



Original: **English**

No.: **ICC-01/05-01/08**
Date: **9 December 2020**

THE PRESIDENCY

Before: **Judge Chile Eboe-Osuji, President**
 Judge Robert Fremr, First Vice-President
 Judge Marc Perrin de Brichambaut, Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO

Public

Public redacted version of “Decision on ‘Mr. Bemba’s request for the designation of a Pre-Trial Chamber pursuant to Regulation 46(3) of the Regulations of the Court’ dated 30 October 2020 (ICC-01/05-01/08-3698-Conf-Exp)” (ICC-01/05-01/08-3701-Conf-Exp)

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

The Office of the Prosecutor

Fatou Bensouda
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Counsel for the Defence

Peter Haynes
Kate Gibson

Legal Representatives of the Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Detention Section

Other

Victims and Witness Unit

**Victims Participation and Reparations
Section**

The Presidency of the International Criminal Court (the ‘Court’) has before it the request filed by Mr Jean-Pierre Bemba Gombo on 30 October 2020 (the ‘Request’), referring to regulation 46(3) of the Regulations of the Court (the ‘Regulations’), requesting that the Presidency designate a Pre-Trial Chamber in order to issue requests for assistance to relevant State authorities to discharge all remaining freezing, protective or charging orders over Mr Bemba’s assets and properties that are still in place and to adjudicate a claim for damages resulting from the freezing of Mr Bemba’s assets, and their consequent deterioration, depreciation and destruction.¹

I. RELEVANT PROCEDURAL HISTORY

1. On 23 May 2008, Pre-Trial Chamber III issued a warrant of arrest against Mr Bemba.² The arrest warrant was followed by various requests for cooperation addressed to several States, with a view to identify, trace, freeze and seize the property and assets of Mr Bemba, subject to the rights of *bona fide* third parties.³
2. On 8 June 2018, the Appeals Chamber, by majority, acquitted Mr Bemba from charges of war crimes and crimes against humanity.⁴
3. On 18 October 2018, Trial Chamber III issued a decision clarifying a number of matters pertaining to the unfreezing of Mr Bemba’s assets in view of his acquittal (the ‘Trial Chamber III Decision’).⁵ The Chamber clarified that actions directed at the freezing and seizure of assets pursuant to the cooperation regime in part 9 of the Rome Statute are ultimately taken by a State under its domestic law⁶ and that the lifting of such coercive measures similarly must be done under domestic law.⁷ The

¹ Defence for Mr Bemba, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of ‘Mr. Bemba’s request for the designation of a Pre-Trial Chamber pursuant to Regulation 46(3) of the Regulations of the Court’, ICC-01/05-01/08-3698-Red, para. 44, public redacted version filed on 3 November 2020.

² Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Mandat d’arrêt à l’encontre de Jean-Pierre Bemba Gombo, ICC-01/05-01/08-1.

³ See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ‘Public redacted version of “Decision on the Defence’s preliminary application for reclassification of filings, disclosure, accounts, and partial unfreezing of Mr Bemba’s assets”, 24 August 2018’, 16 November 2018, ICC-01/05-01/08-3655-Red, para. 1.

⁴ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’, ICC-01/05-01/08-3636-Red.

⁵ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of ‘Decision on Mr Bemba’s preliminary application for reclassification of filings, disclosure, accounts, and partial unfreezing of Mr Bemba’s assets and the Registry’s Request for guidance, 18 October 2018’, ICC-01/05-01/08-3660-Red2, para. 11, public redacted version filed on 29 November 2018.

⁶ Trial Chamber III Decision, ICC-01/05-01/08-3660-Red2, para. 11.

⁷ Trial Chamber III Decision, ICC-01/05-01/08-3660-Red2, para. 12.

Chamber further clarified that States were no longer required to comply with the cooperation requests pertaining to Mr Bemba in view of the acquittal and noted that it is for States to determine what actions need to be taken under domestic law as a result of the conclusion of its obligation to assist the Court through the freezing of assets.⁸

4. On 30 October 2018, the Presidency, acting pursuant to rule 173(1) of the Rules of Procedure and Evidence (the ‘Rules’), designated Pre-Trial Chamber II to hear any request for compensation under article 85 of the Statute by Mr Bemba,⁹ the latter of which provides for the exceptional and discretionary awarding of compensation in the event that conclusive facts show that there has been a grave and manifest miscarriage of justice.
5. On 18 May 2020, Pre-Trial Chamber II issued its decision on Mr Bemba’s claim for compensation and damages pursuant to article 85 of the Statute (the ‘Article 85 Decision’).¹⁰ A component of the Article 85 Decision pertained to a claim by Mr Bemba that the Court had been negligent in seizing and freezing his property and seeking damages in this regard, with Mr Bemba submitting that such claim could be addressed by the Chamber under the Court’s inherent powers or, alternatively, could be submitted to arbitration.¹¹ The Chamber determined that this component fell outside the scope and purpose of proceedings under article 85(3) of the Statute.¹² Mr Bemba sought leave to appeal the Article 85 Decision, including in respect of the abovementioned component.¹³ Pre-Trial Chamber II rejected such request for leave to appeal, noting its view that a claim pertaining to the alleged mismanagement of Mr Bemba’s frozen assets and its adverse consequences could never be initiated before it, thus such matter could not qualify as an interlocutory decision within the meaning of article 82(1)(d) of the Statute.¹⁴

⁸ Trial Chamber III Decision, ICC-01/05-01/08-3660-Red2, para. 13.

⁹ Presidency, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision referring a request arising under article 85 to Pre-Trial Chamber II, ICC-01/05-01/08-3662.

¹⁰ Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Mr Bemba’s claim for compensation and damages, ICC-01/05-01/08-3694 (‘Article 85 Decision’).

¹¹ See Article 85 Decision, ICC-01/05-01/08-3694, para. 53.

¹² See Article 85 Decision, ICC-01/05-01/08-3694, para. 64.

¹³ Defence for Mr Bemba, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Request for leave to appeal the ‘Decision on Mr Bemba’s claim for compensation and damages’, 25 May 2020, ICC-01/05-01/08-3695, para. 23.

¹⁴ Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the request or leave to appeal the ‘Decision on Mr Bemba’s claim for compensation and damages’, 1 October 2020, ICC-01/05-01/08-3697, para. 16.

6. On 30 October 2020, Mr Bemba filed the present Request before the Presidency, on an *ex parte* basis,¹⁵ asking the latter to designate a Pre-Trial Chamber pursuant to regulation 46(3) of the Regulations, to: (i) issue requests for assistance to the relevant authorities of States to discharge all remaining freezing, protective or charging orders over Mr Bemba's assets and properties that are still in place; and (ii) adjudicate a claim for damages resulting from the freezing of Mr Bemba's assets, and their alleged consequent deterioration, depreciation and destruction.¹⁶
7. On 16 November 2020, the Prosecution filed a response to the Request, submitting that it should be dismissed (the 'Prosecution Response').¹⁷
8. On 19 November 2020, Mr Bemba filed a request to strike the Prosecution Response from the record, submitting that the Office of the Prosecutor did not have standing to respond the Request, which was filed *ex parte* and is unrelated to the former parties and participants in the *Bemba* case.¹⁸

II. THE REQUEST

9. The Request seeks to bring to an end the case against Mr Bemba by seeking assistance in respect of his property and assets in the Republic of Portugal and the Kingdom of Belgium (the 'States') which remain frozen.¹⁹ He explains that although the freezing orders over his property ceased to have legal effect as of his acquittal,²⁰ he has been unsuccessful in his attempts to regain access to his property.²¹ Mr Bemba alleges that in addition to his assets continuing to be unlawfully frozen, they are now being corruptly misused and his properties illegally occupied.²²
10. In respect of the freezing orders, the Request submits that the States will not unfreeze the assets without a request from the Court, Trial Chamber III has considered that the

¹⁵ As noted at footnote 1, a public redacted version of the Request was filed on 3 November 2020.

¹⁶ Request, ICC-01/05-01/08-3698-Red, para. 44.

¹⁷ Office of the Prosecutor, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's response to Mr Bemba's request to designate a Pre-Trial Chamber pursuant to Regulation 46(3) of the Regulations of the Court, ICC-01/05-01/08-3699, para. 20.

¹⁸ Defence for Mr Bemba, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Mr. Bemba's request to strike the 'Prosecution's response to Mr Bemba's request to designate a Pre-Trial Chamber pursuant to Regulation 46(3) of the Regulations of the Court', ICC-01/05-01/08-3700, paras 1, 4.

¹⁹ Request, ICC-01/05-01/08-3698-Red, para. 1.

²⁰ Request, ICC-01/05-01/08-3698-Red, para. 3.

²¹ Request, ICC-01/05-01/08-3698-Red, para. 4.

²² Request, ICC-01/05-01/08-3698-Red, para. 6.

unfreezing of assets is a matter for States and not the Court, and the States in question have refused to communicate directly with Mr Bemba, requiring all correspondence to go through the Court.²³ In order to address this *impasse*, the Request submits that the Presidency should assign a Chamber with an express mandate to order appropriate requests for assistance to the States to stem the ongoing financial loss being caused to him.²⁴ He further submits that there is no ongoing lawful basis for his assets to continue to be frozen, for example, in respect to his indebtedness to the Court for his outstanding legal fees.²⁵

11. In respect of his compensation claim, Mr Bemba submits that the Article 85 Decision's determination that Pre-Trial Chamber II did not have jurisdiction to determine his request for damages does not extinguish his right to obtain compensation for damages to his assets.²⁶ He submits that he is not seeking to revisit that Decision but considers that, in his view, the Article 85 Decision indicated only that Pre-Trial Chamber II did not have jurisdiction, not that the Court lacked jurisdiction to adjudicate on the matter.²⁷ Elsewhere, in recalling the procedural history, the Request submits that Pre-Trial Chamber II failed to indicate that there was a jurisdictional question at issue or seek clarification in this regard, prior to determining itself to lack jurisdiction in respect of the request for damages.²⁸ Mr Bemba submits that, as a matter of internationally recognised human rights he cannot be arbitrarily deprived of his right to property nor of his right to remedy in respect of damage caused to his property and assets.²⁹ Acknowledging that the right to financial compensation to remedy a violation of human rights is not directly addressed in the Court's applicable legal framework, he submits that the Court has a power to provide an effective remedy, referring in this regard to both the Court's inherent powers and its obligation to respect generally accepted human rights norms.³⁰

12. In respect of both the request for the issuing of requests of assistance to States to facilitate the discharge of all remaining freezing, protective or charging orders over Mr Bemba's assets and the request for a Chamber to adjudicate damages arising from the freezing of his assets, the Request relies upon regulation 46(3) of the Regulations

²³ Request, ICC-01/05-01/08-3698-Red, paras 5, 28, 30.

²⁴ Request, ICC-01/05-01/08-3698-Red, paras 31-32.

²⁵ Request, ICC-01/05-01/08-3698-Red, paras 33-34.

²⁶ Request, ICC-01/05-01/08-3698-Red, para. 36.

²⁷ Request, ICC-01/05-01/08-3698-Red, para. 37.

²⁸ Request, ICC-01/05-01/08-3698-Red, paras 21-23.

²⁹ Request, ICC-01/05-01/08-3698-Red, paras 38-40.

³⁰ Request, ICC-01/05-01/08-3698-Red, para. 41.

as granting the Presidency the authority to appoint a Pre-Trial Chamber to consider the matter.³¹

III. DETERMINATION OF THE PRESIDENCY

1. Preliminary procedural matters

a. Admissibility of Prosecution Response

13. Mr Bemba submits that the Prosecution Response to his Request should be struck from the record, arguing that it is unrelated to the former parties and participants of the *Bemba* case and averring that the Prosecution could only respond if invited by the Presidency.³² Mr Bemba submits that as the case against him is closed, the Prosecution no longer has any standing in respect of the final matter of Mr Bemba's access to his property.³³
14. Whilst not expressly stated in the Prosecution Response, it is presumably a response in accordance with regulation 24(1) of the Regulations which provides that the 'Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber'.
15. The Presidency considers that it was reasonable on the part of the Prosecution to consider that the ordinary rule established in regulation 24(1) of the Regulations applied in respect of the Request. The Request was filed in the case record of ICC-01/05-01/08 and made available to the Prosecution through the filing of a public redacted version. Further, the Request purports to be making a request pursuant to regulation 46(3) of the Regulations, thus appearing to fit the definition of a 'document filed by any participant in the case in accordance with ... these Regulations'. On the other hand, the Presidency notes that the subject-matter no longer directly concerns the Office of the Prosecutor and the filing was clearly made on an *ex parte* basis.

³¹ Request, ICC-01/05-01/08-3698-Red, paras 2, 44.

³² Defence for Mr Bemba, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Mr. Bemba's request to strike the 'Prosecution's response to Mr Bemba's request to designate a Pre-Trial Chamber pursuant to Regulation 46(3) of the Regulations of the Court', 19 November 2020, ICC-01/05-01/08-3700, para. 1.

³³ *Ibid.*, paras 2-3.

16. On balance, the Presidency considers that it was not unreasonable for the Prosecution to have considered that the ordinary right to reply was applicable and it sees no reason to consider striking the Prosecution Response from the case record. Nonetheless, noting that there is ambiguity in this regard, the Presidency considers it appropriate to exercise its discretion to not rely on the Prosecution Response.

b. Notification of States

17. The Request and all subsequent filings have included three States on the notification page of the filing: the Competent authorities of the Kingdom of Belgium, the Competent authorities of the Portuguese Republic and the Competent authorities of the Democratic Republic of the Congo.

18. On 4 November 2020, the Registry reached out to the Presidency via email seeking instructions as to whether these authorities should be formally notified of the Request.

19. The Presidency notes that in connection with the Article 85 Decision, an issue was similarly raised and Pre-Trial Chamber II clarified that ‘none of the Three States was to be regarded as a participant in the proceedings related to the Claim; and ... the Registry was not subject to the obligation of notification of either the Claim or any of the relevant documents pertaining thereto’.³⁴ In that context, Pre-Trial Chamber II also noted information provided by the Registry that regulation 31(1) of the Regulations provides that it is *participants in the relevant proceedings* who are to be notified of documents by the Registry, noting also that the notification of the three States would also require the translation of large numbers of related documents (more than 600 pages) into French and Portuguese.³⁵

20. The Presidency notes that the Request expressly states that it pertains only to an issue concerning his property and assets located in Portugal and Belgium and refers only to these two States.³⁶ Neither the Request nor its annexes refer to any ongoing issues in respect of Mr Bemba’s assets in the Democratic Republic of the Congo. Accordingly,

³⁴ Article 85 Decision, ICC-01/05-01/08-3694, para. 9 *referring to* 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.

³⁵ *Ibid.*

³⁶ Request, ICC-01/05-01/08-3698-Red, para. 1.

it is evident that the inclusion of the latter on the notification page of the Request and subsequent filings may be disregarded.

21. In respect of Portugal and Belgium, the Presidency adopts the same approach as that taken by Pre-Trial Chamber II. These States are not participants in the proceedings before the Presidency, the scope of which is limited to the determination of whether the Request can be granted. The Presidency hereby clarifies that there is no requirement under regulation 31(1) of the Regulations, for the Registry to notify Portugal and Belgium of the Request and subsequent filings. Nonetheless, noting the Registry's responsibilities in respect of ongoing cooperation with all States Parties and its functions as a channel of communication, the Presidency has no concern if the Registry exercises its discretion to informally transmit copies of any public redacted documents related to the present Decision to any State, as it considers relevant.

2. *Merits*

22. Regulation 46(3) of the Regulations, relied upon as the legal basis of the Request, provides, in full, that:

Any matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber in accordance with sub-regulation 2, shall be directed by the President of the Pre-Trial Division to a Pre-Trial Chamber according to a roster established by the President of that Division.

23. Far from granting a power to the Presidency to assign matters, request or information to a Pre-Trial Chamber, this power is expressly granted to the *President of the Pre-Trial Division*. This is because, when read contextually, regulation 46(3), being part of section 2 of chapter 3 of the Regulations concerning 'Pre-trial' is clearly connected to matters, requests or information arising in connection to pre-trial functions and proceedings. The Request provides no explanation as to why it addresses the Presidency seeking the exercise of a power which is clearly not vested in it. The legal authority relied upon in the Request provides no legal basis for the Presidency to designate a Pre-Trial Chamber, regardless of the purpose of such Chamber.

24. Nonetheless, the Presidency considers it useful to further elucidate the scope of its powers to constitute chambers and/or assign matters thereto. The powers of the Presidency to constitute Chambers are expressly regulated in the Court's legal framework. Regulation 46(1) of the Regulations grants the Presidency the power to constitute permanent Pre-Trial Chambers, with regulation 46(2) giving it the capacity to assign situations to Pre-Trial Chambers. Article 61(11) of the Statute authorises the Presidency to constitute Trial Chambers, following the confirmation of charges.³⁷ The Presidency is also specifically vested the power to designate a Chamber to hear requests for compensation on the grounds indicated in article 85 of the Statute, pursuant to rule 173(1) of the Rules. In accordance with rule 60 of the Rules, the Presidency may receive challenges to the jurisdiction of the Court or the admissibility of a case, if made after the confirmation of charges but before the designation of a Trial Chamber, in which case it will refer such challenge to the Trial Chamber when constituted. The Presidency may also constitute a panel of one judge at trial level and a panel of three judges at appeals level in respect of offences defined in article 70 of the Statute, pursuant to regulation 66 *bis* of the Regulations. Beyond these express powers, the Presidency does not have capacity to constitute Chambers or assign matters to a Chamber. Further, it warrants noting that the above express powers are administrative functions whereby the Presidency constitutes or designates a Chamber to perform a function which exists expressly in the Court's legal texts.
25. The Presidency further notes that the Request's rather cursory reference to inherent powers is made in the context of the issue of whether the Court's constituent documents provide for financial compensation to remedy an alleged human rights violation,³⁸ i.e. it goes to the merits of whether the Court has jurisdiction to determine Mr Bemba's claim for damages. The Request does not argue that the Presidency bears any inherent power to constitute Chambers beyond those powers granted to it in the Court's legal framework.
26. In sum, the Presidency clearly has no power under regulation 46(3) of the Regulations, nor elsewhere in the applicable legal texts, to grant the relief requested.
27. Although the above disposes of the Request, the Presidency briefly notes that its lack of capacity to appoint a Chamber has not denied Mr Bemba the opportunity for judicial determination of the issues at the heart of the Request. The first issue in the

³⁷ See also rule 130 of the Rules.

³⁸ Request, ICC-01/05-01/08-3698-Red, para. 41.

Request, namely whether there is a need for specific requests for assistance to States from the Court to facilitate the unfreezing of assets, has already been determined in the Trial Chamber III Decision, which clearly stated that Mr Bemba's acquittal had the legal effect that States are no longer required to comply with any freezing measures and, therefore, it is for 'States to determine what actions to take under domestic law as a result of the conclusion of its obligation to assist the Court through the freezing of assets',³⁹ noting elsewhere that 'the lifting of coercive measures, including the unfreezing of assets, must be done under domestic law'.⁴⁰ [REDACTED].⁴¹ Trial Chamber III has been fully seized of the matters set out in the first part of the Request. Being dissatisfied with the decisions of that Chamber, it is not open to Mr Bemba to now seek to raise matters before an alternative Chamber in the hope that a different Chamber may understand its jurisdiction differently. Similarly, in respect of the second aspect of the Request, Mr Bemba's capacity to seek compensation for damages to his assets, the Presidency notes that Mr Bemba already elected to argue his capacity to seek compensation from the Court for damages to his assets before Pre-Trial Chamber II in the context of the proceedings under article 85(3) of the Statute. In such context, Pre-Trial Chamber II determined, *inter alia*, that 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'.⁴² The Presidency observes that while Mr Bemba sought leave to appeal the Article 85 Decision, he did not do so in respect of the Trial Chamber III Decision. A request for the designation of a new chamber cannot be used to circumvent either the outcome of a leave to appeal decision nor the failure to pursue such leave to appeal in the first place.

The Presidency *hereby* dismisses the Request.

³⁹ Trial Chamber III Decision, ICC-01/05-01/08-3660-Red2, para. 13.

⁴⁰ Trial Chamber III Decision, ICC-01/05-01/08-3660-Red2, para. 12.

⁴¹ [REDACTED].

⁴² Article 85 Decision, ICC-01/05-01/08-3694, para. 58.

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

A handwritten signature in black ink, consisting of a long horizontal line on the left and a series of vertical and diagonal strokes on the right, forming a stylized name.

Judge Chile Eboe-Osuji
President

Dated this 9 December 2020

At The Hague, The Netherlands