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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

***v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO***

**Public
with Public Annex A**

**Prosecution response to Jean-Jacques Mangenda Kabongo's request for leave to
appeal "Decision on request for compensation for unlawful detention"**

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Introduction

1. Jean-Jacques Mangenda Kabongo's request for leave to appeal¹ the decision rejecting his compensation claim² is inadmissible. No appeal lies against a compensation decision—the Statute does not authorise such an appeal. The Request impermissibly extends the restrictive scope of interlocutory appeals under article 82(1)(d). Not only does the Request fail to respect the drafters' intent and the Judges' resolve to maintain the exceptional nature of the article 82(1)(d) remedy,³ it also ignores the law set out by the Appeals Chamber. This Request should be dismissed *in limine*.

2. Even if the Request is deemed admissible, it should still fail. None of the six issues⁴ are appealable under article 82(1)(d); rather, they are mere disagreements with the Decision. Mr Mangenda also misreads the Decision. Further, the Request is no more than an attempt to re-litigate failed submissions. Indeed, Mr Mangenda's Request for Compensation was flawed: it failed to satisfy even the basic minimum expected of article 85 compensation requests and could have been summarily

¹ ICC-01/05-01/13-1704 ("Request").

² ICC-01/05-01/13-1663 ("Decision" or "Compensation Decision").

³ See *e.g.* ICC-01/12-01/15-T-1-ENG (open session), p. 12, lns. 7-16, where the Single Judge noted "[t]hird, and final, issue is regard to the leave to appeal. In this regard, I remind the parties that interlocutory appeals under Article 82(1)(d) of the Statute are to be considered as an exceptional—as an exceptional—remedy in the presence of one of the issues mentioned therein, which have to be and which will be interpreted restrictively by the Chamber. Interlocutory appeals are not a tool for expressing disagreement with the decision taken by the Chamber. Normally the Chamber—a decision of the Chamber is always disagreed by one party, so—but that's not the problem, so it is not a disagreement, as very often it is perceived and it appears. Of course I'm not referring to this case because it is too early to refer to this case, but to my experience. And, therefore, I'm saying this as a guidance to the parties." See also ICC-01/05-01/13-T-10-Red-ENG (open session), p. 11, lns. 3-9, where the Presiding Judge noted that "[w]hile the Chamber is mindful of the rights of the parties to seek legal remedy under [a]rticle 82(1)(d) of the Statute, I would like to remind that such interlocutory appeals are exceptional. And they are not or should not be an automatic reflex as it sometimes appears. They are neither meant to be a hidden application for reconsideration nor a legal tool to express mere disagreement with any of the Chamber decisions. And we all know that it lies in the nature of things that usually at least one party is not completely satisfied with what the Chamber decides [...]" See also ICC-02/11-01/15-T-15-Red-ENG (open session), p. 16, lns. 1-3, where the Presiding Judge noted, in the context of an article 82(1)(d) application, that "[a] disagreement between the parties on the one hand and the Bench on the other [...] does not at all make, as such, the trial unfair and in violation of the accused's human rights."

⁴ Here, "Issues".

dismissed.⁵ An article 82(1)(d) application is not the appropriate forum to revive such requests.

3. Nor does the Request meet the other criteria for leave to appeal: it fails to show that the Issues would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and that the Appeals Chamber's immediate resolution of these Issues may materially advance the proceedings.

Submissions

A. Compensation decisions are not appealable

4. Compensation decisions at this Court are one-time, self-contained decisions, and cannot be appealed. Not only does the Statute exhaustively define the permissible appeals, it also—critically—omits appeals against compensation decisions. Moreover, the Appeals Chamber has previously considered, and rejected, similar arguments to expand the scope of article 82(1)(d). The Request fails to identify any legal grounds to depart from this authoritative jurisprudence.

5. *First*, as the Appeals Chamber has made clear, decisions may be appealed only so far as articles 81 and 82 permit. As held, Part 8 of the Statute exhaustively enumerates, under articles 81 and 82, the decisions that are subject to appeal. No right to appeal arises except as provided in Part 8.⁶ And, according to the Appeals Chamber, this “inexorable inference” is determinative.⁷ Moreover, a right to appeal exists under article 81 only with respect to article 74 and 76 decisions, *i.e.*, final

⁵ Decision, paras. 19, 20, noting that “[t]he Defence in this case has not identified any prior decision that determined Mr Mangenda’s detention to be unlawful, nor does it appear to have sought to obtain any such decision prior to submitting the Request”, and further noting that “[t]he relief sought in the Request could be dismissed on this basis alone.”

⁶ ICC-01/04-168 OA3 (“DRC Extraordinary Review Appeal Decision”), para. 35; ICC-01/04-01/06-2799 OA19 (“Lubanga Appeal Decision of 26 August 2011”), paras. 7 and 8; ICC-01/04-01/07-3424 OA14 (“Katanga Appeal Decision on detained witnesses”), paras. 27-31.

⁷ DRC Extraordinary Review Appeal Decision, para. 39.

decisions of a criminal court determinative of its verdict or decisions pertaining to the punishment meted out to the convict.⁸ The Compensation Decision is not a final decision in the sense of article 81, nor does Mr Mangenda argue that it is.

6. *Second*, compensation decisions do not fall within the scope of article 82(1)(d). Although article 82 more generally, and article 82(1)(d) in particular, governs interlocutory decisions and determinations, the Decision is not one such determination. Rather, it is a final decision, rendered after separate proceedings before a different Chamber.⁹

7. *Third*, article 82(1)(d) is an exceptional remedy and should be restrictively construed.¹⁰ Both the drafters' intent and the Appeals Chamber's decisions confirm its limited scope. Indeed, contrary to the Request,¹¹ the drafters' resolve to exclude compensation decisions from all appeals (article 82(1)(d) included) is unambiguous. The Request misreads the commentary in claiming that the *travaux préparatoires* were inconclusive on the finality of compensation decisions.¹² Rather, as the commentary shows and the Request acknowledges,¹³ "[e]veryone agreed that the decision on compensation should be final and that no appeal was possible under article 82 [...]"¹⁴ Other academic commentary also confirms this position.¹⁵ Moreover, the *travaux préparatoires* for both articles 82 and 85 in all their different versions do not support the proposition that compensation decisions may be appealed.¹⁶ The Request impermissibly attempts to rewrite the drafting history.

⁸ DRC Extraordinary Review Appeal Decision, para. 38.

⁹ Rule 173 requires compensation requests to be heard by a Chamber composed of judges other than those that participated in the earlier judgement.

¹⁰ See e.g., Nerlich, V, "Appeal against other decisions", pp. 1960-1961, stating in the context of article 82(1)(d), "[...] leave to appeal is to be granted only under limited and very specific circumstances [...]"

¹¹ *Contra* Request, paras. 14-15.

¹² *Contra* Request, para. 15.

¹³ Request, para. 14.

¹⁴ See Bitti, G, "Compensation to an Arrested or Convicted Person", p. 634; Request, para. 14.

¹⁵ See e.g., Staker, C and Nerlich, V, "Compensation to an arrested or convicted person", p. 2001, stating "[n]o provision is made for any appeal against such a [compensation] decision."

¹⁶ See Bassiouni, C, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute*, pp. 582-584, pp. 601-604.

8. In particular, the Request fails to interpret the commentary, and thereby the drafting history, in context.

- i. Contrary to the Request, it is clear that the commentary in question was referring to definite processes in the drafting history, starting in the March session of 2000.¹⁷ When the commentary is read in its proper context, Mr Mangenda's claim alleging an absence of "citation to the *travaux préparatoires*"¹⁸ is unpersuasive.
- ii. Further, the Request incorrectly claims that "[a] proposal to preclude appeals from decisions pursuant to Article 82 was unsuccessful."¹⁹ That proposal was discussed in the context of providing written reasons for a compensation decision.²⁰ Therefore, neither the decisions not to include references to "reasons" nor to article 83(4)—a provision that requires an appeal judgement to "state the reasons on which it is based"—are instructive. To the contrary, the commentary only underscores the decision to exclude appeals of compensation decisions, despite the absence of these references.²¹

9. *Fourth*, contrary to the Request,²² the limited scope of article 82(1)(d) cannot be expanded by referring to either "the general practice in civilised legal systems of the world [...] according a right of appeal [...]" nor to "violations of rights."²³ Indeed, the Appeals Chamber has previously considered and rejected a similar argument in

¹⁷ Bitti, G, "Compensation to an Arrested or Convicted Person", pp. 633-634.

¹⁸ *Contra* Request, para. 14.

¹⁹ *Contra* Request, para. 14.

²⁰ See Bitti, G, "Compensation to an Arrested or Convicted Person", p. 633, where the Canadian proposal to refer to article 83(4) is discussed in the context of "[t]he motivation (or reasoning) of the Decision."

²¹ Bitti, G, "Compensation to an Arrested or Convicted Person", p. 634, stating that "[...] the decision on compensation should be final and that no appeal was possible under article 82, but there was no agreement on referring either to "reasons" or to article 83, paragraph 4. Hence, the unfortunate result was the deletion of the entire sentence on the motivation of the decision."

²² Request, paras. 2, 10-15.

²³ *Contra* Request, paras. 12-15.

the context of article 82(1)(d). In the *DRC Extraordinary Review Appeal Decision*, although it was argued that higher courts should have an inherent power to review decisions of a subordinate court,²⁴ the Appeals Chamber overruled such a notion.²⁵ As the Appeals Chamber held, the content of article 82(1)(d) was deliberate.²⁶ Arguing otherwise, as the Request does, unduly expands the sphere of article 82(1)(d) and contradicts established law.

10. *Finally*, the Request wrongly relies on the *Kilolo Appeals Decision* of 23 December 2015.²⁷ That Decision governed a potential appeal on the seizure of assets, and is wholly unrelated to compensation decisions. The seizure of assets will normally be an interlocutory issue—and appropriate subject matter of an article 82(1)(d) application—because such decisions are inherently provisional and precautionary in nature and are geared towards protecting rights and benefits when proceedings are finally terminated. Compensation decisions, however, are not. Rather, compensation claims are adjudicated in standalone proceedings. And such compensation proceedings are an end in themselves. They neither trigger nor safeguard rights or interests outside of the limited determination to be made. Nor, once concluded, do they have any impact on the proceedings. Indeed, Mr Mangenda himself acknowledges that the Compensation Decision “is fully dispositive of the litigation.”²⁸ In these circumstances, interpreting the *Kilolo Appeals Decision* of 23 December 2015 in the blanket terms that Mr Mangenda

²⁴ *DRC Extraordinary Review Appeal Decision*, paras. 21-25.

²⁵ *Ibid.*, paras. 26-42.

²⁶ *DRC Extraordinary Review Appeal Decision*, paras. 39-41. *See also* paras. 33-42, rejecting the argument that a lacuna existed in the Statute, based on good faith treaty interpretation based on the Vienna Convention, the plain text of the Statute and the *travaux préparatoires*. In that context, the Appeals Chamber noted that the Kenyan delegation’s suggestion to accord a right to appeal under article 82(1)(d) was rejected.

²⁷ *See* Request, paras. 10-11, citing to ICC-01/05-01/13-1533 OA12 (“*Kilolo Appeals Decision* of 23 December 2015”), paras. 13-17, and ICC-01/05-01/13-773 (“*Kilolo Decision* of 1 December 2014”), pp. 3-7.

²⁸ Request, para. 29.

suggests,²⁹ contradicts the settled law in the *DRC* Extraordinary Review Appeal Decision, and is unpersuasive.

11. Since no appeal lies against compensation decisions—confirmed by the Statute, the drafters’ intent and the Appeals Chamber’s case law—the Request should be dismissed on this basis alone.

B. Arguendo, the Request fails to meet the article 82(1)(d) test

12. Even if the Chamber were minded to consider Mr Mangenda’s Request, the Request should still be dismissed because it fails to meet the threshold criteria for applications seeking leave to appeal.

i. The Issues do not arise from the Decision and are not appealable

13. None of the six Issues qualify as appealable Issues. They fail to demonstrate “[a]n identifiable subject or topic requiring a decision for its resolution.”³⁰ To the contrary, Mr Mangenda merely disagrees with the Decision. Moreover, several Issues misread the Decision and do not arise from the Decision. The Request is also a transparent, but impermissible, attempt to revive matters already decided.

14. The First Issue—“whether the Trial Chamber erred in law by addressing only the conduct of the Registry, and not other actors, to determine whether the extended detention was unlawful”³¹—does not arise from the Decision. It simply misreads the Decision. Contrary to the Request, the Decision clearly addressed the

²⁹ *Contra* Request, paras. 11, 12, suggesting that the Appeals Chamber in the *Kilolo* Appeal Decision of 23 December 2015 articulated an approach reflecting “a general practice in civilised legal systems of the world of according a right to appeal from decisions above a certain threshold of importance.”

³⁰ See ICC-01/04-168 OA3, para. 9; ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. See also ICC-01/04-01/06-1433 OA11 (Partly Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.” See also ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 25; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

³¹ Request, para. 2.

conduct of other actors, and Mr Mangenda in particular, in determining if his detention was unlawful.³² As the Decision states *inter alia*, “Mr. Mangenda consequently failed, at that stage, to fulfil one of the pre-conditions to his release. The Chamber therefore finds that Mr Mangenda had no entitlement to immediate and unconditional release as of 22 October 2014”.³³

15. The Second Issue—“whether the Trial Chamber erred in law in applying a fault standard upon the conduct of the Registry to determine whether Mr Mangenda’s detention was unlawful”³⁴—is not appealable. It merely speculates and parcels out certain phrases, while excluding others and the larger context.³⁵ Mr Mangenda’s continuing dissatisfaction with the Registry’s efforts to relocate him does not make this Issue appealable.

16. The Third Issue—“whether the Trial Chamber erred in law and in fact in finding that the formal obstacles to release could not have been anticipated by any relevant actor, whereas Mr Mangenda had put the Pre-Trial Judge and the Registry on express notice eight days in advance of the release order that the UK authorities’ equivocal statements needed to be addressed immediately and without awaiting the release order”³⁶—is not appealable. It is no more than a disagreement with the Decision’s outcome. It also ignores certain key findings and procedural developments underscoring the State’s reluctance to accept Mr Mangenda.³⁷

17. The Fourth Issue—“whether the Trial Chamber erred in law and in fact in attributing Mr Mangenda’s continued detention to his own alleged failure to give

³² Decision, paras. 23-24.

³³ Decision, para. 23.

³⁴ Request, para. 2.

³⁵ See Request, fn. 6, referring to one phrase in Decision, para. 25 (“the Registry[...] did everything in its power”).

³⁶ Request, para. 2.

³⁷ See *e.g.*, ICC-01/05-01/13-1439-Red (“Prosecution response to Jean-Jacques Mangenda Kabongo’s request for compensation”), paras. 15-18, noting previous filings and decisions underscoring the State’s reluctance to permit Mr Mangenda’s interim release to its territory.

an address at which he could reside during his period of release”³⁸—is also not appealable. Yet again, Mr Mangenda appears to dispute the conditional nature of the release order—despite its express terms. Indeed, the Decision clearly stated that “[t]he Release Order required the identification not just of an address where Mr Mangenda intended to stay, but rather where he would in fact be staying during the period of his release [...]”³⁹ An application for leave to appeal is not the appropriate forum to re-litigate failed issues.

18. The Fifth Issue—“whether the Trial Chamber erred in fact in apparently determining that Mr Mangenda caused his own non-release by declining to be repatriated to the Democratic Republic of Congo, a country to which he had legitimate fears of being returned”⁴⁰—is not appealable. Once again, the Request raises issues previously heard and rejected. The Issue is a mere conflicting opinion.

19. The Sixth Issue—“whether the Trial Chamber erred in law and in fact in finding that Mr Mangenda’s continued detention from 22 October to 31 October 2014 ‘constituted an extension of his lawful detention’”⁴¹— is not appealable. Mr Mangenda’s reluctance to accept the conditional nature of the release order, also confirmed on appeal, is unpersuasive: his mere disagreement does not make the Issue appealable.

20. For all these reasons, none of the six Issues is appealable and all should be dismissed.

³⁸ Request, para. 2.

³⁹ Decision, para. 24.

⁴⁰ Request, para. 2.

⁴¹ Request, para. 2.

21. Because the article 82(1)(d) criteria are cumulative, Mr Mangenda's failure to demonstrate that the Issues are appealable is fatal to his Request.⁴² Nevertheless, the Request fails to meet the remaining criteria.

ii. The Request fails to meet the remaining article 82(1)(d) criteria

22. *First*, Mr Mangenda fails to show that the Issues significantly impact the fair and expeditious conduct of the proceedings. Indeed, there is no such impact on the compensation proceedings. Contrary to the Request, Mr Mangenda has not shown that the Issues significantly affected the fairness of those proceedings, in the sense that they affected "the norms of a fair trial".⁴³ Nor has he shown, or even argued, that the Issues affected the expedition of those proceedings. Because the criteria of "fair and expeditious" are cumulative, the argument fails. Moreover, the Compensation Decision has no bearing on the article 70 proceedings, and as Mr Mangenda concedes, "will not be revisited in that context."⁴⁴

23. *Second*, the Issues do not impact the outcome of the trial. The Request wrongly conflates the Compensation Decision and "the outcome of the trial".⁴⁵ The compensation proceedings that Mr Mangenda initiated did not constitute a trial; rather they were discrete and collateral proceedings emanating from certain developments in the article 70 proceedings. Nor were the compensation proceedings dispositive of the article 70 trial. Indeed, contrary to settled law, the Compensation Decision will not "directly relate with the amount and type of evidence that the Chamber will have to consider when making its final determination in accordance with [a]rticle 74."⁴⁶

⁴² ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria are cumulative, and "[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal."

⁴³ *DRC Extraordinary Review Appeal Decision*, para. 11; *Contra Request*, paras. 27-29.

⁴⁴ *Request*, para. 29.

⁴⁵ *Request*, paras. 28-29.

⁴⁶ ICC-01/05-01/08-1169, para. 35.

24. *Finally*, contrary to the Request,⁴⁷ permitting an appeal on the Issues will not materially advance the proceedings. Rather, the Appeals Chamber will be seized by non-statutory proceedings, neither envisioned by the drafters nor permitted by the Statute. Nor is the Appeals Chamber's intervention necessary when Mr Mangenda merely misreads and disagrees with the Decision.

Relief Sought

25. Mr Mangenda's Request seeking leave to appeal the Compensation Decision should be dismissed *in limine*. Compensation decisions cannot be appealed. If the Chamber were so minded to consider the Request, the Request still fails to meet the article 82(1)(d) test and should be dismissed on the merits.



Fatou Bensouda, Prosecutor

Dated this 11th day of March 2016

At The Hague, The Netherlands

⁴⁷ Request, paras. 29-30.