Cour Pénale Internationale

International Criminal Court

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No. **ICC-01/05-01/08**
Date: **18 May 2020**

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

Decision on Mr Bemba's claim for compensation and damages

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

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

Counsel for the Defence
Peter Haynes, QC
Kate Gibson

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this decision on 'Mr. Bemba's claim for compensation and damages' (the 'Claim'), submitted by Counsel for Mr Jean-Pierre Bemba Gombo ('Mr Bemba') on 8 March 2019.[1]

I. BACKGROUND AND PROCEDURAL HISTORY

1. On 24 May 2008, pursuant to the 'Warrant of arrest for Mr. Jean-Pierre Bemba Gombo' issued by Pre-Trial Chamber III on 23 May 2008,[2] Mr Bemba was arrested in the Kingdom of Belgium. On 3 July 2008, Mr Bemba was surrendered and transferred to the seat of the Court; on 4 July 2008, he made his first appearance before Pre-Trial Chamber III.[3]

2. On 15 June 2009, Pre-Trial Chamber II rendered the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo', deciding that there was sufficient evidence to establish substantial grounds to believe that Mr Bemba was responsible under article 28(a) of the Rome Statute (the 'Statute') for crimes against humanity and war crimes allegedly committed on the territory of the Central African Republic (the 'CAR') from on or about 26 October 2002 to 15 March 2003.[4]

3. On 21 March 2016, Trial Chamber III rendered its decision pursuant to article 74 of the Statute in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (the 'Main Case'), convicting Mr Bemba for crimes against humanity and war crimes under article 28(a) of the Statute (the 'Trial Judgment').[5] On 21 June 2016, Mr Bemba was sentenced to 18 years of imprisonment.[6]

[1] Counsel for Mr Bemba, Mr Bemba's claim for compensation and damages, 8 March 2019, ICC-01/05-01/08-3673-Conf, with public Annexes A, B, C, D and E, and confidential Annexes F, G, H and I (first public redacted version notified 11 March 2019, with public Annexes A, B, C, D and E, and public redacted Annexes F, G, H and I, later reclassified as confidential following Pre-Trial Chamber II's instructions dated 25 March 2019 (ICC-01/05-01/08-3673-Red-Conf); second public redacted version notified 19 March 2019, with public Annexes A, B, C, D and E, second public redacted Annex F, public redacted Annexes G, H and I, and confidential Annex J (ICC-01/05-01/08-3673-Red2)).
[2] Pre-Trial Chamber III, Warrant of arrest for Jean-Pierre Bemba Gombo, 23 May 2008, ICC-01/05-01/08-1-tENG-Corr. On 10 June 2008, Pre-Trial Chamber III issued a new warrant of arrest entirely replacing the one issued on 23 May 2008: Pre-Trial Chamber III, Warrant of arrest for Jean-Pierre Bemba Gombo replacing the warrant of arrest issued on 23 May 2008, 10 June 2008, ICC-01/05-01/08-15-tENG.
[3] Transcript of hearing, 4 July 2008, ICC-01/05-01/08-T-3-ENG.
[4] Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424.
[5] Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343.
[6] Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, ICC-01/05-01/08-3399.

4. On 8 June 2018, the Appeals Chamber, by majority, reversed the Trial Judgment in the Main Case and acquitted Mr Bemba from all charges of crimes against humanity and war crimes for which he had been convicted at trial (the 'Appeal Judgment').[7]

5. On 22 October 2018, Mr Bemba notified the Presidency 'of his intention to file an Article 85 claim'. He submitted that the circumstances warranted a variation of both the general time and page limits and, accordingly, requested (i) a three-month extension to the time limit applicable under rule 173(2) of the Rules of Procedure and Evidence (the 'Rules'); and (ii) a variation of the page limit under regulation 38(2)(f) of the Regulations of the Court (the 'Regulations') up to a 100 pages (the '22 October 2018 Application').[8]

6. On 30 October 2018, the Presidency designated Pre-Trial Chamber II to consider the 22 October 2018 Application and any subsequent request for compensation under article 85 of the Statute.[9] On 13 November 2018, the Chamber (i) granted the variation of the time limit, extending it for three additional months; and (ii) partially granted the variation of the page limit, allowing Mr Bemba to submit a request of not more than 60 pages.[10]

7. On 8 March 2019, Mr Bemba filed the Claim. First, Mr Bemba requests the Chamber (i) to order '[t]hat pursuant to Article 85 [he] be awarded: (a) [a] sum of not less than €12 million for the period of his detention; (b) [a] further sum of €10 million by way of aggravated damages; (c) €4.2 million for his legal costs; and (d) [a] sum not less than €42.4 million for damage to his property'.[11] Second, and '[i]n the alternative, [Mr Bemba requests] (a) [t]hat [he] be awarded a sum not less than €42.4 million for damage to his property under the ICC's inherent power to make an award of financial compensation; (b) [i]n the alternative, [his] claim for financial loss for the destruction of and damage to his property be submitted to binding arbitration under UNCITRAL Rules'.[12]

[7] Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636-Conf (public redacted version notified on the same day, ICC-01/05-01/08-3636-Red).
[8] Counsel for Mr Bemba, Mr. Bemba's request for a variation of the time and page limits in relation to a claim under Article 85 of the Statute, 22 October 2018, ICC-01/05-01/08-3661-Conf-Exp (later reclassified as confidential following Pre-Trial Chamber II's instructions dated 17 November 2018; ICC-01/05-01/08-3661-Conf).
[9] Presidency, Decision referring a request arising under article 85 to Pre-Trial Chamber II, 30 October 2018, ICC-01/05-01/08-3662-Conf-Exp.
[10] Pre-Trial Chamber II, Decision on "Mr. Bemba's request for a variation of the time and page limits in relation to a claim under Article 85 of the Statute", 13 November 2018, ICC-01/05-01/08-3664.
[11] Claim, para. 169(1).
[12] Claim, para. 169(2).

8. On 14 March 2019, by its 'Order on the conduct of the proceedings related to 'Mr Bemba's claim for compensation and damages'',[13] the Chamber *inter alia* (i) convened an oral hearing to be held on 9 May 2019; (ii) ordered the Registry to submit observations on the Claim; and (iii) partially granted the Prosecutor's request for a time and page limit extension dated 12 March 2019.[14]

9. On 22 March 2019, the 'Registry's Request for Guidance Regarding Some Procedural Aspects' was filed.[15] Noting that Counsel for Mr Bemba had included 'the competent authorities' of three States (the Kingdom of Belgium, the Portuguese Republic and the Democratic Republic of the Congo: respectively, 'Belgium', 'Portugal' and 'the DRC'; collectively, the 'Three States') among those to be notified of the Claim, the Registry (i) recalled that, pursuant to regulation 31(1) of the Regulations, only 'participants in the relevant proceedings' could be notified of documents; (ii) indicated that, if the Claim were to be notified to the States indicated by Mr Bemba, translations into French and Portuguese of relevant documents (in an amount of approximately 600 pages) would be necessary and (iii), accordingly, sought the Chamber's guidance as to whether the Claim should be notified to the Three States (either in its confidential or redacted form) as 'participants in the relevant proceedings' within the meaning and for the purposes of regulation 31 of the Regulations. On 11 April 2019, the Chamber clarified that (i) none of the Three States was to be regarded as a participant in the proceedings related to the Claim; and, (ii) accordingly, the Registry was not subject to the obligation of notification of either the Claim or any of the relevant documents pertaining thereto.[16]

10. On 6 May 2019, the Prosecutor responded to the Claim, submitting that it should be dismissed since it fell 'manifestly short of the article 85 legal standard' (the 'Prosecutor's Response').[17]

11. On the same day, the Registry filed its 'Observations on the Defence Compensation Claim' (the 'Registry's Observations').[18] As regards Mr Bemba's assets which had been

[13] 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.
[14] Prosecutor, Prosecution's request to extend the page limit and for sufficient time to file its response to Bemba's request for compensation and damages, 12 March 2019, ICC-01/05-01/08-3674.
[15] Registry, Registry's Request for Guidance Regarding Some Procedural Aspects, 22 March 2019, ICC-01/05-01/08-3676-Conf.
[16] Pre-Trial Chamber II, Decision on the 'Registry's Request for Guidance Regarding Some Procedural Aspects', 11 April 2019, ICC-01/05-01/08-3677-Conf.
[17] Prosecutor, Prosecution's response to Mr Bemba's claim for compensation and damages, 6 May 2019, ICC-01/05-01/08-3680-Conf-Exp, with confidential, *ex parte*, available only to the Prosecution and the Registry, Annex A (public (ICC-01/05-01/08-3680-Red) and confidential (ICC-01/05-01/08-3680-Conf-Red2) redacted versions, with public Annex A, notified on the same day).

frozen and/or seized pursuant to orders issued in the Main Case, the Registry stressed that, while some cooperation may occur and be provided by the Court, the responsibility for the management of assets rested with the States and that, accordingly, its activities had been limited to 'perform[ing] its statutory role in transmitting to states requests for cooperation issued by relevant Chambers', as well as to 'discharg[ing] its obligation to follow-up with states on their execution' and provided ample information as to the various steps undertaken in connection with Mr Bemba's assets.[19] Furthermore, the Registry 'oppose[d] the Claim as ill-founded in law and in fact'.[20]

12. On 8 May 2019, Mr Bemba requested leave to file a reply to the Prosecutor and the Registry's submissions.[21]

13. At the 9 May 2019 public hearing, the parties supplemented their written arguments, including by raising and addressing additional factual and legal points.[22]

14. On 3 June 2019, pursuant to the Chamber's decision dated 13 May 2019,[23] 'Mr Bemba's Reply to the Prosecution Response to and Registry Submissions on "Mr. Bemba's claim for compensation and damages"' ('Mr Bemba's Reply') was filed.[24]

15. On 26 June 2019, also pursuant to the Chamber's decision dated 13 May 2019,[25] the Prosecutor[26] and the Registry[27] submitted their responses to Mr Bemba's Reply (respectively, the 'Prosecutor's Response to Mr Bemba's Reply' and the 'Registry's Response').

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[18] Registry, Registry's Observations on the Defence Compensation Claim, 6 May 2019, ICC-01/05-01/08-3681-US-Exp, with corrected versions of 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 Counsel for Mr Bemba (under seal *ex parte* (ICC-01/05-01/08-3681-US-Exp-Red), confidential *ex parte* (ICC-01/05-01/08-3681-Conf-Exp-Red2) and public (ICC-01/05-01/08-3681-Red3) redacted versions notified on the same day).
[19] Registry's Observations, para. 1.
[20] Registry's Observations, para. 39.
[21] Counsel for Mr Bemba, Mr. Bemba's Request for Leave to Reply to Prosecution's response and Registry's Observations to Mr. Bemba's claim for compensation and damages (ICC-01/05-01/08-3680-Red and ICC-01/05-01/08-3681-Red3), 8 May 2019, ICC-01/05-01/08-3682.
[22] Transcript of hearing, 9 May 2019, ICC-01/05-01/08-T-376-ENG.
[23] Pre-Trial Chamber II, Decision on Mr. Bemba's Request for Leave to Reply to Prosecution's Response and Registry's Observations to Mr. Bemba's Claim for Compensation and Damages, 13 May 2019, ICC-01/05-01/08-3684.
[24] Counsel for Mr Bemba, Mr. Bemba's reply to the Prosecution Response to and Registry Submissions on "Mr. Bemba's claim for compensation and damages", 3 June 2019, ICC-01/05-01/08-3687-Conf, with confidential Annexes A, B and C.
[25] Pre-Trial Chamber II, Decision on Mr. Bemba's Request for Leave to Reply to Prosecution's Response and Registry's Observations to Mr. Bemba's Claim for Compensation and Damages, 13 May 2019, ICC-01/05-01/08-3684.
[26] Prosecutor, Prosecution's response to Mr Bemba's reply on compensation and damages, 26 June 2019, ICC-01/05-01/08-3690-Conf, with public Annex A (first public redacted version notified on 28 June 2019, later

II. GENERAL REMARKS

16. The Chamber regrets the choice made by Counsel for Mr Bemba to at times resort, both in addressing the Chamber and in referring to other parties and the Court as a whole, to language and tone in some instances of such a nature as to make it questionable whether they can be considered consistent with the professional duties incumbent on all those who are parties to or otherwise involved in the proceedings. Expressions such as 'hugely flawed', 'amateur', 'negligent' or 'woeful mismanagement';[28] reference to the 'industrial falsification' of victims' applications,[29] or the accusation that the Trial Chamber would have 'act[ed] with impunity'[30] and that the trial would have been 'a farce'[31] – to name but a few[32] – can hardly be considered as consistent with counsel's professional duty to be at all times 'respectful and courteous' *vis-à-vis* not only the Chamber, but also 'any other person involved in the proceedings', as provided in article 7(1) of the Code of Professional Conduct for counsel (the 'Code').[33] Whilst the Chamber refrains from further proceeding in the matter at this stage, it reminds Counsel that it expects all parties, including Counsel for Mr Bemba, to strictly adhere to the Code and to fully honour their obligations.

17. The Chamber notes that the Claim is two-pronged and consists of two discrete, alternative requests: first, a request for compensation on the basis of and pursuant to article 85

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reclassified as confidential following Pre-Trial Chamber II's instructions dated 3 July 2019 (ICC-01/05-01/08-3690-Conf-Red); second public redacted version notified on 21 November 2019 (ICC-01/05-01/08-3690-Red2)).

[27] Registry, Registry's Observations on Mr Jean-Pierre Bemba Gombo's Lawyers' Reply ICC-01/05-01/08-3687-Conf, 26 June 2019, ICC-01/05-01/08-3689-US-Exp, with an under seal *ex parte* Annex (under seal *ex parte* version, only available to the Prosecutor and the Registry, and confidential *ex parte* version, only available to Counsel for Mr Bemba and the Registry, notified on the same day (ICC-01/05-01/08-3689-US-Exp-Red; ICC-01/05-01/08-3689-Conf-Exp-Red2); public redacted version notified 25 July 2019 (ICC-01/05-01/08-3689-Red3)).

[28] Claim, para. 21.

[29] Claim, Part I.B.4.

[30] Claim, para. 31.

[31] Claim, para. 75.

[32] *See also* Claim, paras 30 ('[t]his 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'), 33 ('[o]f course, this explanation is untenable. A professional judge in receipt of internal VWU reports would have returned them without reading them and informed the parties of their mistaken transmission. Her Honour Judge Steiner took these materials, cross-examined Defence witnesses on them, dismissed Defence objections and then (and only following a filing by the Defence) blamed her questioning on VWU. More alarmingly, this attempted justification was untrue'), 41 ('[a] professional trial Judge in receipt of this request would have immediately directed it to a Pre-Trial Chamber, informed the Defence of the error, and sought the parties' submissions on whether a fair trial was still possible. Trial Chamber III apparently did not realise its error for five months'); Transcript of hearing, 9 May 2019, ICC-01/05-01/08-T-376-ENG, p. 9, lines 5-9 ('[h]e could have gone before Judge Steiner and said: "Can you please give me back the cut up pieces of my aeroplanes?"'), p. 12, lines 17-19 ('[l]et aside for a minute the fantastic possibility that Judge Steiner would ever have lifted a freezing order […]'); Mr Bemba's Reply, para. 47 ('[…] what occurred was a scandal of mismanagement').

[33] Code of Professional Conduct for counsel, *annexed to* ICC-ASP/4/Res.1, 2 December 2005, article 7(1): 'Counsel shall be respectful and courteous in his or her relations with the Chamber, the Prosecutor and the members of the Office of the Prosecutor, the Registrar and the members of the Registry, the client, opposing counsel, accused persons, victims, witnesses and any other person involved in the proceedings'.

of the Statute, centred on the allegation that a grave and manifest miscarriage of justice to the detriment of Mr Bemba occurred in the Main Case (the 'First Component of the Claim'); second, a request to be awarded compensation as a remedy to the damage allegedly suffered by Mr Bemba's property and assets frozen and seized as a result of the Court's orders and as a result of the Court's failure in properly managing and preserving them (the 'Second Component of the Claim'). That the two components of the Claim are intended to be alternative requests is clarified by Mr Bemba's statement to the effect that a determination 'on whether or not the case meets the qualifying criteria of Article 85 of the Statute […] is not a prerequisite […] to a determination that [he] is entitled to compensation for the loss arising from the seizure of his property';[34] in Mr Bemba's submission, the Court's liability in respect of the facts and circumstances underlying the Second Component of the Claim would arise 'irrespective of any consideration of a miscarriage of justice'.[35] Accordingly, the Chamber will address the First and Second Components of the Claim separately.

III. THE FIRST COMPONENT OF THE CLAIM

18. Article 85 of the Statute provides that:

> 1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
>
> 2. 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.
>
> 3. 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 the proceedings for that reason.

19. At the outset, the Chamber notes that, whilst recurringly making reference to the occurrence of a 'grave and manifest miscarriage of justice', which would squarely place the First Component of the Claim within the scope of article 85(3) of the Statute, Mr Bemba also occasionally refers to article 85(2), in particular when elaborating on the criteria presiding over the measurement of his loss. More specifically, he states that '[c]ompensation under Article 85(2) is apparently "according to law", whereas under Article 85(3), it is according to the "criteria provided in the Rules"'; however, he also submits that 'these tests are broadly similar' and that the 'heads of damage for which the claimant is entitled to compensation […]

[34] Claim, paras 4-5.
[35] Claim, para. 6.

follow whether a claim succeeds under Article 85(2) or (3)'.[36] The Prosecutor seems to consider this as a flaw in the Claim which renders 'Mr Bemba's submissions […] legally incorrect': 'although Mr Bemba refers in passing to article 85(2) (compensation for wrongful conviction), 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'.[37]

20. The Chamber recalls that, whilst reference to article 85(2) of the Statute does not indeed seem pertinent or otherwise relevant in the context of the Claim, Mr Bemba has since had the opportunity to explain that reference to article 85(2) of the Statute 'was never intended to suggest that Mr. Bemba's claim was admissible under that provision, but rather to illustrate that there was a semantic difference in the guidance as to how to assess compensation between the two sub-articles, whereas the loss and damage in reality is precisely similar (i.e. that the claimant has been wrongly convicted and, presumably, imprisoned)',[38] which made it unnecessary for him to further address the provision. Thus, the Chamber will exclusively entertain the First Component of the Claim as a request for compensation under article 85(3) of the Statute, based on the allegation that a grave and manifest miscarriage of justice worthy of compensation occurred to the detriment of Mr Bemba in the Main Case.

21. As a preliminary remark, the Chamber notes that rule 173(2) of the Rules states that '[t]he request for compensation shall be submitted not later than six months from the date the person making the request was notified of the decision of the Court concerning: […] (c) The existence of a grave and manifest miscarriage of justice under article 85, paragraph 3'. As stated by Trial Chamber II in the case of *The Prosecutor v. Mathieu Ngudjolo Chui*,[39] however, a prior decision issued by another Chamber, to the effect that a grave and manifest miscarriage of justice took place, is not a prerequisite to entertaining a request for compensation under article 85(3) of the Statute. Determining that a grave and manifest miscarriage of justice within the meaning and for the purposes of article 85(3) of the Statute occurred must be regarded as a preliminary step *vis-à-vis* the power to exercise discretion as to whether compensation should be awarded; as such, it should be considered as falling within the scope of the powers of the Chamber designated to address and determine the claim for compensation.

[36] Claim, paras 84-85.
[37] Prosecutor's Response, para. 2 (second point).
[38] Mr Bemba's Reply, para. 12.
[39] Trial Chamber II, *The Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the "*Requête en indemnisation en application des dispositions de l'article 85(1) et (3) du Statut de Rome*", 16 December 2015, ICC-01/04-02/12-301-tENG (the '*Ngudjolo* Decision'), para. 16.

22. Also similarly to Trial Chamber II in the *Ngudjolo* Decision,[40] the Chamber will follow a two-fold approach: (i) first, it shall determine whether a grave and manifest miscarriage of justice occurred; (ii) second, and only in the event that the first question is answered in the affirmative, it shall determine whether compensation under article 85(3) of the Statute should be awarded and, in the affirmative, in what amount.

Mr Bemba's submissions in respect of the First Component of the Claim

23. The Chamber has already expressed above its dismay at the language used by Mr Bemba throughout the submissions. This is particularly apparent in the context of the submissions supporting the First Component of the Claim, some of which the Chamber regrets having to quote *verbatim* in this decision. Mr Bemba submits that a miscarriage of justice took place because his 'trial was a parody of justice'[41] and aims, throughout the Claim, at 'paint[ing] an overall picture of the gap between a fair trial, and what in fact happened'.[42] In Mr Bemba's view, '[t]he Prosecution's disregard for its investigations; the Chamber's negligent mismanagement of the trial; the hugely flawed Trial Judgment; the Prosecutor's public disavowal of the acquittal and deliberate campaign to undermine it […] can lead to no other conclusion other than that the trial was a miscarriage of justice',[43] which '[b]y definition […] is grave and manifest'; in his view, '[t]o suggest otherwise is to accept that there can be a "trivial" or "unclear" miscarriage of justice, which flies in the face of its ordinary meaning, being a "failure of a court or judicial system to attain the end of justice, especially one which results in the conviction of an innocent person"'.[44] More specifically, in support of the First Component of the Claim, Mr Bemba presents a list of grievances, which he divides into six main arguments:

(i) *The Prosecutor's alleged violation of the duty to act impartially following the decision on the confirmation of the charges*

Mr Bemba recalls that he was arrested 'on the basis that he was responsible as an indirect co-perpetrator under Article 25(3)(a)': however, when '[t]he Pre-Trial Chamber declined to confirm the charges under Article 25(3)(a), and suggested prosecution under Article 28', the Prosecutor 'jettisoned its original investigation and brought a case it knew to be untrue'; instead of dropping the case, 'the evidence

[40] *Ngudjolo* Decision, para. 16.
[41] Claim, Part I.B.
[42] Claim, para. 21.
[43] Claim, para. 21.
[44] Claim, para. 12.

gathered up to that point was simply jettisoned as inconvenient to the charges pursued' because it did not align 'with the Prosecutor's novel theory of command'; by abandoning 'an entire investigation and a wealth of corroborated evidence in favour of a directly contradictory case', the Prosecutor would have violated the 'duty to act as impartial minister of justice, and set the scene for the miscarriage of justice which was the *Bemba* trial'.[45]

(ii) *The Trial Chamber's alleged 'negligent mismanagement' of the case*

Mr Bemba enumerates a number of instances in which he claims that the Trial Chamber mishandled the judicial process. In particular, he alleges that:

(a) the Judges 'cross-examined Defence witnesses on the basis of material unknown to the Defence', which would move the trial 'outside any recognisable system of criminal justice';

(b) 'the *Bemba* case was a procedural void' because it was '[c]onducted routinely in closed session', affected by 'a litany of incomprehensible and inconsistent procedural decisions' and 'hermetically sealed from Appeals Chamber review by the Trial Chamber's denial of all requests for certification';

(c) Several 'false statements littered the Bemba case record';

(d) 'Defence and Prosecution witnesses were treated differently', for instance because the 'ambit of cross-examination about the benefits of testifying was imbalanced and unjust', which would show that '[d]ouble standards were rampant, and always to the detriment of the accused'; and

(e) the Trial Chamber erroneously entertained '*ex parte* allegations concerning the credibility of Defence witnesses and the Defence itself, in breach of the statutory regime of the Court', thus damaging 'the fairness of proceedings by prejudicing the Trial Chamber against the Defence and its evidence': in his submission, '[n]o trial could be considered fair […] when *ex parte* submissions on witness credibility which should never have been entertained by the trier of fact were allowed to linger in secret throughout the duration of the Defence

[45] Claim, paras 22-27.

case' and 'when the Defence was never given an opportunity to address the Trial Chamber on their validity'.[46]

(iii) *The alleged excessive scope of the Legal Representatives of Victims' (the 'LRVs') involvement*

Mr Bemba submits that an imbalance in the proceedings arose from the LRVs being allowed to question witnesses in the same manner as the Prosecution: in his view, 'the LRVs asked any question they wanted, of any witness, without limitation'. For instance, the Trial Chamber authorised the LRVs to ask '"follow-up" questions to every Defence witness, without ever having specified the nature and the details of the questions, or the way in which personal interests of the victims were affected'; the LRVs also 'asked wildly leading questions' with a design to attack Defence witnesses' credibility and undermine the Defence case; '[t]he LRVs could also ask questions on any topic', which 'meant that Defence witnesses were cross-examined three times'. According to Mr Bemba, '[i]n making virtually no distinction between the Prosecution and LRVs participation in the trial proceedings, the Trial Chamber stretched the bounds of victims' participation beyond anything that those who championed their inclusion in the trial process could possibly have imagined' and made the LRVs 'a party to three-way adversarial proceedings'.[47]

(iv) *The alleged 'industrial falsification' of victims' applications*

Mr Bemba asserts that 'victim applications in the *Bemba* case had been falsified on an industrial scale', which was 'used to undermine the Defence case'. In his submission, 'forms were mass-produced, by intermediaries, at least some of whom were actively encouraging applicants to fabricate claims'.[48]

(v) *The alleged 'sub-standard and unacceptable quality' of the Trial Judgment*

Mr Bemba submits that '[t]he very fabric of the Judgment, namely the connection between its factual findings and the evidence, was negligently woven'. Referring to the Majority's opinions annexed to the Appeal Judgment, Mr Bemba asserts that 'they pointed to concrete example after concrete example of findings which had no

[46] Claim, paras 28-53.
[47] Claim, paras 54-63.
[48] Claim, paras 64-68.

evidentiary basis, and [led] three Judges to consider that the Trial Chamber had failed to give Mr. Bemba the benefit of the doubt'. In Mr Bemba's view, '[t]he volume of errors gives rise to the irresistible inference that the Trial Chamber, rather than building a factual narrative on the basis of the evidentiary record, was determined to convict at the cost of respect for presumption of innocence, and without regard for the standard of "beyond a reasonable doubt"'.[49]

(vi) *The alleged excessive duration of the proceedings in the Main Case*

Mr Bemba submits that '[a] decade, to conclude a single accused case, with one form of liability, and events spanning a five-month period, is not reasonable' and that, as a consequence, his 'right to an expeditious trial was violated'.[50]

Prosecutor's submissions

24. In the view of the Prosecutor, 'Mr Bemba's Request does not meet the high threshold under article 85 of the Statute and should be dismissed' and 'Mr Bemba's catalogue of complaints – alleging a grave and manifest miscarriage of justice – is unfounded'.[51]As regards the grievances against the OTP, the Prosecutor submits that not only did the Office act and investigate properly, but that, '[a]bsent a concrete showing of inappropriate conduct, the procedure in article 85 "is not appropriate for conducting a review of the Prosecution's investigations[…]"'.[52] As to the grievances *vis-à-vis* the Trial Chamber and the alleged flaws affecting the victims' involvement in the proceedings, the Prosecutor submits that 'Mr Bemba's submissions largely re-litigate his submissions from earlier proceedings';[53] as to the allegations of 'falsification' of statements and victim participation forms, the Prosecutor notes that they remain unsubstantiated.[54]

Determination by the Chamber

25. The Chamber notes that most of the grievances raised by Mr Bemba can be traced back to issues raised and deliberations taken at various stages of the proceedings in the Main Case. The Chamber recalls that compensation proceedings do not constitute an opportunity to reopen the debate on matters that have already been submitted and/or addressed by previous Chambers in the case. As stated by Trial Chamber II in the *Ngudjolo* Decision, '[t]he wording

[49] Claim, paras 69-75.
[50] Claim, paras 76-78.
[51] Prosecutor's Response, paras 1, 23.
[52] Prosecutor's Response, para. 27 *citing Ngudjolo* Decision, para. 30.
[53] Prosecutor's Response, para. 44.
[54] Prosecutor's Response, paras 68-74.

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'.[55]

26. Mr Bemba submits that the features of the Appeal Judgment (including the length of the deliberations and the errors exposed by the Appeals' Majority Judges in their respective separate opinions)[56] are sufficient as to *per se* prove the existence of a grave and manifest miscarriage of justice and asserts that '[…] an acquittal on appeal does not prevent a finding that there has been a miscarriage of justice. The reversal of the conviction does no more than prevent the miscarriage of justice from continuing further'.[57]

27. The Chamber notes that Mr Bemba was able to raise and litigate as many as six grounds of appeal during the appellate proceedings in the Main Case.[58] The fact that 'the Appeals Chamber dealt only with two discrete aspects of his appeal' and that, as a consequence, some of the issues raised as grounds of appeal '[have] never been the subject of scrutiny other than by the Judges who committed them',[59] is simply representative of the manner in which appeals proceedings function: since the Appeals Chamber was 'of the view that the second ground of appeal and part of the third ground of appeal [were] determinative of the outcome of the appeal', it did not need to address the first, fourth, fifth and sixth grounds of appeal;[60] similarly, the fact that some of the arguments included in those grounds (most notably, those pertaining to grounds which it considered not determinative of the outcome of the appeal) were not directly addressed by the Appeals Chamber is inherent in the nature, structure and function of proceedings before that Chamber and cannot *per se* substantiate an allegation of miscarriage of justice. More broadly, the Chamber finds that features inherent to the ordinary functioning of judicial proceedings cannot be considered as amounting *per se* to a miscarriage of justice.

28. The Chamber is aware that Mr Bemba's acquittal was based on a standard of review which, far from being uncontroversial, split the Appeals Chamber, triggered the dissent of two

[55] *Ngudjolo* Decision, para. 47. *See also* para. 53.
[56] Separate Opinion of Judge Van den Wyngaert and Judge Morrison (ICC-01/05-01/08-3636-Anx2) *and* Concurring Separate Opinion of Judge Eboe-Osuji (ICC-01/05-01/08-3636-Anx3), *annexed to the* Appeal Judgment. *See* Claim, para. 71.
[57] Transcript of hearing, 9 May 2019, ICC-01/05-01/08-T-376-ENG, p. 5, lines 7-9.
[58] Defence for Mr Bemba, Appellant's document in support of the appeal, 28 September 2016, ICC-01/05-01/08-3434-Conf (public redacted version notified on the same day, ICC-01/05-01/08-3434-Red) (the 'Appeal Brief'); Appeal Judgment, para. 29.
[59] Claim, paras 79-80.
[60] Appeal Judgment, para. 32.

Judges and led to questioning its consistency with the statutory framework, where decisions taken by the Appeals Chamber are not subject to an additional layer of review. In their dissenting opinion, Judges Hofmánski and Monageng (the 'Minority Judges') 'disagree[d] with the standard of appellate review which the Majority adopt[ed] with respect to factual findings': in their view, it amounted to a modification 'to the standard of appellate review for alleged errors of fact' that is 'unwarranted and contrary to the corrective model of appellate review and, in some aspects, potentially inconsistent with the Statute'.[61] In particular, the Minority Judges emphasised that (i) since '[t]he Majority appears to have considered that, given its modification of the standard of review, it was not required to review the evidentiary record comprehensively and should simply overturn the factual findings of the Trial Chamber in case of doubt', the Appeals Chamber conducted a '*de novo* trial' because '[i]f the Appeals Chamber were to assess all evidence *de novo*, according no deference to the first-instance findings, the appellate proceedings would necessarily turn into a second trial', a result 'incompatible with the aims of achieving justice';[62] and, (ii) by 'stating that it suffices for the appellant "to identify sources of doubt about the accuracy of the trial chamber's findings"', 'the Majority appears to have modified the requirement of substantiation of arguments on appeal' and accept that an appellant 'would be able to disagree with just about any finding of the trial chamber and formulate countless alternative conclusions, in order to obstruct the proceedings'.[63] By the same token, the Chamber notes that the Appeal Judgement, while identifying and remedying errors committed at the trial stage, never referred, whether implicitly or explicitly, to the existence of a miscarriage of justice, even less to a grave and manifest one, or to circumstances of such gravity as to make it plausible or necessary to consider that such miscarriage might indeed have occurred. Rather, both the Majority and the Minority Appeals Judges, although holding diverging views as to the abovementioned standard of appellate review, seemed to agree that the core responsibility of the Appeals Chamber and the ultimate goal of its review consist of preventing a miscarriage of justice;[64] to

[61] Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmánski (ICC-01/05-01/08-3636-Anx1; public redacted version notified on the same day, ICC-01/05-01/08-3636-Anx1-Red) *annexed to the* Appeal Judgment, paras 1, 4.
[62] Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmánski (ICC-01/05-01/08-3636-Anx1; public redacted version notified on the same day, ICC-01/05-01/08-3636-Anx1-Red) *annexed to the* Appeal Judgment, paras 7, 14, 47.
[63] Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmánski (ICC-01/05-01/08-3636-Anx1; public redacted version notified on the same day, ICC-01/05-01/08-3636-Anx1-Red) *annexed to the* Appeal Judgment, paras 16, 17.
[64] *See* Appeal Judgment, para. 40: '[t]he Appeals Chamber is of the opinion that it may interfere with the factual findings of the first-instance chamber whenever the failure to interfere may occasion a miscarriage of justice'; Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmanski (ICC-01/05-01/08-3636-Anx1; public redacted version notified on the same day, ICC-01/05-01/08-3636-Anx1-Red) *annexed to the* Appeal Judgment, para. 6: '[i]n our view, the standard of review applied so far (we will refer to it as "the

the extent that this review was meaningfully carried out and resulted in the acquittal, this prevented any miscarriage of justice.

29. Accordingly, whenever Mr Bemba merely engaged in a 'repetition of arguments which have already been brought before the Chambers and settled by them',[65] the Chamber will neither reiterate the reasoning of previous Chambers nor address such arguments anew.

30. More specifically:

(i) As to Mr Bemba's allegations regarding the Prosecutor's conduct,[66] the Chamber notes that it first surfaced before the Trial Chamber in the Main Case[67] and was included in Mr Bemba's third ground of appeal.[68]

(ii) As to Mr Bemba's submissions to the effect that 'the Presiding Judge cross-examined Defence witnesses on the basis of material unknown to the Defence',[69] the Chamber notes that these submissions were both addressed at the trial stage[70] and mentioned before the Appeals Chamber;[71] although they were not presented as one of the grounds of appeal.

(iii) As to Mr Bemba's allegations relating to the existence of false statements in the Main Case record,[72] they were raised in the context of the appeal against the Trial Chamber's decision on sentencing and considered to be moot in light of the fact that, as a result of the acquittal, no sentence was to be imposed on Mr Bemba.[73]

(iv) As to Mr Bemba's allegation of the Trial Chamber's adoption of double standards *vis-à-vis* respectively Defence and Prosecution witnesses, as well as on errors in entertaining '*ex parte* allegations concerning the credibility of Defence

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conventional standard") ensures that miscarriages of justice resulting from factual errors made by a trial chamber are avoided'.

[65] *Ngudjolo* Decision, para. 48.

[66] Claim, paras 22-27.

[67] Trial Judgment, paras 35-37.

[68] Appeal Brief, paras 224-225.

[69] Claim, paras 28-33.

[70] Transcript of hearing, 23 October 2012, ICC-01/05-01/08-T-260-Red3-ENG, p. 34, line 24 to p. 36, line 2.

[71] Defence for Mr Bemba, Appellant's submissions further to the appeal hearing, 19 January 2018, ICC-01/05-01/08-3596-Conf (public redacted version notified on the same day, ICC-01/05-01/08-3596-Red), paras 2-8.

[72] Claim, paras 34-35.

[73] Defence for Mr Bemba, Appellant's response to "Observations consolidées de la Représentante légale des victimes […] sur « The Appeals against Trial Chamber III's decision on Sentence pursuant to Article 76 of the Statute »", ICC-01/05-01/08-3490-Conf, 8 May 2017, ICC-01/05-01/08-3501-Conf (public redacted version notified on the same day, ICC-01/05-01/08-3501-Red), paras 36-40; Appeals Chamber, Decision on the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 21 June 2016 entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 June 2018, ICC-01/05-01/08-3637, para. 8.

witnesses',[74] they were raised as part of Mr Bemba's first and sixth grounds of appeal;[75] although not addressed by the Appeals Chamber,[76] they were discussed – and rejected – by the Minority Judges.[77]

(v) As to the grievances revolving around the scope of the LRVs' involvement and the alleged 'industrial falsification' of victims' applications in the Main Case,[78] they were both addressed by the Trial Chamber[79] and included in Mr Bemba's sixth ground of appeal.[80]

(vi) Finally, Mr Bemba's submissions on the 'sub-standard and unacceptable quality' of the Trial Judgment[81] were likewise heard and addressed by the Appeals Chamber and eventually remedied through the reversal of the Trial Judgment and the acquittal of Mr Bemba.[82]

31. In light of the above, to the extent that all of these grievances amount to or relate to matters already addressed during the proceedings, they do not form an appropriate basis for a claim under article 85(3) of the Statute.

32. To the extent that the grievances raised against the Prosecutor and/or the Trial Chamber have been submitted for the first time in the context of the First Component of the Claim, the Chamber clarifies that they only pertain to article 85(3) insofar as it is submitted that they qualify as constitutive of a grave and manifest miscarriage of justice within the meaning of that provision. As stated in the *Ngudjolo* Decision, 'in the absence of any indication of inappropriate conduct, the procedure set forth in article 85 of the Statute is not appropriate for conducting a review of the Prosecution's investigations';[83] other specific procedures, including under articles 41, 46 and 47 of the Statute, provide the parties with avenues allowing them to challenge either the Prosecutor or the judges and to request that disciplinary measures of varying degrees of gravity be adopted by the competent organs.

[74] Claim, paras 36-53.
[75] Appeal Brief, paras 14-15, 51-75 (Section II in general) and paras 494-520 (Section VII.A.). *See also* Defence for Mr Bemba, Appellant's submissions further to the appeal hearing, 19 January 2018, ICC-01/05-01/08-3596-Conf (public redacted version notified on the same day, ICC-01/05-01/08-3596-Red), paras 9-18.
[76] Appeal Judgment, para. 32.
[77] Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmanski (ICC-01/05-01/08-3636-Anx1; public redacted version notified on the same day, ICC-01/05-01/08-3636-Anx1-Red) *annexed to the* Appeal Judgment, paras 441-450, 614-646.
[78] Claim, paras 54-68.
[79] Trial Judgment, paras 19-28.
[80] Appeal Brief, paras 521-546.
[81] Claim, paras 69-75.
[82] Appeal Judgment, paras 120, 166-194.
[83] *Ngudjolo* Decision, para. 30.

33. The preparatory works leading to article 85(3) of the Statute make it clear that the reference to a grave and manifest miscarriage of justice was never meant to address situations falling within the scope of the dynamics inherent to the natural developments of criminal proceedings. Rather, it was meant to encompass scenarios of an exceptional nature, substantially differing from those that are typical of procedural phases of a trial and for which there are specific opportunities for review. The risk and possibility of errors, whether of fact or of law, is at the heart of the provisions setting forth the right to appeal. As such, the Appeals Chamber's finding upholding a ground for appeal cannot *per se* be equated to a miscarriage of justice, even less so to a grave and manifest miscarriage of justice within the meaning of article 85(3).

34. Article 85 was included in the Statute with a view to providing suspects and accused persons with a full range of guarantees against serious violations of their fundamental right to a fair trial, including the possibility for the Court to provide compensation in cases of serious abuse of the judicial process.[84] The provision is novel and unprecedented in international criminal law: the statutory framework of international tribunals existing at the time of the adoption of the Rome Statute (including the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda; respectively, 'ICTY' and 'ICTR') did not provide for compensation to an arrested or convicted person under any circumstances, and they still do not.[85] The only constitutive instrument of an internationalised criminal tribunal posterior to the Rome Statute expressly providing for compensation to an acquitted person was the Regulations of the Special Panels for Serious Crimes in East Timor, which are, however, no longer active.[86]

35. The drafters of the Rome Statute were obviously aware of the right to compensation as enshrined in international human rights treaties, in particular in articles 9(5) and 14(6) of the International Covenant on Civil and Political Rights (the 'ICCPR'). Article 9(5) of the ICCPR provides that '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. As clarified by the United Nations Human Rights Committee, '[p]aragraph 5 of article 9 of the Covenant provides that anyone who has been the

[84] W. A. Schabas, 'The International Criminal Court: A Commentary on the Rome Statute' (2016) ('Schabas'), pp. 1257-1258.
[85] Schabas, p. 1256; S. Zappalà, 'Compensation to an arrested or convicted person' in A. Cassese *et al.* (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (2002) ('Zappalà'), p. 1578; C. Staker and V. Nerlich, 'Article 85' in O. Triffterer and K. Ambos (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (2016) ('Triffterer/Ambos'), p. 1998; M. Klamberg, 'Commentary on the Law of the International Criminal Court' (2017) ('Klamberg'), p. 627.
[86] United Nations Transitional Administration in East Timor, Regulation 2001/25 – On the Amendment of UNTAET Regulation No. 2000/11 on the organization of courts in East Timor and UNTAET Regulation No. 2000/30 on the transitional rules of criminal procedure, 14 September 2001, UNTAET/REG/2001/25, section 52.

victim of unlawful arrest or detention shall have an enforceable right to compensation'; '[p]aragraph 5 obliges States parties to establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion'.[87] Article 14(6) of the ICCPR provides that '[w]hen 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'. The United Nations Human Rights Committee has clarified that '[a]rticle 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein'.[88]

36. It comes therefore as no surprise that proposals for including a provision granting a right to compensation, mirroring the standards set forth in the relevant provisions of the ICCPR, were put forward since the early stages of the negotiating process of the Rome Statute;[89] the first and second paragraphs of article 85 mirror *verbatim* the ICCPR's articles.[90] Only the provision enshrined in the third paragraph, allowing the Court to award compensation to a suspect or accused having been acquitted, was, and remains to this day, unique and specific to the Rome Statute as far as international criminal law and international human rights law are concerned; as stated by Trial Chamber II in the *Ngudjolo* Decision,

[87] United Nations Human Rights Committee, General Comment No. 35 – Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, paras 49-50.
[88] United Nations Human Rights Committee, General Comment No. 13 – Article 14 (Administration of Justice), 13 April 1984, para. 18.
[89] Schabas, pp. 1257-1258, 1261: 'The Working Group on Procedural Matters finalized the provision at the Rome Conference. Its report included a footnote, clearly signalling the provenance of article 85: '[t]he Working Group draws the attention of the Drafting Committee to the need to follow the wording of the relevant provisions of the International Covenant on Civil and Political Rights in all of the language versions'; '[t]he travaux préparatoires confirm the intent of the drafters to align the rights contained in article 85 with the relevant provisions of the International Covenant on Civil and Political Rights'.
[90] *See* Triffterer/Ambos, p. 2000. At the time of the negotiations of the Statute most domestic legislations contained provisions relating to compensation for scenarios corresponding to those currently described in Articles 85(1) and (2) of the Statute (*see e.g.* Belgium: *Loi relative à l'indemnité en cas de détention préventive inopérante*, article 27; *Code d'instruction criminelle*, article 447; Luxemburg: *Loi portant indemnisation en cas de détention préventive inopérante*, article 1; *Code de l'instruction criminelle*, article 447; Italy: Code of criminal procedure, articles 314(2), 643(1); Switzerland: Code of criminal procedure, articles 431(1), article 436(4)). As a consequence, proposals by States for such provisions to be included in the Statute have emerged very early and have been adopted quite easily, without significant controversies or debates (*see, inter alia*, Draft Statute for an International Criminal Court, International Law Commission, 1994, p. 50; Summary of the proceedings of the Preparatory Committee during the period 25 March – 12 April 1996, 7 May 1996, p. 111; Decisions taken by the Preparatory Committee at its session held from 1 to 12 December 1997, 18 December 1997, p. 26; Text of the Draft Statute for the International Criminal Court, 1 April 1998, p. 15 (Article 53 [29]); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June – 17 July, Official Records, Volume I, Final documents, A/CONF.183/12 (Vol. I), p. 46).

'article 85(3) of the Statute has no equivalent in any other international instrument'.[91] As such (and notwithstanding some concerning features, most notably the absence of time limits as regards the overall duration of proceedings),[92] the Statute marks a step forward as regards the scope of rights pertaining to those having been adversely affected by the operation of international criminal law and tribunals: in the words of one scholar, it is 'the most advanced text in terms of protection of the right of compensation, even compared to the provisions of the international conventions on human rights'.[93]

37. The approach taken by the drafters of the Rome Statute, and their intention to provide for a full catalogue of protection to the benefit of suspects and accused, seems to have been inspired, or at least influenced, by the approach already taken at that time by the national legislation of a number of countries. For some time now, several States, predominantly of civil law tradition, have been providing for the right of acquitted persons to request and obtain compensation for the time unjustly spent in detention during the unfolding of the judicial proceedings.[94] While the requirements for and the content of this right will vary to a significant extent within each jurisdiction, its very existence is grounded in the belief that there is an inherent unfairness when an innocent person has spent time in prison and that some form of reparation is due as a matter of fundamental justice.

38. In the context of the preparatory works of the Statute, however, this belief was always going to be controversial, and likely to trigger the opposition of those States who would not provide for a similar remedy in their own system; as noted by Trial Chamber II in the *Ngudjolo* Decision, when approaching how to construe article 85(3) of the Statute one should always bear in mind that 'the adoption of article 85(3) during the negotiations over the Statute of the Court was not without controversy'.[95] While some States, including Japan and France, advocated in favour of a full-fledged right to compensation in the event of a final acquittal, other strongly opposed it; this resulted in the submission of a number of proposals, which,

[91] *Ngudjolo* Decision, para. 40.

[92] *See* considerations developed *infra*, in Section V of this decision.

[93] Zappalà, p. 1578.

[94] *See e.g.* France: Code of criminal procedure, article 149; Japan: Constitution of Japan, article 40; Criminal Compensation Law, article 1; Belgium: *Loi du 13 mars 1973 relative à l'indemnité en cas de détention préventive inopérante*, article 28; Luxemburg: *Loi du 30 décembre 1981 portant indemnisation en cas de détention préventive inopérante*, article 2; Spain: Constitution of Spain, article 121; Organic Act of the Judicial Power, articles 292 and 294; Italy: Code of criminal procedure, article 314(1); Germany: *Gesetz über die Entschädigung für Strafverfolgungsmassnahmen* (StrEG), Section 2; Code of criminal procedure, Section 467; Switzerland: Code of criminal procedure, article 429; Norway: Code of criminal procedure, Section 444; Austria: *Bundesgesetz über den Ersatz von Schäden aufgrund einer strafgerichtlichen Anhaltung oder Verurteilung* (*Strafrechtliches Entschädigungsgesetz* - StEG), paras 1-2; Sweden: *Lag om ersättning vid frihetsberövanden och andra tvångsåtgärder*, Section 2.

[95] *Ngudjolo* Decision, para. 38.

whilst varying in specific wording, shared the ultimate objective of ensuring that compensation, if any, would only be provided on a limited and exceptional basis.[96]

39. This objective was ultimately achieved by making the very operation of the provision conditional upon a number of restrictive, cumulative requirements, namely: (i) the existence of 'exceptional circumstances'; and (ii) the finding of 'conclusive facts' indicating the occurrence of a 'grave and manifest miscarriage of justice'. The issue as to the degree of autonomy between these two requirements is a matter for debate among scholars: according to some, 'the fact of being victim of a grave and manifest miscarriage of justice should be considered *ipso facto* an 'exceptional circumstance'' and it would be reasonable 'to argue that the drafts persons used the formula 'in exceptional circumstances' more as a wish than as a limitation of the scope of the rule'.[97] For the purposes of this decision, the Chamber notes that, while accepting – as a matter of principle – that there might indeed be room for compensation to the benefit of an acquitted person having spent time in custody during the proceedings, the price for achieving consensus among the negotiating States was to adopt a formulation ensuring that any such room would remain extremely narrow.[98]

40. Additionally, the provision makes it clear that, even upon fulfilment of all relevant requirements, the award of compensation does not ensue as a right but is ultimately left to the discretion of the Court: 'the Court […] *may in its discretion* award compensation'.[99] Accordingly, a finding that a grave and manifest miscarriage of justice occurred and that

[96] *See e.g.* Proposal submitted by Canada, A/CONF.183/C.1/WGPM/L.56, 6 July 1998; Proposal submitted by Kenya, A/CONF.183/C.1/WGPM/L.55, 6 July 1998. *See also* H. Brady and M. Jennings, 'Appeal and Revision' in R. S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute* (1999), pp. 303-304: '[…] in 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 changes for fear such proceedings would result in an acquittal and consequently to a large compensation claim by the accused. These delegations wanted to restrict the situations in which an accused person may bring a claim for compensation to ones akin to "malicious prosecution" situations. These delegations pointed out that the system envisaged by the Statute contains enough "checks and balances" to ensure frivolous proceedings and charges would not be brought against an accused person, and thus argued that the Court should only award compensation when it determined the prosecution was undertaken in *malafides* or for malicious purposes. However, other delegations, whose systems allow for compensation in the event of an acquittal, wanted to retain the provision'.

[97] Zappalà, p. 1583.

[98] *See Ngudjolo* Decision, para. 38, recalling how the Working Group on Procedural Matters explained, in a footnote to the final draft of article 85(3) of the Statute, the extent of the divergences between delegations as regards this provision, underlining that this indicates that it should be applied in a restrictive manner and only where all its conditions are fulfilled: '[t]here are delegations which believe that there should not be an unfettered right to compensation where a person is acquitted or released prior to the end of the Trial. The text of paragraph 3 is intended to limit the right to compensation to cases of grave and manifest miscarriage of justice. Other delegations considered this text to be too restrictive' (Report of the Working Group on Procedural Matters, A/CONF.183/C.1/WGPM/L.2/Add.7, 13 July 1998, p. 7).

[99] *See* article 85(3) of the Statute (emphasis added).

exceptional circumstances exist would only operate as a trigger for the Court's discretionary power to compensate; an *ex gratia* payment, awarded by the Court as a concession rather than due.[100] One could note that the overall structure of article 85 of the Statute as eventually adopted seems to signal the drafters' intention to progressively weaken the nature and scope of the prerogatives vested in an individual whom the provision is aimed to benefit: article 85(1) provides for 'an *enforceable right to compensation*' to the benefit of the victim of unlawful arrest and detention; article 85(2) refers to compensation which *shall be awarded* in case of a reversal of conviction only subject to a number of procedural and substantive requirements; article 85(3) makes compensation conditional not only to a number of procedural and substantive requirements but also and ultimately upon the Court's decision to resort to its discretionary power. While the first two paragraphs are centred on the person entitled to compensation, the focus of article 85(3) shifts to the Court itself, therefore signalling that the concerned person is not entitled to a right to compensation.

41. The notion of 'grave and manifest miscarriage of justice' must therefore be construed in light of the above. In the *Ngudjolo* Decision, Trial Chamber II, recalling some of the definitions to be found in legal commentary and in the practice of international and national bodies,[101] noted that 'a grave and manifest miscarriage of justice […] is a certain and undeniable miscarriage of justice following, for example, an erroneous decision by a trial chamber or wrongful prosecution', which must have given rise to 'a clear violation of the applicant's fundamental rights' and 'caused serious harm to the applicant'; accordingly, 'not every error committed in the course of the proceedings is automatically considered a "grave and manifest miscarriage of justice"';[102] more fundamentally, 'a decision of acquittal, in and of itself, does not constitute a grave and manifest miscarriage of justice'.[103]

42. The Chamber concurs with this approach and underlines that the threshold set by article 85(3) is particularly high. It seems beyond controversy that the provision is not limited

[100] *Ngudjolo* Decision, para. 46: '[…] the Chamber notes that article 85(3) of the Statute does not provide for the right to compensation even when a grave and manifest miscarriage of justice has occurred. Rather, it provides that the Court may award compensation at its discretion'; ICTR, Trial Chamber III, *Prosecutor v. André Rwamakuba*, Decision on appropriate remedy, 31 January 2007, Case No. ICTR-98-44C-T, para. 28; ICTR, Trial Chamber III, *Prosecutor v. Protais Zigiranyirazo*, Decision on Protais Zigiranyirazo's motion for damages, 18 June 2012, Case No. ICTR-2001-01-073, para. 19. *See also* Triffterer/Ambos, p. 2000; Zappalà, p. 1583; Klamberg, p. 628; D. Dreyssé, 'Article 85 - Indemnisation des personnes arrêtées ou condamnées' in J. Fernandez and X. Pacreau (eds.) *Statut de Rome de la Cour pénale internationale : commentaire article par article* (2012) ('Fernandez/Pacreau'), p. 1787.
[101] *Ngudjolo* Decision, paras 41-44.
[102] *Ngudjolo* Decision, para. 45.
[103] *Ngudjolo* Decision, para. 15. *See also* Triffterer/Ambos, p. 2000; Fernandez/Pacreau, p. 1787; S. Beresford, 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted or Convicted by the Ad Hoc Tribunals' in *96 American Journal of International Law 628* (2002), p. 637.

to the notion of *malafides*, since this was explicitly excluded during article 85(3)'s drafting history; by the same token, it seems likewise beyond controversy that not every flaw of the proceedings, or even violation of fair trial rights, can be considered as *per se* amounting to a 'grave and manifest miscarriage of justice': for this threshold to be met, the violation must be so serious and exceptional as to indicate that, in the words of the *Ngudjolo* Chamber, 'the proper administration of justice was compromised'. As to scenarios that may be sufficiently grave so as to reach the relevant threshold, the *Ngudjolo* Trial Chamber identified, *inter alia*, the conviction of an innocent person[104] and wrong decisions on the admissibility of evidence;[105] similarly grave instances could also include demonstrated or substantiated suspicion of corruption and lack of impartiality on the part of the bench or other examples of gross negligence in the administration of justice to the detriment of the suspect or the accused. All of these are situations which should be regarded as truly exceptional; as such, they share the feature of going beyond typical errors, whether of fact or of law, suitable to be addressed and remedied during appellate proceedings.

43. None of the grievances listed by Mr Bemba in support of the First Component of the Claim qualify as exceptional scenarios of this nature. Ultimately, the Chamber notes that the only submission contained in the Claim which exceeds the scope of issues already addressed at the appeals stage consists in the submission that 'Mr Bemba's right to an expeditious trial was violated', since he 'should not have been incarcerated for 10 years before his acquittal and release'.[106]

44. Both the wording, the drafting history and international human rights law make it clear, however, that the drafters of the Statute never meant to go so far as to vest an acquitted person with a right to benefit from compensation by mere virtue of the fact that the acquittal was preceded by time spent in custody, or of the mere duration of the proceedings, however lengthy either might have been; the duration of the proceedings *per se*, as long as there is no grave and manifest miscarriage of justice, is not a factor triggering a right to compensation.

45. The Chamber is mindful that article 21(3) of the Statute mandates it to interpret and apply the relevant provisions in such a way as to make it 'consistent with internationally recognised human rights'. Accordingly, the Chamber would have to revisit its conclusion (i.e. to exclude compensation solely based on an acquittal following having spent time in detention, and in the absence of a grave and manifest miscarriage of justice) only in the event

[104] *Ngudjolo* Decision, para. 41.
[105] *Ngudjolo* Decision, para. 43.
[106] Claim, paras 77-78.

that a different outcome would be required on the basis of either 'applicable treaties and […] principles and rules of international law', or (ii) 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime' – two additional layers of provisions which article 21 of the Statute allows the Court to apply to ensure that consistency.

46. As regards treaties, principles and rules of international law, the Chamber recalls that (i) articles 9(5) and 14(6) of the ICCPR limit the right to compensation to the same scenarios as those envisaged in articles 85(1) and (2) of the Statute and that (ii) a right to be compensated following an acquittal is neither contemplated in the text, nor explicitly recognised as existing in the context of the General Comments or the case law of the United Nations Human Rights Committee. Consistently with its view to the effect that 'the fact that a criminal defendant was ultimately acquitted, at first instance or on appeal, does not in and of itself render any preceding detention "unlawful"',[107] claims for compensation for time spent in detention prior to the acquittal are systematically dismissed by the Committee as inadmissible *ratione materiae*, whether lodged under article 9(5) or article 14(6) of the ICCPR.[108]

47. The same approach prevails at the regional level: articles 5(5) of the European Convention on Human Rights (the 'ECHR') and 3 of Protocol 7 to the ECHR also limit the right to compensation to the same scenarios as enshrined in articles 85(1) and (2) of the Statute.[109] It is interesting to note that, when directly addressing the issue as to whether compensation should be awarded beyond those scenarios, namely in the perspective of the principle of presumption of innocence,[110] the European Court of Human Rights (the 'ECtHR') answered in the negative.[111] The American Convention on Human Rights (the 'ACHR') only

[107] United Nations Human Rights Committee, General Comment No. 35 – Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para. 51.
[108] *See e.g.* United Nations Human Rights Committee, Communication No. 963/2001, *Colin Übergang v. Australia*, CCPR/C/71/D/963/2001, 22 March 2001, paras 4.2-4.4; Communication No. 432/1990, *W.B.E. v. Netherlands*, CCPR/C/46/D/432/1990, 23 October 1992, para. 6.5; Communication No. 1367/2005, *Tim Anderson v. Australia*, CCPR/C/88/D/1367/2005, 31 October 2006, paras 7.4-7.5.
[109] Article 5(5) of the ECHR states that '[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation'; article 3, Protocol 7 to the ECHR reads that '[w]hen 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 the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him'.
[110] Article 6(2) of the ECHR states that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.
[111] ECtHR, Grand Chamber, *Allen v. The United Kingdom*, Judgment, 12 July 2013, paras 82-83.

provides for compensation in case a person is 'sentenced by a final judgment through a miscarriage of justice':[112] however, the Inter-American Commission on Human Rights has not so far had to address the issue of compensation to an acquitted person in the absence of a miscarriage of justice.[113] Finally, the African Charter on Human and Peoples' Rights (the 'ACHPR') is silent on the right to compensation for wrongful conviction or for miscarriages of justice. Principles M(1)(h) and N(10)(c) of the 'Principles and Guidelines to a Fair Trial and Legal Assistance in Africa', adopted by the African Commission on Human and Peoples' Rights, respectively mirror articles 85(1) and (2) of the Rome Statute:[114] as of today, neither the African Court nor the African Commission on Human and Peoples' Rights have been called upon to apply either of these principles. Similarly, article 16(3) of the Arab Charter on Human Rights, which limits the right to compensation to unlawful arrest or detention,[115] has never been implemented nor subjected to legal analysis. Thus, the Chamber finds that a right to compensation for an acquitted person has not yet emerged as a general principle of international human rights law, be it either in treaty, international customary law or in the jurisprudence of regional and international human rights bodies.

48. The practice of the international *ad hoc* criminal tribunals confirms this assertion: claims for compensation have been brought before both the ICTY and the ICTR, despite the fact that neither the Statute, nor the Rules of Procedure and Evidence of either tribunal address the issue of compensation as a remedy to the benefit of accused persons.

49. The ICTY has systematically dismissed claims for financial compensation to acquitted persons in light of the absence of a statutory basis to do so. In the context of the *Kupreškić et al.* case,[116] the ICTY ninth annual report to the General Assembly and the Security Council indicated that, upon receiving (by way of correspondence) a request for compensation from the acquitted *Kupreškić* brothers, the President of the Tribunal had 'recalled that neither the

[112] Article 10 of the ACHR affirms that '[e]very person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice'.
[113] *See e.g.* Inter-American Commission on Human Rights, *Macias Gomes v. Nicaragua*, 16 April 1986, p. 14; *Arguelles et al. v. Argentina*, 9 October 2002, para. 59; *Yamileth Rojas Piedra v. Costa Rica*, 13 October 2004, paras 63-64; *Tomás Eduardo Cirio v. Uruguay*, 27 October 2006, paras 122-124, 133.
[114] Principle M(1)(h) states that 'States shall ensure, including by the enactment of legal provisions and adoption of procedures, that anyone who has been the victim of unlawful arrest or detention is enabled to claim compensation'; Principle N(10)(c) affirms that '[w]hen a person has by a final decision been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she 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'.
[115] Article 16(3) of the Arab Charter on Human Rights states that '[a]nyone who is the victim of unlawful arrest or detention shall be entitled to compensation'.
[116] ICTY, *Prosecutor v. Kupreškić et al.*, Request by Zoran Kupreškić, Case No. IT-96-16-T, 21 December 2001; *Prosecutor v. Kupreškić et al.*, Request for Compensation for Mirjan Kupreškić, Case No. IT-96-16-T, 7 February 2002.

Statute nor the Rules of Procedure and Evidence of the Tribunal granted the right to compensation to persons wrongly prosecuted and convicted and that, without any specific provision in the Tribunal's founding texts, it was not possible for the judges of the Tribunal to rule on the matter'.[117]

50. A different approach emerged at the ICTR, where claims for compensation and damages were adjudicated by Chambers on the basis of a unique 'praetorian' system, notwithstanding the absence of a statutory provision on the matter. This system, first shaped in the *Rwamakuba* case, was based on the fundamental principle that, in the event of a violation of the accused's fair trial rights and of an ensuing prejudice to his detriment, compensation would be warranted; (i) '[i]f the [person] is found not guilty, he shall receive financial compensation'; (ii) '[i]f the [person] is found guilty, his sentence shall be reduced to take account of the violation of his rights'.[118] The ICTR Trial Chamber III did not go so far as to state the existence of a general principle of international (human rights) law granting a right of compensation to an acquitted person; however, it still considered it possible and necessary to identify the legal basis for compensation within the broad context of international human rights law. It noted that the 'right to an effective remedy for violations of human rights […] undoubtedly forms part of customary international law and is expressly provided for in the following instruments: the Universal Declaration of Human Rights, the ICCPR, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, the ECHR, the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights'.[119] The Chamber did not consider that the statutory silence as to the issue of

[117] ICTY, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/57/379–S/2002/985, 4 September 2002, para. 28.

[118] *See e.g.* Appeals Chamber, *Prosecutor v. Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, 31 March 2000, para. 75; Appeals Chamber, *Prosecutor v. Semanza*, Decision, Case No. ICTR-97-20-A, 31 May 2000, para. 129(6).

[119] Trial Chamber III, *Prosecutor v. Rwamakuba*, Decision on appropriate remedy, Case No. ICTR-98-44C-T, 31 January 2007, para. 40. *See* article 8 of the Universal Declaration of Human Rights ('[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'); article 2(3) of the ICCPR ('[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted'); article 6 of the Convention on the Elimination of All Forms of Racial Discrimination ('States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial

compensation should represent an obstacle: it relied on the 'combined effect of the Tribunal's inherent powers and its obligation to respect generally accepted international human rights norms' to find that 'it [had] the inherent power to provide an accused or former accused with an effective remedy for violations of his or her human rights while being prosecuted or tried before [the] Tribunal'.[120] Furthermore, noting that international human rights bodies 'have all recommended paying compensation as an appropriate remedy for a human rights violation', the Chamber added that 'its inherent power to give effect to an accused's or former accused's right to an effective remedy encompasses the power to grant financial compensation where, in the specific circumstances of a case, it constitutes the appropriate remedy to redress a violation of the human right in question'.[121] The Appeals Chamber confirmed this approach; whilst affirming that 'a remedy for a violation of the rights of the accused may include an award of financial compensation', however, it also clarified that 'there is no right to compensation for an acquittal *per se*'.[122]

51. As regards the national legal systems relevant to the present case, namely those of the DRC and the CAR, they do not seem to enshrine a principle of compensation similar to that underlying article 85(3) of the Statute. In the DRC, there is no legal basis to grant

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discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination'); article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment ('[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation'); articles 15(2), 16(4) and 16(5) of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (referring to 'fair compensation for damages' at article 15(2), 'compensation in money' at article 16(4) and full compensation for 'any loss or injury' at article 16(5)); paras 4 ([v]ictims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered') and 8 ([o]ffenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants') of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power; article 13 of the ECHR ('[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'); article XVIII of the American Declaration of the Rights and Duties of Man ('[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights'); article 25 of the ACHR ('(1) [e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. (2) The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted').

[120] Trial Chamber III, *Prosecutor v. Rwamakuba*, Decision on appropriate remedy, Case No. ICTR-98-44C-T, 31 January 2007, paras 45, 49.

[121] Trial Chamber III, *Prosecutor v. Rwamakuba*, Decision on appropriate remedy, Case No. ICTR-98-44C-T, 31 January 2007, paras 55, 58.

[122] Appeals Chamber, *Prosecutor v. Rwamakuba*, Decision on Appeal against Decision on Appropriate Remedy, Case No. ICTR-9844C-A, 13 September 2007, para. 25.

compensation to a person who has been acquitted: the only provision relating to compensation governs a scenario similar to that envisaged in article 85(1) of the Statute, thus relating to unlawful arrest and detention.[123] In the CAR, if a judgment is reversed, the courts will acquit the accused and decide on the claims for damages and the restitution of seized property:[124] as such, CAR's national laws do not provide for compensation as of right, nor do they specify according to which criteria a court may adjudicate such claims.

52. Having found that Mr Bemba failed to establish that he suffered a grave and manifest miscarriage of justice, and that international human rights law does not require one to question the consistency between the restricted scope of article 85(3) of the Statute as construed by the Chamber and internationally recognised human rights, it is not necessary for the Chamber to further entertain the First Component of the Claim, including for the purposes of determining whether the other requirements set forth in article 85(3) of the Statute are satisfied. Accordingly, the Chamber finds that there are no grounds for it to exercise its discretion to award compensation to Mr Bemba under article 85(3) of the Statute.

IV. SECOND COMPONENT OF THE CLAIM

53. In support of the Second Component of the Claim, Mr Bemba alleges that the Court 'acted negligently in seizing and freezing his property' and failed 'properly to manage it or even account for it':[125] the legal basis for this component would be 'at once […] upon his fundamental human right to property and a private law claim alleging tortious behaviour by the ICC'.[126] Mr Bemba submits that, since his 'property and assets in Portugal, Belgium, and the DRC were seized and frozen' and 'no steps were taken to manage or preserve' their value he 'should be put in the position in which he would have been had the management of his assets been competently carried in accordance with law' and 'seeks damages in the amount of at least €42.4 million'.[127] In Mr Bemba's submission, the Second Component of the Claim could and should be addressed by the Chamber under the Court's inherent powers or, in the

[123] On 31 December 2015 the *Loi n° 15/024* was passed to modify the *Code de procédure pénale* (Criminal Procedure Code) and add an Article 26bis(4)(c) reading as follows: '*Toute personne privée de sa liberté par arrestation ou détention a le droit : a) d'introduire un recours devant la chambre du conseil qui statue à bref délai sur la légalité de sa détention et ordonne sa libération si la détention n'est pas conforme aux motifs et selon la procédure déterminés par le présent code; b) de bénéficier d'un traitement qui préserve sa vie, sa santé physique et mentale ainsi que sa dignité; c) à une juste et équitable réparation du préjudice causé par une arrestation ou une détention illégale*'.

[124] Code de procédure pénale, article 204: '*Si, le jugement est réformé parce que le fait n'est réputé ni délit ni contravention par aucune loi, la Cour relaxera le prévenu et statuera, s'il y a lieu, sur les demandes en dommages-intérêts et la restitution des biens saisis*'.

[125] Claim, para. 6.

[126] Claim, para. 7.

[127] Claim, paras 123-125.

alternative, submitted to arbitration 'under UNCITRAL, with all parties (the claimant, the Court, and third parties) agreeing to be bound by the outcome'.[128]

54. Both the Prosecutor and the Registry submit that the Second Component of the Claim exceeds the scope of article 85 of the Statute and, as such, should be dismissed *in limine*. The Prosecutor submits that '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 that '[h]is effort to sue the Court for "tortious liability" – in the guise of the statutory compensation scheme – is plainly incompatible with the Statute'.[129]

55. As to the Registry, it submits that (i) it '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', which 'includes no Court's "obligation" to manage assets […], as assets are domestically seized or frozen on a conservatory basis under national laws';[130] (ii) that the Court is fully dependent on states 'to execute, under Part 9 of the Statute, cooperation requests concerning assets'; and that, accordingly, (iii) allegations of mismanagement of frozen assets and property by way of actions and omissions undertaken by those States where those assets were and are located should be brought before and against those States.[131]

56. The Chamber considers it necessary to first address the issue as to whether it is the competent organ to entertain and adjudicate the Second Component of the Claim. Under articles 57(3)(e) and 93(1)(k) of the Statute, a Pre-Trial Chamber may address cooperation requests to States to take measures for the identification, tracing and freezing or seizure of proceeds, property and assets of a suspect or accused person. Rule 176(2) of the Rules identifies the Registry as the channel of communication between the Chamber issuing requests for cooperation and the requested States, not only by transmitting such requests to national authorities but also by ensuring a constant dialogue between the Chamber and those States for the purposes of ensuring the proper implementation of the requests.

57. These provisions all seem to consistently rely on the fact that the responsibility for the proper execution of a cooperation request emanating from the Court rests primarily with the requested States and that the role of the Registry is limited to facilitating their communication

[128] Claim, paras 8, 169(2).
[129] Prosecutor's Response, paras 2 (fourth point), 85; *see also* Transcript of hearing, 9 May 2019, ICC-01/05-01/08-T-376-ENG, p. 19, lines 19-24 and p. 38, lines 15-19; Prosecutor's Response to Mr Bemba's Reply, paras 3 (third point), 7-10.
[130] Registry's Observations, para. 1.
[131] Registry's Observations, para. 41.

with the Court.[132] Furthermore, when a request for cooperation emanating from the Court raises issues under domestic law, pursuant to articles 96(3) and/or 97 of the Statute the requested State is to start consultations 'with the Court';[133] it is worth recalling that, in the *Al Bashir* case, Pre-Trial Chamber II clarified that reference to 'the Court' for the purposes of this provision should be read as referring to the Chamber vested with competence for the purposes of the relevant cooperation request:[134] while a Chamber cannot but rely on the Registry's support for transmitting its own request to the relevant State, the Registry's role remains confined to acting as a channel of communication.

58. The Chamber notes that the relevant documents, as either included in the record of the Main Case or submitted in this phase of the proceedings, as well as the supplementary information submitted by the Registry upon the Chamber's request, all point to the Registry having adequately discharged its obligations in acting as a channel of communication between the Court and the requested Three States. To the extent that any damage to Mr Bemba's assets might have arisen in connection with or as a result of the conduct of operations of those States, the Chamber finds that it is not competent to adjudicate the matter.

59. Neither is the Chamber persuaded by Mr Bemba's argument to the effect that it should address the Second Component of the Claim in the exercise of its 'inherent powers'. As explicitly acknowledged by Counsel for Mr Bemba, the Second Component of the Claim constitutes a 'private law claim alleging tortious behaviour by the ICC'[135] and 'does not depend upon a finding under Article 85', i.e. a finding to the effect that a grave and manifest miscarriage of justice occurred.[136] Otherwise stated, the Second Component 'is a claim which stands alone' and was only submitted jointly with the First Component 'simply' as 'a means of expedience'.[137]

60. However, the Chamber notes that the scope of the current proceedings, as well as its ensuing mandate in this regard, is strictly limited to considering whether financial

[132] Registry's Observations, paras 1, 15, 22.
[133] Article 96(3) of the Statute states that '[u]pon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply […]. During the consultations, the State Party shall advise the Court of the specific requirements of its national law'; article 97 of the Statute affirms that '[w]here a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter'.
[134] Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, 13 June 2015, ICC-02/05-01/09-242.
[135] Claim, para. 7; Mr Bemba's Reply, para. 5.
[136] Claim, para. 5; Transcript of hearing, 9 May 2019, ICC-01/05-01/08-T-376-ENG, p. 13, lines 4-16 and p. 38, lines 10-22; Mr Bemba's Reply, para. 4.
[137] Mr Bemba's Reply, para. 5.

compensation may be awarded on the basis of a claim submitted under article 85 of the Statute. As clarified by the Presidency, the Chamber has been designated as competent to consider 'any eventual request for compensation under article 85 of the Statute, pursuant to rule 173(1) of the Rules'.[138]

61. The wording and drafting history of article 85(3) of the Statute make it apparent that it was never meant to provide a remedy for damages of an economic and financial nature which are not the result of a grave and manifest miscarriage of justice. Rule 175 of the Rules explicitly states that compensation pursuant to this provision shall be established taking into account the 'consequences of the grave and manifest miscarriage of justice on the personal, family, social and professional situation of the person filing the request'. While the impact on one's professional situation may well have an economic and financial component, the Chamber takes the view that redressing damage to property or assets was never the primary objective pursued underlying article 85(3) of the Statute, even in the scenario where a grave and manifest miscarriage of justice occurred and resulted in such damages. Accordingly, since damages to the assets and property of an acquitted person allegedly brought about by mismanagement of those assets are to be considered as falling outside the scope of article 85 of the Statute and hence outside of the Chamber's mandate, the Chamber concludes that it has no jurisdiction over the Second Component of the Claim.

62. The Chamber finds that Mr Bemba's reference to 'inherent powers' is unsuitable to disturb its conclusion that the Second Component of the Claim falls outside the scope of its jurisdiction. As it has consistently been held in the Court's case law, 'the notion of "inherent powers" – or "incidental jurisdiction" – refers to judicial powers which, while not explicitly conferred in the relevant constitutive instruments, are to be considered necessarily encompassed within ("inherent to") other powers specifically provided for, in that they are essential to the judicial body's ability to perform the judicial functions assigned to it by such constitutive instruments'.[139] As clarified by the International Court of Justice, the ultimate end

[138] Presidency, Decision referring a request arising under article 85 to Pre-Trial Chamber II, 30 October 2018, ICC-01/05-01/08-3662-Conf-Exp.

[139] Appeals Chamber, *The Prosecutor v. Bemba et al.*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 March 2018, ICC-01/05-01/13-2276-Conf-Exp (public redacted version notified on the same day, ICC-01/05-01/13-2276-Red), para. 75; *see also* Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the defence request for a temporary stay of proceedings (and CONCURRING SEPARATE OPINION OF JUDGE EBOE-OSUJI), 26 October 2012, ICC-02/05-03/09-410, paras 75-77 *referring to* International Court of Justice, *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* (1949), ICJ Reports 174, p. 182 ('[an international body or organisation] must be deemed to have those powers which, though not expressly provided in the [constitutive instrument], are conferred upon it by necessary implication as being essential to the performance of its duties'); Special Tribunal for Lebanon, Appeals Chamber, In the Matter of El Sayed, Decision

of invoking 'inherent powers' is to enable a Chamber 'to take such action as may be required […] to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated'.[140] No such scenario exists in the case at hand, where the statutory framework is specific and detailed enough as to satisfactorily and comprehensively set forth the Chamber's powers and the requirements for their exercise.

63. This conclusion also makes it unnecessary for the Chamber to address the issue as to whether those States having frozen Mr Bemba's assets and property, and – in Mr Bemba's submission – being responsible, whether in whole or in part, for their alleged mismanagement, should or could be considered as 'participants' in these proceedings and hence notified of relevant documents or otherwise involved: as a collateral aspect of the Second Component of the Claim, it also falls beyond the boundaries of the Chamber's jurisdiction and powers under article 85(3) of the Statute.

64. The Chamber clarifies that its determination to the effect that the Second Component of the Claim falls outside the scope and purpose of proceedings under article 85(3) of the Statute is without prejudice to Mr Bemba's right to pursue other procedural remedies and avenues which might otherwise be open to him with a view to seeking redress for damages allegedly suffered in connection with his assets targeted by freezing orders and other similar measures undertaken by States in connection with the implementation of the Court's orders.

V. EXCESSIVE LENGTH OF THE PROCEEDINGS

65. The Chamber is receptive to Mr Bemba's submission to the effect that '[a] decade, to conclude a single accused case, with one form of liability, and events spanning a five-month period, is not reasonable'.[141] Although a finding of a grave and manifest miscarriage of justice cannot be entered on these grounds alone, and (unlike the situation at the ICTY) resort to inherent powers would be inappropriate in the presence of a specific provision directly

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on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, 10 November 2010, CH/AC/2010/02, para. 45 ('[w]ith regard to the Tribunal, by "inherent jurisdiction" we mean the power of a Chamber of the Tribunal to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction'); International Court of Justice, *Nuclear Tests Case (New Zealand v. France)* (1974) ICJ Reports, para. 23 ('it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' […] Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of the States, and is conferred upon it in order that its basic judicial functions may be safeguarded').

[140] International Court of Justice, *Nuclear Tests Case (New Zealand v. France)* (1974) ICJ Reports, para. 23.

[141] Claim, paras 76-78.

addressing and governing the matter, the Chamber recalls that all suspects and accused persons before the Court do enjoy fundamental fair trial rights, including the right to an expeditious trial conducted without undue delay and within a reasonable time pursuant to article 67(1)(c) of the Statute.[142]

66. According to the well-established jurisprudence of the ECtHR, 'the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute'.[143] This approach has also been echoed approvingly by both the Inter-American Court of Human Rights[144] and the United Nations Human Rights Committee.[145]

67. The Chamber notes that reasonableness in a matter so complex as the duration of criminal proceedings not only depends on the relevant context, but is also of a very sensitive nature: this is even more so in the framework of the Court, where – at this stage – no time limits exist either with regard to the different phases of the proceedings or, more critically, in respect of the duration of custodial detention, whether in respect of each phase of the proceedings or overall.

68. The Chamber acknowledges that the approach ultimately enshrined in article 85(3) of the Statute is more restrictive than the one followed by several domestic systems, some of which might have inspired its adoption. In this perspective, if the Court's aim is to serve as a beacon at the forefront of all matters pertaining to individual human rights, the case for legislative reform could indeed be made and a review of article 85(3) aiming at aligning the Statute to the most progressive systems in this area might be warranted.

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[142] Article 14(3)(c) of the ICCPR states that '[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: […] c) to be tried without undue delay'; article 6(1) of the ECHR affirms that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'; article 8(1) of the ACHR reads as follows: '[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature'; article 7(1)(d) of the ACHPR states that '[e]very individual shall have the right to have his cause heard. This comprises: […] (d) the right to be tried within a reasonable time by an impartial court or tribunal'.

[143] *See*, among many other authorities, ECtHR, Grand Chamber, *Frydlender v. France*, Judgment, 27 June 2000, para. 43; Grand Chamber, *Sürmeli v. Germany*, Judgment, 8 June 2006, para. 128; Chamber (Fourth Section), *Dimitrov and Hamanov v. Bulgaria*, Judgment, 10 May 2011, para. 71; Chamber (Third Section), *Ardelean v. Romania*, Judgment, 30 October 2012, para. 82.

[144] *See* Inter-American Court of Human Rights, *Genie-Lacayo v, Nicaragua*, Judgment, 29 January 1997, para. 77; *Suárez-Rosero v. Ecuador*, Judgment, 12 November 1997, para. 72; *Maya Indigenous Communities of the Toledo District v. Belize*, Report N. 40/04, 12 October 2004, para. 177.

[145] United Nations Human Rights Committee, General Comment No. 32 – Article 14 (Right to equality before courts and tribunals and to a fair trial), 23 August 2007, CCPR/C/GC/32, para. 35.

69. The Chamber finds that, irrespective of any consideration as to the merits of the Main Case, and without prejudice to its finding that no grave and manifest miscarriage of justice occurred, ten years is a significant amount of time to spend in custody, likely to result in personal suffering, which would trigger compensation in many national systems for violation of the fundamental fair trial right to be tried expeditiously. Whilst the statutory constraints, as illustrated in this decision, are such as to make it impossible for the Chamber to compensate this, it seems unquestionable that the *Bemba* case provides a case in point as to the seriousness of the consequences entailed by the absence of statutory limits as to the duration either of the proceedings or, even more critically, of custodial detention. The Chamber finds it urgent for the States Parties to embark on a review of the Statute so as to consider addressing those limitations; until then, it will be the Court's own responsibility to be mindful of the expeditiousness of the proceedings as a fundamental tenet of the right to a fair trial and to streamline its own proceedings accordingly.

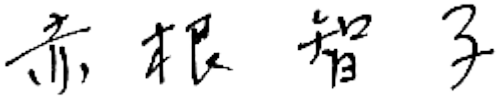
FOR THESE REASONS, THE CHAMBER

REJECTS the First Component of the Claim;

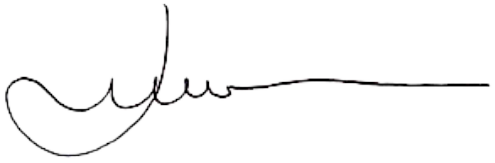
DISMISSES the Second Component of the Claim.

Done in both English and French, the English version being authoritative.

Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Monday, 18 May 2020

At The Hague, The Netherlands