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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 reply on compensation and damages", 26 June 2019, ICC-01/05-01/08-3690-Conf

Source: **Office of the Prosecutor**

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

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INTRODUCTION

1. The Rome Statute requires that an alleged miscarriage of justice under article 85(3) should be "grave" and "manifest", *i.e.*, it should be "critical" *and* "unmistakeable".[1] Mr Bemba's claim is neither. Notwithstanding his initial claim (60 pages, nine annexes),[2] a court hearing held at his request,[3] and his further reply (18 pages, three annexes),[4] Mr Bemba's submissions alleging a "grave and manifest miscarriage of justice" remain unclear and unconvincing.[5]

2. Mr Bemba's remarks in his Reply—alleging a "litany of procedural errors", "erroneous approach[es]" and a "handful" of errors at trial—do little to assist his claim:[6] he has not shown a single error relevant to article 85 in these compensation proceedings—let alone "numerous examples" of them.[7] Further, whatever Mr Bemba may perceive as a "miscarriage of justice" during his trial was "averted" when the Appeals Chamber, by majority, acquitted him.[8] In other words, by acquitting Mr Bemba, three judges of the Appeals Chamber already addressed any miscarriage of justice they may have found at trial. And in doing so, they made no finding that a "grave and manifest miscarriage of justice", in the article 85(3) sense, had occurred—such that this Chamber must address it. To the contrary: the Majority of the Appeals Chamber chose not to address many of Mr Bemba's submissions, and the two Dissenting Judges in the appeal emphatically rejected them.

3. Of note, Mr Bemba's Reply shows that his claim has morphed in several ways.

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[1] *Oxford English Dictionary*, "grave, *adj.* and *n.*", "manifest, *adj.* and *adv.*". *See also* article 85(3) in the French version of the Statute: Dans des circonstances exceptionnelles, si la Cour constate, au vu de faits probants, *qu'une erreur judiciaire grave et manifeste a été commise*, elle peut, à sa discrétion, accorder une indemnité conforme aux critères énoncés dans le Règlement de procédure et de preuve à une personne qui avait été placée en détention et a été libérée à la suite d'un acquittement définitif ou parce qu'il a été mis fin aux poursuites pour ce motif. (emphasis added).
[2] Request, with Annexes A, B, C, D, E, F, G, H, I.
[3] Request, para. 169. *See* Article 85 Hearing, 1:1-41:13.
[4] Reply.
[5] Reply, paras. 3, 14-24.
[6] Reply, paras. 3, 16.
[7] Reply, para. 3 (alleging that "[t]he Appeals Chamber pointed to numerous examples of the manipulation of evidence and the failure to apply central and essential principles", but without substantiating these examples).
[8] *See* Reply, para. 3 ("[…] the Appeals Chamber judges in this case were clear; they had to intervene to prevent one.")

- *First*, the factual basis for his claim is now almost entirely limited to a purported "loss arising from the seizure of his property" or the alleged "economic damage" to his property.[9] Arguments made originally to claim a "miscarriage of justice" at trial are now—at best—peripheral.[10] For instance, despite his initial claim that the *Bemba* Trial Judgment was "error-strewn" and that the trial showed a "pattern of amateur mismanagement",[11] Mr Bemba has still not concretely addressed any of the Prosecution's submissions in response based on the case record.[12]

- *Second*, although his original Request incorrectly interpreted the article 85(3) standard as not requiring a showing of *malafides* conduct[13]—and thus did not expressly allege prosecutorial *malafides*,[14] following the discussion on the article 85(3) standard at the hearing[15]—Mr Bemba now belatedly attempts to claim *malafides*.[16]

- *Third*, Mr Bemba now claims he is a "third party" bringing a "private claim" for "property loss or damage":[17] however in this capacity, he cannot invoke the protections of article 85, which are limited to specific claims brought as "an arrested or convicted person" arising from proceedings against him. Article 85 would be inapplicable in this context.

4. Further, given both the ambiguity of his claim, and the exceptional nature of article 85 proceedings, it would not serve the Court in either this case or in future cases if his claim were to be "shoe-horned" into article 85.

[9] Reply, paras. 1-2, 4, 7-11, 25-52.
[10] Reply, paras. 3, 16-18, 22-23. *Compare with* Request, paras. 14-83.
[11] *See* Request, paras. 14-19.
[12] *See e.g.*, Reply, para. 18 (stating that "The Prosecution caricatures and substantially avoids the submissions of Mr Bemba […]", but fails to give concrete examples from the case record or a comprehensive list of the 84 footnotes in the Trial Judgment which, in his view, are flawed).
[13] *See* Request, paras. 10-13.
[14] *See* Request, paras. 22-27, 129-132.
[15] *See e.g.*, Article 85 Hearing, 18:3-14; 21:4-22:4.
[16] Reply, paras. 19-24.
[17] Reply, para. 25.

5. Yet, merely because article 85 does not apply to Mr Bemba's situation, does not mean that the situation is without a solution. Given Mr Bemba's willingness, and indeed preference,[18] to "sit across the table" to resolve the alleged issues regarding his assets, this Chamber may find it preferable to direct Mr Bemba and the Registry (as the Court's administrative organ under article 43) to do so—outside of the Court's judicial proceedings on article 85.

Level of confidentiality

6. This response is filed confidentially pursuant to regulation 23*bis*(2) of the Regulations of the Court, since it responds to a confidential filing. The Prosecution will file a public redacted version of its response in due course.

[18] Reply, para. 4 ("Regardless, and for the avoidance of doubt, Mr Bemba repeats that a finding of a grave and manifest miscarriage of justice under Article 85 is **not** a pre-requisite […]"); para. 51 ("[…] Rather than continue to expend both his assets and those of the Court through litigation—whether before the ICC or in other jurisdiction(s)—Mr Bemba remains willing to move towards some kind of dispute resolution or arbitration process, whether within the ICC or externally, with Portugal, Belgium and the DRC included as parties."); Article 85 Hearing, 14:24-15:4 ("[…] we are perfectly ready on Mr Bemba's behalf to engage in that sort of exercise in any form, whether it's through referral of the matter to some formal arbitration authority or by simply ordering the parties, which you perfectly well can do, *to sit around a table somewhere in this building*. That, we submit, would be a constructive and sensible way forward, leading to an expeditious and practical resolution of the matters […]"). (emphasis added).

I. THE CORRECT, REASONABLE AND EFFICIENT RESOLUTION OF THIS MATTER LIES OUTSIDE ARTICLE 85 LITIGATION

I.A. MR BEMBA'S ARTICLE 85 CLAIM IS DISTINCT FROM HIS PROPERTY DISPUTE CLAIM AND SHOULD NOT BE CONFLATED WITH IT

7. Mr Bemba's effort to "shoehorn" what is essentially a property dispute into the statutory parameters of article 85 should be dismissed. As his Reply underscores, he conflates a statutory article 85 claim with his request for damages resulting from a property dispute arising out of an alleged mismanagement of his assets. Although Mr Bemba may have "simply amalgamated" his two claims as a "means of expedience",[19] the two claims raise distinctly separate issues and are governed by very different legal frameworks. They are not readily "amalgamated".

8. Mr Bemba's first claim—under article 85(3)—is based on a specific statutory provision: the article 85(3) proceedings are statutory proceedings before this Chamber to determine if a "grave and manifest miscarriage of justice" has occurred. Mr Bemba may trigger such proceedings to bring a claim as an "arrested or convicted person" at this Court—but not as a "third party". The Prosecution is involved in these proceedings as a matter of right. And it is to this claim that the Prosecution has primarily responded thus far. Aspects relating to "assets management" *may* fall within this article 85(3) claim only if a "grave and manifest miscarriage of justice" is shown. As demonstrated, there is no such miscarriage of justice.

9. Mr Bemba's second claim—an ancillary claim outside of the scope of article 85—concerns a dispute about the management of his assets, essentially a dispute between Mr Bemba and the Court's Registry. These are not proceedings based on any provision of the Rome Statute, and by Mr Bemba's own admission, he brings his

[19] Reply, para. 5.

claim as a "third party".[20] It is axiomatic, therefore, that as a "third party", Mr Bemba may not invoke article 85—which has a different purpose. In this respect, Mr Bemba misconstrues the Prosecution's submissions.[21]

10. Article 85(3) is therefore inapt to his ancillary claim. To allow Mr Bemba's claim under article 85(3) would open the floodgates at this Court to all manner of claims and frivolous and protracted litigation—and undermine the provision's exceptional nature. Rather, this Chamber may direct Mr Bemba to approach the Registry to discuss his claim outside of these article 85 proceedings. In any event, since Mr Bemba continues to interpret the assets-related record in a manner vastly different from the Registry,[22] this is the most appropriate solution.

I.B. MR BEMBA MISINTERPRETS THE ARTICLE 85 STANDARD

11. Given the Prosecution's view that Mr Bemba's assets-based claim may, and indeed should be resolved *outside* of article 85 and the Court's judicial proceedings, Mr Bemba's submissions (mis)interpreting article 85 may simply be dismissed.[23] They are unnecessary. They are also incorrect—misapprehending article 85, its drafting history and the object and purpose of the Statute.

12. Mr Bemba's attempt to (mis)characterise the negotiating history of article 85 as simply the views of the Prosecution's Senior Appeals Counsel is inaccurate.[24] As it is apparent, those views were not given in her capacity as a staff member of the OTP, but rather, more than 20 years ago, as a member of one of the delegations in Rome

[20] Reply, para. 25.
[21] *Compare* Reply, para. 2 *with* Article 85 Hearing, 39:14-40:16 ("[…] This hearing has shown basically what now the claim that Mr Bemba is bringing is about. There is, on the one hand, an Article 85(3) claim that seems to now be predicated—it didn't used to, but now seems to be predicated on *mala fides* by the Prosecutor, the Court, and then there is an independent claim, which is a private claim for damages to his property. […] [the ancillary claim of damages to his property] falls manifestly outside the scope of Article 85 and it would be inappropriate and dangerous to resort to inherent powers of the Chamber. […] This is not something that this Chamber should rule on and I respectfully think there is no need for that. This is an Article 85 claim. You have to deal within the context of that provision, and then Mr Bemba will be free to choose whatever forum he wishes to choose for bringing any subsequent claims that he wishes to bring. […]").
[22] *See e.g.*, Registry Observations, paras. 5, 7-11, 13-14 and Article 85 Hearing, 34:24-37:19.
[23] *See* Reply, paras. 12-13.
[24] Reply, para. 13.

and as a witness to and participant in those negotiations.[25] That summary reflected the concerns and views of the different delegations, and the final outcome of the negotiations, which was to limit the application of article 85(3).[26] Nor was this an isolated view. Members of other delegations have expressed similar views.[27] Academic commentators have also supported this interpretation, when they have analysed the provision.[28] Further, all three sources that Mr Bemba relies on to claim the contrary[29] confirm the "exceptional nature" of compensation under article 85(3) as it was intended.[30]

13. Moreover, the exceptional nature of article 85(3) is consistent with the object and purpose of the Statute (interpreted in light of the Vienna Convention on the Law

[25] *See* Prosecution Response, fn. 29 (stating "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").
[26] Brady/Jennings in Lee (Ed.), p. 303.
[27] Bitti in Lee (Ed.), p. 623, fn. 3, citing the report of the Working Group on Procedural Matters at the Rome Conference, Document (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" (emphasis added)
[28] 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 […]"); Schabas (2016), p. 1260 ("[…] The French version of the Rome Statute speaks of '*une erreur judiciaire grave et manifeste'*. In exceptional circumstances, the Court may in its discretion award compensation according to the criteria provided in the Rules of Procedure and Evidence […]"); p. 1261 ("[…] The Court must find 'conclusive facts' that show there has been 'a grave and manifest miscarriage of justice'. Even then, compensation is to be awarded only 'in exceptional circumstances' and 'in its discretion'"); Dreyssé in Fernandez and Pacreau (Eds.), p. 1787 ("[…] *Cet article consacre l'existence d'une compétence discrétionnaire offerte à la Cour dans des circonstances exceptionnelles lui permettent d'indemniser la « victime » d'une erreur judiciaire. Celle-ci doit être « grave et manifeste », terminologie laissant un large pouvoir d'appréciation aux juges. La difficulté d'obtenir une indemnisation dans ce cas s'explique par le déroulement «normal» de la procédure.* En effet, si une personne a été accusée, présumée innocente, son innocence a pu être affirmée par un jugement ou parce qu'il a été mis fin aux poursuites alors que dans le cas du paragraphe 2, l'erreur judiciaire consiste à avoir condamnée une personne innocente. *Ici, la justice, établissant la vérité et reconnaissant l'innocence de l'accusé, a fonctionné. Il n'y a donc pas de droit à être indemnisé en cas d'acquittement ou d'abandon des poursuites*. Il est nécessaire de préciser que l'abandon des poursuites ne préjuge pas de l'innocence de la personne accusée et peut être le résultat d'une politique pénale, qui se concentrerait par exemple sur la condamnation des supérieurs hiérarchiques les plus importants.") (emphasis added).
[29] Reply, para. 13, fn. 24.
[30] Zappalà in Cassese *et al.* (Eds.), p. 1583 ("[…] This kind of compensation can hardly be considered as amounting to an individual right. Not only compensation under paragraph 3 may 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. […]"); Mulgrew *et al.*, pp. 477-478 (acknowledging the drafters' intention to restrict the compensation scheme); Federova *et al.*, p. 26 ("[…] article 85(3) ICC Statute is very narrowly defined and provides for compensation only in exceptional circumstances when there has been a 'grave and manifest miscarriage of justice'." Both Zappalà and Mulgrew then express their own views on what the compensation scheme should be.

of Treaties, 1969).[31] While article 21(3) of the Statute requires that the Court's legal framework is interpreted "consistent with internationally recognised human rights", article 85 already reflects these rights, and in a sense, goes beyond these protections. Indeed, while article 85(1) is identical to article 9(5) of the ICCPR and article 85(2) reflects article 14(6) of the ICCPR, article 85(3)—although inspired by some national legislations—does not exist in major international human rights instruments.[32] Article 85(3) represents, therefore, "an improvement of international law".[33] It is therefore only appropriate that compensation under this article remains confined to exceptional circumstances, and available only at a Chamber's discretion.

14. Likewise, since article 85 was carefully crafted in light of the object and purpose of the Statute, no resort to the Court's inherent powers is necessary. The inherent jurisdiction of this Court is triggered only when there is a lacuna in the Statute.[34] There is no lacuna in article 85: rather its scope is limited and deliberately so—and it gives full effect to the Statute's objectives.

15. While it is certainly true that the *ad hoc* tribunals (such as the ICTR) made use of their "inherent powers" to award compensation in limited cases,[35] the circumstances under which they did so can be distinguished. *First,* the *ad hoc* tribunals relied on their "inherent powers" to address compensation matters only because their Statutes/legal framework did not themselves provide for compensation for "human

[31] Article 31 (1), VCLT: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. *Contra* Reply, paras. 12-13.
[32] Bitti in Lee (Ed.), p. 623.
[33] Bitti in Lee (Ed.), p. 623.
[34] *Bemba et al.* SAJ, para. 75 ("[…] The Appeals Chamber emphasises that, in the legal framework of this Court, "inherent powers" should be invoked in a very restrictive manner and, in principle, only with respect to matters of procedure"); para. 76 ("[…] The Appeals Chamber recalls that, in accordance with article 21 of the Statute, the Court shall apply in the first place the Statute and the Rules. […] Similarly, the Appeals Chamber considers that when a matter is regulated in the primary sources of law of the Court, there is also no room for chambers to rely on purported "inherent powers" to fill in non-existent gaps. In addition, it is clear that not every "silence" in the legal framework of the Court constitutes a lacuna. The Appeals Chamber recalls that in order to determine whether the absence of a power constitutes a 'lacuna', it has previously considered whether '[a] gap is noticeable [in the primary sources of law] with regard to the power claimed in the sense of an objective not being given effect to by [their] provisions.' […]")
[35] *See* Article 85 Hearing, 31:1-4 (JUDGE MINDUA: "[…] if we consult the jurisprudence of other tribunals, international criminal tribunals that is, we see that there is an element of compensation for the violation of human rights on the basis of the inherent powers of the Court itself.")

rights violations".[36] The Rome Statute—being specific in its terms for when human rights violations may be compensated—is different. *Second,* in any event, those *ad hoc* tribunal decisions rejected the use of "inherent powers" to award compensation for a "grave and manifest miscarriage of justice" for claims analogous to the one Mr Bemba now brings.[37] *Third,* the *ad hoc* tribunals allowed compensation only when a specific violation in terms of the accused's fair trial rights was established.[38] Mr Bemba has not established such a violation. Indeed, while he alleges a violation of his purported "fundamental right to property",[39] such a right can neither be described as a violation of an accused's fair trial right (in terms of article 67 of the Statute)[40] nor can such a "right to property" be said to be established in international human rights law. The international human rights conventions—ICCPR and the ICESCR—do not recognise a "fundamental right to property" in the sense that Mr Bemba asserts. Regional conventions such as the ECHR recognise a person's "peaceful enjoyment of possessions", but in very cautious terms.[41] Moreover, even if such a "fundamental right to property" was considered universally recognised, Mr Bemba has not established his right was violated, or in any event, that such "violation" is attributable to the Court's *malafides* actions or a result of "serious

[36] *Rwamakuba* Compensation Decision, paras. 58-59 ("[…] The lack of an appropriate mechanism to provide redress to an accused or former accused of this Tribunal, including the award of financial compensation when appropriate, when he or she is a victim of a human rights violation in fact justifies the Chamber's decision to entertain Rwamakuba's claim.")
[37] *Rwamakuba* Compensation Decision, paras. 19-31 ("[…] while the Chamber acknowledges the importance of the principle provided for in Article 85(3) of the ICC Statute, it does not find that at present customary international law provides for a right to compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice. In the absence of a provision in its Statute and Rules or any other applicable source of law in this regard, the Chamber therefore denies the Defence's claim for compensation on this basis. […]"); upheld in *Rwamakuba* Compensation AD, paras. 10-15.
[38] *Rwamakuba* Compensation AD, paras. 23-31 (upholding the award of compensation for the violation of a right to legal assistance and to an initial appearance without delay because they were attributable to the Tribunal).
[39] Reply, para. 5.
[40] Article 67, Statute.
[41] Harris *et al.*, p. 849 ("It proved exceedingly difficult to reach agreement on a formulation of the right to property when the European Convention was being drafted. Eventually, it was one of the provisions left over until the First Protocol. Even then, the differences between states were considerable and the provision finally adopted guarantees only a much qualified right, allowing the state a wide power to interfere with property […] In its final form, Article 1 of the First Protocol contains no express reference to a right to compensation at any level in the event of interference with property, save any that might be found in the reference to 'the general principles of international law'. […]"). The ACHPR allows the "right to property" to be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provision of appropriate laws.

misconduct" by the Court.[42] Similarly, while cursorily alleging that his "right to liberty and family life were violated", Mr Bemba fails to acknowledge that his detention at the Court was always lawful.[43]

16. Finally, Mr Bemba asks this Chamber to disregard all views contrary to his own[44]—even when they reflect the weight of the negotiating history, academic commentary and the views of other judges at this Court—and he gives no proper reason for why this Chamber must do so. Mr Bemba's unsubstantiated views do not overrule the requirement for judicial comity, probity and common sense. The *Ngudjolo* compensation decision (and its endorsement of the *malafides*/*serious misconduct* standard for article 85(3)) is not only consistent with what the drafters intended for that provision,[45] it is also consistent with decisions of the *ad hoc* tribunals, which also emphasised the *malafides* component required.[46] Moreover, merely because Mr Bemba advances a different factual scenario (regarding asset management) from situations in other cases does not mean that the Court's prior decisions (*Ngudjolo* and *Mangenda*) establishing the legal standard for compensation are irrelevant.[47] Two cases may differ on their facts, but the law applied must be clear, consistent and predictable.

[42] *Ngudjolo* Compensation Decision, para. 45.
[43] Reply, p. 7 (sub-heading ii). *See* Prosecution Response, paras. 75-82.
[44] Reply, para. 13.
[45] Dreyssé in Fernandez and Pacreau (Eds), p. 1787; Brady/Jennings in Lee (Ed.), p. 303; Schabas (2016), pp. 1260-1261.
[46] *See Zigiranyirazo* Compensation Decision, para. 20 (rejecting a compensation claim since "[…] the Appeals Chamber [had] made no finding that the Trial Chamber committed these errors because *it was not competent, impartial or independent*, or that its conclusions were otherwise *motivated by inappropriate considerations. It did not find that the prosecution of the Claimant was malicious.* Nor has the Claimant contested the presumption that the Trial Chamber was competent, impartial and independent, or that the Prosecution acted with integrity in pursuing the case against him. *Courts of first instance regularly make mistakes of facts and/or law*. […]"), upheld in *Zigiranyirazo* Compensation AD, paras. 7-8.
[47] *Contra* Reply, para. 13.

I.C. MR BEMBA FAILS TO ESTABLISH A "GRAVE AND MANIFEST MISCARRIAGE OF JUSTICE"

17. Similar to his original Request,[48] Mr Bemba's Reply fails to show that he suffered a grave and manifest miscarriage of justice, in terms of article 85(3).[49]

18. *First*, in circumstances where Mr Bemba bears the burden to establish the threshold under article 85 and fails to do so, there was no need for the Prosecution to produce witness evidence of its own.[50] Even if the Chamber were to accept the contents of the three unsworn "statements" that Mr Bemba relies on, they do not establish his claim.[51] They manifestly fail to demonstrate a "grave and manifest miscarriage of justice" for the purposes of article 85, in particular, in relation to allegations made against the Prosecution.

19. For instance, the Bank Manager Statement: (i) ambiguously suggests, without substantiation, that the Prosecution may have had the keys and documents to the plane;[52] (ii) opines—again without substantiation or view of the case record—that the Prosecution's possession of those items prevented Mr Bemba from selling or leasing the plane, but fails to note his attempts to gain access to the keys and documents;[53] and (iii) indicates only that by the time of Mr Bemba's arrest, he had sufficient funds to discharge outstanding parking fees, but says nothing regarding Mr Bemba's ability or intention to pay for the necessary repairs and maintenance costs for the plane.[54] While the Aviation Company Statement, given by Mr Bemba's business partner, opines that the failure to place the plane in long storage has now rendered it

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[48] *See* Prosecution Response, paras. 23-103.
[49] Reply, paras. 7-24.
[50] *Contra* Reply, paras. 7, 9.
[51] *See* Bank Manager Statement; Aviation Company Statement; DRC Lawyer Statement.
[52] Bank Manager Statement, para. 19 ("It is my understanding that all materials seized were passed to the ICC Prosecution, including the documents and keys of the plane"). *But see* Prosecution Response, paras. 34-36 ("[…] 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.")
[53] Bank Manager Statement, para. 37 ("Although not frozen, by order of the Court, 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").
[54] Bank Manager Statement, para. 16.

beyond economic repair, the Statement does not attribute the failure to any party, let alone address the issue of the keys and documents or Mr Bemba's ability to access the plane.[55] The DRC Lawyer Statement contains no information relating to the plane allegations.

20. In any event, the status of the three "statements" submitted by Mr Bemba in these proceedings remains unclear. The Chamber has not yet taken any procedural step to "admit" the evidence or to "formally recognise" its submission. Notwithstanding the opportunity of a hearing, the Chamber has not called Mr Bemba's "witnesses" to testify in these proceedings. In these circumstances, the "statements" cannot determine the outcome of this claim.

21. *Second,* Mr Bemba's submissions obscure the Prosecution's arguments.[56] Arguments based on the existing case record are relevant only when a previous Chamber has explicitly found that a complainant suffered an article 85 violation or in the absence of this explicit finding, if the Chamber addressing the compensation claim can reasonably find such a violation. In either case, a prior judicial finding of an article 85 violation is necessary before the compensation amount can be determined.

22. Mr Bemba's references to the case record do not assist him in his article 85(3) claim. Not only did the Majority of the Appeals Chamber *not* make an explicit finding of an article 85 violation (despite acquitting him); the Dissenting Judges rejected most of his arguments challenging aspects of the trial (and as the Dissenting Judges stated, their views did not necessarily contradict the views of the Majority on those issues).[57] In any event, the acquittal on appeal "averted" any perceived

[55] Aviation Company Statement, para. 20.
[56] Reply, para. 15 (claiming that the Prosecution "submits that a complainant is not entitled to raise anything at all to prove his claim")
[57] *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.[…]").

miscarriage of justice.[58] In these circumstances, Mr Bemba's attempt to ask this Chamber to revisit all those conclusions (and in essence, to overturn them) is no more than an impermissible "second appeal" in these proceedings.

23. *Third,* Mr Bemba's attempt (in and following the hearing) to expressly claim *malafides* by the Court's organs (namely, the Prosecution and the Registry) so as to import his claim into the article 85 legal framework is belated, unsubstantiated and unfounded.[59] In his initial Request, Mr Bemba had similarly impugned the professionalism of the Trial Chamber Judges, and some of his remarks appeared to go beyond respectful professional disagreement.[60] These remarks remain unsubstantiated: Mr Bemba appears to maintain them despite the case record showing the converse.[61] Moreover, Mr Bemba's attempt to attribute his remarks to the Majority of the *Bemba* Appeals Chamber must be rejected:[62] the Judges of this Court did not make such findings. Likewise, his attempt to disregard the views of the Dissenting Judges (without explanation)—despite their views being part of the judgment—is uncalled for.[63] On the whole, the practice of bringing allegations of *malafides*—absent either substantiation or a responsible reading of the record—does not conform to litigation standards expected before this Court.

[58] *See e.g.*, Dreyssé in Fernandez and Pacreau (Eds), p. 1787.
[59] Reply, paras. 19-24 (re-casting several claims to belatedly claim that the Prosecution acted in bad faith. Mr Bemba also alleges that the Registry's submissions "offend its status as a neutral organ of the Court").
[60] *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).
[61] *See* Article 85 Hearing, 22:9-23:7.
[62] *See* Reply, para. 17 ("Mr Bemba's submissions as to the Trial Judgment, whilst expressed in different terms, […] chime harmoniously with the views of the majority of the Appeals Chamber […]").
[63] *See* Reply, para. 17 (arguing that the views of the Majority are "the only judicial views to which the Chamber in this claim can have proper regard").

I.D MR BEMBA FAILS TO DEMONSTRATE THE PROSECUTION'S *MALAFIDES* OR MISCONDUCT

24. Mr Bemba fails to establish that the Prosecution's conduct supports any aspects of his claim, including that under article 85.

25. *First,* Mr Bemba fails to concretely or coherently address the Prosecution's submissions[64] on his allegations about the Prosecution's conduct regarding the keys and documents for the Boeing 727 aircraft in Faro Airport, Portugal.[65] Rather than address the specific matters raised in the Prosecution's response to the plane allegations (including his purported inability to move or sell the plane), he now shifts his position, claiming that "who had the keys and documents is a red herring",[66] and rather that the Court had a responsibility, nonetheless, "to preserve the plane as an asset from that moment onwards".[67] This claim is unclear, incorrect in fact, and unsupported in law. The plane was never frozen or seized;[68] Mr Bemba has previously acknowledged this.[69] The Court is under no obligation to manage assets that were never frozen or seized. It is unsurprising that Mr Bemba is unable to cite any authorities in support of this proposition. Indeed, Mr Bemba's recent shift in position merely further obscures the exact nature of his allegations, even at this late stage.

26. Even assuming that Mr Bemba maintains his original claim that the Prosecution's conduct prevented him from generating an income from the plane,[70] he gives no reason as to why the Prosecution's reference to the record to refute the plane allegations[71] should be "disregarded".[72] Mr Bemba has not been deprived of

[64] Prosecution Response, paras. 33-36.
[65] Reply, paras. 7, 9, 36, 38-39.
[66] Reply, para. 41.
[67] Reply, para. 41.
[68] [REDACTED].
[69] Request, para. 129; *see also* Bank Manager Statement, para. 37.
[70] Request, paras. 129-132, 149.
[71] Prosecution Response, paras. 34, 36 (setting out the information on the record relevant to the plane allegations).
[72] Reply, para. 7.

any opportunity to comment on the Prosecution's submissions regarding the record.[73] To the contrary, despite the Prosecution's submissions on the plane's technical documents and access to the keys being available to him [REDACTED] Mr Bemba has not addressed them. Likewise, it was open to Mr Bemba to request access to the specific *ex parte* information on which the Prosecution relies, just as the Prosecution had done in seeking access to *ex parte* information cited by Mr Bemba.[74] He did not do so. Nor has the Prosecution had any objection to Mr Bemba being provided with the specific *ex parte* information relevant to these proceedings, but is bound to respect the *ex parte* classification of documents designated as such by the Chambers.[75] Mr Bemba's claim that the Prosecution is "not prepared to reveal" this material thus mischaracterises the record.[76]

27. Crucially, Mr Bemba has not shown that the plane's alleged "destruction" was as a result of the Prosecution's alleged conduct or the freezing orders.[77] As Mr Bemba acknowledges,[78] the plane had not been subject to any maintenance or long storage procedures since it landed at Faro Airport in April 2007, *i.e.*, over a year *before* Mr Bemba's arrest. While Mr Bemba claims to have received offers to lease the plane in late 2009, [REDACTED].[79] That status would not have changed even if Mr Bemba had the keys and documents to the plane when he requested them one year later, in December 2010,[80] and accordingly the alleged Prosecution conduct *following* that request is immaterial to the plane's loss in value.

28. *Second,* Mr Bemba appears to allege that freezing orders were issued out of "malice borne of personal and institutionalised enmity towards Mr Bemba and his

[73] *Contra* Reply, para. 7.
[74] Email from [REDACTED] (OTP) to [REDACTED] (Chambers) and Peter Haynes dated 12 April 2019, re: Bemba compensation: Request for access to filing [REDACTED].
[75] Regulation 23*bis*(1) and (2) of the Regulations of the Court.
[76] *Contra* Reply, para. 7.
[77] Reply, paras. 7, 8, 37.
[78] Reply, para. 39.
[79] Reply, para. 39; [REDACTED]
[80] Request, para. 131.

family",[81] but yet again fails to explain this extraordinary speculation. Freezing orders are issued within the strict legal parameters of the Statute (and with judicial authorisation). The Appeals Chamber has endorsed this approach.[82]

29. *Third,* Mr Bemba's submissions that the Prosecution had "jettisoned its original investigation to ensure Mr Bemba would face trial no matter what" are repetitive.[83] They fail to engage substantially with the Prosecution's response.[84] Nor does Mr Bemba show that the Prosecution "ignore[d] the results of its own investigation". Likewise, despite Mr Bemba's theory that "the MLC troops had been re-subordinated to the FACA hierarchy", the Appeals Chamber did not endorse this theory.[85]

30. *Fourth,* in claiming that the OTP felt "a level of malice and enmity […] towards him personally" in issuing the Prosecutor's statement following the *Bemba* Appeal Judgment,[86] Mr Bemba speculates, and fails again to address the Prosecution's response in any concrete way.[87]

31. *Fifth, and finally,* Mr Bemba alleges that the Prosecution's reference in the recent hearing to Mr Bemba's article 70 convictions is a further example of the Prosecution's malice towards him.[88] Yet he fails to explain why it would be incorrect for the Chamber to consider his article 70 convictions as relevant to its exercise of discretion in considering his present claim, given the gravity of his conduct giving rise to his

[81] Reply, para. 20.
[82] *See* Assets Freezing AD, para. 63 (underscoring the Court's mandate in terms of requesting cooperation to freeze assets).
[83] *See* Request, paras. 22-27.
[84] Prosecution Response, paras. 27-32; Article 85 Hearing, 24:9-25:1.
[85] *See* 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).
[86] Reply, para 21.
[87] Prosecution Response, paras. 37-42; Article 85 Hearing, 25:23-26:10.
[88] Reply, para. 21.

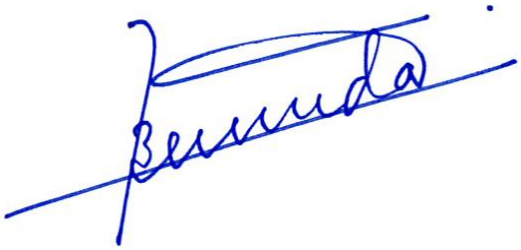
article 70 convictions and the fact that such criminal conduct occurred in the course of his trial which he now claims amounted to a gross miscarriage of justice. Having been confirmed on appeal, these convictions—and the Judgments containing them (court records)—may be said to constitute facts of common knowledge within the parameters of article 69(6).[89] It would be within the Pre-Trial Chamber's discretion to take these convictions into account when considering his present claim.

32. For the reasons above, the Prosecution requests the Chamber to dismiss Mr Bemba's submissions.

[89] *See* Piragoff/Clarke in Triffterer *et al* (Eds.), p. 1744 fn. 58 ("Facts of common knowledge are facts which are so notorious that they do not require formal proof. They include the facts of which an informed and reasonable person has knowledge or which he or she can learn from reliable and publicly accessible sources, having regard to the circumstances of the case and, in the context of the ICC, to the parties involved. […]"); *Bemba et al.* First Judicial Notice Decision, paras. 5-6 (taking judicial notice, under article 69(6), of ICC court records); *Bemba et al.* Second Judicial Notice Decision, paras. 3-7.

CONCLUSION AND RELIEF

33. Mr Bemba's original Request fell manifestly short of the article 85 legal standard. Equally, his Reply fails to establish an article 85 violation. The Prosecution respectfully requests the Chamber to dismiss Mr Bemba's submissions. In the Prosecution's respectful view, the solution to this matter does not lie within the parameters of article 85 or in litigation before the Chambers. However, the Chamber may find it preferable to direct Mr Bemba to liaise with the Court's Registry, should he wish to further discuss aspects relating to his dispute concerning the management of his assets.



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Fatou Bensouda, Prosecutor

Dated this 21st day of November 2019

At The Hague, The Netherlands