



Original: **English**

No.: **ICC-01/14-01/22**
Date: **13 February 2025**

ARTICLE 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

Prosecution response to Maxime Mokom's request for leave to appeal the decision on his request for compensation

Source: Office of the Prosecutor

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INTRODUCTION

1. Maxime Mokom seeks leave to appeal the Article 85 Chamber's decision on his request for compensation,¹ identifying four purportedly appealable issues.² Consistent with its position during the compensation litigation, the Prosecution addresses the Request only insofar as it relates to issues purportedly arising from the Chamber's decision concerning Mr Mokom's allegations against the Prosecution's conduct (i.e. the First Issue),³ and not the claims he advances against other organs of the Court (i.e. the Second, Third and Fourth Issues).⁴
2. First, the Prosecution requests the Chamber to dismiss the Request *in limine* insofar as it concerns the First Issue. The proposed issue is inadmissible since compensation decisions under article 85(3) are final decisions in stand-alone compensation proceedings that are not appealable under article 82(1)(d) of the Rome Statute.
3. Second, even if assessed on its merits, the First Issue does not meet the criteria for certification under article 82(1)(d) and may also be rejected on that basis.

SUBMISSIONS

A. The First Issue is inadmissible since article 85(3) decisions are not subject to appeal

4. The First Issue Mr Mokom proposes for appeal is "[w]hether 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".⁵ This issue relates to the Chamber's finding that Mr Mokom's allegations regarding the Prosecution's compliance with the Pre-Trial Chamber's disclosure orders were not sufficient to establish a grave and manifest miscarriage of justice under article 85(3) of the Statute.⁶ The Chamber rejected this aspect of Mr Mokom's claim under article 85(3).⁷
5. The Request insofar as it concerns the First Issue should be dismissed *in limine* since decisions under article 85(3) are not appealable under the Statute. Articles 81 and 82 exhaustively set out the rights of appeal in the Court.⁸ These provisions do not explicitly provide

¹ ICC-01/14-01/22-354-Red ("[Decision](#)").

² ICC-01/14-01/22-355 ("[Request](#)"), paras. 23(i)-(iv), 28-37.

³ [Request](#), paras. 23(i), 28-31.

⁴ [Request](#), paras. 23(ii)-(iv), 32-37.

⁵ [Request](#), para. 23(i).

⁶ [Decision](#), para. 56. *See also* paras. 38-55.

⁷ [Decision](#), para. 56.

⁸ ICC-01/05-01/13-1533 ("[Bemba et al. Asset Seizure AD](#)"), para. 14, citing ICC-01/04-168 ("[DRC Extraordinary Review Judgment](#)"), paras. 35 ("The decisions that are subject to appeal are enumerated in articles

for appeals as of right for article 85(3) compensation decisions,⁹ nor do they provide the Appeals Chamber with the inherent power to review decisions of first-instance chambers.¹⁰ Nor is an article 85(3) decision capable of meeting the criteria for interlocutory appeals under article 82(1)(d), which chambers have held must be construed strictly, as an exceptional remedy,¹¹ for the following reasons.

6. First, article 82(1)(d) applies to decisions that are *interlocutory* in nature.¹² These are decisions intervening between the beginning and end of criminal proceedings that adjudicate a specific issue without constituting a final decision.¹³ Whether a decision is appealable under article 82(1)(d) will depend on “the nature and features of the issue to be litigated, and its potential impact on the course of the proceedings”.¹⁴ Article 85(3) decisions, by contrast, are final. They are issued in compensation proceedings, which are stand-alone and self-contained proceedings, set apart from the criminal proceedings.¹⁵ They decide article 85(3) requests for compensation, which can only be made once a person has been released from detention “following a final decision of acquittal or a termination of the proceedings”. Their issuance concludes the compensation proceedings. As such, article 85(3) decisions cannot meet the requirements of article 82(1)(d) when interpreted in good faith, and in light of its ordinary meaning, purpose and context.¹⁶

7. In particular, contrary to article 82(1)(d)’s requirements, article 85(3) decisions cannot affect “the outcome of the trial” or “the fair and expeditious conduct of the proceedings” since any trial or proceeding will have concluded prior to the compensation claim being made.

81 and 82 of the Statute. There is nothing in Part 8 to suggest that a right to appeal arises except as provided thereunder. Another corollary is that the legislator specified distinctly decisions liable to or subject to appeal”, 39 (stating that “the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers”); ICC-01/04-01/06-2799 (“[Lubanga Decision on Netherlands’ Request for Directions](#)”), para. 7; ICC-01/04-01/07-3424 (“[Katanga Decision on Witness Interim Release](#)”), para. 28.

⁹ ICC-01/05-01/13-1893 (“[Bemba et al. Compensation ALA Decision](#)”), para. 13; V. Nerlich, ‘Article 85’ in K. Ambos (ed.), *The Rome Statute of the International Criminal Court: A Commentary* (Beck/Nomos/Hart, 2022), p. 2431, mn. 5080.

¹⁰ [DRC Extraordinary Review Judgment](#), paras. 35, 38-39.

¹¹ ICC-02/05-01/20-525 (“[Abd-Al-Rahman Oral Decisions AD](#)”), para. 11; ICC-01/04-01/10-443 (“[Mbarushimana Disclosure AD](#)”), p. 4.

¹² ICC-01/05-01/08-3697 (“[Bemba Compensation ALA Decision](#)”), para. 14; ICC-01/05-01/13-1964 (“[Bemba et al. Compensation AD](#)”), para. 15; ICC-01/05-01/13-1893-Anx (“[Bemba et al. Judge Chang-Ho Chung Sep. Op.](#)”), para. 4; [DRC Extraordinary Review Judgment](#), para. 36.

¹³ [Bemba Compensation ALA Decision](#), para. 12.

¹⁴ [Bemba Compensation ALA Decision](#), para. 10.

¹⁵ ICC-02/11-01/15-1427 (“[Blé Goudé Compensation Decision](#)”), para. 18. See also [Bemba et al. Compensation AD](#), para. 16.

¹⁶ See Vienna Convention on the Law of Treaties (“[VCLT](#)”), article 31(1). See further e.g. ICC-01/05-01/13-2275-Red (“[Bemba et al. AJ](#)”), para. 675; ICC-01/05-01/08-3343 (“[Bemba TJ](#)”), para. 77; ICC-01/04-01/07-3436-tENG (“[Katanga TJ](#)”), para. 45.

Further, and for the same reason, the immediate resolution by the Appeals Chamber of any issues arising from an article 85(3) decision cannot “materially advance the proceedings”.

8. Nor can appeals of article 85(3) decisions serve the purpose of article 82(1)(d), which is to “create a procedure by which appellate intervention on a certain issue can be anticipated to an intermediate stage of proceedings when it is determined that to have that issue decided only in the final appeal at the conclusion of the said proceedings would mean to risk that large parts or the entire proceedings may be invalidated”.¹⁷ Article 85(3) decisions complete the compensation proceedings, such that there is no intermediate stage of proceedings. This is the case even if the decision itself involves two steps; the first requiring a finding that there had been a grave and manifest miscarriage of justice; and if so, a second step requiring the compensation chamber to determine whether to exercise its discretion and grant compensation.¹⁸

9. Second, this interpretation was confirmed by the Pre-Trial Chamber in *Bemba*—a decision which Mr Mokom overlooks—which squarely addressed the question of whether article 85(3) decisions may be appealed under article 82(1)(d).¹⁹ The Pre-Trial Chamber concluded that article 85(3) decisions could not be appealed under article 82(1)(d) since article 85(3) decisions can only be issued after criminal proceedings have ended, cannot affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and appellate intervention cannot materially advance the proceedings.²⁰ It found this interpretation to be consistent with international human rights law on the right of appeal,²¹ and the drafting history of article 85²² as elaborated further in this response.

10. Third, while Mr Mokom relies extensively on the *Bemba et al.* decision in which the Appeals Chamber found Jean-Jacques Mangenda’s appeal of a decision rejecting his article 85(1) compensation claim to be admissible under article 82(1)(d),²³ that decision may be distinguished from the present case. The Appeals Chamber found that article 85(1) decisions involve a two-step process, the first step of which requires a decision on the unlawfulness of the arrest or detention which may be considered interlocutory within the meaning of article

¹⁷ ICC-01/09-01/13-41 (“[Barasa ALA Decision](#)”), para. 7.

¹⁸ *Contra* [Request](#), para. 18.

¹⁹ [Bemba Compensation ALA Decision](#).

²⁰ [Bemba Compensation ALA Decision](#), para. 13.

²¹ [Bemba Compensation ALA Decision](#), para. 15. *See below* paras. 12-14.

²² [Bemba Compensation ALA Decision](#), para. 9. *See below* para. 15.

²³ [Request](#), paras. 18-19, citing [Bemba et al. Compensation AD](#), paras. 16-17. *See also* [Bemba et al. Compensation ALA Decision](#), paras. 21, 23.

82(1)(d).²⁴ By extension, Mr Mokom argues that under article 85(3), the first decision as to whether there was a “grave and manifest miscarriage of justice” constitutes an interlocutory decision for the purposes of article 82(1)(d).²⁵

11. However, unlike Mr Mokom’s compensation claim relating to the Prosecution’s conduct, which was brought under article 85(3),²⁶ Mr Mangenda brought his claim under article 85(1),²⁷ and the Appeals Chamber confined its reasoning to this specific sub-provision of article 85.²⁸ Moreover, Mr Mangenda brought his compensation claim in the pre-trial phase, based on his allegation that he had been unlawfully detained for a period of nine days following an order provisionally releasing him from pre-trial detention which was not properly executed by releasing him immediately.²⁹ His claim under article 85(1) was therefore founded on the provisional release order, which was an interlocutory decision issued in the ongoing criminal proceedings against him.³⁰ In the circumstances, the Appeals Chamber’s finding that the article 85(1) decision was interlocutory in nature was congruent with the interlocutory nature of the provisional release order which triggered Mr Mangenda’s article 85(1) claim. This can be contrasted with Mr Mokom’s article 85(3) claim against the Prosecution—to which the First Issue relates—which was brought at a distinctly different procedural phase of the criminal proceedings, namely, following their conclusion. The Appeals Chamber’s reasoning as to the interlocutory nature of article 85(1) decisions cannot simply be extended to article 85(3) decisions in these circumstances.

12. Fourth, contrary to Mr Mokom’s submission,³¹ human rights considerations do not warrant a broad interpretation of article 82(1)(d) to find decisions under article 85(3), which are not criminal in nature, appealable. As is evident from a survey of international and regional human rights instruments, a right of appeal is only guaranteed in the context of criminal proceedings, enabling a convicted person to appeal their conviction; there is no right of appeal

²⁴ [Bemba et al. Compensation AD](#), para. 17.

²⁵ [Request](#), para. 18.

²⁶ See [Decision](#), para. 56. The Article 85 Chamber further noted that while it was unclear whether Mr Mokom also intended to invoke article 85(1) in respect of the Prosecution’s alleged misconduct, he relied on the same factual allegations as those in his article 85(3) claim against the Prosecution. As a result, the Chamber applied the legal framework applicable under article 85(3) and decided not to separately assess the allegations under article 85(1): [Decision](#), para. 57.

²⁷ ICC-01/05-01/13-1663 (“[Bemba et al. Compensation Decision](#)”), paras. 9-10.

²⁸ [Bemba et al. Compensation AD](#), paras. 16-17.

²⁹ [Bemba et al. Compensation Decision](#), paras. 9-10.

³⁰ [Bemba et al. Compensation Decision](#), paras. 1, 3.

³¹ [Request](#), para. 20, citing ICC-01/05-01/13-1533 (“[Bemba et al. Asset Seizure AD](#)”), para. 16.

for decisions on compensation arising from criminal proceedings.³² Thus, as the Appeals Chamber found in the *DRC* situation, “[o]nly final decisions of a criminal court determinative of its verdict or decisions pertaining to the punishment meted out to the convict are assured as an indispensable right of man. [...] This right is assured to the accused under article 81 of the Statute”.³³ Moreover, as the Appeals Chamber confirmed, there is no internationally recognised right to appeal against *every* decision of a hierarchically subordinate court to a court of appeal.³⁴

13. As has been consistently held in this Court, including by this Article 85 Chamber, compensation proceedings under article 85 are not criminal proceedings; they are not part of the criminal trial or a continuation thereof, but are akin to a civil suit or administrative complaint.³⁵ This has also been acknowledged in the jurisprudence of regional human rights courts.³⁶ A right to appeal such decisions, which are wholly separate from criminal proceedings and convictions, is therefore not accepted in international human rights law.

14. The lack of recourse to appeal is not inconsistent with Mr Mokom’s fundamental human rights.³⁷ To the contrary, the remedy provided in article 85 provides a fair opportunity for claimants to apply for and obtain compensation in appropriate circumstances. Indeed, those circumstances exceed those expressed in the ICCPR.³⁸ As the Pre-Trial Chamber stated in *Bemba*, article 85(3) in particular is “unique and specific to the Rome Statute as far as international criminal law and international human rights law are concerned,” and “marks a step forward as regards the scope of rights pertaining to those having been adversely affected by the

³² See [International Covenant on Civil and Political Rights](#) (“ICCPR”), article 14(5); [American Convention on Human Rights](#), article 8(2)(h); [Arab Charter on Human Rights](#), article 16(7); [CIS Convention on Human Rights and Fundamental Freedoms](#), article 7(2). The right to appeal a criminal conviction is more circumscribed in the European Convention on Human Rights: see [Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms](#), article 2. It is vaguely prescribed in the [African Charter on Human and Peoples’ Rights](#): see article 7(a)). It is not enshrined at all in the [ASEAN Human Rights Declaration](#).

³³ [DRC Extraordinary Review Judgment](#), para. 38.

³⁴ [DRC Extraordinary Review Judgment](#), para. 38.

³⁵ [Decision](#), para. 33; [Blé Goudé Compensation Decision](#), para. 18; ICC-01/05-01/08-3694 (“*Bemba Compensation Decision*”), para. 40; [Bemba et al. Compensation AD](#), para. 16.

³⁶ See e.g. IACtHR, *Spoltore v. Argentina*, [Judgment](#), 9 June 2020, Serie C. No. 404, paras. 104-105 (finding that the right to appeal under article 8(2)(h) of the American Convention on Human Rights did not apply to proceedings which had the aim of requesting compensation since they were “not a criminal proceeding against an alleged victim, nor an administrative proceeding that might imply a loss of freedom. Nor was it an administrative proceeding that had a sanctioning nature, in which the guarantees included in Article 8(2) could be applicable, according to its nature and scope”).

³⁷ *Contra* [Request](#), para. 27.

³⁸ [Bemba Compensation Decision](#), para. 35. See ICCPR, article 9(5) (“Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”), article 14(6) (“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him”).

operation of international criminal law and tribunals: in the words of one scholar, it is ‘the most advanced text in terms of protection of the right of compensation, even compared to the provisions of the international conventions on human rights’³⁹.

15. Finally, the drafting history of article 85 shows that the drafters of the Statute did not envisage any possibility of appeal for article 85 decisions. As one commentator has noted on the drafting of article 85, “[e]veryone agreed that the decision on compensation should be final and that no appeal was possible under article 82”.⁴⁰ This is further evidenced by a Canadian proposal in relation to Rule 174 (setting out the procedure for seeking compensation) which would have required an article 85 decision to state the reasons on which it is based, just as it is required for decisions under article 83(4) (decisions on appeal). Canada’s proposal was based on the understanding that, since no appeal of article 85 decisions was possible under article 82, the decision on compensation would be final and should therefore contain similar reasoning requirements to final judgments of the Appeals Chamber under article 83(4).⁴¹ Although Canada’s proposal was not ultimately taken up, it nonetheless provides clear indication of the drafters’ common understanding that article 85 decisions could not be appealed.

16. For the reasons outlined above, the First Issue should be dismissed *in limine* on the basis that article 85(3) decisions are not subject to appeal under article 82(1)(d).

B. The First Issue is not an appealable issue within the meaning of article 82(1)(d)

17. Even if, *arguendo*, an interlocutory appeal of the First Issue were admissible under article 82(1)(d), the issue should be rejected on its merits. This is because Mr Mokom mischaracterises the Chamber’s findings, such that the First Issue does not arise from the Decision.⁴² Moreover, Mr Mokom fails to specify or pinpoint the aspects of the Chamber’s reasoning from which he alleges the First Issue arises,⁴³ instead merely disagreeing with its conclusion that the Prosecution’s delayed compliance with the Pre-Trial Chamber’s orders did not constitute a grave and manifest miscarriage of justice.⁴⁴

³⁹ [Bemba Compensation Decision](#), para. 36.

⁴⁰ G. Bitti, ‘Compensation to an Arrested or Convicted Person’, in R.S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure & Evidence* (New York, Transnational Publishers, Inc., 2001), p. 634; see also [Bemba Compensation ALA Decision](#), para. 9.

⁴¹ G. Bitti, ‘Compensation to an Arrested or Convicted Person’, in R.S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure & Evidence* (New York, Transnational Publishers, Inc., 2001), pp. 633-634.

⁴² [DRC Extraordinary Review Judgment](#), para. 9; see also ICC-01/05-01/13-801 (“[Bemba et al. Joint ALA Decision](#)”), para. 12; ICC-02/11-01/15-1051 (“[Gbagbo & Blé Goudé ALA Decision](#)”), paras. 5-7.

⁴³ See generally [Request](#), paras. 23(i), 28-31.

⁴⁴ [Request](#), para. 23(i).

18. Mr Mokom submits that the First Issue amounts to a legal and factual error relating to the scope of evidence that a claimant must offer in support of the allegations of a grave and manifest miscarriage of justice under article 85(3).⁴⁵ He submits that it arises from the Chamber’s finding that Mr Mokom failed to “demonstrate[e] that the evidence subject to Prosecution disclosure failures would have proved his innocence, from the charges now withdrawn by the Prosecution”.⁴⁶ Mr Mokom submits that this constituted an “impermissible inversion of the burden of proof applicable in criminal proceedings” and was “procedurally improper” as it required him to defend himself against charges he no longer stands accused of.⁴⁷

19. Mr Mokom mischaracterises the Chamber’s reasoning and the nature of the compensation proceedings. The Chamber did not invert the burden of proof applicable in criminal proceedings and force him to defend charges he no longer stands accused of.⁴⁸ The criminal proceedings in this case had already concluded by the time Mr Mokom brought his article 85 claim. The Chamber articulated the burden and standard of proof required under article 85(3). In doing so, it explicitly affirmed that article 85 compensation proceedings are not criminal in nature, and that the criminal case against Mr Mokom had been terminated.⁴⁹ It then found, citing the previous jurisprudence of the Court, that claimants requesting compensation under article 85(3) must provide “concrete evidence” to satisfy the Chamber that a grave and manifest miscarriage of justice has occurred.⁵⁰ The Chamber’s articulation of the standard was thus correctly tied to the specific nature of article 85(3) claims, which requires the claimant to specify and substantiate the alleged grave and manifest miscarriage of justice.

20. In this context, the Chamber noted Mr Mokom’s allegations that, *inter alia*: the Arrest Warrant was “based on allegations never capable of being substantiated”;⁵¹ the Prosecution’s late identification and disclosure of potentially exonerating information was “so extreme” as to indicate wilful misconduct or negligence on the part of the Prosecution;⁵² the Prosecution misled the Pre-Trial Chamber into issuing the Arrest Warrant by misrepresenting the strength

⁴⁵ [Request](#), paras. 29, 31.

⁴⁶ [Request](#), para. 28.

⁴⁷ [Request](#), para. 28.

⁴⁸ *Contra* [Request](#), para. 28.

⁴⁹ [Decision](#), para. 33.

⁵⁰ [Decision](#), para. 33, citing [Blé Goudé Compensation Decision](#), para. 34. See also [Decision](#), para. 40.

⁵¹ [Decision](#), para. 34.

⁵² [Decision](#), para. 35.

of the evidence;⁵³ and there are “no doubts” that the Prosecution’s wilful or negligent failure to properly evaluate the case was the reason for its withdrawal of the charges.⁵⁴

21. The Chamber then went on to examine each of these allegations in detail applying the “concrete evidence” standard.⁵⁵ It concluded that Mr Mokom “ha[d] not presented *concrete facts and evidence* to support his allegations” that a grave and manifest miscarriage of justice arose from the Prosecution’s wilful or negligent failure to properly evaluate its case.⁵⁶

22. The Chamber did not require Mr Mokom to show that the belatedly disclosed evidence would have actually proved his innocence.⁵⁷ Rather, the Chamber highlighted that Mr Mokom broadly referred to 406 items of belatedly disclosed/identified potentially exonerating information, without explaining the significance of that information in the context of a voluminous case, and how such information demonstrated that the Prosecution misled the Chamber into issuing the Arrest Warrant, or that it withheld evidence that would have demonstrated that it never had a case against Mr Mokom.⁵⁸ In other words, the Chamber found that Mr Mokom had failed to concretely show how this material, when read holistically with the other evidence in the case, would have impacted the Prosecution’s case and disturbed the Pre-Trial Chamber’s finding that there were reasonable grounds to believe he had committed the alleged crimes when issuing the arrest warrant.

23. Mr Mokom also overlooks a critical aspect of the Chamber’s reasoning, which is that, in accordance with article 85(3), the grave and manifest miscarriage of justice must be the *reason* for the termination of the proceedings.⁵⁹ In this regard, the Chamber found that the Prosecution’s reason for withdrawing the charges—which led to the termination of the proceedings—was because it became clear to the Prosecution in mid-September 2023 that certain witnesses would be unlikely to testify at trial, and that the Prosecution had considered the totality of the evidence and whether further investigative efforts could produce comparable evidence, and unsuccessfully attempted to interview additional potential witnesses.⁶⁰ While Mr Mokom alleged in his article 85(3) claim that the Prosecution had misled the Court as to its reasons for withdrawing the charges,⁶¹ the First Issue proposed for appeal does not raise any

⁵³ [Decision](#), para. 35.

⁵⁴ [Decision](#), para. 36.

⁵⁵ [Decision](#), paras. 45-53.

⁵⁶ [Decision](#), para. 56. *See also* paras. 45-55.

⁵⁷ [Contra Request](#), para. 28.

⁵⁸ [Decision](#), para. 46. *See also* para. 56.

⁵⁹ [Decision](#), paras. 31, 54.

⁶⁰ [Decision](#), para. 35.

⁶¹ [Decision](#), para. 55.

purported legal or factual error with the Chamber's finding on the Prosecution's reason for withdrawing the charges, which was determinative of the Chamber's conclusion that there had been no grave or manifest miscarriage of justice within the meaning of article 85(3).

24. The Defence thus fails to demonstrate an appealable issue on the basis of these mischaracterisations of and disagreements with the Decision.

C. The First Issue does not meet the remaining criteria of article 82(1)(d)

25. Given that the article 82(1)(d) criteria are cumulative, and that failure to fulfil one of the criteria is fatal to an application for leave to appeal,⁶² the Request concerning the First Issue should be rejected for failing to identify an appealable issue. Nonetheless, as already demonstrated above, the proposed issue also fails to fulfil the cumulative criteria of article 82(1)(d), as it does not—and cannot—“significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and its immediate resolution by the Appeals Chamber would not materially advance the proceedings.⁶³

26. Mr Mokom's arguments to the contrary are unpersuasive. Simply because the Decision rejected his compensation claim under the first limb of article 85(3), and precluded the Chamber from proceeding to decide on the second limb (i.e. whether to award compensation), this did not “necessarily affect[] the outcome of the proceedings”.⁶⁴ It merely affected the conclusion of the compensation proceedings.

27. Moreover, the fact that no other avenue exists to seise the Appeals Chamber of the issues,⁶⁵ is not an appropriate justification for expanding the remedy in article 82(1)(d). As chambers have confirmed, article 82(1)(d) must be construed strictly, as an exceptional remedy,⁶⁶ to correct errors at interlocutory or intermediate phases of the proceedings.

28. Finally, while Mr Mokom submits that the Decision warrants a broader interpretation of article 82(1)(d) to ensure compliance with the requirements of article 21(3) of the Statute,⁶⁷ as shown above, human rights considerations do not justify an expansion of the scope of article 82(1)(d) in this instance.⁶⁸

⁶² ICC-01/05-01/08-3273 (“[Bemba Abuse of Process ALA Decision](#)”), para. 8; ICC-02/11-01/15-117 ([Gbagbo & Blé Goudé Trial Commencement ALA Decision](#)) para. 26; ICC-02/11-01/15-132 (“[Gbagbo & Blé Goudé Confidential Material ALA Decision](#)”), para. 5.

⁶³ See above paras. 6-8.

⁶⁴ *Contra Request*, para. 38.

⁶⁵ *Request*, paras. 26, 40.

⁶⁶ [Abd-Al-Rahman Oral Decisions AD](#), para. 11; [Mbarushimana Disclosure AD](#), p. 4.

⁶⁷ *Request*, para. 40.

⁶⁸ See above paras. 12-14.

CONCLUSION

29. For the foregoing reasons, the Chamber should dismiss the Request *in limine* insofar as it relates to the First Issue, or in the alternative, reject it on its merits since the First Issue does not meet the criteria for leave to appeal under article 82(1)(d).



Karim A. A. Khan KC
Prosecutor

Dated this 13th February 2025
At The Hague, the Netherlands