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**International
Criminal
Court**

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Date: **1 June 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

Prosecution response to Mr Bemba's request for leave to appeal the 'Decision on Mr Bemba's claim for compensation and damages'

Source: Office of the Prosecutor

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INTRODUCTION

1. On 18 May 2020, Pre-Trial Chamber II dismissed Mr. Bemba’s claim for compensation and damages.¹ It rejected Mr. Bemba’s compensation claim (the First Component) since he had failed to demonstrate a grave and manifest miscarriage of justice under article 85(3) of the Statute.² Regarding Mr. Bemba’s claim for damages (alleging negligence in seizing, freezing and managing his property, the Second Component), the Chamber—relying on Mr. Bemba’s description of his ancillary claim—found that it had no jurisdiction to decide “a private law claim alleging tortious behaviour” which “[did] not depend upon a finding under [a]rticle 85.”³ In particular, the Chamber found that the scope of the proceedings and its own mandate were limited to determining claims of financial compensation under article 85.⁴ Accordingly, it dismissed the Second Component.⁵

2. On 26 May 2020, Mr. Bemba sought leave to appeal the Compensation Decision.⁶ Only three of the 12 issues (the First, the Second, and the Twelfth Issues) potentially relate to the First Component under article 85, the proper subject-matter of the article 85 proceedings and the Compensation Decision.⁷ However, they fail to meet the test under article 82(1)(d) of the Statute. Therefore, they should be rejected.

3. The remaining nine issues (the Third to the Eleventh Issues) concern the Second Component, unrelated to article 85. Although compensation decisions granting or rejecting claims under article 85 are potentially appealable under article 82(1)(d) (provided the respective issues meet the test),⁸ this Court has not yet decided if a Chamber’s dismissal of a private law/tortious liability claim against the Court may

¹ ICC-01/05-01/08-3694 (“[Compensation Decision](#)” or “[Decision](#)”).

² [Decision](#), paras. 23-52, 65-69.

³ [Decision](#), paras. 53-64.

⁴ [Decision](#), para. 60.

⁵ [Decision](#), paras. 53-64.

⁶ ICC-01/05-01/08-3695 (“[Request](#)”).

⁷ [Request](#), paras. 26(i), (ii), (xii) (only to the extent that it alleges that the Chamber was not impartial towards him when it allegedly failed to respect Mr Bemba’s acquittal), 27, 33.

⁸ ICC-01/05-01/13-1964 OA13 (“[Mangenda Compensation AD](#)”), paras. 9-18.

be appealed using the statutory mechanisms under articles 81 and 82, and in particular article 82(1)(d). In the Prosecution's respectful view, they may not. The Statute does not authorise such appeals. Nor can the restrictive scope of article 82(1)(d) and its exceptional nature be so extended, when Mr. Bemba had advanced this aspect of his claim as a private "third party". Therefore, the Chamber should dismiss Mr. Bemba's attempt to appeal its rejection of the tortious liability claim *in limine*.

4. Even if the Chamber considers that this aspect of its Decision may be appealed under article 82(1)(d), the Issues advanced are not appealable and do not meet the other prongs for leave to appeal. They should be rejected.

SUBMISSIONS

I. The Issues relating to the First Component do not meet the article 82(1)(d) test

5. The Appeals Chamber has found that compensation proceedings under article 85 are "stand alone" or ancillary proceedings, separate from criminal prosecutions at the Court.⁹ While compensation proceedings under article 85 involve a two-step process (requiring at least two distinct decisions), preliminary decisions under article 85 are interlocutory decisions and may, in principle, be appealed under article 82(1)(d).¹⁰ Although this finding was made in the context of a compensation request under article 85(1) (unlawful arrest or unlawful detention), it may be said to apply equally to preliminary decisions under article 85(3) (grave and manifest miscarriage

⁹ [Mangenda Compensation AD](#), para. 16.

¹⁰ [Mangenda Compensation AD](#), paras. 16-18 (in the context of article 85(1)). *See also* ICC-01/05-01/13-1893 ("Mangenda Compensation ALA Decision"), paras. 13-14, 21-22. *But see* ICC-01/05-01/13-1893-Anx ("Mangenda Compensation ALA J.Chung Dis. Op"), paras. 1-7 ("[...] Notwithstanding, even if the 'proceedings' at hand were interpreted as such, the Impugned Decision represents a final decision issued in the course of those proceedings, rather than an interlocutory decision, and unlike a final judgment issued by a trial chamber under Article 74 of the Statute, no further avenue of appeal is specified or envisaged in the statutory framework.").

of justice), since they involve the same two steps of decision-making.¹¹ Therefore, issues relating to the First Component may be examined under article 82(1)(d).

6. Notwithstanding, the First, Second and Twelfth Issues are not appealable and, in any event, do not meet the other article 82(1)(d) criteria.

1.A The Issues relating to the First Component are not appealable

7. The First Issue—whether an article 85(3) claim can only be supported by matters which have never been raised at trial or on appeal—¹² misreads the Decision and does not arise from it. Although this Issue suggests that the Chamber found that only “fresh” issues (not previously raised on trial or on appeal) may be raised under article 85(3), the Chamber’s findings were considerably more nuanced.¹³

- i. The Chamber first found that compensation proceedings were not an opportunity to re-open the debate on matters already submitted and/or addressed by previous Chambers in the case.¹⁴
- ii. The Chamber then considered the various issues raised under the First Component, finding that not only had Mr. Bemba raised those issues before previous Chambers, but they had been addressed (and often expressly rejected) by those Chambers.¹⁵
- iii. The Chamber further found that in relation to the appeal in the Main Case, the Appeals Chamber (Majority) need not have directly addressed all of Mr. Bemba’s grounds of appeal, and that, in any event, that it did not do so could

¹¹ [Request](#), paras. 17-20.

¹² [Request](#), paras. 26(i), 27.

¹³ [Decision](#), paras. 25-31.

¹⁴ [Decision](#), para. 25.

¹⁵ [Decision](#), para. 30 (i)-(vi) (allegations regarding the Prosecutor’s conduct had been considered by the Trial Chamber and raised on appeal; allegations relating to cross-examining Defence witnesses had been addressed by the Trial Chamber and raised on appeal; allegations on double standards between Prosecution and Defence witnesses were raised on appeal and expressly rejected by the Minority Judges; allegations on industrial falsification of victims’ applications had been addressed by the Trial Chamber and raised on appeal; allegations on the ‘sub-standard and unacceptable quality’ of the Trial Judgment had been addressed by the Appeals Chamber, leading to its reversal and Mr. Bemba’s acquittal; allegations on false statements in the record were raised and considered moot, as, following his acquittal, Mr. Bemba was not sentenced).

not amount to a miscarriage of justice *per se*. Significantly, both the Majority and Minority Judges—irrespective of the standard of appellate review employed—had reviewed the record with the aim of preventing a miscarriage of justice, resulting in Mr. Bemba’s acquittal.¹⁶

8. By failing to acknowledge that many of his arguments were raised *and specifically addressed*, Mr. Bemba’s submissions reflect the Decision only partially. Equally, he fails to acknowledge that the earlier Chambers did not need to have specifically addressed arguments for those Chambers to have considered their merits.¹⁷ Accordingly, the compensation Chamber is not required to re-consider arguments that had failed to persuade all earlier Chambers.

9. The Second Issue—the proper definition of when a matter is “settled” by a Chamber—¹⁸ is a mere disagreement and accordingly not appealable. The Chamber did not need to “define” what it meant by the term “settled”:¹⁹ that the phrase “settled matters” refers to matters raised, considered, addressed or rejected by earlier Chambers is apparent from a common-sense reading of the Decision and its reliance on the *Ngudjolo* compensation decision.²⁰ Nor, in this context, does Mr. Bemba adequately explain why the Chamber needed to define the term “settled”.²¹

10. The Twelfth Issue challenges the Chamber’s impartiality and claims that it did not accord due respect to Mr. Bemba’s acquittal.²² Although Mr. Bemba also claims that the Chamber accorded little or no weight to his submissions, relying instead on

¹⁶ [Decision](#), paras. 27-28.

¹⁷ By analogy, see requirements of a reasoned opinion; ICC-01/05-01/13-2275 A A2 A3 A4 A5 ([Bemba et al. AJ](#)), para. 105 (“[a chamber] is not required to address all the arguments raised by the parties [...] provided that it indicates with sufficient clarity the basis for its decision.”).

¹⁸ [Request](#), paras. 26(ii), 27.

¹⁹ *Contra* [Request](#), para. 27.

²⁰ See [Decision](#), para. 29 (“[...] whenever Mr Bemba merely engaged in a ‘repetition of arguments which have already been brought before the Chambers and settled by them’, the Chamber will neither reiterate the reasoning of previous Chambers nor address such arguments anew.”, also referring to ICC-01/04-02/12-301-tENG (“[Ngudjolo Compensation Decision](#)”), para. 48.

²¹ [Request](#), para. 27.

²² [Request](#), paras. 26(xii), 33.

those of the Registry, this aspect relates to the Second Component and is unexplained. It should be dismissed *in limine*.²³

11. The Twelfth Issue does not arise from the Decision. Mr. Bemba merely speculates that the Chamber did not accord his acquittal due respect.²⁴ In so arguing, he further misinterprets the Decision's plain text and the case record. The Chamber's discussion of the different views of the appeal judges on the "standard of review" on appeal accurately reflects the record.²⁵ Mr. Bemba does not explain why referring to Judge Hofmański and Judge Monageng's Dissenting Opinion in this context was inappropriate and merely disagrees with the Chamber's rationale. Moreover, in arguing that the Chamber's reference to "acquitted by Majority" "[departed] from the practice of referring to defendants as 'convicted' or 'acquitted'", Mr. Bemba takes the plain language of the Decision out of its context.²⁶

12. Accordingly, the First, Second and Twelfth Issues should be dismissed, as they are not appealable.

I.B The Issues relating to the First Component do not meet the remaining article 82(1)(d) criteria

13. The First, Second and Twelfth Issues do not meet the other prongs of article 82(1)(d).

14. *First*, Mr. Bemba does not argue that these Issues affect the fair and expeditious conduct of the compensation proceedings.²⁷ Nonetheless, they cannot have such an effect. Although the First and Second Issues purport to relate to the scope of the evidence Mr. Bemba offered in support of his article 85(3) claim, they misapprehend

²³ In any event, this aspect is similar to the Fifth Issue (Second Component); *see below* para. 28.

²⁴ [Request](#), para. 33.

²⁵ *See e.g.*, ICC-01/05-01/08-3636 A ("[Bemba AJ](#)"), paras. 34-70; ICC-01/05-01/08-3636-AnXI-Red A ("[Bemba Dis. Op](#)"), paras. 2-18; ICC-01/05-01/08-3636-Anx3 A ("[Bemba J.Eboe-Osuji Sep. Op](#)"), paras. 32-90.

²⁶ [Decision](#), para. 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')").

²⁷ *See* [Request](#), paras. 35-38 (limiting itself to the outcome of the proceedings and need for appellate review).

the Chamber’s findings. The Twelfth Issue—although raising a serious allegation of a lack of judicial impartiality in conducting the proceedings—is poorly substantiated. Likewise, Mr. Bemba’s overly broad reliance on the time he spent in detention does not demonstrate why *these* Issues—unrelated to his detention—have an impact on the fair and expeditious conduct of these proceedings.²⁸ As the Appeals Chamber has said, the *issue* must be likely to have repercussions on the fair and expeditious conduct of proceedings.²⁹ Generalised claims of unfairness are inadequate.

15. *Second*, although Mr. Bemba argues that the Decision “[denies] his right to receive compensation” and thus affects the outcome of the proceedings,³⁰ he fails to acknowledge that he has no right to receive such compensation under article 85(3).³¹ He must first convincingly demonstrate a grave and manifest miscarriage of justice, and even if he makes such a showing (which he has not), the Chamber still retains the discretion on whether to make an *ex gratia* payment or not in the circumstances.³²

16. *Third*, while Mr. Bemba claims that he has advanced “novel” and “complex” issues that the Appeals Chamber must hear,³³ they are neither novel nor complex. The Appeals Chamber need not correct Mr. Bemba’s misapprehension of the record and Decision. In this sense, granting leave to appeal is unnecessary to ensure that the proceedings follow the right course.³⁴ Likewise, although the Pre-Trial Chamber had considered it “appropriate to guarantee [Mr. Bemba’s rights] to the highest possible extent” when granting him additional time to make his article 85 claim,³⁵ this is inapposite to the question of why the Appeals Chamber must hear the merits of the matter at this stage. Nor does Mr. Bemba recognise that the Chamber’s remark was

²⁸ *Contra Request*, para. 37.

²⁹ ICC-01/04-168 OA3 (“[DRC Extraordinary Review AD](#)”), para. 10.

³⁰ *Request*, para. 36.

³¹ *Decision*, para. 40.

³² *Decision*, para. 40.

³³ *Request*, para. 37.

³⁴ [DRC Extraordinary Review AD](#), para. 15.

³⁵ *Request*, para. 38; ICC-01/05-01/08-3664 (“[Time Extension Decision](#)”), para. 6.

made “without any prejudice to the merits of the case”³⁶—a significant qualification in this context.

17. For the reasons above, Mr. Bemba’s submissions on the First Component should be rejected.

II. The Second Component may not be appealed under article 82(1)(d), and *arguendo*, the Issues do not meet the article 82(1)(d) criteria

18. Mr. Bemba’s attempt to appeal the Second Component under article 82(1)(d) is inadmissible and should be dismissed, for the following reasons.³⁷

19. *First*, as the Appeals Chamber has found, the Statute exhaustively defines the right to appeal against first instance decisions.³⁸ Although article 82 must be interpreted and applied according to internationally recognised human rights, there is no lacuna in the Statute in terms of the right to appeal.³⁹ If private claims alleging tortious liability (a subject matter distinct from that already specified under articles 81 and 82) were meant to be appealed under those provisions, the Statute would have expressly said so.⁴⁰ The Appeals Chamber has dismissed earlier attempts to invoke its appellate jurisdiction outside of the express terms of the Statute.⁴¹ Accordingly, it is debatable if article 82(1)(d) (ordinarily governing interlocutory decisions at pre-trial and trial) can be said to apply to such claims, in principle. Moreover, allowing article 82(1)(d) to apply to Mr. Bemba’s non-statutory private claim (which, on his own interpretation, does not depend on an article 85 finding) risks opening the floodgates to impermissible, frivolous and protracted attempts to

³⁶ [Time Extension Decision](#), para. 6.

³⁷ *Contra* [Request](#), paras. 21-23.

³⁸ [DRC Extraordinary Review AD](#), para. 39; ICC-01/04-01/06-2799 OA19 (“[Lubanga Asylum AD](#)”), para. 7.

³⁹ [DRC Extraordinary Review AD](#), paras. 38-39.

⁴⁰ ICC-01/04-01/07-3697 (“[Katanga Article 108 AD](#)”), para. 13.

⁴¹ See [Katanga Article 108 AD](#), paras. 15-16; ICC-01/04-01/07-3424 OA14 (“[Katanga Detained Witnesses AD](#)”), paras. 27-39 (dismissing attempts to appeal under articles 82(1)(a) and (b); [Lubanga Asylum AD](#), paras. 7-8 (dismissing an appeal, even when the Trial Chamber had granted leave to appeal since it had considered it necessary and desirable under article 64); ICC-02/17-137 OA OA2 OA3 OA4 (“[Afghanistan Victims Standing AD](#)”), paras. 11-23 (dismissing the victims’ attempt to appeal the decision).

appeal a host of other private claims against the Court. Merely because Mr. Bemba joined this claim to his article 85 claim as a “means of expedience” does not mean that it would be appealable for the same reasons as the article 85 claim.⁴² Significantly, maintaining his earlier strategy to advance two distinct claims (albeit at the same time), Mr. Bemba has not expressly challenged the Chamber’s jurisdictional finding regarding his private claim, but has rather shoe-horned his attempt to appeal it within article 82(1)(d), a provision available for his article 85 claim but not otherwise.

20. *Second*, although Mr. Bemba brought his article 85 claim as a former “arrested or convicted person”,⁴³ he brought his private claim as a “third party”.⁴⁴ Who may qualify as “a party” bringing an appeal under article 82(1) depends on the type of decision under appeal and its procedural context.⁴⁵ While both the Prosecution and Mr. Bemba may appeal the article 85 compensation decision as “parties” to the article 85 proceedings, this rationale does not extend to Mr. Bemba’s status as a private “third party” in a wholly unrelated tort proceeding, concerning a dispute about the management of his assets between Mr. Bemba and the Court’s Registry.⁴⁶

21. *Third*, misconstruing the Decision, Mr. Bemba incorrectly suggests that the Chamber’s rejection of the Second Component constituted a “final determination” of questions relating to the management of his assets.⁴⁷ But the Chamber expressly found that although the Second Component fell outside the ambit of article 85 and

⁴² [Decision](#), para. 59.

⁴³ See Article 85: Compensation to an arrested or convicted person.

⁴⁴ ICC-01/05-01/08-3686-Red2 (“[Reply](#)”), para. 25.

⁴⁵ [Afghanistan Victims Standing AD](#), paras. 14 and 15 (“In the context of criminal proceedings, ‘either party’ refers, in the first place, to the prosecution and the defence—the two principal participants to such proceedings”).

⁴⁶ Compare [Reply](#), para. 2 with [Article 85 Hearing](#), 39:14-40:16 (“[...] This hearing has shown basically what now the claim that Mr Bemba is bringing is about. There is, on the one hand, an Article 85(3) claim that seems to now be predicated—it didn’t used to, but now seems to be predicated on *mala fides* by the Prosecutor, the Court, and then there is an independent claim, which is a private claim for damages to his property. [...] [the ancillary claim of damages to his property] falls manifestly outside the scope of Article 85 and it would be inappropriate and dangerous to resort to inherent powers of the Chamber. [...] This is not something that this Chamber should rule on and I respectfully think there is no need for that. This is an Article 85 claim. You have to deal within the context of that provision, and then Mr Bemba will be free to choose whatever forum he wishes to choose for bringing any subsequent claims that he wishes to bring. [...]).

⁴⁷ [Request](#), para. 23.

that it did not have jurisdiction over it, Mr. Bemba could pursue other procedural remedies and avenues to seek redress for the alleged damage to his property.⁴⁸ Accordingly, aspects falling under the Second Component may still find a solution using those procedural avenues.

22. *Fourth*, Mr. Bemba’s reliance on the Court’s case law in *Bemba et al.* to claim that questions relating to seizing of assets are appealable under article 82(1)(d) over-generalises that case law.⁴⁹ While the Appeals Chamber dismissed Mr. Kilolo’s notice of appeal before it, finding that it would have been more appropriate for him to instead seek leave to appeal from the relevant first-instance Chamber under article 82(1)(d) in the circumstances,⁵⁰ this finding does not grant blanket permission to appeal any or all issues relating to “assets” under article 82(1)(d).⁵¹ Rather, requests and decisions must be viewed in their appropriate context. In this context, that Mr. Bemba’s claim is a private tortious claim is determinative.

23. For the reasons above, Mr. Bemba’s attempt to appeal the Second Component under article 82(1)(d) is inadmissible and should be dismissed.

III. The Issues relating to the Second Component do not meet the article 82(1)(d) test

24. *Arguendo*, and in any event, even if the Chamber finds that article 82(1)(d) applies to the Second Component, the Issues are not appealable and do not meet the remaining criteria under article 82(1)(d).

III.A The Issues relating to the Second Component are not appealable

25. None of the Issues advanced under the Second Component are appealable.

⁴⁸ [Decision](#), paras. 61, 64.

⁴⁹ [Request](#), para. 21.

⁵⁰ ICC-01/05-01/13-1533 OA12 (“[Bemba et al. Assets Appeal Admissibility AD](#)”), para. 15.

⁵¹ *Contra* [Request](#), paras. 21-23.

26. The Third and Fourth Issues—whether articles 57, 93, 96 and 97 of the Statute or rule 176 of the Rules “exclude or limit the Court’s liability for tortious acts” or “confer liability on cooperating States”—misapprehend the Decision and do not arise from it.⁵² Even if they are considered to be “issues”, they would not meet the remaining article 82(1)(d) criteria.⁵³

27. Contrary to Mr. Bemba’s submission, the Chamber did not find that articles 57, 93, 96 and 97 and rule 176 “exclude[d] or limit[ed] the Court’s liability for tortious acts” or “confer[red] [such] liability on cooperating States”. Rather, it found that under articles 57(3)(e) and 93(1)(k), a Chamber may address cooperation requests to States to take measures to identify, trace, freeze or seize property and assets of a suspect or accused person.⁵⁴ The Registry serves as a channel of communication between the Court and the States—an obligation that it had properly discharged.⁵⁵ The Chamber then noted that the responsibility for executing the cooperation requests rests primarily with the requested States, which may raise issues of domestic law.⁵⁶ Since the Registry had discharged its obligations adequately, and to the extent that any purported damage to assets may have arisen in connection with or as a result of the conduct of operations of the requested States, the Chamber found it was not competent to adjudicate those matters.⁵⁷ Rather than acknowledging the Chamber’s reasoning and findings, Mr. Bemba’s Third and Fourth Issues advance sweeping claims about the alleged “*tortious liability*” of the Court and/or the States, findings which the Chamber did not make. The Chamber’s findings related to the demarcation of responsibility within Part 9 of the Statute (apparent from its plain text)—but did not concern questions of liability for torts.

⁵² [Request](#), paras. 26 (iii) and (iv), 28.

⁵³ *See below* paras. 34-38.

⁵⁴ [Decision](#), para. 56.

⁵⁵ [Decision](#), paras. 56-58.

⁵⁶ [Decision](#), para. 57.

⁵⁷ [Decision](#), para. 58.

28. The Fifth Issue—whether the Chamber erred in law by seeking the views of the Registry on the situation regarding Mr. Bemba’s assets—merely disagrees with the Chamber’s findings and outcome.⁵⁸ He claims that the Chamber should not have asked for the Registry’s submissions, but does not explain his view, which is surprising given that the Registry is both an organ of the Court and its channel of communication with States.⁵⁹ Moreover, Mr. Bemba’s submissions during the proceedings directly commented on and related to the Registry’s functions.⁶⁰ Although Mr Bemba argues that opening “the evidential and briefing record of the Second Component” to the Registry was unfair and wasted Court resources because, in his view, the Chamber “knew that apparently it had no jurisdiction to decide it”,⁶¹ this is speculative. Nor does he recognise the shifting nature of his claim on assets—which only clarified at a late stage, at the hearing and afterwards in his post-hearing submissions, and accordingly led to the Chamber finding that it had no jurisdiction over his alleged private tortious claim.⁶²

29. The Sixth Issue—whether the Chamber erred in fact and in law by finding that States are responsible for the proper execution of cooperation requests, without considering the domestic/international practice and the evidence that Mr. Bemba put forward—⁶³ is a mere disagreement. Although Mr. Bemba appears to initially cast the Issue as a pure question of law, in essence, Mr. Bemba faults the Chamber for not “considering” his pleadings,⁶⁴ when there is no evidence of this. Rather, the Chamber received several written submissions from him on the issues advanced and even held a hearing at his behest.⁶⁵ Mr. Bemba’s submissions amount to mere conjecture.

⁵⁸ [Request](#), paras. 26(v), 29.

⁵⁹ Articles 34, 43, Statute; rule 176, RPE.

⁶⁰ ICC-01/05-01/08-3675 (“[Hearing Order](#)”), para. 8.

⁶¹ [Request](#), para. 29.

⁶² [Decision](#), para. 59.

⁶³ [Request](#), paras. 26(vi), 30.

⁶⁴ [Request](#), para. 30.

⁶⁵ [Hearing Order](#), para. 7.

30. The Seventh and Eighth Issues—both asking whether the Court’s liability for consequential loss or damages in tort was determined by the Registry’s internal responsibilities and limited role—do not arise from the Decision.⁶⁶ Contrary to Mr. Bemba’s submissions, the Chamber did not make any findings—nor did it need to—on whether the Court’s responsibility for cooperation requests implicated the Office of the Prosecutor in making such requests or the Chamber in granting them.⁶⁷ This is not germane to the Chamber’s core findings on why it could not decide questions of liability for consequential loss or damages in tort, which turned on the nature of Mr. Bemba’s private claim, and *not* on which Court organ—the Office of the Prosecutor, the Registry or the Chambers—was allegedly responsible or liable.

31. The Ninth and Tenth Issues—whether the Chamber needed the Presidency’s express mandate or clarification before deciding it did not have jurisdiction over the claim for damages—misread the record and do not arise from the Decision.⁶⁸ Although the Issues suggest that the Chamber’s mandate was unclear, the record shows otherwise. On 30 October 2018, the Presidency expressly granted the Chamber the mandate to decide the article 85 compensation claim.⁶⁹ This was in line with rule 173(1).⁷⁰ The Chamber exercised its mandate accordingly, limiting itself to the article 85 claim.⁷¹ Although Mr. Bemba had initially informed the Presidency that he intended to file an article 85 request (which included his claim regarding the alleged damage to his assets) (based on which the Presidency designated the Chamber),⁷² he later clarified that this aspect of his claim did not depend on article 85.⁷³ In this context, Mr. Bemba fails to show why the Chamber would have additionally needed

⁶⁶ [Request](#), paras. 26(vii) and (viii), 31.

⁶⁷ [Request](#), para. 31.

⁶⁸ [Request](#), paras. 26 (ix) and (x); 32.

⁶⁹ [Time Extension Decision](#), para. 3 (noting that the Presidency had designated this Chamber to consider Mr Bemba’s request for additional time and pages “as well as any eventual request for compensation under article 85 of the Statute”). The Prosecution does not have access to the Presidency’s decision referring a request arising under article 85 to Pre-Trial Chamber II (ICC-01/05-01/08-3662-Conf-Exp, p. 3).

⁷⁰ Rule 173(1), RPE.

⁷¹ [Time Extension Decision](#), paras. 2 (noting Mr Bemba’s intention to file an article 85 claim), 3 (noting Mr Bemba’s intention to consult a number of experts for his article 85 claim), 6-7 (noting rules relevant to article 85 proceedings).

⁷² See [Time Extension Decision](#), para. 2.

⁷³ [Decision](#), para. 59.

either the Presidency's express mandate or clarification regarding the tortious damages claim.

32. The Eleventh Issue—whether a first instance chamber could decide it had no jurisdiction over a claim for damages without inviting submissions from the parties—is a mere disagreement.⁷⁴ As the record shows, the Chamber gave Mr. Bemba ample opportunity to address this aspect. Significantly, when the Prosecution noted that Mr. Bemba's claim for damages fell manifestly outside the scope of article 85,⁷⁵ Mr. Bemba was given a further opportunity to address this aspect at the hearing and in his further reply submissions. In so doing, he chose not to specifically address the jurisdictional component and consistently maintained that his damages claim did not depend on article 85 and that he was willing to “sit across the table” to find a solution.⁷⁶ In finding that Mr. Bemba could pursue procedural remedies outside the ambit of article 85, the Chamber has given Mr Bemba exactly this opportunity.⁷⁷

33. For all the reasons above, the Issues relating to the Second Component are not appealable.

III.B The Issues relating to the Second Component do not meet the remaining article 82(1)(d) criteria

34. Mr. Bemba fails to show that the Issues relating to Second Component meet the remaining article 82(1)(d) criteria.

⁷⁴ [Request](#), paras. 26 (xi), 32.

⁷⁵ [Article 85 Hearing](#), 39:14-40:16.

⁷⁶ [Reply](#), paras. 4 (“Regardless, and for the avoidance of doubt, Mr Bemba repeats that a finding of a grave and manifest miscarriage of justice under Article 85 is **not** a pre-requisite [...]”); 51 (“[...] Rather than continue to expend both his assets and those of the Court through litigation—whether before the ICC or in other jurisdiction(s)—Mr Bemba remains willing to move towards some kind of dispute resolution or arbitration process, whether within the ICC or externally, with Portugal, Belgium and the DRC included as parties.”); [Article 85 Hearing](#), 14:24-15:4 (“[...] we are perfectly ready on Mr Bemba's behalf to engage in that sort of exercise in any form, whether it's through referral of the matter to some formal arbitration authority or by simply ordering the parties, which you perfectly well can do, *to sit around a table somewhere in this building*. That, we submit, would be a constructive and sensible way forward, leading to an expeditious and practical resolution of the matters [...]”). (emphasis added).

⁷⁷ [Decision](#), para. 64.

35. *First*, the Issues do not affect the fair and expeditious conduct of the proceedings. In particular, Mr. Bemba fails to acknowledge that he can pursue other procedural remedies and avenues to address the alleged damage to his assets.⁷⁸ Other than some generalised claims of unfairness (some unrelated to the Second Component),⁷⁹ Mr. Bemba does not argue that the Issues as such had any repercussions on the proceedings. Moreover, although he claims that his property was negligently mismanaged and “decimated in value”,⁸⁰ this is yet to be concretely established. For now, these remain Mr. Bemba’s (as yet) unproven assertions and cannot be said to affect either the fairness or expedition of the proceedings.

36. *Second*, the Issues do not affect the outcome of the proceedings.⁸¹ Mr. Bemba has not established any damage to his property (especially in the manner and amount claimed). It cannot be assumed that his damages claim would be successful. Moreover, whether Mr. Bemba can receive damages for any alleged property loss would depend on whether he chooses to exercise other procedural remedies available to him (which could mitigate any alleged damage, to the extent it can be shown). It would be premature to determine the outcome of his claim at this stage.

37. *Third*, rather than identifying novel issues, Mr. Bemba’s submissions misapprehend the record and the Decision.⁸² The Appeals Chamber’s intervention is not needed to correct such misapprehensions. Nor would the Appeals Chamber’s immediate resolution of this matter assist, when Mr. Bemba has not yet availed himself of the other procedural remedies and avenues at his disposal. In particular, Mr. Bemba’s property claim raises several differences in view with the Registry’s own assessment. Further litigation before Chambers of this Court is unlikely to assist to advance it.

⁷⁸ [Decision](#), para. 64.

⁷⁹ [Request](#), para. 37.

⁸⁰ [Request](#), paras. 36, 37.


⁸¹ *Contra* [Request](#), para. 36.

⁸² [Request](#), para. 37.

38. For the reasons above, the Issues relating to the Second Component fail to meet the article 82(1)(d) criteria and should be rejected.

CONCLUSION AND RELIEF

39. The Prosecution respectfully requests the Chamber to reject Mr. Bemba's request for leave to appeal the Compensation Decision. The Issues regarding the First Component do not meet the article 82(1)(d) criteria. The Issues regarding the Second Component may not be appealed under article 82(1)(d). Even if the Chamber were to find that article 82(1)(d) applies to these Issues, they too do not meet the criteria for leave to appeal in article 82(1)(d).



Fatou Bensouda, Prosecutor

Dated this 1st day of June 2020

At The Hague, The Netherlands