

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/05-01/13

Date: 13 May 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

**Decision on Defence request seeking leave to appeal the ‘Decision on request for
compensation for unlawful detention’**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell
Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku
Ms Beth Lyons

Legal Representatives of Victims

The Office of Public Counsel for Victims

States' Representatives

Legal Representatives of Applicants

The Office of Public Counsel for the Defence

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ('Bemba et al. case'), having regard to Articles 21(3) and 82(1)(d) of the Rome Statute ('Statute') and Regulation 24(5) of the Regulations of the Court ('Regulations'), issues by Majority, Judge Chung dissenting, this 'Decision on Defence request seeking leave to appeal the "Decision on request for compensation for unlawful detention"'.

I. Procedural history

1. On 26 February 2016, the Chamber issued the 'Decision on request for compensation for unlawful detention' ('Impugned Decision'),¹ in which it rejected the request of the defence team for Mr Mangenda ('Defence') for compensation for Mr Mangenda in relation to his detention between 22 and 31 October 2014, having held that there was no basis to find that this detention was unlawful.²
2. On 7 March 2016, the Defence filed a request for leave to appeal the Impugned Decision ('Request') with respect to six issues ('Issues').³
3. On 11 March 2016, the Office of the Prosecutor ('Prosecution') filed a response ('Response'), arguing that the Request ought to be rejected.⁴
4. On 22 March 2016, the Defence filed a request for leave to reply to the Response on two issues ('Request for Leave to Reply').⁵

¹ ICC-01/05-01/13-1663.

² See Impugned Decision, ICC-01/05-01/13-1663, paras 21-26.

³ Request for Leave to Appeal "Decision on request for compensation for unlawful detention" (ICC-01/05-01/13-1663), ICC-01/05-01/13-1704.

⁴ Prosecution response to Jean-Jacques Mangenda Kabongo's request for leave to appeal "Decision on request for compensation for unlawful detention", 11 March 2016, ICC-01/05-01/13-1715, with one public annex.

⁵ Corrigendum to Request for Leave to Reply to "Prosecution response to Jean-Jacques Mangenda Kabongo's request for leave to appeal 'Decision on request for compensation for unlawful detention'" (ICC-01/05-01/13-1715), ICC-01/05-01/13-1734-Corr, with two public annexes.

5. On 24 March 2016, the Prosecution requested that the Chamber dismiss the Request for Leave to Reply *in limine* ('Request for Dismissal') on the basis that it impermissibly includes substantive arguments as well as voluminous appended material.⁶
6. On 29 March 2016, the Defence responded to the Request for Dismissal ('Response to Request for Dismissal') arguing, *inter alia*, that it should be rejected as being improperly filed.⁷

II. Submissions

7. The Defence seeks leave to appeal on the following Issues:
 - i. Whether the Chamber erred in law by addressing only the conduct of the Registry, and not other actors, to determine whether the extended detention was unlawful ('First Issue');
 - ii. Whether the Chamber erred in law in applying a 'fault standard' upon the conduct of the Registry to determine whether Mr Mangenda's detention was unlawful ('Second Issue');
 - iii. Whether the Chamber erred in law and in fact in finding that the 'formal obstacles to release' could not have been anticipated by any relevant actor ('Third Issue');
 - iv. Whether the 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 ('Fourth Issue');
 - v. Whether the Chamber erred in fact in apparently determining that Mr Mangenda caused his own non-release by declining to be repatriated to the Democratic Republic of Congo ('DRC') ('Fifth Issue'); and
 - vi. Whether the 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' ('Sixth Issue').⁸

⁶ Prosecution's request to dismiss *in limine* Jean-Jacques Mangenda Kabongo's request for leave to reply to the Prosecution's response on his request to appeal "Decision on request for compensation for unlawful detention", ICC-01/05-01/13-1750. *See in particular* paras 4-5.

⁷ Response to "Prosecution's request to dismiss *in limine* Jean-Jacques Mangenda Kabongo's request for leave to reply to the Prosecution's response to his request to appeal 'Decision on request for compensation for unlawful detention'" (ICC-01/05-01/13-1750), ICC-01/05-01/13-1755-Conf. *See in particular* para. 16.

8. The Defence argues that leave to appeal the Impugned Decision may viably be sought under Article 82(1)(d) of the Statute because, despite the fact that there is no express right of appeal granted under Article 85(1), the Impugned Decision constitutes ‘a final disposition of Mr Mangenda’s fundamental human rights’⁹ and an avenue of appeal ought to stem therefrom. The Defence argues that this approach is: (i) consistent with previous jurisprudence of the Court; (ii) required by Article 21(3) of the Statute; (iii) justified by the inconclusiveness of the *travaux préparatoires* relating to Article 85; and (iv) ‘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’.¹⁰
9. The Defence avers further that the Request meets the requirements of Article 82(1)(d) of the Statute – submitting that each of the Issues is appealable, the Impugned Decision significantly affects the outcome of the proceedings and the trial, and granting leave to appeal ‘constitutes the only avenue of appellate review’.¹¹
10. The Prosecution argues that the Request ought to be dismissed *in limine* on the basis that it is inadmissible, insofar as the Statute does not authorise any appeal of decisions on compensation, and that the Request therefore ‘impermissibly extends the restrictive scope of interlocutory appeals under [A]rticle 82(1)(d)’.¹² The Prosecution also submits that the jurisprudence referred to by the Defence in justification of the admissibility of the Request is misguided, and that the *travaux préparatoires* do not support the argument that compensation decisions are appealable.¹³

⁸ See Request, ICC-01/05-01/13-1704, para. 2.

⁹ Request, ICC-01/05-01/13-1704, para. 1.

¹⁰ Request, ICC-01/05-01/13-1704, para. 12. See also paras 10-15.

¹¹ Request, ICC-01/05-01/13-1704, page 13 and paras 16-30.

¹² Response, ICC-01/05-01/13-1715, para. 1. See also paras 4-11.

¹³ Response, ICC-01/05-01/13-1715, paras 7 and 10.

11. The Prosecution argues that, even on its merits, the Request fails to meet the requirements of Article 82(1)(d) of the Statute. It avers that none of the Issues is appealable, and further, that the Request fails to show that the Issues would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of trial, with there being no possible impact on the proceedings at hand, nor on the *Bemba et al.* case more broadly. It submits that the Request also fails to demonstrate that the Appeals Chamber's immediate resolution of the issues could materially advance the proceedings where, *inter alia*, the Defence 'merely misreads and disagrees with the [Impugned] Decision'.¹⁴

III. Analysis

i. Request for Leave to Reply and associated filings

12. As a preliminary matter, regarding the Request for Leave to Reply, pursuant to Regulation 24(5) of the Regulations, the Chamber recalls that participants may only reply to a response with the leave of the Chamber. The Chamber does not consider that it would have been assisted by further submissions on either of the identified issues. The Chamber therefore rejects the Request for Leave to Reply. Having so decided, the Chamber does not consider it necessary to further address the Request for Dismissal, nor the Response to Request for Dismissal.

ii. Applicable law

13. The Chamber notes that there is no direct right of appeal for decisions on compensation issued pursuant to Article 85(1) of the Statute, nor can such a right be read into the statutory framework.¹⁵ Therefore, the Chamber considers

¹⁴ Response, ICC-01/05-01/13-1715, para. 24. *See also* paras 12-23.

¹⁵ *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (OA 3) ('DRC Appeals Judgment'), paras 35 and 39.

that the Request may only be appealed if the specific requirements of Article 82(1)(d) of the Statute are met.

14. The Chamber incorporates by reference the applicable law on leave to appeal as set out in its previous decisions.¹⁶

iii. Analysis and findings of the Chamber

15. The Chamber will first consider whether each of the Issues constitute appealable issues arising from the Impugned Decision.

First, Second and Third Issues

16. The Chamber considers that the First Issue misconstrues the Impugned Decision. Contrary to the Defence submission, the Chamber did not consider only the conduct of the Registry in determining whether Mr Mangenda's detention was unlawful, but also clearly adverted to the actions of Mr Mangenda.¹⁷
17. The Chamber considers that the Second Issue similarly misrepresents the Impugned Decision. The Chamber did not apply a 'fault standard' in determining whether Mr Mangenda's detention was unlawful but rather considered the express terms of the Release Order¹⁸ and the fact that the necessary pre-conditions to release had not been fulfilled. The Chamber also noted that 'the administrative and legal procedure required for the release' could not be dispensed with.¹⁹ In submitting that the Chamber applied a fault standard, the Defence merely refers to the Chamber's subsequent consideration

¹⁶ See, for example, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 4 August 2015, ICC-01/04-02/06-760-Red, paras 20-21.

¹⁷ See for example, Impugned Decision, ICC-01/05-01/13-1663, paras 23-24.

¹⁸ See 'Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido', 21 October 2014, ICC-01/05-01/13-703 (referred to as 'Release Order').

¹⁹ Impugned Decision, ICC-01/05-01/13-1663, para. 22.

of the timeliness of the Registry's efforts in assisting Mr Mangenda to secure the necessary conditions for his release.²⁰

18. Similarly, contrary to the Defence submissions with respect to the Third Issue, the Chamber did not find that the Release Order could not have been anticipated 'by any relevant actor'. Rather, the Chamber noted that it did not consider that the Registry was 'in a position, or under an obligation' to anticipate the Release Order.²¹ Moreover, the Chamber's observation that the Release Order could not have been anticipated by the Registry was not essential to its finding regarding the lawfulness of Mr Mangenda's detention. The Chamber considers that the First, Second and Third Issues mischaracterise the Impugned Decision, and consequently do not arise therefrom.

Fourth Issue

19. The Chamber considers that the Fourth Issue does not constitute an appealable issue but rather mischaracterises and demonstrates mere disagreement with the Chamber's finding that Mr Mangenda failed to fulfil one of the pre-conditions of his release.²² Indeed, in so arguing, the Defence disregards the Chamber's finding as to the conditional nature of the Release Order, and misrepresents the Impugned Decision to the extent it submits that the Chamber attributed the actions of the United Kingdom to Mr Mangenda.

Fifth Issue

20. The Chamber does not consider that the resolution of the Fifth Issue was essential to its finding in the Impugned Decision that Mr Mangenda's detention was not unlawful.²³ The Chamber's observation that Mr Mangenda declined to be released to the DRC constituted one of a number of factors in its assessment

²⁰ See Impugned Decision, ICC-01/05-01/13-1663, para. 25.

²¹ Impugned Decision, ICC-01/05-01/13-1663, para. 25.

²² See, in this regard, DRC Appeals Judgment, ICC-01/04-168, para. 9, and Impugned Decision, ICC-01/05-01/13-1663, paras 23-24.

²³ See, in this regard, DRC Appeals Judgment, ICC-01/04-168, para. 9.

of whether the pre-conditions of release had been fulfilled.²⁴ Attribution of cause to Mr Mangenda for his non-release was not an essential element of the Chamber's objective finding that the conditions to release had not been fulfilled at the relevant time.

Sixth Issue

21. The Chamber considers the Sixth Issue to constitute an appealable issue arising from the Impugned Decision and shall therefore proceed to assess whether the remaining requirements of Article 82(1)(d) are met. In so doing, the Chamber recalls the Appeals Chamber's guidance that a chamber ought to 'exercise its discretion 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'.²⁵ For this purpose, the Chamber considers the 'proceedings' at hand to be the compensation proceedings of which it is seised. In the context of these compensation proceedings, the Chamber concurs with the Defence that the Impugned Decision constitutes the final disposition of matters involving Mr Mangenda's fundamental human rights, and that the Sixth Issue, which relates to the lawfulness of Mr Mangenda's detention, bears upon such rights.²⁶ In light of this, the Chamber considers that the fairness and expeditiousness of those proceedings would be significantly impacted if the Chamber had wrongly decided the Sixth Issue.
22. Finally, in light of the aforementioned finality of the Impugned Decision and the fact that there would otherwise be no opportunity to 'advance the proceedings' at hand outside granting leave to appeal under Article 82(1)(d) of the Statute, the Chamber considers that immediate resolution of the Sixth Issue,

²⁴ See Impugned Decision, ICC-01/05-01/13-1663, para. 23.

²⁵ 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.

²⁶ See, in this regard, Article 9 of the Universal Declaration of Human Rights and Articles 9(1) and (5) of the International Covenant on Civil and Political Rights.

as formulated below, would indeed constitute an appropriate avenue to remove any doubt as to the correctness of the Impugned Decision, and would provide a 'safety net for the integrity of the proceedings'.²⁷

23. Accordingly, noting the discretion afforded to chambers to formulate issues for appeal,²⁸ the Chamber certifies the following two issues for appeal under Article 82(1)(d) of the Statute:

(i) 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; and

(ii) 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 the initial arrest warrant of 20 November 2013 and the conditions identified in the Release Order'.²⁹

²⁷ *DRC Appeals Judgment*, ICC-01/04-168, para. 15.

²⁸ *DRC Appeals Judgment*, ICC-01/04-168, para. 20.

²⁹ As found by the Chamber in the Impugned Decision, ICC-01/05-01/13-1663, para. 24.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

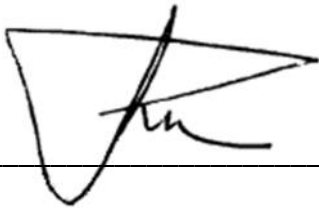
GRANTS leave to appeal the Impugned Decision, in accordance with paragraph 23 above;

REJECTS all other requests; and

ORDERS the Defence to file a public redacted version of the Response to Request for Dismissal (ICC-01/05-01/13-1755-Conf) within two weeks of the present decision being issued.

Judge Chung appends a dissenting opinion.

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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 13 May 2016

At The Hague, The Netherlands