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Date: **7 March 2016**

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, AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND
NARCISSE ARIDO

Public

**Request for Leave to Appeal “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, pursuant to Article 82(1)(d) of the Statute,¹ leave to appeal Trial Chamber VI's finding that there "is no basis for finding that the continued detention of Mr. Mangenda between 22 October and 31 October was unlawful."² This finding constitutes a final disposition of Mr. Mangenda's fundamental human rights, and remedies for alleged breach thereof. The Appeals Chamber has previously held that appeals from such types of decisions "fall[] within the ambit of article 82(1)(d) of the Statute."³
2. Leave to appeal is necessary and appropriate in present circumstances. First, it is a general principle of law that a final determination of fundamental human rights and other valuable claims is subject to appeal. The absence of an express right of appeal in Article 85(1), particularly when interpreted in light of the Appeals Decision cited above, cannot properly be interpreted as a bar on appeals with leave. On the contrary, Article 82(1)(d) should be interpreted "broadly" and permissively when "necessary due to human rights considerations under [sic] article 21 of the Statute."⁴ Second, the Decision involves at least six appealable "issues": (i) 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;⁵ (ii) 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;⁶ (iii) 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

¹ All references to "Article", unless otherwise indicated, are to be understood as references to articles of the Rome Statute. This request for leave to appeal is timely submitted pursuant to Regulation 33 of the Regulations of the Court and Rule 155(1) of the Rules of Procedure and Evidence. Neither the day on which the initial decision was notified nor the day on which the leave to appeal is filed is included in the calculation of the five-day time limit. Notice of the Decision was given on Friday, 26 February 2016. Pursuant to Regulation 33(1)(c), the time limit began to run on Monday, 29 February 2016 and expired on Friday, 4 March 2016. Regulation 33(1)(d) provides that a filing deadline is the "first working day of the Court following expiry of the time limit." The filing deadline for this submission is, accordingly, Monday, 7 March 2016. *See Gaddafi and Al-Senussi*, The Government of Libya's Appeal against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-350, 7 June 2013, para. 7.

² *Bemba et al.*, Decision on request for compensation for unlawful detention, ICC-01/05-01/13-1663, 26 February 2016 ("Decision"), para. 26.

³ *Bemba et al.*, Decision on the "Requête en appel de la defense de monsieur Aimé Kilolo Musamba contre la decision de la Chambre de première instance VII du 17 novembre 2015", ICC-01/05-01/13-1533, 23 December 2015 ("Appeals Decision on the Scope of Article 82(1)(d)"), para. 15.

⁴ *Id.* para. 16.

⁵ Decision, para. 25 (addressing only the obligations and conduct of the Registry, without analyzing the conduct of other actors whose conduct contributed to the situation that arose on 22 October 2013).

⁶ Decision, para. 25 ("the Registry [...] did everything in its power").

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;⁷ (iv) whether the Trial Chamber erred in law and in fact in attributing Mr. Mangenda's continued detention to his own alleged failure to give an address at which he would reside during his period of release;⁸ (v) the Trial Chamber's error 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; and (vi) 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".⁹

3. These issues satisfy the requirements of leave pursuant to Article 82(1)(d). First, each of these issues arises out of the Decision, and each is "essential for the determination of the Decision's correctness."¹⁰ Second, the Decision itself constitutes a final outcome, which satisfies the first objective test under Article 82(1)(d). Third, immediate resolution is the only appellate resolution available. Denial of recourse to appeal now will, in effect, irrevocably deprive him of any right of appeal.

II. PROCEDURAL HISTORY

4. 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

⁷ Decision, para. 25 ("[t]he Chamber does not consider that the Registry was either in a position, or under an obligation to anticipate the Release Order").

⁸ Decision, para. 23 ("Mr. Mangenda consequently failed, at that stage, to fulfil one of the pre-conditions of his release.")

⁹ Decision, para. 24.

¹⁰ *Bemba et al.*, Prosecution's application for leave to appeal the "Decision on Witness Preparation and Familiarisation", ICC-01/05-01/13-1276, 21 September 2015, para. 22.

arrangements which are necessary and appropriate for the purposes of the enforcement of this decision.¹¹

5. On 22 October 2014, both Pre-Trial Chamber II¹² and the Appeals Chamber¹³ denied Prosecution requests to suspend execution of this Order. From that moment on, the Single Judge's Release Order was enforceable immediately.
6. Two of the three other defendants subject to the Release Order were released immediately;¹⁴ the third was released very early the next morning.¹⁵
7. Mr. Mangenda, however, was not released from detention until after 18h30 on 31 October 2014¹⁶ – nine days after the Single Judge's Release Order was immediately enforceable.¹⁷
8. On 21 April 2015, Mr. Mangenda submitted a request to the Presidency of the Court seeking compensation for his unlawful detention from 22 October to 31 October 2014.¹⁸ The matter was referred by the Presidency to Trial Chamber VI on 2 October 2015.¹⁹ The Prosecution filed its Response on 30 October 2015,²⁰ and the Defence sought leave to reply on 6 November 2015.²¹
9. On 26 February 2016, Trial Chamber VI denied the Request.²²

¹¹ *Bemba et al.*, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido", ICC-01/05-01/13-703, 21 October 2014 ("Release Order").

¹² 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.

¹³ *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.

¹⁴ *Bemba et al.*, 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, 27 October 2014 ("First Registry Report"), paras. 11-12.

¹⁵ *Id.* paras. 16-21.

¹⁶ *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.

¹⁷ Fourth Registry Report, p. 5.

¹⁸ *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).

¹⁹ *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.

²⁰ *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).

²¹ *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, 6 November 2015.

²² *Bemba et al.*, Decision on request for compensation for unlawful detention, ICC-01/05-01/13-1663, 26 February 2016, paras. 23, 26.

III. ARTICLE 82(1)(D) GOVERNS THE APPEALABILITY OF THE DECISION

10. The Appeals Chamber has previously held that Article 82(1)(d) applies to decisions that constitute a final disposition of rights and claims of an accused. This holding arose from a decision concerning the seizure of an accused's assets which, according to the Pre-Trial Chamber seized of the matter, fell "*per se* [...] outside the scope of article 82(1)(d) of the Statute."²³ The Pre-Trial Chamber recognized, however, that depriving an accused of the right to appeal such an important decision "might be hard to reconcile with the need that the Statute be construed consistently with internationally recognized human rights" and concluded as a result that "it is desirable that the issue be brought before the Appeals Chamber and, accordingly, sees no obstacle for Mr Kilolo to directly submit his 'Notice of Appeal' to the Appeals Chamber, thereby prompting its determination of the matter."²⁴
11. The Appeals Chamber disagreed that there was an appeal as of right, but expressly held that leave to appeal could have been sought pursuant to Article 82(1)(d) instead:

The Appeals Chamber observes that the Pre-Trial Chamber informed Mr Kilolo that decisions related to the seizure of an accused's assets "*per se* fall outside the scope of article 82(1)(d) of the Statute", which was apparently misleading in its broad terms for Mr Kilolo. However, the Appeals Chamber observes that this was said in the context of wholly different issues than those presently raised in Mr Kilolo's Notice of Appeal. In this regard, the Appeals Chamber considers that Mr Kilolo has not adequately substantiated his argument that the issues he now seeks to directly appeal to the Appeals Chamber do not fall within the scope of article 82 (1) (d) of the Statute. In the view of the Appeals Chamber, the proper avenue to bring the issues raised in Mr Kilolo's Notice of Appeal to the Appeals Chamber is by requesting leave to appeal from the relevant first-instance Chamber pursuant to article 82 (1) (d) of the Statute [...]. The Appeals Chamber recalls that that article 82 (1) (d) of the Statute vests power in the Pre-Trial and Trial Chambers to certify appealable issues and to determine whether appellate resolution will materially advance the proceedings. In addition, article 21 (3) of the Statute is applicable to all Chambers, not only the Appeals Chamber. ***Accordingly, should a first-instance Chamber find itself in a situation similar to that encountered by the Pre-Trial Chamber, the Appeals Chamber considers that the matter falls within the ambit of article 82 (1) (d) of the Statute. Therefore, it is for that Chamber to exercise its discretion to broadly interpret the two prongs of article 82 (1) (d) of the Statute if it considers***

²³ *Bemba et al.*, Decision on Mr. Kilolo's "Notice of appeal against the decision of the Single Judge ICC-01/05-01/13-743-Conf-Exp" dated 10 November 2014 and on the urgent request for the partial lifting of the seizure on Mr. Kilolo's assets dated 24 November 2014, ICC-01/05-01/13-773, 1 December 2014, p. 5.

²⁴ *Id.* p. 6.

*it necessary due to human rights considerations under to article 21 (3) of the Statute.*²⁵

12. The approach articulated by the Appeals Chamber reflects a general practice in civilized legal systems of the world of according a right of appeal from decisions above a certain threshold of importance. An appeal lies as of right in civil matters in France unless otherwise indicated,²⁶ and the *Code de l'organisation judiciaire* specifies that appeals lie as of right in the two main civil courts for claims equal to or exceeding 4,000 euros.²⁷ Article 111 of the Italian Constitution enshrines an appeal as of right for errors of law, which is reflected in a general right of appeal in the Italian Code of Civil Procedure.²⁸ A party has a right of appeal from a first instance decision in German courts wherever “the subject matter of the appeal is greater than 600 euros”.²⁹ The Slovenian Constitution declares that at least one appeal must be provided in respect of decision by which a citizen’s rights, duties, or legal interests are determined.³⁰ The Czech Code of Civil Procedure provides that “[a] participant may challenge the decision of the district court or a regional court decision issued in first instance appeal”, unless otherwise indicated.³¹ The Committee of Ministers of the Council of Europe has declared that “appeal procedures [...] should also be available for civil and commercial cases and not only for criminal cases” and that “[i]n principle, it should be possible for any decision of a lower court (‘first court’) to be subject to the control of a higher court (‘second court’)”.³²
13. A sampling of Asian and African legal systems reflects the same approach. China accords at least one appeal in civil matters.³³ The Japanese Code of Civil Procedure likewise provides that “[a]n appeal to the court of second instance may be filed against a final judgment made by a district court as the court of first instance or a final

²⁵ Appeals Decision on the Scope of Article 82(1)(d), paras. 15-16 (emphasis added).

²⁶ *Code of Civil Procedure*, art. 543 (‘[l]a voie de l’appel est ouverte en toutes matières, même gracieuses, contre les jugements de première instance s’il n’en est autrement disposé.’)

²⁷ *Code de l'organisation judiciaire*, arts. R221-3 and R221-4.

²⁸ *Constitution of Italy*, art. 111 (except in cases of ‘sentences by military tribunals in time of war’); *Code of Civil Procedure*, art. 339.

²⁹ *Code of Civil Procedure*, s. 511.

³⁰ *Constitution of the Republic of Slovenia*, art. 25; *Civil Procedure Act*, arts. 35-37; Order of the Constitutional Court of Slovenia in Case UP-377/04, para. 4.

³¹ *Code of Civil Procedure*, s. 201.

³² Recommendation No. R (95) 5 of the Committee of Ministers to Member States concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases, 7 February 1995, Preamble and Article 1(a).

³³ *Civil Procedure Law of the People’s Republic of China (Civil Procedure Law)*, arts. 164, 175, 198. See also *Organic Law*, art. 12.

judgment made by a summary court”, unless otherwise agreed by the parties.³⁴ Under the Constitution of the Democratic Republic of the Congo “*le droit de former un recours contre un jugement est garanti à tous et est exercée dans les conditions fixées par la loi.*”³⁵ The Ugandan Constitution provides that in cases involving a fundamental right or other right or freedom guaranteed under its Constitution, “[a]ny person aggrieved by any decision of the court may appeal to the appropriate court”.³⁶ The Civil Procedure Act then specifies the procedures for first³⁷, second³⁸ and third³⁹ appeals in civil proceedings. Under the Civil Procedure Act of South Korea, “[a]n appeal may be filed against a final judgment rendered by a district court in the first instance”⁴⁰, provided that the parties have not agreed otherwise.⁴¹

14. One author has expressed the view that during some part of the drafting of Article 85 “[e]veryone agreed that the decision on compensation should be final and that no appeal was possible under article 82”.⁴² However, no citation to the *travaux préparatoires* of the Rome Statute is provided to support this view. On the contrary, the author admits that a proposal to preclude appeals from decisions pursuant to Article 82 was unsuccessful.⁴³ The failure of this proposal, rather than implying unanimous agreement that no appeal should lie from decisions taken under Article 85, suggests the contrary.
15. The inconclusiveness of the *travaux préparatoires* in this situation should give way, as recognized by the Appeals Chamber, to the interpretative guidance provided by general principles of law and by internationally recognized human rights. The overwhelming trend in civilized legal systems is that an appeal should lie as of right

³⁴ *Code of Civil Procedure*, art. 281(1).

³⁵ *Constitution of the Democratic Republic of the Congo*, art. 21. The Code of Civil Procedure provides, subject to limited enumerated exceptions, that final decisions are subject to appeal. See e.g., articles 66-79.

³⁶ *Constitution of Uganda*, art. 50.

³⁷ *Civil Procedure Act*, art. 66.

³⁸ *Id.* art. 72.

³⁹ *Id.* art. 73.

⁴⁰ *Civil Procedure Act*, art. 390.

⁴¹ *Id.*

⁴² G. Bitti, “Compensation to an Arrested or Convicted Person”, in Roy S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc., New York), p. 634.

⁴³ *Id.* 633-634 (“Canada suggested making a reference to article 83, paragraph 4. The reasoning behind the Canadian proposal was that no appeal was possible in this matter according to article 82, so the decision on compensation by the Chamber would be final. It would therefore be logical to refer to article 83, paragraph 4, which applies to the final judgments issued by the Appeals Chamber. Everyone agreed 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”) (internal citations omitted).

from important decisions, especially those involving declarations of human rights, unless there is a specific provision to the contrary. This claim involves Mr. Mangenda's most basic rights and freedoms. If further categorization is required, it constitutes a public tort, for which compensation is sought. The general practice of nations confirms that litigation concerning violations of rights and public torts is subject to appeal. The least that must be required under the Statute, given this context, is that such claims are subject to appeal *with leave* pursuant to Article 82(1)(d).

IV. LEAVE IS JUSTIFIED PURSUANT TO ARTICLE 82(1)(d)

(i) *Introduction*

16. A decision is subject to appeal, pursuant to Article 82(1)(d), where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

17. The Prosecution has previously submitted, with which the Defence agrees, that a request for leave to appeal “must not engage on the merits or correctness of a Decision.”⁴⁴ The sole issue of concern, unlike in a request for reconsideration, is the consequences – not the correctness – of the decision. Article 82(1)(d) confers no discretion to deny leave when the conditions are satisfied.

(ii) *Each of the Six Issues Is Appealable*

18. The Appeals Chamber has defined an “issue” as “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination” and as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”⁴⁵ “Essential” in this context is understood as meaning essential to some

⁴⁴ *Bemba et al.*, Corrected version of “Prosecution’s application for leave to appeal the “Decision on Witness Preparation and Familiarisation”, 21 September 2015, ICC-01/05-01/13-1276, ICC-01/05-01/13-1276-Corr, 21 September 2015, para. 24.

⁴⁵ *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, para. 9 (“DRC, Appeals Chamber LtA Decision”). See *Ntaganda*, Decision on Defence

judicial disposition, and “not merely a question over which there is disagreement or conflicting opinion.”⁴⁶ Issues that have previously been recognised as appealable range from the correctness of a particular determination to the standard that has been applied as part of a determination. An appealable issue may be “legal or factual or mixed.”⁴⁷ An example of the former includes the following broadly formulated issue recently approved for interlocutory appeal by another ICC Trial Chamber:

Whether the Chamber had already made the requisite findings under Article 87(7) of the Statute that the Kenyan Government failed to comply with the Prosecution’s cooperation request, such that it ought to have referred the matter to the Assembly of States Parties (‘ASP’); or in the alternative, if the Chamber’s findings are not considered ‘formal’ or ‘judicial’ findings under Article 87(7) of the Statute, whether it had any discretion not to enter the required finding under that provision and thus refer the matter to the ASP.⁴⁸

19. Examples of issues that are more legal in nature include:

Whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of “interference.”⁴⁹

[...]

“Whether the test for an excusal of the accused developed by the Majority is supported by the applicable law.”⁵⁰

[...]

The correctness of the standard and procedure established and applied by the Trial Chamber to determine whether the identity of an intermediary must be disclosed under Rule 77.⁵¹

request for leave to appeal the Chamber’s decision on postponement of the trial commencement date, ICC-01/04-02/06-604, 21 May 2015, para. 15.

⁴⁶ *Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victim’s Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, para. 8.

⁴⁷ *DRC*, Appeals Chamber LtA Decision, para. 9.

⁴⁸ *Kenyatta*, Decision on the Prosecution’s request for leave to appeal, ICC-01/09-02/11-1004, 9 March 2015 (“*Kenyatta* Decision on Leave to Appeal”), para. 9(i), 25.

⁴⁹ *Ruto et al.*, Decision on the Defence’s Applications for Leave to Appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, ICC-01/09-01/11-1953-Red-Corr, 10 September 2015 (“*Ruto* Decision on Leave to Appeal”), paras. 20(v), 21.

⁵⁰ *Ruto et al.*, Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial’, ICC-01/09-01/11-817, 18 July 2013, para. 2(ii), 18-19.

⁵¹ *Lubanga*, Decision on the prosecution request for leave to appeal the “Decision on Intermediaries”, ICC-01/04-01/06-2463-Conf, 2 June 2010, paras. 2, 8.

20. A Trial Chamber has the discretion to re-formulate issues posited for appeal as it deems necessary and fit⁵² and, as illustrated above, such issues may be formulated in the alternative.⁵³
21. Each of the six proposed issues appear to have been determinative of the claim before the Trial Chamber.
22. The first two issues are appealable. The Decision addresses the unlawfulness of the detention according only to a fault standard (second issue), and only in respect of the Registry (first issue). Nothing in Article 85 suggests that an unlawful detention can arise only out of the conduct of the Registry, let alone as a result only of its fault or negligence. The application of these additional conditions erroneously limited the Trial Chamber's analysis of the definition of "unlawful". In other words, the Decision erroneously failed to consider whether unlawful detention can arise in the absence of fault, or in the absence of fault by a single actor.
23. The third issue is also appealable. The Trial Chamber failed to direct its attention to Mr. Mangenda's counsel's vigorous efforts – including by way of a motion filed eight days before the Release Order⁵⁴ – to ensure in advance that the position of the United Kingdom was unequivocal. The Single Judge did not respond to this request until the issuance of the Release Order itself – in which he, incidentally, dismissed the request as unnecessary because Mr. Mangenda "is the holder of a visa expiring in August 2015 for the United Kingdom" and that, "accordingly, since no additional conditions are imposed to the release, there is no need for the Chamber to further consult with the relevant States."⁵⁵ Regardless of whether, as stated in the Decision, the Registry "was either in a position, or under an obligation, to anticipate the Release Order", the Single Judge and the Registry together were at least under an obligation to ensure that Mr. Mangenda could be released safely and in compliance with the Court's obligations to States on the date on which such a release was to be ordered. Indeed, if this requirement was, as the Trial Chamber found, "reasonable and foreseeable" to Mr.

⁵² *Ruto* Decision on Leave to Appeal, para. 20.

⁵³ *Kenyatta* Decision on Leave to Appeal, para. 9(i), 25.

⁵⁴ *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.

⁵⁵ Release Order, p. 6.

Mangenda,⁵⁶ then it must likewise have been “reasonable and foreseeable” to the Single Judge and Registry as well.

24. The fourth appealable issue concerns the Trial Chamber’s error in finding that Mr. Mangenda did not give an address, as prescribed in the Release Order, “at which [he] will be staying.”⁵⁷ Mr. Mangenda did give such an address. The United Kingdom, however, denied access to that address. Regardless of the legality or even reasonableness of the UK’s decision, Mr. Mangenda fulfilled the condition precedent prescribed in the Release Order and was, thus, entitled to release. Any action by a third party denying Mr. Mangenda access to an address that he reasonably believed would be accessible to him cannot be attributed to Mr. Mangenda, let alone relied upon as a justification for his detention beyond the prescribed date of his release ordered by the Single Judge.

25. The fifth appealable issue is the Trial Chamber’s erroneous reliance on Mr. Mangenda’s refusal to be released to the Democratic Republic of Congo (DRC) to find that his continued detention was lawful. The Registry and Trial Chamber were both aware that Mr. Mangenda had legitimate reasons to fear being repatriated to the DRC – a country from which his own wife has been granted refugee status in the United Kingdom on the basis of her association with him. The Decision’s apparent reliance on this consideration to find that his continued detention after 21 October 2014 was not unlawful was erroneous.

26. The sixth appealable issue is the Trial Chamber’s erroneous characterization of the period of unlawful detention as “an extension of his lawful detention pursuant to the initial arrest warrant of 20 November 2013.”⁵⁸ This ignores the plain wording of the Release Order. Had the Trial Chamber intended to authorize any continued detention of Mr. Mangenda in light of any administrative difficulties, then it could only have done so by a further judicial order. Detention is not, and cannot, be a matter of administrative discretion. Liberty can be curtailed only pursuant to a valid court order. The suspension or delay of a judicial release order is a serious infringement of the right to liberty that can only be infringed in accordance with another lawful judicial order. No such order exists or was made by the Pre-Trial Judge. The Decision

⁵⁶ Decision, para. 23.

⁵⁷ Release Order, p. 6.

⁵⁸ Decision, para. 24.

accordingly erred in law and in fact in finding that Mr. Mangenda's continued detention was merely an extension of his lawful detention.

V. THE DECISION SIGNIFICANTLY AFFECTS THE OUTCOME OF THE PROCEEDINGS AND THE TRIAL, AND GRANTING LEAVE TO APPEAL CONSTITUTES THE ONLY AVENUE OF APPELLATE REVIEW

27. The Appeals Chamber, as described above, has indicated that Article 82(1)(d) is applicable to final decisions such as the freezing of assets. The Appeals Chamber did not specify, however, how the criteria of Article 82(1)(d) – which on their face apply to interlocutory matters – should be interpreted when applied to such final decisions.
28. The plainest possible interpretation of Article 82(1)(d) in this context, which must be informed by the “general principles of law” referred to in Article 21(1)(c), is that leave to appeal should be granted in cases where the decision involves the “outcome” of an important proceeding, and which would materially advance *that* proceeding. In other words, the reference point for the appeal, rather than being the criminal trial, must be the decision itself. This is the only sensible, coherent and possible interpretation of the words of Article 82(1)(d) when applied to a final decision of the issue that will not be revisited in the context of the criminal trial to which it relates.
29. The Decision will not be revisited in the context of the Article 70 trial to which it relates and is fully dispositive of the litigation. The interests in question are of vital importance to Mr. Mangenda. The Decision directly addresses his most fundamental of human rights – to liberty and freedom and to be free from arbitrary and unlawful detention. The amount of compensation claimed reflects the importance of those interests. The Decision constitutes an “outcome” in respect of a claim of a violation of human rights, and a request for compensation therefor. Permitting an appeal now is the only avenue of appeal and, accordingly, would “materially advance” that proceeding.
30. The finality of the Decision, combined with the importance of the interests, would lead to an appeal as of right in almost any domestic legal system. The standard for granting leave pursuant to Article 82(1)(d), when interpreted in light of Article 21(1)(c) and Article 21(3), should be informed by this practice of nations.

VI. CONCLUSION AND RELIEF REQUESTED

31. Leave is requested pursuant to Article 82(1)(d) to Appeal the Decision in respect of the six issues identified above; or, in the alternative, in respect of any of the six issues as the Trial Chamber may deem appropriate; or, in the further alternative, in respect of any issues that the Trial Chamber may itself deem fit and appropriate to formulate.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 7 March 2016,
At The Hague, The Netherlands