

DISSENTING OPINION OF JUDGE CHANG-HO CHUNG

1. For the reasons outlined below, I respectfully disagree with the decision of the Majority ('Majority Decision') to grant leave to appeal in relation to the 'Decision on request for compensation for unlawful detention' ('Impugned Decision').
2. At the outset, I note that the Prosecution disputes the admissibility of the Request, arguing, *inter alia*, that leave to appeal under Article 82(1)(d) of the Statute is reserved for 'interlocutory decisions and determinations, [and] the [Impugned] Decision is not one such determination', being instead a decision of a final nature.¹
3. Conversely, the Defence argues that 'Article 82(1)(d) applies to decisions that constitute a final disposition of rights and claims of an accused'.² Relying on recent jurisprudence of the Appeals Chamber that a first-instance chamber ought to 'broadly interpret the two prongs of [A]rticle 82(1)(d) of the Statute if it considers it necessary due to human rights considerations under [...] [A]rticle 21(3) of the Statute',³ the Defence argues that the Request, which seeks leave to appeal a decision addressing Mr Mangenda's 'most fundamental of human rights – to liberty and freedom and to be free from arbitrary and unlawful detention' – ought to be admissible on the basis of the importance of its subject matter.⁴
4. However, even in interpreting Article 82(1)(d) of the Statute in an expansive manner, I am not of the view that this provision is applicable to the current circumstances, in which the Impugned Decision constitutes a final decision adjudicated in stand-alone proceedings involving an accused person in a case

¹ Response, ICC-01/05-01/13-1715, para. 6.

² See Request, ICC-01/05-01/13-1704, para. 10.

³ Decision on the "Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.", 23 December 2015, ICC-01/05-01/13-1533 (OA 12), para. 16.

⁴ See Request, ICC-01/05-01/13-1704, para. 29. See also paras 10-15 and 27-30.

before a separate chamber of the Court.⁵ In this connection, I note that Article 82(1)(d) ‘confers a right of appeal against *interlocutory or intermediate decisions* of either the Pre-Trial or the Trial Chamber’⁶ with the potential to ‘move forward’ the proceedings to ensure they follow the right course.⁷

5. Noting the jurisdictional issue of this Chamber making a decision impacting on proceedings over which a separate chamber presides, I agree with the finding in the Majority Decision that the appropriate interpretation of the proceedings at hand would be the ‘satellite’ compensation proceedings that this Chamber is seised of, rather than the *Bemba et al.* case more broadly. Notwithstanding, even if the ‘proceedings’ at hand were interpreted as such, the Impugned Decision 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 Article 74 of the Statute, no further avenue of appeal is specified or envisaged in the statutory framework.⁸
6. The Defence makes no submissions regarding the impact of the Issues on the fair and expeditious conduct of the proceedings, and, in the present circumstances, I do not consider that they could possibly be significantly affected. Further, I do not consider that immediate resolution by the Appeals Chamber may materially advance the compensation proceedings, which have concluded. I therefore respectfully disagree with the Majority Decision insofar as I do not consider the requirements of Article 82(1)(d) of the Statute are capable of being met in the context of the Request, and, noting that leave to appeal has been described as an ‘exceptional remedy’,⁹ I concur with the Prosecution that granting such leave

⁵ It is recalled that the Defence failed to obtain a decision on the unlawfulness of the detention prior to bringing a claim for compensation. *See* Impugned Decision, ICC-01/05-01/13-1663, paras 19-20.

⁶ *DRC Appeals Judgment*, ICC-01/04-168, para. 36 (emphasis added). *See also* paras 13 and 20.

⁷ *DRC Appeals Judgment*, ICC-01/04-168, para. 15.

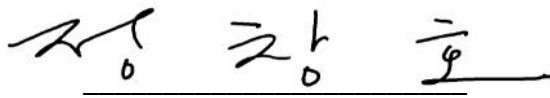
⁸ *See, in this regard, DRC Appeals Judgment*, ICC-01/04-168, paras 35 and 39.

⁹ *See, for example, The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript of hearing on 30 September 2015, ICC-01/12-01/15-T-1-ENG, page 12, lines 7-11.

would 'impermissibly extend[...] the restrictive scope of interlocutory appeals under [A]rticle 82(1)(d)'.¹⁰

7. Accordingly, I would have rejected the Request.

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

A handwritten signature in black ink, consisting of three distinct, stylized characters, positioned above a horizontal line.

Judge Chang-ho Chung

Dated this 13 May 2016

At The Hague, The Netherlands

¹⁰ Response, ICC-01/05-01/13-1715, para. 1.