

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/14-01/22**

Date: **14 March 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**

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

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

☒ **The Office of the Prosecutor**

☒ **Counsel for Mr Mokom**

☐ **Legal Representatives of the Victims**

☐ **Legal Representatives of the Applicants**

☐ **Unrepresented Victims**

☐ **Unrepresented Applicants  
(Participation/Reparation)**

☐ **The Office of Public Counsel for  
Victims**

☐ **The Office of Public Counsel for the  
Defence**

☐ **States' Representatives**

☐ **Amicus Curiae**

## **REGISTRY**

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**Registrar**  
Mr Osvaldo Zavala Giler

☐ **Counsel Support Section**

☐ **Victims and Witnesses Unit**

☐ **Detention Section**

☐ **Victims Participation and Reparations  
Section**

☐ **Other**

**The Article 85 Chamber** of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, pursuant to article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on Mr Mokom’s Request for Leave to Appeal the “Decision on Mr Mokom’s request for compensation”’.

## I. PROCEDURAL HISTORY

1. On 17 April 2024, Mr Mokom filed a request for compensation pursuant to article 85 of the Statute (the ‘Compensation Claim’).<sup>1</sup>
2. On 31 January 2025, the Chamber issued its Decision on Mr Mokom’s request for compensation (the ‘Impugned Decision’), in which it rejected the Compensation Claim.<sup>2</sup>
3. On 7 February 2025, Mr Mokom filed a request for leave to appeal the Impugned Decision (the ‘Request’), identifying ‘at least four appealable issues’.<sup>3</sup>
4. On 13 February 2025, the Prosecution filed its response to the Request (the ‘Response’).<sup>4</sup> The Prosecution limits its Response to the issues purportedly arising from the Impugned Decision regarding Mr Mokom’s allegations against the Prosecution.<sup>5</sup>

## II. ADMISSIBILITY OF THE APPEAL

5. The Chamber will begin by addressing the admissibility of appeals of decisions under article 85 of the Statute.
6. Mr Mokom submits that the Impugned Decision is subject to appeal pursuant to article 82(1)(d) of the Statute.<sup>6</sup> He relies on the Appeals Chamber’s decision in *The Prosecutor v. Jean-Pierre Bemba Gombo et al.* (the ‘Mangenda case’),<sup>7</sup> in which the Appeals Chamber found that the decision to award compensation under article 85(1) of the Statute

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<sup>1</sup> 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](#)).

<sup>2</sup> Decision on Mr Mokom’s request for compensation, ICC-01/14-01/22-354-Conf-Exp (only available to Mr Mokom and the Registry, confidential version, ICC-01/14-01/22-354-Conf, and public redacted version, [ICC-01/14-01/22-354-Red](#), filed the same day).

<sup>3</sup> Request for Leave to Appeal the ‘Decision on Mr Mokom’s request for compensation’, [ICC-01/14-01/22-355](#), para. 23.

<sup>4</sup> Prosecution response to Maxime Mokom’s request for leave to appeal the decision on his request for compensation, [ICC-01/14-01/22-356](#).

<sup>5</sup> Response, [ICC-01/14-01/22-356](#), para. 1; Impugned Decision, [ICC-01/14-01/22-354-Red](#), para. 57.

<sup>6</sup> Request, [ICC-01/14-01/22-355](#), para. 16.

<sup>7</sup> The Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo 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](#) (the ‘Mangenda Appeals Decision’).

involves a two-step process whereby the Chamber first decides on the unlawfulness of the arrest or detention, followed by a decision on the request for compensation.<sup>8</sup> The Appeals Chamber held that the first limb of the two-step approach is therefore an ‘interlocutory’ aspect of the decision on compensation and thus falls within the ambit of article 82(1)(d) of the Statute.<sup>9</sup> Mr Mokom argues that this reasoning applies by extension to article 85(3) of the Statute, which, he submits, also involves a two-step process, whereby the Chamber first decides whether a grave and manifest miscarriage of justice has occurred, followed by a decision on whether to award compensation.<sup>10</sup> Mr Mokom also submits 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 article 21(3) of the Statute’.<sup>11</sup>

7. The Prosecution submits that there is no appeal as of right for article 85(3) decisions under the Statute and that these decisions do not fall within the scope of article 82(1)(d) of the Statute.<sup>12</sup> The Prosecution points out that this reasoning was adopted by Pre-Trial Chamber II in *The Prosecutor v. Jean-Pierre Bemba Gombo* (the ‘Bemba case’),<sup>13</sup> which also found this interpretation to be consistent with international human rights law on the right of appeal and the drafting history of article 85 of the Statute.<sup>14</sup> The Prosecution also argues that the *Mangenda* case relied on by Mr Mokom is distinguishable from the present case as Mr Mangenda’s claim was founded on a provisional release order, which was an interlocutory decision issued in ongoing criminal proceedings against him.<sup>15</sup> The Prosecution further submits that, contrary to Mr Mokom’s submission, human rights considerations do not warrant a broad interpretation of article 82(1)(d) to find decisions under article 85(3) appealable.<sup>16</sup>

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<sup>8</sup> Request, [ICC-01/14-01/22-355](#), para. 18, citing the *Mangenda* Appeals Decision, [ICC-01/05-01/13-1964](#), para. 17.

<sup>9</sup> Request, [ICC-01/14-01/22-355](#), para. 18.

<sup>10</sup> Request, [ICC-01/14-01/22-355](#), para. 18.

<sup>11</sup> Request, [ICC-01/14-01/22-355](#), para. 20.

<sup>12</sup> Response, [ICC-01/14-01/22-356](#), paras 5-6. As noted above, the Prosecution limits its Response to article 85(3) as it only addresses the Request as it relates to claims against the Prosecution, which were decided by the Chamber under article 85(3) of the Statute. See Response, [ICC-01/14-01/22-356](#), para. 1; Impugned Decision, [ICC-01/14-01/22-354-Red](#), para. 57.

<sup>13</sup> Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 1 October 2020, [ICC-01/05-01/08-3697](#) (the ‘Bemba Leave to Appeal Decision’), para. 6.

<sup>14</sup> Response, [ICC-01/14-01/22-356](#), paras 9, 15.

<sup>15</sup> Response, [ICC-01/14-01/22-356](#), para. 11.

<sup>16</sup> Response, [ICC-01/14-01/22-356](#), paras 12-14.

8. The Appeals Chamber jurisprudence confirms that ‘the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers’.<sup>17</sup> The Chamber notes that article 81 of the Statute provides for appeals only against specific types of decisions, namely, an appeal against decisions of acquittal or conviction, decisions on sentence and decisions of the Trial Chamber maintaining the detention of the person pending appeal in case of an acquittal.<sup>18</sup> Article 82 allows for appeals of other types of decisions. Specifically, paragraphs 1(a) to (c), 2 and 4 ‘respectively restrict its material scope to specifically identified decisions, namely decisions with respect to jurisdiction or admissibility, decisions granting or denying release of the suspect or accused, decisions of the Pre-Trial Chamber to act on its own initiative under article 56(3) of the Statute, decisions of the Pre-Trial Chamber under article 57(3)(d) of the Statute and orders for reparations under article 75 of the Statute’.<sup>19</sup>
9. The Impugned Decision – and compensation decisions in general – do not fall within any of these categories. As such, the only potential avenue for appeal of such decisions would be article 82(1)(d) of the Statute.<sup>20</sup> The Appeals Chamber has found that appeals pursuant to article 82(1)(d) of the Statute are limited to interlocutory or intermediate decisions of either the Pre-Trial or Trial Chamber,<sup>21</sup> meaning ‘decisions intervening between the commencement and the end of criminal proceedings and adjudicating a specific issue without constituting a final decision’.<sup>22</sup> Article 82(1)(d) confines admissible interlocutory appeals to ‘limited and very specific circumstances’, namely to decisions involving issues ‘that would significantly affect the fair and expeditious conduct of the *proceedings* or the outcome of the *trial*, and, for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially *advance the proceedings*’ [emphasis added].<sup>23</sup> In the view of the Chamber, the wording and requirements of article

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<sup>17</sup> Appeals Chamber, 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, 13 July 2006, [ICC-01/04-168](#) (the ‘DRC Appeals Decision’), para. 39.

<sup>18</sup> Bemba Leave to Appeal Decision, [ICC-01/05-01/08-3697](#), para. 7.

<sup>19</sup> Bemba Leave to Appeal Decision, [ICC-01/05-01/08-3697](#), para. 8.

<sup>20</sup> Bemba Leave to Appeal Decision, [ICC-01/05-01/08-3697](#), para. 10.

<sup>21</sup> DRC Appeals Decision, [ICC-01/04-168](#), para. 36.

<sup>22</sup> Bemba Leave to Appeal Decision, [ICC-01/05-01/08-3697](#), para. 12.

<sup>23</sup> Pre-Trial Chamber II, Situation in Uganda, Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58, 19 August 2005, [ICC-02/04-01/15-12](#), para. 16.

82(1)(d) of the Statute suggest that the provision only covers interlocutory appeals arising in the course of criminal proceedings.

10. The Chamber notes that article 85 decisions are neither interlocutory nor criminal in nature. Compensation decisions are instead the final result of separate ancillary proceedings akin to a civil suit or administrative complaint.<sup>24</sup> It is difficult to imagine circumstances in which a compensation decision could ‘significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial’ or in which immediate appellate intervention could ‘materially advance the proceedings’ in the criminal case to which those proceedings are related.
11. This interpretation would also be, as highlighted by previous jurisprudence, consistent with international human rights law.<sup>25</sup> The Chamber concurs with the Pre-Trial Chamber in the *Bemba* case that ‘[u]niversal and regional human rights instruments, as well as related human rights bodies, are unanimous in limiting the scope of the right to appeal as a fundamental right to criminal judicial proceedings and, more broadly, proceedings which may result in the sanction of the deprivation of liberty’.<sup>26</sup> The International Covenant on Civil and Political Rights, for example, provides that everyone convicted of a crime has the right to their conviction and sentence being reviewed by a higher tribunal according to law.<sup>27</sup>
12. In addition, the *travaux préparatoires* of the Rome Statute also seem to support the argument that requests for leave to appeal an article 85 decision are not admissible. As reported by one commentator in relation to the drafting of rule 174 of the Rules of Procedure and Evidence, ‘everyone agreed that the decision on compensation should be final and that no appeal was possible under article 82 [...]’.<sup>28</sup> Further, as noted by the Pre-Trial Chamber in the *Bemba* case, there does not appear to be any other record about

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<sup>24</sup> Article 85 Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Mr Blé Goudé’s request for compensation 10 February 2022, [ICC-02/11-01/15-1427](#) (the ‘Blé Goudé Request for Compensation Decision’), para. 18.

<sup>25</sup> DRC Appeals Decision, [ICC-01/04-168](#), para. 38; Bemba Leave to Appeal Decision, [ICC-01/05-01/08-3697](#), para. 15.

<sup>26</sup> Bemba Leave to Appeal Decision, [ICC-01/05-01/08-3697](#), para. 15.

<sup>27</sup> Article 14(5) of the International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668.

<sup>28</sup> G. Bitti, ‘Compensation to an Arrested or Convicted Person’ in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 634.

decisions under article 85 qualifying as interlocutory and thereby being appealable pursuant to article 82(1)(d) of the Statute.<sup>29</sup>

13. With that said, the Chamber notes that there is inconsistency in the Court's jurisprudence regarding the admissibility of appeals under article 85 of the Statute. In the *Mangenda* case, Trial Chamber VI, by majority, granted leave to appeal a compensation decision under article 85(1) of the Statute and the Appeals Chamber found the appeal to be admissible as an interlocutory appeal under article 82(1)(d) of the Statute.<sup>30</sup> The Pre-Trial Chamber in the *Bemba* case subsequently rejected leave to appeal a compensation decision under article 85(3) of the Statute on the grounds that the decision was not interlocutory in nature.<sup>31</sup> Thus, there is currently divergent jurisprudence on the admissibility of appeals of compensation decisions under article 82(1)(d) of the Statute.
14. The Chamber notes the argument of the Prosecution that the *Mangenda* case is distinguishable from the present case as Mr Mangenda's claim was founded on a provisional release order, which was an interlocutory decision issued in ongoing criminal proceedings against him.<sup>32</sup> However, the Chamber does not consider this to be an accurate reflection of the Appeals Chamber's reasoning in the *Mangenda* case. Rather, it appears that the Appeals Chamber's acceptance of the appeal was based on its view that the preliminary determination as to the lawfulness of the arrest and detention under article 85(1) of the Statute was an interlocutory decision necessary before a final determination on compensation.<sup>33</sup> Indeed, the Appeals Chamber in the same case recognised that the compensation proceedings at issue may be seen as separate from the criminal prosecution of Mr Mangenda, but found that this view did 'not justify depriving the parties of the possibility of appellate intervention throughout the conduct of such proceedings'.<sup>34</sup> The

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<sup>29</sup> Bemba Leave to Appeal Decision, [ICC-01/05-01/08-3697](#), para. 9.

<sup>30</sup> Trial Chamber VI, "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](#); Dissenting Opinion of Judge Chang-Ho Chung to the 'Decision on Defence request seeking leave to appeal the 'Decision on request for compensation for unlawful detention'', [ICC-01/05-01/13-1893-Anx](#); Mangenda Appeals Decision, [ICC-01/05-01/13-1964](#).

<sup>31</sup> Bemba Leave to Appeal Decision, [ICC-01/05-01/08-3697](#). The Chamber notes that while the Pre-Trial Chamber in the *Bemba* case limited its analysis to article 85(3) decisions, its reasoning applies equally to article 85(1) decisions.

<sup>32</sup> Response, [ICC-01/14-01/22-356](#), para. 11.

<sup>33</sup> Mangenda Appeals Decision, [ICC-01/05-01/13-1964](#), para. 17.

<sup>34</sup> Mangenda Appeals Decision, [ICC-01/05-01/13-1964](#), para. 16.

Chamber considers that the same logic and rationale would appear to apply to appeals of all compensation decisions irrespective of which limb of article 85 is invoked.

15. Finally, the Chamber notes that, while article 82(1)(d) is framed narrowly under the Statute, the Court's jurisprudence has, at times, provided for an expansive interpretation of the scope of article 82(1)(d) of the Statute.<sup>35</sup> There have also been instances in which the Appeals Chamber of other international tribunals, have allowed for the appeal of decisions in the absence of any explicit right of appeal defined in the Statute.<sup>36</sup>
16. In light of this, although the Chamber is not fully persuaded that decisions pursuant to article 85 fall within the ambit of article 82(1)(d) of the Statute, in light of existing Appeals Chambers jurisprudence, it decides to defer to the latter in terms of admissibility. This will also allow the Appeals Chamber to consider all relevant arguments and ultimately determine whether decisions under article 85 may or may not be appealed under article 82(1)(d), which the Chamber considers to be in the interest of legal certainty.

### III. APPLICABLE LAW

17. Under article 82(1)(d) of the Statute, the Chamber will have regard to whether: (i) the matter is an 'appealable issue'; (ii) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>37</sup> The three criteria under article 82(1)(d) of the Statute are

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<sup>35</sup> William A. Schabas, *An Introduction to the International Criminal Court* (2020), p. 334, noting that in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II granted the State of Jordan leave to appeal the Pre-Trial Chamber's ruling under article 82(1)(d) of the Statute despite the fact that article 82(1)(d) states that an appeal may be filed by '[e]ither party' and Jordan was arguably not a party to the proceeding. The Pre-Trial Chamber never addressed whether or not Jordan was a 'party' in the case and the Prosecutor did not challenge the admissibility of the appeal. See Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on Jordan's request for leave to appeal, 21 February 2018, [ICC-02/05-01/09-319](#).

<sup>36</sup> See for example International Criminal Tribunal for Yugoslavia, Appeals Chamber, *The Prosecutor v. Dusko Tadic et al.*, Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 27 February 2001, [IT-94-1-A-AR77](#), in which a defense counsel had been found guilty of contempt by the Appeals Chamber ruling in the first instance. While the applicable rules did not provide for an appeal against such a decision, the appeal was heard by a differently constituted Appeals Chamber. See also International Criminal Tribunal for Yugoslavia, Appeals Chamber, *The Prosecutor v. Brdanin and Talic.*, Decision on Interlocutory Appeal, 11 December 2002, [IT-99-36-AR73.9](#), in which a decision on a motion to set aside a subpoena was heard by the Appeals Chamber despite there being no mechanism to do so in the applicable rules.

<sup>37</sup> Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, Decision on the Application on behalf of Mr Bosco Ntaganda seeking leave to appeal Decision on the Registry submission in compliance with the "Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled 'Reparations Order'", 21 December 2022, [ICC-01/04-02/06-2805](#) (the 'Ntaganda Leave Decision'), para. 12; Trial Chamber VI, *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the Defence's Request for



cumulative. Therefore, failure to fulfil one or more of the criteria will result in dismissal of the Request.<sup>38</sup>

18. Regarding the first criterion, the Appeals Chamber has held:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.<sup>39</sup>

19. Further, issues that are based on a misunderstanding of the decision are not appealable.<sup>40</sup>

#### IV. ISSUES PROPOSED FOR APPEAL

##### A. FIRST ISSUE

20. The first issue Mr Mokom raises 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' (the 'First Issue').<sup>41</sup> Mr Mokom submits that the Chamber required him to demonstrate that the 'evidence subject to the Prosecution's disclosure failures' would have proven his innocence,<sup>42</sup> thereby impermissibly inverting 'the burden of proof applicable in criminal proceedings' and requiring him to defend himself against charges that were withdrawn.<sup>43</sup> He further argues that this issue is essential to the determination of the 'scope of evidence that the Claimant must offer in support of the allegations of grave and manifest miscarriage of justice'.<sup>44</sup>

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Reconsideration of or Leave to Appeal the Decision on the Prosecution's Fifth Request under Rule 68(2)(b), 21 December 2022, [ICC-01/14-01/21-575](#) (the 'Said Decision on Leave to Appeal'), para. 21.

<sup>38</sup> Said Decision on Leave to Appeal, [ICC-01/14-01/21-575](#), para. 23.

<sup>39</sup> Said Decision on Leave to Appeal, [ICC-01/14-01/21-575](#), para. 22, citing DRC Appeals Decision, [ICC-01/04-168](#), para. 9.

<sup>40</sup> Ntaganda Leave Decision, [ICC-01/04-02/06-2805](#), para. 15; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for reconsideration, or leave to appeal, "Decision on Defence request in relation to P-0626", 10 February 2021, [ICC-01/12-01/18-1295-Red](#), para. 14.

<sup>41</sup> Request, [ICC-01/14-01/22-355](#), para. 23(i).

<sup>42</sup> Request, [ICC-01/14-01/22-355](#), para. 28.

<sup>43</sup> Request, [ICC-01/14-01/22-355](#), para. 29.

<sup>44</sup> Request, [ICC-01/14-01/22-355](#), para. 31.

21. The Prosecution submits that Mr Mokom's request for leave on the First Issue should be rejected as Mr Mokom has failed to demonstrate an appealable issue.<sup>45</sup> The Prosecution submits that the Chamber stated the burden and standard of proof applicable to claims under article 85(3) of the Statute and applied this standard to Mr Mokom's allegations against the Prosecution.<sup>46</sup> Further, the Prosecution states that Mr Mokom overlooks the 'critical aspect' of the Chamber's finding that the miscarriage of justice alleged in his claim was not the reason for the termination of the proceedings.<sup>47</sup> The Prosecution submits that the First Issue does not raise any alleged legal or factual error with the Chamber's finding on the reason for the termination of the proceedings, which was determinative for the purposes of the Chamber's conclusion under article 85(3) of the Statute.<sup>48</sup>
22. The Chamber considers that the First Issue as formulated by Mr Mokom misrepresents the Impugned Decision and the nature of the proceedings in question. The Chamber did not reverse the burden of proof applicable in criminal proceedings and did not require Mr Mokom to defend himself against charges that had been withdrawn. As clearly stated in the Impugned Decision, the criminal case against Mr Mokom concluded with the withdrawal of charges against him.<sup>49</sup> Given that Mr Mokom's Compensation Claim was 'akin to a civil suit or administrative complaint', the Chamber found that the burden was on him to substantiate his allegations of a miscarriage of justice.<sup>50</sup> Regarding the standard of proof, the Chamber found that Mr Mokom was required to produce concrete evidence on the basis of which it could be satisfied that a grave and manifest miscarriage of justice took place as alleged.<sup>51</sup> The Chamber explicitly stated that Mr Mokom was not required to prove his claim to the standard of beyond reasonable doubt.<sup>52</sup> Requiring the complainant to produce concrete facts and evidence on the basis of which the Chamber could be satisfied that his complaint was made out for the purpose of a Compensation Claim is not the legal equivalent of requiring him to prove his innocence in a criminal matter. Given that the First Issue as formulated by Mr Mokom does not accurately reflect the content of the Impugned Decision, the Chamber finds that it is not an appealable issue.

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<sup>45</sup> Response, [ICC-01/14-01/22-356](#), paras 17, 24.

<sup>46</sup> Response, [ICC-01/14-01/22-356](#), paras 19-21.

<sup>47</sup> Response, [ICC-01/14-01/22-356](#), para. 23.

<sup>48</sup> Response, [ICC-01/14-01/22-356](#), para. 23.

<sup>49</sup> Impugned Decision, [ICC-01/14-01/22-354-Red](#), para. 33.

<sup>50</sup> Impugned Decision, [ICC-01/14-01/22-354-Red](#), para. 33.

<sup>51</sup> Impugned Decision, [ICC-01/14-01/22-354-Red](#), para. 33.

<sup>52</sup> Impugned Decision, [ICC-01/14-01/22-354-Red](#), para. 33.

## B. SECOND ISSUE

23. The second issue Mr Mokom raises for appeal is '[w]hether 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' (the 'Second Issue').<sup>53</sup> Mr Mokom argues that the Chamber failed to consider whether the Court's legal framework on interim release was incompatible with his internationally recognised human rights,<sup>54</sup> in disregard of article 21(3) of the Statute, which requires that all applicable law before the Court be interpreted in accordance with internationally recognized human rights.<sup>55</sup> Mr Mokom argues that the Chamber's finding that the lack of willingness of States to receive him on their territory did not violate his rights under the Statute or international human rights law 'contradicts the official position of the Court' in relation to States Parties' cooperation regarding the release of persons from the Court's custody and thus constitutes an error of fact.<sup>56</sup> Mr Mokom submits that this is an identifiable topic arising from the Impugned Decision and does not merely represent an abstract question or a hypothetical concern<sup>57</sup> He submits that resolution by the Appeals Chamber is essential.<sup>58</sup>

24. The Chamber finds that Mr Mokom again misrepresents the Impugned Decision. The Chamber explicitly addressed the issue of whether the statutory framework accords with international human rights standards in the Impugned Decision and found it does, although it acknowledged that the interim release of detainees is 'more challenging than in domestic jurisdictions in certain cases.'<sup>59</sup> This is consistent with the official position of the Court on cooperation, the relevant part of which was referred to and considered in full for the purposes of the Impugned Decision.<sup>60</sup> The Chamber went on to evaluate whether the lack of willingness of various States to receive Mr Mokom on their territory had the

<sup>53</sup> Request, [ICC-01/14-01/22-355](#), para. 23(ii).

<sup>54</sup> Request, [ICC-01/14-01/22-355](#), para. 32.

<sup>55</sup> Request, [ICC-01/14-01/22-355](#), para. 32.

<sup>56</sup> Request, [ICC-01/14-01/22-355](#), para. 34, referring to ASP 2023 Report on Cooperation, para. 47.(a report by the Court to the Assembly of States Parties, which states that the absence of States Parties willing to accept persons on interim release 'prevents the Court's system from functioning and runs counter to the Court's objective of applying the highest international standard').

<sup>57</sup> Request, [ICC-01/14-01/22-355](#), para. 35.

<sup>58</sup> Request, [ICC-01/14-01/22-355](#), para. 35.

<sup>59</sup> Impugned Decision, [ICC-01/14-01/22-354-Red](#), paras 62-63.

<sup>60</sup> Impugned Decision, [ICC-01/14-01/22-354-Red](#), para. 63.

effect of violating his rights under the Statute or under international human rights law.<sup>61</sup> Its conclusion, based on the particular circumstances of Mr Mokom's case, was that his continued detention was lawful.<sup>62</sup> The Second Issue as formulated by Mr Mokom inaccurately reflects the content and reasoning of the Impugned Decision. To the extent that the Second Issue could be said to engage with the Impugned Decision, Mr Mokom fails to identify concrete errors and merely disagrees with the outcome of the assessment provided in the Impugned Decision. Therefore, the Chamber finds that the Second Issue is not an appealable issue.

### C. THIRD ISSUE

25. The third issue Mr Mokom raises for appeal is '[w]hether 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' (the 'Third Issue').<sup>63</sup> Mr Mokom submits that the Chamber erred in law by departing from the Pre-Trial Chamber's findings that Mr Mokom was subject to a regime that appeared to amount to a form of house arrest, without providing justifications for such departure.<sup>64</sup> Mr Mokom submits that even if the Chamber considered the Pre-Trial Chamber's findings to be a *prima facie* determination on the issue, it offered no basis to depart from this finding.<sup>65</sup> Mr Mokom submits that the Chamber's departure from the Pre-Trial Chamber's 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'.<sup>66</sup> He further submits that the issue is not hypothetical or abstract and arises directly from the Impugned Decision.<sup>67</sup>

26. The Chamber finds that Mr Mokom misrepresents the significance of the Pre-Trial Chamber's statement in the Order of 21 November 2023. The Pre-Trial Chamber found

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<sup>61</sup> Impugned Decision, [ICC-01/14-01/22-354-Red](#), para. 66.

<sup>62</sup> Impugned Decision, [ICC-01/14-01/22-354-Red](#), para. 71.

<sup>63</sup> Request, [ICC-01/14-01/22-355](#), para. 23(iii), referring to the Public redacted version of 'Order regarding arrangements pending Mr Mokom's transfer', 11 April 2024, [ICC-01/14-01/22-294-Red](#) (public redacted version issue on 21 November 2023) (the '21 November 2023 Order').

<sup>64</sup> Request, [ICC-01/14-01/22-355](#), para. 36.

<sup>65</sup> Request, [ICC-01/14-01/22-355](#), para. 36.

<sup>66</sup> Request, [ICC-01/14-01/22-355](#), para. 36.

<sup>67</sup> Request, [ICC-01/14-01/22-355](#), para. 36.

that ‘Mr Mokom has been subjected to a regime that appears to amount to a form of house arrest’.<sup>68</sup> The language highlighted by Mr Mokom (‘*appears to amount to a form of house arrest*’) cannot be reasonably understood as an unequivocal finding that Mr Mokom had been unlawfully detained. Mr Mokom further disregards the context in which the Pre-Trial Chamber’s observation was made; the Pre-Trial Chamber’s reasoning was aimed at emphasising that the Court lacks a legal basis to restrict Mr Mokom’s liberty and underlining the need to ensure his freedom to the greatest extent possible, without prejudice to any measures that the Host State may wish to adopt under its own legal framework. The Pre-Trial Chamber was not engaged in an evaluation of Mokom’s situation for the purposes of determining whether he was being unlawfully detained.

27. In contrast, in the Impugned Decision, the Chamber analysed whether Mr Mokom was detained within the meaning of article 85(1) of the Statute, taking various factors into consideration, including the observations of the Pre-Trial Chamber. The Third Issue as framed by Mr Mokom shows no error in the Chamber’s reasoning or conclusion and exaggerates the legal significance of the Pre-Trial Chamber’s statements. Accordingly, the Chamber finds that the Third Issue is not an appealable issue.

#### **D. FOURTH ISSUE**

28. The fourth issue Mr Mokom identifies is ‘[w]hether 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 [r]ule 185 of the Rules regarding the transfer of persons released from the custody of the Court’ (the ‘Fourth Issue’).<sup>69</sup> Mr Mokom submits that, in the absence of an agreement with the Host State to allow him to enter its territory, he had to remain in the hotel pending the conclusion of the process under rule 185 of the Rules, according to which the Court *shall* make arrangements for the transfer of the person released from the custody of the Court.<sup>70</sup> Mr Mokom therefore submits that the scope and application of the Court’s legal framework, which was relied upon by the Chamber to dismiss the Request, is an identifiable topic that arises from the Impugned Decision and the resolution of which is essential to the judicial disposition in question.<sup>71</sup> He further

<sup>68</sup> 21 November 2023 Order, [ICC-01/14-01/22-294-Red](#), para. 3.

<sup>69</sup> Request, [ICC-01/14-01/22-355](#), para. 23(iv).

<sup>70</sup> Request, [ICC-01/14-01/22-355](#), para. 37.

<sup>71</sup> Request, [ICC-01/14-01/22-355](#), para. 37.

submits that the issue is not an abstract or hypothetical question and requires a decision for its resolution.<sup>72</sup>

29. The Chamber considers the Fourth Issue to be an appealable issue within the meaning of article 82(1)(d) of the Statute, albeit some clarification is necessary. The Impugned Decision did not find that Mr Mokom could choose to *enter* the Host State's territory (given that he was at all material times present on the territory of the Host State).<sup>73</sup> However, the Chamber notes that an element of the reasoning of the Impugned Decision was that 'Mr Mokom retained the option to avoid the restrictions applied to him by leaving the hotel, which would have had the effect of unilaterally putting an end to the practical arrangements.'<sup>74</sup> The Chamber considers that the scope and application of the Court's legal framework relied upon to dismiss the Compensation Claim raises important questions that merit appellate review. The Chamber notes that the issue was central to the Chamber's determination of the Compensation Claim. As such, it considers that the issue would significantly affect the fair and expeditious conduct of the proceedings and that an immediate resolution by the Appeals Chamber would materially advance the proceedings. Accordingly, the Chamber grants leave to appeal the following issue:

whether the Chamber erred in law in finding that Mr Mokom could choose to leave the hotel designated as the premises of the Court despite the Court's obligations enshrined in rule 185 of the Rules regarding the transfer of persons released from the custody of the Court.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**GRANTS** leave to appeal the issue as formulated in paragraph 29; and

**REJECTS** the remainder of the Request.

Done in both English and French, the English version being authoritative.

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<sup>72</sup> Request, [ICC-01/14-01/22-355](#), para. 37.

<sup>73</sup> See in this regard, Pre-Trial Chamber, Decision pursuant to Rule 185 of the Rules of Procedure and Evidence, ICC-01/14-01/22-309-Conf (public redacted version notified simultaneously, [ICC-01/14-01/22-309-Red](#)), para. 19.

<sup>74</sup> Impugned Decision, [ICC-01/14-01/22-354-Red](#), para. 132.



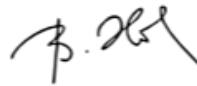
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**Judge Miatta Maria Samba, Presiding Judge**



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**Judge Keebong Paek**



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**Judge Beti Hohler**

Dated 14 March 2025

At The Hague, The Netherlands