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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 Redacted
With public Annexes A, B, C, D and E
Second Public Redacted Annex F and Public Redacted Annexes G, H and I and Confidential Annex J

Second Public Redacted Version of "Mr. Bemba's claim for compensation and damages"

Source: **Mr. Jean-Pierre Bemba Gombo**

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INTRODUCTION **4**
PART I: THE MISCARRIAGE OF JUSTICE **5**
A. APPLICABLE LAW 5
B. BEMBA'S TRIAL WAS A PARODY OF JUSTICE 7
1. The Prosecution jettisoned its original investigation and brought a case it knew to be untrue 9
2. The Trial Chamber negligently mismanaged the case 11
3. The scope of LRV involvement lead to an unbalanced and unfair trial 21
4. The industrial falsification of victims' applications was used to undermine the Defence case 25
5. The judgment was of sub-standard and unacceptable quality and did not respect the presumption of innocence 27
6. The case should never have taken 10 years 29
7. Conclusion 30
C. THE APPROPRIATE MEASUREMENT OF LOSS 31
1. Damages for Incarceration 32
a) Relevant Features of Mr. Bemba's personal, family, social and professional situation 33
b) Comparators 37
2. Aggravated Damages 40
3. Consequential Loss 41
a) Property damaged, devalued, or destroyed 42
b) Legal costs 42
PART II: THE DAMAGE TO MR BEMBA'S ASSETS **42**
A. What happened: The freezing orders 43
B. Frozen assets are required to be properly managed to preserve their value 45
C. The ICC had a duty in relation to the management of Mr. Bemba's assets 49
D. The ICC's management of the frozen assets was negligent 51
E. Mr Bemba has suffered loss as a result of the ICC's negligence/breach of fiduciary duty 54
F. The Court must provide the Claimant with a remedy 55
1. Financial compensation for the damage and destruction of property and assets 55
2. Submission to a dispute resolution mechanism 57
PART III – CONCLUSION, RELIEF AND DIRECTIONS **59**

INTRODUCTION

1. Jean-Pierre Bemba was arrested on 23 May 2008. He was detained from that date until his release on 12 June 2018, a period of a little over 10 years. By then he had been acquitted of all charges justifying his arrest and continued detention.

2. This case is almost unprecedented; an innocent man lost 10 years of his life. That alone justifies the description "extraordinary". The purpose of this claim is to attempt to repair some of the damage done to the man and his family by his arrest, detention and ancillary actions of the Court and certain States Parties. Of course, the Chamber cannot turn back the clock and give him back the time. The only remedy it can provide is financial reparation.

3. The simple loss of time spent in prison is incalculable. However, a significant part of the damage inflicted is readily susceptible to precise quantification, as more particularly set out in the remainder of this document and its annexes. That damage arises from the treatment of Mr. Bemba's material assets following his arrest.

4. In determining the amount of money which would compensate Mr. Bemba for spending 10 years in prison, the Chamber will have substantial discretion. It will, however, doubtless be guided by relevant jurisprudence on the level of awards to those wrongly imprisoned in other jurisdictions, as well as the equation of detention time to money in international criminal law. Before turning to that question, the Chamber will of course need to determine whether or not the case meets the qualifying criteria of Article 85 of the Statute.

5. That is not a prerequisite, however, to a determination that Mr. Bemba is entitled to compensation for the loss arising from the seizure of his property. That aspect of the claim is pleaded in the alternative. If the Chamber accepts, firstly, that the criteria under Article 85 are satisfied, and, secondly, that the losses sustained by Mr. Bemba are a consequence of the miscarriage of justice he suffered, then it could go on to award him compensation for those losses. If, however, it baulks at either proposition, that is not an end of the matter.

6. Mr. Bemba alleges that, in any event, the Court acted negligently in seizing and freezing his property but failing properly to manage it or even account for it. This liability arises irrespective of any consideration of a miscarriage of justice. Put simply, Mr. Bemba would have had a valid claim even in the event of his conviction in the criminal trial. Indeed, the Court's shortcomings in this regard disclose a worrying mission failure. Mr. Bemba's assets

were frozen in the name of the victims, but far from preserving or even developing a fund for use in reparations, the Registry allowed the assets to devalue, dissipate or simply rot. The Court failed the victims every bit as much as it failed the claimant.

7. 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. Resorting to a claim of immunity is not an available option, even if that were considered an appropriate course for an institution of this stature to take. The ICC has no immunity from claims under private law in contract or tort.

8. The ICC can be sued for those losses in domestic jurisdictions; Portugal, Belgium or the DRC. However, in the interests of judicial economy, Mr. Bemba proposes two alternatives to multiple concurrent legal claims. First, that this Court assumes jurisdiction over the claims under its inherent powers. Alternatively, that the claims be submitted to arbitration, under UNCITRAL, with all parties (the claimant, the Court and third parties) agreeing to be bound by the outcome. As an aside, it is useful to observe that such claims are not subject to the time limits imposed on claims solely under Article 85, wherever they are brought.

9. Any award for the destruction of and damage to his personal property will be used to put Mr. Bemba, members of his family, and other affected third parties, in the position they would have been had the negligent conduct not occurred. The award of damages insofar as it relates to compensating Mr. Bemba for the period of detention, will be used to provide reparations to the people of the Central African Republic. Mr Bemba wishes it to be known that he is ready and willing to work with the LRV, TFV and any other appropriate agency to provide meaningful assistance to those affected by conflict in that region funded by any compensation he receives for his wrongful incarceration.[1]

PART I: THE MISCARRIAGE OF JUSTICE

A. APPLICABLE LAW

[1] Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636-Anx3, fn. 1: "[…] in light of the outcome of the appeal, I must hope that Mr Bemba will use his new lease on freedom to do the following: assist victims of violations (including victims of rape) that occurred during the period of his involvement in the CAR war, regardless of the question of his own legal responsibility to do so; and, also, become an ambassador for lasting peace and human development in his country and continent."

10. Article 85(3) of the Rome Statute provides: "In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason." Rule 173(2) requires that: "The request for compensation shall be submitted not later than six months from the date the person making the request was notified of the decision of the Court concerning: […] (c) The existence of a grave and manifest miscarriage of justice under article 85(3)."[2]

11. In *Ngudjolo*, it was held that a grave and manifest miscarriage of justice "is a certain and undeniable miscarriage of justice following, for example, an erroneous decision by a trial chamber or wrongful prosecution. The miscarriage of justice must have given rise to a clear violation of the applicant's fundamental rights and must have caused serious harm to the applicant."[3] An applicant is required to give details of the elements within the purview of Article 85(3), with "specific references to the content of hearings and to any relevant decisions and must also show proof that the conditions set out above are satisfied."[4]

12. The phrase "grave and manifest miscarriage of justice" is tautologous. By definition, a miscarriage of justice is grave and manifest. To suggest otherwise is to accept that there can be a "trivial" or an "unclear" miscarriage of justice, which flies in the face of its ordinary meaning, being a "failure of a court or judicial system to attain the ends of justice, especially one which results in the conviction of an innocent person".[5] Moreover, a miscarriage of justice has necessarily to be an 'exceptional circumstance' within the meaning of Article 85(3). Zappalà's view is that: "the draftspersons used the formula 'in exceptional circumstances' more as a wish than as a limitation of the scope of the rule. In other words, it is hoped that 'grave and manifest miscarriages' of justice will occur only in exceptional circumstances, but it would seem that in every case of 'grave and manifest' miscarriage of justice, some sort of compensation should be foreseen."[6]

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[2] This time limit was extended to an additional three months by Decision ICC-01/05-01/08-3664-Conf.
[3] ICC-01/04-02/12-301-tENG, para. 45.
[4] ICC-01/04-02/12-301-tENG, para. 48.
[5] Miscarriage of justice in Oxford English Dictionary.
[6] 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, noting: "An important consideration for the judges to address in the future is whether the existence of a grave and manifest miscarriage of justice amounts per definition to exceptional circumstances. This would be a reasonable

13. As regards the language in Rule 173(2) linking the request for compensation to a "decision of the Court", the Trial Chamber in *Ngudjolo* examined the request for compensation in the absence of a "decision", finding that "there is no provision in the applicable legal texts which states that a prior decision, concerning any of the situations listed in Rule 173(2) of the Rules, should be issued by a chamber other than that seized of the request for compensation".[7] A similar approach was adopted by Trial Chamber VII.[8]

B. BEMBA'S TRIAL WAS A PARODY OF JUSTICE

14. Mistakes in international criminal judgments are rare. While differences of opinion arise in the interpretation of legal norms, or the correct weight to be ascribed to evidence; actual mistakes, meaning human error or genuine faults, are largely absent from ICL jurisprudence. The importance of the task ascribed to Judges has translated into a practice of recording the basis for convictions in a sufficiently accurate way.

15. The *Bemba* Trial Judgment[9] must be set aside from this. Littered with mistakes, and error-strewn on a level never before seen in ICL, the *Bemba* Trial Judgment stands alone. An analysis of the 1009 evidence citations in the "facts" section of the Judgment revealed errors in 84 or 8.3% of them.[10] Not typographical errors. In 84 footnotes the Trial Chamber cites to evidence to make adverse findings against an accused, which has nothing to do with, or in fact says the exact opposite of the proposition for which it is cited in support.

16. Arguably, the Trial Chamber's central finding, was that the MLC units in the CAR remained within its operational control during the 2002-2003 conflict. Evidence cited in support of this proposition reads:[11]

> Court Officer: Just for the record of the case the document being shown on your screens is a public document".

assumption to make, or to put it differently, it seems beyond reasonable doubt to afford some kind of compensation to persons erroneously detained due to a 'grave and manifest miscarriage of justice'; *And* 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, citing Zappalà, and noting that: "The current threshold however seems to raise the bar for eligibility too high. The legal framework currently in place creates a multi-tiered system to determine eligibility that considerably narrows the field of claimants that will qualify."

[7] ICC-01/04-02/12-301-tENG, para. 16.
[8] ICC-01/05-01/13-1663, paras. 18-20.
[9] ICC-01/05-01/08-3343, hereinafter: "Judgment".
[10] ICC-01/05-01/08-3434-Conf, paras. 6-11.
[11] Judgment, para. 427, citing T-151, 68:5-8.

17. This is not a typographical error. The same passage of transcript is cited four times in the Judgment.[12] Concerning the identification of perpetrators, critical evidence distinguishing Bozizé's troops is said to be:[13]

> for you and our interpreters and court reporters to take a break.
> It's 11o'clock. We will resume at 11.30

18. This is not the only adverse finding supported by the Trial Chamber announcing it would take a recess.[14] The errors in the Trial Judgment were so numerous that Mr. Bemba's counsel considered asking the Trial Chamber if the correct version had been circulated. The figure of 8.3% was never challenged by the Prosecution, nor by the Appeals Chamber, in particular by the minority Judges seeking to uphold the conviction.

19. These basic errors which litter the Trial Judgment are raised here because they are, in fact, a totemic indicator of the care with which Trial Chamber III approached the Bemba case, and of its ability to render justice. They illustrate a pattern of amateur mismanagement of the trial process, in which the Judges regularly demonstrated ignorance of basic principles of criminal law and procedure,[15] and which resulted in a judgment which was replete with "obvious evidentiary problems",[16] including the Trial Chamber's "selective and partial use of the available evidence", findings based on "no shred of evidence" against the accused,[17] giving rise to "deep concerns" about whether the Judges applied the beyond reasonable doubt standard,[18] and where the Judges' interpretation of the law in a manner adverse to the accused led to, for example, a "trivialisation of the crime against humanity".[19]

20. Nothing about this claim will serve as a precedent for compensation claims for future acquittees. The Bemba case was utterly remarkable. It will be forever unique in terms of the mistakes made at every step by a Chamber determined to convict at all costs. The process was a million miles removed from a fair and impartial determination of guilt.

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[12] *See* Judgment, fns. 1152, 1182, 1183, 1185.
[13] Judgment, para. 450, fn. 1259 citing T-151, 22:16
[14] Judgment, para. 497, fn. 1458, citing T-192, 38:8-9.
[15] T-178-Red2-ENG, 17:24-18:11: Q. Sir, did all of the 40 women go on to the ferry-boat?… MR HAYNES: Your Honour, I do protest. The witness has had the opportunity to refresh his memory from his interview with the Office of the Prosecutor. There really is no need for Mr Iverson to continue to put words into his mouth. This could be asked in an open way, and not in a suggestive way. PRESIDING JUDGE STEINER: What is the -- what is the question you are objecting? I don't see any leading question here. MR HAYNES: Well, if "Sir, did all of the 40 women go on to the ferry-boat" is not a leading question, then I don't know what is. PRESIDING JUDGE STEINER: Mr Haynes, maybe we have different points of view in that respect. You can proceed, Mr Iverson. MR IVERSON: Thank you, Madam President.
[16] ICC-01/05-01/08-3636-Anx2, para. 12.
[17] ICC-01/05-01/08-3636-Anx3, para. 12.
[18] ICC-01/05-01/08-3636-Anx2, para. 14.
[19] ICC-01/05-01/08-3636-Anx2, para. 72.

21. Mr. Bemba acknowledges that Article 85(3) is not simply another level of adjudication or re-assessment of the merits of the various decisions which have been adopted, or not, by other Chambers in the proceedings.[20] This is not a request for Pre-Trial Chamber II to review some (or all) of the flawed decisions in this trial and find that they should have been differently decided. Rather, he seeks to paint an overall picture of the gap between a fair trial, and what in fact happened. The Prosecution's disregard for its investigations; the Chamber's negligent mismanagement of the trial; the hugely flawed Trial Judgment; the Prosecutor's public disavowal of the acquittal and deliberate campaign to undermine it - underpinned by the woeful mismanagement of Mr. Bemba's personal property showing negligence and incompetence to an extent that defies belief - can lead to no other conclusion other than that the trial was a miscarriage of justice. The process to which he was subjected violated Mr. Bemba's fundamental right to a fair trial, and the 10 years of incarceration, particularly during the formative years in the lives of his 5 children, caused serious harm.[21]

1. **The Prosecution jettisoned its original investigation and brought a case it knew to be untrue**

22. The Prosecution's investigation in the Bemba case spanned 1 year,[22] and cost millions of euros.[23] The CAR government cooperated with the Prosecution's investigation.[24] As such, the Prosecution interviewed the central players from within Central African military and political hierarchy in 2002-2003.[25]

23. Their statements were unequivocal. told the Prosecution that the MLC

[20] ICC-01/04-02/12-301-tENG, para. 47.
[21] ICC-01/04-02/12-301-tENG, para. 45.
[22] *See* ICC-01/05-01/08-128-Conf-AnxA, para. 4, 123: the investigation started on 10 May 2007 and the Arrest warrant was issued on 23 May 2008 (ICC-01/05-01/08-1-tENG-Corr).
[23] The set-up and basic equipping of an ICC office in the CAR to support the CAR investigation alone cost € 587,000 (ICC-ASP/7/8/Add.1, p. 3). In the year during which the Bemba investigation was conducted, the revised expenditure for the OTP's Investigations Division in 2007 was € 8,519,500 (p. 2), of which the situation-related expenditure was € 8,133,600 (p. 3).
[24] *See*, for example, EVD-P-02492-CAR-OTP-0019-0385, EVD-P-00003/CAR-OTP-0001-0139.
[25] The interviewees included:

[26] and were "by the CAR state.[27] confirmed that it was the CAR Minister of Defence that was " and that "
"[28]
"[29] Even confirmed not only that [30] and ,[31] but also that the MLC ,[32] that, "[33] that " .[34] Mr. Bemba was no longer in command of the MLC troops, rather they formed part of a new command chain, whereby the troops operating side by side received orders from those coordinating operations on the ground.

24. Mr. Bemba was accordingly arrested on the basis that he was responsible as an indirect co-perpetrator under Article 25(3)(a), together with President Patassé. Command responsibility was not included as an alternate charge. At confirmation, the Prosecution stressed the "coordination of the essential contributions" of both Mr. Bemba and President Patassé,[35] and asserted "Patassé continued to provide the MLC with bases, transportation,

[26] EVD-P-02553/CAR-OTP-0007-0121_R01 at 0151-0152 (non-official translation). *See also* at 0156.
[27] EVD-P-02553/CAR-OTP-0007-0121_R01at 0155 (non-official translation).
[28] EVD-P-00137/CAR-OTP-0008-0194_R01 at 0204 (non-official translation).
[29] EVD-T-OTP-00757/CAR-OTP-0020-0239_R02 at 0258-0259. *See also* EVD-T-OTP-00759/CAR-OTP-0020-0263_R02 at 0286-0287:
[30] EVD-P-03938/CAR-OTP-0048-0263_R01 at 0268 (non-official translation).
[31] EVD-P-03938/CAR-OTP-0048-0263_R01 at 0269 (non-official translation).
[32] EVD-P-03937/CAR-OTP-0048-0240_R01 at 0257 (non-official translation).
[33] EVD-P-03937/CAR-OTP-0048-0240_R01at 0252 (non-official translation).
[34] EVD-P-03937/CAR-OTP-0048-0240_R01 at 0253 (non-official translation).
[35] T-12-ENG, 73:7-14.

fuel and food."[36] The Prosecution submitted that: "Together, Jean-Pierre Bemba and Patasse coordinated the conduct of the MLC troops in the [CAR]".[37]

25. The Pre-Trial Chamber declined to confirm the charges under Article 25(3)(a), and suggested prosecution under Article 28.[38] Knowing that the CAR military and political hierarchy had given statements confirming the re-subordination of the MLC troops to the FACA, the Prosecution could have dropped the case at this point, and pursued those who were responsible for the alleged crimes. Instead, the evidence gathered up to that point was simply jettisoned as inconvenient to the charges then pursued. None of the CAR politicians or soldiers or commanders interviewed was called by the Prosecution to give evidence. [REDACTED] was also cast aside. Despite their obvious relevance to the case, they could not give truthful testimony that aligned with the Prosecution's novel theory of command, and were thus abandoned.

26. Thus, the Prosecution presented a "command" case without command evidence. Only two members of any armed force (from either side of the conflict) were called by the Prosecution, [REDACTED][39] All other soldiers and commanders were abandoned. No-one with knowledge of the realities of the 2002-2003 operation could truthfully have testified that Mr. Bemba was in operational control. In fact, they had previously said the opposite in statements sitting in the Prosecution's archives. Rather than an unbiased search for the truth, this shows a determination on the part of the Prosecution to "get their man at all costs".

27. Of course, the Prosecution has a discretion to adopt and adapt its case to the evidence as it emerges. It cannot, however, abandon an entire investigation and a wealth of corroborated evidence in favour of a directly contradictory case, simply to avoid a big fish slipping its grasp. This conduct violated the Prosecution's duty to act as impartial minister of justice, and set the scene for the miscarriage of justice which was the *Bemba* trial.

2. The Trial Chamber negligently mismanaged the case

28. During the evidence of D64, a defence witness, Presiding Judge Steiner sought to impugn and contradict his testimony, on the basis of information allegedly contained in a

[36] T-12-ENG, 73:7-14.
[37] T-12-ENG, 73:14-16.
[38] ICC-01/05-01/08-388.
[39] [REDACTED]

Facebook account in the witness' name.

29. When it was drawn to her attention that she was cross-examining on the basis of material on the internet that had not been disclosed to the Defence, Her Honour responded that "we could just say that Facebook is a public site in which everyone could consult Facebook and find the information one wants to have… the Judges of the Chamber… are truth finders. We are allowed to put to the witness whatever questions we deem necessary… the Chamber is not bound by the documents of the case file".[40] Thus, for Judge Steiner, it was legitimate to question Defence witnesses on confidential information unknown to the Defence, and on the basis that it allegedly existed on Facebook.

30. This was not the only time the Presiding Judge cross-examined Defence witnesses on the basis of material unknown to the Defence.[41] This practice (unique to the Defence case) gives a flavour of Her Honour's approach to criminal procedure, rules of evidence, and rights of the accused. Once a trier of fact decides to conduct internet research and seek to impugn an accused's witnesses with that material, the trial has moved outside any recognisable system of criminal justice.

31. In fact, between 2010-2013, the *Bemba* case was a procedural void. Conducted routinely in closed session,[42] it was a litany of incomprehensible and inconsistent procedural decisions, hermetically sealed from Appeals Chamber review by the Trial Chamber's denial of all requests for certification.[43] The Trial Chamber granted certification once, at the outset of the trial in January 2011.[44] This resulted in the Trial Chamber's regime for the admission of documents being savaged by the Appeals Chamber as being outside the legal framework

[40] T-260-Red3-ENG, 34:7-9, 35:14-17.
[41] T-260-CONF-ENG, 31:21-36:3, 37:5-38:8; T-265-CONF-ENG, 63:18-64:10.
[42] *See*, for example, Another Day of Closed Session in the Bemba Trial; Bemba Trial Continues in Closed Session; Fifth Day of Closed Session in Bemba Trial; Bemba Trial in Closed Session at Restart of Hearings; Judges' Witness Gives All Evidence in Bemba Trial in Closed Session; Bemba's 33rd Witness Continues His Testimony in Closed Session; New Witness in Bemba Trial Testifies Entirely in Closed Session; Bemba's 15th Witness Continues Testimony in Closed Session; Second Week of Closed Hearings in Bemba Trial; Witness 48 Cross-Examined in Closed Session; Tenth Defense Witness Concludes Testimony in Closed Session; Prosecutors Question Patassé Intelligence Officer in Closed Session; Insider Witness in Third Day of Closed Session; Last Prosecution Witness to Give All Evidence in Closed Session; Second to Last Prosecution Witness Against Bemba Still in Closed Session; New Prosecution Witness Gives All Evidence in Closed Session; Questioning of Former Bemba Insider Continues in Closed Session; Trial Proceeds in Closed Session; Victims' Lawyers Question Witness - Mainly in Closed Session; New Witness Testifies in Closed Session.
[43] ICC-01/05-01/08-1850-Conf, ICC-01/05-01/08-2129, ICC-01/05-01/08-2399, ICC-01/05-01/08-2487-Conf, ICC-01/05-01/08-2800, ICC-01/05-01/08-2925-Conf, ICC-01/05-01/08-2980-Conf, ICC-01/05-01/08-3122, ICC-01/05-01/08-3114, ICC-01/05-01/08-3113, ICC-01/05-01/08-3152, ICC-01/05-01/08-3273.
[44] ICC-01/05-01/08-1169.

of the ICC; "incompatible" with the Statute;[45] and resulting from the Trial Chamber "paying little or no regard to the principle of orality, to the rights of the accused, or to trial fairness generally".[46] Following this extraordinary rebuke, the Trial Chamber **never certified any of its decisions**. The next occasion the Appeals Chamber ruled on anything in the *Bemba* case was 7 years later, when it rendered an acquittal. Appellate review exists precisely to avoid a Trial Chamber sealing itself off from scrutiny, and acting with impunity. This is precisely what happened in the *Bemba* case.

32. Coming back to Facebook; the cross-examination itself was only the start of the problem. Following this incident, the Defence seized the Trial Chamber with a request for disclosure of the materials used by Judge Steiner to examine its witnesses.[47] Eventually, the Trial Chamber said that the materials, including the alleged Facebook page, had been **wrongly provided to the Chamber** in VWU Security Assessment Reports.[48] The Chamber "regret[ted] the unfortunate procedural error **on the part of the VWU**, whereby, in relation to four witnesses called by the defence, the Chamber received internal working documents from the VWU that should not have been transmitted to it." The Trial Chamber conceded that in relation to D64, "this procedural error **resulted in the Chamber questioning the witness** on the basis of information which should have been used solely for the purpose of preparing a risk assessment."[49]

33. Of course, this explanation is untenable. A professional judge in receipt of internal VWU reports would have returned them without reading them and informed the parties of their mistaken transmission. Her Honour Judge Steiner took these materials, cross-examined Defence witnesses on them, dismissed Defence objections and then (and only following a filing by the Defence)[50] blamed her questioning on VWU. More alarmingly, this attempted justification was untrue. Previously, VWU had confirmed that reports are provided following a request from the Chamber.[51] This contradiction was brought to the attention of the Chamber.[52] It was never addressed. It was raised on appeal[53] and remains unaddressed.

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[45] ICC-01/05-01/08-1386, paras. 1-3.
[46] ICC-01/05-01/08-1386, para. 78.
[47] ICC-01/05-01/08-2491-Conf.
[48] ICC-01/05-01/08-2588, para. 2.
[49] ICC-01/05-01/08-2410-Conf, para. 11.
[50] ICC-01/05-01/08-2491-Conf.
[51] ICC-01/05-01/08-2491-Conf, para. 7.
[52] ICC-01/05-01/08-2491-Conf, para. 12.
[53] ICC-01/05-01/08-3596-Conf, para. 6.

34. Other false statements litter the Bemba case record. D7 was a vulnerable witness.[54] He did not finish his evidence. He was blatantly [55] The Registrar believed that *prima facie* [56]

35. D7 recounted his exchange with to the Chamber under oath.[57] The witness was, ,[58] and the VWU .[59] The Defence pressed the Trial Chamber repeatedly in relation to this incident.[60] In declining to take any action, the Trial Chamber said the incident was a ”[61] Following a Registry report emphasising the “ ,[62] claimed that D7 [64] This contradicts the Chamber's assertion that [65] Either Mr. Bemba will never know. This contradiction was raised on appeal,[66] and not addressed.

36. Defence and Prosecution witnesses were treated differently. The Trial Chamber adjourned for weeks on end for the professional convenience of Prosecution witnesses.[67] Requests to accommodate Defence witnesses were dismissed.[68] Prosecution and LRV witnesses were told by the Trial Chamber "we believe you",[69] a reassurance that was

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[54] T-249-CONF-ENG, 15:16.
[55] ICC-01/05-01/08-2513-Conf, para. 2.
[56] ICC-01/05-01/08-2513-Conf, para. 7.
[57] T-250-CONF-ENG, 48:3-49:18, 63:6-64:17; *see also* the French transcript T-250-CONF-FRA, 51:12-14, which differs substantially from the English.
[58] ICC-01/05-01/08-2605-Conf, para. 14.
[59] ICC-01/05-01/08-2605-Conf, fn. 26.
[60] T-250-CONF-ENG, 63:6-64:14, T-253-CONF-EXP-ENG, 9:2-11:6; ICC-01/05-01/08-2534-Conf.
[61] T-253-CONF-EXP-ENG, 16:23.
[62] ICC-01/05-01/08-2513-Conf, para. 7.
[63] ICC-01/05-01/08-2574-Conf, para. 9.
[64] ICC-01/05-01/08-2574-Conf, para. 3.
[65] T-253-CONF-EXP-ENG, 16:23.
[66] ICC-01/05-01/08-3501-Conf, paras. 36-40.
[67] *See*, for example, ICC-01/05-01/08-1904-Conf; ICC-01/05-01/08-2146: P36 was scheduled to testify at the end of 2011, a first postponement was granted to early 2012. He was then scheduled to testify on 16 February 2012 but testified only on 13 March 2012. The transcripts also demonstrate the 30 day lapse in hearings: T-211 and T-213. *See also* ICC-01/05-01/08-1893-Conf-Red, paras. 5-6.
[68] T-332-Red-ENG, 2:14-6:10.
[69] T-221-Red-ENG, 14:22-24; T-222-ENG, 3:15-25.

apparently justified on the basis that they were vulnerable and it would assist them in giving (incriminating) evidence. Defence witnesses, including those who had suffered terribly, were cross-examined by the same Judges, who questioned the veracity of their testimony.[70]

37. The ambit of cross-examination about the benefits of testifying was imbalanced and unjust. For example, P178 received over [redacted] from the ICC,[71] a fact about which the Trial Chamber was aware.[72] When the defence sought to ask him questions about the benefits to him of testifying, the Presiding Judge reacted as follows:[73]

> Q. […] How much money, if applicable, did you get or do you expect to get in the context of your testimony?
> PRESIDING JUDGE STEINER: Maître Badibanga, you have the floor, **but I have already the answer to this question**.
> MR BADIBANGA: (Interpretation) Your Honour, yes. Of course we do object to these particularly insulting questions first of all in respect of the witness, whose integrity is being questioned **on an imaginary basis** and I really don't see any element that could possibly justify the position of the Defence. It is also very insulting towards the Office of the Prosecution […].
> PRESIDING JUDGE STEINER: Maître Badibanga, if there is any system to compensate the witness for the days the witness spent in The Hague, this is an issue that relates only to VWU and will be the same that will apply for the Defence witnesses when the Defence witnesses come. So the tone in which the question was posed to the witness is offensive and **the Chamber does not accept this kind of question.**

38. Had these questions been allowed, P178 would either have denied receiving or seeking money from the ICC (and thereby perjured himself), or confirmed that he had done so. Either answer would have had a bearing on his credibility, and thus was materially relevant for the Defence. The Trial Chamber went on to rely on P178's testimony to make

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[70] *See*, for example, T-249-CONF-ENG, 16:7-17:10; T-263-Red2-ENG, 21:18-23:20; T-266-CONF-ENG, 9:15-11:20; T-292-CONF-ENG, 36:18-53:2; T-306-Red2-ENG, 75:7-20 ; T-322-Red2-ENG, 46:2-47:22 ; T-337-Red-ENG, 21:13-22:22, 44:21-46:3, 63:7-15.
[71] ICC-01/05-01/08-2912-Conf-AnxD, pp. 2-3.
[72] During Defence cross-examination, the Trial Chamber convened an *ex parte* status conference with P178 and the Prosecution to hear alleged security concerns (For a full analysis of this Status Conference, refer to ICC-01/05-01/08-3596-Conf, paras. 9-17. P178's testimony at the status conference was given under oath. He made numerous references to the receipt of payments from the ICC (T-155-CONF-RED2-ENG, 11:9-13, 13:19-20, 14:2-3, 16:23-24, 19:10-11, 21:12-20). He testified that he had been offered "sums of money" by [redacted] the day prior to the *ex parte* status conference, but went on to insist that he didn't want money, he wanted protection (T-155-CONF-RED2-ENG, 19:10-11, 20:23-24) It was later disclosed that the Prosecution had sought the admission of P178 into the ICCPP, a measure of protection of almost incalculable value, and that VWU had provided financial assistance for "protection measures including interim measures pending the Registrar's decision for his inclusion into the ICCPP […] consist[ing] of the financial assistance for the witness and his family's move to a safe residence, and financial assistance when the witness was advised to temporarily terminate his business activities (ICC-01/05-01/08-2912-Conf-AnxD, p. 3).
[73] T-157-Red2-ENG, 53:11-54:1 (emphasis added).

key findings adverse to Mr. Bemba.[74]

39. By contrast, the Prosecution routinely asked Defence witnesses if they had been paid.[75] Prosecutors would ask "have you received any payment purportedly on Bemba's behalf?"[76] The Defence would object, and the question would be allowed. The double-standard was pointed out, and dismissed.[77] It was raised on appeal,[78] and not addressed. What was offensive to Prosecution witnesses was fair game for Defence witnesses. Double standards were rampant, and always to the detriment of the accused.

40. Of all the mistakes the Trial Chamber made, however, one stands above all others. One mistake that, alone, removed any objective appearance of fairness. This was its erroneous entertainment of *ex parte* allegations concerning the credibility of Defence witnesses and the Defence itself, in breach of the statutory regime of the Court.[79] On 15 November 2012, during the presentation of the 17th Defence witness, the Prosecution informed the Chamber *ex parte* that it had been conducting an investigation into "potential payments to Defence witnesses of Mr. Jean-Pierre Bemba,"[80] and asked the Chamber to order the Registry to provide confidential Defence information to assist in its investigation.

41. The Prosecution seized the Trial Chamber in error.[81] Under Article 39(4), the Prosecution was required to seize a Pre-Trial Chamber.[82] A professional trial Judge in receipt of this request would have immediately directed it to a Pre-Trial Chamber, informed the Defence of the error, and sought the parties' submissions on whether a fair trial was still possible. Trial Chamber III apparently did not realise its error for five months.[83]

42. Instead, it directed the Registry on 19 November 2012 to provide it with observations on the Prosecution request.[84] After the Registry advised that it had already provided the

[74] Judgment, para. 543, fn. 1652, para. 568, fns. 1766-1767; para. 564, fn. 1744; para. 427, fn. 1185; para. 420, fn. 1150; para. 555, fn. 1702; paras. 539-543, fns. 1637-1641, 1651-1653.
[75] T-322-Red2-ENG, 26:6–27:9; T-323bis-Red-ENG, 21:22-23; T-334-Red-ENG, 17:23-25; T-335-Red-ENG, 19:8-13; T-337-Red-ENG, 40:3-6, 13-20; T-339-Red-ENG, 41:18-19; T-342-Red-ENG, 13:1-10; T-345-Red-ENG, 12:4-15:6.
[76] T-277-CONF-ENG, 33:21-35:20, 37:3-38:4.
[77] T-277-CONF-ENG, 33:21-35:20, 37:3-38:4. *See also* ICC-01/05-01/08-3239-Conf-Exp, para. 40, ICC-01/05-01/08-3255, para. 110.
[78] ICC-01/05-01/08-3434-Conf, para. 71; *see also* para. 109 and fns. 213-214.
[79] For a full details of this error, *see* further ICC-01/05-01/08-3434-Conf, para., paras. 51-114.
[80] ICC-01/05-01/08-2412, para. 1.
[81] *See*, Rome Statute, Article 57(3)(a), Article 64(4), Article 70(2), and RPE, Rules 162 to 169.
[82] ICC-01/05-01/08-2606-Conf, para. 21.
[83] ICC-01/05-01/08-2606-Conf, para. 21.
[84] ICC-01/05-01/08-2421.

Prosecution with confidential Defence information (absent an order of the Court as required),[85] the Trial Chamber ruled that a decision on the Prosecution's request was no longer required.[86] The Registry's unauthorised and unlawful conduct drew no comment.

43. Emboldened, the Prosecution, on 20 March 2013, improperly returned to the Trial Chamber.[87] Its 18-page filing contained unsubstantiated allegations, including alleged promises of benefits to Defence witnesses;[88] allegations of Defence presenting false documents;[89] details of money transfers to nine Defence witnesses, each of whom were named;[90] the alleged link between the results of the Prosecution's investigation and the testimony of Defence witnesses;[91] and the alleged role of the accused in facilitating a "bribery scheme".[92]

44. Having been apprised in full of the Prosecution's investigation, and its unsubstantiated suspicions concerning Mr. Bemba's role, the Trial Chamber convened an *ex parte* status conference, which lasted 1.5 hours. The accused was not represented. The Defence was not present. The Presiding Judge demonstrated an extensive knowledge of the Prosecution's investigation. She even made suggestions as to further avenues which the Prosecution could pursue in its investigation of Mr. Bemba and his witnesses.[93]

45. It was averred that Defence witnesses had lied;[94] and asserted that huge sums had been paid to witnesses that could only be for an improper purpose.[95] The STA announced the Prosecution's intention to investigate the allegations in respect of 9 witnesses, 5 of whom had already testified.[96] Much could have been said in response to these allegations, had the Defence been given the opportunity. First, none of the payments to any of the witnesses-of-fact who had actually testified, [REDACTED] [REDACTED], were suspiciously large.[97] Legitimate explanations existed for the payments to other

[85] ICC-01/05-01/08-3434-Conf, paras. 60-65.
[86] ICC-01/05-01/08-2461.
[87] ICC-01/05-01/08-2548-Conf-Red.
[88] ICC-01/05-01/08-2548-Conf-Red, para. 9.
[89] ICC-01/05-01/08-2548-Conf-Red, para. 10.
[90] ICC-01/05-01/08-2548-Conf-Red, para. 13.
[91] ICC-01/05-01/08-2548-Conf-Red, para. 15.
[92] ICC-01/05-01/08-2548-Conf-Red, para. 16.
[93] T-303-Red3-ENG, 24:8-10. PRESIDING JUDGE STEINER: Maître Badibanga, for instance, would be a good start for the Prosecution investigation just to check the log-book that Detention Centre's – nodding does not help. I need your answer. […] *See also*, at 8:16-20.
[94] T-303-Red3-ENG, 26:19-25.
[95] T-303-CONF-Red2-ENG, 26:23-25; 28:15-28:18; 29:5-20.
[96] T-303-CONF-Red2-ENG, 7:11-18.
[97] ICC-01/05-01/08-2548-ConfAnxA, p. 2.

witnesses that the Defence had no opportunity to provide.[98] The Prosecution's *ex parte* submissions, however, created an entirely different impression.[99]

46. Without a second thought as to the propriety of this process, the Trial Chamber stated that it would decide on the investigative requests.[100] Only on 26 April 2013, did it appreciate that it had "no competence" to deal with the Prosecution's request,[101] a decision it should have taken over five months earlier. No regard was apparently had to practice at the ICTY and ICTR following the (not infrequent) allegations against accused, lawyers or investigators, where the allegations remained *ex parte* for a very short period, normally a matter of days.[102]

47. The status conference allegations went to the heart of the credibility of Defence witnesses and the Defence itself. The submissions, regardless of whether they constituted a sound basis for an Article 70 investigation, damaged the fairness of proceedings by prejudicing the Trial Chamber against the Defence and its evidence. These highly damaging submissions remained *ex parte*, unrefuted, and irrefutable, throughout the remainder of the Defence case. Their eventual disclosure was too late to remedy the prejudice. First, the Trial Chamber's impression of 23 of the Defence's 34 witnesses was formed under the cloud of allegations of which the Defence had no knowledge, let alone any opportunity to respond. Second, once the allegations did come to light, the Chamber found that litigating the merits of those allegations was no longer practicable,[103] and that it could not "make findings relating" to the merits of the Article 70 case.[104] At the same time the Chamber was aware of the witnesses implicated in the Article 70 case, who were listed in the Judgment.[105]

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[98] ICC-01/05-01/08-3434-Conf, paras. 64-66.
[99] T-303-Red3-ENG, 26:17-27:1.
[100] T-303-Red3-ENG, 25:16-25.
[101] ICC-01/05-01/08-2606-Conf, para. 22.
[102] ICC-01/05-01/08-3434-Conf, paras. 79-84. Chambers then allowed *inter partes* submissions followed by a decision as to whether the matter should be investigated further (*see The Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Prosecution Oral Motion for Amendment of the Chambers Decision on Allegations of Contempt, 6 July 2010; *The Prosecutor v. Ngirabatware*, ICTR-99-54-R77.1, Decision on Allegations of Contempt, 12 March 2010; *The Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on the Prosecution's Urgent Motion Alleging Contempt of the Tribunal, 15 December 2009; *Prosecutor v. Ngeze*, ICTR-99-52-A, Order Directing the Prosecution to Investigate Possible Contempt and False Testimony, 6 September 2005; *The Prosecutor v. Ntakirutimana & Ntakirutimana*, ICTR-96-10-T and ICTR-96-17-T, Decision on Prosecution Motion for Contempt of Court and on Two Defence Motions for Disclosure etc., 16 July 2001) *Amicus curiae* reports were made available for *inter partes* comment before any further orders (*see The Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order to Disclose Amicus Curiae Report with Respect to Allegations Made by Witnesses CNAL and CNAE to the Parties and Request for Submissions, 13 May 2011, p. 4).
[103] ICC-01/05-01/08-3029, para. 26.
[104] ICC-01/05-01/08-3029, para. 31.
[105] Judgment, para. 253.

48. No trial could be considered fair, whether by a jurist or reasonably informed observer, when *ex parte* submissions on witness credibility which should never have been entertained by the trier of fact were allowed to linger in secret throughout the duration of the Defence case; and when the Defence was never given an opportunity to address the Trial Chamber on their validity. This error was fatal to the fairness of the case. When informed of this process, the Defence sought a remedy which was denied,[106] as was a request for certification.[107] The error was raised on appeal,[108] but not addressed. The Trial Chamber dismissed its error as having no impact on the proceedings.[109] In fact, it had destroyed their integrity.

49. The Presiding Judge's enthusiasm for the Prosecution's investigations against Mr. Bemba and his witnesses stands in marked contrast to her approach to allegations that Prosecution witnesses were being paid to give false testimony. In another example of the discrepancy in the treatment of Prosecution and Defence witnesses, the Trial Chamber blocked an investigation into a scheme on the part of Prosecution witnesses to extort money from the Prosecution. It is almost impossible to condense this incredible story of Prosecution witness blackmail, bribery and collusion into a few paragraphs, but this is an attempt.[110]

50. Prosecution witnesses against Mr. Bemba were paid. P169 and P178, for example, received [REDACTED] and [REDACTED] respectively.[111] P169 in fact received a [REDACTED][112] (although not the [REDACTED] he had requested).[113] The Prosecution called 21 witnesses from the CAR. Each was granted protective measures.[114] On 7 June 2013, an accurate list of their

[106] ICC-01/05-01/08-3217-Conf-Exp; ICC-01/05-01/08-3231-Conf-Exp: ICC-01/05-01/08-3234; ICC-01/05-01/08-3239-Conf-Exp (*see also* confidential redacted and public versions).
[107] ICC-01/05-01/08-3260-Corr.
[108] ICC-01/05-01/08-3434-Conf, paras. 13-114; ICC-01/05-01/08-3483-Conf, paras. 6-23.
[109] ICC-01/05-01/08-3255.
[110] For a full account, Mr. Bemba refers to paragraphs 494 to 520 of his appeal brief ICC-01/05-01/08-3434-Conf, and filings ICC-01/05-01/08-1660-Conf-Anx1-Red2; ICC-01/05-01/08-2827-Conf-AnxA-Red; ICC-01/05-01/08-2827-Conf-AnxB-Red3; ICC-01/05-01/08-2872-Conf; ICC-01/05-01/08-2912-Conf-AnxD; ICC-01/05-01/08-2932-Conf; ICC-01/05-01/08-2939-Conf; ICC-01/05-01/08-2975-Conf-Red; ICC-01/05-01/08-3005-Conf-Corr; ICC-01/05-01/08-3013-Conf; ICC-01/05-01/08-3099-Conf; ICC-01/05-01/08-3138-Conf-AnxA; ICC-01/05-01/08-3139-Conf; ICC-01/05-01/08-3159-Conf; ICC-01/05-01/08-3164-Conf; ICC-01/05-01/08-3166-Conf; ICC-01/05-01/08-3177-Conf; ICC-01/05-01/08-3178-Conf; ICC-01/05-01/08-3190-Conf; ICC-01/05-01/08-3192-Conf; ICC-01/05-01/08-3200-Conf. *See also* EVD-T-D04-00105/CAR-OTP-0083-1489-R01.
[111] ICC-01/05-01/08-2912-Conf-AnxD, pp. 2-3.
[112] T-361-CONF-ENG, 29:17-22.
[113] ICC-01/05-01/08-2827-Conf-AnxB-Red3.
[114] T-47-Red2-ENG, 45:12-46:12; T-50-CONF-ENG, 37:24-42:9; T-63-Red2-ENG, 50:2-51:19; T-66-CONF-ENG, 1:25-4:5, 41:18-44:9; T-79-Red-ENG, 44:11-46:2; T-81-CONF–ENG, 54:21-56:24; T-90-CONF-ENG, 57:19-60:1; T-107-ENG, 1:21-3:5; T-115-Red2-ENG, 53:19-55:19; T-123-Red2-ENG, 31:23-33:20; T-127-Red2-ENG, 58:12-60:10; T-176-CONF-ENG, 6:4-10:11; ICC-01/05-01/08-1021-Conf; ICC-01/05-01/08-1940.

names, addresses and telephone numbers was compiled, and circulated to the public.[115] The List, titled " , was annexed to a letter from P169 to the Prosecutor (, in which P169 referenced " .[116] Witness protective measures had not only been breached, but on an unprecedented scale. According to the letter and List, protected Prosecution witnesses had been in contact, with the apparent purpose of extorting more money from the ICC. The Defence was not informed.[117]

51. On 5 August 2014, P169 wrote another letter confirming contact between Prosecution witnesses.[118] He characterised his testimony as being the result of a bargain, and evinced an intention to "*reconsidérer mon témoignage*".[119] Of the 21 witnesses on the List, P169 stated that *"[i]ls sont prêts à apporter la preuve de subordination des témoins*". The Prosecution characterised this letter as "entirely untruthful".[120] Only after a Defence request, did the Trial Chamber order the recall of P169.[121]

52. On recall, P169 lied about his contacts with other Prosecution witnesses,[122] which had been relied upon by the Chamber to deny Defence requests for further investigation.[123] His testimony raised new questions about P178's role in the scheme,[124] and made it impossible to assess his explanations for the creation of the List, and allegations of false testimony by Prosecution witnesses, without hearing from P178. The Defence asked the Chamber to recall P178,[125] which was denied.[126] VWU then [127] were involved in this scheme, [128] P178 apparently obtained the list of protected Prosecution witnesses from

[115] ICC-01/05-01/08-2827-Conf-AnxB-Red3.
[116] ICC-01/05-01/08-2827-Conf-AnxA-Red.
[117] For a total of five months, *see* ICC-01/05-01/08-3434-Conf, paras. 498-500.
[118] ICC-01/05-01/08-3138-Conf-AnxA: "

ICC-01/05-01/08-3138-Conf-AnxA.
[120] ICC-01/05-01/08-3139-Conf-AnxB.
[121] ICC-01/05-01/08-3154-Conf.
[122] ICC-01/05-01/08-3200-Conf, paras. 50-57.
[123] ICC-01/05-01/08-3077-Conf, paras. 18-19.
[124] T-361-CONF-ENG, 55:7-10; 66:16-19; 69:16-24; T-362-CONF-ENG, 5:2-18; 7:12-16; T-363-CONF-ENG, 11:7-17; 17:9-24.
[125] ICC-01/05-01/08-3177-Conf.
[126] ICC-01/05-01/08-3186-Conf.
[127] ICC-01/05-01/08-3190-Conf, para. 3.
[128] ICC-01/05-01/08-3190-Conf, para. 4.

[REDACTED][129] and he was only willing to [REDACTED] in front of the Judges.[130]

53. VWU refuted P178's assertions.[131] A further Defence request for recall of P178, on the basis of this additional information, was denied.[132] The Prosecution took no steps to investigate or indict any of its witnesses under Article 70. The Trial Chamber moved into its deliberations with no clear picture of how the List had been assembled, or the level of collusion between Prosecution witnesses. P178 and P169, and in fact all of the witnesses on the list who had apparently been willing to "*apporter la preuve de subordination des témoins*" were relied upon unreservedly by the Trial Chamber.

3. The scope of LRV involvement lead to an unbalanced and unfair trial

54. Allowing victims to become active participants in the trial proceedings runs the risk of creating "a serious imbalance in the fact finding mechanism and would be inconsistent with the rights of the accused in that the defendant would be forced to confront more than one party (which would be in clear violation of the principle of equality and would alter the balance of the process in many other respects)."[133]

55. For the only time at the ICC, the two LRVs appointed in the Bemba case were drawn from among the affected community. They were from the CAR, had lived through the conflict,[134] were openly anti-Patassé,[135] regularly testified on key live issues in the case,[136] were known to Defence witnesses,[137] and were permitted to cross-examine on the basis of their own alleged recollections of events.[138] The LRVs openly viewed their role as ensuring Mr. Bemba was convicted, in order to secure reparations.[139] Maître Douzima's response to the Defence final brief contained a series of attacks against Defence Counsel.[140] During trial, when asked by the Presiding Judge whether she would consider giving English transcript

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[129] ICC-01/05-01/08-3190-Conf, para. 5.
[130] ICC-01/05-01/08-3190-Conf, para. 10.
[131] ICC-01/05-01/08-3190-Conf, para. 6.
[132] ICC-01/05-01/08-3192-Conf; ICC-01/05-01/08-3204-Conf.
[133] Zappalà, S., "The Rights of Victims v. The Rights of the Accused", *J. Int Crim J* (2010), p. 162. *See also* Doak, J., "Victims' Rights in Criminal Trials: Prospects for Participation", *J. of Law & Soc* (2005), p. 298.
[134] T-255-Red2-ENG, 45:25-46:1.
[135] T-258-Red2-ENG, 49:2-5.
[136] *See*, for example, T-91-Red2-ENG, 63:10-18; T-234-Red2-ENG, 36:9-23; T-329-CONF-ENG, 31:22-34:23. (Defence objections were dismissed ICC-01/05-01/08-2733-Conf; ICC-01/05-01/08-2751; ICC-01/05-01/08-2800).
[137] T-247-Red2-ENG, 14:25-15:1; T-250-Red2-ENG, 59:18-21.
[138] *See*, for example, T-255-Red2-ENG, 45:25-46:1: "I raised this question as a Central African Republic citizen myself, who was there and who heard about these things."
[139] *See*, for example, ICC-01/05-01/08-3499-Conf, paras 2-3, citing ICC-01/05-01/08-3489-Corr-tENG, para. 10. *See also* T-32-ENG, 36:19-24, 38:10-39:19, 42:21-43:21.
[140] ICC-01/05-01/08-3140-Conf, *see*, especially para. 10, but also paras. 11-12, 19, 21, 35.

references as a courtesy to members of the Defence team, she said that she would not.[141] A trite example, but indicative of how the LRVs viewed their role; as unswervingly adverse to and obstructive of the interests of the Defence. In a particularly upsetting submission to Mr. Bemba, the LRV suggested the death penalty as an appropriate sentence.[142]

56. However, the "unbalancing" of the proceedings arose from the LRVs questioning witnesses in the same manner as the Prosecution, in breach of Rule 91(3). In the other ICC trials, LRV questioning has been meticulously monitored and strictly limited to eliciting evidence relevant to the views and concerns of the victims,[143] through the asking of pre-approved questions, or questions on pre-approved topics.[144] In the *Bemba* case, the LRVs asked any question they wanted, of any witness, without limitation.[145]

57. The Trial Chamber circumvented Rule 91(3) in two ways. Firstly, although LRVs were initially required to file a written application setting out the "nature and details" of their proposed questions,[146] the Trial Chamber then held that:[147]

> victims may, at the end of the questioning by the prosecution, **request leave to ask questions in addition to those filed in application** as set out in the paragraph above. Such request must explain both the nature and the details of the proposed questioning as well as specify in what way the personal interests of the victims are affected […]

58. This procedure was never implemented. The LRVs asked "follow-up" questions to every Defence witness, without ever having specified the nature and the details of the questions, or the way in which personal interests of the victims were affected.[148] The term "follow up questions" was a euphemistic synonym for questions for which no prior authority

[141] T-269-Red2-ENG, 13:6-23.
[142] ICC-01/05-01/08-3371-Conf, para. 63.
[143] *See*, for example, ICC-01/04-01/06-1119, para. 96; ICC-01/04-01/06-2842, para. 20, fn. 62; ICC-01/04-01/07-T-87-Red-ENG, 26:15-25. *See also* ICC-01/04-01/07-T-160-Red-ENG, 20:1-25; ICC-01/04-01/07-T-252-ENG, 40:15-18; 43:7-13; ICC-01/04-02/06-T-25-Red-ENG, 8:12-16; ICC-02/11-01/15-205, para. 37.
[144] ICC-01/09-01/11-847-Corr, para. 19; ICC-01/09-01/11-460, para. 73; ICC-01/04-01/07-1665-Corr, para. 87; ICC-02/11-01/15-205, para. 37; ICC-01/04-02/06-619, para. 10. In the one case which differed in procedure, the *Ongwen* Trial Chamber did not require "an advanced written note" of intended questions, but held that "applications to question may be presented orally" and "the necessity or propriety of questions asked will be addressed on a case-by-case basis": ICC-02/04-01/15-497, para. 10.
[145] T-254-Red2-ENG, 66:21-23: In October 2012, 2 years into the trial, the LRVs were ordered to restrict examination of witnesses to 2 hours in total (not including technical or other delays, procedural debates or follow-up questions from the bench). However, this 2-hour limit applied regardless of the length of the Defence examination in chief, (which was often little more than two hours per witness). D6, for example, was examined by the Defence for 1 hr 55 minutes. The LRVs were still afforded (and used) more than 2 hours.
[146] ICC-01/05-01/08-1023, para. 19; ICC-01/05-01/08-807-Corr, para. 102(h); ICC-01/05-01/08-1005, para. 39.
[147] ICC-01/05-01/08-1023, para. 19; T-42-Red2-ENG, 18:6-14 (emphasis added).
[148] ICC-01/05-01/08-3434-Conf, paras. 521-523; ICC-01/05-01/08-3499-Conf, paras. 55-63.

had been given.[149] Consistent Defence objections were dismissed.[150] Next, the LRVs were authorised to pose any questions arising "from the transcript" of the examination-in-chief.[151] Defence objections that Rule 91(3) was "simply being circumnavigated" were dismissed.[152]

59. In other cases, LRVs could only ask neutral questions.[153] Questions on credibility were prohibited "unless the LRV can demonstrate that the witness gave evidence that goes directly against the interests of the victims".[154] In *Bemba*, LRV questions to Defence witnesses were designed to attack their credibility, and undermine the Defence case. The LRVs asked wildly leading questions,[155] and put lengthy extracts from the testimony of other witnesses to Defence witnesses, with a view to contradicting their evidence.[156]

60. The LRVs could also ask questions on any topic.[157] The Chamber rejected the standard adopted in all other ICC cases,[158] and held that "victims **have a general interest in the proceedings** and in their outcome. As such, they have an interest in making sure that **all pertinent questions are put to witnesses**."[159] In *Lubanga*, a "general interest in the outcome of the case or in the issues or evidence the Chamber will be considering" was deemed insufficient to warrant questioning of witnesses.[160] LRVs were required to establish,

[149] T-277-Red2-ENG, 40:13-17: "PRESIDING JUDGE STEINER: […] Mr Witness, legal representatives of victims were authorised to put some questions to you, were authorised by the Chamber, and therefore I'll now give the floor to Maître Douzima Lawson, who will put to you the questions authorised by the Chamber **and some follow-up questions that legal representatives deem necessary**." (emphasis added).
[150] *See,* for example, T-160-Red2-ENG, 13:7-14:24; T-230-ENG, 44:1-45:19; T-327-Red-ENG, 52:15-25; T-334-CONF-ENG, 47:3-49:5; T-335-Red-ENG, 37:2-8; T-342-Red-ENG, 18:14-21; ICC-01/05-01/08-2259.
[151] T-160-Red2-ENG, 13:7-14:24.
[152] T-160-Red2-ENG, 13:7-14:24; T-230-ENG, 44:1-45:19; T-327-Red-ENG, 52:15-25; T-334-CONF-ENG, 47:3-49:5; T-335-Red-ENG, 37:2-8; T-342-Red-ENG, 18:14-21.
[153] ICC-02/11-01/15-205, para. 37; ICC-02/05-03/09-545, para. 33; ICC-01/04-01/07-1665-Corr, para. 91.
[154] ICC-01/04-01/06-2127, para. 28; ICC-01/04-01/07-1665-Corr, para. 90; *See also* Dissenting Opinion of Judge Kuniko Ozaki on the questioning of witnesses by the LRVs, authorized by the majority: T-108-Red2-ENG, 26:9-13; T-117-Red2-ENG, 3:11-22; ICC-01/05-01/08-1471, para. 13.
[155] *See*, for example, T-274-Red2-ENG, 54:16-18: "Did you learn that, once they got to the support regiment, the troops […] looted everything in that area?"; T-299-Red2-ENG, 41:10-12: "Do you know that, when they got to PK12 Begoua, the ALC soldiers occupied private individuals' homes without their authorisation and got involved in pillaging, murders and theft?" *See also* T-292-Red2-ENG, 17:2-6; T-306-Red2-ENG, 70:7-8, 23-24, 71:1-2; T-310-Red-ENG, 36:5-8; T-329-Red-ENG, 42:10-12.
[156]
[157] *See* further ICC-01/05-01/08-3499-Conf, paras. 59-60.
[158] *See*, for example, ICC-01/04-01/06-T-124-Red3-ENG, 54:4-13; ICC-01/04-01/06-T-200-Red2-ENG, 52:3-54:15; ICC-01/04-01/07-T-87-Red-ENG, 26:15-25; 33:9-21; ICC-01/04-01/07-T-160-Red-ENG, 20:1-25; ICC-01/04-01/07-T-252-ENG, 42:18-20; 43:8-13; ICC-01/04-02/06-T-25-Red-ENG, 8:12-16. *See also* ICC-01/04-01/06-1119, para. 96; ICC-01/09-01/11-460, para. 75; ICC-01/09-02/11-498, para. 74; ICC-02/11-01/15-498-AnxA, para. 17.
[159] ICC-01/05-01/08-1729, para. 15 (emphasis added).
[160] ICC-01/04-01/06-1119, para. 96.

for example, "involvement in or presence at a particular incident which the Chamber is considering", or "identifiable harm" from that incident.[161] In *Bemba*, it was a free for all.[162]

61. In reality, this meant that Defence witnesses were cross-examined three times. In other trials, the LRVs were required to "avoid areas that the Prosecution has already covered",[163] and were only authorised to ask those questions not already asked by the calling party.[164] In *Bemba*, the Chamber sat silently as the exact same questions were posed repeatedly.[165] Not only was this incompatible with Mr. Bemba's right to an expeditious trial, the endless repetition was oppressive. The exhaustion and agitation felt by Defence witnesses after three cross-examinations was palpable. Perversely, instead of protecting these witnesses, their reluctance to answer the same question repeatedly is cited to support a finding of "evasive" demeanor in the Judgment.[166]

62. Contemporaneous Defence objections were numerous and consistent.[167] Then, during the summer judicial recess of 2013, the Defence prepared a compendious motion, requesting the Chamber to apply the proper procedure and re-balance the proceedings. It was dismissed in three paragraphs, with the Chamber asserting it had appropriately supervised the LRVs questioning, and would continue to do so.[168] Leave to appeal the decision was denied.[169] This issue was raised on appeal,[170] and not addressed.

63. The net effect was that the Trial Chamber heard three times as much evidence inculpating Mr. Bemba, as that which exculpated him. In making adverse findings, the Chamber regularly corroborated evidence led by the parties with that led by LRVs.[171] Occasionally, it relied solely on testimony elicited or documents introduced by the LRVs for findings in the Judgment.[172] In making virtually no distinction between the Prosecution and LRVs participation in the trial proceedings, the Trial Chamber stretched the bounds of victims' participation beyond anything that those who championed their inclusion in the trial

[161] ICC-01/04-01/06-1119, para. 96.
[162] ICC-01/05-01/08-3434-Conf, para. 528.
[163] ICC-01/09-01/11-T-105-Red-ENG, 37:20-38:19.
[164] ICC-01/09-01/11-460, para. 75.
[165] ICC-01/05-01/08-3434-Conf, paras. 533-336; ICC-01/05-01/08-2733-Conf, paras. 10, 13, 24-28, 33-34.
[166] *See,* for example Judgment, para. 348, fn. 875, citing T-322, 55:24-57:7.
[167] ICC-01/05-01/08-3499-Conf, paras. 50-54.
[168] ICC-01/05-01/08-2751, paras. 9-11.
[169] ICC-01/05-01/08-2800.
[170] ICC-01/05-01/08-3434-Conf, paras. 521-546; ICC-01/05-01/08-3483-Conf, paras. 69-72; ICC-01/05-01/08-3499-Conf, paras. 50-73.
[171] Judgment, para. 555, fn. 1702 citing T-269, 46:21-47:10; para. 419, fn. 1147 citing, among others, T-263, 36:16-17.
[172] Judgment, para. 602, fn. 1884; para. 288, fns. 679-680.

process could possibly have imagined. This was not a balanced trial. The LRVs were a party to three-way adversarial proceedings.

4. The industrial falsification of victims' applications was used to undermine the Defence case

64. In February 2011, Prosecution witness P73 testified that MLC soldiers pillaged food, firewood, some money, and forced him to buy a radio for 4,000 francs, which they then stole back.[173] P73 was asked why he hadn't testified about the rape of his wife and daughter, as described in his victims' application form. His explanation beggared belief. P73 described a man called " with ICC documents "moving around in the neighbourhoods" who was "responsible for the reparation of victims". "introduced himself as a member of the Court" and helped people complete victim application forms.[174] P73 saw that his neighbour had listed an amount of €4,700,000 which was "not serious", and he warned his neighbour against giving false figures.[175] When his turn came, P73 recounted what he had lost. told him "but, listen! People are mentioning large sums of money, and you, you are mentioning just small amounts of money. You don't want to eat of the cake?"[176] He then told P73 "see you have a very beautiful daughter",[177] and encouraged him to say that his daughter had been gang raped by MLC soldiers in order to get more money from the ICC. assisted "many people" in P73's neighbourhood,[178] and formed part of a group who helped applicants across the CAR.[179]

65. This was the first coherent insight into what had, in fact, been clear all along; victim applications in the *Bemba* case had been falsified on an industrial scale. Review of a random sample of the 5,229 authorised victims support P73's story of false claims. For example, while applicants were required to note the "date of the incident",[180] many indicate only the dates of the indictment.[181] Many make claims for financial loss running to hundreds of thousands of euros for a few household items and some livestock[182] Many merely "copy and

[173] T-70-CONF-ENG, 33:1-34:6, 35:24-36:7.
[174] T-73-CONF-ENG, 18:17-29:15.
[175] T-73-Red-ENG, 19:7-14.
[176] T-73-Red-ENG, 19:24-25.
[177] T-73-Red-ENG, 33:14-34:3.
[178] T-73-Red-ENG, 18:25-19:1.
[179] T-73-CONF-ENG, 20:16-21:14; T-76-CONF-ENG, 7:12-25. *See also*, ICC-01/05-01/08-3200-Conf.
[180] RPE, Rule 94(1)(c).
[181] a/0769/10; a/1258/10; a/1264/10; a/1290/10; a/1355/10; a/1356/10; a/1357/10; a/1358/10; a/1359/10; a/1360/10; a/1361/10; a/2187/10; a/2191/10; a/2192/10; a/2193/10; a/2194/10; a/2195/10; a/2312/10; a/2689/10; a/2690/10; a/2592/10.
[182] a/1656/10. *See also*, for example, the demands of a/2650/10; a/2650/10; a/1651/10; a/1629/10; a/1604/10; a/1576/10; a/0907/10; a/0703/10; a/0300/10, a/2266/10, etc.

pasted" allegations of abuse by MLC soldiers (what the LRV later referred to as "standardisation").[183] A batch of forms state in identical terms that Mr. Bemba was responsible because "he did not teach his soldiers humanitarian law concerning the protection of civilians".[184] Forms completed in English, when the applicant spoke only French and Sango, designate the person responsible as "Mr. John Peter Bemba Gombo",[185] suggesting the use of "Google translate" or similar applications in their production. These forms were mass-produced, by intermediaries, at least some of whom were actively encouraging applicants to fabricate claims.[186]

66. Compounding this, a significant percentage of the 5,229 participating victims claimed harm with no link to the MLC, or Mr. Bemba. The Trial Chamber authorised participation of victims who claimed to have suffered harm in areas into which the MLC never ventured, on dates when the MLC were never present, and where the victim asserted, for example, that the crimes were committed by Bozizé's troops, and not the MLC.[187]

67. Notwithstanding all this, the existence of 5,229 victims of the MLC became an immutable truth in the case. After a ██████████ [88] testified that he did not witness the MLC soldiers committing crimes, for example, the Prosecution put to him the following assertion:[189]

> [P]erhaps, if you don't have already knowledge of that, of the fact that over 5,000 applications, over 5,000 accounts, reached this Chamber, this Honourable Court, in which victims, citizens, from Central African Republic stated that they were raped, pillaged, killed, tortured, or subjected to other maltreatments from the MLC forces, and with all due respect, Mr Witness, that is not the testimony we heard from you just now. **You cannot possibly expect us to believe that 5,000 Central African Republic civilians would be lying.**

68. Given the content of their application forms, many of them, regrettably, were.

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[183] ICC-01/05-01/08-3582, para. 25.
[184] *See*, for example, a/0012/10; a/0013/10; a/0017/10; a/0298/10.
[185] *See*, for example, a/0017/10.
[186] T-73-Red-ENG, 19:24-25.
[187] *See*, for example, a/0654/09; a/0917/10; a/16124/11; a/16112/11; a/0124/11; a/17326/11; a/0734/11; a/16129/11.
[188] ██████████
[189] T-258-Red2-ENG, 21:16-22.

5. The judgment was of sub-standard and unacceptable quality and did not respect the presumption of innocence

69. It is not possible, in the context of this filing, to list the evidential errors in the Trial Judgment. They are plentiful. On the critical issue of withdrawal of MLC troops, the Chamber found "various witnesses testified that Mr Bemba took the decision and issued the order for the MLC troops to withdraw",[190] citing to P178 who said that **Patassé**, not Bemba, asked the troops to withdraw.[191] To support its central finding that the MLC troops operated independently of the FACA, the Chamber cited three witnesses who said they fought **together**.[192] The Chamber found that Mr. Bemba made "no effort to refer the matter to the CAR authorities",[193] not mentioning Mr. Bemba's letter referring the matter to the CAR authorities.[194] Five central Defence witnesses were dismissed with no discussion of their reliability or credibility.[195]

70. Listing every one of the Trial Chamber's errors would fill these 60 pages. These are not disputes as to whether the Chamber ascribed too much weight to some evidence, or not enough to others. These are mistakes. And they likely eclipse the total of all the errors in judgments in international criminal trials which preceded Mr. Bemba's. The very fabric of the Judgment, namely the connection between its factual findings and the evidence, was negligently woven. The volume of errors gives rise to the irresistible inference that the Trial Chamber, rather than building a factual narrative on the basis of the evidentiary record, was determined to convict at the cost of respect for presumption of innocence, and without regard for the standard of "beyond a reasonable doubt".

71. The period of appellate deliberation was exceptionally long. The eventual Judgment, and in particular the separate opinions of its majority Judges, reveal that much of this time was spent determining whether the alarm expressed by Mr. Bemba as to the Trial Chamber's willingness to make adverse factual findings in the absence of evidence was justified. Three of the five Judges concluded that it was.

72. Judge Van den Wyngaert and Judge Morrison were "**deeply concerned** about the Trial

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[190] Judgment, para 272, fn 1702.
[191] T-154-CONF-ENG, 26:4-11.
[192] Judgment, para. 411, fn. 1110, citing T-353, 48:8-20 and T-354, 42:16-17; para. 411, fn. 1111, citing T-290, 64:8-65:19; T-261, 37:25-38:5; and T-261, 65:25-66:10.
[193] Judgment, para. 733.
[194] ICC-01/05-01/08-3434-Conf, paras. 356-360.
[195] D4, D6, D23, D26 and D29.

Chamber's application of the "**beyond a reasonable doubt standard**"."[196] They were "firmly of the view that **many of the findings in the impugned Conviction Decision fail to reach this threshold"** and "strongly believe that the Appeals Chamber cannot turn a blind eye to such **obvious evidentiary problems"**.[197] As for the finding that Mr. Bemba knew that crimes were committed the CAR, one of five elements of command, their Honours stated that "the Trial Chamber's **selective and partial use of the available evidence** for substantiating the finding of Mr Bemba's knowledge of the media reports, while **ignoring other parts of the very same evidence**, casts doubt as to **whether the Trial Chamber has always adhered to the principle that the accused is entitled to the benefit of the doubt**."[198] As to the Trial Chamber's finding that Mr. Bemba's failure to take measures was deliberate and consciously aimed at encouraging crimes, their Honours held that there was "**no evidence** to suggest that this was the case here and, as the Elements of Crimes make clear, **it would be entirely inappropriate to assume such intentions** from the absence of action on behalf of the MLC. Otherwise, any finding of responsibility under article 28 of the Statute would have to be seen as supporting the existence of an organisational policy to commit crimes against humanity, **which would be absurd** given the nature of superior responsibility."[199] Their Honours noted that in finding that the MLC operated pursuant to a criminal organisational policy, the Trial Chamber relied upon "the so-called 'self-compensation' of MLC troops, which, apart from the fact that it relates to pillaging, which is not a crime listed in article 7 of the Statute, does not point to the existence of a policy". Their Honours noted that "**there is not the slightest indication** that the MLC deliberately underpaid its troops or did not provide them with sufficient resources in order to cause them to engage in looting."[200] Many other errors were noted.

73. His Honour Judge Eboe-Osuji shared the deep concern of his colleagues. He found the Trial Judgment, "fraught with **many concerns**", and while some were reviewed in the Majority Opinion, "**there was so much more**.[201] In reviewing the Trial Chamber's evidential analysis supporting the finding that Mr. Bemba failed to take measures, for example, His Honour stated:[202]

> I was struck by an uneasy, yet distinct, impression that literally every measure that the Appellant took was bound to provoke a riposte of

[196] ICC-01/05-01/08-3636-Anx2, para. 14 (emphasis added).
[197] ICC-01/05-01/08-3636-Anx2, para. 14 (emphasis added).
[198] ICC-01/05-01/08-3636-Anx2, para. 50 (emphasis added).
[199] ICC-01/05-01/08-3636-Anx2, para. 71 (emphasis added).
[200] ICC-01/05-01/08-3636-Anx2, para. 70 (emphasis added).
[201] ICC-01/05-01/08-3636-Anx3, para. 20 (emphasis added).
[202] ICC-01/05-01/08-3636-Anx3, para. 18 (emphasis added).

> view as a shortcoming; even by way of adverse inference, with **little or no effort made to eliminate reasonable inferences consistent with innocence**. At times, limitations of the **primary evidence in support of such adverse inferences were ignored**. Many times, **gaping holes** were coped with logomachy.

74. The examples His Honour gave were "**typical**" of "**very many**".[203] Time and time again, he noted that "the Trial Judgment revealed **no real evidence** showing that those admonitions were insincere";[204] and "the Trial Judgment revealed **no evidence** that justifies attributing to him any identifiable short-comings of the court-martial";[205] and "the Judgment reveals ***no*** **shred of evidence**" of wilfulness on the part of Mr. Bemba in terms of failings as a commander, and in fact "**[t]he evidence shows the contrary**."[206] His Honour noted that the finding of guilt beyond a reasonable doubt cannot result "from giving **bloated significance to available evidence**, in ingenious ways; nor, from an analysis of the evidence that suggests **purposeful tropism** in the light of the indictment."[207]

75. These were not findings that the Trial Chamber misappreciated evidence or applied the wrong standard at law. Rather, they pointed to concrete example after concrete example of findings which had no evidentiary basis, and lead three Judges to consider that the Trial Chamber had failed to give Mr. Bemba the benefit of the doubt. They had presumed his guilt, rather than his innocence. This language is unparalleled in the history of ICL, because the *Bemba* Trial Judgment has no comparison. Mr. Bemba's conviction at first instance was a miscarriage of justice. Indeed, on any objective analysis, his trial was a farce.

6. The case should never have taken 10 years

76. A decade, to conclude a single accused case, with one form of liability, and events spanning a five-month period, is not reasonable.[208] Mr. Bemba made his initial appearance on 4 July 2008.[209] 192 days then passed before the confirmation of charges hearing, which began on 12 January 2009.[210] Once charges were eventually confirmed on 15 June 2009,[211] a further 525 days passed before the start of the trial on 22 November 2010.[212]

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[203] ICC-01/05-01/08-3636-Anx3, para. 19 (emphasis added).
[204] ICC-01/05-01/08-3636-Anx3, para. 13 (emphasis added).
[205] ICC-01/05-01/08-3636-Anx3, para. 13 (emphasis added).
[206] ICC-01/05-01/08-3636-Anx3, para. 12 (emphasis added).
[207] ICC-01/05-01/08-3636-Anx3, para. 10 (emphasis added).
[208] Judgment, para. 2.
[209] T-3-ENG.
[210] T-9-ENG.
[211] ICC-01/05-01/08-424.
[212] T-32-ENG.

77. Mr. Bemba's trial began in November 2010 and lasted 4 years. After the trial, a further 16 months elapsed before the Trial Chamber convicted Mr. Bemba in March 2016.[213] A further 659 days then passed before the hearing of his appeal on 9 January 2018.[214] Mr. Bemba filed his appeal brief in September 2016[215] and the Prosecution responded in November 2016,[216] but it was not until November 2017 that the Appeals Chamber scheduled the appeal hearing,[217] with the Judgment taking another 213 days to deliver.[218] Mr. Bemba's right to an expeditious trial was violated.

78. There can be no possible justification for a case taking this long. Nor can resort be had to the argument that there were trials at the ICTY and ICTR that also lasted a decade. The length of trials at the ICTY and ICTR is a stain on their legacy from which they will perhaps never recover, and the ICC should be doing better. In any event, the comparison does not assist. The *Popović* case, for example, involved **seven** accused; **seven times** the volume of documentary evidence; and at least **four times** more testimony.[219] Yet the trial was conducted in just over **three years**, with verdicts rendered **nine months** thereafter. Mr. Bemba should not have been incarcerated for 10 years before his acquittal and release. This was a miscarriage of justice.

	Prosecutor v. Bemba	***Prosecutor v. Popović et al.***
Accused	1	7
Witnesses heard	77	315
Documents admitted	733	5,838
Length of trial	4 years	3 years
Judgment length	364 pages	866 pages
Judgment drafting	16 months	9 months

7. Conclusion

79. Mr. Bemba set out these errors before the Appeals Chamber. In acquitting him, the Appeals Chamber dealt only with two discrete aspects of his appeal.[220] The procedural and substantive errors, which had been hermetically sealed from appellate review by a Trial Chamber which refused all requests for certification, remain un-addressed.

80. A miscarriage of justice will not be established under Article 85 "by the repetition of

[213] Judgment.
[214] T-372-Red2-ENG; T-373-ENG; T-374-ENG.
[215] ICC-01/05-01/08-3434-Conf.
[216] ICC-01/05-01/08-3472-Conf.
[217] ICC-01/05-01/08-3568.
[218] ICC-01/05-01/08-3636-Conf.
[219] *Prosecutor v. Popović et al.*, IT-05-88-T, Judgement, 10 June 2010, para. 5.
[220] ICC-01/05-01/08-3636-Conf, para. 32.

arguments which have already been brought before the Chambers and settled by them."[221] However, the errors identified above, having never been the subject of scrutiny other than by the Judges who committed them, are not settled. They remain on the record of this case, and the record of the Court, despite Mr. Bemba's efforts to have them reviewed by a higher tribunal both during the trial and on appeal.

81. Mr. Bemba is not asking this Pre-Trial Chamber to revisit these impugned decisions and find that the Trial Chamber should have decided differently. The errors raised represent a sample, a cross-section, of the *Bemba* case, and give a flavour of this Trial Chamber's disregard for the rights of the accused, and the presumption of innocence. They demonstrate how these Judges were able to convict Mr. Bemba while citing to evidence which, in many cases, did not exist.

82. Some of these errors, in particular the Trial Chamber's five-month entertainment of *ex parte* allegations, are of a category of unfairness which are alone tantamount to a miscarriage of justice. However, it is the "catalogue of rampant little errors of law or fact or procedure [which] may in their accumulated weight or harassing minions or in their proportion, amount to unfairness rising to miscarriage of justice", regardless of whether "their joint or several incidence overwhelms the fitness of the proceedings and its resulting judgment or sentence to stand up as a reliable expression of justice."[222] Severally, or cumulatively, these errors are of a gravity and scope never before seen in ICL. The trial record of the *Bemba* case will forever stand as a cautionary tale.

83. Trial Chamber III's steerage of this case was a "failure of a court or judicial system to attain the ends of justice, especially one which results in the conviction of an innocent person";[223] a grave and manifest miscarriage of justice which gave rise to repeated violations of Mr. Bemba's rights, and caused him serious harm, as further elaborated below.[224]

C. THE APPROPRIATE MEASUREMENT OF LOSS

84. Compensation under Article 85(2) is apparently "according to law", whereas under Article 85(3), it is according to the "criteria provided in the Rules". Insofar as the Rules set out criteria for assessment of compensation, it is limited to "the consequences of the grave

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[221] ICC-01/04-02/12-301-tENG, para. 48.
[222] ICC-01/05-01/08-3636-Anx3, para. 89.
[223] Miscarriage of justice in Oxford English Dictionary.
[224] ICC-01/04-02/12-301-tENG, para. 45.

and manifest miscarriage of justice on the personal, family, social and professional situation of the person filing the request."[225] It is submitted that these tests are broadly similar.

85. As to the appropriate "law", Mr. Bemba submits that the Chamber must have regard to established principles of damage assessment in cases of assault by detention, or false imprisonment cases. As to the relevant "consequences" under Rule 175, those will be all consequences contingent upon the miscarriage of justice, whether physical, pecuniary or intangible. The following, it is submitted, are the generic heads of damage for which the claimant is entitled to compensation: (1) Damages for incarceration; (2) Aggravating features; and (3) Consequential financial losses. In Mr. Bemba's submissions, those heads of damage follow whether a claim succeeds under Article 85(2) or (3).

1. Damages for Incarceration

86. Damages for false imprisonment are non-pecuniary in nature. They are substantially within the discretion of the Judges. They compensate loss of dignity and the like. The principal heads of damage arise from the consequences of loss of liberty (loss of time considered from a non-pecuniary view) and injury to feelings (indignity, mental suffering, disgrace, humiliation, and attendant loss of social status and injury to reputation.)[226]

87. The formulation above, from the leading common law text on damages, and derived from years of decided jurisprudence, is replicated almost *verbatim* in Rule 175. It is not usual for the court in computing damages to break down the amount of the award to attribute an amount to each aspect of the award for false imprisonment. However, the computation of so-called "general damages" should be made before any element of aggravation is considered. Pecuniary loss is additionally the subject of a separate calculation.[227]

88. The usual practice has been for courts to fix a unit of compensation and multiply the award by the number of days, weeks or months' of imprisonment.[228] The unit will reflect the time and experience of incarceration relative to the claimant's age and experience.[229] However, very few of the decided cases concern the imprisonment of an individual for ten

[225] *See* RPE, Rule 175.
[226] *See* McGregor, H., *McGregor on Damages*, Sweet & Maxwell, 20th ed., 2017, para. 42-013.
[227] *See Thompson -v- Commissioner of the Police of the Metropolis [1998] Q.B 498 C.A.*
[228] In *Thompson*, the Court of Appeal approved an award of £3,000 per day (approximately €4,000).
[229] In *Thompson*, the Court of Appeal felt that £500 (€650) was appropriate for the first hour of detention. In *Taylor -v- Chief Constable of Thames Valley Police [2004] 1 W.L.R 355,* an award of £1,500 (€1,950) to a 10-year-old boy for 4 hours detention, was not inappropriate.

years. Each case turns on its own facts, and the practice of multiplying a daily amount will become less appropriate, the longer the period of detention.[230] However, the contrary consideration is derived from the extraordinary length of time that Mr. Bemba has been incarcerated, for, as the need for the award to reflect the immediate shock and shame of incarceration recedes, so does the claimant need increasingly to be compensated for the irreparable loss of time to live his life at liberty.

a) Relevant Features of Mr. Bemba's personal, family, social and professional situation

i. The Length of his Detention

89. To spend a period of 10 years in detention as an innocent man is unimaginable. No matter how relatively comfortable the prison, it remains a prison, and beyond the limited privileges it may afford, all liberty is removed. Mr. Bemba was locked in his room every night for over 3,000 nights. All travel was denied to him. His access to his family and associates was both limited and monitored. He did not see his homeland, and neither oceans nor mountains. For 10 years, if he wanted to take a walk, he had to walk round in a circle.

90. Ten years of life passed him by. Until his release on 12 June 2018,[231] he had never seen a smart phone. A whole decade of technological, social and political change had been lost to him, as had the childhoods and youths of his children, for although he was able to receive them at the UNDU, there were no family holidays, no festivals or parties, and no opportunities for meaningful guidance in difficult times. The same is true for his marriage.

ii. The loss of the best years of his life

91. At the time of his arrest, Mr. Bemba was 45.[232] He was the leader of the main opposition political party in the DRC and had just been narrowly defeated in a Presidential election.[233] He had, additionally, vibrant businesses in both Europe and the DRC. He was happily married and was the father of five children. His parents were both alive.

92. It is impossible to predict, from that base, what he might have achieved during the last decade. It is likely that he would have been a Presidential candidate in 2011 and, concurrently, substantially expanded his business interests. The decade 45-55 is traditionally

[230] *See,* for example, *Takitota -v- Attorney General* [2009] UKPC 11.
[231] ICC-01/05-01/13-2291.
[232] ICC-01/05-01/08-1-tENG-Corr.
[233] *See,* for example, ICC-01/05-01/08-950-Conf-AnxA, para. 7 and ICC-01/05-01/08-128-Conf-AnxA, p. 9.

one of the most dynamic and productive in the life of any businessman or political figure.

93. Whilst the consequential losses to his existing assets can be calculated (see Annex F), the loss of opportunity to develop not just his own life, but that of his family, is a relevant consideration under Rule 175 and "the law" relating to compensation for wrongful imprisonment. In Mr. Bemba's case, it is a considerable loss. It is not fanciful to imagine that, but for his detention, he could have become, by 55, one of the most eminent political figures in the world, as well as one of the richest and most successful men.

iii. The refusal to grant provisional release

94. During the inexcusably tardy progress of this case, set out above, none of which was Mr. Bemba's doing, the prosecution and the court remained hard set against his provisional release on any terms,[234] notwithstanding; (1) the inherent weakness of the case against him; (2) the fact that his family home in Brussels is little more than two hours' drive from the seat of the Court in The Hague;[235] (3) that his other residence was in Portugal; (4) that his return to the DRC was unlikely due to issues of personal security;[236] (5) that the Belgian and Portuguese authorities had histories of good compliance with the ICC;[237] (6) that all his means of transport and travel documents had been seized; and (7) that other political figures of a similar standing to Mr. Bemba were not detained.[238]

95. Indeed, with the exception of two days to attend his father and his stepmother's

[234] ICC-01/05-01/08-65-Conf; ICC-01/05-01/08-73; ICC-01/05-01/08-262; ICC-01/05-01/08-321; ICC-01/05-01/08-354-Conf; ICC-01/05-01/08-403; T-13-Red-ENG, 31:14-36:10; ICC-01/05-01/08-431; ICC-01/05-01/08-457-tENG; ICC-01/05-01/08-485; ICC-01/05-01/08-507-Corr-Anx-tENG; ICC-01/05-01/08-519; ICC-01/05-01/08-631-Conf; T-18-Red-ENG, 24:10-29:17; ICC-01/05-01/08-702; ICC-01/05-01/08-703; T-21-ENG, 38:5-39:3; ICC-01/05-01/08-743; ICC-01/05-01/08-828-Red; ICC-01/05-01/08-825; ICC-01/05-01/08-843; ICC-01/05-01/08-850-Conf; ICC-01/05-01/08-862-tENG; ICC-01/05-01/08-1019; ICC-01/05-01/08-1088; ICC-01/05-01/08-1423-Conf; ICC-01/05-01/08-1440-Conf-tENG; ICC-01/05-01/08-1543-Conf; ICC-01/05-01/08-1552-Conf-tENG; ICC-01/05-01/08-1539-Conf-tENG; ICC-01/05-01/08-1540; ICC-01/05-01/08-1541-Conf; ICC-01/05-01/08-1542; ICC-01/05-01/08-1565-Conf; ICC-01/05-01/08-1592-Conf; ICC-01/05-01/08-1609-Conf-tENG; ICC-01/05-01/08-1613-Conf; ICC-01/05-01/08-1659; ICC-01/05-01/08-1660-Conf-tENG; ICC-01/05-01/08-1661-Conf; ICC-01/05-01/08-1670; ICC-01/05-01/08-1691; ICC-01/05-01/08-1789-Conf; ICC-01/05-01/08-1832-Conf-tENG; ICC-01/05-01/08-1836-Conf; ICC-01/05-01/08-1860-Conf-tENG; ICC-01/05-01/08-1863-Conf; ICC-01/05-01/08-1937-Conf; ICC-01/05-01/08-2006-Conf-tENG; ICC-01/05-01/08-2007-Conf; ICC-01/05-01/08-2008-Conf-tENG; ICC-01/05-01/08-2022-Conf; ICC-01/05-01/08-2031-Conf; ICC-01/05-01/08-2034-Conf; ICC-01/05-01/08-2047-Conf; ICC-01/05-01/08-2151-Conf; ICC-01/05-01/08-3214-tENG; ICC-01/05-01/08-3215; ICC-01/05-01/08-3221; ICC-01/05-01/08-3235-Conf; ICC-01/05-01/08-3249-Conf.

[235] *See* T-13-CONF-ENG, 57:12-25.

[236] *See,* for example, ICC-01/05-01/08-950-Conf-AnxA, para. 7 and ICC-01/05-01/08-128-Conf-AnxA, p. 9. *See also* T-13-CONF-ENG, 53:20-55:1.

[237] *See,* for example, ICC-01/05-01/08-3657-Conf-Exp-AnxA.

[238] *See*, for example, ICC-01/09-01/11-777, para. 7.

funerals,[239] Mr. Bemba remained in custody from arrest to acquittal, notwithstanding the obvious feasibility of his being released to reside in Belgium or Portugal.

iv. Multiple bereavements

96. Mr. Bemba's father, Jeannot Bemba Saolona, died on 2 July 2009.[240] He died in transit whilst travelling to attend the hearing on 29 July 2009 of Pre-Trial Chamber III concerning the provisional release of his son.[241] Mr. Bemba was permitted provisional release, under guard, to attend a memorial service in Belgium on 8 July 2009.[242] He was afforded little opportunity to grieve with his wider family, and none to resolve his father's estate. It was only in August 2018 that he was able to visit his father's grave.

97. On 3 January 2011, Mr. Bemba's stepmother, Maman Efika Lola Saida Josette, died unexpectedly, just after having celebrated the New Year with the family in their home in Belgium.[243] The deceased was the *de facto* mother of Mr. Bemba, having raised him from 12 years, after the death of his biological mother, until adulthood.[244] Mr. Bemba was authorized to attend the funeral on the morning of 10 January 2011, until the end of the requiem mass held on the same day.[245] He was afforded little if no opportunity to grieve and to support his family, including his brothers and sisters, in this bereavement. Richard Nkwebe Liriss, Mr. Bemba's Lead counsel, lawyer for all matters generally, and friend for life, died on 26 February 2012.[246] He had been Mr. Bemba's father's lawyer and Mr. Bemba had known him since childhood.[247] Mr. Bemba was unable to pay his last respects to Maître Liriss, nor offer his condolences in person to his family.

v. The number and ages of his children

98. In addition to the impact of Mr. Bemba's detention on the development of his family individually and collectively in economic and career terms, it is relevant to consider under Rule 175 the emotional consequences for the family. Mr. Bemba married Liliane Texeira on 15 July 1995. They have had five children together: [REDACTED] now aged 28, [REDACTED] (25), [REDACTED] (24), and [REDACTED] (21). Mr. and Mrs. Bemba have been

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[239] ICC-01/05-01/08-437-Conf; ICC-01/05-01/08-1099-Conf.
[240] ICC-01/05-01/08-430-Conf, para. 1.
[241] ICC-01/05-01/08-430-Conf, para. 2.
[242] ICC-01/05-01/08-437-Conf.
[243] ICC-01/05-01/08-1092-Conf, paras. 2-5.
[244] ICC-01/05-01/08-1092-Conf, paras. 7-10.
[245] ICC-01/05-01/08-1099-Conf.
[246] T-213-Red2-ENG, 1:23-3:12.
[247] T-213-Red2-ENG, 3:10-11.

devoted to each other throughout their marriage and the family is a very close one.

99. It is perhaps trite to say that Mr. Bemba has missed his children growing up. They were children at the time of his arrest, and are now adults. His incarceration has had other subliminal effects on them which merit consideration as a component of the award of compensation. None of the children has left home in the last decade. They have felt compelled to remain with their mother and routinely and regularly visit their father in the DU. It is, moreover, relevant to any consideration of the consequences for Mr. Bemba's family situation that his missing their growing up, developmental milestones, achievements, celebrations and occasions, is not his loss alone. It is theirs too.

vi. The significant events missed

100. In ten years of detention, Mr. Bemba has missed ten Christmases, New Years, Easters and wedding anniversaries, as well as sixty birthdays, five of which were eighteenth birthdays. He has missed three funerals, three graduations, five *baccalauréat* passes and five successful driving examinations within his immediate family. There have been four family weddings from which he was absent, and five children were born to his siblings, nieces and nephews; children he didn't meet until after 13 June 2018.

101. In his political and professional life, perhaps of greatest significance was that, not only was he unavailable to stand as a candidate for any office in the 2011 DRC elections, he was not even permitted to vote, despite applying for provisional release to be allowed to do so.[248]

102. In business, he was unable to manage his various enterprises. The immediate consequence of the freezing orders was that he was deprived of the very means of his businesses. The direct and consequential losses are below, but there is an additional unquantifiable loss, from the removal of the opportunity to direct and develop businesses, which is appropriately included in the award for general damages for his imprisonment.

103. Perhaps most poignantly under this heading is the lost opportunity to open his father's will, distribute the estate amongst the various beneficiaries and profit from the consequent investments that would necessarily have followed. Whilst this may be too remote to quantify under the head of consequential losses below, the lost opportunity is appropriately incorporated in the general award.

[248] ICC-01/05-01/08-1639-Conf-tENG.

vii. His status as a Vice-President and Senator of his country

104. It is plain from any reading of the legal authorities concerning awards of damages to the wrongfully imprisoned that the character of the detainee is a highly relevant consideration in its computation. This of course makes sense; the effect of detention on the emotional welfare and reputation of a man who has multiple criminal convictions is not so grave as it would be upon a priest or a Judge. It is submitted that Mr. Bemba's case comes much closer to the latter examples than the former. Mr. Bemba was without criminal conviction at the time of his arrest. As a DRC Vice-President he had a high social standing, and kept the company of heads of state, diplomats, politicians and clerics of influence.[249]

105. Additionally, damage to his reputation was of course so much the greater due to its global publication. This places his case in a wholly different category to the detainee of lesser social standing whose case attracts little or no publicity. His fall from grace was broadcast on TV, radio, in the printed media and over the internet. Indeed, as highlighted below, this process is largely unabated.

viii. Humiliation in the eyes of family friends and colleagues

106. Leaving aside global publicity, reputational damage also has an acutely personal aspect. In terms of his immediate circle; his family, friends and colleagues; Mr. Bemba was a proud and authoritative figure who commanded the respect of all. The ignominy of a public arrest coupled with the damage to relationships from restrictions placed upon them by their conduct within the confines of a prison are difficult to repair. Additionally, family have to cope with the suspicion and condescension of neighbours and friends, not just for a few days, but for years.[250] Friends and colleagues chose their allegiances. In all, the detention of Mr. Bemba has ruptured not only his life in multiple ways, but those of his family, friends and colleagues.[251]

b) Comparators

i. Periods of imprisonment in default of financial penalties

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[249] Mr. Louis Michel, Belgian Minister of Foreign Affairs in 2002-2003 and Herman J. Cohen, US Ambassador (retired) both wrote in favour of Mr. Bemba at different stages of the case, *see* ICC-01/05-01/08-200-Anx3-tENG and Press Article "*Case of Jean-Pierre Bemba*". Monseigneur Ambongo, a Bishop and President of the Episcopal justice and Peace Commission, who was head of the Capuchin friars in the DRC testified on his behalf in the sentencing phase, *see* T-368-ENG. *See also*, ICC-01/05-01/08-3450-Conf , paras. 105, 109.

[250] *See also* Annex G, para. 42: Mr. Bemba's children were required by banks to close accounts, [REDACTED]

[251] *See*, for example, Annex H, paras. 25-28 and Annex I, para. 4.

107. Quantifying in financial terms the loss to Mr Bemba of 10 years' of freedom is not straightforward. In this section, how the law equates periods of imprisonment to financial awards will be examined. As a starting point, it is submitted, that it is a relevant and useful exercise to reverse the equation. In other words, how do courts convert cash amounts into periods of imprisonment? International criminal tribunals have long had the power to impose fines upon those convicted. In enforcing those fines, courts are empowered to impose terms of imprisonment as an alternative punishment to the payment of them.

108. As a poignant example, the claimant was imprisoned for 12 months and fined €300,000 in the *Bemba et al.,* case. A continued failure to pay that sum would invoke the procedure under Rule 146(5), whereby the sentence of 12 months could be "extended" by one quarter or 5 years, whichever is the shorter.[252] In this case, the shorter period would be one quarter, *i.e.* 3 months. Trial Chamber VII, fully cognisant of Mr Bemba's status and the RPE, thus equated €100,000 to each month of imprisonment. Separately, the ICTY in 2011, in the case of a journalist, determined the period in default of payment of a €7,000 fine to be 7 days, or €1,000 per day.[253]

109. Neither is the practice of setting terms of imprisonment in default unique to international courts. Domestic courts have set tariffs for the enforcement of fines. In England and Wales, there are set tariff bands for non-payment under confiscation orders. A term of 10 years imprisonment would only be imposed where a defendant had failed to pay an amount "in excess of a million pounds".[254]

ii. Awards in Other Cases

110. A period of 10 years' incarceration is outside the range of most decided cases. Such a period of detention involves damage to the very fabric of life that lesser periods do not. An attempt has been made to set out some additional features above. There are many unreported settlements in such cases. Available information indicates that lengthy periods of wrongful

[252] *See* RPE, Rule 146(5).
[253] *In the Case against Florence Hartmann*, IT-02-54-R77.5-A, Second Order on Payment of Fine Pursuant to Rule 77 Bis and Warrant of Arrest, 16 November 2011, para. 12(a) and (b).
[254] Section 139 Powers of the Criminal Courts (Sentencing) Act 2000 (UK). *See also* section 182A of the Queensland Penalties and Sentencing Act 1992 (Australia); Canadian Criminal Code, para 734 (Canada).

imprisonment demand very substantial awards of compensation indeed.[255] Other features of the instant case which set it apart from the cases briefly discussed are, firstly, Mr. Bemba's position, character and reputation prior to his arrest, and, secondly, the extraordinary worldwide publicity given to his situation. Nonetheless, the following list gives some indication of the range of awards in cases of false imprisonment for shorter periods, and, perhaps highlights some of the relevant considerations in determining the basic award.

111. In *Lunt v Liverpool City Justices*[256] the Court of Appeal increased an award to £25,000 (€32,000)[257] for 42 days imprisonment. In *Tarakhil v Home Office*[258] the Judge awarded the claimant who had spent 3 weeks in immigration detention a total of £19,250 (€24,300). In *Okoro v The Commissioner of Police*[259] the claimant was awarded £13,000 (€16,500) for a few hours of detention, and in *Patel v Secretary of State for the Home Department,*[260] a case in which the immigration officer's behaviour was regarded as particularly serious, an award was made of £20,000 (€25,250) for 6 days of imprisonment before consideration of aggravated or exemplary damages. In *AXD v The Home Office,*[261] a claimant who had been held in detention for 20 months was awarded £80,000 (€100,000), and in *R v Secretary of State for the Home Department,*[262] a claimant was awarded £40,000 (€50,000) for a period of 295 days. However, in the conjoined cases of *AT, NT, ML, AK v Dulghieru,*[263] the awards for 3-4 months captivity ranged from £132-175,000 (€167,000-225,000).

112. There is no exact science to the process of compensating a claimant for the loss of his liberty and all attendant physical, psychiatric and reputational damage, but there is an abundance of guidance as to how to weigh the factors in each case. Given the features of Mr. Bemba's case, it is submitted that the basic award for his imprisonment, before consideration of aggravated and/or exemplary damages, or any consequential financial loss,

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[255] *See*, for example, Craig Coley, $21 million, [2019]: He spent 39 years in prison for a double murder he didn't commit. Now, he's getting $21 million; Teina Pora, $2,5 million, [2016]: Teina Pora compensation: Justice Minister Amy Adams confirms $2.52 million payout; 1994 murder of Putten stewardess Christel Ambrosius, $2.15 million [2004] or Cees B, $718,000, [2001]: Compensation for wrongful imprisonment totals $16 million for 2004; Kristian Liland, $1,7 million, [2000]: Per Kristian Liland; "Birmingham Six", compensation between £840,000 to £1.2million, [2001]: Birmingham Six: 40th anniversary of pub bombings that led to 'one of the worst miscarriages of British justice'; Edward Splatt, $300,000, [1991]: 'Someone got away with murder'; Michael O'Brien, £647,900, Ellis Sherwood £200,000, Winston Silcot, £50,000, [2006]: Police pay out nearly £1m to Newsagent Three.
[256] [1991] C.A Transcript No. 158.
[257] Using an inflation calculator, the current value of this award would be £51,000 or $64,000.
[258] [2015] EWHC 2845 QB.
[259] [2011] EWHC 3 (QB).
[260] [2014] EWHC 501 (Admin).
[261] [2016] EWHC 1617 (QB).
[262] [2017] EWHC 1834 (Admin).
[263] [2009] EWHC 225 (QB).

is measured in millions rather than thousands of euros.

2. Aggravated Damages

113. According to Lawrence LJ in *Walter v Alltools:*[264] "any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty; it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false."

114. Thus, where false imprisonment has been brought about by a defendant preferring a charge against the claimant, any evidence tending to show that the defendant is persevering in the charge is evidence which may be given for the purposes of aggravating damages.[265] In *Walter v Alltools*, the damages were increased because the defendants had not expressed their regret, had not notified the claimant's colleagues that he had been exonerated from suspicion, and had written a letter which suggested that the claimant's conduct had been suspicious and which, in effect, justified the imprisonment.[266] In *Warwick v Foulkes* the Defendant unsuccessfully pleaded that the claimant had indeed been guilty of the felony for which he had been falsely imprisoned. It was deemed to be "a great aggravation of the Defendant's conduct as showing an animus of persevering in the charge to the very last".[267]

115. It remains to be seen what assertions will be made by the Prosecutor in the instant application. However, since 8 June 2018, nothing approaching "an avowal that the imprisonment was false" has been uttered by anybody representing the ICC. Indeed, the opposite is true. On 13 June, the ICC Prosecutor, with the logo of the institution behind her, issued a press statement, decrying the appeal judgement.[268] In addition to being wholly inappropriate, it was, in at least two respects, factually inaccurate and misleading.[269]

116. Notwithstanding censure by the ICC President on 15 June, the press release remains

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[264] (1944) 61 T.L.R. 39 CA at p. 40.
[265] *See also Warwick -v- Foulkes (1844) 12 M & W 50.*
[266] (1944) 61 T.L.R. 39 CA.
[267] *Warwick -v- Foulkes (1844) 12 M & W 50* at pp. 508-509.
[268] Statement of ICC Prosecutor Fatou Bensouda.
[269] *Ibid.*: The averments that (1) at 4:05-4:11: one judge allowed the appeal **but favoured a retrial** and that; (2) at 4:49-5:22: the appeal judgment confirmed that troops **under Mr. Bemba's effective control** had committed offences **of which he had knowledge,** are both false and have gone uncorrected for nine months.

on the ICC website and YouTube feed.[270] The impression that the Prosecutor and her staff have expressly sought to continue to damage Mr. Bemba's reputation is reinforced by the concerted campaign, by members of the Prosecution staff, past and present, publicly to undermine the judgment of the Appeals Chamber. Annexes D and E are a collection of legal articles, blog and social media posts which have repeated and amplified the Prosecutor's comments. Many of these contributors might have hesitated to make such comments, given their professional responsibilities, had it not been for the Prosecutor's catalytic and inspirational lack of repentance at her own.

117. The Prosecution is not alone in prolonging the adverse effects of ICC intrusion into the Bemba family's life. The Registry, Trial Chamber III and the authorities in Belgium, Portugal and the DRC have all resisted attempts by the claimant to unfreeze his assets.[271] At the time of filing, in Belgium and Portugal, the 2008 freezing orders remain in force, including that on the family home in Brussels.

118. The post-judgment and continuing behaviour of the ICC merits an award of aggravated damages, which are compensatory in nature. They should compensate the claimant for the further damage to his reputation caused by the refusal to avow his acquittal and false imprisonment. The award can be expressed as a defined sum or can increase the basic award by a percentage. It should not ordinarily increase the basic award by more than 100%.[272]

3. Consequential Loss

119. The consequences of the miscarriage of justice upon the personal and social situation of Mr. Bemba extend beyond the matters already mentioned. In addition to compensating him for the non-pecuniary harm of being incarcerated, there are tangible and quantifiable "consequences" which he is entitled to recover under Rule 175.

120. Such an approach is, moreover, consistent with established legal principles concerning awards in cases of wrongful imprisonment. If a man is wrongfully detained for a week and loses a week's wages, he is entitled to recover that loss, in addition to general damages for

[270] Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo.
[271] *See*, ICC-01/05-01/08-3654-Conf-Exp, ICC-01/05-01/08-3656-US-Exp-Red; ICC-01/05-01/08-3655-US-Exp; ICC-01/05-01/08-3663-Conf-Exp; ICC-01/05-01/08-3665-Conf-Exp; ICC-01/05-01/08-3667-US-Exp; ICC-01/05-01/08-3670-Conf-Exp; ICC-01/05-01/08-3671-US-Exp.
[272] [1998] Q.B. 498 CA at 516 E-F.

imprisonment.[273] Where he is a businessman, he is entitled to the loss of profits which flow from his wrongful detention.[274] A claimant is also entitled to recover the costs of freeing himself from imprisonment.[275]

a) Property damaged, devalued, or destroyed

121. The details of how Mr Bemba's personal property was destroyed, degraded, lost or mismanaged is set out in Annexes F, G, H and I hereto, and the consequential financial losses therein explained. Mr. Bemba's primary position is that the totality of the loss is a consequence of the miscarriage of justice suffered. In the alternative, as discussed below, the losses which flow from the seizing/freezing of his assets are attributable to the ICC's negligence in their preservation. Those losses are not dependent upon a finding of a miscarriage of justice, as the ICC's liability would have arisen even had Mr. Bemba been convicted.

b) Legal costs

122. As stated above, the claimant is entitled as a consequential loss to recover the cost of securing his freedom. During much of the 10 years of litigation, the ICC advanced fees to Mr. Bemba's lawyers against the security of his frozen assets. The total amount of legal fees incurred by Mr. Bemba, prior to his eventual acquittal was approximately €4.2 million.[276]

PART II: THE DAMAGE TO MR BEMBA'S ASSETS

123. In May 2008, Mr. Bemba's property and assets in Portugal, Belgium, and the DRC were seized and frozen on the basis of applications filed by the Office of the Prosecutor,[277] granted by Pre-Trial Chamber III.[278] These assets were frozen in order to be paid as reparations to victims in the CAR in the event of a conviction.

124. Contrary to law, no steps were taken to manage or preserve the value of any of these assets. Mortgages were left unpaid, taxes, parking fees and registration payments were

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[273] *See* for example *Childs -v- Lewis* (1924) 40 T.L.R. 870.
[274] *Ibid.* at 871.
[275] *Pritchett -v- Boevey* (1833) 1 Cr & M 775.
[276] ICC-01/05-01/08-3232-Conf-Exp-Corr, para. 6. Indeed €2,067,982 million were recovered from the Cape Verde Bank account in 2004 (ICC-ASP/13/20, para. 36), €1,886,736.87 is the outstanding advance (ICC-01/05-01/08-3651-US-Exp), and €180 900 was taken from Mr. Bemba's Portuguese and [REDACTED] bank accounts during the Pre-trial phase in 2008-2009 (*see* ICC-01/05-01/08-149-Conf, para.8; ICC-01/05-01/08-339-Conf, paras. 3, 10; ICC-01/05-01/08-505-Conf, para. 8, and ICC-01/05-01/08-567-Red, para. 11).
[277] ICC-01/05-01/08-128-Conf-AnxA, para. 131.
[278] ICC-01/05-01/08-2-US-Exp (Mr. Bemba does not currently have access to this filing) cited in ICC-01/05-01/08-37-Conf, fn. 2; ICC-01/05-01/08-8; ICC-01/05-01/08-9-US-Exp (Mr. Bemba does not currently have access to this filing) cited in ICC-01/05-01/08-37-Conf, fn. 4.

ignored, income streams were abandoned, despite pleas from Mr. Bemba that they be maintained,[279] and houses, cars, boats, and other physical property were neglected.

125. The burden upon claimants of proving what financial loss resulted from mismanagement this type is not a high one.[280] Nonetheless, at Annex F, Mr. Bemba provides compelling evidence of the loss to him: it totals €42.4 million.[281] It is a sobering thought that, had the Trust Fund for Victims taken over Mr. Bemba's portfolio after a conviction, it would have inherited a debt of that magnitude. Mr. Bemba should be put in the position in which he would have been had the management of his assets been competently carried in accordance with law. As such, he seeks damages in the amount of at least €42.4 million.

A. WHAT HAPPENED: THE FREEZING ORDERS

Assets and Property frozen

126. The original Requests for Assistance issued by the Court to Portugal, Belgium, and the DRC were cast in the broadest terms, inviting the states to trace and freeze all Mr. Bemba's assets (and in some cases of his wife and children) within their jurisdictions.[282] The ICC also asked the UN Organisation Stabilisation Mission in the DR Congo (MONUSCO) to assist in seizing and impounding property, including six planes parked at N'djili Airport, Kinshasa.[283]

127. Relying, however, for present purposes on the schedules of frozen assets provided by the Registry[284] (and other information in the annexes hereto), it would appear that the following were frozen pursuant to domestic court order:

a) All bank accounts in the name of Mr Bemba in the DRC, Portugal, Belgium and

[279] *See*, for example, ICC-01/05-01/08-1087-Conf-Exp-Anx3; ICC-01/05-01/08-1563-Conf-Exp-AnxB; T-15-CONF-EXP, 25:16-28:5.
[280] *Fiona Trust & Holding Corporation v Yuri Privalov & ors* [2016] EWHC 2163 (Comm), citing *Les Laboratoires Servier v Apotex Inc* [2008] EWHC 2347 (Ch), endorsed by the Court of Appeal in *AstroZeneca AB v. KRKA dd Novo Mesto* [2015] EWCA Civ 484 at [16], which held that while the burden of proof rests with the defendant to demonstrate the loss suffered, the concept of "liberal assessment" applies, given that an assessment of the damages suffered as a result of a freezing order will often be inherently precise, and overeager scrutiny and criticism of the defendant's evidence as to how they would have used the funds is not appropriate. See also *Yukong Line Ltd v Rendsburg Investments Corp [2001] 2 Lloyds Rep 113 at 119-120:* In cases where a freezing injunction has been obtained and discharged, the party against whom it was made may seek an inquiry as to damages. Upon that party adducing credible evidence that he has suffered ***some loss***, the evidential burden passes to the party seeking to resist the application.
[281] Annex F, calculated to 31 December 2018.
[282] *See* EVD-P-03324/CAR-OTP-0041-0165*;* CAR-D04-0007-0083 and ICC-01/05-01/08-8.
[283] Annex H, para. 24.
[284] ICC-01/05-01/08-3650-Conf-Exp-Anx; ICC-01/05-01/13-2295-Conf-Exp-AnxII.

b) Certain bank accounts in Belgium, Portugal and [REDACTED] in the name of his wife, Lillia Texeira;

c) The family home in Brussels;

d) Several properties and parcels of land in the DRC;

e) A villa, named [REDACTED] in [REDACTED] Portugal; and

f) A boat in Portugal.

Assets and Property seized and not frozen

128. In addition, following Mr Bemba's arrest, the following was seized, apparently without judicial order:

(a) A Boeing 727-100 aircraft at Faro airport in Portugal (*see* below);

(b) Six aircraft at N'djili airport, Kinshasa, DRC;

(c) A river cruiser in the DRC;

(d) A villa at [REDACTED] Portugal, which had a caution placed upon its title at the Land Registry;

(e) A villa at [REDACTED] sealed as a crime scene by the Portuguese police;

(f) Several motor vehicles in the DRC; and

(g) Three motor vehicles, impounded by the police in Faro, Portugal.

Assets and Property seized by the Prosecution

129. Mr. Bemba arrived in Faro in early April 2007, in a Boeing 727-100 [REDACTED]. After his arrest on 24 May 2008, a number of properties were searched by the Portuguese police, including two villas [REDACTED] and the Boeing 727. Several items of property were seized and passed to the Prosecution, including the keys and air certificates to the plane.[285]

130. As part of its service to him, Mr. Bemba's Portuguese bank [REDACTED] received invoices for parking and maintenance of the plane. Per month, parking fees were €1,355.20, and maintenance was €172. The fees were last paid in October 2007.[286] When arrested in May 2008, Mr. Bemba had comfortably enough funds in Portugal alone to discharge outstanding parking and maintenance fees.[287] Once these funds were frozen by the Portuguese authorities at the request of the ICC, these fees and charges were unpaid, and continued to accrue. In January 2009, the Portuguese government deemed that the plane was liable to VAT, as it

[285] Annex G, para. 19; ICC-01/05-01/08-583-US-Anx1; ICC-01/05-01/08-1563-Conf-Exp-AnxB.
[286] Annex G, paras. 15-16.
[287] Annex G, para. 16.

was considered to have been imported, so long had it been parked at Faro.

131. In December 2010, Mr. Bemba requested that the keys and documentation be returned, so the plane could be leased to generate an income. However, on 10 May 2011, the Registry informed Mr. Bemba's counsel by email that the Prosecution had been unable to identify the key of the plane and thus it could not be handed over.[288] The keys were subsequently returned in September 2018 by the Prosecution, following Mr. Bemba's acquittal, together with the other physical material seized by the Prosecution in May 2008.

132. The Registry represented in June 2011 that the plane had been "in default of parking and maintenance since December 2007", and this was the reason it was grounded.[289] In April 2016, the Registry stated that the Boeing 727 "has not been frozen because Mr Bemba has run up a large debit in relation to the plane (over €500,000) in unpaid customs and parking."[290] Of course, these charges and fees were a direct result of Mr. Bemba's funds in Portugal being frozen at the ICC's request. Moreover, any attempt to generate an income through the plane; sell it (an offer of €1 million was made);[291] mitigate losses by moving the plane to a location with lower or no fees; or preserve its value, was prevented by the Prosecution's possession of the documentation and/or keys. The debts incurred by the plane stand at €981,954.37.[292] The plane is now scrap.

B. FROZEN ASSETS ARE REQUIRED TO BE PROPERLY MANAGED TO PRESERVE THEIR VALUE

133. Freezing orders, are one of the law's "nuclear weapons"[293] with "potential serious consequences for defendants and third parties". Following the 1975 *Mareva Compania Naviera SA* case,[294] the "Mareva injunction" has been widely applied in common law jurisdictions,[295] mirroring the "*saisie conservatoire*" already commonplace in civil

[288] *See* email exchange at ICC-01/05-01/08-1563-Conf-Exp-AnxB.
[289] ICC-01/05-01/08-1497-Conf-Exp, para. 10.
[290] ICC-01/05-01/08-3375-Conf-AnxII, pp. 2-3.
[291] Annex G, para. 37.
[292] *Ibid.*, para. 38.
[293] *See* *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308 (1999), at 332.
[294] [1975] 2 Lloyd's Rep. 509 (Eng.).
[295] *See*, for example, Canada; *Chitel v. Rothbart*, [1982], 141 D.L.R. 3d 268, para. 63: "The Mareva injunction is here and here to stay and properly so"; Australia: *Jackson v Sterling Indus. Ltd.* (1987) 162 CLR 612, at 623: "As a general proposition, it should now be accepted in this country that 'a Mareva injunction can be granted"; New Zealand: *Chesterfield Preschools Ltd. v. Comm'r of Inland Revenue*, HC Christchurch CIV 2004-409-001596, 13 September 2005 at [21] (N.Z.): "Mareva orders are orders in personam, arising out of the equitable jurisdiction inherent in the High Court.".

systems,[296] which placed a defendant's assets under the authority of the court, to permit their judicial sale to enforce a judgment.[297] Given their potentially draconian impact,[298] and the fact that a defendant, often taken by surprise, may be unable to keep businesses running, or may suffer irreparable damage to reputation, procedural safeguards have been adopted.

134. For example, parties seeking a freezing order are required to give a cross-undertaking to indemnify the defendant against any loss,[299] with indemnities often requiring financial security to be deposited with the court or a trustee.[300] Assets subject to a freezing order must be properly managed to preserve their value because, should the proceedings be unsuccessful, "the asset will then have to be returned to its lawful owner in the condition it was when it was first made subject to an interim order".[301] This principle is uncontroversial, and universally applied, with obligations to protect and preserve property having now been widely incorporated into domestic law.[302]

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[296] *Rasu Maritima SA v Perusahaan Pertambangan* [1978] QB 644, at 658.

[297] Art. 48 of the French Code of Civil Procedure (ancien) cited *in* Tetley, W., Q.C., "Attachment, the Mareva Injuction, and saisie conservatoire", *Lloyds Maritime and Commercial Law*, p. 65.

[298] *Third Chandris Corp v Unimarine SA* [1979] Q.B. 645 at 653; Zuckerman, "Interlocutory Remedies and Quest of Procedural Fairness" (1993) 56 M.L.R. 325; *Grupo Mexicano* 527 US 308 (1999), at 330–332; Wasserman, R., "Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments" (1992) 67 *Wash. L. Rev.* 257, at 319–324.

[299] *See*, for example, *Third Chandris Shipping Corp. v. Unimarine S.A*., [1979] Q.B. 645 (C.A.), 668, 669 per Lord Denning: "(v) The plaintiff must, of course, give an undertaking in damages — in case he fails in his claim or the injunction turns out to be unjustified. In a suitable case this should be supported by a bond or security; and the injunction only granted on it being given, or undertaken to be given." See also *Z Ltd v A-Z and AA-LL [1982] Q.B. 558, 577E.*

[300] *See*, for example, UK Civil Procedure Rules, Practice Direction, 25A (Interim Injunctions), para 5.1 "Any order for an injunction, unless the court orders otherwise, must contain: (1) Subject to paragraph 5.1B an undertaking by the applicant to the Court to pay any damages which the respondent sustains which the court considers the applicant should pay".

[301] 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. *See also* Transparency International, Policy Paper, Confiscation of Criminal and Illegal Assets: European Perspectives in Combat against Serious Crimes, pp. 7–8, 15: it "is important to identify the most appropriate model for management of confiscated/forfeited assets and accredit it to one institution, marked with integrity, accountability, transparency and efficiency", and recommending "[a]dequate mechanisms for managing frozen and subsequently confiscated property".

[302] See, for example, **United Kingdom**: Proceeds of Crime Act 2002 (POCA 2002), ss. 48–49 (giving the Crown Court the power to appoint management receivers), ss. 50–51 (enforcement receivers), and ss. 52–53 (director's receivers). Management receivers are the ones that manage frozen property. **France**: Report from the Commission to the European Parliament and the Council based on Article 8 of the Council Decision 2007/845/JHA of 6 December 2007, published 12 April 2011, p. 6: In 2010, France established the *Agence de gestion et de recouvrement des avoirs saisis et confisqués* ("AGRASC"), which is a dedicated asset management office, based on the provisions of the bill no. 2010-768 of 9 July 2010. The purpose of the management is to preserve assets and to prevent any depreciation. **Bulgaria**: The Forfeiture of Illegal Asset Act "imposes on keepers obligations to preserve the property in safety exercising due diligence and acting in good faith" (Transparency International, Comparative Report: Legislation Meets Practice: National and European Perspectives in Confiscation and Forfeiture of Assets (2015), Annex 6. Management of seized and forfeited criminal assets in Bulgaria: How to improve the current model, p. 124). **Ecuador**: When a person's property has been the object of a "precautionary measure" (such as a seizure), they must be returned to the person if he is acquitted. The Ecuadorian Narcotic Drugs and Psychotropic Substances Act ("NDPSA") regulates this return, and states, in relevant part: Article 110. Return of property. If the accused, owner of the seized property, is acquitted, the property shall be returned by CONSEP when the judge so orders, once the

135. Preserving the value of frozen assets seeks to obviate a situation where mismanagement "frustrate[s] efforts to compensate victims for their loss and undermine[s] efforts to repair the harm done by criminal conduct." It is accordingly "important to ensure that assets are preserved at minimum costs and that they yield maximum return when they are ultimately realized."[303] Arrangements put in place to manage seized assets "must be beyond reproach" and deal with assets "in accordance with the law". This requires "[m]eticulous record keeping, the adoption of transparent procedures and compliance with the policies, procedures, court orders and laws that govern the asset management process" which are "critical to ensuring transparency and accountability of the asset management system."[304] Some assets cost "considerably more to maintain or to keep profitable, such as yachts, aircrafts and businesses."[305] Even those assets which do not require active maintenance to preserve their value, "usually still need to be stored in a safe place, data about [their] location, ownership and status in the process needs to be captured and routinely monitored."[306]

136. Failure to preserve the value of frozen property gives rise to a claim for damages. In *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, the IACtHR awarded damages to the complainant after his factory, frozen by the state, suffered serious deterioration. Debts were left unpaid which led to the factory being embargoed, and "no type of maintenance could be observed during the whole time [it had been seized] and… all the equipment was damaged.[307] The State was found to be in breach of its legal obligation to return the frozen property "in the condition in which it was at the time of its reception, except for normal

precautionary measures have been cancelled. The institutions to which the property was delivered shall return it in the condition in which it was when they received it, except for normal deterioration owing to its legitimate use. If it has been damaged, they must repair it or pay the compensation established by the judge, except in the case of force majeure or unforeseeable circumstances, *see* *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, 21 November 2007, para. 200; **Italy**: The Law of 31 March 2010, no. 50, established the "National Agency for the management and use of the assets seized and confiscated to the organized crime". Judges appoint judicial administrators as the "guardian" of the asset and assume the role of the owner and manager of the property; Open-ended Intergovernmental Working Group on Asset Recovery, The Italian experience in the management, use and disposal of frozen, seized and confiscated assets, 11–12 September 2014, CAC/COSP/WG.2/2014/CRP.3, pp. 3, 18.

[303] 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.

[304] 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. 14-15.

[305] *Ibid.*

[306] *Ibid.*

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

deterioration owing to legitimate use."[308] This is because when property is frozen, "the State assumes a position of guarantor of its good use and conservation, particularly taking into account that precautionary measures are not of a punitive nature."[309]

137. The proper management of seized assets is a requirement across international conventions and agreements governing legal cooperation in the freezing of property. The European Parliament Directive on the freezing and confiscation of proceeds of crime, binding on 28 member states (including Belgium and Portugal), provides that "[p]roperty frozen with a view to possible subsequent confiscation should be managed adequately in order not to lose its economic value", and requires Member States "to ensure the adequate management of property frozen.[310] Other instruments are framed in the same terms.[311]

138. State practice in this regard can also be found in the "best practices", "model regulations" and "strategy documents" of intergovernmental organizations which consistently require states who freeze assets to put in place measures "to facilitate preservation of the maximum value of property which depreciates while frozen or seized", including by "the appointment in appropriate cases of specialist accountants or receivers".[312] Resolution 5/3 adopted by the conference of States Parties of the UN Convention against Corruption (186 States), for example, urges States Parties to ensure "adequate mechanisms in place to manage and preserve the value and condition of assets pending the conclusion of

[308] *Ibid*., para. 214.
[309] *Ibid*., para. 211.
[310] European Parliament and Council, Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (3 April 2014), para. 32 (preamble), Article 10. *See also*: (2005), Article 6: "[e]ach Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention".
[311] See, for example, the United Nations Convention against Corruption (2004), Article 31(3): requires each state party to "adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property…"; Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceedings from Crime and on the Financing of Terrorism, Article 6, provides that "[e]ach Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention".
[312] G8 Lyon/Roma Group, Criminal Legal Affairs Subgroup, G8 Best Practices for the Administration of Seized Assets, 27 April 2005, para. 19: "States should have measures in place to facilitate preservation of the maximum value of the property that may depreciate while frozen or seized, to protect the respective interests of the parties concerned." *See also* Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery (2012), paras. 26 and 27: "[t]o enhance the effectiveness of confiscation regimes, countries need to implement a program for efficiently managing frozen, seized and confiscated property and, where necessary, disposing of such property", with further details; Financial Action Task Force, The FATF Recommendations, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, February 2012 (updated 2018), Recommendation 38: with regard to mutual legal assistance and the freezing of assets: "Countries should also have effective mechanisms for managing such property, instrumentalities or property of corresponding value…".

confiscation proceedings in another State."[313] The OAS model regulations require the designation of a specialized administrative authority with responsibility for the "reasonable preservation of the economic value of [frozen] assets".[314] The EC communication on the proceeds of organised crime, require national asset recovery offices to "ensure the proper management of the seized assets".[315] The World Bank's Stolen Asset Recovery Initiative includes a chapter on "managing assets subject to confiscation" which requires that authorities "ensure the safety and value of assets" until confiscated or released.[316] UNODC Manuals and Programs advocate for the effective management of seized property "to preserve and maintain the productivity or value of the property"[317] and advise on "provisional measures to preserve assets pending confiscation."[318] The implications of managing costly assets such as aircraft are often specifically considered.[319]

C. THE ICC HAD A DUTY IN RELATION TO THE MANAGEMENT OF MR. BEMBA'S ASSETS

139. Mr. Bemba's assets were seized and/or frozen by Belgium, Portugal, and the DRC, at

[313] Resolution 5/3 (25 to 29 November 2013), para. 16. See also Resolution 6/3 (2 to 6 November 2015), para. 16: "*Encourages* States parties and the United Nations Office on Drugs and Crime to continue sharing experiences and building knowledge on the management, use and disposal of frozen, seized, confiscated and recovered assets, and to identify good practices as necessary…".

[314] Organization of American States, Inter-American Drug Abuse Control Commission, Model Regulations Concerning Laundering Offense Connected to Illicit Drug Trafficking and Other Serious Offenses, November 2005, Article 7. *See also*, Hemispheric Drug Strategy, 3 May 2009, in which member states adopted, inter alia, the following principle: "National entities responsible for the management and disposition of assets seized and/or forfeited in cases of illicit drug trafficking, money laundering, and other related crimes should be established or strengthened, as appropriate." *See further,* Plan of Action 2011–2015, objective 12, which provides for the creation or strengthening, in accordance with national laws, competent national agencies for the administration of seized or confiscated assets.

[315] European Commission, Communication from the Commission to the European Parliament and the Council – Proceeds of organised crime: ensuring that "crime does not pay", 20 November 2008: "[w]here AROs do not directly manage seized assets, they should at least collect information on seized assets from the authorities managing them".

[316] Stolen Asset Recovery Initiative, Asset Recovery Handbook, A Guide for Practitioners, The World Bank, 2011, p. 91.

[317] See, for example, UNODC, Legal Assistance Programme for Latin America and the Caribbean (LAPLAC), Model Law on In Rem Forfeiture, 2011, provides, in Chapter VII, Article 39 on the purposes of the management of property ("to preserve and maintain the productivity or value of the property"), Article 40 on the general rules of management, Article 41 of the advance sale of property (at risk of perishing, deteriorating, or becoming devalued).

[318] UNODC, Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime (2012) Chapters VI (provisional measures to preserve assets pending confiscation) and VII (post-preservation issues). See also Anti-Corruption Summit London 2016: Communiqué of 12 May 2016 as agreed by participating countries and international organisations, para 19: "We welcome efforts to strengthen international cooperation on the transparent and accountable management of frozen and returned assets"; *See also* Camden Asset Recovery Inter-Agency Network (CARIN), CARIN Manual, 2018, pp. 19-22.

[319] *See*, for example, Open-ended Intergovernmental Working Group on Asset Recovery, Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets, 23 August 2017, CAC/COSP/WG.2/2017/CRP.1, pp. 59-60. See also pp.10-11, which provides that assets should be returned to the owner in the condition it was first in.

the request of the ICC.[320] In situations of cross-border freezing orders, the state which makes, validates or confirms a freezing order is the "issuing State", and the state in whose territory the property or evidence is located is the "executing State". 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, in cross-border cases, the issuing State bears responsibility for loss arising from the management of the frozen assets. Institutional protocols and agreements accordingly provide for the issuing State to indemnify the executing State where there are cross-border freezing orders.[321]

140. Moreover, in this case, it is plain that the ICC was in control of and responsible for the preservation of assets through the States. The ICC designated how the freezing was to be carried out ("*conformément aux procedures prévues par sa législation nationale*"),[322] and retained control of the assets following their seizure, as demonstrated by the ability of Chambers to order, for example, the partial unfreezing of Mr. Bemba's assets when deemed necessary.[323] This was consistent with the understanding of the States,[324] and the cooperation between them and the ICC.[325] The responsibility assumed by the ICC for the frozen assets reflects international practice; it is the issuing party and not the state on whose territory the assets are found that is liable and responsible for their preservation.

141. Internal ICC documents also demonstrate that the Court considered itself responsible for ensuring that assets frozen at its request did not diminish in value, recognising that the

[320] ICC-01/05-01/08-8, p. 4: "demande à la République portugaise de prendre, conformément aux procedures prévues par sa législation nationale, toutes les mesures nécessaires afin d'identifier, localiser, geler ou saisir les biens et avoirs de M. Jean-Pierre Bemba Gombo qui se trouvent sur son territoire, y compris ses biens meubles ou immeubles, ses comptes bancaires ou ses parts sociales, sous réserve des droits des tiers de bonne foi.

[321] *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 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.

[322] ICC-01/05-01/08-8, p. 4.

[323] ICC-01/05-01/08-251-Anx, para. 17 ; ICC-01/05-01/08-281-Conf-Anx; ICC-01/05-01/08-339-Conf, para. 3; *See* for example, T-13-CONF-ENG, 60:16-20:

T-15-CONF-EXP-ENG, 18:6-7.

ICC-01/05-01/08-254. When it became apparent that money was missing from a frozen bank account, for example, it was the ICC that ordered Portugal to conduct an investigation.

Court's "consultation with States at the very early stage is crucial to avoid the devaluation of assets frozen on behalf of the Court."[326] States were not left to manage the process, rather the ICC acknowledged it needed to work with States to avoid the value of frozen assets "significantly decreas[ing] by the time they can be sold."[327] The Registry regularly described its role as including following-up on requests to freeze assets,[328] with the ASP Hague Working Group recognising a need for the ICC to organise bilateral meetings with State Parties who have frozen assets at the Court's request, form networks and put in place focal points, and identify "the best procedures to follow together with the requested State".[329]

142. The ICC's acknowledgement of its failures in managing State cooperation in general, and the process of freezing assets in particular, is also telling. A 2016 internal report describes the Registry's "grossly insufficient" ability to deal with State cooperation, with a capacity "at best able to perform routine tasks in 'damage control' mode as a result of a decentralised, uncoordinated and insufficiently staffed Registry external relations and State cooperation function." [330] Relevantly, "[r]egarding the freezing of assets, the limited human resources were dedicated to drafting requests and follow-up, leaving no time for strategic planning and engagement with key stakeholders on this matter." Specifically, the Registry noted that it was not possible "to ensure adequate access to the resources that could be used for… reparations".[331] The failings of the Registry in this context are relevant to demonstrating the gap between effective asset management and the ICC's conduct, but also demonstrate the Court's recognition of a duty to engage in, for example, "strategic planning and engagement with key stakeholders" and ensure "adequate access to resources" when it came to the management of frozen assets. Neither can there be any room for doubt that this damning self-appraisal referred to the mismanagement of orders in the instant case: Mr. Bemba was the only individual whose assets were frozen at the request of the ICC in 2016.

D. THE ICC'S MANAGEMENT OF THE FROZEN ASSETS WAS NEGLIGENT

143. The obvious starting point for the issuing party's management of frozen assets, is the compilation of an accurate list of the property that has been frozen. "Meticulous record

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[326] ICC, Financial investigations and recovery of assets, 1st edition, November 2017, p. 16.
[327] *Ibid.*
[328] ICC-ASP/17/26, Report of the Registry on financial investigations conducted by the Registry and the seizure and freezing of assets, 29 October 2018, paras. 6-8 (emphasis added).
[329] *Ibid.*, paras. 10-12.
[330] ICC Registry, Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court, August 2016, pp. 13–14.
[331] *Ibid.*

keeping" is "critical to ensuring transparency and accountability of the asset management system."[332] The Registry's "Reports on Mr. Bemba's Solvency", the most recent in July 2018, reveal that the Registry never compiled (or even apparently sought) information from States as to what had been seized or frozen. The Registry reports include a column titled "Frozen or not", in which numerous assets are designated "not known".[333]

144. Domestic court documents available to Mr. Bemba, as well as his own records and recollection suggest other frozen property of which the Registry is not aware. This property includes items in the names of his wife, and his brother.[334] Having issued requests to States and MONUSCO,[335] there was no follow-up on what had been frozen. Requests from Mr. Bemba, following his acquittal, for "an account in relation to each item of property frozen, identifying the same, specifying its precise location, and detailing at a minimum, its value throughout the period of its detention by the state or institution"[336] were opposed by the Registry,[337] and rejected by the Trial Chamber.[338] Against this backdrop, the ICC then failed to ensure that the value of Mr. Bemba's frozen assets was preserved. Ultimately, as detailed by in Annex F, Mr. Bemba's properties and assets were simply run into the ground.

145. It is now apparent that the ICC froze Mr Bemba's assets with no concomitant ability to manage the process. An August 2016 report acknowledges "overlaps and inefficiencies and a lack of clarity as to internal processes when dealing with cooperation requests involving complex legal issues" and a "grossly insufficient" ability to deal with these issues. The Registry acknowledged being "unable to adequately react to cooperation requests or proactively identify cooperation opportunities in practical and tangible ways" with "little capacity to effectively follow up on these requests to obtain the requested cooperation".[339]

146. Significantly, a result of its inability to "undertake effective cooperation" with States, "Registry staff sometimes had to rely on the staff of the Office of the Prosecutor to follow up on certain issues. This created confusion among external stakeholders as to the role of

[332] 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. 14-15.
[333] ICC-01/05-01/08-3657-Conf-Exp, para. 7.
[334] ICC-01/05-01/08-3657-Conf-Exp, para. 8.
[335] Annex H, para. 24.
[336] ICC-01/05-01/08-3654-Conf-Exp, p. 18.
[337] ICC-01/05-01/08-3656-US-Exp-Red.
[338] ICC-01/05-01/08-3655-US-Exp. *See also* ICC-01/05-01/08-3663-Conf-Exp, again opposed by Registry (ICC-01/05-01/08-3665-Conf-Exp) and rejected by the Trial Chamber (ICC-01/05-01/08-3667-US-Exp).
[339] ICC Registry, Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court, August 2016, pp. 13-14.

different organs of the ICC and risked undermining the image of the Registry as a neutral service provider."[340] Importantly, this confusion as to the different roles and responsibilities of the organs of the Court was then cited as causing a lack of understanding or awareness on the part of States Parties as to "the nature and extent of the obligation to cooperate."[341]

147. Regarding frozen assets specifically, "limited human resources were dedicated to drafting requests and follow-up, leaving no time for strategic planning and engagement with key stakeholders on this matter". The Registry acknowledged that "requests were sent **and not followed up"** meaning that "asset freezing could not be pursued strategically" and "a number of requests or opportunities could simply not be pursued and crucial opportunities were lost."[342] As such, it was "not possible" to ensure access to the resources that could be used for reparations.[343]

148. The lack of expertise within the ICC in the management of frozen assets was widely known. After funds for "training on the freezing of assets" were re-directed, the Registry acknowledged that "cancellation of these funds will lead to loss of expertise. As a consequence, it is likely that certain assets might not become available for use in payment for defence teams, damages and/or reparations."[344] In October 2015, after Mr. Bemba's assets had been frozen for seven years, the Court again acknowledged its shortcomings in technical expertise in financial investigations and tracing assets, stating that "relevant expertise and experience within the Court, but also within domestic jurisdictions, was currently rather limited. Specifically, it was pointed out that there [were] not enough financial investigators at the Court to conduct such complex investigations".[345]

149. These reports are a damning admission of the ICC's "grossly insufficient" capacity to meet its obligations as regards frozen assets, which was at best an exercise in "damage control".[346] In issuing requests to freeze of Mr. Bemba's assets, the ICC was engaging in a

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[340] *Ibid.*, paras. 433.
[341] ICC, Report on cooperation challenges faced by the Court with respect to financial investigations, Workshop 26–27 October 2015, The Hague, Netherlands, Forward-looking conclusions, p. 7 (emphasis in original).
[342] ICC Registry, Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court, August 2016, para. 444.
[343] *Ibid.*, p. 14 and para. 432.
[344] ICC-ASP/11/15, Report of the Committee on Budget and Finance on the work of its nineteenth session, 29 October 2012, p.43.
[345] ICC, Report on cooperation challenges faced by the Court with respect to financial investigations, Workshop 26–27 October 2015, The Hague, Netherlands, Forward-looking conclusions, p. 4.
[346] ICC Registry, Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court, August 2016, pp. 13–14.

practice without the skills, resources, or competence to attempt it. The negligent mismanagement was not limited to the Registry. The Prosecution's seizure of the keys and documentation to the Boeing 727-100 is well-documented and lead to substantial damage.[347]

150. Assets were frozen to ensure that reparations would be available to victims in the event of a conviction. The ICC understood that the frozen assets may devalue over time, and that this should be avoided. The ICC, despite prompting States to appoint administrators to manage frozen assets, took no steps to follow up with the States to ensure compliance with this request, or indeed, to ensure that the freezing had been carried out in accordance with national law. The Registry has since acknowledged that it could not effectively follow up on cooperation requests due to, *inter alia*, "grossly insufficient" resources and mismanagement. Whether expressed as negligence or as a breach of a fiduciary duty to preserve his assets, the ICC is culpable in the destruction or devaluation of Mr Bemba's assets.

E. MR BEMBA HAS SUFFERED LOSS AS A RESULT OF THE ICC'S NEGLIGENCE/BREACH OF FIDUCIARY DUTY

151. Annex F is a valuation report ("the ███[348] Report") into the losses caused to Mr Bemba through the seizure/freezing of his assets. As has been previously averred, the ICC's liability for those losses arises in two ways: (1) as a consequence of the grave and manifest miscarriage of justice he has suffered; and/or (2) by reason of the Court's negligence and/or breach of fiduciary duty in failing to preserve his assets.

152. The ███ Report's provisional calculation of Mr Bemba's losses sets them at €42.4 million. There are two important caveats to that figure. First, the calculation of losses only extends to 31 December 2018.[349] The losses are, however, ongoing, and will already, by the time of this filing be higher. Secondly, within the temporal confines of an Article 85 claim, the ███ Report has been unable accurately to quantify significant losses in relation to real estate investments in the DRC. Accordingly, those losses have not been included.[350]

153. Prior to the final determination of the claims herein, the claimant will seek to update and complete the true picture of his losses.

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[347] Annex G, para. 19.
[348] The principal author of the report, ███████████████████████████.
[349] Annex F, p. 8.
[350] Annex F, p. 23.

F. THE COURT MUST PROVIDE THE CLAIMANT WITH A REMEDY

1. Financial compensation for the damage and destruction of property and assets

154. Article 21(1)(b) requires the Court to apply, "where appropriate, applicable treaties and the principles and rules of international law". This has been understood to include "customary international law principles"[351] and "customary rules".[352] Article 21(1)(c) allows the Court to apply general principles of law derived from national laws. Article 21(3) requires the Court to adhere to internationally recognised human rights.

155. Mr. Bemba has the right to own property of which he shall not be arbitrarily deprived. The right to property is part of customary international law because of its recognition by almost all nations, who have expressed their belief that the right exists under international law.[353] 95 percent of the world's nearly two hundred states guarantee the right to property under their national laws, most commonly in their national constitutions. The right is typically contained in the section of the constitution which enumerates "basic rights", "fundamental rights" or "human rights" recognized by that nation.[354] More than 2/3 of states are also party to an international human rights treaty – the Universal Declaration on Human Rights,[355] American Convention,[356] the European Convention of Human Rights,[357] the African Charter,[358] and the Arab Charter[359] – which recognises the right to property and a court with the power to issue legally binding judgments to enforce it.

156. In negligently failing to take any steps to preserve the value of Mr. Bemba's property

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[351] DeGuzman, M., M. "Article 21. Applicable Law", *in* Triffterer, O., Ambos, K. (eds.), *Rome Statute of the International Criminal Court A Commentary*, C.H. Beck Hart Nomos, 2016, 3rd ed., p. 939.
[352] *Ibid.*, p. 941.
[353] Sprankling, J., G., "The Global right to Property", 52 *Colum. J. Transnat'l L.* 464, at 465 (or p.1 of this website).
[354] *Ibid.*, at 485 (or p.16 of this website).
[355] UDHR, Article 17: 'Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.'
[356] American Convention on Human Rights, Article 21: Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment in the interest of society. (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
[357] ECHR, Article 1, Protocol 1: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. The ECtHR has ruled that Article 1 protects the right to property. See, e.g., *Marckx v. Belgium*, App. No. 6833/74, Eur. Ct. H.R., para. 63.
[358] African Charter on Human and Peoples' Rights, Article 14.
[359] Arab Charter on Human Rights, Article 25.

and assets, the ICC has interfered with Mr. Bemba's right to own and enjoy property. As such, he is entitled to a remedy. The right to a remedy for violations of human rights "undoubtedly forms part of customary international law",[360] and is expressly provided for in the Universal Declaration of Human Rights,[361] the International Covenant on Civil and Political Rights,[362] the Convention on Elimination of All Forms of Racial Discrimination,[363] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,[364] the ECHR,[365] and the American Convention on Human Rights.[366]

157. International criminal courts and tribunals are not immune from the obligations to remedy damage caused to individuals. The ICTY and ICTR repeatedly recognized that "all violations of rights demand a remedy."[367] In the *Barayagwiza* case, where the ICTR Appeals Chamber affirmed the right to a remedy, Judge Rafael Nieto-Navia expanded the Appeals Chamber's reasoning in a Separate Declaration, stating:[368]

> Human rights treaties provide that when a state violates fundamental human rights, it is obliged to ensure that appropriate domestic remedies are in place to put an end to such violations and in certain circumstances to provide for fair compensation to the injured party.
>
> Although the Tribunal is not a State, it is following such a precedent to compensate the Appellant for the violation of his human rights. As it is impossible to turn back the clock, I think that the remedy decided by the Appeals Chamber fulfills the international requirements.

158. There is nothing in the ICC's constituent documents that provides for financial compensation to remedy a violation of an accused or former accused's human rights. However, the ICC has the power to provide an effective remedy, arising from the combined effect of the ICC's inherent powers and its obligation to respect generally accepted human rights norms. In compensating Mr. Rwamakuba for the ICTR's violation of his right to

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[360] *Rwamakuba*, TC, para. 40.
[361] UDHR, Article 8.
[362] ICCPR, Article 2(3)(a).
[363] Convention on Elimination of All Forms of Racial Discrimination, Article 6.
[364] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Article 14(1).
[365] ECHR, Article 13.
[366] American Convention on Human Rights, Article 25.
[367] *Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, Judgment, 23 May 2005, para. 209; *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 74; *The Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, paras 42-43.
[368] *Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Declaration of Judge Rafael Nieto-Naviam on Prosecutor's Request for Review or Reconsideration, 31 March 2000, at paras. 28-29. Judge Lal Chand Vohrah indicated that he approved of Judge Nieto-Naviam' statement as it related to human rights principles, *Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Declaration of Judge Lal Chand Vohrah on Prosecutor's Request for Review or Reconsideration, 31 March 2000, para. 3.

counsel,[369] for example, a Trial Chamber held that "[t]he doctrine of inherent powers provides that a court should be recognized as having been implicitly conferred the powers which prove necessary to the exercise of its mandate" and that "the power to give effect to the right to an effective remedy for violations of the rights of an accused or former accused accrues to the Chamber because this power is essential for the carrying out of judicial functions, including the fair and proper administration of justice."[370] The Chamber therefore concluded, in a decision upheld on appeal, "in accordance with its obligation to give full effect to an accused's or former accused's right to an effective remedy, [the ICTR] must have the inherent power to make an award of financial compensation."[371]

159. Should the ICC be unable to provide financial compensation for human rights violations, "then an individual's right to an effective remedy would be unjustifiably restricted in cases where such compensation was necessary to adequately and efficaciously address the prior human rights violation."[372]

160. The ICC has acknowledged its right to invoke inherent powers or "incidental jurisdiction".[373] A natural corollary of the ICC's obligation to adhere to internationally recognised human rights is the ability to afford an effective remedy upon their violation. Any perceived inability is a "lacuna" which should be remedied by recourse to its inherent powers, and the ICC should award Mr. Bemba damages as appropriate.

2. Submission to a dispute resolution mechanism

161. The ICC is an international organisation,[374] which under Article 4(1) of the Rome Statute, has "international legal personality", and therefore bears responsibility for all acts and omissions of its organs and officials attributable to it.[375]

162. Under the ICC Agreement on Privileges and Immunities ("APIC"), the ICC has

[369] *The Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, p. 23; the Appeals Chamber affirmed the award, in *The Prosecutor v. André Rwamakuba*, ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, para. 32.
[370] *Rwamakuba*, TC, para. 47.
[371] *Ibid.*, para. 62.
[372] *Ibid*.
[373] ICC-01/05-01/13-2276-Red, para. 75, 76.
[374] Rolf Lüder, S., "The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice", *IRRC*, March 2002 Vol. 84 No. 845.
[375] Schmalenbach, K., "Dispute Settlement (Article VIII Sections 29-30 General Convention)", *in* Reinisch, A., (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary*, OSAIL, 2016, p. 529.

immunity from "every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity".[376] As a corollary to asserting immunity, and to prevent against its abuse, international organizations are required to implement dispute resolution mechanisms.[377] As such, Article 31 of the APIC provides that: "[t]he Court shall, without prejudice to the powers and responsibilities of the Assembly under the Statute, make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts and other disputes of a private law character to which the Court is a party".

163. This language mirrors that of Article VIII Section 29 of the UN Convention on Privileges and Immunities,[378] which places the UN under "an affirmative duty to create mechanisms by which injured victims can seek redress for damages from contractual disputes and tort claims where the UN is involved."[379] The UN itself has repeatedly affirmed that Section 29 imposes legal obligations on the organization and its leadership to compensate people who have suffered damage for which the organization is legally liable.[380] Moreover, the UN has repeatedly complied with this provision by providing various forms of dispute resolution to injured parties.[381]

164. The current dispute, which concerns the ICC's liability for the damage to and destruction of Mr. Bemba's property, is a "dispute[s] of a private law character to which the Court is a party" pursuant to Article 31 of APIC. This language, in particular, the nexus between "contract" and "other disputes of a private law character", has been held as recognising that "the provision is tailored towards disputes over rights and duties within the

[376] Agreement on the Privileges and Immunities of the International Criminal Court, ICC-ASP/1/3, Article 6.
[377] Choudhury, F., "The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability", *Georgetown Law Journal*, Vol. 104:725, p. 728.
[378] Convention on the Privileges and Immunities of the United Nations, Article VII, Section 29: "The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party."
[379] Choudhury, F., "The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability", *Georgetown Law Journal*, Vol. 104:725, p. 730.
[380] *See*, for example, U.N. Doc. A/CN.4/L.118 and Add. 1–2, The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities: Study Prepared by the Secretariat, [1967], 2 *Yearbook of the International Law Commission* 154, at p. 220: "It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the [CPIUN]."; Selected Legal Opinions of the Secretariats of the United Nations and Related Intergovernmental Organizations, 2001 U.N. Jurid. Y.B. 381, at p. 382: "[T]he United Nations is required to make provisions for appropriate modes of settlement [...]".
[381] Selected Legal Opinions of the Secretariats of the United Nations and Related Intergovernmental Organizations, 2001 U.N. Jurid. Y.B. 381, at p. 382: "[W]hile specific procedures have been devised for particular types of claims, the central features of the modes of settlement used by the United Nations pursuant to article VIII, section 29, of the Convention are the amicable resolution of such claims, where possible, such as through negotiation or, in certain cases, insurance, and, if amicable settlement cannot be achieved, the submission of claims to formal dispute resolution procedures, usually arbitration.".

private law domain which traditionally embraces under domestic law subjects such as property".[382] The UN has previously treated compensation claims for the destruction of private property by ONUC peacekeepers as tortious claims of individual claimants,[383] allocating a lump sum payment from which compensation was awarded.[384]

165. In these circumstances, should the ICC fail to provide Mr. Bemba with a financial settlement for the violation of his rights, Mr. Bemba requests that it makes "provision for appropriate modes of settlement", namely through the submission of this dispute for binding arbitration pursuant to UNCITRAL Arbitration Rules, and with the arbitration agreement containing any necessary waiver of immunity on the part of the ICC in order to ensure the enforceability of any award. Again, should the ICC contest liability on the basis of responsibility on the part of Belgium, Portugal, the DRC or the UN, Mr. Bemba submits that these states and the UN should also be included as parties to the arbitration.

PART III – CONCLUSION, RELIEF AND DIRECTIONS

166. This case is only the third claim to have been made under Article 85, only the second to have been made following the acquittal of an accused, and the first to have been based substantially on losses consequent to the claimant's arrest and detention and/or caused by the misfeasance of the court in managing an accused's frozen assets. It is also, with respect, the first case in which any attempt has been made to examine the sort of award of compensation which is appropriate in a case of such prolonged detention.

167. However, that is not the only area of potential novelty about the claims herein. There is at least the possibility that issues of contributory negligence may arise in relation to any alleged misfeasance by the states concerned. That, in turn, raises jurisdictional issues in relation to the Court's power to make binding financial orders, or even findings against States Parties who cooperate with it. Indeed, it might be thought that fundamental issues of natural justice arise in these circumstances; there is potentially multi-party litigation in which the judging body has a financial interest in the outcome.

168. Liability on the part of the ICC for loss consequential to a miscarriage of justice

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[382] Schmalenbach, K., "Dispute Settlement (Article VIII Sections 29-30 General Convention)", *in* Reinisch, A., (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary*, OSAIL, 2016, p. 552.
[383] Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals, New York, 20 February 1965, No. 7780.
[384] Wellens, K., *Remedies Against International Organisations,* Cambridge University Press, 2002, at p. 162.

undoubtedly arises under Article 85 from the plain wording of Rule 175. The ICC, moreover, has a duty to provide a remedy and a dispute resolution mechanism in relation to private law claims arising from its allegedly tortious behavior. Where those forms of liability are co-extensive or overlapping, and the possibility of allegations of contributory negligence exists, there ought to be no question of some form of self-declared partial immunity arising, or of the claimant being forced to engage in "musical chair" litigation in concurrent claims in different jurisdictions.

169. Accordingly, the claimant herein invites the Chamber to order and direct as follows:

(1)That pursuant to Article 85 the claimant be awarded:

(a) A sum of not less than €12 million[385] for the period of his detention;

(b) A further sum of €10 million by way of aggravated damages;

(c) €4.2 million for his legal costs; and

(d) A sum not less than €42.4 million for damage to his property;

(2) In the alternative,

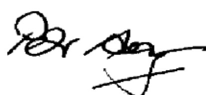
(a) That the claimant be awarded a sum not less than €42.4 million for damage to his property under the ICC's inherent power to make an award of financial compensation;

(b) In the alternative, Mr. Bemba's claim for financial loss for the destruction of and damage to his property be submitted to binding arbitration under UNCITRAL Rules;

(3) That the claimant be permitted to file updated financial reports in support of any increase in losses arising from the passage of time and/or further discovery; and

(4) That upon the close of the written pleadings herein, the Chamber make appropriate orders for oral hearings, including the hearing of evidence and oral submissions.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands, 8 March 2019

[385] *See* discussion at paras. 107-112 above, especially para. 108 where at current values for Mr. Bemba €100,000 was equated to each month of imprisonment.