Bim, Bam, Bem-Boom!

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Jean-Pierre Bemba, recently finally acquitted by the Appeals Chamber, dropped quite the legal bombshell last night on the ICC: he is demanding nearly €70,000,000 from the Court — €22,000,000 in compensation for the 10 years he spent in detention; €4,000,000 in legal fees; and €42,400,000 for the economic loss he has suffered as a result of the Court’s mismanagement of property it ordered states to freeze.

Although I completely agree with the acquittal, I think it is exceptionally unlikely that Bemba will receive any compensation under Art. 85(3) of the Rome Statute, which provides as follows:

In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

The acquittal does not mean Bemba has suffered “a grave and manifest miscarriage of justice.” Bemba’s brief does yeoman’s work trying to establish that the trial was a “parody of justice,” and indeed there were many problems with the trial. That’s why Bemba was ultimately, and rightly, acquitted. But it is difficult to argue — and the chances of the Pre-Trial Chamber finding are essentially zero — that Bemba’s original conviction represented “a grave and manifest miscarriage of justice,” given that the Trial Chamber unanimously convicted him and that the Appeals Chamber acquitted him by a bare majority (3-2). There is also the issue of Bemba’s final conviction for interfering with the administration of justice. That conviction alone is probably enough to reject his claim of a “a grave and manifest miscarriage of justice” in the main case.

Interestingly, Bemba claims in his brief that he will use any compensation he receives under Art. 85(3) to hep the people of the Central African Republic (para. 9):

The award of damages insofar as it relates to compensating Mr. Bemba for the period of detention, will be used to provide reparations to the people of the Central African Republic. Mr Bemba wishes it to be known that he is ready and willing to work with the LRV, TFV and any other appropriate agency to provide meaningful assistance to those affected by conflict in that region funded by any compensation he receives for his wrongful incarceration.

I had an interesting exchange on twitter last night with the inestimable Mark Kersten about Bemba’s statement. My central point was simply that the statement should not be seen as creating any kind of legally-enforceable right to “reparations” for Bemba’s alleged victims. Bemba is simply promising to give whatever compensation he receives to “the people of the Central African Republic” — a group that is quite obviously not coterminous with the class of victims the Court recognized in the Bemba case. In other words, the statement is nothing more than smart PR on Bemba’s part.

As noted above, Bemba will almost certainly not receive any compensation under Art. 85(3). The same cannot be said for his claim regarding the spoliation of his property in Belgium, Portugal, and the DRC. Those states froze that property in response to a Court order under Art. 93(1)(k) of the Rome Statute, which reads as follows:

States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecution… The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.

According to Bemba, the Court grossly mismanaged his frozen property, causing it to lose significant value during the 10 years he was in detention. That is, of course, merely an allegation at this point. But as his brief notes, the allegation is based in no small part on the Registry’s own internal documents:

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

146. Significantly, a result of its inability to “undertake effective cooperation” with States, “Registry staff sometimes had to rely on the staff of the Office of the Prosecutor to follow up on certain issues. This created confusion among external stakeholders as to the role of different organs of the ICC and risked undermining the image of the Registry as a neutral service provider.” Importantly, this confusion as to the different roles and responsibilities of the organs of the Court was then cited as causing a lack of understanding or awareness on the part of States Parties as to “the nature and extent of the obligation to cooperate.”

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

Bemba provides a particularly troubling example of the Court’s negligence in his press release, concerning an airplane grounded in Portugal:

[I]n 2008, the ICC Prosecution seized the keys and documentation to a Boeing 727 parked at Faro Airport. Parking charges were left unpaid, no maintenance was performed for a decade, and the plane was left stranded for so long that it was viewed by the Portuguese authorities as an import, attracting VAT. When Mr. Bemba asked for the return of the keys and documentation in order to lease the plane to generate an income to put towards the cost of his legal fees, he was informed that the Prosecution was unable to find the keys. The debts incurred by the plane stand at €713,251.52. The plane is now scrap. It still stands stranded on the tarmac at Faro Airport.

Assuming the allegations are correct, there is a difficult question about who is responsible for compensating Bemba for the spoliation of his property — the ICC, the states, or both. The Court will no doubt argue that it bears no responsibility, much less liability, for the damage, because the actual freezing was carried out by Belgium, Portugal, and the DRC. The brief, however, does an excellent job arguing that Bemba has a cause of action against the Court itself, in addition to whatever legal remedies he might have against the states. Here is a snippet of the argument, which intelligently emphasizes that the Court, far from taking a hands-off approach, was constantly involved in the “management” of Bemba’s property:

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

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

This is not my area of law, so I’m loathe to offer any legal conclusions about liability. But it certainly seems that the ICC at least shares responsibility with the three states for the spoliation. If Bemba’s allegations are correct, therefore, it is likely that at some point the Court will have to pay him significant damages.

That is an unsettling prospect, to say the least. And everyone — ICC supporters and haters alike — should be outraged by the Court’s negligence. For those who think Bemba was wrongly acquitted, it will be tempting to see the damage to his property as some kind of karmic just desserts. But remember: the Court ordered Belgium, Portugal, and the DRC to freeze Bemba’s property in order to ensure that there would be sufficient funds available to pay reparations to Bemba’s legally-recognized victims. Had Bemba been convicted, I am quite sure the victim’s representatives would now be complaining — rightly! — that the Court’s negligence had deprived the victims of adequate reparations for their suffering.

In short: what a disaster. Even if the ICC somehow manages to avoid responsibility for the spoliation, heads need to roll in the Registry and the OTP.