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PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public

With Public Redacted Annexes A and C, and Confidential Annex B

Public Redacted Version of “Mr. Bemba’s reply to the Prosecution Response to and Registry Submissions on “Mr. Bemba’s claim for compensation and damages””

Source: Mr. Jean-Pierre Bemba Gombo

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

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A. INTRODUCTION

1. Annex A to this filing is an updated quantum of the economic loss being claimed in the present case. The loss now stands at 42.84 million euros as of 30 June 2019.¹

2. The central plank of the Prosecution's submissions concerning Mr. Bemba's claims is a surprising one. According to the Prosecution, the Pre-Trial Chamber can safely ignore the claim for economic damage on the grounds that "this is an Article 85 claim"² and in the absence of a finding of a grave and manifest miscarriage of justice, the Chamber is not entitled to decide the claim for economic damage.³ Indeed, the Prosecution argues that it would be "inappropriate and dangerous"⁴ to do so.

3. A miscarriage of justice occurred in this case. A litany of procedural errors during the trial phase, an erroneous approach to victim participation that upset the balance of the proceedings, and a Trial Chamber that sealed itself off from appellate review,⁵ resulted in a Trial Judgment which gave rise to deep concerns on the part of Appeals Chamber judges as to whether the Trial Chamber had applied the correct standard of proof, or adhered to the principle that the accused is entitled to the benefit of the doubt.⁶ The Appeals Chamber pointed to numerous examples of the manipulation of the evidence and the failure to apply central and essential principles.⁷ While not every acquittal on appeal necessarily gives rise to a miscarriage of justice, the Appeals Chamber judges in this case were clear; they had to intervene to prevent one.⁸

4. Regardless, and for the avoidance of doubt, Mr. Bemba repeats⁹ that a finding of a grave and manifest miscarriage of justice under Article 85 is **not** a pre-requisite to a determination that he is entitled to compensation for the loss arising from the seizure of his property. The Court acted negligently in seizing and freezing his property but failing properly to manage or even account for it. This liability arises irrespective of any consideration of a miscarriage

¹ Mr. Bemba again requests that he be permitted to file updated financial reports in support of any increase in losses arising from the passage of time and/or further discovery.

² ICC-01/05-01/08-T-376-ENG CT WT, p. 40 lines 16-17.

³ ICC-01/05-01/08-T-376-ENG CT WT, p. 40 lines 6-8.

⁴ ICC-01/05-01/08-T-376-ENG CT WT, p. 40, line 9.

⁵ ICC-01/05-01/08-3673-Conf, paras. 28-63.

⁶ ICC-01/05-01/08-3636-Anx2, paras. 14, 50.

⁷ ICC-01/05-01/08-3673-Conf, paras. 71-75.

⁸ ICC-01/05-01/08-3673-Conf, paras. 71-75.

⁹ ICC-01/05-01/08-3673-Conf, paras. 5-9; ICC-01/05-01/08-T-376-ENG CT WT, p. 38, lines 13-25.

of justice. Put simply, Mr. Bemba would have had a valid claim even in the event of his conviction.

5. As such, the Prosecution's insistence that "[t]hese proceedings are limited to determining if the Article 85 criteria are met"¹⁰ is incorrect. Mr. Bemba's claims in this regard are at once based upon his fundamental human right to property and a private law claim alleging tortious behaviour by the ICC. He is entitled to a remedy for that behaviour which the Court is obliged to provide. The claims were simply amalgamated as a means of expedience, and so that the matter could be dealt with before the same Chamber.

6. With respect to both the Prosecution and the Registry, Mr. Bemba perfectly well understands the "Court's legal framework". More than that, he understands the wider legal framework within which the Court has to exist; how it relates to other legal personalities; how it can sue and be sued. Its internal legal framework can only describe its capacity to act. It does not nor cannot absolve it from liability for its failures or negligent acts towards third parties. No institution through constitutive documents can make itself entirely immune from civil suit. Notwithstanding that, moreover, Mr. Bemba understands that under the Court's legal framework it may request the assistance of states under Part 9 of the Statute, for example, to arrest a person, whilst simultaneously providing that person with an "enforceable right to compensation" **from the Court**, in the event that the request is carried out unlawfully by the state (*see* Article 85(1)). The suggestion that Part 9 of the Statute in some way limits the Court's liability is untenable.

B. THE EVIDENCE BEFORE THE PRE-TRIAL CHAMBER

(i) The rules of natural justice preclude findings based on "evidence" which is submitted *ex parte*

7. The assertions in paragraphs 34 and 36 of the Prosecution response should be completely disregarded. They are apparently supported by material which it is not prepared to reveal. Mr. Bemba has no opportunity to comment on this assertion, beyond maintaining that the only keys and relevant documents to the plane were seized by the Portuguese police in 2008. They were handed to the Prosecution and only returned to Mr. Bemba after the plane had passed the point of being fit to fly.¹¹ Those assertions are supported by disclosed admissible

¹⁰ ICC-01/05-01/08-3680-Conf-Red2, para. 2, p. 6.

¹¹ ICC-01/05-01/08-3673-Conf, paras. 129, 131.

evidence.¹² The contrary is not. The suggestion that Mr. Bemba had access in detention to keys and documents seized and retained by the Prosecution is, moreover, palpable nonsense.

8. For the same reason paragraph 11 of the Registry's observations similarly falls to be disregarded. Whether the planes in Kinshasa were frozen subject to local judicial order is "not known" to the Registry.¹³ Whether they were or not is irrelevant. Their destruction was a direct consequence of [REDACTED] relating to all property belonging to Mr. Bemba or his family¹⁴ in the Democratic Republic of Congo (DRC), and the Registry's "grossly insufficient" management and follow-up of that process.¹⁵ The Court must not only have known about the planes but must also have known their actual and potential value.

(ii) The parties have been afforded a sufficient opportunity to submit relevant admissible evidence

9. This Chamber has to deal with these claims on the evidence before it. Especially in relation to the claims relating to the damage to Mr. Bemba's property arising from its seizure, evidence has been presented in proper and admissible form for the Chamber to consider. Had any party to this process wished, for example, to contradict that evidence by requiring a witness to attend for cross-examination or by producing admissible evidence to counter it, it could have done. The submissions of counsel, whether oral or written, are not evidence. In that vein, criticism, for example, of the evidence of the bank manager in Portugal is completely misplaced.¹⁶ The Prosecution and the Registry had every opportunity to present evidence concerning the plane in Faro and the various properties there, as they did the planes and property in the DRC.

10. Had the Prosecution wanted to demonstrate before this Chamber that, for example, the seized materials in Portugal had not been handed to the Prosecution, it could have taken statements from members of the Portuguese police who had conduct of the search and seizure operation, or statements from the Prosecution investigators who were involved in this process, and who presumably still work in the ICC building. It chose not to do so,

¹² ICC-01/05-01/08-3673-Conf-AnxG, paras. 35-38.

¹³ See ICC-01/05-01/08-3650-Conf-Exp-Anx; ICC-01/05-01/08-3654-Conf-Exp, fn. 5; ICC-01/05-01/08-3657-Conf-Exp, para. 7.

¹⁴ CAR-D04-0007-0083.

¹⁵ ICC-01/05-01/08-3673-Conf, para. 142; ICC Registry, [Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court](#), August 2016, pp. 13-14.

¹⁶ ICC-01/05-01/08-3680-Conf-Red2, para. 35.

despite having requested an extension of time within which, primarily, to respond to the evidence underlying Mr. Bemba's claim.¹⁷

11. Nor is the Registry entitled to submit that "the amount of compensation requested has been deemed to be exaggerated".¹⁸ The Registry was also free to engage professional forensic accountants from the ICC's list of experts to examine Mr. Bemba's report, or to produce an assessment of its own, as it has regularly done throughout the case to date.¹⁹ It did not. The only evidence properly before the Pre-Trial Chamber in the present claim concerning damage to his property is that which was produced by Mr. Bemba.

C. THE PROSECUTION SUBMISSIONS

(i) The Prosecution submissions on the Article 85 criteria are irrelevant and/or non-responsive

12. The Prosecution misunderstands or misrepresents the basis upon which Mr. Bemba brings his case under Article 85. The reference in Mr. Bemba's claim to Article 85(2)²⁰ was never intended to suggest that Mr. Bemba's claim was admissible under that provision, but rather to illustrate that there was a semantic difference in the guidance as to how to assess compensation between the two sub-articles, whereas the loss and damage in reality is precisely similar (*i.e.* that the claimant has been wrongly convicted and, presumably, imprisoned).²¹

13. References to the Court's "established law and practice" are misplaced in this case. There is no binding decision on the proper interpretation of Article 85(3). *Ngudjolo* is merely a previous first instance decision and is not binding.²² Many of the arguments raised herein were not effectively litigated in that case. The *Mangenda* litigation did not concern Article 85(3).²³ Moreover, the reference works are not unanimous as to its interpretation,²⁴

¹⁷ ICC-01/05-01/08-3674-Conf, paras. 3-4, 6-7.

¹⁸ ICC-01/05-01/08-T-376-ENG CT WT, p. 34, lines 24-25.

¹⁹ See, for example, ICC-01/05-01/08-3650-Conf-Exp-Anx.

²⁰ ICC-01/05-01/08-3673-Conf, paras. 84-85.

²¹ ICC-01/05-01/08-3673-Conf, paras. 84-85.

²² ICC-01/04-02/12-301-tENG.

²³ ICC-01/05-01/13-1663; ICC-01/05-01/13-1964.

²⁴ Zappalà, S., "[Compensation to an Arrested or Convicted Person](#)", in Cassese, A., Gaeta, P., Jones, J. R.W.D., (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, Vol. II, S. 6, Ch. 38, OUP, 2002, p. 1583. See also Fedorova, M., Verhoeven, S., Wouters, J., [Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings](#), Working Paper No. 27, June 2009; Mulgrew, R., "[The costs of suspicion: a critical analysis of the compensation scheme established by Article 85\(3\) of the Rome Statute](#)" in Mulgrew, R., Abels, D. (eds.), *Research Handbook on the International Penal System*, Chap. 19, Edward Elgar Publishing, 2016.

and citation of the Prosecution's senior appeals Counsel's published views as the principal basis for propositions is procedurally unusual and, in Mr. Bemba's submission, inauthoritative.²⁵

(ii) Mr. Bemba's rights were violated – his rights to liberty, a family life and to own property just for a start

14. The Prosecution offers no definition or example of the distinction between a grave and manifest miscarriage of justice and a miscarriage of justice, plain and simple.²⁶ Since it fails to define a distinction, its submissions lend weight to Mr. Bemba's assertion that there is none.²⁷

15. In terms of proving his claim, the Prosecution's submissions are illogical. Firstly, **of course** Mr. Bemba is entitled to draw the Chamber's attention to aspects of his trial which support a finding that there has been a grave and manifest miscarriage of justice. How otherwise could he prove it? That those matters have been ventilated during the trial or appeals process in a criminal case is of no consequence.²⁸ The issues in this compensation claim are different, as is the burden and standard of proof. Indeed, the Prosecution's complaints in that regard are schizophrenic; they object to the fact that certain complaints have been raised before,²⁹ whilst in the next breath, objecting to novel matters.³⁰ In short, by those twin routes, it submits that a complainant is not entitled to raise anything at all to prove his claim.

16. Lastly, it is not the individual complaints that demonstrate the grave and manifest miscarriage of justice but rather the defects viewed holistically (an approach much touted by the Prosecution itself).³¹ Whilst the Prosecution chides Mr. Bemba that he raises "only a handful" of complaints,³² that "handful" of serious errors is more than enough to substantiate the criteria under Article 85(3).

²⁵ ICC-01/05-01/08-3680-Conf-Red2, fns. 29, 46, 50-53; ICC-01/05-01/08-3673-Conf, paras. 10-13.

²⁶ ICC-01/05-01/08-3680-Conf-Red2, para. 17-22.

²⁷ ICC-01/05-01/08-3673-Conf, paras. 10-13.

²⁸ ICC-01/05-01/08-3680-Conf-Red2, para. 2.

²⁹ ICC-01/05-01/08-3680-Conf-Red2, para. 2, pp. 4-5; and ICC-01/05-01/08-T-376-ENG CT WT, p. 19, lines 10-18.

³⁰ ICC-01/05-01/08-3680-Conf-Red2, para. 2, p. 6; and ICC-01/05-01/08-T-376-ENG CT WT, p. 19, lines 19-24.

³¹ ICC-01/05-01/08-T-374-ENG CT WT, p. 63, line 23 – p. 64, line 2; p. 66, lines 4-15; p. 67, lines 2-20.

³² ICC-01/05-01/08-3680-Conf-Red2, para. 3.

17. Mr. Bemba's submissions as to the Trial Judgment, whilst expressed in different terms, far from "go[ing] beyond respectful professional disagreement",³³ chime harmoniously with the views of the majority of the Appeals Chamber³⁴ (the only judicial views to which the Chamber in this claim can have proper regard).

18. The Prosecution caricatures and substantially avoids the submissions of Mr. Bemba concerning the significant and substantial numbers of examples of the Trial Chamber making findings against the evidence.³⁵ It also fails to address the myriad criticisms of the Appeals Chamber, citing to only two (unpersuasive) examples of judicial remarks apparently taken out of context.³⁶

(iii) The Prosecution acted in bad faith

19. The Prosecution argues that an Article 85(3) claim requires an applicant to establish *mala fides* or, at least, serious misconduct.³⁷ The authorities relied upon do not assist.³⁸ A *mala fides* standard for an Article 85(3) claim is not something that can be read into a footnote of a Trial Chamber decision.³⁹ It would form part of the Statute or be stated unequivocally in the applicable jurisprudence. It is not.

20. Regardless, malice and bad faith suffused this Prosecution from start to finish; a malice borne of personal and institutionalised enmity towards Mr. Bemba and his family,⁴⁰ and has continued after his acquittal. The targeting of his children, the deliberate destruction of his property, the unprecedented statement of the Prosecutor following Mr. Bemba's acquittal all come from an institutionalised characterisation of Mr. Bemba as someone who can be vilified and deserves to be so.⁴¹ Rather than issuing an avowal of the acquittal, an apology, or at the least an expression of regret for the 10 years he spent detained, the Prosecutor rushed to signal her disappointment, mischaracterised the Appeals Chamber's

³³ ICC-01/05-01/08-3680-Conf-Red2, para. 44; ICC-01/05-01/08-T-376-ENG CT WT, p. 4, line 22 – p. 5, line 6.

³⁴ ICC-01/05-01/08-3636-Conf; ICC-01/05-01/08-3673-Conf, paras. 69-75.

³⁵ ICC-01/05-01/08-3673-Conf, paras. 69-75; ICC-01/05-01/08-T-376-ENG CT WT, p. 4, line 22 – p. 5, line 6.

³⁶ ICC-01/05-01/08-3680-Conf-Red2, paras.46-47.

³⁷ ICC-01/05-01/08-3680-Conf-Red2, para. 17.

³⁸ ICC-01/05-01/08-3680-Conf-Red2, fns. 45-48.

³⁹ ICC-01/05-01/08-3680-Conf-Red2, fn. 47.

⁴⁰ ICC-01/05-01/08-T-376-ENG CT WT, p. 6, line 5 – p. 8, line 24.

⁴¹ ICC-01/05-01/13-T-58-ENG ET WT, p. 17, line 1 – p. 19, line 1. See in particular, p. 18, line 20 – p.19, line 2.

findings,⁴² and called for a “redirection” of the law on aspects of the Appeals Chamber Judgment (pointedly referred to as the “Majority’s ruling”).⁴³

21. This malice continues. At the oral hearing of 9 May 2019, the Prosecution submitted that it would “run counter the principles of justice to compensate Mr. Bemba” after his Article 70 conviction, and that the Chamber has the “discretion to assess that”.⁴⁴ In effect, the Prosecution is submitting that should the Chamber find that Mr. Bemba is entitled to compensation arising from the miscarriage of justice and destruction of his property, it would run counter to the principles of justice to grant him a remedy. Or, put another way, Mr. Bemba’s sentence in the Article 70 case can rightfully include not only a prison term, and a fine of 300,000 euros, but also the destruction of his personal property with no available recourse. The very fact that the Prosecution is moved to make such a legally incorrect and procedurally troubling statement demonstrates the level of malice and enmity felt within the Office of the Prosecutor towards him personally, and the bad faith with which it continues to act. Significantly, the Prosecution does not argue that Mr. Bemba’s Article 70 conviction breaks the nexus between his wrongful conviction and the destruction of his assets and the resulting loss and damage. Of course not, because it does not.

22. In fact, the Prosecution was acting in bad faith when it jettisoned its original investigation to ensure Mr. Bemba would face trial no matter what. Mr. Bemba agrees that the confirmation process may result in the charges being filtered, or adjusted to reflect a different mode of liability, and that the Prosecution is obliged to adapt charges accordingly.⁴⁵ His arguments are different.

23. In pursuing a command case against Mr. Bemba, the Prosecution was required not only to adapt the charges, but effectively to ignore the results of its own investigation which revealed that the MLC troops had been re-subordinated to the FACA hierarchy.⁴⁶ The [REDACTED] in the CAR told the Prosecution that Mr. Bemba was not the one directing

⁴² ICC-01/05-01/08-3673-Conf, fn. 269.

⁴³ The impropriety of the Prosecutor’s statement after the *Bemba* Appeal Judgement is nowhere better demonstrated than by the ICC President’s statement in response; [Statement of the President of the Court in relation to the case of Mr Jean-Pierre Bemba Gombo](#), of 14 June 2018. See ICC-01/05-01/08-3680-Conf-Red2, fn. 114. Moreover, Judge Eboe-Osuji was part of the Majority which ordered Mr. Bemba’s acquittal, not retrial. The Prosecutor’s statement that “one Judge in the Majority allowing the appeal, but favouring a new trial” is incorrect. As is the *post-facto* attempted reliance on paragraphs of a Dissenting Opinion to justify incorrect factual statements therein.

⁴⁴ ICC-01/05-01/08-T-376-ENG, p. 26, lines 14-16.

⁴⁵ ICC-01/05-01/08-3680-Conf-Red2, paras. 29, 30.

⁴⁶ ICC-01/05-01/08-3673-Conf, para. 23.

operations. To then ignore all those interviews and statements and run a case that Mr. Bemba was directing operations (none of the CAR politicians or soldiers or commanders interviewed were called by the Prosecution to give evidence), is incompatible with the Prosecution's role as an impartial minister of justice. The Prosecution's submissions that the confirmation process allows charges to be amended do not address Mr. Bemba's complaint. This case should never have proceeded as a command case. The Prosecution's own investigations made that clear.

24. Furthermore, malice towards Mr. Bemba was not confined to the Office of the Prosecutor. As will hereinafter be developed,⁴⁷ the Registry's approach to him continues to lack appropriate neutrality.

(iv) The present claim is of a private law nature which must be settled or directed to dispute resolution under the APIC

25. Mr. Bemba is not required to be a "contracting party"⁴⁸ with the ICC in order for his claim for damages to succeed. He is a party aggrieved by the harm that flowed from the actions of an international organisation which enjoys legal personality. This is precisely the kind of harm for which the UN – with its identical APIC provisions⁴⁹ – has compensated.⁵⁰ Indeed, a 1995 report of the Secretary-General to the General Assembly defined private law claims in this context as "(ii) claims by third parties for personal injury, death, or **property loss or damage**".⁵¹ The Prosecution's listing of other types of claims that have been compensated as private law claims (from which property is deliberately excluded) does not assist.⁵² Indeed the Prosecution's reluctance to assert unequivocally that "this is a public law claim",⁵³ undermines any suggestion that it is.

26. Even should the claim be characterised as "public" in nature, which it is not, the ICC is only excused from paying compensation through asserting its absolute immunity. Notably, the Prosecution does not argue that this is an appropriate course. Immunities of this kind

⁴⁷ See below, paras. 27-43.

⁴⁸ ICC-01/05-01/08-3680-Conf-Red2, para. 102.

⁴⁹ "Agreement on Privileges and Immunities" [Convention on the Privileges and Immunities of the United Nations](#), Article VII, Section 29, and [Agreement on the Privileges and Immunities of the International Criminal Court](#), Article 6.

⁵⁰ ICC-01/05-01/08-3673-Conf, para. 164, fns. 383-384.

⁵¹ [UN Secretary General Financing Report 1995](#), A/C.5/49/65, 24 April 1995, paras. 15–17, 20; see also [U.N. Secretary-General Financing Report 1996](#), A/51/389, 20 September 1996, para. 22 (emphasis added).

⁵² ICC-01/05-01/08-3680-Conf-Red2, para. 100.

⁵³ ICC-01/05-01/08-3680-Conf-Red2, paras. 96-102. See in particular para. 102: "Taking into account this guidance, **certain aspects** of Mr Bemba's property damage claim **may be said** to distinguish it from the private law sphere, and **may indicate** a public law character" (emphasis added).

“conflict with an individual’s right to a remedy and the law’s ordinary principles of responsibility for causing harm.”⁵⁴ Asserting immunity would stand in contrast to the ICC’s underlying promotion of the Rule of Law and to the standards expected of States Parties. The ICC must be beyond reproach. The inclusion of an immunity in the APIC is not a *carte blanche* to allow the ICC to commit human rights abuses or shield itself in the event of its own negligence.

C. THE REGISTRY RESPONSE

(i) The Registry’s submissions offend its status as a neutral organ of the Court

27. In its written and oral submissions, the Registry could not have moved further from its role as a neutral organ of the Court. From characterising the destruction of Mr. Bemba’s assets as “alleged damage”,⁵⁵ to dedicating its written and oral submissions to countering Mr. Bemba’s claim,⁵⁶ the Registry has positioned itself as a party with a vested interest in this litigation. In reality, it is.

28. The criticism that Mr. Bemba has made “no submissions” on whether national laws have been violated in the management of his assets stands to be dismissed.⁵⁷ No serious suggestion can be made that the wholesale abandonment or destruction of frozen assets is in accordance with any national law. Should national laws permit such negligence, the ICC should never have asked those States to freeze the assets in its name.

29. Regardless, in relation to a property in Portugal, for example, Mr. Bemba has learned since his release that “a simple caution was placed on the land registry that it could not be sold”⁵⁸ without any indication of compliance with national law, or domestic judicial oversight. The most basic enquiries by the Registry in 2008 would have revealed this anomaly, and that the abandonment of the physical property was causing economic loss. Other violations of domestic law (for example the physical destruction of Mr. Bemba’s aviation business in the DRC) were more apparent. The Registry’s position means, in effect, that the ICC can ask States to engage in significant legal processes on its behalf, and then put its hands over its eyes and ears as to how its requests are carried out. This cannot be the

⁵⁴ K. Boon, “The United Nations as Good Samaritan: Immunity and Responsibility”, *Chicago Journal of International Law*, Vol. 16(2) (2016), p.341.

⁵⁵ ICC-01/05-01/08-3681-Conf-Exp-Red2, para. 15.

⁵⁶ ICC-01/05-01/08-3681-Conf-Exp-Red2; ICC-01/05-01/08-T-376-ENG CT WT, p. 34, line 7 – p. 37, line 22.

⁵⁷ ICC-01/05-01/08-3681-Conf-Exp-Red2, para. 37.

⁵⁸ ICC-01/04-01/08-3673-Conf-AnxG, para. 26; CAR-D04-0007-0065.

position, regardless of the (admitted) shortcomings of the relevant cooperation sections of the Registry.⁵⁹

30. Nor is the Registry in a position to assert that the States' understanding was that they assumed complete liability for the management of the frozen assets.⁶⁰ This is incompatible with, for example, [REDACTED],⁶¹ or the ongoing blanket refusal by the DRC, Belgium, and Portugal [REDACTED].⁶² In the view of the States, the ICC was in control of this process. The ICC ultimately retains responsibility.

31. Moreover, in asserting that Mr. Bemba "has never been deprived of his property, of his right of property",⁶³ the Registry has misled the Court. Following the seizure and freezing of his property in the DRC, Portugal and Belgium, Mr. Bemba was deprived of it, by any definition. He could neither sell nor dispose of it, despite offers from third parties. Today, on 4 June 2019, his houses in Portugal remain frozen. On visiting Faro, his requests to access his vehicles, themselves substantially destroyed, have been refused. His wife cannot access her personal property in Belgium. In the DRC, Mr. Bemba cannot enter his houses, even to survey the extent of their destruction by the squatters who live therein. The ICC Registry submission that he "has never been deprived of his property" is incorrect. He was, and he continues to be so.

(ii) The Registry's submissions about the value of Mr. Bemba's assets are inconsistent

32. The Registry' position on Mr. Bemba's wealth is a shifting concept. Whether Mr. Bemba is a man of extraordinary wealth and fortune, or a man whose assets have been exaggerated and were already depleted at the time of his arrest, depends on the forum before which the Registry is appearing, and its goal in the relevant litigation.

33. When making submissions on an [REDACTED],⁶⁴ or asking that Mr. Bemba be ordered to [REDACTED],⁶⁵ the Registry is capable of producing detailed Reports on "Mr. Bemba's Solvency",⁶⁶ which claim to place a precise figure on the value of his assets in

⁵⁹ ICC-01/05-01/08-3681-Conf-Exp-Red2, para. 24.

⁶⁰ ICC-01/05-01/08-3681-Conf-Exp-Red2, para. 31.

⁶¹ T-15-CONF-EXP-ENG, 18:6-7.

⁶² ICC-01/05-01/08-3663-CONF-EXP, paras 1, 10, 33.

⁶³ ICC-01/05-01/08-T-376-ENG CT WT, p. 35, lines 4-5.

⁶⁴ ICC-01/05-01/13-2295-Conf-Exp-AnxII.

⁶⁵ ICC-01/05-01/13-2325-Conf-Exp.

⁶⁶ See, for example, ICC-01/05-01/08-3650-Conf-Exp-Anx; ICC-01/05-01/08-3656-US-Exp-Red, para. 6

order to allow a Trial Chamber to, for example, suspend legal aid payments to his lawyers.⁶⁷ In the present litigation, when the Registry itself is being implicated in the destruction of Mr. Bemba's assets, it suggests for the first time that it has no information about the state of maintenance or repair of the properties,⁶⁸ and asserts that the values are being "exaggerated",⁶⁹ although without any basis.

34. Had the Registry wished to contest the amount of compensation being claimed, it was entitled to engage experts or perform its own calculations. Not having done so, its submission in open court that the values have been exaggerated borders on the professionally negligent, and must be disregarded.

(iii) The Registry's submissions about Mr. Bemba's ability to manage his assets are disingenuous

35. The Registry then attempts to blame Mr. Bemba for the economic damage, suggesting that "[h]e was able, he was in a position to administer or manage his property from the detention centre" and could "provide any instructions for the management of his property".⁷⁰

36. There is not a single precedent in any legal system whereby a defendant whose property is frozen then assumes responsibility for the management of those assets. Domestic and international practice, set out in Mr. Bemba's claim, demonstrates the opposite.⁷¹ The Prosecution and Registry assertions that Mr. Bemba was given the plane's documents, or that he received the keys (even though after his release in 2018), or that the plane subsequently needed maintenance in order to be rented,⁷² in fact, miss the point. The onus never shifted to Mr. Bemba to manage the frozen assets. Consistent with the principle of commercial law that the party requesting a freezing or *Mareva* injunction must give an indemnity or undertaking as to damages, the party seeking the freezing of property assumes responsibility for loss arising from the management of that property.⁷³

⁶⁷ ICC-01/05-01/08-3651-US-Exp, para. 7.

⁶⁸ ICC-01/05-01/08-T-376-ENG, CT WT, p. 36, lines 2-3.

⁶⁹ ICC-01/05-01/08-T-376-ENG CT WT, p. 34, lines 24-25.

⁷⁰ ICC-01/05-01/08-T-376-ENG CT WT, p. 35, lines 5-8. *See also* ICC-01/05-01/08-3681-Conf-Exp-Red2, para. 34.

⁷¹ ICC-01/05-01/08-3673-Conf, paras. 133-138.

⁷² ICC-01/05-01/08-3680-Conf-Red2, para. 3; ICC-01/05-01/08-3681-Conf-Exp-Red2, para. 10.

⁷³ *See, for example, EU Regulation Proposal (2016)*, Article 34 – Reimbursement: (1) "Where the executing State is responsible under its national law for injury caused to one of the interested parties referred to in Article 33 by the execution of a freezing or confiscation order transmitted to it pursuant to Articles 4 and 14, the issuing State shall reimburse the executing State of any sums paid in damages by virtue of that responsibility to the interested party except if, and to the extent that, the injury or any part of it is exclusively due to the conduct of the executing State." (2) "Paragraph 1 is without prejudice to the law of the Member States on claims by

37. Moreover, the value of frozen assets must be preserved.⁷⁴ Frozen businesses must be responsibly run, and yield maximum return when they are ultimately realised.⁷⁵ Frozen aircraft must be maintained, and relevant fees and charges paid. Frozen houses cannot just be left to dilapidate. From the moment the freezing orders were issued, the responsibility for the management of the seized and frozen assets was taken out of Mr. Bemba's hands. Further, some frozen assets cost "considerably more to maintain or to keep profitable, such as yachts, aircrafts and businesses."⁷⁶ This is why in domestic jurisdictions it is difficult to get orders to freeze them. It does not mean that they can just be left on the tarmac of an airport to rust.

38. Moreover, this attempt to shift blame to Mr. Bemba was made in court by Mr. Dubuisson in the knowledge that, for example, Mr. Bemba had asked him [REDACTED].⁷⁷ Regardless, nothing was done.

39. The Registry claims that the Mr. Bemba "[REDACTED]", citing to a filing from 8 June 2011.⁷⁸ Mr. Bemba's request to Mr. Dubuisson to [REDACTED].⁷⁹ No reference is made to the plane being "[REDACTED]" at that time. Indeed, the Registry's own assessments in November 2009 put its [REDACTED].⁸⁰ It is true that Mr. Bemba was informed in 2009 that "[REDACTED]".⁸¹ This was not news to him. However, when arrested in May 2008, he had enough funds in Portugal to discharge outstanding parking fees and maintenance costs.⁸² Responsibility rested with the party who requested the freezing.

40. It is also important, in Mr. Bemba's submission, to bear in mind that claims are brought, not against the Office of the Prosecutor nor the Registry, but against the Court. The Prosecution and Registry are organs of the Court, and the Court cannot avoid liability for its misfeasance or negligence through the apportionment of blame between them. The

natural or legal persons for compensation of damage." See also [EU Council Framework Decision \(2003\)](#), Article 12; [EU Council Framework Decision \(2006\)](#), Article 18. See also *Derby & Co Ltd v Weldon* (nos 3 and 4) [1990] Ch 65.

⁷⁴ [Chaparro Álvarez and Lapo Ñíguez v. Ecuador](#), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, 21 November 2007, paras. 211-213.

⁷⁵ UNODC, [CAC/COSP/WG.2/2017/CRP.1](#), Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets, 23 August 2017, pp. 10-11. See also [S/2016/209](#), Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), paras. 252-260.

⁷⁶ *Ibid.*

⁷⁷ See Confidential Annex B.

⁷⁸ ICC-01/05-01/08-3681-Conf-Exp-Red2, para. 10.

⁷⁹ T-15-CONF-EXP-ENG.

⁸⁰ ICC-01/05-01/08-545-Conf-Exp-Anx2, p. 2.

⁸¹ ICC-01/05-01/08-1497-Conf-Exp, para. 14.

⁸² ICC-01/05-01/08-3673-Conf, para. 103.

Prosecution and Registry cooperate with the States to achieve the Court's ends. Indeed, according to the Registry's internal reports, there is significant overlap of function in this regard.⁸³

41. In this instance, the Prosecution [REDACTED] firstly to search and seize all property from Mr. Bemba's homes and aircraft in Portugal, resulting in the effective incapacitation of the Boeing 727. It then [REDACTED] cooperation to freeze all assets of Mr. Bemba and his family. Who had the keys and documents is a red herring. The responsibility of the Court, through whatever organ, was to preserve the plane as an asset from that moment onwards. If that involved, for example, seeking the release of funds to pay maintenance and parking charges, then so be it.

42. Moreover, the suggestion that Mr. Bemba could have administered or managed his property from the detention centre is an utter fantasy. He was incarcerated, and on trial. The idea that he could continue to run his businesses, manage his properties, enter into commercial contracts, give instructions as to reinvestments, purchase new aircraft, facilitate commercial transactions from a prison cell in Scheveningen is simply untrue. The property in question had been frozen or seized, and his airline business had literally been cut up into pieces. He made one request in 2009 to Mr. Dubuisson to [REDACTED] the plane in Faro. It is now a 9 million euro liability.

(iv) The Registry's submissions about legal ownership of some of the property are irrelevant

43. The Registry submissions that [REDACTED] are irrelevant.⁸⁴ The property was frozen indiscriminately with his family members being explicitly targeted.⁸⁵ The Court thus cared not for such legal niceties then. Mr. Bemba is perfectly entitled to claim damages for property destroyed or devalued as a result of the ICC freezing orders, on the part of these family members. Regardless, annexed at Annex C are the relevant powers of attorney of Mr. Bemba's family, authorising him to act on their behalf in relation to any property seized or frozen by the ICC, the Kingdom of Belgium, Republic of Portugal or the DRC. The argument is thus moot in any event.

⁸³ ICC Registry, [Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court](#), August 2016, para. 433.

⁸⁴ ICC-01/05-01/08-3681-Conf-Exp-Red2, para. 8.

⁸⁵ See, for example, CAR-D04-0007-0083, [REDACTED]."

(v) The States should be joined as participants to the proceedings, or invited to make written submissions

44. In his Article 85 claim, Mr. Bemba asked that filing be notified to the competent authorities in the Kingdom of Belgium, the Portuguese Republic and the DRC.⁸⁶ He also submitted that “should the ICC contest liability on the basis of responsibility on the part of Belgium, Portugal, the DRC or the UN”, these states and the UN should be included as parties to any ordered arbitration.⁸⁷ The Pre-Trial Chamber subsequently found that Belgium, Portugal and the DRC are not “[REDACTED].”⁸⁸

45. It is now clear that the position of both the Prosecution and the Registry is that responsibility for the economic loss arising out of the freezing orders lies not with the ICC, but with the Belgium, Portugal, and the DRC,⁸⁹ and that these states were “aware of their obligation to manage the assets they were requested to freeze or seize on behalf of the Court.”⁹⁰ Moreover, the Registry concedes that “the Chamber may further require the states’ submissions on the alleged wrongdoing in managing Mr Bemba’s assets.”⁹¹

46. As such, to decide on questions of liability for the economic loss suffered in the absence of submissions from the States Parties now being blamed by the ICC, runs counter to the rules of natural justice. Mr. Bemba accordingly repeats and underlines his request to the Chamber to join the Kingdom of Belgium, the Portuguese Republic and the DRC as parties to the proceedings. In the alternative, Mr. Bemba requests that the Chamber invite the Kingdom of Belgium, the Portuguese Republic and the DRC to submit written observations on the present claim, and in particular the submissions of the Prosecution and Registry as concerns their liability for damages, for the proper determination of the case, pursuant to Rule 103 of the Rules of Procedure and Evidence.

D. CONCLUSION

47. The ICC cannot continue to operate in this manner. Chambers at the Court in the future must be confident in issuing requests for assistance that property they order to be seized and/or frozen will be properly protected and preserved with the ultimate probability

⁸⁶ See ICC-01/05-01/08-3673-Conf, p. 2.

⁸⁷ ICC-01/05-01/08-3673-Conf, para. 165, 168-169.

⁸⁸ ICC-01/05-01/08-3677-Conf, para. 3.

⁸⁹ ICC-01/05-01/08-3681-Conf-Exp-Red, paras. 30-38; ICC-01/05-01/08-3680-Conf-Red2, paras. 92-95.

⁹⁰ ICC-01/05-01/08-3681-Conf-Exp-Red2, para. 31.

⁹¹ ICC-01/05-01/08-3681-Conf-Exp-Red2, para. 38.

that it will be available for purpose. What occurred in this case was a scandal of mismanagement. There was no strategy either at the outset nor one which developed over the course of 10 years, with the result that Mr. Bemba's assets were simply dissipated to a shocking and "unprecedented" extent.

48. Whilst, of course, lessons have been learned, Mr. Bemba should not have to pay the price for the mistakes already made. Despite some of the submissions advanced, a suspect's property is not frozen to punish him for crimes of which he is suspected, nor those unrelated matters for which he may subsequently be convicted, and his continued deprivation of that property following acquittal has no legitimate justification.

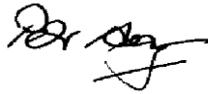
49. Neither is the ICC some special case when it comes to the management of assets which it asks to be seized and frozen. Just like any individual, corporation, police authority or state it assumes responsibility for the preservation and management of the property concerned, and when it fails in that responsibility, it is liable to compensate the loser. That is the position at law throughout the world, as Mr. Bemba has compendiously demonstrated in this claim. Those for whom his acquittal still rankles merely rail against that proposition, but in truth present no argument to challenge it.

50. Instead of acknowledging the reality of Mr. Bemba's situation and working towards finding a solution, the Registry and Prosecution have engaged in finger-pointing and blame-shifting. Neither has produced a single comparable example, whether at the national or international level, where a party requesting the imposition of freezing orders is immune from responsibility when it all goes wrong. Nor have they produced precedent whereby a defendant's assets were left to rot, and businesses destroyed, and upon release he was told "it was your fault, you should have managed your assets from prison". The position is simply untenable. This happened to Mr. Bemba. He is entitled to a remedy.

51. Mr. Bemba accepts that it is open to him to pursue that remedy in multiple *fora*. Nonetheless, he asserts that one of those *fora* is the ICC itself, which has a duty and the ability to provide him with one. Rather than continue to expend both his assets and those of the Court through litigation – whether before the ICC or in other jurisdiction(s) – Mr. Bemba remains willing to move towards some kind of dispute resolution or arbitration process, whether within the ICC or externally, with Portugal, Belgium and the DRC included as parties.

52. Additionally, he lost 10 years of his life as a result of a miscarriage of justice. However, he seeks no personal enrichment for that. All the same, he does not resile from the submission that the process he endured was expressly imbalanced against him and the judgment passed upon him at first instance had to be righted to prevent an obvious and serious miscarriage of justice from continuing further. His complaints more than satisfy the statutory criteria under Article 85(3) and nothing should deter the Chamber from that finding.

The whole respectfully submitted.



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Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands, 17 July 2019