framework applicable to the freezing and seizing orders as protective measures issued by a Chamber or the Prosecution

17. Whereas, in the context of managing legal aid funds, the Registry has an active role in determining defendants' means who apply for legal assistance paid by the Court,⁵² the Registry has a limited role when it acts – such as here – upon judicial orders to transmit Chambers' cooperation requests issued to, *inter alia*, identify, trace, freeze and seize assets belonging to a defendant.

18. With regard to the Court's requests for cooperation, the Registry's role is mainly to support the judiciary and, upon its guidance and oversight, to facilitate their execution in coordination with states concerned. According to article 57(3)(e) of the Statute, a chamber may “seek the cooperation of States Parties pursuant to article 93, paragraph (1)(k)” of the Statute to identify, trace, freeze or seize “proceeds, property and assets for the purpose of eventual forfeiture”, “in particular for the ultimate benefit of victims”. In this respect, by analogy to mutual, inter-state cooperation in criminal matters, the Court performs a role similar to the “requesting” state, and the states receiving the judicial requests are the “requested” states. A chamber, based on information requests and financial information received from the Prosecution, issues cooperation requests to freeze and seize assets. These protective measures can be thus ordered at the national level on behalf of the Court at an early stage of the proceedings. In articles 57(3)(e) or 93(1)(k) of the Statute, there is no mention of management of assets by the Court.

19. As for the Registry, pursuant to article 43(1) of the Statute, the “Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in

⁵² See regulation 84 of the RoC; regulations 130-132 of the Regulations of the Registry. For the sake of completeness, in the Main Case, the Registry was requested to facilitate the recovery of the legal assistance advances, See for example, TCIII, “Redacted Version of Decision on the Defence Application for Review of the Registrar's Decision of 15 October 2010 on the Application for Adjustment of the Expenses and Fees of the Defence (ICC-01/05-01/08-1007-Conf)”, 7 December 2010, ICC-01/05-01/08-1007-Red, para. 39(vii).

accordance with article 42 of the Statute". The execution of cooperation requests is a judicial aspect of the proceedings, as such requests are governed by provisions under Part 9 of the Statute. Any follow-up to be made by the Registry to a cooperation request is thus subject to judicial determination.

20. Pursuant to rules 13 and 176(2) (first sentence) of the RPE, the Registry serves as a channel of communication between chambers issuing cooperation requests and relevant states (States Parties or not). For its part, the Registry's role is to "transmit" these requests, and it "shall receive the responses, information and documents from requested States." The feedback received from states, if any, is subsequently transmitted to the chamber that issued the initial cooperation request. In this respect, the Registry has a reporting obligation to the chambers. Further, cooperation requests transmitted to states by the Registry may be "followed up" by the Registry, if so ordered by the judiciary. Further, the Registry also reports on the cooperation efforts made to follow-up on the requests (i.e. meetings, phone calls, written reminders sent to states).

21. As for the Prosecution, it has an express power to investigate and collect evidence, including evidence pertaining to defendants' means. Acting independently and as a separate organ, it is responsible for conducting investigations and prosecutions before the Court.⁵³ The Prosecution is the organ initiating investigations⁵⁴ and/or which requests the issuance of an arrest warrant pursuant to article 58 of the Statute. It is at that early stage that the Prosecution also requests a Chamber to issue orders to identify, trace, freeze, seize assets of a defendant.⁵⁵ The Prosecution has its own channel of communication with relevant States⁵⁶ and transmits its own cooperation requests in accordance with rule 176(2) RPE, last sentence. This cooperation between the Prosecution and the requested

⁵³ See articles 42(1) and 54 of the Statute.

⁵⁴ See article 15 of the Statute.

⁵⁵ See articles 57(3)(e) and 93(1)(k) of the Statute.

⁵⁶ See articles 54(2)(a) and (3) of the Statute.

states takes place separately from the Registry's transmittal of judicial cooperation requests as described above.

22. In practice, it may happen that a requested state finds the initial chamber's cooperation request too general to be able to be complied with and, based on the requirements set out in article 96(2) of the Statute, may require more detailed information on a defendant's assets. Indeed, while some requested states may have the capacity to execute the chambers' requests, be pro-active and propose innovative ways to identify, trace, seize or freeze assets, other states may experience other challenges in relation to the execution of cooperation requests. In the latter case, faced with difficulties to execute a request, states "shall" consult with the Court in accordance with article 96(3) of the Statute. This is for the states to "advise the Court of the specific requirements of its national law". In such a situation, the Registry requests for guidance to the relevant chamber on the possible difficulties faced in executing the Court's request. The success of cooperation requests thus depends on this constant dialogue chambers, operating through the Registry, may have with the requested states regarding their execution in accordance with their national laws. This is notwithstanding that, ultimately, the requested state remains sovereign in its decision to execute or not a Court's request. The Court in general and the Registry in particular, cannot interfere in this decision.
23. In light of the above, the Registry acts within the strict confines of these judicial requests. Once the requested states have identified, traced, frozen or seized the targeted assets on a conservatory basis (i.e. protective measures), and absent any difficulties in the execution of the said requests identified by the states, as above explained, they are deemed executed.
24. The Defence seems to infer from this dialogue between the Court and the requested states that the Court, in particular the Registry, assumed responsibility

in the management of the assets in question.⁵⁷ However, this inference finds no support in the applicable legal framework. This is in the context of strengthening cooperation that some Registry reports, cited by the Defence,⁵⁸ called for more staff resources and efficiency within the Court to follow-up on cooperation requests. This call for better cooperation concerned (a) the “freezing of assets”, as opposed to their management and (b) all proceedings and not only in the *Bemba* case. The reports cannot be decontextualized to now show the alleged Registry “failures in managing State cooperation in general and the process of freezing assets in particular”.⁵⁹

25. In addition, to fully understand the Court’s legal framework governing judicial cooperation, the above-mentioned dialogue is based, as stated by TCIII, on a “relationship of trust” and the “need for confidentiality” for successful cooperation.⁶⁰ In this respect, the Registry appreciates that the Defence may not have the full picture of all the Registry’s reports and the exchanged *notes verbales* between the Court and the requested states concerning the protective measures against Mr Bemba’s numerous assets.⁶¹ This is because information received from states, if any, is reported to the Chamber by the Registry following the level of classification of the initial requests, namely under seal *ex parte* only available to the Chamber and the Prosecution.

26. In the present case, the Court in the Main Case was in constant interactions with states in relation to freezing and/or seizure of assets on a conservatory basis,⁶² in particular with Portugal and DRC,⁶³ the two states where damages to assets would have allegedly occurred.

⁵⁷ Defence, Claim, para. 141.

⁵⁸ Defence, Claim, paras. 142, 145-149 and related footnotes.

⁵⁹ Defence, Claim, 142.

⁶⁰ TCIII, “Public Redacted version of ‘Decision on Mr Bemba’s preliminary application for reclassification of filings, disclosure, accounts, and partial unfreezing of Mr Bemba’s assets and the Registry’s Request for guidance’”, 20 November 2018, ICC-01/05-01/08-3660-Red2, para.16.

⁶¹ Defence, Claim, paras. 143-144.

⁶² [REDACTED].

⁶³ [REDACTED].

b) Legal framework applicable to the cooperation relationship between the Court and the cooperating states

27. In the same way that the Court is fully dependent on states to arrest suspects on their territory in respect of their domestic laws and procedures,⁶⁴ it is also fully dependent on states to execute, under Part 9 of the Statute, cooperation requests concerning assets. This applies to both, (1) the management of frozen/seized assets and (2) potential compensation requests in case of proven mismanagement of these assets.

28. First, as to the issue of management of assets, as per Part 9 of the Statute any request for cooperation is to be executed in accordance with national laws.⁶⁵ Accordingly, domestic freezing and seizing orders, even if taken at the Court's request, fall within the purview of the judiciary at the national level. This is in line with Pre-Trial Chamber III's analysis on Part 9, which stated that :

“[REDACTED]”.⁶⁶

29. This applies equally when it comes to managing the assets in execution of a Court's request. As the Defence notes, many states now have adopted relevant provisions on management of assets.⁶⁷ Hence, the Court is dependent on these legislations. It is for the requested states to adopt and apply them when cooperating with the Court.

30. Under the Court's legal framework, pursuant to article 100(1) of the Statute, costs linked to the execution of a judicial request, unless specified otherwise,⁶⁸ are considered “ordinary” and shall be borne by the requested state. This applies to management of assets. The Court may still be involved in some assets management issues when the Court and the requested states may hold

⁶⁴ See e.g. articles 59(1)-(2) and 89(1) of the Statute.

⁶⁵ See for example articles 88, 93 *chapeau* and 96(3) of the Statute.

⁶⁶ [REDACTED].

⁶⁷ Defence, Claim, fn 302.

⁶⁸ See list of specific costs (a)-(e) that shall be borne by the Court under article 100(1) of the Statute.

consultations under article 100(1)(f) of the Statute. Indeed, the issue of management of assets may arise, especially when the maintenance of specific assets would require engaging “extraordinary costs”. These consultations usually take place before a state decides to seize or freeze assets through a domestic order. In any event, the potential Court’s involvement in this consultation process does not render the Court responsible for the management of assets.

31. In the present case, states were aware of their obligation to manage the assets they were requested to freeze or seize on behalf of the Court. For example, Portugal [REDACTED] in relation to the management of the plane Boeing 727-100 parked in Faro (Portugal).⁶⁹ [REDACTED].⁷⁰ [REDACTED].

32. Another example of how management of assets may be dealt with domestically is when the relevant chamber did include in its cooperation request with Portugal, as the Defence concedes,⁷¹ the following order in relation to the management of frozen or seized assets:⁷²

“demande à la République portugaise de communiquer le cas échéant a la Chambre les nom et adresse de tout administrateur provisoire éventuellement désigné conformément a sa loi nationale pour gérer, pendant le déroulement de la procédure devant la Cour, les biens et avoirs de M. Jean-Pierre Bemba Gombo qui auraient été gelés ou saisis”.

33. This paragraph - usually included in cooperation requests - shows that the Court obviously relied, here, on the Portuguese authorities for the management of these assets. In this regard, Portugal has never consulted the Court under articles 96(2) or 100 of the Statute to explain any difficulties it may have encountered to manage the said assets located in Portugal once frozen or seized.

⁶⁹ See annexed table.

⁷⁰ Pre-Trial Chamber II, “*Décision et demande en vue d’obtenir l’identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise*”, 27 May 2008, ICC-01/05-01/08-8; [REDACTED].

⁷¹ Defence, Claim, para. 150.

⁷² Pre-Trial Chamber III, “*Décision et demande en vue d’obtenir l’identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise*”, 27 May 2008, ICC-01/05-01/08-8, operative part (c), p. 5. [REDACTED].

34. In the same vein, in the context of freezing of assets (not in case of seizure as conservatory measure), it should be noted that, when a defendant is made aware of the domestic freezing order in place – which was the case for Mr Bemba and his frozen assets in Portugal – she or he can always seize the relevant chamber of a substantiated request for lifting of the said measures, alleging that his assets were mismanaged. Assets are frozen only to prevent their sale. Freezing orders do not prevent the accused from accessing his/her property. If Mr Bemba had found during the proceedings that his assets were mismanaged by Portugal, he had the opportunity to seize the Court with a substantiated request for lifting of the freezing order taken at the national level. [REDACTED].⁷³ However, he never did so in relation to the management of his assets.

35. Second, as to the issue of compensation and the related mechanism for reimbursing an affected person of any alleged damages, article 100 of the Statute would apply. Seized of a compensation request, the requested state may elect to consult with the Court pursuant to article 100(1)(f) of the Statute if it considers that any reimbursement would amount to “extraordinary costs” for the execution of the Court’s request.

36. Instead, the Defence relies, *inter alia*, on the 2016 EU Regulation Proposal on the mutual recognition of freezing and confiscation orders⁷⁴ and submits that “it is the issuing party and not the state on whose the assets are found that is liable and responsible for their preservation.”⁷⁵ From the outset, it is not applicable law before the Court. Further, even assuming that this EU Regulation Proposal would be indicative of how cooperation may work at the Court with regard to assets management and potential related compensation, the Defence does not fully

⁷³ [REDACTED].

⁷⁴ Defence, Claim, para. 139 and fn 320. The Registry notes that this EU Regulation Proposal is now Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders, which entered into force on 19 December 2018 and will be applicable in all EU countries, including Portugal, 24 months later.

⁷⁵ Defence, Claim, para. 140.

consider the said EU proposal. In particular, article 34, titled “Reimbursement”, states:

“Where the executing State is liable under its law for damage to an affected person resulting from the execution of a freezing order transmitted to it pursuant to Article 4 (...), the issuing State shall reimburse the executing State for any damages paid to the affected person. However, where the issuing State can demonstrate to the executing State that the damage, or any part thereof, was exclusively due to the conduct of the executing State, the issuing and executing States shall agree between themselves on the amount to be reimbursed.” [Emphasis added].

37. A proper reading of this article commands that, in any event, the Defence should first demonstrate the state’s liability when executing the Court’s cooperation request, namely that national laws have not been respected at one point in the domestic procedures relating to either the conservatory freezing/seizure or management of assets.⁷⁶ However, the Defence makes no submission thereon.

38. In the circumstances, the Registry notes the Chamber’s decision [REDACTED].⁷⁷ Should the Chamber first judicially determine that, regardless of the legal basis,⁷⁸ the Claim is receivable, the Chamber may further require the states’ submissions on the alleged wrongdoing in managing Mr Bemba’s assets. Even if this litigation takes place before the Court, one cannot rely on grounds of “judicial economy” – as the Defence submits⁷⁹ – to in effect deprive the states from presenting arguments to counter the Claim.

IV. Concluding remarks

39. The Registry opposes the Claim as it is ill-founded in law and in fact.

40. On a legal standpoint, the Chamber may need first to consider to what extent the Claim is admissible. In any event, the Court, and in particular the Registry, has

⁷⁶ See for a similar approach, Pre-Trial Chamber II, [REDACTED].

⁷⁷ Pre-Trial Chamber II, “Decision on the ‘Registry’s Request for Guidance Regarding Some Procedural Aspects”, 17 April 2019, ICC-01/05-01/08-3677-Conf, p. 4.

⁷⁸ Defence Claim, para. 121 : articles 85 or 21 of the Statute and/or inherent powers.

⁷⁹ Defence, Claim, para. 8.

done its utmost to discharge its obligation to follow-up on judicial requests within the existing legal framework and under judicial oversight. Further, the Court's legal framework under Part 9 of the Statute⁸⁰ does not support such a Claim. It is not for the Court in general, and particularly not for the Registry, to manage assets that are frozen and/or seized at the domestic level according to national laws of requested states. The Registry's role is limited to (1) acting as a channel of communication between Chambers and the states, and (2) subject to judicial oversight, following-up on such requests. This limited role does not amount to the responsibility for managing assets. The Registry only manages information related to assets that are preserved otherwise domestically.

41. On a factual standpoint, in light of the above observations and information in annex, the Court cannot be held liable in relation to the claimed damages concerning assets that are unrelated to any Court's requests for cooperation.

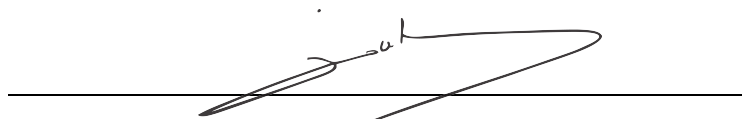
42. Alternatively, the Chamber may defer its decision on whether it is well-founded on its merit. Indeed, should the Chamber contemplate any of the claimed damages, further submissions may be required for the purpose of (1) proving these alleged losses and (2) accurately evaluating them. This is because:

- a. The states where assets at issue are located would need to be considered "participants" to the present proceedings;
- b. The Defence may be ordered to disclose material relied upon for the purpose of the [REDACTED] Report;⁸¹
- c. Pursuant to regulation 44 of the RoC, the Chamber may consider instructing an expert to undertake a neutral evaluation of the losses; and

⁸⁰ See in particular article 93(1)(k) of the Statute to be read in conjunction with article 57(3)(e) of the Statute.

⁸¹ Defence, Claim, [REDACTED].

d. The Defence submits that the Claim is neither complete (as other assets may be added) nor final (as reported losses may increase).⁸²

A handwritten signature in black ink, appearing to read 'Marc Dubuisson', is written over a solid horizontal line.

Marc Dubuisson, Director, Division of Judicial Services

On behalf of Peter Lewis, Registrar

Dated this 6 May 2019

At The Hague, the Netherlands

⁸² Defence, Claim, paras. 152-153 and 169(3). The Registry notes the Defence's submissions that losses are allegedly "ongoing".