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Topic: ICC Statute, Article 85

Level: Introductory

Date of recording: 3 July 2017

Place of recording: The Hague, the Netherlands

Duration of recording: 04:17

PURL of film: www.cilrap.org/cilrap-film/85-cross/

PURL of English transcript: www.legal-tools.org/doc/fa75b2/

Article 85 gives effect to the individual right to receive compensation. It is not an appeal at all, but rather a set of three discrete procedures under the Rome Statute.

First, article 85(1) states generally that orders for compensation may be issued in respect of anyone who has been the victim of unlawful arrest or detention. The ICC's jurisprudence has interpreted rule 173(2) of the Rules of Procedure and Evidence as also requiring a previous decision that arrest or detention has been unlawful before a claim for compensation can be brought. On the other hand, even without such a decision, chambers have proceeded to consider article 85 requests on their merits.

To date, two applications have been made for compensation, in the *Ngudjolo* case, and by Mr Mangenda in the *Bemba and Others* article 70 case, and both have been rejected. In *Ngudjolo*, the Court stressed that the fact that a person has ultimately been acquitted does not automatically make their prior detention unlawful—what matters is whether the decisions authorizing their detention were properly reasoned, and consistent with the requirements of the Statute, including article 21(3).

Second, article 85(2) apparently establishes a right to compensation for persons who were convicted and then obtained reversal of their conviction by the revision procedure under article 84. This circumstance has not yet arisen at the ICC. Article 85(2) appears to set an even higher standard than required by article 84, since it conditions compensation on a conclusive showing that there has been a miscarriage of justice. This standard might well be higher than required to overturn a conviction under article 84. Moreover, repeating the requirement of article 84(1)(a)(i), the late discovery of the new fact establishing the miscarriage of justice cannot be attributed in whole or in part to the convicted person.

Finally, article 85(3) contemplates a third alternate scenario. Unlike article 85(2), this is not contingent upon article 84 proceedings, but instead applies to certain persons who are acquitted at trial or on appeal. The field of possible claimants is, however, highly circumscribed, and manifestly does not assure compensation for *all* acquitted persons. First, there must be exceptional circumstances. Second, in acquitting the person, the Court must have found conclusive facts

showing that there has been a grave and manifest miscarriage of justice. Third, the chamber seized of the article 85(3) application still appears to retain discretion whether or not to award compensation, to be exercised in accordance with the Rules.

In the *Ngudjolo* case, compensation was also sought unsuccessfully under this provision. The chamber noted that article 85(3) was somewhat controversial in its drafting, and clarified that this provision requires a certain and undeniable miscarriage of justice causing a clear violation of human rights, resulting in serious harm. This as the term suggest is a very high threshold, and not every error committed in the course of judicial proceedings will meet this test.