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IN THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi
Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański

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 Redacted Version
with Public Annexes A and B**

**Corrigendum to Brief in Support of Appeal from “Decision on request for compensation
for unlawful detention” (ICC-01/05-01/13-1663)**

Source: Defence for Jean-Jacques Kabongo Mangenda

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

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I. INTRODUCTION

1. Jean-Jacques Mangenda respectfully requests the Appeals Chamber to: (i) reverse Trial Chamber VI's determination that his continued detention by the Registry from 22 to 31 October 2014, despite a judicial order for his release as of 22 October 2014, "constituted an extension of his lawful detention";¹ and (ii) remand the matter to the Trial Chamber for a determination of compensation.
2. The Appeals Chamber should not to address the second issue for which the Trial Chamber granted certification – "[w]hether a decision on the unlawfulness of detention is required as a condition precedent" for a compensation claim. The issue does not "arise" out of the decision below and would accordingly require the Appeals Chamber to pronounce on the issue as if it were a court of first instance. In the alternative, the Appeals Chamber should reject the purported "double procedure"² for claims pursuant to Article 85.

II. PROCEDURAL BACKGROUND

3. On 21 October 2014, the Single Judge ordered:

that Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido shall be released, subject to the following order;

ORDERS the Registrar to ensure that, prior to their leaving the Detention Centre of the Court, each of the Released Persons sign an individual declaration (i) stating their commitment to appear at trial, or whenever summoned by the Court, and (ii) indicating the address at which they will be staying;

ORDERS the Registrar to file the signed declarations in the record of the case;

ORDERS the Registrar to promptly make all the practical arrangements which are necessary and appropriate for the purposes of the enforcement of this decision.³

¹ *Bemba et al.*, Decision on request for compensation for unlawful detention, ICC-01/05-01/13-1663, 26 February 2016 ("Decision"). This submission is a public redacted version prepared pursuant to the Appeals Chamber's direction in its *Order on the filing of public redacted versions of certain documents*, ICC-01/05-01/13-1946, 7 July 2016.

² *Bemba et al.*, Public redacted version of "Prosecution response to Jean-Jacques Mangenda Kabongo's request for compensation", 30 October 2015, ICC-01/05-01/13-1439, ICC-01/05-01/13-1439-Red, 30 October 2015 ("Response"), para.6.

³ *Bemba et al.*, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo,

4. On 22 October 2014, both Pre-Trial Chamber II⁴ and the Appeals Chamber⁵ denied Prosecution requests to suspend enforcement of the Single Judge's Order. The Single Judge's Release Order, from that moment on, was immediately enforceable.⁶ The legal basis of Mr Mangenda's detention was eliminated as of that moment.
5. Two of the three other defendants subject to the Release Order were released immediately;⁷ the third was released very early the next morning.⁸ Mr. Mangenda, however, was not released from detention until after 18h30 on 31 October 2014⁹ – nine days after the Single Judge's Release Order was enforceable.¹⁰
4. On 21 April 2015, Mr. Mangenda submitted a request to the Presidency of the Court seeking compensation for his detention from 22 October to 31 October 2014 on the basis that it was unlawful.¹¹ The matter was referred by the Presidency to Trial Chamber VI on 2 October 2015.¹² The Prosecution filed its Response on 30 October 2015,¹³ and the Defence sought leave to reply on 6 November 2015.¹⁴
5. Trial Chamber VI denied the Compensation Request on 26 February 2016¹⁵ but subsequently granted leave to appeal two issues:

Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13-703, 21 October 2014 (“Release Order”).

⁴ *Bemba et al.*, Decision on the Prosecutor's “Urgent Motion for Interim Stay of the ‘Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido’”, ICC-01/05-01/13-711, 22 October 2014.

⁵ *Bemba et al.*, Decision on the Prosecutor's urgent request for suspensive effect of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014, ICC-01/05-01/13-718, 22 October 2014.

⁶ *Bemba et al.*, Annex 15 to Registry's Report on the Implementation of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” (ICC-01/05-01/13-703), ICC-01/05-01/13-722-Conf-Anx15, 27 October 2014 (“First Registry Report”), p.2 (“[REDACTED]”).

⁷ First Registry Report, paras.11-12.

⁸ *Id.* paras.16-21.

⁹ *Bemba et al.*, Registry's Fourth Report on the Implementation of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” (ICC-01/05-01/13-703), ICC-01/05-01/13-751-Conf, 12 November 2014 (“Fourth Registry Report”), pp.5-6.

¹⁰ Fourth Registry Report, p.5.

¹¹ *Bemba et al.*, Request for Compensation for Unlawful Detention, ICC-01/05-01/13-921-Conf, 21 April 2015. A public redacted version was filed on 1 May 2015 (ICC-01/05-01/13-921-Red) (“Compensation Request”).

¹² *Bemba et al.*, Decision referring the “Request for Compensation for Unlawful Detention” to Trial Chamber VI, ICC-01/05-01/13-1329, 2 October 2015.

¹³ *Bemba et al.*, Prosecution response to Jean-Jacques Mangenda Kabongo's request for compensation, ICC-01/05-01/13-1439-Conf, 30 October 2015. A public redacted version was filed on the same day (ICC-01/05-01/13-1439-Red).

¹⁴ *Bemba et al.*, Request for Leave to Reply to “Prosecution response to Jean-Jacques Mangenda Kabongo's request for compensation”, ICC-01/05-01/13-1467-Conf, 5 November 2015.

¹⁵ Decision, paras.23,26.

- “Whether the Chamber erred in finding that Mr Mangenda’s detention from 22 to 31 October 2014 ‘constituted an extension of his lawful detention pursuant to an initial arrest warrant of 20 November 2013 and the conditions identified in the Release Order’”;¹⁶
- “Whether a decision on the unlawfulness of detention is required as a condition precedent to seeking compensation under Article 85(1) of the Statute and Rule 173 of the Rules, and which body should appropriately make such a finding.”¹⁷

III. WHETHER THE TRIAL CHAMBER ERRED IN FINDING THAT MR MANGENDA’S DETENTION AFTER 22 OCTOBER 2014 CONSTITUTED AN “EXTENSION OF HIS LAWFUL DETENTION”

(i) *The Registry Has No Discretion to Detain a Person Without a Judicial Order*

6. The Release Order addressed a single obligee: the Registry. The Registry was at that time holding the accused in its custody under the authority of previous judicial orders of the ICC. The operative paragraphs of the Release Order “order” the Registry: (a) to release the four accused; (b) to “ensure that, prior to leaving the Detention Centre, each of the Released Persons sign an individual declaration (i) stating their commitment to appear at trial, or whenever summoned by the Court, and (ii) indicating the address at which they will be staying”; and (c) “to promptly make all practical arrangements which are necessary and appropriate for the purposes of this decision.”¹⁸
7. Mr Mangenda is not an addressee of the Release Order. No conditions precedent were imposed on Mr Mangenda. The Registry was, undoubtedly, authorized to require Mr Mangenda to sign the “individual declaration” and to “indicate” the address at which he would be staying. He was prepared to comply with those requirements at all times and, in fact, did “indicate” the address at which he intended to stay.

¹⁶ *Bemba et al.*, Decision on Defence request seeking leave to appeal the ‘Decision on request for compensation for unlawful detention’, ICC-01/05-01/13-1893, 13 May 2016, para.23(ii).

¹⁷ *Id.* para.23(i).

¹⁸ Release Order, pp.6-7.

8. The Registrar, notwithstanding the Release Order, kept Mr Mangenda in physical detention until after 18h30 on 31 October 2014.¹⁹ Requests by the OTP to suspend enforcement of the Release Order were dismissed on 22 October 2014.²⁰ The Release Order was immediately enforceable as of that moment.

9. The Registrar never requested suspension of enforcement of the Release Order. The first official information provided to the Single Judge that Mr Mangenda had not been released was in a Registry submission to the Single Judge on 27 October 2014 entitled “Report.” The “Report” “INFORMS” the Single Judge that Mr Mangenda was still in detention.²¹ No request was made in that “Report”, nor in a subsequent report dated 29 October 2014, for judicial authorization to delay enforcement of the Release Order.

10. The Registry, regardless of the legal impasse that it may have faced, did not possess the legal authority to keep Mr Mangenda in detention. The decision to suspend or delay the Single Judge’s order – concerning as it did the deprivation of a human being’s liberty – was exclusively a matter for the Single Judge or Pre-Trial Chamber. Only the Pre-Trial Chamber had the authority to authorize Mr Mangenda’s detention; having revoked that authority, the Registry could not continue to hold him in detention.

11. Article 9(1) of the ICCPR prohibits “arbitrary arrest or detention.” Detention is arbitrary, barring specific circumstances that do not apply here, unless authorized by judicial order.²² Not only was Mr Mangenda’s continued incarceration at the ICC Detention Centre not authorized by judicial order, but his *release* had been judicially ordered. Hence, the Release Order not only revoked authorization for his physical detention, but positively ordered the Registry to immediately restore his liberty.

¹⁹ Fourth Registry Report, pp.5-6.

²⁰ *Bemba et al.*, Decision on the Prosecutor’s “Urgent Motion for Interim Stay of the ‘Decision ordering the release of Aimé Kilolo Musamba, Jean Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido’”, ICC 01/05 01/13 711, 22 October 2014; *Bemba et al.*, Decision on the Prosecutor’s urgent request for suspensive effect of the “decision ordering the release of Aimé Kilolo Musamba, Jean Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido of 21 October 2014, ICC-01/05-01/13-718, 22 October 2014.

²¹ First Registry Report, paras.22-32.

²² UN Human Rights Committee, CCPR/C/GC/35, General Comment No. 35, 16 December 2014, para.11 (“[c]ontinued confinement of detainees in defiance of a judicial order for their release is arbitrary as well as unlawful”), 22, 36 (“the judge must decide whether the individual should be released or remanded in custody for additional investigation or to await trial”), 32 (“the right is intended to bring the detention of a person in a criminal investigation under judicial control”), 41.

12. Nothing in the Release Order can be properly interpreted as having delegated (even assuming such delegation is possible) any discretion to the Registry to deviate from the Release Order. The Registry sought no judicial authorization to keep Mr Mangenda in detention, thus choosing to keep him in detention on its own ostensible authority. The period that Mr Mangenda was kept in detention at the ICC Detention Centre against his will by the Registry was, accordingly, unlawful.
- (ii) *The Reasons for the Failure to Release Mr Mangenda Are Not Material to its Unlawfulness, Especially Given the Absence of Any Contribution by Mr Mangenda to the Legal Impasse that Faced the Registry*
13. Mr Mangenda's release may have been incompatible with other legal obligations of the Registry or the ICC. This does not mean, however, that Mr Mangenda's detention was not *also* unlawful. Indeed, a situation appears to have arisen in which the ICC Registry was faced with two courses of action, both of which were unlawful according to different legal norms. This impasse does not justify or excuse the unlawfulness of Mr Mangenda's detention, nor was it within the ICC Registry's discretion to resolve this impasse to Mr Mangenda's detriment. If such a choice was to be made at the expense of Mr Mangenda's liberty, only a judicial organ of the ICC was entitled to make that choice.
14. The circumstances of the impasse may nevertheless be of some interest to the Appeals Chamber, in order to assess whether, as the Prosecution alleges,²³ the impasse arose because of any illegitimate or negligent conduct by Mr Mangenda or his counsel. On the contrary, both Mr Mangenda and his counsel acted with the utmost diligence to avoid the impasse that did ultimately arise.
15. The Pre-Trial Chamber laid the groundwork for granting provisional release of the accused long before the Release Order, in particular, by twice soliciting the views of the States to which the accused sought provisional release.²⁴ The United Kingdom, for which Mr Mangenda held a valid five-year multi-entry visa and where his wife and children lawfully reside, responded to these invitations with full knowledge of the

²³ Response, paras.11-18.

²⁴ *Bemba et al.*, Decision requesting observations from States for the purpose of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court, ICC-01/05-01/13-683, 26 September 2014; Annex I to "Rapport du Greffe sur la Requête de mise en liberté de Mr Mangenda Kabongo", ICC-01/05-01/13-137-Conf-AnxI, 29 January 2014 ("[REDACTED]").

issue.²⁵ The United Kingdom did not expressly object to accepting Mr Mangenda on provisional release subject to the reservation that it [REDACTED].²⁶ On the other hand, the United Kingdom did not [REDACTED].²⁷

16. Mr Mangenda's counsel was concerned at the potential equivocation in the UK's position and did everything possible – and more than most counsel would have done – to ensure that the United Kingdom would not engage in such an unexpected course of action. Three days after the United Kingdom's second submissions to the Single Judge, and more than a week before the Release Order, Mr Mangenda's counsel filed a “very urgent” motion expressing concern about the vagueness of the United Kingdom's submissions, and requesting a hearing to which a British representative could be invited to provide clarification.²⁸
17. The Single Judge, however, did not share these concerns. He denied the request for such a hearing in the Release Order itself, noting that “since no additional conditions are imposed to the release, there is no need for the Chamber to further consult with the relevant States, whether in writing or by way of hearing.”²⁹ The Single Judge ordered Mr Mangenda's release straightaway on the basis that he is “the holder of a visa expiring in August 2015 for the United Kingdom, where his family resides and where he seeks to be released.”³⁰
18. The Single Judge's unambiguous expectation as reflected in the Release Order is that the United Kingdom – having not expressly objected to Mr Mangenda's entry to the UK [REDACTED] – would grant Mr Mangenda entry as long as no such restrictive conditions were imposed. Since no such restrictions were ordered in the Release Order, the manifest expectation and assumption of the Single Judge is that the five-

²⁵ *Bemba et al.*, Annex I to “Transmission of the observations submitted by the Belgian, Dutch, French and British authorities on the ‘Decision requesting observations from States for the purpose of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court’”, ICC-01/05-01/13-691-Conf-AnxI, 10 October 2014 (“States’ Observations of October 2014”); *Bemba et al.*, Annex III to “Rapport du Greffé sur la Requête de mise en liberté de Mr Mangenda Kabongo”, ICC-01/05-01/13-137-Conf-AnxIII, 29 January 2014.

²⁶ States’ Observations of October 2014, p. 3 (“[REDACTED].”)

²⁷ *Id.* p. 3 (“[REDACTED].”)

²⁸ *Bemba et al.*, Requête très urgente d’octroi de plus amples informations au Royaume Uni dans le cadre de la norme 51 du règlement de la Cour ainsi que de la tenue d’une audience, ICC-01/05-01/13-692-Conf, 13 October 2014.

²⁹ Release Order, p.6.

³⁰ *Id.* pp.5-6.

year entry visa to the UK – which had not been revoked in the eleven months since Mr Mangenda’s arrest – would be honoured.

19. The Pre-Trial Judge’s expectation, unfortunately, turned out to be misplaced. The day after the Registry advised the United Kingdom that provisional release had been ordered³¹, and three weeks after the Registry had sought its observations as to the potential for Mr Mangenda’s release onto its territory, the United Kingdom revoked Mr. Mangenda’s visa. The Immigration Officer’s ostensible basis for doing so was that information had [REDACTED] that Mr. Mangenda had been arrested eleven months before – even though the UK authorities were already fully informed of this information when making its prior submissions to the Pre-Trial Chamber:

[REDACTED].³²

20. The Registry responded to the UK two days later as follows:

[REDACTED].³³

21. The Registry’s observation was correct: the United Kingdom’s action, though perhaps lawful under its own law, could place the ICC in breach of its legal obligations – *i.e.* by holding Mr Mangenda in “**illegal detention.**”
22. Fault cannot be attributed to Mr Mangenda for the impasse. First, Mr Mangenda complied with the condition imposed by the Release Order by giving an address at which he would be staying. This was the same address that he had given to the Single Judge months before as the address at which he would stay if provisionally released.³⁴ The Release Order did not require the detainees to perform the impossible – *i.e.* to ensure that their legitimate expectations as to the addresses at which they would be staying would not be blocked unexpectedly by the immigration authorities of those States.

³¹ Annex 2 to First Registry Report, p.1 (“[REDACTED].”)

³² Annex III to “Urgent Submission of the Authorities of the United Kingdom of Great Britain and Northern Ireland”, ICC 01/05 01/13-719-Conf-AnxIII, 22 October 2014 (“Urgent UK Submissions”), p.1 (emphasis added).

³³ Annex 15 to First Registry Report, p. 2 (emphasis added).

³⁴ *Bemba et al.*, Requête extrêmement urgente en vue de la tenue d’une audience avec les représentants des États du Royaume Uni, des Pays Bas et de la Belgique par rapport au manque de coopération en vue de la mise en liberté ordonnée de Monsieur Jean Jacques KABONGO MANGENDA et à sa détention arbitraire, ICC-01/05-01/13-723-Red, 28 October 2014 (“Mangenda Urgent Application”), para.3.

23. Second, Mr Mangenda’s counsel acted with the utmost diligence to avoid the situation that ultimately arose. His requests for further clarification were rejected by the Single Judge as unnecessary. Mr Mangenda could not, incidentally, return to his country of citizenship “*où il est menacé, ainsi 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.*”³⁵ No one with such legitimate fears should be obliged to choose between either unlawful detention or *refoulement* to a country without a hearing as to whether their fears of return are justified and warranted. Neither the Single Judge nor the Registry,³⁶ quite correctly, suggested otherwise. The expectation in the Release Order was quite simply that the United Kingdom would honour the valid entry visa about which it had twice been consulted over the eleven months since Mr Mangenda’s arrest.
24. The Single Judge and the Registry carried out their consultations with the United Kingdom on the basis, and with full knowledge, of Mr Mangenda’s expressed fears about returning to the DRC – the country of which he is a citizen. Indeed, the Single Judge was aware that Mr Mangenda’s wife had been accepted in the United Kingdom as a refugee and that he likewise feared, and had legitimate reasons to fear, returning there.³⁷
25. Leaving aside who should be deemed to be at fault for the situation that arose, the Dutch authorities could also have been approached by the ICC in advance of the Release Order to ask permission for Mr Mangenda’s release on its territory in the event of any unexpected surprises from the UK government. This was not done, and negotiations that did ultimately successfully lead to that outcome took ten days. During that time, instead of being free, Mr Mangenda continued to be confined on Dutch territory inside the ICC Detention Centre.

³⁵ *Id.* p.5.

³⁶ *Bemba et al.*, Registry’s Second Report on the Implementation of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” (ICC-01/05-01/13-703), ICC-01/05-01/13-726-Conf, 29 October 2014, para. 8 (“[REDACTED].”)

³⁷ Mangenda Urgent Application, paras.3,6 (“[c]eci est d’autant plus le cas que le ménage du concluant bénéficie de l’asile politique au Royaume Uni, suite aux menaces qui pèsent sur le concluant et sa famille en RDC, menaces ayant pour cause la défense de Monsieur Jean-Pierre BEMBA GOMBO [...] Le Royaume Uni, plus particulièrement, est au courant du fait que le concluant ne peut plus retourner en RDC, où il est menacé, ainsi 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.”)

IV. WHETHER A DECISION ON LAWFULNESS IS A CONDITION PRECEDENT TO PROCEEDINGS UNDER ARTICLE 85

(i) *The Issue Is Not “Appealable” Under Article 82(1)(d)*

26. Only an “issue” may form the subject-matter of an interlocutory appeal.³⁸ Matters over which there is mere “disagreement or conflicting opinion” are not proper for appellate resolution.³⁹ This requirement ensures that the Appeals Chamber is not required to issue advisory opinions, or opinions upon matters which the court below has not provided reasons.
27. The issue for which the Trial Chamber granted leave to appeal pertained to its finding that “it is in the interests of justice for it to proceed to consider the lawfulness of Mr Mangenda’s detention.”⁴⁰ This finding followed a brief discussion of a Prosecution argument that an Article 85 claim is irreceivable unless there was a *prior ruling* in a *separate proceeding*⁴¹ that the detention was unlawful. Hence, the Prosecution position is that Article 85 proceedings must in all cases be bifurcated so that there is: (i) an initial determination of unlawful detention; and (ii) then a separate proceeding to assess compensation under Article 85.
28. The Trial Chamber believed there to be a divergence in the case-law on this issue. The Trial Chamber then stated that “the Defence in this case has not identified any prior decision that determined Mr Mangenda’s detention to be unlawful.”⁴² Without further discussion of the ostensibly divergent case-law, or which strand it considered to be correct, the Trial Chamber then proceeded to consider the merits of the lawfulness of detention on the basis that it was in “the interests of justice.” The inference to be drawn from the lack of reasoning is that the Trial Chamber considered it unnecessary to address the issue since it proceeded to determine that there had been no unlawful detention.

³⁸ *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, ICC-01/04-168, 13 July 2006 (Judgement on OTP Appeal Application’), para.9.

³⁹ *Id.*

⁴⁰ Decision, para.20.

⁴¹ Response, para.6-7.

⁴² Decision, para.19.

29. The Appeals Chamber has dismissed *in limine* appeals where the “Trial Chamber did not determine the issue” in question.⁴³ Leave to appeal would not normally be granted for such matters, but may arise – as appears to be the case here – where the Trial Chamber wishes to obtain advisory guidance.
30. The Appeals Chamber, however, does not have an advisory function, and such a request does not comply with the “appealable issue” requirement. The parties in such circumstances do not have the benefit of a reasoned decision on the issue concerned. This turns the Appeals Chamber, in substance, into a court of first instance. Any decision rendered by the Appeals Chamber, accordingly, is in substance, a first-instance decision that cannot be appealed. This undermines the appellate process, which is predicated on identifying, discussing and correcting errors by a first instance court.
31. The Appeals Chamber has an inherent jurisdiction to determine the scope of the interlocutory appeals brought before it, including whether matters placed before it are “justiciable.”⁴⁴ This inherent jurisdiction, notwithstanding the authority conferred by Article 82(1)(d), must include the capacity to decline to adjudicate a matter for which leave to appeal has been granted by a Trial Chamber.
- (ii) *The Prosecution’s Proposed “Double Procedure” Is Not Required By the Statute or Rules, and Is So Inefficient That it Cannot Have Been Contemplated by the Drafters*
32. Nothing in the text of Article 85 suggests that a claimant cannot seek adjudication of both the unlawfulness of detention and compensation for that unlawful detention in one and the same proceeding. Sub-parts (2) and (3) address specific situations of unlawful detention, but there is nothing in these provisions suggesting any limitation on the generality of Article 85(1).
33. Mr Mangenda sought adjudication of both unlawfulness and compensation before the Trial Chamber at paragraphs 18 and 19 of the Compensation Request.⁴⁵ Indeed, this is

⁴³ *Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, ICC-01/04-02/06-1225, 22 March 2016, para.24.

⁴⁴ Judgment on OTP Appeal Application, para.42.

⁴⁵ Compensation Request, paras.18-19 (“Mr Mangenda’s detention from 22 October 2014 until 21 October 2014 had no lawful basis. The Release Order was unequivocal, stating that Mr Mangenda ‘shall be released.’ The Appeals Chamber, in denying the Prosecution’s request for suspension of the Release Order, specifically noted

reflected in the Decision itself, which decided to reject these arguments.⁴⁶ On this basis, the Trial Chamber declined to address compensation.⁴⁷

34. The Prosecution argues⁴⁸ that seeking a declaration of unlawfulness and compensation in one and same proceeding is not permitted under the Statute and the Rules. A possible basis for this argument is Rule 173(2), which states, *inter alia*, that:

the request for compensation shall be submitted not later than six months from the date the person making the request was notified of the decision of the court concerning: (a) The unlawfulness of the arrest or detention under article 85, paragraph 1; (b) The reversal of the conviction under article 85, paragraph 2; (c) The existence of a grave and manifest miscarriage of justice under article 85, paragraph 3.

35. Rule 173(2) should not, and need not, be read as limiting the generality of Article 85(1). Instead, Rule 173(2) merely sets out the time limits that apply if there has already been: (i) a finding of unlawful detention under Article 85(1); (ii) the reversal of a conviction; or (iii) a miscarriage of justice. Nothing in this provision says or implies that a claim of unlawful detention under Article 85(1) cannot be presented at the same time as the request for compensation for that unlawful detention.
36. The two commentaries cited by the Prosecution⁴⁹ are either mistaken or not as clear as the Prosecution believes. Mr Zappala offers no support for his assertion that Rule 173(2) entails a “double procedure” in any and all cases.⁵⁰ Mr Bitti’s description of the drafting history is likewise unclear as to whether it was the drafting parties’ intention in respect of Article 85(1) – as opposed to 85(2) and 85(3) – to require a “double procedure.”⁵¹

that ‘the four suspects have an interest to be released immediately.’ Mr Mangenda was at all time prepared to sign the declaration required by the second operative paragraph of the Release Order. Administrative or practical difficulties are not excuse for a person’s continued detention in the absence of any proper legal basis. The European Court of Human Rights has held that ‘administrative formalities connected with release cannot justify a delay of more than several hours’ in releasing a detainee. The prompt release of all three other defendants demonstrates that Mr Mangenda’s tardy release was avoidable, whether by obtaining in advance a more definite commitment from the United Kingdom that it would honour Mr Mangenda’s multi-entry visa, and/or by making alternative arrangements with The Netherlands should that become necessary. The period of unlawful detention was therefore neither necessary nor justified.”)

⁴⁶ Decision, paras.21-25.

⁴⁷ *Id.* para.26.

⁴⁸ Response, paras.4-7.

⁴⁹ *Id.* para.6.

⁵⁰ S Zappalà, “Compensation to an arrested or convicted person”, p.1583.

⁵¹ G Bitti, “Compensation to an Arrested or Convicted Person”, p.628.

37. The “double procedure” is so impractical and inefficient in respect of Article 85(1) claims that it cannot have been within the drafters’ intentions. The “double procedure” would imply in a case such as that involving Mr Mangenda that three separate benches would be required: a bench for trial on the merits; a bench for a declaration under of unlawfulness;⁵² and then a third bench to adjudicate the Article 85(1) claim proper. It cannot have been in the contemplation of the drafters that a simple compensation claim under Article 85(1) should involve at least fifty percent of this Court’s eighteen judges.
38. Alternatively, the Prosecution may argue that second and third benches can consist of the same judges. But if this is the case, then why the necessity of the “double-procedure”? The “double procedure” would consume more of the court’s resources than a consolidated proceeding and delay resolution of the issue.
39. The Prosecution’s asserted “double procedure” in respect of 85(1) would have a second consequence that shows that this could not have been the intention of the drafters of the Rome Statute. The six-month time-limit set out in Rule 173(2) only starts to run, according to the Prosecution, upon the initial declaration of unlawfulness. This would mean that claims of unlawful detention would have no time-limit under the Statute. The drafters would not have been careful to impose a six-month time limit on requests for compensation, while disregarding the time-limit for the supposed condition precedent for such claims. This consequence militates against the double procedure advocated by the Prosecution.

V. RELIEF REQUESTED

40. The Appeals Chamber is respectfully requested to (i) reverse Trial Chamber VI’s determination that Mr Mangenda’s detention by the Registry from 22 to 31 October 2014 was not unlawful; and (ii) remand the matter to the Trial Chamber for a determination on compensation.

⁵² In the present case, the President of the Court decided to designate a bench other than a bench hearing the merits of his case. The reason, presumably, was to avoid any actual or appearance of conflict or contamination arising from the two very separate interests under adjudication. The Pre-Trial Chamber was also apparently also presumed to be unsuitable to adjudicate the Article 85(1) claim.

41. The Appeals Chamber is also respectfully requested not to determine the other issue for which leave to appeal was granted or, in the alternative, reject the Prosecution's asserted "double procedure" for Article 85(1) claims.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 14 July 2016,
At The Hague, The Netherlands