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**International
Criminal
Court**

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Art. 85 CHAMBER

Before: Judge Miatta Maria Samba, Presiding Judge
Judge Keebong Paek
Judge Beti Hohler

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

***IN THE CASE OF THE PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM
GAWAKA***

Public Document

**Request for Leave to Appeal the 'Decision on Mr Mokom's request for
compensation'**

Source: Defence for Mr Maxime Mokom

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D34

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I. INTRODUCTION

1. Pursuant to article 82(1)(d) of the Statute, Mr. Mokom (“the Claimant”) hereby seeks the leave of the Article 85 Chamber (“the Chamber”) to appeal its “Decision on Mr. Mokom’s request for compensation” of 31 January 2025 (“Impugned Decision”).¹

2. The present request for leave to appeal meets the requirements of article 82(1)(d) of the Statute. The Impugned Decision gives rise to four appealable issues. Each of the issues significantly affects the outcome of the proceedings and their immediate resolution may materially advance the proceedings.

3. Should the Chamber consider that the formulation of any of these issues is deficient or defective, it is invited to make any modifications thereto as are deemed necessary and appropriate, as permitted.²

II. PROCEDURAL BACKGROUND

4. On 14 March 2022, the Claimant was surrendered to the Court and arrived at the Detention Centre.³

5. On 7 November 2022, Pre-Trial Chamber II (“the Pre-Trial Chamber”) ordered the Claimant to provide submissions on interim release (“Order of 7 November 2022”).⁴

6. On 14 November 2022, the Claimant submitted an application for interim release pursuant to the Order of 7 November 2022.⁵

7. On 8 March 2023, the Pre-Trial Chamber rejected the Claimant’s request for interim release due to the absence of States willing to accept the Claimant and enforce conditions for the purpose of the interim release.⁶

¹ Public redacted version of Decision on Mr Mokom’s request for compensation, 31 October 2025, [ICC-01/14-01/22-354-Red](#) (“Impugned Decision”).

² Trial Chamber V, *Prosecutor v. Yekatom & Ngaïssona*, Decision on the Yekatom Defence Request for Leave to Appeal the Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial, [ICC-01/14-01/18-730](#), 13 November 2020, paras 8, 14–15; Trial Chamber V(a), *Prosecutor v. Ruto & Sang*, Decision on the Defence’s Applications for Leave to Appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, [ICC-01/09-01/11-1953-Red-Corr](#), 10 September 2015, para. 20.

³ Transcript of Hearing, 22 March 2022, [ICC-01/14-01/22-T-001-Red-ENG](#), p. 1.

⁴ Order to Mr Mokom to provide submissions on interim release, 7 November 2022, [ICC-01/14-01/22-105](#) (“Order of 7 November 2022”).

⁵ Public Redacted Version of “Mr. Mokom’s Application for Interim Release pursuant to Order ICC-01/14-01/22-105”, 14 November 2022, [ICC-01/14-01/22-110-Red](#) (“Application for Interim Release”).

⁶ Public redacted version of ‘Decision on interim release’, 8 March 2023, [ICC-01/14-01/22-173-Red](#) (“Decision on Interim Release”) paras. 59–60.

8. On 16 October 2023, the Office of the Prosecutor (“Prosecution”) withdrew all charges against the Claimant.⁷

9. On 17 October 2023, the Pre-Trial Chamber terminated the proceedings against the Claimant with immediate effect and ordered his release from detention center.⁸ The Pre-Trial Chamber also instructed the Registry to “ensure that the conditions of Mr. Mokom’s temporary stay pending his transfer do not in any way amount to a deprivation of liberty and that no restrictions are placed on his freedom of communication or his freedom of movement within the territory of the Host State.”⁹

10. On 21 November 2023, the Pre-Trial Chamber found the Claimant had been subjected to a regime that appears to amount to a form of house arrest following his release from the detention center and reiterated that the Claimant’s rights as a free person are not restricted in any way under the Court’s legal framework (“Order of 21 November 2023”).¹⁰

11. On 17 April 2024, the Claimant submitted a request for compensation pursuant to article 85 of the Statute (“Request for Compensation”).¹¹

12. On 23 April 2024, the Presidency constituted the present Chamber and referred the Request for Compensation to it.¹²

13. On 11 July 2024, the Chamber scheduled a hearing to take place on 9 September 2024 in relation to the Request for Compensation.¹³

14. On 9 September 2024, a hearing was held during which the Claimant’s Counsel, the Prosecution, and the Registry made submissions to the Chamber.¹⁴

⁷ Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka, 16 October 2023, [ICC-01/14-01/22-275](#), (“Notice of Withdrawal of the Charges”).

⁸ Order in relation to the Prosecution’s ‘Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka’, 17 October 2023, [ICC-01/14-01/22-276](#) (“Order of 17 October 2023”), para. 9.

⁹ Order of 17 October 2023, [ICC-01/14-01/22-276](#), para. 10.

¹⁰ Order regarding arrangements pending Mr Mokom’s transfer”, 21 November 2023 (with the Public Redacted Version notified on 11 April 2024), [ICC-01/14-01/22-294-Red](#), (“Order of 21 November 2023”), para. 3.

¹¹ Request for Compensation under Article 85 of the Rome Statute, ICC-01/14-01/22-329-Conf (with confidential annexes A to G; public redacted version notified on 23 April 2024: [ICC-01/14-01/22-329-Red](#)) (“Request for Compensation”).

¹² Decision constituting an Article 85 Chamber and referring the ‘Request for Compensation under Article 85 of the Rome Statute’ dated 17 April 2024 (ICC-01/14-01/22-329-Conf), 23 April 2024, [ICC-01/14-01/22-330](#).

¹³ Order scheduling a hearing regarding Mr Mokom’s claim for compensation, 11 July 2024, [ICC-01/14-01/22-349](#).

¹⁴ Transcript of Hearing, 9 September 2024, [ICC-01/14-01/22-T-009-Red2- ENG](#).

15. On 31 January 2025, the Chamber issued the Decision on Mr Mokom's request for compensation.¹⁵

III. THE DECISION IS APPEALABLE PURSUANT TO ARTICLE 82(1)(d)

16. A decision is subject to appeal, pursuant to article 82(1)(d) of the Statute, where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

17. This provision solely refers to a "decision" without characterising the nature of the decision. Nevertheless, the Appeals Chamber has found that this provision provides an avenue of appeal for decisions of an "interlocutory" nature that have the potential to "affect the fair and expeditious conduct of the proceedings or the outcome of the trial".¹⁶

18. It is well-established that, pursuant to Rule 173(2) of the Rules of Procedure and Evidence ("Rules"), a decision on whether or not to grant compensation in response to a claim under article 85 of the Statute must be preceded by an affirmative decision that at least one of the grounds for compensation under one of the three paragraphs of the provision has been satisfied.¹⁷ Accordingly, Chambers have followed a 'two fold' approach whereby they first determine whether a situation warranting compensation under article 85(1), (2), or (3) has occurred, then, if this is found to have been the case, as a second step, determine whether they will exercise their jurisdiction to award compensation to the claimant.¹⁸ As such, the question of the existence of a 'grave and manifest miscarriage of justice' under article 85(3) forms part of the first limb of the two fold approach and is thus an interlocutory aspect of a decision on a

¹⁵ Impugned Decision.

¹⁶ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 24 July 2006, [ICC-01/04-168](#) ("DRC OA3 Judgment"), paras. 13, 36; Appeals Chamber, *Prosecutor v. Bemba et al.*, Judgment on Mr Mangenda's appeal against the "Decision on request for compensation for unlawful detention", 8 August 2016, [ICC-01/05-01/13-1964](#) ("*Bemba et al.* Compensation Appeal Judgment"), para. 15.

¹⁷ See Trial Chamber II, *Prosecutor v. Ngudjolo Chui*, Decision on the "*Requête en indemnisation en application des dispositions de l'article 85(1) et (3) du Statut de Rome*", 16 December 2015, [ICC-01/04-02/12-301-tENG](#) ("*Ngudjolo Chui* Compensation Decision"), para. 13; Trial Chamber VI, *Prosecutor v. Bemba et al.*, Decision on Request for Compensation for Unlawful Detention, 26 February 2016, [ICC-01/05-01/13-1663](#) ("*Bemba et al.* Compensation Decision"), para. 18; Article 85 Chamber, *Prosecutor v. Gbagbo and Blé Goudé*, Decision on Mr Blé Goudé's Request for Compensation, 10 February 2022, [ICC-02/11-01/15-1427](#) ("*Gbagbo and Blé Goudé* Compensation Decision"), para. 20.

¹⁸ See *Bemba et al.* Compensation Appeal Judgment, [ICC-01/05-01/13-1964](#), para. 17 Article 85, *Prosecutor v. Gbagbo and Blé Goudé*, Decision on Mr Blé Goudé's Request for Compensation, 10 February 2022, [ICC-02/11-01/15-1427](#) ("*Gbagbo and Blé Goudé* Compensation Decision"), para. 23; Pre-Trial Chamber II, *Prosecutor v. Bemba*, Decision on Mr Bemba's Claim for Compensation and Damages, 7 June 2020, [ICC-01/05-01/08-3694](#), para. 22. See also *Ngudjolo Chui* Compensation Decision, [ICC-01/04-02/12-301-tENG](#), para. 16; *Bemba et al.* Compensation Decision, ICC-01/05-01/13-1663, para. 20.

request for compensation. In addition, despite the absence of an express right of appeal in article 85(1) of the Statute, the Appeals Chamber found that an appeal is admissible in the context of compensation proceedings related to the unlawfulness of detention and held that parties are not deprived of the possibility of appellate intervention throughout the conduct of compensation proceedings under article 85(1) even if such proceedings may be seen as “stand alone” or ancillary proceedings.¹⁹

19. The Appeals Chamber thereby considered that a decision on the unlawfulness of a detention may be considered to be an interlocutory decision within the meaning of article 82(1)(d) of the Statute even if such a decision has the effect of denying the right to receive compensation and thereby brings the compensation proceedings to an end.²⁰

20. Moreover, the Appeals Chamber has found that first instance Chambers should broadly interpret the two prongs of article 82(1)(d) if they consider this necessary due to human rights considerations under to article 21(3) of the Statute and stated that

*[...] article 21 (3) of the Statute is applicable to **all Chambers**, not only the Appeals Chamber. Accordingly, should a first-instance Chamber find itself in a situation similar to that encountered by the Pre-Trial Chamber, the Appeals Chamber considers that the matter falls within the ambit of article 82 (1) (d) of the Statute. Therefore, it is for that Chamber to exercise its discretion to broadly interpret the two prongs of article 82 (1) (d) of the Statute if it considers it necessary due to human rights considerations under to article 21 (3) of the Statute.*²¹

21. The Appeals Chamber has also defined the term “issue” within the meaning of article 82(1)(d) as “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination” and as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”²² “Essential” in this context is understood as meaning essential to some judicial disposition, and “not merely a question over which there is disagreement or conflicting

¹⁹ *Bemba et al.* Compensation Appeal Judgment, [ICC-01/05-01/13-1964](#), para. 16.

²⁰ *Bemba et al.* Compensation Appeal Judgment, [ICC-01/05-01/13-1964](#), para. 17.

²¹ Appeals Chamber, *Prosecutor v. Bemba et al.*, Decision on the “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015”, 23 December 2015, [ICC-01/05-01/13-1533](#), para. 16 (emphasis added).

²² *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, [ICC-01/04-168](#), 13 July 2006 (“DRC Judgment on Application for Extraordinary Review”), para. 9.

opinion.”²³ A right of appeal will arise only if, in the Chamber’s opinion, the impugned decision “must receive the immediate attention of the Appeals Chamber.”²⁴

22. An appealable issue may be “legal or factual or a mixed one.”²⁵ Issues that have previously been recognised as appealable include alleged errors of law and fact in relation to the Chamber’s interpretation of the Statute²⁶ and whether the Chamber erred in the exercise of its discretion.²⁷

IV. LEAVE TO APPEAL IS JUSTIFIED PURSUANT TO ARTICLE 82(1)(d)

23. The present request for leave to appeal meets the requirements of article 82(1)(d) of the Statute. The Decision involves at least four appealable issues and all of the issues are essential for the determination of the Impugned Decision correctness, namely:

- (i) Whether the Chamber erred in law and fact in finding that the Prosecution’s failure to implement the Pre-Trial Chamber’s disclosure orders did not constitute a grave and manifest miscarriage of justice;
- (ii) Whether the Chamber erred in law and fact by not declaring unlawful the time spent by the Claimant in the custody of the Court between the Pre-Trial Chamber’s 8 March 2023 decision on his application for interim release and his release on 17 October 2023 due to the failure of the cooperation system put in place under the Court’s legal framework to identify a State willing to enforce conditions of interim release;
- (iii) Whether the Chamber erred in law by failing to consider the findings of the Order of 21 November 2023 in determining whether the Claimant was unlawfully detained in the hotel, thereby disregarding a previous Order issued by the Pre-Trial Chamber without providing specific legal reasons for departing from the House Arrest Findings;

²³ DRC Judgment on Application for Extraordinary Review, [ICC-01/04-168](#), para. 9; *Prosecutor v. Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, [ICC-01/04-01/06-1191](#), 26 February 2008, para. 8 (“*Lubanga* Decision on Leave to Appeal”).

²⁴ DRC Judgment on Application for Extraordinary Review, [ICC-01/04-168](#), para. 20.

²⁵ DRC Judgment on Application for Extraordinary Review, [ICC-01/04-168](#), para. 9.

²⁶ *E.g.*, *Prosecutor v. Abd-Al-Rahman*, Decision on Defence’s request for leave to appeal the decision on the admissibility of a video, [ICC-02/05-01/20-894](#), 8 March 2023, paras 16-17.

²⁷ *E.g.*, *Prosecutor v. Kenyatta*, Decision on the Prosecution’s request for leave to appeal, [ICC-01/09-02/11-1004](#), 9 March 2015, para. 25.

- (iv) Whether the Chamber erred in law in finding that the Claimant could choose to enter the Host State's territory despite the Court's obligations enshrined in Rule 185 of the Rules regarding the transfer of persons released from the custody of the Court;

24. The issues emanate from the Impugned Decision and none of the issues constitutes a mere disagreement or conflict of views with the Chamber.²⁸ The issues significantly affect, in a material way, the outcome of the proceedings and an immediate resolution by the Appeals Chamber will materially advance the proceedings.²⁹

25. Moreover, the Appeals Chamber found that the meaning conveyed by "advance" in subparagraph (d) of article 82(1) is to ensure that the proceedings are following the right course in order to remove doubts about the correctness of a decision, thereby providing "a safety net for the integrity of the proceedings."³⁰ Subsequent chambers have interpreted this function of article 82(1)(d) appeals as establishing the need to ensure "legal certainty" in proceedings.³¹

26. As such, leave to appeal has been granted where an impugned decision constituted "the final disposition" of matters related to the lawfulness of an accused's detention and bore upon his fundamental rights.³² In the same context, leave to appeal was granted to provide "a safety net for the integrity of the proceedings" in light of the fact that there would otherwise be no opportunity to "advance the proceedings" at hand outside granting leave to appeal under article 82(1)(d).³³ Denial of recourse to appeal at this stage will irrevocably deprive the Claimant of any right to achieve legal certainty with regard to the myriad of issues implicated in the present proceedings.

²⁸ DRC OA3 Judgment, [ICC-01/04-168](#), para. 9; Pre-Trial Chamber III, *Prosecutor v. Bemba*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, [ICC-01/05-01/08](#), 25 August 2008, para. 11.

²⁹ DRC OA3 Judgment, [ICC-01/04-168](#), para. 10; Article 82 (1)(d) of the Statute.

³⁰ DRC OA3 Judgment, [ICC-01/04-168](#), para. 15. See also Trial Chamber IV, *Prosecutor v. Banda and Jerbo*, Decision on the "Defence Application for Leave to Appeal the 'Decision on the defence request for a temporary stay of proceedings'", 13 December 2012, [ICC-02/05-03/09-428](#), para. 18.

³¹ Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, [ICC-01/04-01/06-1191](#), para. 33; Pre-Trial Chamber I, *Prosecutor v. Al Hassan*, Decision on the Defence Request for Leave to Appeal the Order Setting a Deadline for the Filing of the Applications, 10 May 2019, [ICC-01/12-01/18-342-Red-tENG](#), para. 27; Pre-Trial Chamber A, *Prosecutor v. Bett*, Decision on the 'Request for leave to appeal the Decision on the Applicability of Provisional Rule 165', 23 December 2020, [ICC-01/09-01/15-66](#), para. 41.

³² Trial Chamber VI, *Prosecutor v. Bemba et al.*, Decision on Defence request seeking leave to appeal the 'Decision on request for compensation for unlawful detention, 13 May 2016, [ICC-01/05-01/13-1893](#) ("Bemba et al. Decision on Leave to Appeal Compensation Decision"), para. 21. See also *Bemba et al.* Compensation Appeal Judgment, [ICC-01/05-01/13-1964](#), para. 17.

³³ *Bemba et al.* Decision on Leave to Appeal Compensation Decision, [ICC-01/05-01/13-1893](#), para. 22.

27. The Impugned Decision directly addresses the Claimant's most fundamental human rights and each of the proposed issues are determinative of the Request for Compensation submitted before the Chamber.

(i) *First Issue*

28. The First Issue addresses the Chamber's requirement that the Claimant demonstrates that the evidence subject to Prosecution disclosure failures would have proved his innocence, from the charges now withdrawn by the Prosecution,³⁴ in proceedings which have been terminated.³⁵ The First Issue therefore addresses the application of the burden of proof, which is inherently linked to the fairness of a judicial proceedings. For this reason, appealable issues alleging the application of an erroneous burden of proof have been recognised as "affecting the fairness of the proceedings", warranting certification to appeal under Article 81(2)(d) of the Statute.³⁶

29. The Chamber's approach thus not only constituted an impermissible inversion of the burden of proof applicable in criminal proceedings, but was also procedurally improper insofar as it required the Claimant to effectively defend himself against charges he no longer stands suspected of. Accordingly, the First Issue constitutes an error of both law and fact.

30. The Prosecutor is supposed to know his case *before* he goes to trial, not after he argues his case. That the Prosecutor, in a very short period of time, was able to find not one or two, but hundreds of pieces of exculpatory material touching on every aspect of the case against the Claimant constitutes a grave and manifest miscarriage of justice. This is not so much an issue of disclosure as an issue touching on the fundamental duties of the Prosecutor to this Court, and the fact that breaches as serious as those documented in this case necessarily amount to a grave and manifest miscarriage of justice.

31. As such, the issue is not a mere disagreement with the Chamber and constitutes an identifiable topic arising from the Impugned Decision, which is essential for the determination of the scope of evidence that the Claimant must offer in support of the allegations of grave and

³⁴ Notice of Withdrawal of the Charges, [ICC-01/14-01/22-275](#).

³⁵ Order of 17 October 2023, [ICC-01/14-01/22-276](#), para. 9.

³⁶ See, e.g., *Lubanga* Decision on Leave to Appeal, [ICC-01/04-01/06-1191](#), para. 42: "Although the Impugned Decision does not have the effect *per se* of shifting the burden of proof, it could lead, in particular circumstances and in some degree, to such an effect, and this could significantly affect the fairness of the proceedings pursuant to Article 67(1)(i) of the Statute"; *Prosecutor v. Mbarushimana*, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the confirmation of charges'", 1 March 2012, [ICC-01/04-01/10-487](#), para. 11 "Applying an erroneous burden of proof can create a 'direct and detrimental impact' on correctly assessing the evidence and can affect the degree to which the Defence can effectively challenge the evidence presented, thus affecting the fairness of the proceedings" (footnote omitted).

manifest miscarriage of justice. It is neither abstract nor hypothetical and requires a resolution by the Appeals Chamber.

(ii) *Second Issue*

32. The Second Issue is appealable. The Chamber erred in law and fact in finding that the Claimant has “failed to establish that the lack of willingness of various States to receive him on their territory had the effect of violating his rights under the Statute or under international human rights law and that this gave rise to unlawful detention.”³⁷ This finding first ignores that Article 21(3) of the Statute requires that all applicable law before the Court be “interpreted and more importantly applied in accordance with internationally recognized human rights”.³⁸ As such, in effectively acquiescing to the Court’s framework for interim release being rendering inoperable by the absence of a State willing to receive the Claimant, the Chamber erred in law by failing to consider that the application of the Court’s legal framework for cooperation in the context of interim release in the present case was incompatible with the Claimant’s internationally recognised human rights.

33. Moreover, the Impugned Decision relied upon a truncated use of a Report made by the Court to the Assembly of States Parties (“ASP”) regarding the cooperation with the Court³⁹ which stated that the consequences of the absence of States Parties willing to accept released persons are so serious that:

*“individuals who cannot be successfully relocated **may remain de facto detained, despite having been released**”. [...] In addition to the egregious impact such a situation would have on the released person, **it prevents the Court’s system from functioning and runs counter to the Court’s objective of applying the highest international standards.** Moreover, in the case that the Pre-Trial or Trial Chamber grants a person with interim release, in order for it to be effective, the Court must rely on States Parties and their willingness to accept the person on their territory. **If States Parties are unwilling to do so, this could hamper the possibility of interim release or render it impossible.**”⁴⁰*

³⁷ Impugned Decision, para. 66.

³⁸ Appeals Chamber, *Prosecutor v. Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, [ICC-01/04-01/06-772](#), para. 37.

³⁹ Impugned Decision, para. 63, *referring to* referring to Assembly of States Parties, *Report of the Court on Cooperation*, 26 October 2023, [ICC-ASP/22/24](#) (“ASP 2023 Report on Cooperation”), para. 46.

⁴⁰ ASP 2023 Report on Cooperation, para. 47 (emphases added).

34. The Chamber's finding that the lack of willingness of States to receive the Claimant on their territory did not have the effect of violating his rights under the Statute or under international human rights law contradicts the official position of the Court in relation to the States Parties' cooperation with the Court regarding the release of persons from ICC custody and thereby constitutes an error of fact.

35. The resolution of the issue by the Appeals Chambers is therefore essential for the determination of the matters arising in the judicial cause under examination. The issue is an identifiable topic which arises from the Impugned Decision and does not merely represent an abstract question or a hypothetical concern.

(iii) *Third Issue*

36. The Third Issue is appealable. Following the issuance of the Impugned Decision, the record of the *Mokom* case contains two decisions which are, in essence, opposite regarding the basic tenets of the Claimant's fundamental rights: the Impugned Decision denies that the Claimant was subject to an illegal detention for 43 days in a hotel ("Hotel Stay Detention") whilst the Pre-Trial Chamber's Order of 21 November 2023 found that, during the same period, the Claimant was subject to a regime that appeared to amount to a form of house arrest ("House Arrest Findings").⁴¹ As such, the Chamber erred in law by vesting itself with the power to effectively depart from the Pre-Trial Chamber's findings made in the Order of 21 November 2023 without providing justifications for such departure. Even if the Chamber considered the Pre-Trial Chamber's House Arrest Findings as only *prima facie* determinations on the issue, it offered no basis to depart from them and no further considerations that could have weighed against the House Arrest Findings. The Chamber's departure from the House Arrest Findings therefore constitutes an identifiable topic addressing a question of law that is essential for the determination of a matter relevant to the dismissal of the Request for Compensation. It is not a hypothetical or abstract question but arises directly from the Impugned Decision.

(iv) *Fourth Issue*

37. The fourth appealable Issue concerns the Chamber's finding that the Claimant had the possibility to enter the Host State's territory at his own will in the context of the Rule 185 proceedings.⁴² Pursuant to Rule 185 of the Rules, the Court "shall" make arrangements for the

⁴¹ Impugned Decision, paras. 122–38; *contra* Order of 21 November 2023, [ICC-01/14-01/22-294-Red](#).

⁴² Impugned Decision, para. 126–127 ("Mr Mokom could have made an application for international protection with the Host State authorities. The Chamber observes that, in order to facilitate Mr Mokom's temporary stay in

transfer of the person released from the custody of the Court. The position of the Chamber according to which the Claimant had the possibility to enter the Host State's territory contradicts the obligation of the Court enshrined in Rule 185. As the Court had an obligation to make arrangements for the Claimant's transfer, the Chamber erred in law by stating that the Claimant had the possibility to enter the Host State's territory at his own will without legal permit. The Host State clearly articulated to the Registry its position that "[w]ith reference to Article 48 of the Headquarters Agreement and Rule 185 of the Rules of Procedure and Evidence [...] it is under no legal obligation to allow Mr Mokom's entry and stay in the Netherlands."⁴³ In the absence of an agreement from the Host State's authorities that the Claimant was allowed to move freely on their territory, the Claimant had to remain in the hotel pending the conclusion of the Rule 185 proceedings. As such, the proper scope and application of the Court's legal framework, relied upon by the Chamber to dismiss the Claim is an identifiable topic that arises directly from Impugned Decision, and a resolution of which is essential to the judicial disposition in question. It is not an abstract question or an hypothetical concern, and requires a decision for its resolution.

V. THE DECISION SIGNIFICANTLY AFFECTS THE OUTCOME OF THE PROCEEDINGS AND GRANTING LEAVE TO APPEAL CONSTITUTE THE ONLY APPELLATE REVIEW

38. The Impugned Decision affects the outcome of the proceedings through denying the Claimant's enforceable right for compensation under article 85(1) and thereby bringing the compensation proceedings to an end.⁴⁴ In addition, in light of the two-step approach to claims arising under article 85(3), the Impugned Decision, which rejects all aspects of the Request for Compensation on the first limb of the test, necessarily affects the outcome of the proceedings through rendering void the possibility for the Claimant to receive compensation under the second limb of article 85(3).

39. The interests in question are of vital importance to the Claimant and directly addresses his most fundamental of human rights. The Impugned Decision, rejecting all aspects of the Claimant's Request for Compensation on the basis of the first limb of the applicable test, thus

the Host State while the Court's consultations with States pursuant to rule 185 of the Rules were ongoing, practical arrangements were put in place").

⁴³ Public redacted version of "Updated Registry's Submissions on the Defence Request for Compensation under Article 85 of the Rome Statute (ICC-01/14-01/22- 329-Conf)", 13 June 2024, ICC-01/14-01/22-343-Conf-Exp, 12 July 2024, [ICC-01/14-01/22-343-Red](#) ("Registry Submissions"), para. 25, *quoting* Annex IV to "Registry's Report pursuant to Pre-Trial Chamber II's Instruction of 25 October 2023", 26 October 2023, ICC-01/14-01/22-280-Conf-Exp-AnxIV.

⁴⁴ See *Bemba et al.* Compensation Appeal Judgment, [ICC-01/05-01/13-1964](#), para. 17.

significantly affects the outcome of proceedings as it prevent them moving to second limb, where the Chamber would determine whether or not to award compensation to the Claimant. Accordingly, as no other avenue exists to seize the Appeals Chamber of the issues discussed within this request, the granting of leave to appeal under article 82(1)(d) constitutes the only method of achieving a final resolution of these issues.

40. The Impugned Decision is of precisely the character which warrants a broader interpretation of article 82(1)(d) to ensure compliance with the requirements of article 21(3) of the Statute. The Claimant spent 19 months in detention before the entirety of the charges were withdrawn by the Prosecution. The Impugned Decision also constitutes a final determination of the question of whether the Claimant's fundamental human rights have been violated following the denial of his request for interim release due to the absence of States' cooperation and in relation to the Hotel Stay Detention.

41. The Impugned Decision will not be revisited in the context of other proceedings, with the case against the Claimant having ended following the termination of the proceedings against the Claimant on 17 October 2023⁴⁵ and the conclusion of the Pre-Trial Chamber's residual jurisdiction over the Claimant on 8 February 2024,⁴⁶ and is therefore fully dispositive of the litigation. Permitting an appeal would therefore materially advance the proceedings, through moving them forward and providing "a safety net for the integrity of the [Compensation] proceedings",⁴⁷ and would constitute the only means by which this could occur.

VI. CONCLUSION

42. The Claimant submits that leave to appeal the Impugned Decision should be granted pursuant to the satisfaction of the conditions of article 82(1)(d) and the importance of the interests at stake in respect of the four issues identified above; or, in the alternative, in respect of any of the four issues as the Chamber may deem appropriate; or, in the further alternative, in respect of any issues that the Chamber may itself find appropriate to formulate.

Respectfully submitted,

⁴⁵ Order of 17 October 2023, para. 9.

⁴⁶ Public Redacted Version of 'Decision pursuant to Rule 185 of the Rules of Procedure and Evidence', 18 January 2024, [ICC-01/14-01/22-309-Red](#), p. 10.

⁴⁷ DRC OA3 Judgment, [ICC-01/04-168](#), para. 15.



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Dated this 7 February 2025

At Montreal, Canada