

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/22 OA5

Date: 2 September 2025

THE APPEALS CHAMBER

Before:

**Judge Solomy Balungi Bossa, Presiding
Judge Luz del Carmen Ibáñez Carranza
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin
Judge Nicolas Guillou**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

THE PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA

Public redacted

Judgment

**on the appeal of Mr Maxime Jeoffroy Eli Mokom Gawaka against the “Decision
on Mr Mokom’s request for compensation”**

Judgment 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

Registrar

Mr Osvaldo Zavala Giler

☐ **Counsel Support Section**

☐ **Victims and Witnesses Unit**

☐ **Detention Section**

☐ **Victims Participation and Reparations
Section**

☐ **Other**

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Maxime Jeoffroy Eli Mokom Gawaka against the decision of the Article 85 Chamber entitled “Decision on Mr Mokom’s request for compensation” of 31 January 2025 (ICC-01/14-01/22-354-Red),

After deliberation,

Unanimously

Delivers the following

JUDGMENT

The Article 85 Chamber’s “Decision on Mr Mokom’s request for compensation” of 31 January 2025 (ICC-01/14-01/22-354-Red) is confirmed.

REASONS

I. KEY FINDINGS

1. “[P]roceedings” [within the meaning of article 82(1)(d) of the Statute] are not limited to trial proceedings concerning the person’s guilt or innocence. Thus, even “stand alone” or ancillary proceedings, separate from the criminal prosecution of an individual before the Court, could be subject to appeal under article 82(1)(d) of the Statute if the relevant criteria for certification are satisfied.

2. Where the person requesting compensation was unable first to obtain a decision concerning the lawfulness of their detention or where such a decision is formulated in a way requiring the compensation chamber to make additional findings on the presence of grounds for compensation, such a “preliminary decision on the unlawfulness of the arrest or detention” can “be considered to be an interlocutory decision”, regardless of its inclusion in the decision disposing of the compensation claim.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

3. On 17 October 2023, Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) terminated the proceedings against Mr Mokom (hereinafter: “17 October 2023 Order”), following the Prosecutor’s notification of the withdrawal of all charges against Mr Mokom.¹ The Pre-Trial Chamber ordered the immediate release of Mr Mokom from the ICC Detention Centre.² In addition, the Pre-Trial Chamber instructed the Registry to make all necessary arrangements for the transfer of Mr Mokom to a State which is obliged to receive him or to another State, and consult with the Kingdom of the Netherlands (hereinafter: “Host State”) to ensure that any temporary conditions of stay of Mr Mokom do not result in any deprivation of liberty or restriction of any freedoms.³ The Pre-Trial Chamber pointed out that “there [was] no longer a legal title for the continued detention of Mr Mokom”.⁴

4. On the same day, Mr Mokom was released from the ICC Detention Centre and accommodated in a hotel in The Hague.⁵ The Host State, following the Registry’s proposal, agreed to designate specific rooms of the hotel as “[p]remises of the Court” pending the transfer of Mr Mokom to a State pursuant to rule 185 of the Rules of Procedure and Evidence (hereinafter: “Rules”).⁶ The Host State further communicated to the Registry that it has no legal obligation to accept the release of any formerly detained person from the Court onto its territory and that it wished to apply certain “practical arrangements” to Mr Mokom’s stay.⁷

5. On 28 November 2023, following the Host State’s agreement to another set of practical arrangements, Mr Mokom began to leave the hotel.⁸

¹ [Order in relation to the Prosecution’s ‘Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka’](#), ICC-01/14-01/22-276.

² [17 October 2023 Order](#), p. 6.

³ [17 October 2023 Order](#), p. 6.

⁴ [17 October 2023 Order](#), para. 9.

⁵ [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, with confidential *ex parte* and public redacted Annexes I to VIII (confidential redacted version filed on 18 June 2024 (ICC-01/14-01/22-343-Conf-Red); public redacted version filed on 12 July 2024 (ICC-01/14-01/22-343-Red)) (hereinafter: “Registry’s Submissions”), para. 18.

⁶ [Registry’s Submissions](#), para. 15.

⁷ [Registry’s Submissions](#), paras 4, 15, 18.

⁸ [Registry’s Submissions](#), paras 50-52.

B. Proceedings before the Article 85 Chamber

6. On 17 April 2024, Mr Mokom filed before the Presidency a request for compensation pursuant to article 85 of the Statute (hereinafter: “Mr Mokom’s Request for Compensation”).⁹

7. On 31 January 2025, the Article 85 Chamber rejected Mr Mokom’s Request for Compensation (hereinafter: “Impugned Decision”).¹⁰

8. On 14 March 2025, the Article 85 Chamber granted Mr Mokom’s request for leave to appeal with respect to one issue (hereinafter: “Decision Granting Leave to Appeal”).¹¹

C. Proceedings before the Appeals Chamber

9. On 27 March 2025, Mr Mokom filed the appeal brief against the Impugned Decision (hereinafter: “Appeal Brief”).¹²

10. On 1 May 2025, pursuant to the Appeals Chamber’s order,¹³ the Registry filed its observations on the Appeal Brief (hereinafter: “Registry’s Observations”).¹⁴

⁹ [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 dated 23 April 2024 and registered on 24 April 2024 (ICC-01/14-01/22-329-Red)).

¹⁰ [Decision on Mr Mokom’s request for compensation](#), ICC-01/14-01/22-354-Conf-Exp (confidential redacted version (ICC-01/14-01/22-354-Conf-Red) and public redacted version (ICC-01/14-01/22-354-Red) filed on the same day).

¹¹ [Decision on Mr Mokom’s Request for Leave to Appeal the ‘Decision on Mr Mokom’s request for compensation’](#), ICC-01/14-01/22-357, para. 29, p. 14.

¹² [Appeal brief against the ‘Decision on Mr Mokom’s request for compensation’](#), ICC-01/14-01/22-358-Conf (public redacted version filed on 28 March 2025 (ICC-01/14-01/22-358-Red)).

¹³ [Order on the filing of submissions by the Registrar](#), 8 April 2025, ICC-01/14-01/22-361.

¹⁴ [Registry’s Observations on the “Appeal Brief against the ‘Decision on Mr Mokom’s request for compensation’”](#), ICC-01/14-01/22-362-Conf (public redacted version filed on 12 May 2025 (ICC-01/14-01/22-362-Red)).

11. On 13 May 2025, following the Appeals Chamber’s decision granting leave,¹⁵ Mr Mokom filed his reply to the Registry’s Observations (hereinafter: “Reply to Registry’s Observations”).¹⁶

III. ADMISSIBILITY OF THE APPEAL

A. Submissions of Mr Mokom

12. Mr Mokom submits, as a preliminary matter, that his appeal of the Impugned Decision is admissible under article 82(1)(d) of the Statute.¹⁷ To this end, he avers that the Statute and the Rules “provide for a two-limb procedure for the adjudication of all requests for compensation, with a decision on the first of those two limbs [...] constituting an interlocutory decision”.¹⁸ Mr Mokom submits that a decision rejecting the first limb of such a procedure effectively ends the compensation proceedings and, if incorrectly decided, would significantly affect the fairness and expeditiousness of those proceedings, by precluding a claimant from recovering compensation to which they were entitled.¹⁹

13. Mr Mokom contends that the resolution by the Appeals Chamber of an appeal against an incorrect ruling on the first limb of a compensation claim would materially advance the compensation proceedings.²⁰ Referring to the Appeals Chamber’s judgment in the *Bemba et al.* case addressing the same issue (hereinafter: “*Mangenda* OA13 Judgment”),²¹ Mr Mokom avers that a recent decision adopting a different

¹⁵ [Decision on Mr Mokom’s request for leave to reply to the Registry’s observations and related matters](#), 8 May 2025, ICC-01/14-01/22-364. *See also* [Request for Leave to Reply to the Registry’s Observations on the “Appeal Brief against the ‘Decision on Mr Mokom’s request for compensation’”](#), 5 May 2025, ICC-01/14-01/22-363.

¹⁶ [Reply to the Registry’s Observations on the “Appeal Brief against the ‘Decision on Mr Mokom’s request for compensation’”](#), ICC-01/14-01/22-365-Conf-Exp (public redacted version dated 14 May 2025 and registered on 15 May 2025 (ICC-01/14-01/22-365-Red)).

¹⁷ [Appeal Brief](#), paras 4, 46.

¹⁸ [Appeal Brief](#), para. 26. *See also* paras 31-34.

¹⁹ [Appeal Brief](#), paras 35-36.

²⁰ [Appeal Brief](#), para. 38.

²¹ 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 (OA13).

approach “cannot undermine the binding force of the Appeals Chamber’s jurisprudence”.²²

B. Relevant part of the Decision Granting Leave to Appeal

14. In the Decision Granting Leave to Appeal, the Article 85 Chamber considered that article 82(1)(d) of the Statute only covers interlocutory appeals arising in the course of criminal proceedings.²³ As, in its view, “article 85 decisions are neither interlocutory nor criminal in nature”, the Article 85 Chamber found it “difficult to imagine circumstances” where they could “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”, or in which immediate intervention of the Appeals Chamber could “materially advance the proceedings” in the criminal case to which those proceedings were related.²⁴ Such an interpretation, in the view of the Article 85 Chamber, is consistent with international human rights law as well as the *travaux préparatoires* of the Statute.²⁵

15. Noting the diverging jurisprudence on this matter, which “has, at times, provided for an expansive interpretation of the scope of article 82(1)(d) of the Statute”, the Article 85 Chamber found that it was not fully persuaded that decisions pursuant to article 85 fell within the ambit of article 82(1)(d) of the Statute.²⁶ Nonetheless, in the interest of legal certainty, the Article 85 Chamber decided to defer to the determination of the Appeals Chamber in terms of admissibility.²⁷

C. Determination by the Appeals Chamber

16. The Appeals Chamber recalls that “article 82 (1) (d) of the Statute clearly vests power solely in the Pre-Trial and Trial Chambers to certify appealable issues and to determine whether appellate resolution will materially advance the proceedings”.²⁸ This

²² [Appeal Brief](#), paras 43-45, referring to [Mangenda OA13 Judgment](#); Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the request for leave to appeal the ‘Decision on Mr Bemba’s claim for compensation and damages’](#), 1 October 2020, ICC-01/05-01/08-3697 (hereinafter: “Bemba Leave to Appeal Decision”).

²³ [Decision Granting Leave to Appeal](#), para. 9.

²⁴ [Decision Granting Leave to Appeal](#), para. 10.

²⁵ [Decision Granting Leave to Appeal](#), paras 11-12.

²⁶ [Decision Granting Leave to Appeal](#), paras 13, 15-16.

²⁷ [Decision Granting Leave to Appeal](#), para. 16.

²⁸ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court’](#), 18 December 2015, ICC-02/11-01/15-369 (OA7), para. 18.

notwithstanding, the Appeals Chamber has also found that “[w]here necessary, [...] [it] has to establish the true nature of an impugned decision, in order to ensure that the decision in question is appropriately before it, and that the appeal is determined pursuant to the correct legal basis”.²⁹ Accordingly, in cases such as the one at hand, where the issue of admissibility of the appeal has arisen, a consideration of certain aspects of the impugned decision is warranted with a view to determining of whether it is properly before the Appeals Chamber.

17. The Appeals Chamber thus finds it appropriate, by virtue of the present appeal as well as the uncertainty highlighted in the Decision Granting Leave to Appeal, to determine the admissibility of appeals under article 82(1)(d) of the Statute against compensation decisions rendered pursuant to article 85(1).

18. The Appeals Chamber recalls its previous ruling, made in the *Mangenda* OA13 Judgment, that “the preliminary decision on the unlawfulness of the arrest or detention”, pertaining to the first step “in a two-step decision-making process” regarding compensation, “may be considered to be an interlocutory decision”.³⁰ The Appeals Chamber therefore found that such decisions are appealable under article 82(1)(d) of the Statute.³¹ The Appeals Chamber, however, deems it pertinent to revisit the issue. It notes the differing practice within different chambers of this Court on the question of whether compensation decisions can be appealed under article 82(1)(d) of the Statute.³² Furthermore, and as will be discussed below, the procedure adopted by various chambers for compensation proceedings differs from that set out in rules 173 and 174 of the Rules.

²⁹ [Mangenda OA13 Judgment](#), para. 13, referring to Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the admissibility of the appeals against TC I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings](#), 14 December 2012, ICC-01/04-01/06-2953 (A1 A2 A3 OA21), para. 50. See also Appeals Chamber, *The Prosecutor v. Paul Gicheru*, [Decision on the Office of Public Counsel for the Defence’s request for the Prosecutor’s arguments on standing to be dismissed in limine and request for leave to reply](#), 29 January 2021, ICC-01/09-01/20-89 (OA), para. 14.

³⁰ [Mangenda OA13 Judgment](#), para. 17.

³¹ [Mangenda OA13 Judgment](#), paras 17-18.

³² [Bemba Leave to Appeal Decision](#), para. 17; Trial Chamber VI, *The Prosecutor v. Jean-Pierre Bemba Gombo 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, para. 13. See also [Decision Granting Leave to Appeal](#), para. 13.

19. The Appeals Chamber recalls that although it retains discretion as to whether or not to follow its previous interpretations of principles and rules of law, “[a]bsent ‘convincing reasons’, it will not depart from its previous decisions, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions”.³³ The Appeals Chamber will therefore consider whether there is a “convincing reason” to depart from its previous ruling.

1. *Interlocutory decisions*

20. Article 82(1) of the Statute reads in its relevant part as follows:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue 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.

21. The Appeals Chamber notes that a “decision” which can be appealed pursuant to article 82(1)(d) of the Statute is one that has been issued in the course of “proceedings”. The Appeals Chamber recalls in this regard that compensation proceedings are “stand alone” or “ancillary proceedings”, which are “separate from the criminal prosecution of [the person] before the Court”.³⁴ By contrast, the “proceedings”, within the meaning of article 82(1)(d) of the Statute, are typically trial proceedings concerning a criminal prosecution. Nonetheless, for the reasons that follow, the Appeals Chamber finds that

³³ Appeals Chamber, *The Prosecutor v. Mahamat Said Abdel Kani*, [Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Trial Chamber VI entitled “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions”](#), 19 May 2022, ICC-01/14-01/21-318 (OA3), para. 45, referring to Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention \(ICC-02/11-01/15-134-Red3\)”](#), 31 July 2015, ICC-02/11-01/15-172 (OA6), para. 14. See also Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Reasons for the “Decision on the Participation of Victims in the Appeal against the ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”](#), 20 October 2009, ICC-01/05-01/08-566 (OA2), para. 16; Appeals Chamber, *Situation in the Bolivarian Republic of Venezuela*, [Judgment on the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I’s “Decision authorising the resumption of the investigation pursuant to article 18\(2\) of the Statute”](#), 1 March 2024, ICC-02/18-89 (OA), para. 73.

³⁴ [Mangenda OA13 Judgment](#), para. 16.

proceedings other than trial proceedings concerning the person's guilt or innocence may also constitute "proceedings" within the meaning of article 82(1)(d) of the Statute.

22. In this regard, the Appeals Chamber previously clarified that article 82(1)(d) of the Statute, when read in the context of its second limb, relates to "judicial proceedings" or the "judicial process".³⁵ Similarly, the term "proceedings" is defined as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment".³⁶ In light of these references, restricting the scope of article 82(1)(d) of the Statute exclusively to proceedings concerning the person's prosecution is misguided. Indeed, the Statute does not make apparent any such restriction. The Appeals Chamber underlines that the wording of article 82(1)(d) refers to two alternatives in its first limb: the "fair and expeditious conduct of the proceedings" or "the outcome of the trial". The second alternative already places an emphasis on the outcome of the trial, referring to a criminal trial before this Court, thus necessarily encompassing proceedings concerning the person's prosecution within its scope. The Appeals Chamber considers that the first alternative, referring to the realm of proceedings more generally, thus envisions a broader scope of application that extends beyond the trial.

23. For these reasons, the Appeals Chamber finds that "proceedings" are not limited to trial proceedings concerning the person's guilt or innocence. Thus, even "stand alone" or ancillary proceedings, separate from the criminal prosecution of an individual before the Court, could be subject to appeal under article 82(1)(d) of the Statute if the relevant criteria for certification are satisfied.

24. Turning to another aspect of article 82(1)(d) of the Statute, the Appeals Chamber recalls that this provision "confers a right of appeal against interlocutory or intermediate decisions".³⁷ With respect to compensation proceedings, the Appeals Chamber held that "before making its final determination on whether or not to grant compensation under article 85 (1) of the Statute, the Chamber may need to take other decisions that could be considered to be interlocutory to the final outcome of such 'stand alone'

³⁵ *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 (OA3) (hereinafter: "DRC OA3 Judgment"), paras 14-15.

³⁶ Bryan A. Garner (ed.), *Black's Law Dictionary* (2019), p. 1457.

³⁷ [DRC OA3 Judgment](#), para. 36. See also [Mangenda OA13 Judgment](#), para. 17.

proceedings”.³⁸ The Appeals Chamber referred to “the preliminary decision on the unlawfulness of the arrest or detention”, issued under rule 173(2)(a) of the Rules, and noted that such a decision is the first step “in a two-step decision-making process”.³⁹ It is for this reason that the Appeals Chamber held that such a decision “may be considered to be an interlocutory decision”.⁴⁰

25. The Appeals Chamber notes that in the practice of this Court the aforementioned determination on whether any of the grounds under article 85 have been fulfilled has always been taken, at least in part, in the decision which also disposes of the request for compensation. It may be observed that while some requests for compensation, including that in the present case, have been based on pre-existing decisions, which in the person’s view established grounds for compensation,⁴¹ as postulated by rule 173(2) of the Rules, other requests have *preceded* a ruling on grounds for compensation,⁴² which then became part of the ultimate decision on compensation.⁴³ Similarly, in the present case, the Impugned Decision contains findings concerning the alleged detention of Mr Mokom. Compensation proceedings at this Court have thus not, *stricto sensu*, adopted the sequence of events as stipulated in the Rules.

2. “The decision of the Court” concerning unlawfulness of detention

26. The Appeals Chamber notes that rule 173(2) of the Rules refers to “the decision of the Court” concerning one or more of the grounds for seeking compensation. The procedure set out in rules 173 and 174 of the Rules, if applied strictly, presupposes the

³⁸ [Mangenda OA13 Judgment](#), para. 17.

³⁹ [Mangenda OA13 Judgment](#), para. 17.

⁴⁰ [Mangenda OA13 Judgment](#), para. 17.

⁴¹ See Counsel for Mr Ngudjolo, *The Prosecutor v. Mathieu Ngudjolo Chui*, [Requête en indemnisation sur pied de l’article 85 \(1\) et \(3\) du Statut de Rome](#), 14 August 2015, ICC-01/04-02/12-290, paras 31, 33; [Mr Mokom’s Request for Compensation](#), para. 8.

⁴² See Trial Chamber VI, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on request for compensation for unlawful detention](#), 26 February 2016, ICC-01/05-01/13-1663 (hereinafter: “Mangenda Compensation Decision”), para. 19; Counsel for Mr Bemba, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Mr. Bemba’s claim for compensation and damages](#), 8 March 2019, ICC-01/05-01/08-3673-Conf, with Annexes A-I (public redacted version filed on 19 March 2019 (ICC-01/05-01/08-3673-Red2)), para. 13; Counsel for Mr Blé Goudé, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Mr Blé Goudé’s Request for Compensation pursuant to Article 85\(3\) of the Rome Statute](#), 9 September 2021, ICC-02/11-01/15-1411-Conf-Exp (public redacted version filed on the same day (ICC-02/11-01/15-1411-Red)), para. 9.

⁴³ See [Mangenda Compensation Decision](#), para. 20; Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on Mr Bemba’s claim for compensation and damages](#), 18 May 2020, ICC-01/05-01/08-3694, paras 21-22; 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, paras 21-23.

issuing of such a decision by the chamber in charge of proceedings concerning the person. In this regard, the Appeals Chamber recalls that article 60 of the Statute enables the person to challenge the grounds for his or her detention and seek release as a remedy.⁴⁴ If the chamber in charge of proceedings concerning the person makes a determination of unlawfulness of detention in relation to the person's challenge under article 60, its decision may then constitute "the decision of the Court" within the meaning of rule 173(2)(a) of the Rules.

27. However, the Appeals Chamber is mindful of scenarios other than the one described above in which the person may wish to challenge the grounds of their detention, but the remedies under article 60 of the Statute are not readily available, for instance when the person continues to be detained after the charges against them were withdrawn. In such a case, the person may not be able to seek interim release under article 60(2) of the Statute, as it confers the right to make an application for release to "[a] person subject to a warrant of arrest". After the withdrawal of the charges, the person is no longer "subject to a warrant of arrest".⁴⁵

28. Furthermore, the Appeals Chamber notes that article 85(1) of the Statute and rule 173(2)(a) of the Rules are the only provisions of the Court's legal texts which use the term "unlawful arrest or detention". It is therefore possible that a chamber seised of a request for a finding of the unlawfulness of the person's detention may make a ruling which, depending on the context, may only acknowledge in substance that the person's detention was based on insufficient grounds, without expressly finding that it was unlawful. The question therefore arises whether the person may rely upon such a decision when seeking compensation and, if so, whether the compensation chamber may then make its own findings on the lawfulness of detention within the meaning of article 85(1).

⁴⁴ See Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda"](#), ICC-01/05-01/13-560 (OA4), 11 July 2014 (hereinafter: "*Mangenda* OA4 Judgment"), para. 47.

⁴⁵ Article 61(10) of the Statute reads: "Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor".

29. The Appeals Chamber must therefore consider whether the remedy of compensation for unlawful arrest or detention is only available in cases in which, prior to seeking compensation, the claimant has been able to obtain a decision of the Court that makes a finding on the lawfulness of the arrest or detention.

30. Neither the Statute, nor the Rules clarify how the person may obtain a determination of unlawfulness relevant to a future compensation claim. In this respect, the Appeals Chamber notes that one of the early proposals for the section of the future Statute concerning “Pre-trial detention or release”, contained the following provision: “A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation”.⁴⁶ Another proposal made at the time addressed the following question: “If the Court (or the appropriate national authorities) decides that the arrest or detention was illegal, what are the consequences of that decision?”. That proposal read: “If the Preliminary Investigations Chamber decides to release the person concerned because his arrest or detention was unlawful, it may award him compensation”.⁴⁷ It is significant that those proposals sought to confer upon the person the right to seek “a determination of the lawfulness under this Statute of the arrest or detention”. This is similar to the aforementioned reference in rule 173(2)(a) of the Rules to “the decision of the Court concerning [...] [t]he unlawfulness of the arrest or detention”.

31. The subsequent proposals retained much of this language and foreshadowed that the award of compensation in such cases might be regulated by a separate article of the future Statute:

A person arrested may apply to the [Presidency] [Pre-Trial Chamber] for a determination of the lawfulness under this Statute of any arrest warrant or order of detention issued by the Court. If the Presidency [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall order the

⁴⁶ United Nations, Preparatory Committee on the Establishment of an International Criminal Court, [*Report of the Preparatory Committee on the Establishment of an International Criminal Court*](#), Volume II (Compilation of proposals), 13 September 1996, Supplement No. 22A (A/51/22) (hereinafter: “1996 Proposals”), p. 139; *see also* pp. 141, 143, 145.

⁴⁷ [1996 Proposals](#), p. 143.

release of the person, [and may award compensation] [in accordance with article ...].⁴⁸

32. The proposals for such a separate article on compensation included the following:

Proposal 4

Compensation for irregular or unjustified detention

The Court may award compensation to a person who was held in detention, based on the prejudice caused to him by such detention, when the proceedings against him have concluded with a decision:

- to release him because of the irregularity of the arrest or detention [...].⁴⁹

33. Similar to the aforementioned proposals, this proposal also presupposed that any award of compensation would be preceded by “a decision [...] to release [the person] because of the irregularity of the arrest or detention”.

34. The proposal put forward in April 1998 read:

Article 84

Compensation to a suspect/accused/convicted person

1. Anyone who has been subject to arrest or detention in violation of the Statute, [the Rules] or internationally recognized human rights law shall have a right to compensation from the Court, in accordance with the Rules.

[...].⁵⁰

35. This proposal did not expressly require that a decision on the unlawfulness of detention be rendered before an award for compensation is made. However, it referred to the future Rules, where a procedure for claiming compensation would be set out. The ultimate proposal, which became the current article 85(1) of the Statute,⁵¹ corresponds

⁴⁸ United Nations, Preparatory Committee on the Establishment of an International Criminal Court, [Decisions taken by the Preparatory Committee at its Session held from 1 to 12 December 1997](#), 18 December 1997, A/AC.249/1997/L.9/Rev.1, p. 27. See also United Nations, Preparatory Committee on the Establishment of an International Criminal Court, [Report of the inter-sessional meeting from 19 to 30 January 1998 in Zutphen, The Netherlands](#), 4 February 1998, A/AC.249/1998/L.13 (hereinafter: “February 1998 Proposals”), p. 103.

⁴⁹ [February 1998 Proposals](#), p. 140.

⁵⁰ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, [Report of the Preparatory Committee on the Establishment of an International Criminal Court](#), 14 April 1998, A/CONF.183/2/Add.1, p. 130.

⁵¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, [Report of the Preparatory Committee on the Establishment of an International Criminal Court](#), 15 June – 17 July 1998, A/CONF.183/13 (Vol. III), pp. 122, 170, 291-292.

to article 9(5) of the International Covenant on Civil and Political Rights (“ICCPR”).⁵² The Rules set out a procedure for “[c]ompensation to an arrested or convicted person”. As indicated earlier, rule 173(2) requires that the request for compensation must be submitted “not later than six months from the date the person making the request was notified of the decision of the Court concerning [*inter alia*] [...] [t]he unlawfulness of the arrest or detention under article 85, paragraph 1”.

36. The drafting history of the relevant provisions of the Statute and the procedure set out in rules 173-174 of the Rules support the view that a request for compensation must be preceded by a decision concerning the unlawfulness of the person’s detention. The seemingly broad formulation of the ultimate article 85(1) of the Statute, adopting the text of article 9(5) of the ICCPR, may suggest that the scope of application is broader than that of article 60 of the Statute.

37. The Appeals Chamber also notes that the early proposals for a provision enabling the person to claim compensation for unlawful detention specified how the person might obtain a ruling on unlawfulness. Indeed, they stipulated that the person could apply for “a determination of the lawfulness” and indicated the body/chamber to which the person could apply.⁵³ The ultimate text of the Statute did not retain that language and contains no other express provision for seeking a determination whether the person’s detention was unlawful.⁵⁴ The Appeals Chamber is therefore of the view that these considerations should inform the interpretation of the requirement in rule 173(2)(a) of the Rules that, prior to making a request for compensation, the person must obtain a ruling on the alleged unlawfulness of the arrest or detention.

⁵² International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series vol. 999. Article 9(5) of the ICCPR reads: “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.

⁵³ [1996 Proposals](#), p. 139; *see also* pp. 141, 143, 145.

⁵⁴ *See Mangenda OA4 Judgment*, para. 47 (“the principal consideration [when release is sought under article 60 of the Statute] is not whether a warrant of arrest has been illegally issued, but whether the conditions for detention under article 58 (1) of the Statute are presently met (article 60 (2) of the Statute), whether there has been a change in the circumstances (article 60 (3) of the Statute), or whether the person has been detained for an unreasonably long period prior to trial, due to an inexcusable delay by the Prosecutor (article 60 (4) of the Statute)”). *See also* V. Nerlich, “Article 85 Compensation to an arrested or convicted person” in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (2021), p. 2434 (“[t]he Statute and RPE do not specifically provide for a procedural avenue that would result in a decision finding that arrest or detention were unlawful, though it is conceivable that decisions on detention under Article 60(2–4) may contain determinations as to the lawfulness or otherwise of arrest or detention”).

38. The Appeals Chamber notes in this regard that the language of rule 173 of the Rules supports the view that a compensation chamber may make a determination on aspects of the question of whether the person has been unlawfully detained. The Appeals Chamber takes note of the requirement in rule 173(1) that “[the] judges [of a compensation chamber] shall not have participated in any earlier judgement of the Court regarding the person making the request”. The Appeals Chamber is of the view that this requirement does not go so far as to exclude the judges of a compensation chamber from any determination concerning the lawfulness of the person’s detention. Rather, they may participate in such a determination as long as they have not participated in any earlier judgment in the main proceedings against the person.

39. Furthermore, rule 173(3) of the Rules requires that the request for compensation contain “*the grounds* and the amount of compensation requested” [emphasis added]. By requiring the request for compensation to contain “the grounds”, rule 173(3) allows for flexibility in this regard. If “the decision of the Court” does not cover all aspects of the grounds for compensation or only confirms the presence of such grounds in substance, without expressly stating that the person has been unlawfully detained, the claimant may fully develop “the grounds” in his or her request for compensation.

40. For these reasons, the Appeals Chamber finds by majority, with Judge Ibáñez Carranza setting out her separate opinion below, that, if it was not possible for the person to obtain “[a] decision of the Court” from the chamber in charge of proceedings concerning the person or if such a decision only contains incidental findings on unlawfulness, the compensation chamber, designated by the Presidency in accordance with rule 173(1) of the Rules, may need to make findings on at least some aspects of the lawfulness of the person’s detention.

3. *Whether decisions on the alleged unlawfulness of detention can be appealed against if taken by a compensation chamber*

41. The Appeals Chamber further notes that the Court’s practice in compensation cases shows that what, according to the Rules, should constitute a stand-alone decision establishing the presence or absence of a ground for compensation, becomes part of the ultimate decision on compensation.

42. In the view of the Appeals Chamber, the aforementioned considerations are relevant when assessing the appealability of the first limb of compensation decisions.

If the determinations on the unlawfulness of arrest or detention were made in a stand-alone decision of the relevant (pre-)trial chamber, they might, in certain circumstances, be appealable, whether as of right under article 82(1)(b) of the Statute, as a “decision granting or denying release”, or, depending on which chamber rendered such a decision and in what form, with leave of the chamber in charge. However, shifting at least part of the determination of unlawfulness to within the compensation decision results in a situation where the claimant’s ability to appeal an adverse finding may be limited, simply by virtue of the finding of unlawfulness being part of stand-alone proceedings. This would lead to an unjust result whereby the claimant or another party to the proceedings would be deprived of the ability to challenge a finding on the unlawfulness of the person’s arrest or detention that would often be appealable if the pronouncement were made by the chamber in charge of the main proceedings.

43. The Appeals Chamber finds that considerations of fairness militate in favour of regarding the determinations on unlawfulness of arrest or detention made by a compensation chamber as interlocutory decisions which can be appealed subject to leave of the compensation chamber. For these reasons, while underscoring the significance of the person’s diligence in seeking a ruling on unlawfulness from the chamber in charge of the main proceedings, the Appeals Chamber accepts by majority, with Judge Ibáñez Carranza setting out her separate opinion below, that there may be cases where obtaining such a ruling is not possible or where the ruling thus obtained only contains incidental findings concerning the alleged unlawfulness of detention. The Appeals Chamber finds by majority, with Judge Ibáñez Carranza setting out her separate opinion below, that (i) where the person requesting compensation was unable first to obtain a decision concerning the lawfulness of their detention or (ii) where such a decision is formulated in a way requiring the compensation chamber to make additional findings on the presence of grounds for compensation, such a “preliminary decision on the unlawfulness of the arrest or detention” can “be considered to be an interlocutory decision”,⁵⁵ regardless of its inclusion in the decision disposing of the compensation claim.

44. The Appeals Chamber points out that these considerations only pertain to the first limb of the decision disposing of a compensation claim. The actual decision on the

⁵⁵ [Mangenda OA13 Judgment](#), para. 17.

request for compensation, rendered pursuant to rule 174(3) of the Rules, “concludes or brings to an end the compensation proceedings”,⁵⁶ and is thus not an interlocutory decision that can be appealed pursuant to article 82(1)(d) of the Statute.

45. Accordingly, the Appeals Chamber finds no “convincing reason” to depart from its *Mangenda* OA13 Judgment.

46. In view of the foregoing considerations, the Appeals Chamber finds that the Impugned Decision, which contains findings concerning the lawfulness of the alleged detention of Mr Mokom, is an interlocutory decision which can be appealed subject to leave of the compensation chamber. The Appeals Chamber therefore finds that the present appeal is admissible.

47. Judge Ibáñez Carranza agrees that the present appeal is admissible. However, she notes that the only question before the Appeals Chamber in respect of admissibility is whether there are convincing reasons to depart from the *Mangenda* OA13 Judgment. In this regard, Judge Ibáñez Carranza considers that there is no need to engage in an interpretation of rule 173 of the Rules in this case. She notes that this case is exceptional in this respect, as the main proceedings against Mr Mokom had terminated before the commencement of the compensation proceedings. Therefore, it would not have been possible for Mr Mokom to obtain any ruling under rule 173 from the Pre-Trial Chamber. However, consistent with article 21(3) of the Statute and bearing in mind that the Court retained residual jurisdiction and Mr Mokom remained under the Court’s protection, the Article 85 Chamber and the Appeals Chamber are under a duty to consider Mr Mokom’s compensation claim and his appeal against the Impugned Decision. Judge Ibáñez Carranza would therefore have stated that the Appeals Chamber will follow the *Mangenda* OA13 Judgment in this instance, without engaging in a discussion of scenarios under rule 173 which are not relevant to this case.

IV. STANDARD OF REVIEW

48. In the present appeal, Mr Mokom alleges errors of law. With respect to errors of law, the Appeals Chamber has previously held that it

⁵⁶ [Mangenda OA13 Judgment](#), para. 17.

will not defer to the relevant Chamber’s interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.⁵⁷

49. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.⁵⁸ An impugned decision is “materially affected by an error of law” if the chamber “would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error”.⁵⁹

50. The above standard of review will guide the analysis of the Appeals Chamber.

V. MERITS

A. Preliminary issue: the scope of the certified issue

51. The Registry submits that “despite the clear issue certified on appeal”, Mr Mokom “formulated three grounds in support of his appeal” which raise issues that were not certified by the Article 85 Chamber and therefore fall outside the scope of the present appeal.⁶⁰ Mr Mokom replies that the three grounds of appeal fall within the scope of the issue certified for appeal, as they address alleged legal errors affecting the Article 85 Chamber’s finding that Mr Mokom “retained the option to avoid the restrictions applied to him by leaving the hotel”.⁶¹ The Appeals Chamber notes that the Registry does not provide reasons in support of its argument that the three grounds of appeal set out in the Appeal Brief fall outside of the certified issues. In any event, the Appeals Chamber recalls that the Article 85 Chamber granted leave to appeal with respect to the following issue: “whether the [Article 85] 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

⁵⁷ *Situation in the Republic of the Philippines*, [Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I’s “Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation”](#), 18 July 2023, ICC-01/21-77 (OA), para. 35 and references therein.

⁵⁸ *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, [Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Trial Chamber I of 17 February 2023 entitled “Decision on the admissibility of video \(DAR-OTP-0216-0119\) and records of telephone calls \(DAR-OTP-0216-0127, DAR-OTP-0216-0128\)”](#), 28 June 2023, ICC-02/05-01/20-982 (OA12) (hereinafter: “*Abd-Al-Rahman OA12 Judgment*”), para. 21 and references therein.

⁵⁹ [Abd-Al-Rahman OA12 Judgment](#), para. 21 and references therein.

⁶⁰ [Registry’s Observations](#), para. 9.

⁶¹ [Reply to Registry’s Observations](#), paras 14-16.

of persons released from the custody of the Court”.⁶² Having considered the arguments raised on appeal, discussed in detail below, the Appeals Chamber is satisfied that the three grounds of appeal raised in the Appeal Brief fall within the scope of the certified issue and are therefore properly before it.

B. The first and part of the second ground of appeal: the alleged failure to consider the Court’s duties under rule 185(1)

52. Under the first ground of appeal, Mr Mokom submits that the Article 85 Chamber erred in finding that he was at liberty to leave the hotel designated as premises of the Court and enter the Host State’s territory, as “such action would have overturned the mandatory Rule 185 process”.⁶³ Under the second ground of appeal, Mr Mokom argues that his liberty following his release “was limited to what was permitted under both the Court’s legal framework and the laws of the Host State”.⁶⁴

1. Relevant part of the Impugned Decision

53. The Article 85 Chamber set out factors relevant to a determination of whether an individual has been deprived of their liberty:

[T]he starting-point must be the person’s specific situation. The analysis must take into account a range of factors such as the type, duration, effects and manner of implementation of the measure in question. The subjective will of the person concerned is also an important consideration: a person who has validly consented to the confinement in question cannot be considered to have been deprived of their liberty.⁶⁵

54. Regarding persons released without conviction, the Article 85 Chamber noted that the applicable “legal framework does not specify a deadline for the completion of the process under rule 185 of the Statute, other than an indication that the Court must make these arrangements ‘as soon as possible’”.⁶⁶ The Article 85 Chamber also noted that “the legal framework does not provide a basis to deprive a person awaiting transfer pursuant to rule 185 of the Rules of their liberty”.⁶⁷

⁶² [Decision Granting Leave to Appeal](#), para. 29.

⁶³ [Appeal Brief](#), paras 47-56.

⁶⁴ [Appeal Brief](#), para. 59.

⁶⁵ [Impugned Decision](#), para. 114 (footnotes omitted).

⁶⁶ [Impugned Decision](#), para. 117.

⁶⁷ [Impugned Decision](#), para. 120.

55. The Article 85 Chamber noted that “the Court has an obligation to release the person from the detention centre, and the Host State has no obligation to receive the person onto its territory”.⁶⁸ In this regard, the Article 85 Chamber observed that

in order to facilitate Mr Mokom’s temporary stay in 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. Mr Mokom stayed at a hotel, which the Host State designated as the ‘premises of the Court’.⁶⁹

56. With regard to the circumstances of Mr Mokom’s stay in the Host State after his release from the Court’s detention centre, the Article 85 Chamber held that in the period in which Mr Mokom stayed in the hotel, namely between 17 October 2023 and 28 November 2023 (hereinafter: “Relevant Period”), “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”.⁷⁰

57. The Article 85 Chamber determined that if the Court had engaged the Host State to facilitate Mr Mokom’s transfer to the State obliged to receive him, “[i]t would then have been for Mr Mokom to decide whether to make a claim for international protection with the authorities of the Host State, potentially invoking the principle of non-refoulement”.⁷¹

2. *Summary of the submissions*

a. **Mr Mokom’s submissions**

58. Mr Mokom submits that in light of the Court’s obligations under rule 185 of the Rules, the Article 85 Chamber erred in finding that he was at liberty to leave the hotel designated as premises of the Court and enter the Host State’s territory.⁷² Mr Mokom argues that, since it is “through the Court’s actions and decisions” that the person has been brought onto the territory of the Host State, the Court has the “concomitant obligation”, under rule 185 of the Rules, to arrange for the transfer of the person to a safe state after his or her release from the Court’s custody, and that this is an obligation of result.⁷³ Referring to article 48 of the Headquarters Agreement between the

⁶⁸ [Impugned Decision](#), para. 121.

⁶⁹ [Impugned Decision](#), para. 127.

⁷⁰ [Impugned Decision](#), para. 132.

⁷¹ [Impugned Decision](#), para. 125; *see also* para. 126.

⁷² [Appeal Brief](#), paras 47, 56-58.

⁷³ [Appeal Brief](#), paras 47-50, 56.

International Criminal Court and the Host State (hereinafter: “Headquarters Agreement”) and a note verbale from the Host State, Mr Mokom argues that the Article 85 Chamber failed to consider the position of the Host State, according to which, “[i]f [he] had left the hotel in the absence of agreement from the Host State, the obligations listed under Rule 185 and Article 48 would have been violated”.⁷⁴ Mr Mokom contends that if he had left the hotel, “he would have [annihilated] the efforts taken by his Defence team and the Registry to secure his safe relocation to a third State”.⁷⁵

59. Mr Mokom argues that, in order to make an application for international protection with the Host State’s authorities, he “would have been required to illegally enter the Host State’s territory in violation of the laws of the Host State” and that his liberty following his release “was limited to what was permitted under both the Court’s legal framework and the laws of the Host State”.⁷⁶

b. Registry’s observations

60. The Registry refers to the Article 85 Chamber’s findings on the Registry’s diligence in its consultations with the relevant stake holders with a view to finding a solution for Mr Mokom’s temporary stay.⁷⁷ The Registry reiterates its previous submission that the restrictions on liberty alleged by Mr Mokom resulted from the practical arrangements requested by the Host State.⁷⁸ The Registry argues that Mr Mokom’s transfer to a state was delayed due to his refusal to return to the Central African Republic, which was obliged to receive him.⁷⁹ The Registry submits that the Host State had no duty to accept Mr Mokom’s release onto its territory or his temporary stay on its territory, and Mr Mokom “did not contest the most stringent practical arrangements”.⁸⁰

61. Regarding the possibility of entering the Host State’s territory and seeking international protection, the Registry submits that Mr Mokom was able to freely leave the hotel, which he did without prior consent by the Host State, in December 2023,

⁷⁴ [Appeal Brief](#), paras 51-53.

⁷⁵ [Appeal Brief](#), para. 55.

⁷⁶ [Appeal Brief](#), para. 59.

⁷⁷ [Registry’s Observations](#), para. 11, referring to [Impugned Decision](#), para. 135.

⁷⁸ [Registry’s Observations](#), para. 13.

⁷⁹ [Registry’s Observations](#), para. 14.

⁸⁰ [Registry’s Observations](#), paras 15-17.

showing that he neither was deprived of liberty when staying in the hotel nor had any concern for “making an illegal entrance on the Host State’s territory”.⁸¹

c. Mr Mokom’s submissions in reply

62. Mr Mokom submits that his departure from the hotel, to which the Registry refers, is of no significance, as it occurred outside the temporal scope of the present appeal.⁸²

3. Determination by the Appeals Chamber

63. Mr Mokom challenges the Article 85 Chamber’s finding that in the Relevant Period, he “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”.⁸³ His main argument appears to be that in making this finding, the Article 85 Chamber failed to duly consider the significance of the Court’s obligations under rule 185 of the Rules.⁸⁴

64. The Appeals Chamber notes that the Article 85 Chamber made the impugned finding as part of its determination of whether Mr Mokom was detained during the Relevant Period and was thus “the victim of unlawful [...] detention”, within the meaning of article 85(1) of the Statute. The Article 85 Chamber was guided by factors which it identified as relevant to the determination of whether the person has been detained. In particular, the Article 85 Chamber held that

[i]n order to determine whether an individual has been deprived of their liberty, the starting-point must be the person’s specific situation. The analysis must take into account a range of factors such as the type, duration, effects and manner of implementation of the measure in question. The subjective will of the person concerned is also an important consideration: a person who has validly consented to the confinement in question cannot be considered to have been deprived of their liberty.⁸⁵

65. In this regard, the Article 85 Chamber relied upon judgments of the European Court of Human Rights (hereinafter: “ECtHR”), which shed light on the

⁸¹ [Registry’s Observations](#), para. 18, referring to [Appeal Brief](#), p. 17.

⁸² [Reply to Registry’s Observations](#), para. 6.

⁸³ [Appeal Brief](#), paras 47, 56, referring to [Impugned Decision](#), para. 132.

⁸⁴ [Appeal Brief](#), paras 47, 52-53, 56.

⁸⁵ [Impugned Decision](#), para. 114 (footnotes omitted).

chamber's understanding of the factors it identified.⁸⁶ One of those judgments, the *Ilias and Ahmed* Judgment, concerned the applicants' confinement in a transit zone when their asylum requests were being examined.

66. In that judgment, the ECtHR underscored the difference between deprivation of liberty and "mere restrictions on liberty of movement".⁸⁷ It held that

[i]n order to determine whether someone has been "deprived of his liberty" [...], the starting-point must be his or her specific situation in reality and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question [...]. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance.⁸⁸

67. In the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants, the ECtHR listed the following factors relevant to a determination of the distinction between a restriction on liberty of movement and deprivation of liberty:

i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants [...].⁸⁹

68. The Appeals Chamber notes that the Article 85 Chamber considered these factors when determining the nature of Mr Mokom's stay at the hotel. Mindful of the scope of the issue certified for appeal,⁹⁰ the Appeals Chamber will focus on one aspect of that determination, which concerns Mr Mokom's ability to leave "the premises of the Court". In this regard, the ECtHR emphasised in the *Ilias and Ahmed* Judgment that

⁸⁶ [Impugned Decision](#), para. 114, fn. 288, referring to ECtHR (Grand Chamber), *Ilias and Ahmed v. Hungary*, Application no. 47287/15, [Judgment](#), 21 November 2019 (hereinafter: "*Ilias and Ahmed* Judgment"); ECtHR (Grand Chamber), *Z.A. and Others v. Russia*, Application nos. 61411/15, 61420/15, 61427/15 and 3028/16, [Judgment](#), 21 November 2019 (hereinafter: "*Z.A. and Others* Judgment").

⁸⁷ [Ilias and Ahmed Judgment](#), para. 211.

⁸⁸ [Ilias and Ahmed Judgment](#), para. 212.

⁸⁹ [Ilias and Ahmed Judgment](#), para. 217.

⁹⁰ "[W]hether the [Article 85] 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" ([Decision Granting Leave to Appeal](#), para. 29).

“the *de facto* possibility of [the applicants] leaving the transit zone for [the neighbouring] Serbia existed”.⁹¹ It noted that

in the absence of a direct threat to the applicants’ life or health, known by or brought to the attention of the Hungarian authorities at the relevant time, the discontinuation of the applicants’ asylum proceedings in Hungary was a legal issue which did not affect their physical liberty to move out of the transit zone by walking into Serbian territory. In the circumstances of the present case [...], the risk of the applicants’ forfeiting the examination of their asylum claims in Hungary and their fears about insufficient access to asylum procedures in Serbia, [...] did not render the applicants’ possibility of leaving the transit zone in the direction of Serbia merely theoretical. Therefore, it did not have the effect of making the applicants’ stay in the transit zone involuntary from the standpoint of Article 5 [of the European Convention on Human Rights] and, consequently, could not trigger, of itself, the applicability of that provision [which prohibits deprivation of liberty save for enumerated cases].⁹²

69. Although not expressly referring to these findings of the ECtHR, the Article 85 Chamber appears to have followed a similar approach. It emphasised that

[t]he CAR [Central African Republic], being the State of Mr Mokom’s nationality, was obliged to receive him under rule 185 of the Rules. However, in October 2023, Mr Mokom had been convicted *in absentia* in the CAR and sentenced to life imprisonment with hard labour. Within an hour of the issuance of the 17 October 2023 Order, Mr Mokom communicated to the Registry that he did not wish to be transferred to the CAR and he consistently maintained this position thereafter.⁹³

70. The Article 85 Chamber found that, had the Court engaged the Host State to facilitate Mr Mokom’s transfer to the State obliged to receive him, pursuant to rule 185(1) of the Rules, “[i]t would then have been for Mr Mokom to decide whether to make a claim for international protection with the authorities of the Host State, potentially invoking the principle of non-refoulement”.⁹⁴ In this regard, Mr Mokom submits that, in order to make such a claim for international protection, he “would have

⁹¹ [Ilias and Ahmed Judgment](#), para. 237.

⁹² [Ilias and Ahmed Judgment](#), para. 248 (emphasis added). By contrast, in the *Z.A. and Others Judgment*, the ECtHR found that “unlike in land border transit zones, in this particular case leaving the Sheremetyevo airport transit zone would have required planning, contacting aviation companies, purchasing tickets and possibly applying for a visa depending on the destination. The Court considers that the Government have failed to substantiate their assertion that despite these obstacles ‘the applicants were free to leave Russia at any time and go wherever they wished’. The practical and real possibility for the applicants to leave the airport transit zone and do so without a direct threat for their life or health, as known by or brought to the attention of the authorities at the relevant time, must be convincingly shown to exist” (*Z.A. and Others Judgment*, para. 154).

⁹³ [Impugned Decision](#), para. 124 (footnotes omitted).

⁹⁴ [Impugned Decision](#), para. 125; *see also* para. 126.

been required to illegally enter the Host State’s territory in violation of the laws of the Host State”.⁹⁵ The Appeals Chamber notes, however, that the Article 85 Chamber was mindful of the risk of contravention of the Host State’s law if Mr Mokom chose to leave the Court’s premises in such a scenario. It acknowledged that Mr Mokom ran such a risk, as the Host State authorities “did not regard him as having any lawful basis to be present on their territory”.⁹⁶

71. The Appeals Chamber, however, recalls that the Article 85 Chamber’s main enquiry was into the *de facto* possibility of Mr Mokom leaving the hotel at which he was accommodated. In the circumstances and consistent with the ECtHR jurisprudence upon which the Article 85 Chamber relied, it focused on (i) the nature of the restrictions imposed on Mr Mokom, (ii) the reasons for Mr Mokom’s preference to abide by the practical arrangements, and (iii) consequences of a breach of those arrangements.

72. While acknowledging the risk of “negative consequences arising from his status in the Host State”,⁹⁷ the Article 85 Chamber duly considered Mr Mokom’s ability to invoke the principle of *non-refoulement* and referred in this regard to the Appeals Chamber’s ruling affirming that “[t]he right to apply for asylum and the principle of *non-refoulement*, as well as the right to an effective remedy are internationally recognised human rights”.⁹⁸ The Appeals Chamber finds by majority, with Judge Ibáñez Carranza setting out her separate opinion below, Mr Mokom has not shown that potential consequences of him violating the Host State’s laws were such as to make it impossible for him to leave the hotel and seek international protection if his transfer to the State obliged to receive him had been arranged for.

73. The Article 85 Chamber also referred to Mr Mokom’s statements demonstrating his preference to abide by the practical arrangements, including his stay at a hotel designated as the “premises of the Court”, “which allowed him to lawfully remain in the Host State while consultations were ongoing between the Registry and States Parties

⁹⁵ [Appeal Brief](#), para. 59.

⁹⁶ [Impugned Decision](#), para. 126.

⁹⁷ [Impugned Decision](#), paras 134, 137.

⁹⁸ [Impugned Decision](#), para. 125, referring to Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui, Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute, 20 January 2014*, ICC-01/04-02/12-158 (A), para. 24 (footnotes omitted).

under rule 185 of the Rules”.⁹⁹ The Article 85 Chamber emphasised that Mr Mokom’s acceptance of the practical arrangements was driven by “[h]is reluctance to subject himself to the authorities of the Host State” and “[REDACTED]”.¹⁰⁰ It concluded that such reluctance “does not transform his situation during the [Relevant Period] into one of detention”.¹⁰¹

74. The Appeals Chamber finds by majority, with Judge Ibáñez Carranza setting out her separate opinion below, that the foregoing considerations are indeed relevant to the assessment of whether Mr Mokom was detained, within the meaning of article 85(1) of the Statute. The Article 85 Chamber’s reliance on the jurisprudence of the ECtHR in this regard is appropriate. Notably, it was correct for the Article 85 Chamber to be guided by the ECtHR’s aforementioned rulings that where the person prefers to be subjected to restrictions merely out of fear for the discontinuation of asylum proceedings, such fear for undesirable legal consequences, “without a direct threat for their life or health, as known by or brought to the attention of the authorities at the relevant time”, does not affect the person’s physical liberty to move out of the restricted area.¹⁰² In the case at hand, Mr Mokom’s wish not to be transferred to the CAR and his reluctance to subject himself to the authorities of the Host State in order to seek international protection, were factors relevant to the Article 85 Chamber’s overall conclusion that Mr Mokom’s stay at the hotel did not amount to a deprivation of liberty.

75. The Appeals Chamber takes note of Mr Mokom’s submission that his liberty in the Relevant Period “was limited to what was permitted under both the Court’s legal framework and the laws of the Host State”.¹⁰³ The Appeals Chamber recalls the aforementioned ruling of the ECtHR that “the discontinuation of the applicants’ asylum proceedings in Hungary was a *legal issue* which did not affect their physical liberty to move out of the transit zone by walking into Serbian territory”.¹⁰⁴ Similarly, in the present case, the Article 85 Chamber considered that the risk of undesirable legal consequences, including for Mr Mokom breaching the Host State’s laws in order to seek international protection, did not affect his physical liberty to leave the hotel at

⁹⁹ [Impugned Decision](#), paras 127, 131, 137.

¹⁰⁰ [Impugned Decision](#), paras 134, 137.

¹⁰¹ [Impugned Decision](#), para. 134.

¹⁰² [Ilias and Ahmed Judgment](#), para. 248; [Z.A. and Others Judgment](#), para. 154.

¹⁰³ [Appeal Brief](#), para. 59.

¹⁰⁴ [Ilias and Ahmed Judgment](#), para. 248 (emphasis added).

which he was accommodated.¹⁰⁵ Such a risk thus did not have the effect of making his stay in the hotel involuntary such that it would amount to detention.¹⁰⁶ The Appeals Chamber therefore finds that Mr Mokom has not demonstrated that the Article 85 Chamber erred in considering that the restrictions to his liberty imposed by “both the Court’s legal framework and the laws of the Host State”¹⁰⁷ were not such that his stay at the hotel would be akin to detention.

76. Turning to Mr Mokom’s argument that the Article 85 Chamber failed to take into account the Court’s obligations under rule 185 of the Rules,¹⁰⁸ the Appeals Chamber recalls that rule 185(1) provides, in its relevant part, that:

where a person surrendered to the Court is released from the custody of the Court [...], the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person [...] to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State.

77. Mr Mokom argues that “[t]he use of the obligatory ‘shall’ in Rule 185 indicates an obligation of result, not an obligation of means”¹⁰⁹ and that if he had left the hotel without the Host State’s agreement, “the obligations listed under Rule 185 and Article 48 would have been violated”.¹¹⁰ The Appeals Chamber understands Mr Mokom to contend that the mandatory nature of the “arrangements” made by the Court affected his ability to leave the hotel at which he was accommodated. However, other than contending that the Court’s duty to make such arrangements is an obligation of result,¹¹¹ Mr Mokom does not explain why this obligation restricted his ability to leave the hotel.

78. The Article 85 Chamber found that Mr Mokom’s departure from the hotel, without the Host State’s consent, “would have had the effect of unilaterally putting an end to the practical arrangements”.¹¹² As noted by the Article 85 Chamber, the only

¹⁰⁵ [Impugned Decision](#), paras 134, 137.

¹⁰⁶ See [Ilias and Ahmed Judgment](#), para. 248; [Impugned Decision](#), para. 134.

¹⁰⁷ [Appeal Brief](#), para. 59.

¹⁰⁸ [Appeal Brief](#), paras 47, 52-53, 56.

¹⁰⁹ [Appeal Brief](#), para. 49.

¹¹⁰ [Appeal Brief](#), paras 53, 56.

¹¹¹ [Appeal Brief](#), paras 47-50, 56.

¹¹² [Impugned Decision](#), para. 132.

consequence of putting an end to the ongoing process in this manner, would be that Mr Mokom would face “negative consequences arising from his status in the Host State”, which would be “undesirable” for him.¹¹³ It was thus immaterial in this context that those arrangements were being made by the Court and that the Court was under a duty to make them. Whether mandatory or not, those arrangements could be forfeited by Mr Mokom. Notably, the Court could not have detained Mr Mokom or imposed any other restrictions upon his liberty if he had unilaterally put an end to the ongoing efforts to secure his transfer to another State. On the contrary, as noted by the Article 85 Chamber, “the position of the Court – that [it] did not have any legal basis to restrict Mr Mokom’s liberty – had been made clear at the outset in the 17 October 2023 Order”.¹¹⁴ The Appeals Chamber is therefore not persuaded that the mandatory nature of the Court’s obligations under rule 185(1) of the Rules had any bearing on Mr Mokom’s ability to forfeit the ongoing process of making arrangements for his transfer to another State.

79. The Appeals Chamber notes the Registry’s submission that Mr Mokom was able to freely leave the hotel, which he did without prior consent by the Host State, in December 2023.¹¹⁵ However, as correctly noted by Mr Mokom,¹¹⁶ these considerations fall outside of the scope of the present appeal. The Article 85 Chamber did not discuss these events in the Impugned Decision. Nor is it argued on appeal that the Article 85 Chamber ought to have considered them as relevant to its determination. The Appeals Chamber will disregard this submission of the Registry.

80. In view of the foregoing, the Appeals Chamber rejects the first ground of appeal and part of the second ground of appeal.

81. Judge Ibáñez Carranza would have found an error under the first ground of appeal and part of the second ground of appeal, but without a material effect. She is of the view that the Article 85 Chamber erred in attaching too much weight to the fact that “Mr Mokom retained the option to avoid the restrictions applied to him by leaving the

¹¹³ [Impugned Decision](#), paras 134, 137.

¹¹⁴ [Impugned Decision](#), para. 132.

¹¹⁵ [Registry’s Observations](#), para. 18, referring to [Appeal Brief](#), p. 17.

¹¹⁶ [Reply to Registry’s Observations](#), para. 6.

hotel, which would have had the effect of unilaterally putting an end to the practical arrangements”.¹¹⁷

82. Judge Ibáñez Carranza would commence by setting out the elements of “detention” or “deprivation of liberty”. She underscores that not every restriction of movement amounts to detention.

83. Judge Ibáñez Carranza notes that the Inter American Court of Human Rights (hereinafter: “IACtHR”) interprets “deprivation of liberty” under article 7 of the American Convention of Human Rights to mean any situation in which a person “cannot or is unable to leave or abandon at will the place or establishment where she or he has been placed”, regardless of whether they have been formally arrested or whether the situation is classified as detention under national law.¹¹⁸ This interpretation encompasses not only criminal incarceration but also other forms of physical restraint such as migratory detention (including of children), institutionalization of minors pending adoption, and potentially involuntary or forced hospitalization.¹¹⁹

84. According to the case law of the Court, ECtHR, UN Human Rights Committee, and IACtHR, the factors for determining whether a situation constitutes detention or deprivation of liberty, which, in the present context, must be established in the light of article 85(1) of the Statute, include:

(i) freedom to leave: whether the individual is truly able to exit the location at will, or whether legal or physical barriers effectively prevent to leave;¹²⁰

(ii) degree of control and implementation: the extent of supervision, surveillance, or regulation of the person’s movement by the authorities, and how the restriction is enforced in practice, including its real-life impact on the individual;¹²¹

¹¹⁷ [Impugned Decision](#), para. 132.

¹¹⁸ IACtHR, Advisory Opinion, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, 19 August 2014, OC-21/14 (hereinafter: “IACtHR Advisory Opinion”), para. 145.

¹¹⁹ Ludovic Hennebel and Hélène Tigroudja, *The American Convention on Human Rights: A Commentary*, Oxford University Press (2022), p. 286.

¹²⁰ United Nations Human Rights Committee, International Covenant on Civil and Political Rights General comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, [CCPR/C/GC/35](#), para. 5; IACtHR Advisory Opinion, para. 145.

¹²¹ ECtHR (Plenary), *Guzzardi v. Italy*, Application no. 7367/76, [Judgment](#), 6 November 1980 (hereinafter: “*Guzzardi v. Italy*”), paras 91, 95; [Z.A. and Others Judgment](#), paras 151, 154.

(iii) duration and conditions: how long the restrictions lasted and the nature of the living or holding conditions;¹²²

(iv) voluntariness and consent: whether the individual has freely agreed to the arrangement, based on informed and realistic options;

(v) purpose and context: the reason behind the restriction, such as ensuring safety, pending relocation, or immigration control, and whether less invasive alternatives were considered;

(vi) access to social interaction: the extent to which the person is isolated or has access to others and external communication;

(vii) consent under pressure: even if formal consent exists, it may not be valid if given under duress, coercion, or a lack of alternatives;

(viii) authority and official involvement: whether the restriction is imposed or sustained by the authorities.

85. Regarding the last of these elements – the requirement that a person is deprived of liberty by order of an authority, Judge Ibáñez Carranza takes note of article 4(2) of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which establishes that “deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will *by order of any judicial, administrative or other authority*” (emphasis added).

86. Judge Ibáñez Carranza considers that the term “unlawful detention” in article 85(1) of the Statute should be understood in light of article 55(1)(d), which prohibits “arbitrary detention” and affirms that a person “shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute”.¹²³

87. Judge Ibáñez Carranza takes note of the international jurisprudence where deprivation of liberty was established on the basis of “objective” factors. For instance, in the case of *Storck v. Germany*, the ECtHR found that, “[o]bjectively, [the applicant] must [...] be considered to have been deprived of her liberty”, because

¹²² [Z.A. and Others Judgment](#), paras 148, 194; [Guzzardi v. Italy](#), paras 92-93.

¹²³ See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed.) (2016), pp. 865, 1259; Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (2021), paras 3575, 5084.

[she] was placed in a locked ward [of a clinic][,] [s]he was under the continuous supervision and control of the clinic personnel and was not free to leave it during her entire stay there of approximately twenty months. When the applicant attempted to escape it had been necessary to shackle her in order to keep her in the clinic. On the one occasion she managed to escape, she had had to be brought back by the police. She was also unable to maintain regular social contact with the outside world.¹²⁴

88. In the present case, these factors were not established. Mr Mokom was not placed in a locked room. On the contrary, apart from the very first day of his stay at the hotel, Mr Mokom was able to leave his hotel room. He was not under continuous supervision and control. Furthermore, there was no direct threat of use of physical force against him if he attempted to leave. Most importantly, Mr Mokom was not placed in the hotel by order of the Court or the Host State's authorities. Rather, the Host State proposed a set of practical arrangements for his stay in the hotel and his lawyer consented to those restrictions.

89. The main restriction to Mr Mokom's movement was the requirement that he remain within the hotel and [REDACTED]. According to Judge Ibáñez Carranza, Mr Mokom's stay at the hotel did not amount to detention. Rather, Mr Mokom was placed under a system of restrictions to his freedom of movement, while remaining under the protection of the Court pending the finalisation of his transfer to another State.

90. Turning to the factor which the Article 85 Chamber identified as the most relevant, Judge Ibáñez Carranza is not persuaded that Mr Mokom was at liberty to breach the practical arrangements. By leaving the hotel, and thus leaving the premises of the Court, Mr Mokom would have had to illegally enter the territory of the Host State, risking serious consequences. He was also not free to return to the CAR, where he had been convicted *in absentia* and sentenced to life imprisonment with hard labour. Given his personal circumstances, Mr Mokom had no choice but to consent to the practical arrangements and undertake to remain in the hotel pending the arrangements for his transfer to another State. Judge Ibáñez Carranza is also concerned by the Court suggesting that Mr Mokom should have breached the law in order to regain full freedom

¹²⁴ ECtHR (Third Section), *Storck v. Germany*, Application no. 61603/00, [Judgment](#), 16 June 2005, para. 73.

of movement. Such burden should not have been placed on Mr Mokom, as he was under the protection of the Court and the Host State.

91. Having found this error of law, Judge Ibáñez Carranza would proceed to determine whether this error materially affected the Impugned Decision. As discussed above, Judge Ibáñez Carranza is of the view that Mr Mokom's stay at the hotel did not amount to detention anyway.

92. For these reasons, Judge Ibáñez Carranza would have found that the aforementioned error did not materially affect the Impugned Decision, because the Article 85 Chamber's ultimate conclusion that Mr Mokom's stay at the hotel did not amount to detention is correct, in light of the foregoing considerations.

C. Part of the second ground of appeal: whether the failure to notify Mr Mokom of the relaxation of restrictions had an impact on the characterisation of his situation

93. Under the second part of the second ground of appeal, Mr Mokom submits that the Article 85 Chamber erred in finding that the Registry's failure to communicate to him the relaxation of the restrictions proposed by the Host State "did not change the [Article 85 Chamber's] view on the overall characterisation of Mr Mokom's situation" because "Mr Mokom always retained the option to terminate the practical arrangements by leaving the hotel".¹²⁵

1. Relevant background and part of the Impugned Decision

a. Relevant chronology of events

94. As noted above, in the 17 October 2023 Order, the Pre-Trial Chamber instructed the Registry to "make all necessary arrangements to transfer Mr Mokom to a State which is obliged to receive him or to another State".¹²⁶ The Host State agreed to the Registry's proposal to designate a hotel as "premises of the Court".¹²⁷

95. During the Relevant Period, the Host State agreed to four sets of practical arrangements, each predicated upon a gradual relaxation of the conditions of

¹²⁵ [Appeal Brief](#), paras 63-64, referring to [Impugned Decision](#), para. 134.

¹²⁶ [17 October 2023 Order](#), para. 10, p. 6.

¹²⁷ [Impugned Decision](#), paras 75, 77.

Mr Mokom’s stay in the hotel. The main conditions proposed in each of the four practical arrangements are detailed below.

96. The first set of the practical arrangements (hereinafter: “First Practical Arrangements”) included the following requirements: [REDACTED] Mr Mokom would not leave the hotel room [REDACTED].¹²⁸ Mr Mokom did not oppose the First Practical Arrangements, and the Registry implemented them as of that day.¹²⁹

97. On 23 October 2023, the Host State informed the Registry of its intention to apply a second set of practical arrangements (hereinafter: “Second Practical Arrangements”), which differed from the First Practical Arrangements in that: [REDACTED].¹³⁰

98. On 26 October 2023, the Host State informed the Registry that it wished to apply a third set of practical arrangements, [REDACTED].¹³¹

99. On 30 October 2023, the Pre-Trial Chamber stated that Mr Mokom was “subjected to a regime that appears to amount to a form of house arrest”.¹³² The Pre-Trial Chamber instructed the Registry to provide clarification [REDACTED].¹³³ The Pre-Trial Chamber instructed the Registry “to refrain from presenting to Mr Mokom any undertaking”.¹³⁴

100. On 14 November 2023, the Host State informed the Registry that it could agree to the following practical arrangements: [REDACTED].¹³⁵

101. On 21 November 2023, the Pre-Trial Chamber issued an order (hereinafter: “21 November 2023 Order”), in which it held that, in the specific circumstances of Mr Mokom, it was appropriate to request him to (hereinafter: “Practical Arrangements in the Order”):

¹²⁸ [Impugned Decision](#), para. 77, fn. 176; [Registry’s Submissions](#), para. 15.

¹²⁹ [Registry’s Submissions](#), para. 17; [Impugned Decision](#), para. 131.

¹³⁰ [Impugned Decision](#), para. 85, fn. 190; [Registry’s Submissions](#), para. 26.

¹³¹ [Impugned Decision](#), para. 86, fn. 193; [Registry’s Submissions](#), paras 28-29, fn. 40.

¹³² [Impugned Decision](#), para. 87; [Registry’s Submissions](#), para. 32.

¹³³ [Impugned Decision](#), para. 87; [Registry’s Submissions](#), para. 34.

¹³⁴ [Transcript of hearing on 9 September 2024](#), ICC-01/14-01/22-T-009-Conf (public redacted version registered on the same day (ICC-01/14-01/22-T-009-Red2)), p. 55, lines 22-23; [Impugned Decision](#), para. 87.

¹³⁵ [Impugned Decision](#), para. 93, fn. 218; [Registry’s Submissions](#), para. 39.

(i) physically report to the Court twice a week; (ii) carry an identification document at all times; (iii) agree, without being obliged, to remain in his hotel room from 00:00 until 06:00 hours; (iv) agree, without being obliged, to being accompanied by an ICC staff member when leaving his hotel room as long as his rights are not restricted in this manner; and (v) inform, without requesting permission, the Registry regarding any travel outside the municipality of The Hague 48 hours in advance of any such travel.¹³⁶

102. On 22 November 2023, Mr Mokom signed a form consenting to abide by the Practical Arrangements in the Order.¹³⁷ On 28 November 2023, the Host State informed the Registry that it agreed to the Practical Arrangements in the Order.¹³⁸ Mr Mokom was informed about the Host State's approval and began to leave the hotel.¹³⁹

b. Relevant part of the Impugned Decision

103. The Article 85 Chamber found that the Registry's failure to inform Mr Mokom of certain relaxations of the restrictions proposed by the Host State during the Relevant Period "was notably in compliance with the Pre-Trial Chamber's direction that Mr Mokom should not be presented with the required undertakings".¹⁴⁰ The Article 85 Chamber further found that

[h]owever, these issues do not change the Chamber's view on the overall characterisation of Mr Mokom's situation. This is because [...] Mr Mokom always retained the option to terminate the practical arrangements by leaving the hotel. His reluctance to subject himself to the authorities of the Host State does not transform his situation during the Hotel Stay Period into one of detention.¹⁴¹

2. Summary of the submissions

a. Mr Mokom's submissions

104. Mr Mokom submits that the Article 85 Chamber erred in finding that the Registry's failure to communicate the relaxation of the restrictions proposed by the Host State to Mr Mokom through four sets of practical arrangements "did not change the [Article 85 Chamber's] view on the overall characterisation of Mr Mokom's situation" because "Mr Mokom always retained the option to terminate the practical

¹³⁶ [Order regarding arrangements pending Mr Mokom's transfer](#), ICC-01/14-01/22-294-Conf-Exp (public redacted version filed on 11 April 2024 (ICC-01/14-01/22-294-Red)), para. 5; [Impugned Decision](#), para. 96.

¹³⁷ [Impugned Decision](#), para. 101; [Registry's Submissions](#), para. 47.

¹³⁸ [Impugned Decision](#), para. 106; [Registry's Submissions](#), para. 50.

¹³⁹ [Impugned Decision](#), para. 106; [Registry's Submissions](#), paras 51-52.

¹⁴⁰ [Impugned Decision](#), para. 134.

¹⁴¹ [Impugned Decision](#), para. 134.

arrangements by leaving the hotel”.¹⁴² Mr Mokom also contends that the instruction of the Pre-Trial Chamber to the Registry to refrain from presenting any undertakings to Mr Mokom, did not prevent the Registry from informing Mr Mokom about the gradual relaxations of the conditions of stay.¹⁴³

b. Registry’s observations

105. The Registry refers to the 21 November 2023 Order, according to which Mr Mokom only had to “inform, without requesting permission, the Registry regarding any travel outside the municipality The Hague 48 hours in advance of such travel”.¹⁴⁴ The Registry further avers that Mr Mokom did not express any concerns in his communications with the Pre-Trial Chamber of the Registry regarding an alleged “breach of the practical arrangement” or about illegally entering the territory of the Host State by leaving unaccompanied the hotel and the municipality of The Hague.¹⁴⁵

3. Determination by the Appeals Chamber

106. Mr Mokom challenges the Article 85 Chamber’s finding that the Registry’s failure to communicate the relaxation of the restrictions proposed by the Host State to Mr Mokom “did not change the [Article 85 Chamber’s] view on the overall characterisation of Mr Mokom’s situation”.¹⁴⁶

107. In this respect, the Article 85 Chamber noted that, following the termination of the proceedings against Mr Mokom, the Court no longer had a legal basis to detain him.¹⁴⁷ As reflected in the Impugned Decision, following the 17 October 2023 Order, the Host State agreed that, pending the preparations for a release of Mr Mokom to a third state, he would stay at a hotel designated as “premises of the Court”.¹⁴⁸ As discussed above, during the Relevant Period, the Host State agreed to four sets of practical arrangements, each predicated upon a gradual relaxation of the conditions of Mr Mokom’s stay in the hotel.

¹⁴² [Appeal Brief](#), paras 63-64, referring to [Impugned Decision](#), para. 134.

¹⁴³ [Appeal Brief](#), para. 65.

¹⁴⁴ [Registry’s Observations](#), para. 19, referring to [21 November 2023 Order](#), para. 5.

¹⁴⁵ [Registry’s Observations](#), para. 20.

¹⁴⁶ [Appeal Brief](#), para. 63, referring to [Impugned Decision](#), para. 134.

¹⁴⁷ [Impugned Decision](#), para. 113.

¹⁴⁸ [Impugned Decision](#), para. 75.

108. According to the practical arrangements, if agreed upon and implemented immediately, the restrictions on Mr Mokom’s freedom of movement were or would be the following. Between 17 October 2023 and 23 October 2023 Mr Mokom could not leave the hotel.¹⁴⁹ After 23 October 2023, Mr Mokom [REDACTED].¹⁵⁰ Between 14 November 2023 until 21 November 2023, Mr Mokom [REDACTED].¹⁵¹ The Appeals Chamber, however, notes that despite the agreement of the Host State to the above practical arrangements, the Registry did not inform Mr Mokom timely about the proposed relaxations.¹⁵² Thus, in so far as Mr Mokom was not aware of certain relaxations of the practical arrangements, he proceeded on the basis of the conditions set out in the First Practical Arrangements throughout a significant part of the Relevant Period.

109. The Appeals Chamber recalls its above finding that Mr Mokom demonstrated no error in the Article 85 Chamber’s conclusion that the restrictions to his liberty imposed by the Court’s legal framework and the laws of the Host State did not amount to detention.¹⁵³ The Appeals Chamber notes that when concluding that, during the Relevant Period, “Mr Mokom retained the option to avoid the restrictions applied to him by leaving the hotel”,¹⁵⁴ the Article 85 Chamber acknowledged that if Mr Mokom chose to do so, he “[REDACTED]”.¹⁵⁵ In making these findings, the Article 85 Chamber duly considered the practical arrangements and the possible consequences of breaching their terms if Mr Mokom chose to leave the hotel.¹⁵⁶ In its analysis, the Article 85 Chamber focused on the main restriction to Mr Mokom’s liberty of movement, which was the requirement that he stayed at a hotel designated as “the premises of the Court”.¹⁵⁷

110. The Article 85 Chamber duly noted the Registry’s failure to inform Mr Mokom of certain relaxations to the restrictions imposed on Mr Mokom.¹⁵⁸ However, none of

¹⁴⁹ [Impugned Decision](#), para. 77, fn. 176; [Registry’s Submissions](#), paras 15, 21.

¹⁵⁰ [Impugned Decision](#), paras 85-86, fns 190, 193; *see also* fn. 330; [Registry’s Submissions](#), paras 26, 28-29, fn. 40.

¹⁵¹ [Impugned Decision](#), para. 93, fn. 218; [Registry’s Submissions](#), para. 39.

¹⁵² [Impugned Decision](#), para. 134.

¹⁵³ *See* paragraph 75 above.

¹⁵⁴ [Impugned Decision](#), para. 132.

¹⁵⁵ [Impugned Decision](#), para. 137.

¹⁵⁶ [Impugned Decision](#), paras 131-134, 137.

¹⁵⁷ [Impugned Decision](#), para. 127.

¹⁵⁸ [Impugned Decision](#), para. 134, fn. 330.

the relaxations of which Mr Mokom was notified with delay affected the aforementioned requirement that he stayed at “the premises of the Court”. Despite those relaxations, Mr Mokom’s ability to leave “the premises of the Court” continued to be restricted in the same way. If he left, the Host State would “[treat] him as entering/residing on its territory illegally”.¹⁵⁹ Therefore, the Appeals Chamber finds that, contrary to Mr Mokom’s submission,¹⁶⁰ the Article 85 Chamber did not err in concluding that the Registry’s failure to inform Mr Mokom of the relaxation of some of the practical arrangements did not change the Article 85 Chamber’s view on the characterisation of his situation.¹⁶¹

111. The Appeals Chamber takes note of Mr Mokom’s related submission that the Registry’s failure to communicate the gradual relaxations of the restrictions, “deprived [him] of liberties that he was gradually entitled to legally exercise”.¹⁶² However, in view of the foregoing considerations, the Appeals Chamber finds that, even if Mr Mokom’s liberty of movement was restricted as a result of the delayed notification of the relaxation of restrictions, this has no bearing on the overall characterisation of his stay at the hotel. Indeed, even under the First Practical Arrangements, which were the most stringent, his stay at “the premises of the Court” did not amount, in the view of the Article 85 Chamber, to detention.

112. The Appeals Chamber takes note of Mr Mokom’s argument that the instruction of the Pre-Trial Chamber to the Registry to refrain from presenting any undertakings to him, did not prevent the Registry from informing Mr Mokom about the gradual relaxations of the conditions of stay.¹⁶³ The Appeals Chamber notes in this regard that, in its communication of 30 October 2023, the Pre-Trial Chamber “[REDACTED]”.¹⁶⁴ The Pre-Trial Chamber also found that “[REDACTED]”.¹⁶⁵ In this regard, the Pre-Trial Chamber instructed the Registry to refrain from presenting Mr Mokom with the required undertakings.¹⁶⁶ Therefore, the Appeals Chamber considers that by refraining

¹⁵⁹ [Impugned Decision](#), para. 137.

¹⁶⁰ [Appeal Brief](#), para. 63.

¹⁶¹ [Impugned Decision](#), para. 134.

¹⁶² [Appeal Brief](#), para. 64.

¹⁶³ [Appeal Brief](#), para. 65.

¹⁶⁴ [Impugned Decision](#), para. 87.

¹⁶⁵ [Impugned Decision](#), para. 87; [Registry’s Submissions](#), para. 33.

¹⁶⁶ [Impugned Decision](#), para. 87; [Registry’s Submissions](#), para. 34.

from informing Mr Mokom about the subsequent practical arrangements, the Registry merely followed the instruction of the Pre-Trial Chamber.¹⁶⁷

113. The Appeals Chamber considers that the Registry duly followed the instructions of the Pre-Trial Chamber. Mr Mokom does not explain why the Registry ought to have disregarded those instructions and, if it had done so, how that would have affected the Article 85 Chamber's overall conclusion on the characterisation of Mr Mokom's stay at the hotel.

114. For the above reasons, the Appeals Chamber rejects Mr Mokom's arguments on this matter, raised under the second ground of appeal.

D. The third ground of appeal: whether Mr Mokom could have left the hotel in the absence of [REDACTED]

115. Under the third ground of appeal, Mr Mokom submits that the Article 85 Chamber erred in law in finding that Mr Mokom was entitled to leave the hotel without having been informed about [REDACTED] during the rule 185 process.¹⁶⁸

1. Relevant background and part of the Impugned Decision

a. Relevant chronology of events

116. On 17 October 2023, the Host State authorities informed the Registry that [REDACTED].¹⁶⁹

117. On 26 October 2023, the Host State informed the Registry that [REDACTED], and that the Second Practical Arrangements took into consideration [REDACTED].¹⁷⁰ However, the Host State did not provide the Registry with a copy [REDACTED].¹⁷¹

118. On 30 October 2023, the Pre-Trial Chamber instructed the Registry to [REDACTED].¹⁷²

¹⁶⁷ [Impugned Decision](#), paras 87, 134.

¹⁶⁸ [Appeal Brief](#), paras 66-70.

¹⁶⁹ [Impugned Decision](#), para. 77, fn. 176; [Registry's Submissions](#), para. 15.

¹⁷⁰ [Impugned Decision](#), fn. 191; [Registry's Submissions](#), para. 27.

¹⁷¹ [Impugned Decision](#), fn. 191; Registry, [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-Red2 (confidential redacted version filed on 30 November 2023 (ICC-01/14-01/22-280-Conf-Red); public redacted version filed on 31 January 2024 (ICC-01/14-01/22-280-Red)), para. 25.

¹⁷² [Impugned Decision](#), para. 87; [Registry's Submissions](#), para. 34.

119. On 1 November 2023, the Host State informed the Registry that further to [REDACTED].¹⁷³ In the Impugned Decision, the Article 85 Chamber noted that there was no indication of the date on which this occurred and that, according to Mr Mokom, [REDACTED].¹⁷⁴

b. Relevant part of the Impugned Decision

120. The Article 85 Chamber considered that Mr Mokom had “initially expressly consented to the restrictions in place during his hotel stay”.¹⁷⁵ As discussed earlier in this judgment, the Article 85 Chamber found that, during the Relevant Period, Mr Mokom “retained the option to avoid the restrictions applied to him by leaving the hotel”.¹⁷⁶

2. Summary of the submissions

a. Mr Mokom’s submissions

121. Mr Mokom submits that the Article 85 Chamber erred in law in finding that he was in a position to leave the premises of the Court without having been informed about [REDACTED].¹⁷⁷ Mr Mokom also argues that the Article 85 Chamber erred in stating that he had been informed about [REDACTED], contrary to his submission to the Article 85 Chamber “that he had never received such information”.¹⁷⁸ Mr Mokom further submits that the Article 85 Chamber erred in failing to consider that the Registry’s failure to inform him about [REDACTED] prevented Mr Mokom from exercising his liberty and thus “contribut[ed] to [his] *de facto* unlawful detention in the hotel”.¹⁷⁹

b. Registry’s observations

122. The Registry submits that, following the instructions of the Pre-Trial Chamber, it requested the Host State to share [REDACTED] and that, despite the Host State’s

¹⁷³ [Impugned Decision](#), para. 92; [Registry’s Submissions](#), para. 37.

¹⁷⁴ [Impugned Decision](#), fn. 215.

¹⁷⁵ [Impugned Decision](#), para. 131.

¹⁷⁶ [Impugned Decision](#), para. 132.

¹⁷⁷ [Appeal Brief](#), para. 66.

¹⁷⁸ [Appeal Brief](#), para. 67.

¹⁷⁹ [Appeal Brief](#), para. 70.

refusal to provide it, the Host State informed the Registry [REDACTED] was taken into consideration in the preparation of further practical arrangements.¹⁸⁰

c. Mr Mokom’s submissions in reply

123. In his Reply to the Registry’s Observations, Mr Mokom submits that the Registry’s Observations “confirm that [REDACTED] conditioned the implementation of practical arrangements by the Host State” and that Mr Mokom “could have only been in a position to leave the [hotel] once informed by the Registry about the practical arrangements put in place by the Host State following [REDACTED]”.¹⁸¹

3. Determination by the Appeals Chamber

124. Mr Mokom’s main argument under this ground of appeal is that the Article 85 Chamber ought to have taken into consideration that the Registry’s failure to inform him about [REDACTED] prevented him from exercising his liberty.¹⁸² The Appeals Chamber notes that, as set out above, the Host State authorities relied upon [REDACTED] when designing the Second Practical Arrangements.¹⁸³ As discussed under the second ground of appeal, restrictions on Mr Mokom’s stay at “the premises of the Court” were set out in the practical arrangements. Therefore, the terms of the practical arrangements, rather than [REDACTED], had a direct impact on the scope of restrictions. Furthermore, as noted above,¹⁸⁴ the delayed notification of the relaxation of restrictions has no bearing on the overall characterisation of Mr Mokom’s stay at the hotel, since, even under the First Practical Arrangements, his stay at “the premises of the Court” did not amount to detention. It is thus unclear how the Registry’s alleged failure to inform Mr Mokom of [REDACTED] was of relevance to the Article 85 Chamber’s overall conclusion on the characterisation of Mr Mokom’s situation. The Appeals Chamber therefore finds that Mr Mokom has not demonstrated that the Article 85 Chamber erred in attaching no weight to the alleged failure to inform him of [REDACTED].

¹⁸⁰ [Registry’s Observations](#), para. 21.

¹⁸¹ [Reply to Registry’s Observations](#), para. 16.

¹⁸² [Appeal Brief](#), para. 70.

¹⁸³ [Registry’s Submissions](#), para. 27.

¹⁸⁴ See paragraph 111 above.

125. For the above reasons, the Appeals Chamber rejects Mr Mokom's arguments raised under the third ground of appeal.

VI. APPROPRIATE RELIEF

126. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.¹⁸⁵ In the present case it is appropriate to confirm the Impugned Decision.

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



Judge Solomy Balungi Bossa
Presiding



Judge Luz del Carmen Ibáñez
Carranza



Judge Gocha Lordkipanidze



Judge Erdenebalsuren Damdin



Judge Nicolas Guillou

Dated this 2nd day of September 2025

At The Hague, The Netherlands

¹⁸⁵ See rule 158(1) of the Rules.