

1 International Criminal Court

2 Pre-Trial Chamber II

3 Situation: Central African Republic

4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo - ICC-01/05-01/08

5 Presiding Judge Antoine Kesia-Mbe Mindua, Judge Tomoko Akane and Judge

6 Rosario Salvatore Aitala

7 Hearing on Mr Bemba's claim for compensation - Courtroom 3

8 Thursday, 9 May 2019

9 (The hearing starts in open session at 9.30 a.m.)

10 THE COURT USHER: [9:30:12] All rise.

11 The International Criminal Court is now in session.

12 Please be seated.

13 PRESIDING JUDGE MINDUA: [9:30:34] (Interpretation) Good morning to all.

14 I would like to welcome you. And without further ado, I would like to

15 address the court officer and request him to call the case, please.

16 Court officer.

17 THE COURT OFFICER: [9:31:34] Good morning, Mr President,

18 your Honours.

19 The situation in the Central African Republic, in the case of The Prosecutor

20 versus Jean-Pierre Bemba Gombo, case number ICC-01/05-01/08.

21 And for the record, we're in open session.

22 PRESIDING JUDGE MINDUA: [9:31:53] (Interpretation) Thank you very

23 much indeed, court officer.

24 I would like now to request that the parties introduce themselves, starting with

25 the Office of the Prosecutor, please.

1 But before doing so, I would like to request that all those present speak slowly
2 and that they observe pauses before answering any questions, in order to
3 enable the interpreters to do their job.

4 May I now request the representatives of the Office of the Prosecutor to please
5 introduce themselves and introduce the members of their team. Thank you.

6 MR GUARIGLIA: [9:32:41] Good morning, Mr President, your Honours.

7 Fabricio Guariglia, director of Prosecutions. And appearing with me today
8 are Ms Helen Brady, senior appeals counsel; Ms Priya Narayanan, appeals
9 counsel; Ms Nivedha Thiru, appeals counsel; and Ms Sylvie Vidinha is our case
10 manager. Thank you.

11 PRESIDING JUDGE MINDUA: [9:32:57] (Interpretation) Thank you very
12 much, Mr Prosecutor.

13 I am now going to turn to counsel for the defence of Mr Bemba. You will
14 have noted that according with your acknowledgment, I am not saying that
15 you are Defence counsel, because he has been acquitted. I am addressing you
16 as counsel for Mr Jean-Pierre Bemba. Could I please ask you to introduce
17 your team. Thank you.

18 MR HAYNES: [9:33:35] Well, good morning, your Honour, and good
19 morning to some familiar and friendly faces in the courtroom. Of course your
20 faces are not familiar to us. This is the first time we have had the honour and
21 the privilege to appear in front of you, and may we say how welcome
22 a privilege it is, and we are grateful to you for affording us this opportunity.
23 My name is Peter Haynes. Sitting to my right is Kate Gibson, my co-counsel;
24 and behind me, Cécile Lecolle, our case manager.

25 You will, of course, have noted that our client Mr Bemba is not present. He

1 doesn't of course have the happiest memories of his time here in The Hague or
2 Scheveningen and prefers not to attend, but you can be assured that we act
3 upon his instructions at all times and we are in regular contact with him.

4 PRESIDING JUDGE MINDUA: [9:34:47] (Interpretation) Thank you very
5 much indeed, Mr Haynes.

6 I would like to introduce myself and my colleagues. My name is Antoine
7 Kesia-Mbe Mindua and I am the Presiding Judge over Pre-Trial Chamber II of
8 the Court. On my right, Judge Tomoko Akane and on my left, Judge Rosario
9 Salvatore Aitala.

10 First of all, I think it would be useful to clarify the nature of this hearing. This
11 hearing is being held in the context of the proceedings for reparations that
12 Mr Bemba has submitted on 7 March 2019 to this very Chamber on the basis of
13 Article 85 of the Rome Statute.

14 On 14 March 2019, the Chamber decided to hold this hearing with a view to
15 enabling the parties to orally present their observations on the matter of
16 reparations requested. I would like to recall that the parties are invited not to
17 merely repeat the contents of the submissions previously filed. Personally, I
18 think that the filings are excellent, both in terms of content and substance.

19 I would like to give each of the parties the floor, requesting that you remain
20 clear and concise in what you have to say. And your allocated time for
21 speaking should not exceed 30 minutes for such allocated speaking time to be
22 fairly distributed and with a view to leaving some time to one side for possible
23 questions and answers.

24 Counsel Haynes, Mr Haynes, you now have the floor.

25 MR HAYNES: [9:37:11] Your Honour, thank you very much.

1 And as a matter of courtesy, I notice also that the representatives of the
2 Registry are here in court. In due course I'm sure they will introduce
3 themselves.

4 This is a case in which you are going to be sailing into uncharted waters. This
5 is new territory. Our analysis is that Mr Bemba may very well be the first and
6 only person whose assets have been frozen by order of an international
7 criminal tribunal or court. He is certainly the only person whose assets have
8 been frozen who was subsequently acquitted. So, therefore, your Honours,
9 you will be making the law about this in this case. There is not much in the
10 jurisprudence of this Court or other tribunals to assist you. You will have
11 regard, of course, to what the judges thought in Ngudjolo, but that is merely
12 informative; it's not binding upon you. And given the vast discrepancies
13 between the facts of the cases, it's barely persuasive.

14 More stridently, I say that the views of the minority of the Appeals Chamber
15 who acquitted Mr Bemba are completely irrelevant, as are the views of the
16 judges of the Trial Chamber who convicted him at first instance.

17 The starting point factually for you is that Mr Bemba was wrongly convicted.
18 Now I'm not about to submit that every person whose conviction is reversed
19 on appeal is the victim of a miscarriage of justice, but this was an exceptional
20 case, and in this case Mr Bemba's wrongful conviction, we submit, does equate
21 to a miscarriage of justice.

22 The manner of his conviction, both procedurally and in terms of the initial
23 judgment passed upon him, was stark and shocking. The language used by
24 the three seasoned and experienced judges who overturned his conviction is
25 unprecedented. They were quite simply flabbergasted by what they saw in

1 the judgment: The manipulation of the evidence and the failure properly to
2 apply central and essential principles, such as the burden and standard of
3 proof. They were explicit; they had to intervene to prevent a miscarriage of
4 justice. Theirs are the only relevant views for you to consider, in our
5 submission. To do otherwise would be to fail to respect a verdict of this
6 Court.

7 Now an acquittal on appeal does not prevent a finding that there has been
8 a miscarriage of justice. The reversal of the conviction does no more than
9 prevent the miscarriage of justice from continuing further.

10 Touching on what you have already said, on Monday evening we received
11 something like 80 pages of filings from the parties opposite. We've had
12 a limited time to digest them and we anticipate everybody is going to want to
13 say a few things today. I am going to limit myself to 20 or 30 minutes of your
14 time and I can't deal in that time with every submission made by the Office of
15 the Prosecutor and the Registry. You have already received our request for
16 leave to reply in writing and I hope you will consider it on its merits
17 favourably.

18 Today I'm just going to outline a few bullet points for you.

19 Now let's get real. It's 11 years since Mr Bemba's arrest and almost a year
20 since his release. Obviously being at liberty makes a substantial difference to
21 his quality of life, but in terms of his access to his property, really not very
22 much has altered. He has no bank account to which he has access. He
23 cannot withdraw cash from the bank at the cashpoint machine, nor amazingly
24 can his wife. He can't open a bank account. His airfreight business has been
25 destroyed. His homes in the Democratic Republic of Congo are occupied by

1 squatters and have been ransacked. His motor vehicles are quite literally
2 being eaten by rats in a compound in Lisbon. And his Boeing 727 aeroplane
3 sits on the tarmac at Faro airport in precisely the same position from which he
4 disembarked it in 2007.

5 Now how did this situation arise? Well, in May of 2008, the Office of the
6 Prosecutor seized Trial Chamber III -- sorry, Pre-Trial Chamber III with
7 applications for RFAs in three States. Those requests are apparently so secret
8 that even to this day we, Mr Bemba's lawyers, are not allowed to see them.
9 But we can work out in what terms they were cast, and there are two features
10 of those requests that are of particular note.

11 Firstly, they were indiscriminate. They sought the tracing, seizure and
12 freezing of absolutely every asset in each jurisdiction. And secondly, they did
13 not only target Mr Bemba, they also targeted members of his family, including
14 his wife and his children.

15 Now in 2008, the age range of Jean-Pierre Bemba's children was 10 to 17.

16 Mr Moreno-Ocampo and his staff would have been well aware of the ages and
17 identities of Mr Bemba's children. What was the possible purpose of asking
18 a Court to seize and freeze the assets of a 10-year-old boy or two twin
19 12-year-old girls?

20 It cannot possibly have had anything to do with securing assets to provide
21 reparations to victims in the future. It can only have been to cause hurt,
22 distress and embarrassment. Seeking to target the property of children in
23 these applications was, in our submission, spiteful and malicious.

24 Now, we disagree with the Prosecution that proof of malice or *mala fides* or
25 malfeasance is a necessary prerequisite for a successful claim under Article 85

1 of the Statute. There were some very clever lawyers who drafted the Rome
2 Statute. They were well aware of phrases like *mala fides*, malfeasance and
3 malicious prosecution, and if they had wanted to include them in Article 85,
4 they would have done and they didn't. And it would be wrong for you to
5 import notions such as that into a construction of that article now.
6 But if you wanted evidence of malice, there it is at the very inception of these
7 proceedings and it has continued right through to this day. You will find it in
8 the Prosecutor's statement of June 13, 2018, when the last thing on earth she
9 could bring herself to do was express regret for the fact that Mr Bemba had
10 spent 10 years in custody, which she should have done. You will find it in the
11 fact that Mr Bemba's wife still cannot access her property or bank accounts and
12 that nobody in this room will lift a finger to help her do that.
13 Malice and bad faith suffused this Prosecution from start to finish; a malice
14 borne of personal and institutionalised enmity towards Mr Bemba and his
15 family. We didn't raise it in our initial filing because we don't believe it's part
16 of the necessary means of proof, but now that it has been raised over there, we
17 answer it.
18 These aren't the only examples. The greatest of them all has probably slipped
19 under the radar and that's the planes at N'djili airport in Kinshasa. The
20 Prosecution knew about them. Of course it did. It has all the financial
21 investigative tools, as the Registry has submitted. It worked hand in hand
22 with authorities in the DRC throughout this case. And let's be honest,
23 Mr Bemba's sources of wealth and income were hardly secret. The Registry
24 knew about them. How could it not? It was, as it submits, in regular contact
25 with the States concerning the freezing of property. This wasn't the first

1 Congolese accused before the International Criminal Court.

2 So what happened to the six aeroplanes at N'djili airport that belonged to
3 Mr Bemba? Shortly after the assurance of the RFAs, they were moved to one
4 side of the airfield on the instructions of representatives of MONUSCO, the
5 peacekeeping force in the Congo. And a few days later, in the face of
6 objection by Mr Bemba's lawyer, they were simply destroyed. Cut to pieces.
7 That, at least, is how I translate the word "*découpés*" in the relevant witness
8 statement.

9 Now, how was that ever going to help the victims? How was that going to
10 protect a fund to provide reparations? Assets valued at €33 million, just cut
11 up. Mr Bemba's principal income stream turned off.

12 Now, had this all been a terrible mistake, you might have expected
13 a representative of the Office of the Prosecutor or the Registry to communicate
14 it to Mr Bemba's lawyers or to him directly even, to go to him and say,
15 "Something awful has happened. The authorities in the Congo
16 misunderstood why we were asking them to seize and freeze your assets."
17 But nothing of that sort happened. Nobody went to Mr Bemba and said,
18 "You've just lost your whole income stream. €33 million worth of planes have
19 just been cut to pieces." No, they didn't do that because, as we say in English,
20 the proof of the pudding is in the eating, which is a roundabout way of saying
21 people intend the consequences of their actions.

22 The cutting up of Mr Bemba's planes was not a mistake. This was about
23 cutting him down to size. This was about saying, "We've got you now and
24 we can do whatever we want to you and your family."

25 Now the Registry purport to deal with this incident in their response. They

1 say that this was not done by the Court. Cited: Redacted. Redacted.
2 Redacted. Redacted. Well, sorry, but no. This is a system of public and
3 open justice. Either that is disclosed and we get to make submissions about it,
4 or you ignore it, whatever it is.
5 The second Registry submission that Mr Bemba could have and should have
6 applied to discharge the freezing orders, once he became suspicious that they
7 were being mismanaged, is equally naive. What would have been the
8 possible point of that? He could have gone before Judge Steiner and said,
9 "Can you please give me back the cut up pieces of my aeroplanes."
10 Now while I'm there, I want to say something about burdens and standards of
11 proof and evidence. Mr Bemba brings this claim and of course he therefore
12 bears the burden of proving it, but he doesn't have to convince you of anything.
13 This is a civil claim. The appropriate burden of proof is on a balance of
14 probabilities and he proves that case on evidence, and he's gone to the trouble
15 of providing you with some: Three witness statements, an expert's report,
16 and various exhibits.
17 We filed this claim in March and everybody asked for a little extra time and
18 you granted it so that they could deal, not just with the legal issues, but the
19 factual issues that were raised in this case. Two months is perfectly enough
20 time to deal with factual issues that have been raised, even enough time to
21 garner, collate and submit some evidence if you want to contradict something
22 Mr Bemba is asserting. But nobody has chosen to do that. No investigator,
23 Portuguese police officer, representative of MONUSCO or the like has been
24 brought before you in the form of a witness statement to contradict anything
25 that Mr Bemba's evidence lays out for you.

1 You have no reason or basis to disbelieve any of the claimant's evidence and
2 you are therefore bound, in our submission, to make findings in line with the
3 evidence that Mr Bemba has provided you with.

4 Pleadings are of some use in that they crystalize the issues that are live in the
5 case, and we submit to you that any sensible analysis of the pleadings or filings
6 in this case reveal that there isn't much in dispute.

7 These are the things that are not in dispute:

8 One, Mr Bemba's assets were decimated. I'm not concerned with the financial
9 loss; they are destroyed, they were decimated, we all agree with that.

10 Two, the destruction of the property resulted from the requests for assistance
11 issued by the ICC.

12 Three, the Pre-Trial Chamber issued the requests for assistance at the request of
13 the Prosecution.

14 Four, the requests for assistance were framed in the broadest of terms.

15 Five, the destruction of somebody's personal property is a breach of
16 a fundamental human right.

17 Six, the ICC is an international institution that has a legal personality and it is
18 not immune from civil claims.

19 And seven, the ICC has the power to provide persons affected by its decisions
20 with a remedy.

21 None of that is in dispute. Plenty of time to dispute it if they wanted to.

22 Indeed, leaving aside the issue of whether Mr Bemba has established
23 a miscarriage of justice, the only thing that is really in dispute in this case, the
24 only moving parts is how much financial loss was caused to Mr Bemba and
25 who and in what proportion should be obliged to repay him for it.

1 Now I want to say something about freezing orders because they really are at
2 the heart of this case and I want to preface it all by perhaps giving a little
3 evidence.

4 You see, I have been a lawyer for 35 years. I have practiced in civil courts and
5 criminal courts, domestic courts and international courts, and I cannot
6 underline for you sufficiently how serious a freezing order is, how seriously
7 courts who are being asked to make them regard those applications, and how
8 serious the impact of those orders are upon those who are affected by them. It
9 breaches their fundamental human right to property; it stops them living their
10 lives; it stops them acting commercially.

11 It's not by coincidence that freezing orders are referred to as one of the law's
12 nuclear weapons. Nor is it a coincidence that despite having had many
13 wealthy accused before it, the ICTY never froze anybody's assets, the ICTR
14 never froze anybody's assets, and the Special Court for Sierra Leone, having the
15 fabulously wealthy Charles Taylor before it, didn't freeze his assets either.

16 Those courts knew that these are not orders to be played with and that they
17 had the self-effacement to acknowledge their own shortcomings and ability to
18 manage properly such orders.

19 Now, I hate to say this, but I sense in the submissions of the Prosecution and
20 the Registry a lack of apprehension of that fact; that they don't realise how
21 serious these orders are and they don't realise how serious what has been done
22 is in this case.

23 Now we have set out before you a compendious review of the domestic and
24 international practice in relation to freezing orders and we did that not because
25 we suggest that the ICC is subject to European Union regulations, of course it

1 isn't, but we did that to illustrate that the development of the law on freezing
2 orders is consistent worldwide. And you can derive three principles from it,
3 we submit.

4 One, when you take possession of somebody else's property, you assume
5 responsibility to look after it and that responsibility is multifarious and serious.

6 Two, you cannot delegate that responsibility to a third party, even if they effect
7 the seizure or freeze it, whether they are within your jurisdiction or another.

8 And three, if it all goes wrong, or your action is misfounded, you, as the person
9 who asked for the order, have to indemnify the person whose assets were
10 frozen.

11 That's why we set those things out. And the ICC as an institution with a legal
12 personality who asked for those orders is in no different position to anybody
13 else. This all went badly wrong. The temerity of the Registry's submissions
14 in this regard really beggar belief. They suggest that it was for Mr Bemba,
15 appreciating that his assets were being mismanaged, to go before
16 Trial Chamber III and ask them to lift the freezing orders.

17 Well, let's leave aside for one minute the fantastic possibility that Judge Steiner
18 would ever have lifted a freezing order in relation to Mr Bemba's property, but
19 place that in the context of accepted international protocol. That is to put it
20 quite the wrong way around. And the real temerity of that submission is that
21 within a very few years of the making of these freezing orders, the Registry
22 was painfully aware of how badly wrong it was all going. They were
23 submitting internal reports, saying "There will be no money left for reparations.
24 We will not be able to advance funds to Mr Bemba's lawyers." Where, we say,
25 was their application to Trial Chamber III to discharge the freezing orders?

1 Where were they accepting the responsibility of going before the Court and
2 saying, "Before this goes completely belly-up, we need to review what we're
3 doing."

4 Now, one last thing before I conclude, and that is another area in which we
5 suggest our submissions have been misrepresented or maybe just
6 misunderstood, Mr Bemba's claims in relation to his destroyed property are
7 pleaded in the alternative. The claim for the destruction of his property does
8 not depend upon a finding that there has been a miscarriage of justice. That
9 claim could well succeed or could well have succeeded even in the event that
10 his trial had been perfectly regular or in the event his conviction had been
11 upheld on appeal, because it depends upon the actions of the Court in failing to
12 look after the property it seized. These claims were simply amalgamated as
13 a means of expedience. Rather than wait for whatever period of time to amass
14 the evidence in relation to a claim for his destroyed property, he has compiled
15 it in with his Article 85 claim so that the matter is expeditiously before the same
16 Chamber.

17 Two things to conclude:

18 One, I want to say a few words in defence of Mr Bemba's position in bringing
19 this claim. The commentary surrounding this case, in our view, has been
20 unfairly critical of Mr Bemba. People suggest that it's an act of revenge or that
21 he's trying to bankrupt the Court or that his claim is, in some way,
22 disproportionate. But that ignores the reality. This happened. His
23 property has been destroyed. It was a result of the requests for assistance
24 issued by this Court. He would have preferred to walk out of prison on
25 June 8 last year, and been handed the reins to a thriving airfreight business and

1 been handed the keys to his houses and told where he could pick his cars up,
2 and be given a wallet full of credit cards that he could have gone out and spent
3 in a restaurant. He still can't do any of those things. And the effect of his
4 claim is only to ask you to put him back in the situation he was in May 2008.
5 It is no more and no less than that.

6 If you do award him any damages for his incarceration, he will give that to
7 victims in the Central African Republic.

8 Now, as you know, we would have preferred to come and talk to you about
9 this case really when all the pleadings were closed. We would have preferred,
10 and I don't think we are necessarily controversial in this, that you received
11 some input from the States concerned. But here we are. We are talking to
12 you really midway through the filings in the case. So we want to make some
13 concrete suggestions as to the road map forward.

14 Don't be under an illusion that a finding that this claim failed because Article
15 85 has not been satisfied will be the end of anything. It won't. And don't be
16 under any illusion that a finding that the States and only the States are
17 responsible for the losses occasioned to Mr Bemba will bring an end to
18 anything. It won't. Indeed such a finding would be scandalous and, in our
19 view, contrary to the rules of natural justice.

20 Mr Bemba's losses are increasing daily.

21 Now what usually happens - and again forgive me if I'm trespassing into the
22 area of evidence in cases or claims of this sort - is that at about this stage,
23 a court would refer the matter to what is generally called ADR, alternate
24 dispute resolution, and we are perfectly ready on Mr Bemba's behalf to engage
25 in that sort of exercise in any form, whether it's through referral of the matter

1 to some formal arbitration authority or by simply ordering the parties, which
2 you perfectly well can do, to sit around a table somewhere in this building.
3 That, we submit, would be a constructive and sensible way forward, leading to
4 an expeditious and practical resolution of the matters referred to herein.
5 I will finish where I started. This happened to Mr Bemba. Hopefully,
6 lessons have been learned and it won't happen again. But his situation needs
7 to be repaired and this sorry chapter of the Court's history needs to be closed.
8 Thank you very much.

9 PRESIDING JUDGE MINDUA: [10:06:36] (Interpretation) Thank you very
10 much, Mr Haynes, for your stellar presentation.

11 Now before I allow the Office of the Prosecutor to address the Court, I would
12 like to do one thing. Now I do see that there are six people in the courtroom
13 and usually the proceedings deal with, well, the two parties, the Defence and
14 Mr Bemba's team, and I also see a team of people from the Registry. Perhaps
15 the Registry would like to introduce the members of their team. I see
16 Mr Dubuisson, so I think I should allow Mr Dubuisson to now take the floor,
17 and if he could tell us who the other people are amongst his team members.

18 MR DUBUISSON: [10:07:49] (Interpretation) Thank you very much,
19 Mr President, your Honours. Indeed, with me today there is Marie Mathiaud,
20 who is a legal officer within the * Registry's legal office; Natalie Wagner; Vera
21 Wang sitting behind me, who is also a legal officer within the external relations
22 and co-operation office; and finally, Elisabeth Boulard-Smith, who is a legal
23 officer who specialises in co-operation with the States; and finally myself, Marc
24 Dubuisson, representing the Registrar, Mr Peter Lewis.

25 PRESIDING JUDGE MINDUA: [10:08:32] (Interpretation) Thank you very

1 much. So I can see that, yes, there are six of you all from the office of the
2 Registry.

3 I will now allow the Prosecution representatives to address the Court.

4 MR GUARIGLIA: [10:08:46] Thank you so much, your Honours. I will
5 make some introductory remarks and then my colleague, Ms Narayanan, will
6 address the main arguments advanced by Mr Bemba in his claim for
7 compensation.

8 Before I do that, your Honours, we received yesterday at 6 o'clock in the
9 evening Mr Bemba's request for a reply. We do oppose the request for a reply.
10 We think that this particular issue has been fully briefed. You have received
11 voluminous submissions from Mr Bemba as well as his opportunity to make
12 comprehensive arguments in this hearing. We will provide further reasons in
13 writing as to why we think that the case for a reply to be granted has not been
14 made out, but just for the purposes of the Chamber's knowledge, we will
15 oppose that particular request.

16 Your Honours, in relation to the claim, the Prosecutor's position, as you know
17 from our documents, is clear. Mr Bemba has not shown that he deserves to be
18 compensated by this Court. His request does not meet the high threshold
19 under Article 85(3) of the Statute; namely, a "grave and manifest miscarriage of
20 justice". In fact, Mr Bemba's claim falls manifestly short of the legal standard
21 and should accordingly be dismissed.

22 Let me first give you a brief recap of this case, which may contrast with the one
23 provided to you by Mr Haynes.

24 Mr Bemba was charged as a superior under Article 28 of the Statute with war
25 crimes and crimes against humanity. In 2009, the Pre-Trial Chamber

1 unanimously confirmed those charges, and in 2016, the Trial Chamber
2 unanimously convicted Mr Bemba and sentenced him. In 2008, 8 June to be
3 more precise, the Appeals Chamber, by majority, acquitted Mr Bemba of
4 crimes against humanity and war crimes. Two other judges of the
5 Appeals Chamber dissented and in a comprehensive opinion explained why
6 they would have upheld Mr Bemba's convictions on appeal. Notwithstanding
7 once he was acquitted, the outcome of this case against Mr Bemba was final.
8 But Mr Bemba's engagement with the Court doesn't finish there. There is, as
9 the Chamber is surely aware of, a second case. While Mr Bemba was detained
10 for the charges of crimes against humanity and war crimes, he was alleged and
11 found to have committed offences against the administration of justice,
12 together with his then leading counsel and other members of his Defence team.
13 In 2016, Trial Chamber VII convicted Mr Bemba of Article 70 offences, and in
14 2018, the Appeals Chamber in a different composition unanimously confirmed
15 his convictions for soliciting the giving of false testimony, Article 70(1)(a) of the
16 Statute, and for corrupting witnesses under Article 70(1)(c). Those
17 convictions are final, although Mr Bemba has launched a second sentencing
18 appeal in that case.
19 Your Honours, Mr Bemba has brought this compensation claim nine months
20 after he was acquitted in the main case. He asks to be compensated in the
21 sum of €68.6 million, an unprecedented amount, and suggests that this sum is
22 owed to him in several ways. You have heard Mr Haynes. I will still give
23 you our understanding of the different categories of claims that he has made.
24 Some of this money is allegedly owed to him for his detention, some as
25 aggravated damages, some as legal costs, and some in relation to purported

1 damage to his property, a particular area in which my colleague Mr Haynes
2 seems to have placed particular emphasis during the hearing.

3 But this discussion, which takes up almost half of the allocated 60 pages of the
4 request, is actually beside the point. It cannot avoid the central question at the
5 core of all compensation claims: Has Mr Bemba established a grave and
6 manifest miscarriage of justice in the sense of Article 85(3), such that he should
7 be compensated by this Court?

8 The answer, your Honours, is a resounding no. Mr Bemba has not met his
9 burden to show that he has suffered a grave and manifest miscarriage of justice.
10 That was already clear on his written submissions. That belated attempt
11 made in this hearing to suddenly present a *mala fides* case for compensation
12 doesn't change that.

13 If your Honours are convinced as we are that the conditions of Article 85 are
14 not met, then these proceedings can be brought to a swift end.

15 I have taken note of Mr Haynes' warnings that this will continue after that, and
16 of course Mr Bemba is free to resort to whatever remedy he considers
17 appropriate, but the fact is the Article 85 proceedings should be terminated,
18 will be closed and there will be no more legal recourse within the Court's legal
19 process for Mr Bemba.

20 Your Honours, compensation proceedings were always meant to be limited in
21 scope and exceptional in nature. Article 85 was carefully carved out when the
22 Rome Statute was negotiated. And to respect the compromise achieved in
23 Rome by very intelligent lawyers, indeed, certain fundamental principles must
24 continue to govern compensation proceedings before this Court.

25 First, compensation proceedings involve a two-step process. The applicant

1 must first convince a panel of judges whether the compensation Chamber, in
2 this case you, your Honours, or a previously seized Chamber, the
3 Trial Chamber or the Appeals Chamber in this case, of an Article 85 violation.
4 And he must be able to affirmatively point at the relevant parts of the record
5 that establish that violation. Further, your Honours, for a claim brought
6 under Article 85(3) to succeed, the applicant must show the existence of a grave
7 and manifest miscarriage of justice. Mr Bemba's claim fails at this first hurdle.
8 There are simply no such findings on the record, nor has he otherwise shown
9 that this Chamber should make those findings at this stage.

10 Second, and this is unique to Mr Bemba's claim, compensation proceedings are
11 not a second appeal. Yet, Mr Bemba repeats in his written submissions
12 several arguments that he has previously voiced unsuccessfully at trial, many
13 of these in a December 2014 abuse of process motion that was rejected. Those
14 arguments were raised again on appeal by Mr Bemba. The majority judges
15 simply did not address them. The dissenting judges on appeal actively
16 rejected those arguments. The outcome of this case is final. Arguments from
17 those proceedings are no longer relevant. Principles of certainty, efficiency
18 require this approach. If not, when will this end?

19 Third, your Honours, these proceedings are Article 85 compensation
20 proceedings governed by the Rome Statute. They are not proceedings to
21 determine claims of negligence, tort, or otherwise entertain Mr Bemba's private
22 claims. These aspects of Mr Bemba's claim fall manifestly outside the scope of
23 Article 85 and therefore of these proceedings and outside the jurisdiction of
24 this Chamber. They must accordingly be dismissed.

25 Your Honours, my colleague, Ms Narayanan, will address now some of the key

1 arguments advanced by Mr Bemba and explain why his claim cannot succeed
2 on the basis of those arguments. Thank you.

3 PRESIDING JUDGE MINDUA: [10:17:15] (Interpretation) Thank you very
4 much, Mr Prosecutor.

5 MS NARAYANAN: [10:17:22] Good morning, your Honours. My name is
6 Priya Narayanan and in our remaining time I will address your Honours on
7 why Mr Bemba's claim falls so manifestly short of the Article 85 legal standard.
8 We have noted your instructions, your Honours, and so we will focus only on
9 those key issues which, in our view, demonstrate the limitations of Mr Bemba's
10 claim. And I can assure you that we will not take too long.

11 Our written submission is our comprehensive response to all the issues that
12 Mr Bemba has raised so far. And also, in light of Mr Bemba's submissions
13 today, we will invite you, your Honours, to look closely at the record in
14 making your decision.

15 But first, what is the legal standard for this compensation claim and has
16 Mr Bemba met it? As Mr Guariglia has just said, the legal threshold is a high
17 one and Mr Bemba has not met his burden.

18 But allow me to turn first to this legal standard under Article 85(3), a grave and
19 manifest miscarriage of justice. And, your Honours, this is not new territory
20 or uncharted waters. This is the Court's law. To explain this, I will make
21 four points.

22 First, obviously, your Honours, the terms "grave" and "manifest" qualify the
23 phrase "miscarriage of justice". So since Mr Bemba has chosen this provision
24 as the basis for his claim, he must show not only that he suffered a miscarriage
25 of justice, but that it is grave and manifest. So if one were to explain this

1 differently, and as the Oxford English Dictionary says, other words for grave
2 are "egregious" and "critical". And the term "manifest" means "obvious" or
3 "unmistakable".

4 Second, the Ngudjolo Chamber - and this is the correct standard in our
5 view - interpreted this provision to mean a certain and undeniable miscarriage
6 of justice; it should result in a clear violation of the applicant's fundamental
7 rights which caused serious harm. And I would like to refer you to the
8 Ngudjolo compensation decision, paragraph 45. And this interpretation also
9 follows the concerted choice of the drafters of the Rome Statute.

10 As you know, your Honours, Article 85(3) was borne out of a resolve not to
11 compensate a person when he or she is acquitted; but rather, compensation
12 under this article was limited to those exceptional circumstances that
13 a Chamber finds will warrant it.

14 The phrase "exceptional circumstances" underlines the drafters' intention to
15 limit liability in the case of acquittals. It does not imply just a wish that cases
16 of miscarriages of justice should be few and far between, as Mr Bemba seems to
17 suggest in his claim. So in other words, awarding compensation upon
18 acquittals was meant to be exceptional.

19 Third, again as the Ngudjolo Chamber has said, the Article 85(3) standard
20 should be viewed through the lens of *mala fide* actions, whether wrongful
21 prosecutions or similarly wrongful judicial decisions. And, your Honours,
22 with respect, the clever lawyers who drafted the Rome Statute meant exactly
23 that. Some of them sit beside me and there are of course others in this
24 institution.

25 So clearly, not every error or even one leading to an acquittal is enough, and

1 even if found, not every miscarriage of justice is a grave or manifest one.

2 Fourth, Article 85 as a statutory compensation scheme is exhaustive. It is
3 already consistent with international human rights standards. And in fact,
4 Article 85(3) goes beyond these standards.

5 Allow me now to turn to the specifics of Mr Bemba's claim under Article 85(3).

6 At the outset we note that Mr Bemba's submissions today on Article 85 are
7 somewhat different from his written claim, but nonetheless, we will address
8 those key issues in the claim.

9 In a nutshell, your Honours, Mr Bemba's claim is simply not what Article 85(3)
10 is meant for, for the following three reasons:

11 First, some of the issues that Mr Bemba brings are insignificant to Article 85.

12 Indeed, your Honours, some may even seem trivial. As his very first
13 allegation, his lead allegation at the heart of his complaint, he asks you to
14 consider his contention that several footnotes in the trial judgment are
15 inaccurate. Your Honours, these Article 85 proceedings before you have
16 a certain gravitas; they were designed to provide for genuine miscarriages of
17 justice, not what Mr Bemba perceives as anomalies in footnotes. But still, on
18 this point, Mr Bemba has never fully identified which 84 footnotes he takes
19 issue with among the over 2,000 footnotes in the trial judgment.

20 But that said, your Honours, we have looked more closely at the three
21 examples that Mr Bemba gives in his claim and we have compared them to the
22 official transcripts.

23 Two of the examples that Mr Bemba gives to fault the Trial Chamber are
24 actually the opposite. They confirm that the Trial Chamber was correct in its
25 references and that the error seems to lie with Mr Bemba. And the third

1 example is nothing more than a typo. It could happen to anyone, perhaps
2 even to Mr Bemba and his counsel.

3 Likewise, another aspect of his complaint focuses on his counsel's
4 disagreement with the Presiding Judge at trial some eight years ago that one
5 question asked of one witness in the course of trial was leading in nature.
6 Let alone a grave and manifest miscarriage of justice, your Honours, these
7 aspects do not even rise to the level of showing an error.

8 Second, Mr Bemba uses these compensation proceedings as a second appeal.
9 Many of the arguments he now raises, whether it relates to how the trial was
10 run or how witnesses were treated or how the Prosecution and the
11 Trial Chamber approached the Article 70 investigations into Mr Bemba's
12 criminal conduct, or even how the Legal Representative of Victims was
13 allowed to participate in the trial, these are all issues which the Trial Chamber
14 heard, comprehensively addressed and rejected.

15 Many of these issues were raised in Mr Bemba's December 2014 abuse of
16 process motion; they were heard and rejected. There are also arguments
17 which the dissenting judges on appeal heard, comprehensively addressed and
18 rejected.

19 Now the majority judges on appeal did not consider them necessary to
20 entertain, but on this point, we have the dissenting judges' views that the
21 majority's opinion was not necessarily inconsistent with their own. I would
22 like to refer you to the dissenting opinion to the Bemba appeal judgment,
23 paragraph 1.

24 And we must note, your Honours, at this point, that Article 74(5) provides that
25 all views, all judicial opinions are part of the judgment, whether they are in the

1 minority or in the majority.

2 But yet at this very late stage, Mr Bemba asks you to consider - or
3 reconsider - these arguments again for the third time in these proceedings.

4 This cannot be. Compensation proceedings are not proceedings of last resort,
5 which Mr Bemba or any other applicant tries when he has tried all else and
6 failed. Rather, the remedy is one of exceptional resort, limited only to those
7 deserving complaints which genuinely meet the Article 85 test. Mr Bemba's
8 claim is not one of those.

9 Third, Mr Bemba's allegations against the Prosecution are simply not founded.

10 At the outset we note that Mr Bemba brings only one allegation against the
11 Prosecution as an alleged miscarriage of justice under Article 85; namely,
12 whether the Prosecution investigated the Bemba case properly.

13 But on its face this complaint does not relate to how the investigations were
14 conducted. But rather, it relates to the change in the mode of liability, from
15 Article 25(3)(a) to Article 28, at confirmation. But, your Honours, this is
16 exactly what the confirmation process is for. Clearly, Mr Bemba himself did
17 not consider the issue of supposed investigative bias important enough before
18 these proceedings, he did not complain about it in his earlier abuse of process
19 motion or even on his appeal. So this is, in a sense, the first we are hearing of
20 this.

21 And as the Ngudjolo Chamber has already said, compensation proceedings are
22 not the place to scrutinize the Prosecution's investigations under a microscope
23 or, with the benefit of hindsight, in a rear-view mirror. Whatever the nature
24 of the Prosecution's investigation, it simply cannot assure a particular outcome.
25 The Prosecution investigates to the best of its ability; it has no obligation -- I

1 beg your pardon -- it has an obligation of means but not an obligation of result.
2 Moving on. Of the two other claims that Mr Bemba makes against the
3 Prosecution, namely that the losses he claims in relation to the plane can be
4 attributed to the Prosecution in some way, and regarding the Prosecutor's
5 public statement after the Bemba appeal judgment, your Honours will need to
6 consider them only if you were to first find that there has been a miscarriage of
7 justice. Otherwise, these arguments, which are made to support his claim for
8 consequential loss or damages, are irrelevant and may simply be dismissed.
9 In any event, neither claim can be made out.

10 On whether the Prosecution's conduct caused Mr Bemba to suffer losses with
11 respect to the plane parked in Faro airport in Portugal, your Honours, any
12 question of the Prosecution's conduct in this regard and whether it had the
13 keys and documents to the plane is beside the point. As the record shows,
14 Mr Bemba had the plane documents and he could access the plane keys
15 otherwise so as to move and sell his plane. We do not know why Mr Bemba
16 did not do so.

17 Answers to any questions on the keys, documents or even the value of the
18 plane all lie in the record before you, your Honours. And we trust that this
19 explains this issue.

20 All the other submissions that my learned friend has made this morning on the
21 RFAs and the freezing orders were not spelled out in the initial claim as any
22 sort of miscarriage of justice, so we will not address them at this stage.

23 On the Prosecutor's statement after the Bemba appeal judgment, this was
24 entirely appropriate, your Honours. As the Appeals Chamber and human
25 rights courts have said, the Prosecutor, unlike Mr Bemba, is not just a party to

1 the proceeding. She has a public information role. Reaching out to the
2 victims and the international community is a critical part of her mandate.
3 And what could be more critical, your Honours, than trying to explain the
4 outcome of the case to victims, including those who suffered sexual violence.
5 This is what the Prosecutor did. And the statement was entirely appropriate;
6 it accepted in clear terms that the outcome of the case was final and that she
7 would respect the appeal judgment. This, the Prosecutor, did.
8 The Court cannot also be responsible for social media commentary.
9 Commentators on all sides are independent and they comment in their own
10 right.
11 And finally, your Honours, you may wish to consider some of the unique
12 features of Mr Bemba's situation. He was acquitted in the main case and that
13 outcome is final, but while in detention he interfered with the integrity of this
14 Court's proceedings and that has been found beyond reasonable doubt. It
15 would run counter to the principles of justice to compensate Mr Bemba in these
16 circumstances. And, your Honours, you have the discretion to assess that.
17 Your Honours, there may be a day when this Court will have to address
18 a bona fide Article 85 claim and assess whether someone should be
19 compensated in the circumstances, but Mr Bemba's claim is not such a claim.
20 Mr Bemba's claim falls manifestly short of the legal standard. We would
21 respectfully request you to dismiss Mr Bemba's claim.
22 Unless your Honours have any further questions for us, that would conclude
23 our submissions. Thank you.
24 PRESIDING JUDGE MINDUA: [10:34:48] (Interpretation) Thank you very
25 much, Madam Prosecutor.

1 If I understand you correctly, the Prosecution has finished with its submissions
2 for this morning; is that correct?

3 MS NARAYANAN: [10:35:01] Yes, your Honours, we have finished.

4 Thank you.

5 PRESIDING JUDGE MINDUA: [10:35:03] (Interpretation) Thank you very
6 much.

7 So now we have a few moments left in order to floor any questions from the
8 Chamber. And whilst my colleagues are thinking on the matter, I think that I
9 might have two questions to put forward. Firstly, a question for the counsel
10 for Mr Jean-Pierre Bemba. I was going to say the defence of Mr Jean-Pierre
11 Bemba, but I'm not going to say that. Counsel for Mr Bemba.

12 I have also two questions for the Prosecution. I will start with counsel for
13 Mr Jean-Pierre Bemba.

14 Mr Haynes, if I have understood you correctly, you said that it is not
15 necessarily a request or there is not necessarily the presence of malicious intent
16 and this is not required for justice to be served in the matter.

17 (Speaks English) I'm going to speak English. It's better maybe.

18 If I understand very well, you said that every miscarriage of justice is
19 miscarriage of justice; we don't need any *mala fide* intention. It seems that it's
20 not the definition of the Prosecution. So I would like you maybe to elaborate
21 a little bit on that if you think that every miscarriage of justice is enough, there
22 is no need of *mala fide* intention, of malicious intention. Because according to
23 the Statute, Article 85, we need grave and manifest miscarriage of justice.

24 That will be my first question.

25 The second question is: You have made a comparison between the ICTY,

1 ICTR and the Special Tribunal for Sierra Leone proceedings about the
2 seriousness of freezing assets, and you have said in the three tribunals we
3 never had cases of freezing assets. Maybe, according to me, it's just - you may
4 correct me if I'm wrong - maybe it is because that before those tribunals we
5 don't have reparations proceedings for the victims; that is why the freezing was
6 not requested. So what do you think about that? It is because of the
7 seriousness of the freezing or because of the purpose of freezing assets?
8 Thank you, sir.

9 MR HAYNES: [10:38:10] I will deal with the second point first. I was really
10 simply seeking to place this case into an historical context and to place
11 alongside the very, very many authorities we have cited, both domestically and
12 the international protocols that relate to freezing orders, existent practice at
13 other courts to show that a body of jurisprudence has grown up which is
14 consistent, which emphasises the seriousness of making these orders, the
15 absolute importance of making sure that you safeguard the position of the
16 person against whom they are made, so that what has happened to Mr Bemba
17 does not happen. And if it does happen, then the person who asks for those
18 orders is obliged very often as a prerequisite to provide an indemnity against
19 losses. That is how serious these orders are.

20 And yes, there were powers in each of those tribunals to seize accused assets.
21 It may well be that the purpose of doing that would have been different
22 because, as you say, there was no reparations proceedings, but there was still
23 an ability to seize money to pay fines or to repay money deemed to be the
24 proceeds of crime.

25 So as it were, the purpose of seizing and freezing the money may have been

1 different, but the mechanism was the same, and the reluctance and the care
2 with which those courts approached it is in marked contrast, we submit, to the
3 way in which they were sought in this case and mismanaged.
4 And it's perhaps appropriate at this stage that I want to make something very
5 clear to the Prosecution. We don't just say that the responsibility they bear in
6 this case is limited to one aeroplane, the Prosecutor's statement and the change
7 in their investigative position. We say it's all down to them. They are the
8 organ of this Court that seized Pre-Trial Chamber III with the requests for
9 assistance. It is their action which is the *sine qua non* to the mess that
10 Mr Bemba is now in.
11 And I'm comforted in making that submission to you because the Registry
12 agree with me. They say in their filing it's the Prosecution who asked for
13 these orders to be made and the responsibility lies with them. Well, we are
14 here now. The Prosecution have known, at least since Monday night, what
15 the Registry's position is. They know full well, if they didn't before just now,
16 what our position is. If they want to answer that, they probably ought to do
17 so today.
18 Now, as regards whether Article 85 has a requirement that the claimant proves
19 malice, we disagree. I mean I can't -- there is no point in me repeating it. I
20 disagree. I've said so. It's not in the terminology of the article itself. It's
21 been imported by the Prosecution in their filing. And in what I regard as
22 a rather extraordinary submission, they say because there are members of their
23 staff who were present at the Rome conferences, then they have, as it were,
24 some sort of final word on telling you how those articles are to be construed.
25 And I disagree with that fundamentally anyway, but I say Article 85 makes no

1 mention of malice, it makes no mention of malfeasance, it makes no mention of
2 *mala fides*. What it does say is that you have to find a grave and manifest
3 miscarriage of justice.

4 I'm not here to repeat what we have put in our written filing, I've been at pains
5 to avoid doing that this morning, but we submit that this is a grave and
6 manifest miscarriage of justice. You can see that from the language of the
7 judges who overturned the conviction, who were very disturbed at the way in
8 which the convicting judges in the Trial Chamber, as it were, dealt with issues
9 of evidence, issues of the burden of proof. I'm not going to go through the
10 various quotes of Judges Morrison, Van den Wyngaert, and Chile, who quite
11 plainly were astounded by some of the things they read in that judgment.

12 So I say that what Mr Bemba has laid out satisfies the test under Article 85.

13 It's wrong to import notions of malice, *mala fides* or malfeasance, but even if
14 you do, having been challenged by the Prosecution on Monday night to do so,
15 I've done so today and they haven't answered that either.

16 PRESIDING JUDGE MINDUA: [10:43:40] (Interpretation) Thank you very
17 much indeed, Counsel.

18 My colleagues of the Bench do not have any questions to put to counsel for
19 Jean-Pierre Bemba.

20 I will now move on to the questions to be fielded by the Office of the
21 Prosecutor. I'm going to sideline the first question and move on to the second.

22 If I have understood you correctly, if I have understood what you said in your
23 presentation, you said that with the exception of Article 85 of the Rome Statute,
24 there are no other solutions to be brought forward to assist Jean-Pierre Bemba.

25 But in the filings submitted by the Defence and in the doctrine in general, and

1 if we consult the jurisprudence of other tribunals, international criminal
2 tribunals that is, we see that there is an element of compensation for the
3 violation of human rights on the basis of the inherent powers of the Court
4 itself.

5 Do you believe that this could be a way forward in this specific case?

6 MR GUARIGLIA: [10:45:18] Thank you, your Honours. The respectful
7 answer to the question will be no. Under the case law from this institution,
8 including the Appeals Chamber, resort to inherent powers is not necessary
9 when there is no lacuna to be filled. And here you have -- and this was all the
10 commentators that have analysed Article 85, and by no means the fact that
11 some members of the Prosecution team were involved in the drafting of the
12 Rome Statute is any authority, on that one I agree completely with Mr Haynes,
13 you don't have to believe us, but if you look at the drafting history of the
14 provision, if you look at the commentaries to the provision, it is clear that
15 Article 85 is *lex specialis*, it is clear that the intention of the drafters was to
16 provide for a process of a highly exceptional nature to provide compensation
17 for wrongfully prosecuted or wrongfully convicted persons who were
18 subsequently found through a finding of the Court to have been the victims of
19 a grave and manifest miscarriage of justice. It is a high threshold, and this
20 was hotly debated in the institution, and attempts to water down the threshold
21 and to create a system of more or less automatic compensation every time that
22 there was an acquittal were rejected.
23 So there was an explicit decision by the drafters of the Statute to give this Court,
24 to give you, your Honours, with a vehicle to provide for compensation. That
25 is the vehicle that applies here. That vehicle is highly exceptional.

1 But perhaps the point where we were not clear enough was that Article 85 is
2 a self-contained system. It applies as a system or some means to compensate
3 a person for wrongful decisions made by the Court in relation to his or her case.
4 It is not a vehicle to bring any type of private law claims against the Court.
5 Mr Bemba had been given inadequate medical treatment in the detention
6 centre and suffered some injury as a result; that is not something that you bring
7 into the context of Article 85. That is a private claim that Mr Bemba will be
8 bringing. It's a claim that, as I think that the Registry has correctly made out
9 in their submissions, falls outside the jurisdiction of this Chamber and falls
10 outside the scope of Article 85.

11 Now I think with some of the claims it would be good to hear our colleagues
12 from Registry as to the facts as to how that happened and how they see also the
13 Court responding to those private claims because surely it's not a process that
14 would involve the Office of the Prosecutor, and it is surely not a process that
15 would involve this Chamber or that would involve Article 85, but it is
16 a process that certainly would involve I think the Registry. So it may be
17 helpful to hear from them as to that particular point.

18 I don't know whether my colleague, Ms Narayanan, wants to add something.
19 I think we have replied to your question.

20 Perhaps one tiny point, your Honour, just for the sake of completeness, the ad
21 hoc tribunals did have the power to issue orders in the freezing of assets and
22 they did it once, at least in the ICTY, in the context of the Milosevic case, the
23 1999 decision from Judge Hunt on the indictment against Slobodan Milosevic
24 and consequential orders. In a very swift decision, the judge issued a request
25 for freezing of assets, of tracing and freezing of assets belonging to Slobodan

1 Milosevic on the basis of I think probably much less evidentiary foundations
2 than the Pre-Trial Chamber had in the Bemba case. As far as I can recall, we
3 could never find those assets at the time and that's why there was no freezing
4 of assets. But the power was there and it was used.

5 Those are my submission, your Honours.

6 PRESIDING JUDGE MINDUA: [10:49:24] (Interpretation) Thank you very
7 much, Mr Prosecutor.

8 So I note that for you Article 85 is sufficient in itself. And with regard to your
9 interpretation of the provisions of the Statute, you come back to the
10 preparatory work and you say that the inherent powers are not to be applied
11 here; is that correct?

12 MR GUARIGLIA: [10:49:50] I followed you in French, your Honour, my
13 French is limited, but yes, I think that is our position.

14 PRESIDING JUDGE MINDUA: [10:49:55] (Interpretation) Wonderful.

15 I'm just going to turn to my colleagues for a moment to consult.

16 (Pre-Trial Chamber confers)

17 PRESIDING JUDGE MINDUA: [10:50:46] (Interpretation) There we are. As I
18 was saying at the outset of this hearing, we have two parts to this hearing
19 today, we have counsel for Mr Jean-Pierre Bemba Gombo and also the Office of
20 the Prosecutor. But it would seem to me that there has been a request on the
21 part of the Office of the Prosecutor and also on the part of the Registry, the
22 Registry would like to intervene.

23 And if so, Mr Dubuisson, you have a number of minutes to take the floor. We
24 have of course already received your submissions, which are exhaustive in
25 nature.

1 MR DUBUISSON: [10:51:31] (Interpretation) Yes, thank you, Mr President.
2 The Registry understands that in terms of the legal criteria to be fulfilled, of
3 course this is a discussion between the Prosecution and the Defence, but I
4 indeed did want to address the Court. And in view of the fact that it is
5 limited or we are limited in time, I'm going to be limiting myself to a number of
6 general observations.
7 Most of all, the Registry would like to note the applicability of Article 85 and
8 173-175 to the ROP and also the inherent powers of the Chamber to take
9 decisions on all aspects of the complaint.
10 Now, paragraph 3 of the submissions of the Office of the Prosecutor, the
11 Registry is in agreement that a request for compensation has to follow
12 a two-pronged approach; namely, to establish the requisite provisions in
13 Article 85 and then to consider any amounts for possible compensation.
14 Now with regard to what Mr Haynes had to say, and obviously with all the
15 respect that I have for my colleague, there are not any new submissions that
16 have been made this morning in response, and of course we are not in
17 agreement and we are contesting the alleged evidence or proof that has been
18 brought forward.
19 We are somewhat reticent to respond, but in view of what the Prosecution has
20 said, the Registry is in agreement with all or the sum of the Prosecution
21 submissions. I would like to provide you with some information, but I would
22 like to also give you extra information, in you will allow, on a number of points.
23 Indeed.
24 Now in the observations of the Registry, the amount of compensation
25 requested has been deemed to be exaggerated. Now, first of all, the right of

1 property of Mr Bemba, which is the right that the Defence would like to have
2 respected in filing its request for compensation, despite any lack of
3 jurisprudence in the matter, has never on one occasion been violated.
4 These are provisional measures. He has never been deprived of his property,
5 of his right of property. He was able, he was in a position to administer or
6 manage his property from the detention centre. And the Registry, who was in
7 charge of managing the detention centre, can confirm that Mr Bemba was in
8 a position to provide any instructions for the management of his property. He
9 could do so either via his counsel in a privileged manner, if he deemed
10 necessary, or via the various visits and channels of communication that were
11 free for him to take up in the detention centre.
12 Now with regard to the legal fees, he asked for his counsel to free up certain
13 amounts of money from his accounts, and he could also provide any
14 instructions for the management of his property that he deems necessary.
15 Now, with regard to the 12 per cent of the sum of compensation requested for
16 the deterioration of his property, that is linked to co-operation requests on the
17 part of the Court, the Defence - I shouldn't say the Defence - Mr Haynes, nor
18 has Mr Haynes demonstrated the alleged responsibility of the Court in the
19 so-called mismanagement of the property. This has not been proven. And
20 this absence of proof, the fact that the Court has taken preservation or
21 protective measures in co-operation with certain States, it is therefore -- the
22 onus is therefore upon Mr Bemba to prove that there has been any damage.
23 A report was produced, and without revealing information publicly, it is based
24 on information that has only been provided by the Defence. And this
25 information is selective in nature, as underscored by the Office of the

1 Prosecutor in paragraph 2 of its submissions.

2 In order to provide you with a concrete example, Mr Bemba does not give any
3 information on the state and the maintenance of his property before his arrest.
4 He does not give us any point of reference, the Court any point of reference in
5 order to quantify the damage to his property. The only point of reference he
6 provides is the date of his arrest in 2008, and he says that all of his property
7 that was damaged due to the shortcomings of the Court was in a proper -- was
8 in a perfect state of repair at the time when he was arrested.

9 Now with reference to this property that was either seized or frozen, the fact
10 that Mr Bemba is or is not the proprietor of said property was not an easy thing
11 to establish via the co-operation channels. Indeed, the property deeds for
12 some of the property for which the depreciation of value of said property has
13 now been alleged was not provided by Mr Bemba. This information is
14 provided in the confidential submissions. However, it is clear that it was
15 indeed Mr Bemba who had the best possible knowledge of his own property.
16 Mr Bemba cannot now request that he be compensated for alleged damage to
17 property for which he has not revealed the existence to the Court.

18 I'm not going to take up too much of your time, so I'm going to go straight to
19 the conclusions.

20 The Registry maintains that the complaint for compensation should be rejected
21 because it is unfounded in fact and in law. If the property that has been
22 seized or frozen has a link with the Court, the Registry notes that some of the
23 compensation requested has not been evaluated by the Defence, whereas the
24 onus is upon it.

25 And secondly, the reasons for the absence of said evaluation have not been

1 provided.

2 And thirdly, whatever the case, the Court via the Registry has never received
3 any information either from States or from third parties that would enable it to
4 conclude that the property was left to rot.

5 Now, as Mr Haynes' submissions do not correspond to the reality of this file,
6 the reality of this situation being the co-operation, because we are in a context
7 of complementarity, and without providing you any confidential information,
8 this co-operation work was lengthy and difficult, because from the very
9 moment that the identification of property came into play, there were
10 a number of difficulties with regard to property that had already deteriorated
11 before his arrest. Now without going into the details, the Defence also has
12 knowledge of many more items of information of what went on, but this
13 cannot be mentioned in public and neither can we.

14 And of course we are providing the public with only a partial version of this
15 case. And that is the problem that we are up against today when we have to
16 explain what happened because most of the information pertaining to this case
17 is confidential or under seal and, on occasion, also ex parte either for the
18 Defence or for the Prosecution. And as my colleague has reminded me, this
19 information has been validated by one Chamber. Thank you.

20 PRESIDING JUDGE MINDUA: [11:00:27] (Interpretation) Thank you very
21 much, Mr Marc Dubuisson, representative of the Registry.

22 Now I don't know, but allow me to confer with my colleagues for a moment.
23 (Pre-Trial Chamber confers)

24 PRESIDING JUDGE MINDUA: [11:01:45] (Interpretation) Well, I must say
25 I'm in a bit of a difficult situation. After the Registry's remarks, if I allow the

1 Defence to address the Court, then the OTP will want to address the Court and
2 we will never come to an end of this; so I would like to ask anyone who wants
3 to add anything to supply fresh filings to the Chamber. Is this solution
4 suitable to the parties?

5 MR HAYNES: [11:02:19] I would simply want to make one, possibly two
6 points, which I can do in no more than two minutes and it arises really from
7 what Mr Dubuisson said and nothing else.

8 PRESIDING JUDGE MINDUA: [11:02:32] Okay, we are going to do that.
9 Two minutes for you and two minutes for the Office of the Prosecutor.

10 MR HAYNES: [11:02:40] Thank you. At the risk of repeating myself, it is
11 our case that the claim for the damage to Mr Bemba's property does not
12 depend upon a finding under Article 85. There is an inherent jurisdiction.
13 Perhaps I could give you an example.

14 Let's suppose Mr Bemba had never been arrested. Let's suppose he had never
15 been detained in custody. Let's suppose he appeared before this Court on
16 a warrant or summons, but during the process of that his goods had been
17 seized and the Court lost or destroyed them. He would have no claim under
18 Article 85, but he would have a claim against the Court under its inherent
19 jurisdiction for the destruction of his property, and that's precisely the way in
20 which we say that that is a claim which stands alone. It may be that it is
21 consequential loss under Article 85, but it is equally losses for which he is to be
22 compensated under the Court's inherent jurisdiction.

23 Now I'm afraid I simply do not understand Mr Dubuisson's submissions that
24 Mr Bemba's rights to property have not been interfered with. We are all
25 agreed pretty much everything that he had in March 2008 has been destroyed.

1 And yes, I agree, a good deal of what is in Mr Dubuisson's files we haven't seen.
2 It cannot apparently be disclosed to us. But what has been disclosed is
3 a witness statement from a bank manager, a witness statement from a director
4 of an airline company who rented out Mr Bemba's aeroplanes, a witness
5 statement from a lawyer of Mr Bemba who provide you with cogent admissible
6 evidence that he owned all that property and it was all destroyed. And
7 Mr Dubuisson has had that two months and has offered nothing in the
8 response to suggest that Mr Bemba didn't own those aeroplanes and that they
9 were not destroyed. So I don't understand that submission. It's quite wrong.

10 PRESIDING JUDGE MINDUA: [11:04:57] (Interpretation) Yes, thank you.
11 *Monsieur le procureur.*

12 MR GUARIGLIA: [11:04:59] Thank you, your Honours. One minute
13 wrap-up submission.

14 This hearing has shown basically what now the claim that Mr Bemba is
15 bringing is about. There is, on the one hand, an Article 85(3) claim that seems
16 to now be predicated -- it didn't used to, but now seems to be predicated on
17 *mala fides* by the Prosecutor, the Court, and then there is an independent claim,
18 which is a private claim for damages to his property. Both claims must
19 necessarily fail.

20 The first one we have already provided written reasons why there is no grave
21 and manifest miscarriage of justice. We can also make clear that in this – here,
22 that we completely dispute the nature of the claim that the Court or the
23 Prosecutor acted in *mala fides*. We did our job to the best of our abilities.
24 And indeed we pushed for the freezing orders, as we are required to do under
25 the Statute for the benefit of the victims, and that is perfectly fine and well.

1 That was a proper discharge of prosecutorial functions. No reasonable claim
2 of *mala fides* can be done on that basis.

3 And then we received the ancillary claim of damages to his property, and this
4 is where I think that basically the position that we have taken, consistent with
5 the position of the Registry, this falls manifestly outside the scope of Article 85
6 and it would be inappropriate and dangerous to resort to inherent powers of
7 the Chamber. This is a complex matter. It involves, as Mr Haynes correctly
8 recognised, it involves the Court's legal personality. The possibility of
9 bringing a case against the Court raises a host of critical legal issues of public
10 international law that frankly, I am certainly not in a position to answer;
11 including the Court's possible assertion of immunity, including which will be
12 the forum for such a claim. This is not something that this Chamber should
13 rule on and I respectfully think there is no need for that. This is an Article 85
14 claim. You have to deal within the context of that provision, and then
15 Mr Bemba will be free to choose whatever forum he wishes to choose for
16 bringing any subsequent claims that he wishes to bring.

17 This concludes our submissions, your Honours. Thank for your patience.

18 PRESIDING JUDGE MINDUA: [11:07:16] (Interpretation) Thank you very
19 much, Mr Prosecutor.

20 I think we have all noticed that this is an extremely complicated and difficult
21 matter. I would like to thank everyone for their filings which were very clear,
22 quite exhaustive, and I would also like to thank you for your pleadings which
23 have been stellar.

24 We have come to the end of today's hearing in the case of The Prosecutor
25 versus Jean-Pierre Bemba Gombo. I would like to take this opportunity to

1 thank all participants who were part of today's hearing, including the
2 interpreters, the courtroom reporters and of course the security staff and other
3 officials and personnel of the Court. I greet those who are in the public
4 gallery and I wish everyone a good day.

5 The hearing is adjourned.

6 (The hearing ends in open session at 11.08 a.m.)

7 VERIFICATIONS REPORT

8 The following verifications have been made into the transcript:

9 Page 15 lines 20-22:

10 "legal officer's legal section ; Natalie Wagner; Vera Wang sitting behind me,
11 who is also a legal officer within the External Relations Office" is changed to
12 "Registry's legal office; Natalie Wagner; Vera Wang sitting behind me, who is
13 also a legal officer within the external relations and co-operation office;"