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APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Péter Kovács

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

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

Public with Public Annex A

Public redacted version of “Prosecution response to Jean-Jacques Mangenda Kabongo’s appeal of ‘Decision on request for compensation for unlawful detention’”, 6 June 2016, ICC-01/05-01/13-1924-Conf

Source: Office of the Prosecutor

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

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Introduction

1. Jean-Jacques Mangenda Kabongo's appeal against Trial Chamber VI's decision rejecting his compensation request¹ should be dismissed. The Appeal lacks both forum and persuasion. The Appeals Chamber is wrongly seised of this Appeal: decisions on compensation are standalone final decisions which are not appealable under article 82(1)(d) of the Statute—a remedy reserved solely for interlocutory matters. Moreover, the Appeal fails to articulate an error for appellate scrutiny. Not only does the Appeal merely repeat Mr Mangenda's failed submissions before Trial Chamber VI without even attempting to meet the appellate standard of review, it also claims counter-intuitively—having first sought leave to appeal—that the Appeals Chamber should refrain from deciding one of the two issues certified for appeal. The Appeal should be dismissed without further consideration.

2. Even if the Appeals Chamber decides to consider the merits, Mr Mangenda's Appeal should fail. Mr Mangenda reluctantly argues the first ground of appeal. But he fails to meaningfully engage with the rationale of requiring a prior finding of unlawful detention for any compensation claim. Rather, Mr Mangenda misreads the Trial Chamber's decision and the Prosecution's submissions. Likewise, on the second ground of appeal, Mr Mangenda presents a skewed view of the events that transpired—a version that is neither reflected in the Single Judge's release order,² the Registry's subsequent reports of Mr Mangenda's detention nor the Decision denying him compensation.

¹ ICC-01/05-01/13-1908-Conf-Corr (“Appeal”); ICC-01/05-01/13-1663 (“Decision” or “Compensation Decision”).

² ICC-01/05-01/13-703 (“Release Order”). On 29 May 2015, the Appeals Chamber reversed the Release Order. The Appeals Chamber found that the Pre-Trial Chamber (i) incorrectly interpreted article 60(4); (ii) failed to properly balance the duration of the suspects' detention against the risks set out in article 58(1)(b); and (iii) failed to conduct a proper assessment of the risks set out in article 58(1)(b). However, despite reversing the Release Order, the Appeals Chamber decided, in view of the exceptional circumstances, to maintain the relief ordered therein, *i.e.*, the release of the suspects (*See* ICC-01/05-01/13-969 OA5 OA6 OA7 OA8 OA9 (“Appeal Decision on Interim Release”), p. 3, paras. 39, 40-57). On 17 August 2015, the Trial Chamber maintained the Accused's release, subject to certain conditions (ICC-01/05-01/13-1151, para. 23).

3. Despite Mr Mangenda's preference to re-order the grounds of appeal, the Prosecution, for reasons of both logic and cohesion, addresses the two grounds of appeal in the order that they were initially certified for appeal.³

Level of Confidentiality

4. The Prosecution files this submission as "Confidential" pursuant to regulation 23bis (2) of the Regulations of the Court, since it responds to a submission similarly classified. The Prosecution will file a public redacted version.

Submissions

A. The Appeals Chamber should declare the Appeal inadmissible: leave to appeal under article 82(1)(d) was wrongly granted

5. Although leave to appeal was granted under article 82(1)(d), the Appeals Chamber is wrongly seised of this Appeal. Article 82 more generally, and article 82(1)(d) in particular, governs appeals of interlocutory decisions and determinations only,⁴ *not* final decisions. Yet, compensation decisions at this Court are final decisions. They are one-time, self-contained decisions, an end in themselves.⁵ The Decision constituted a final decision, adjudicated in stand-alone proceedings involving an accused person—Mr Mangenda—in a case before a separate chamber of the Court. And the Majority Judges, the Dissenting Judge and Mr Mangenda have all acknowledged, in varying terms, that the Decision is a final

³ ICC-01/05-01/13-1893 ("Decision granting leave to appeal"), para. 23.

⁴ ICC-01/04-168 OA3 ("DRC Extraordinary Review Decision"), paras. 13, 20, 36.

⁵ See Bitti, G, "Compensation to an Arrested or Convicted Person", p. 634, stating "[e]veryone agreed that the decision on compensation should be final and that no appeal was possible under article 82 [...]"; 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."; Bassiouni, C, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute*, pp. 582-584, pp. 601-604. See also ICC-01/05-01/13-1715 ("Prosecution response to article 82(1)(d) application"), paras. 1, 4-11.

one.⁶ The Decision is thus outside the scope of article 82(1)(d) and cannot be appealed.

6. Even though the Majority incorrectly found that the Decision could be appealed under article 82(1)(d), the Dissenting Judge did not. According to Judge Chung, granting leave “would impermissibly extend[...] the restrictive scope of interlocutory appeals under article 82(1)(d).”⁷ This accords with the Appeals Chamber’s previously stated view that the Statute may not be departed from: neither “issues of significance or complexity”, nor a Trial Chamber’s view that granting leave to appeal was “desirable or even necessary” justifies such departure.⁸

7. The Appeals Chamber is not bound by the Majority’s decision granting leave to appeal the underlying Decision. Although the Appeals Chamber must consider the Trial Chamber’s view, their characterisation of the Decision is not determinative. Nor is the Appeals Chamber bound by the Trial Chamber’s assessment that leave to appeal was necessary *in this case* “[d]ue to human rights considerations under [...] article 21(3) of the Statute.”⁹ To the contrary, the Appeals Chamber, where necessary, should “establish the true nature of an impugned decision, in order to ensure that the decision in question is appropriately before it,

⁶ Decision granting leave to appeal, para. 21, noting “[i]n the context of these compensation proceedings, [the Impugned Decision] constitutes the final disposition of matters involving Mr Mangenda’s fundamental human rights.” See also ICC-01/05-01/13-1893-Anx (“Judge Chung’s Dissent”), para. 4, noting that “[t]he Impugned Decision constitutes a final decision adjudicated in stand-alone proceedings involving an accused person in a case before a separate chamber of the Court.”; ICC-01/05-01/13-1704 (“Mangenda article 82(1)(d) application”), para. 1.

⁷ Judge Chung’s Dissent, para. 6. See also para. 4, noting that “[a]rticle 82(1)(d) confers a right of appeal against *interlocutory or intermediate decisions*[...]”; para. 5, noting that the “[D]ecision represents a final decision issued in the course of those proceedings, rather than an interlocutory decision, and unlike a final judgment issued by a trial chamber under [a]rticle 74 of the Statute, no further avenue of appeal is specified or envisaged in the statutory framework.”

⁸ ICC-01/04-01/06-2799 OA19 (“*Lubanga* Decision of 26 August 2011”), paras. 3, 8, rejecting leave to appeal granted “on an exceptional basis under article 64(6)(f).” *Contra* Decision granting leave to appeal, para. 22, noting both the “finality of the Impugned Decision” and that “there would otherwise be no opportunity to ‘advance the proceedings’ at hand outside granting leave to appeal under article 82(1)(d)[...].”

⁹ *Contra* Decision granting leave to appeal, para. 21, citing ICC-01/05-01/13-1533 OA12, para. 16 (emphasis added).

and that the appeal is determined pursuant to the correct legal basis.”¹⁰ In this vein, where a Trial Chamber has previously granted leave wrongly under article 82(1)(d)—as in this case—the Appeals Chamber has found such appeals inadmissible.¹¹

8. Therefore, the Prosecution requests the Appeals Chamber to find that the Decision was not the proper subject of an article 82(1)(d) appeal (not being an interlocutory decision), and to reject the Appeal as inadmissible.

¹⁰ ICC-01/04-01/06-2953 OA21 (“*Lubanga* Decision on admissibility of reparations appeal”), para. 50.

¹¹ See *Lubanga* Decision on admissibility of reparations appeal, paras. 63, 64 where the Appeals Chamber found that “[t]he Impugned Decision represents the final judicial decision in respect of reparations[...],” and rejected the appeal under article 82(1)(d) as inadmissible. *Contra* ICC-01/04-01/06-2911 (“*Lubanga* Decision granting leave to appeal the reparations decision”), para. 20, granting leave to appeal, under article 82(1)(d) as the “correct legal basis”, the decision establishing the reparations principles.

B. The Appeal fails to articulate the standard of review

9. Mr Mangenda fails to discharge his burden as an appellant. His Appeal does not even attempt to articulate an alleged error, nor show how such alleged error materially affected the Decision or occasioned a miscarriage of justice. Rather, Mr Mangenda rehearses his submissions at first instance, disregarding the appellate context. He neither substantiates, in the case of a legal error, that the Trial Chamber's interpretation of the law was incorrect, and how such error materially affected the Decision.¹² Nor does he elaborate, in the case of a factual error, why the Trial Chamber's findings were unreasonable.¹³ Notably, with respect to ground 2, Mr Mangenda fails to even articulate that the Trial Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts.¹⁴ In these circumstances, the Appeals Chamber can and should dismiss the Appeal without analysing its substance.¹⁵

¹² ICC-01/04-01/06-3121-Red ("*Lubanga* AJ"), paras. 18-19; ICC-01/04-02/12-271-Corr ("*Ngudjolo* AJ"), para. 20.

¹³ *Contra* Appeal, paras. 6-39.

¹⁴ *Lubanga* AJ, para. 21; *Ngudjolo* AJ, para. 22.

¹⁵ *Lubanga* AJ, paras. 29-34, 440.

C. Response to Ground 1: A prior finding on unlawful detention is a pre-requisite for an article 85(1) compensation claim

10. Compensation proceedings at this Court involve a double or two-step procedure: a first step to verify if the claimant is entitled to compensation, and a second step to determine the amount of compensation. For a compensation claim under article 85(1) to succeed, a prior finding that the claimant was “unlawfully detained” is the first step and a statutory pre-requisite before a Chamber can even entertain how much compensation may be awarded. The Statute, Rules, supporting commentary, case law and the Prosecution’s own position are unambiguous in this regard.

11. No Chamber of this Court—including Trial Chamber VII and Trial Chamber VI—has found that Mr Mangenda was unlawfully detained. Instead of acknowledging this point, Mr Mangenda attempts to sidestep this fundamental statutory pre-requisite by wrongly claiming that the issue “did not arise from the Decision.”¹⁶ To the contrary, as shown below, the Decision plainly addressed the issue. Not only does Mr Mangenda misread the Decision (and the Prosecution’s submissions), but he unfairly dismisses commentary, without substantiation, as irrelevant or “mistaken”, when contrary to his position.¹⁷ Nor does he meaningfully address case law or the rationale supporting the two-step or “double procedure” for compensation claims.¹⁸ Mr Mangenda’s submissions on ground 1 should thus be dismissed.

¹⁶ Appeal, para. 2.

¹⁷ See e.g., Appeal, para. 36.

¹⁸ See ICC-01/05-01/13-1439-Conf (“Prosecution response to Mangenda’s request for compensation”), paras. 5-8.

12. First, the Decision clearly addressed the statutory requirement of a prior finding of unlawful detention.¹⁹ Not only did the Chamber consider the Court's prior case law suggesting that rule 173(2) required "[a] decision on the unlawfulness of the detention prior to the making of a request for compensation";²⁰ it also considered the Court's recent decision in *Ngudjolo*²¹ which found that "[n]otwithstanding the absence of a prior decision on the unlawfulness of the detention", the Chamber would "proceed to itself address the question of the lawfulness of detention."²² Moreover, the Chamber observed that Mr Mangenda had indeed "not identified any prior decision that determined [his] detention to be unlawful." Nor indeed had he "sought to obtain any such decision prior to submitting the Request."²³ In this light, the Chamber found that Mr Mangenda's claim *could be dismissed on this basis alone*.²⁴ The issue of requiring a prior finding establishing unlawful detention therefore squarely arises from the Decision.

¹⁹ Decision, paras. 18-20; Judge Chung's Dissent, para. 4 fn. 5, recalling that the Defence had failed to obtain a decision on the unlawfulness of the detention prior to bringing a claim for compensation.

Article 85(1) states "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." (emphasis added). See Staker, C and Nerlich, V, "Article 85: Compensation to an arrested or convicted person", p. 2000, stating "[p]aragraph 1 of this article adopts the wording of article 9 para.5 of the ICCPR. In the context of the ICC, this provision would apply in cases where a person is arrested or detained in violation of specific provisions of the Statute (in particular, article 55 para.1 (d) or the Rules), and presumably, where the arrest or detention was unlawful under other applicable rules of international law." See also Brady, H and Jennings, M, "Appeal and Revision", p. 303, stating "[d]elegations agreed a person who has been the subject of an unlawful arrest or detention, in violation of either the Statute or internationally recognised human rights law, shall have a right to compensation from the Court. This is reflected in Article 85(1)." (emphasis added).

²⁰ See e.g., ICC-01/04-01/06-772 OA4, para. 4, stating "[t]he subject-matter of a claim to compensation under article 85(1) is [...] the award of compensation following a decision of the Court declaring his arrest or detention unlawful (see rule 173 of the Rules of Procedure and Evidence)."; ICC-01/05-01/13-560, para. 48, stating that Mr Mangenda "[d]id not request a finding of unlawfulness as a basis for seeking compensation under article 85 of the Statute."; ICC-01/04-01/07-1666-Red-tENG, paras. 65-66, regarding *inter alia* the filing of a motion for a declaration of unlawful detention; ICC-01/09-02/11-534, para. 6, fn. 17, stating that "[a] prerequisite for the submission of a request for compensation is that a Chamber must first have decided on the unlawfulness of the arrest or detention under [a]rticle 85(1)."

²¹ See e.g., ICC-01/04-02/12-301-tENG ("*Ngudjolo* Compensation Decision"), para. 16, stating that "[t]here is no provision in the applicable legal texts which states that a *prior decision*, concerning any of the situations listed in rule 173(2) of the Rules, should be issued by a chamber other than that seized of the request for compensation." (emphasis added).

²² Decision, para. 18.

²³ Decision, para. 19.

²⁴ Decision, paras. 19, 20, stating "[R]ather, the Defence *merely argues* in the Request that the detention 'had no lawful basis.' The relief sought in the Request *could be dismissed on this basis alone*." (emphasis added)

Contrary to Mr Mangenda's suggestion,²⁵ if the Appeals Chamber decides to entertain this Appeal, it is not precluded from considering the first certified issue.

13. Second, nothing in the Court's case law suggests that the essential precondition of establishing unlawful detention for an article 85(1) compensation claim can be waived.²⁶ There is no "divergence in the case-law on this issue."²⁷ Nor did the Trial Chamber believe there was any such divergence.²⁸ Rather, since no other Chamber had made a prior finding on unlawful detention, the Trial Chamber proceeded to consider the question itself "in the interests of justice,"²⁹ concluding that "[t]here is no basis for finding that the continued detention of Mr Mangenda between 22 October and 31 October 2014 was unlawful."³⁰ On this basis the Chamber found it "unnecessary for [it] to proceed to consider the submissions with regard to compensation."³¹

14. The *Ngudjolo* Chamber adopted a similar two-step approach. That Chamber clearly acknowledged that rule 173(2) required that the filing of a request for compensation must be preceded by a "decision of the Court" stating that the arrest or detention had been unlawful.³² It further found that no such decision existed. Nor had Counsel sought to request such a decision under rule 173.³³ Notwithstanding, the *Ngudjolo* Chamber considered that "in the circumstances of the case, it would not serve the interests of justice to instruct Counsel to submit another request for compensation based on rule 173[...]"³⁴ According to it, nothing

²⁵ Appeal, paras. 26-31.

²⁶ *Contra* Appeal, paras. 26-39. See e.g., Appeal, para. 28, suggesting that because the Trial Chamber considered the merits of the lawfulness of Mr Mangenda's detention on the basis of "interests of justice", it considered unnecessary the issue of the requisite prior finding on unlawful detention.

²⁷ *Contra* Appeal, para. 28.

²⁸ Decision, paras. 18-20. *Contra* Appeal, para. 28.

²⁹ Decision, para. 20, stating "[n]otwithstanding, in the circumstances, the Chamber finds it is in the interests of justice for it to proceed to consider the lawfulness of Mr Mangenda's detention."

³⁰ Decision, para. 26. See also paras. 21-26, assessing if Mr Mangenda's detention was unlawful.

³¹ Decision, para. 26.

³² *Ngudjolo* Compensation Decision, para. 13.

³³ *Ngudjolo* Compensation Decision, para. 15.

³⁴ *Ngudjolo* Compensation Decision, para. 16.

in the Statute or the Rules required that a Chamber *other than* that seised of the request for compensation should assess whether there had been unlawful detention. On this logic, the Chamber determined for itself whether Mr Ngudjolo's arrest or detention had been unlawful, and dismissed his compensation claim because *inter alia* no such unlawfulness had been shown.³⁵

15. Mr Mangenda appears to suggest that the more recent case law of this Court does not require a prior finding of unlawfulness.³⁶ However, both this Trial Chamber and the *Ngudjolo* Chamber followed the two-step approach: they first required a prior determination of whether or not the detention was unlawful. The only point for discussion, if at all, is one of procedure. Rather than dismissing the compensation claim outright in the absence of a prior finding on unlawful detention from a different Chamber, both Chambers determined for themselves if the detention was unlawful, before dismissing the claims. Yet, no matter the difference in procedure, no Chamber—this Trial Chamber and the *Ngudjolo* Chamber included—could or would have granted Mr Mangenda his requested € 27,000, without first judicially determining, or relying on another Chamber's judicial determination, that he had indeed been unlawfully detained.

16. Third, Mr Mangenda misunderstands³⁷ the Prosecution's submissions before Trial Chamber VI,³⁸ which fully accord with article 85(1), rule 173, commentary and case law. Mr Mangenda bears the burden of showing that his detention was unlawful. No "enforceable right to compensation" exists until such detention is established as unlawful. As every Chamber of this Court and other international tribunals has found, obtaining a first finding on "the unlawfulness of the detention" is critical to advancing any compensation request. Without such a finding, no

³⁵ *Ngudjolo* Compensation Decision, paras. 16-35. (emphasis added)

³⁶ Appeal, para. 28.

³⁷ Appeal, paras. 32-39.

³⁸ Prosecution response to Mangenda's request for compensation, paras. 5-8.

discussion on the quantum of compensation can occur. Not only do commentaries to the Statute support this two-stage determination of a compensation request under article 85,³⁹ *ad hoc* tribunal case law also accords with this understanding. Such case law requires that a decision establishing the basis of the compensation must precede any decision awarding any such compensation.⁴⁰ Equally, this case-law shows that persons are entitled to compensation only if they demonstrate that their rights have been violated.⁴¹ Mr Mangenda fails to show that the Trial Chamber erred in interpreting the law in this manner.

17. Fourth, Mr Mangenda's claim that the compensation "double procedure" is "impractical and inefficient"⁴² betrays his misunderstanding of its application and rationale. Moreover, in contesting the number of judicial benches involved in compensation claims,⁴³ he also appears to conflate the two step process to assess compensation claims with the question of which bench is most suited to determine the compensation claim.

18. Yet, the Rules themselves state that at least two separate judicial benches composed of three judges each are potentially involved in the subject matter giving

³⁹ See Zappalà, S, "Compensation to an arrested or convicted person", p. 1583, stating "[r]ule 173, relies by way of principle on the system of the double procedure. First, the interested person must obtain a decision of the Court affirming that the arrest or detention is unlawful (Article 85(1)) [...]. Moreover, the request shall contain all the elements justifying the request and the amount requested."; Bitti, G, "Compensation to an Arrested or Convicted Person", p. 627, stating "[d]elegations acknowledged that the trigger for the presentation of a request for compensation was the existence of a prior decision of the Court stating that the arrest or detention was unlawful, or reversing a previous conviction, or releasing the person from custody because there has been a grave and manifest miscarriage of justice." See also Zappalà, S, *Human Rights in International Criminal Proceedings*, p. 75, stating "[t]he Rules have opted for a separation of the proceedings on determination of unlawfulness and the decision on compensation (Rule 173.2 ICC Rules)."

⁴⁰ See ICTR: *Rwamakuba* Decision of 13 September 2007, paras. 23-24, emphasising that Trial Chamber II recognised the existence of these violations, and the Appeals Chamber indicated that Mr Rwamakuba could "seek reparation" for them; ICTR: *Zigiranyirazo* Decision of 26 February 2013, para. 8, where the Appeals Chamber found that no compensation was warranted because "[n]othing in the Appeals Judgement could be reasonably interpreted as authorising a claim for compensatory damages."

⁴¹ ICTR: *Zigiranyirazo* Decision of 18 June 2012, paras. 49-51; *Zigiranyirazo* Decision of 26 February 2013, paras. 7-8; *Rwamakuba* Decision of 31 January 2007, paras. 14-18; *Rwamakuba* Decision of 13 September 2007, paras. 31-32.

⁴² See e.g., Appeal, para. 37.

⁴³ Appeal, paras. 32-39. See para. 38, seemingly contesting the "double procedure" when the "second" and "third" benches can consist of the same judges.

rise to a compensation claim.⁴⁴ Within this stipulated procedure, the question of which bench can most appropriately make the prior finding of unlawful detention will depend on the circumstances of each individual case. For instance, if a trial or appeal chamber has already entered a judicial finding of unlawful detention, then a chamber designated under rule 173(1) need not revisit such a finding, or make a separate assessment. Conversely, if a trial or appeal chamber has expressly found that there was no unlawful detention, then a rule 173(1) chamber would be precluded from revisiting such an assessment. To hold otherwise would turn the compensation proceedings into one of appellate review (and in some instances, a second appellate review of the Appeals Chamber's determination)—a result that neither law nor logic permits.

19. And if as in Mr Mangenda's case, no prior finding of unlawful detention exists, a Chamber is entitled to dismiss the claim outright or to make the determination itself before proceeding to decide on the amount of compensation (if any) to be awarded. In terms of dismissing a claim outright, this Trial Chamber considered itself so entitled.⁴⁵ Indeed, Judges are mandated to protect this Court's time and resources from frivolous claims. That this Trial Chamber proceeded to consider the claim "in the interests of justice" does not detract from a Chamber's ability and discretion to dismiss such claims outright in appropriate cases. A rule 173(1) Chamber should retain the discretion and flexibility to assess compensation claims on their face. To interpret article 85(1) and rule 173 otherwise would negate the intended statutory bulwark against frivolous claims for compensation, and expose this Court to irresponsible and time consuming proceedings. Indeed, as Chambers of the *ad hoc* tribunals have cautioned, awarding compensation without a

⁴⁴ Rule 173(1) requires the Presidency to designate a Chamber composed of three judges to consider the request for compensation. Moreover, these judges shall not have participated in any earlier judgement of the Court regarding the person making the request. *Contra* Appeal, fn. 52.

⁴⁵ Decision, paras. 19, 20.

clear violation of the accused's rights, "might open the floodgates to an unmanageable host of compensation claims."⁴⁶

20. Since the Appeal raises no viable challenge to the statutory pre-requisite of a prior finding of unlawful detention before a compensation claim may be awarded, the first ground of appeal should be dismissed.

⁴⁶ See *e.g.*, *Zigiranyirazo* Decision of 18 June 2012, para. 21.

D. Response to Ground 2: The Trial Chamber did not err in finding that Mr Mangenda's detention from 22 October 2014 constituted an "extension of his lawful detention"

21. Mr Mangenda's challenge under ground 2 should be dismissed without further consideration.⁴⁷ His submissions are not even premised on the appellate standard of review. Significantly, the Appeal fails to address the Trial Chamber's specific findings or show how the Trial Chamber allegedly erred in finding that his detention was not unlawful. It fails to even argue, let alone demonstrate, that the Trial Chamber misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. Nor does the Appeal argue that the Trial Chamber was unreasonable in its assessment, such that the Appeals Chamber should intervene because it cannot be discerned how the Trial Chamber's conclusion could have reasonably been reached from the evidence before it.⁴⁸

22. Instead, Mr Mangenda's Appeal resembles a first-instance submission, rehearsing his previous submissions and attributing error to a host of different actors including the Court's Registry, the Single Judge, the United Kingdom ("UK") (including one of its Immigration Officers) and even the Dutch authorities.⁴⁹ Yet, none of these arguments demonstrate that Mr Mangenda's detention from 22 October 2014 was unlawful, let alone establish that the Trial Chamber was unreasonable to find that it was not unlawful. Rather, the correct factual narrative shows that Mr Mangenda's detention was as the Trial Chamber found it was—an extension of his lawful detention, attributable to Mr Mangenda's own failure to fulfill the conditions of his release.⁵⁰

⁴⁷ See above para. 9.

⁴⁸ Lubanga AJ, para. 21; Ngudjolo AJ, para. 22.

⁴⁹ Appeal, paras. 6-25.

⁵⁰ See Prosecution response to Mangenda's request for compensation, paras. 2, 9-31; Decision, paras. 23, 24.

23. First, as he did before the Trial Chamber, Mr Mangenda obfuscates the conditional nature of the Release Order. By incorrectly claiming that “[t]he Release Order addressed a single obligee: the Registry” and that “Mr Mangenda is not an addressee of the Release Order”,⁵¹ the Appeal misstates the terms of the Release Order. Rather, as the Trial Chamber correctly found, “[t]he Release Order was clearly conditional in nature, and the release was only to be implemented upon fulfilment of the specified conditions.”⁵² And as the Trial Chamber correctly found, the most relevant condition was that each of the persons to be released, including Mr Mangenda, provide the address at which they would be staying.⁵³ When Mr Mangenda did not do so, he could not be released.

24. Indeed, in blurring the crucial semantics of the Release Order,⁵⁴ the Appeal fails to capture its essence. By its terms, Mr Mangenda was obliged to provide an address where he was both willing and able to reside. Instead, he gave an address within the UK where he may well have been willing to reside,⁵⁵ but was unable to do so. On 22 October 2014, when the UK revoked Mr Mangenda’s multiple entry visit visa —with immediate effect—because of his prior arrest and pending charges under article 70,⁵⁶ Mr Mangenda failed to meet one of the conditions of his interim release. Mr Mangenda’s intention to stay in the UK, without a valid visa, was irrelevant. His mere wish could not be a sovereign State’s—the UK’s—command.

⁵¹ Appeal, paras. 6-7. *See also* para. 8, claiming that “[t]he Release Order was immediately enforceable [on 22 October 2014]”; para. 11, claiming that “Mr Mangenda’s continued incarceration at the ICC Detention Centre [was] not authorised by judicial order[...].”

⁵² Decision, para. 21. *See also* Release Order, p. 6, stipulating that Mr Mangenda’s release was subject to his signing an individual declaration: (i) stating his commitment to appear at trial, or whenever summoned by the Court, and (ii) indicating the address at which he will be staying.

⁵³ Decision, para. 23.

⁵⁴ *See* Release Order, p. 6 requiring “the address at which he *will be staying*”; *contra* Appeal, para. 7, stating “the address at which he *intended to stay*.” (emphasis added).

⁵⁵ *See e.g.*, ICC-01/05-01/13-71-tENG (“Application for Release”), p. 20; [REDACTED].

⁵⁶ *See* ICC-01/05-01/13-719 (“UK Urgent Submissions”), p. 4 and ICC-01/05-01/13-719-AnxII (“UK *note verbale* of 22 October 2014”), showing that on 22 October 2014, the UK revoked Mr Mangenda’s multiple entry visa with immediate effect.

25. Nor is Mr Mangenda's claim that he could legitimately have expected to stay in the UK correct.⁵⁷ Rather, he was on notice that his visa could be revoked in light of the charges against him. He knew—as early as January 2014—that the UK would consider the article 70 charges against him “when considering any application for entry clearance or leave to enter the UK (*notwithstanding any pre-existing form of entry clearance Mr Mangenda currently holds*)”.⁵⁸ [REDACTED].⁵⁹ At best, the UK's position on whether they would accept him was still equivocal. The Appeal concedes that.⁶⁰

26. Not only was the UK consistently tentative about Mr Mangenda's release to its territory, the Pre-Trial Chamber—and the Appeals Chamber—likewise recognised the UK's uncertain position. At least twice the Pre-Trial Chamber found that the UK's observations signalled neither its willingness nor availability to accept Mr Mangenda if he were released.⁶¹ The Appeals Chamber upheld the reasonableness of the Pre-Trial Chamber's finding.⁶² The Appeal fails to demonstrate the unreasonableness of these findings.

27. Second, not only does Mr Mangenda wrongly fault the Registry for its efforts to execute his release, he also fails to acknowledge his own role in prolonging his detention.⁶³ Indeed, as the Trial Chamber correctly and reasonably found, it was incumbent on the Registry “to urgently and actively assist Mr Mangenda in securing the necessary conditions for his release.”⁶⁴ The Registry was expected to do so within a reasonable time,⁶⁵ and it did so.

⁵⁷ *Contra* Appeal, para. 22.

⁵⁸ ICC-01/05-01/13-137-AnxIII (emphasis added) (“United Kingdom's observations of 24 January 2014”).

⁵⁹ [REDACTED]

⁶⁰ Appeal, para. 15, stating that “[the UK] did not unequivocally guarantee that it would honour the entry visa if Mr Mangenda were to be provisionally released.”

⁶¹ ICC-01/05-01/13-261 (“Article 60(2) Decision”), para. 42; ICC-01/05-01/13-612 (“Article 60(3) Decision”), para. 29. *Contra* Appeal, paras. 15, 17-19.

⁶² ICC-01/05-01/13-560 OA4 (“Article 60(2) Appeal Decision”), para. 125.

⁶³ Appeal, paras. 9-25.

⁶⁴ Decision, para. 25.

⁶⁵ See ICC-01/05-01/13-718 OA9 (“AC Decision denying suspensive effect”), paras. 7-8; [REDACTED]. See also Decision, paras. 21-22.

28. Again as the Trial Chamber reasonably found,⁶⁶ not only did the Registry provide a detailed account of its continuous and eventually successful diplomatic efforts with the British, Belgian and Dutch authorities in order to accommodate Mr Mangenda's release preferences,⁶⁷ it did everything in its power to secure Mr Mangenda's release as promptly as possible.

29. Nor, contrary to the Appeal,⁶⁸ can the Registry's brief opinion in a letter⁶⁹ be construed as anything but a mere by-product of a collateral diplomatic effort; it was not remotely a judicial determination of the situation. Indeed, the Registry cannot make judicial findings on such matters. Only the Trial Chamber could make judicial findings on the potential unlawfulness of any detention, and Mr Mangenda has not shown how these were so unreasonable that no reasonable Trial Chamber could have made them.

30. On the other hand, Mr Mangenda delayed his own release. Not only did he continually insist on his release to the UK, he also rejected out of hand the tangible possibility of his release to his own country, the Democratic Republic of the Congo ("DRC").⁷⁰ [REDACTED].⁷¹⁷²⁷³ Thus, even if only temporarily, Mr Mangenda could have ended his detention and returned to his own country.

31. To justify his rejection of the DRC as his country of release, Mr Mangenda claims, in a few sentences, that he could not return to the DRC "*où il est menacé, ainsi*

⁶⁶ Decision, para. 25.

⁶⁷ See generally ICC-01/05-01/13-722-Conf ("Registry's First Report") (including Annexes 1-15); ICC-01/05-01/13-726-Conf ("Registry's Second Report") (including Annexes I, II and III); ICC-01/05-01/13-732-Conf ("Registry's Third Report") (including confidential Annexes 1 and 2); ICC-01/05-01/13-751-Conf ("Registry's Fourth Report") (including confidential Annex 1); ICC-01/05-01/13-808-Conf ("Registry's Fifth Report") (including confidential annexes 1-4).

⁶⁸ *Contra* Appeal, paras. 20-21.

⁶⁹ [REDACTED]

⁷⁰ [REDACTED]

⁷¹ [REDACTED]

⁷² [REDACTED]

⁷³ [REDACTED]

que sa famille, à cause de sa participation à la défense de Monsieur Jean-Pierre [Bemba Gombo], raison pour laquelle son épouse et ses enfants ont obtenu l'asile politique au Royaume Uni où il résidait avec eux."⁷⁴ However, the Trial Chamber was reasonable not to rely on Mr Mangenda's subjective and unsubstantiated assessment of the situation.⁷⁵ [REDACTED].⁷⁶ Likewise, Mr Mangenda also fails to explain why, in his opinion, it was incumbent on the Dutch authorities to make arrangements for his release in anticipation.⁷⁷

32. Since Mr Mangenda has failed to show that the Trial Chamber erred in finding that he was not unlawfully detained, the second ground of appeal should be dismissed.

⁷⁴ Appeal, para. 23; ICC-01/05-01/13-723-Red ("Defence Request for Hearing"), para. 6.

⁷⁵ Decision, para. 23, noting that Mr Mangenda refused the option of being released to the DRC, and had no immediate entitlement to enter any other country.

⁷⁶ *Contra* Appeal, para. 23, fn. 36, [REDACTED].

⁷⁷ *Contra* Appeal, para. 25; see Prosecution response to Mangenda's request for compensation, para. 26.

Relief Sought

33. Mr Mangenda's Appeal challenging the Decision denying his compensation claim should be dismissed. The Prosecution requests the Appeals Chamber to declare the Appeal inadmissible: the Compensation Decision cannot be appealed and leave to appeal was incorrectly granted under article 82(1)(d). The Appeal also fails to articulate any error warranting appellate intervention. Not only is a prior finding of unlawful detention a fundamental statutory pre-condition for any claim for compensation under article 85(1), Mr Mangenda has failed to show that he was in fact unlawfully detained at the Court. In these circumstances, the Appeals Chamber need not remand the matter back to the Trial Chamber.



Fatou Bensouda, Prosecutor

Dated this 13th day of July 2016

At The Hague, The Netherlands

Word Count: 5973⁷⁸

⁷⁸ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.