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THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

***v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO***

Public with Public Annex

**Prosecution Response to the Mangenda Defence's appeal against the "Decision on
the First Review of Jean-Jacques Mangenda Kabongo's Detention pursuant to
Article 60(3) of the Statute"**

Source: Office of the Prosecutor

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Introduction

1. The Mangenda Defence's appeal¹ against the "Decision on the First Review of Jean-Jacques Mangenda Kabongo's Detention pursuant to Article 60(3) of the Statute"² should be dismissed. Mangenda fails to show that the Single Judge of Pre-Trial Chamber II ("Single Judge") erred in finding no 'changed circumstance',³ an indispensable condition for any modification of a suspect's detention under Article 60(3) of the Statute. To the contrary, the Single Judge correctly and reasonably determined that Mangenda's detention should continue pending trial.

Procedural Background

2. Mangenda was transferred to the Court from The Netherlands on 4 December 2013. His request for interim release pending trial, under Article 60(2) of the Statute, was denied on 17 March 2014. The Single Judge determined that reasonable grounds continued to justify the belief that Mangenda committed the crimes as alleged,⁴ and that his detention was necessary to ensure his appearance at trial, to ensure that he does not obstruct or endanger the Court's proceedings, and to prevent him from continuing to commit the crimes alleged or related crimes.⁵ The Appeals Chamber confirmed the Article 60(2) Decision on 11 July 2014.⁶ On 5 August 2014, the Single Judge completed his first periodic detention review under Article 60(3) of the Statute, and decided that Mangenda should continue to be detained.⁷ Mangenda now challenges this review.

¹ ICC-01/05-01/13-626 OA7 ("Appeal").

² ICC-01/05-01/13-612 ("Decision").

³ See e.g. Decision, paras.14, 16-18, 22-24, 31-32, 35; Statute, Art.60(3).

⁴ See ICC-01/05-01/13-261 ("Article 60(2) Decision"), para.22. See also Statute, Arts.58(1)(a), 60(2).

⁵ See Article 60(2) Decision, paras.29, 31-32, 34-35, 36, 38. See also Statute, Arts.58(1)(b), 60(2).

⁶ ICC-01/05-01/13-560 OA4 ("Appeal Decision"), para.131.

⁷ See Decision.

Submissions

3. Consistent with the direction of the Single Judge,⁸ Article 60(3) of the Statute provides that a Pre-Trial Chamber may modify a detention order “if it is satisfied that changed circumstances so require”.⁹ The Appeals Chamber has explained:

[A] Chamber carrying out a periodic review of a ruling on detention under article 60 (3) of the Statute must satisfy itself that the conditions under article 58 (1) of the Statute [...] continue to be met. In doing so, the Chamber must revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute. [...] It should, however, be underlined that the periodic review of a ruling on detention under article 60 (3) of the Statute does *not* require the Chamber to make a decision on detention *ab initio*. The Chamber does not have to enter findings on the circumstances already decided upon [...] Nor does the Chamber have to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions. [...] [T]he emphasis of the review is whether there has been a change in any of the circumstances.¹⁰

4. Mangenda fails to show that the Single Judge erred in finding that there has been no material change of the circumstances underpinning the Article 60(2) Decision. Rather, he merely disagrees with the Single Judge’s appreciation of the evidence. The Appeal should therefore be dismissed. Mangenda’s collateral argument under Articles 40 and 41(2)(a) of the Statute relating to the alleged impartiality of the Single Judge, brought in the wrong forum, does not assist him.

⁸ See Decision, paras.1-4 (citing ICC-01/05-01/08-631-Red; ICC-01/05-01/08-1019; ICC-01/05-01/08-2151-Red; ICC-02/11-01/11-278-Red; ICC-02/11-01/11-548-Red).

⁹ Statute, Art.60(3) (emphasis added).

¹⁰ ICC-01/05-01/08-1019, paras.52-53.

Mangenda's challenge to the impartiality of the Single Judge should not have been presented in this appeal and is unfounded

5. In addition to having been brought in the wrong forum, Mangenda's challenge to the impartiality of the Single Judge¹¹ is manifestly ill-founded and should be rejected. The Appeal shows no error in the Decision. Although Mangenda asserts that this supposed actual bias is evident from the Single Judge's alleged denial of due process in the Decision, the substance of his argument is in fact a repetition of arguments already rejected by the Plenary.¹²

6. Articles 40 and 41 of the Statute require that a party raise "[a]ny question" concerning judicial independence or judicial disqualification before the Plenary.¹³ Although the Appeals Chamber may in certain circumstances be required to consider similar matters in appeals from final judgement,¹⁴ Mangenda fails to show any reason for it to do so in this interlocutory appeal under Article 82(1)(b), where recourse to the Plenary remains an effective remedy if required. Caution is especially warranted in this case since Mangenda was recently warned by the Plenary—when rejecting his recent request to disqualify the Single Judge—against "attempt[ing] to convert appellate issues into issues of disqualification".¹⁵ The converse also holds true: Mangenda must not be allowed to resurrect an unsuccessful 'issue of disqualification' as a ground of appeal.

7. The Single Judge is entitled to a "strong presumption of impartiality that is not easily rebutted".¹⁶ Mangenda presents no argument capable of meeting this threshold. Indeed, beyond his unsubstantiated assertion that the Decision itself

¹¹ See Appeal, para.4.

¹² See Appeal, para.4 (acknowledging that his allegation confirms and is consistent with his previous allegations in this regard). On this subject, Mangenda has been warned against being "unnecessarily immoderate" in his language: ICC-01/05-01/13-511-Anx ("Plenary Decision"), para.35.

¹³ See e.g. Statute, Arts.40(4), 41(2)(c). See also Appeal, para.4 (referring to Articles 40 and 41).

¹⁴ See e.g. Statute, Art.81(1)(b)(iv). See further e.g. ICTY, *Prosecutor v. Delalić et al*, IT-96-21-A, Judgement, 20 February 2001, paras.692, 707-708; ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para.215 (considering, as part of appeals against final judgement, claims of potential judicial disqualification).

¹⁵ Plenary Decision, para.41.

¹⁶ Plenary Decision, para.18 (citing ICC-01/04-01/06-3040-Anx, para.10; ICC-02/05-03/09-344-Anx, para.14).

somehow demonstrates the Single Judge's alleged bias,¹⁷ the Plenary has already unanimously determined that "none of the arguments put forward by the Defence"—including the Mangenda Defence—"substantiated any allegations of bias, or the appearance thereof, either when considered separately or together".¹⁸ The Plenary specifically heard and rejected arguments relating to the Single Judge's alleged use of language "demonstrating a pre-conviction of the guilt of the Suspects".¹⁹ However, it concluded "that many of the examples employed by the Defence to cast doubt on the impartiality of the Judge due to his choice of language have been taken out of context."²⁰ The Appeal repeats the very same fault.²¹

8. Nothing in the Decision states that the "the allegations are established and that the crimes were committed"²²—to the contrary, the Single Judge refers only to "reasonable grounds to believe that Mangenda committed the crimes alleged"²³ and to the "alleged" nature of the crimes.²⁴ This is entirely in keeping with the presumption of innocence and the legal standards applicable to this stage of proceedings.

The Single Judge did not err in concluding that there was no material change in the circumstances underpinning the Article 60(2) Decision

9. Mangenda fails to show that the Single Judge erred in concluding that no material change in the circumstances underpinning the Article 60(2) Decision has occurred, either with respect to the finding of reasonable grounds to believe that he

¹⁷ See Appeal, para.4. See also para.19. See further Plenary Decision, paras.37, 39-41 (dispute with a judicial decision, without more, cannot be a basis for judicial disqualification since, "[o]therwise all judges would risk being subject to disqualification proceedings when they make adverse rulings").

¹⁸ Plenary Decision, para.35.

¹⁹ See Plenary Decision, para.42. See also para.30.

²⁰ Plenary Decision, para.43.

²¹ See Appeal, para.4 (citing critically ICC-01/05-01/13-588, para.23 (referring to the "presence of substantiated allegations that acts aimed at disrupting the course of justice have already been committed"); ICC-01/05-01/13-599-Conf, paras.3-4 (criticising ICC-01/05-01/13-588, para.23)). Mangenda entirely fails to show why the criticised passage suggests a lack of impartiality—especially since the term "substantiated" may, in context, naturally be taken to refer to the test under Article 58(1)(a) of the Statute.

²² See Appeal, para.4.

²³ See Decision, para.11. See also para.14 (additional elements "pointing to" Mangenda's role).

²⁴ See Decision, paras.14, 28.

has committed a crime or that his detention appears necessary to safeguard at least one of the interests enumerated in Article 58(1)(b). To the contrary, the Single Judge conducted a proper review for the purpose of Article 60(3).²⁵

There is no material change of circumstance relevant to the Single Judge's finding of reasonable grounds to believe Mangenda committed a crime

10. None of the arguments Mangenda advances shows a material change of circumstance relevant to the Single Judge's finding of reasonable grounds to believe that Mangenda committed a crime within the jurisdiction of the Court.

11. Mangenda fails to show how the Single Judge erred in fact or law in concluding that his "submissions relating to the relevance of the inventory of sums deposited on the account pertaining to Jean-Pierre Bemba at the detention centre" were "already existing and known" when the Article 60(2) Decision was issued.²⁶ The accuracy of this statement is confirmed by reference to the Article 60(2) Decision itself,²⁷ and by comparing Mangenda's submissions in January and June this year, and now on appeal.²⁸ In any event, the claim that Mangenda paid all the monies he received to Bemba—even if true—does not materially affect the Single Judge's finding of reasonable grounds to believe that Mangenda committed a crime, which does not depend on such conduct. Rather, the Single Judge's finding rest on the basis of broader conduct including, in particular, Mangenda's close cooperation with Kilolo in the arrangements for the coaching of witnesses.²⁹ Since

²⁵ This is so notwithstanding the Single Judge's observation concerning the limited assistance provided to him by unfocused submissions from counsel: *see e.g.* Decision, paras.15 ("It is the professional duty of counsel, when requested to provide submissions for the purposes of a review under article 60(3) of the Statute, to identify what, in his or her view, amounts to 'changed circumstances' for the purposes of that provision"), 16.

²⁶ Decision, para.16. *Contra* Appeal, para.5.

²⁷ Article 60(2) Decision, para.16 ("The Defence also submits that Jean-Jacques Mangenda would each time transfer money he received in his capacity of case-manager to the ICC detention unit 'aux fins d'être versées au compte de Monsieur Jean-Jacques [sic] Bemba, afin de subvenir à ses besoins en prison.'").

²⁸ *Compare e.g.* ICC-01/05-01/13-71, para.15, with ICC-01/05-01/13-523-Conf, para.8, with Appeal, para.5.

²⁹ *See e.g.* Article 60(2) Decision, paras.11-22. *See also* Decision, para.14 (noting that "additional elements" have come to light "pointing to the role played by Jean-Jacques Mangenda in the implementation of the alleged scheme aimed at perverting the course of justice, and to initiatives taken by him in that context").

proceedings under Article 60 are not the proper forum for Mangenda to test the merits of the case against him, reference to evidence potentially relevant to an argument previously made before the Single Judge,³⁰ concerning an issue upon which the Article 58(1)(a) finding does not depend, can never be a material change of circumstance. Mangenda thus fails to show error.

12. Mangenda's attempt on appeal to reframe his submissions regarding the money transfers as an abuse of process argument is also insufficient to disguise his reliance on the same basic facts.³¹ The Single Judge noted Mangenda's renewed argument that "the Prosecutor's allegations on the criminal responsibility '*sont fausses [...]*'", but observed that "this statement does nothing more than mirror the general (and generic) view" previously taken by Mangenda and was, therefore, "unsuitable" to an analysis under Article 60(3).³² Moreover, the Appeals Chamber has already heard very similar arguments from Mangenda in his appeal against the Article 60(2) Decision, and rejected them as "a mere disagreement" with the Single Judge's findings.³³

13. Mangenda's complaint that the Prosecution, subsequent to the Article 60(2) Decision, provided no concrete example of his participation in the instruction of a witness to give false testimony, or his participation in a conversation with Bemba and Babala, fails to identify a material change of circumstances under Article 60(3).³⁴ As the Single Judge made clear, the evidence suggests that Mangenda and Kilolo together "*ont vraisemblablement, directement ou indirectement, donné des instructions à des témoins sur les propos qu'ils devraient tenir lors de leur déposition*".³⁵ The Prosecution case is fully consistent with the Article 60(2) Decision in this respect,

³⁰ See also Article 60(2) Decision, para.17.

³¹ *Contra* Appeal, para.5.

³² Decision, para.20.

³³ See Appeal Decision, paras.58, 77.

³⁴ *Contra* Appeal, paras.6-7.

³⁵ Article 60(2) Decision, para.13.

and the evidence upon which the Single Judge relied. Both the case and the evidence are broader than the narrow ‘concrete examples’ which Mangenda highlights. Moreover, and in any event, even if the Prosecution *had* elected to emphasise aspects of the evidence differently in its submissions for the confirmation proceedings, the Prosecution’s discretion in *how* it frames its case has no evidentiary weight—it cannot be used to impugn the evidence reasonably relied upon by the Single Judge in the Article 60(2) Decision. Mangenda fails to show any error.

14. Mangenda’s unsupported claim that the Single Judge’s assessment of the evidence in this case is bound by certain procedural decisions of the Trial Chamber in case ICC-01/05-01/08 (“*Bemba*”) is unsupported by the law of this Court or international criminal law more widely.³⁶ Such decisions—which are made for the purpose of the case in which they are rendered—cannot constitute ‘adjudicated facts’.³⁷ Accordingly, the Single Judge made no error in failing to consider procedural decisions from *Bemba* as ‘changes in circumstance’ relevant to his determination of reasonable grounds to believe that Mangenda committed a crime.³⁸ In any event, not only is Mr. Mangenda’s involvement in the use of false or forged documents not crucial for the Single Judge’s finding under Article 58(1)(a),³⁹ the *Bemba* decisions themselves contain nothing material to the circumstances underpinning the Article 60(2) Decision.

- On 2 April 2014, the *Bemba* Trial Chamber declined to admit evidence obtained for the purpose of this case. This decision was not based upon a finding of any deficiency in the evidence itself, or upon any other factual

³⁶ *Contra* Appeal, paras.8-10.

³⁷ *Contra* Appeal, para.9. See further e.g. *Prosecutor v. Mladić*, IT-09-42-AR73.1, Decision on Ratko Mladić’s Appeal Against the Trial Chamber’s Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 12 November 2013, paras.24-25; *Prosecutor v. Popović et al*, IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 26 September 2006, para.3.

³⁸ See also Appeal Decision, para.76.

³⁹ See Decision, para.11. Compare Article 60(2) Decision, paras.11-14, 22, with paras.20-21.

finding, but merely on the circumstances of the *Bemba* trial.⁴⁰ The *Bemba* Trial Chamber also made clear its view that it did not wish to affect proceedings in this case in any way.⁴¹

- On 7 April 2014, the *Bemba* Trial Chamber declared the submission of evidence closed, subject to any further evidence it may consider it appropriate to admit if appropriate and necessary. It made no comment relevant to these proceedings.⁴²

Accordingly, Mangenda fails to show any error.

There is no material change of circumstance relevant to the Single Judge's finding that Mangenda's continued detention appears necessary

15. None of Mangenda's arguments show a material change of circumstance relevant to the Single Judge's finding that his continued detention appears necessary to safeguard at least one of the interests enumerated in Article 58(1)(b).

16. The Single Judge expressly considered whether the recent birth of Mangenda's third child constituted a material change of circumstance.⁴³ He reasonably concluded that it did not, since it did not alter his previous assessment that Mangenda's family circumstances, even with two young children, do not "alter or nullify" the risks identified under Article 58(1)(b).⁴⁴ Mangenda's disagreement with that previous assessment shows no error.⁴⁵

⁴⁰ See ICC-01/05-01/08-3029, paras.27-33. The Trial Chamber expressly recalled that it nonetheless retained its discretion to request additional evidence, "including that relating to the ongoing proceedings in case ICC-01/05-01/13", if required.

⁴¹ See ICC-01/05-01/08-3029, para.26.

⁴² See ICC-01/05-01/08-3035. See further below para.18.

⁴³ *Contra* Appeal, para.11.

⁴⁴ Decision, para.23.

⁴⁵ See further Appeal Decision, paras.116-121, 126. See also Decision, para.23.

17. Mangenda's submissions concerning the profession and good character of his father and uncle in the Democratic Republic of Congo ("DRC") are raised for the first time on appeal.⁴⁶ Since these submissions were not clearly brought to the attention of the Single Judge,⁴⁷ and therefore could not have formed part of the Decision, they must be dismissed *in limine*. Moreover, the fact that these submissions may have only recently come to the attention of Mangenda's counsel does not necessarily qualify them as a material change in circumstance for the purpose of Article 60(3). Moreover, given the Single Judge's finding of reasonable grounds to believe that Mangenda has committed a crime, and hence violated his own professional ethics, Mangenda does not explain why the professional reputation of family members (unchanged from the time of the alleged crimes) would be any more likely to restrain him now from further misconduct. Mangenda fails to show any error.

18. Mangenda fails to show any error in the Single Judge's consideration of developments in *Bemba*.⁴⁸ The Single Judge expressly noted "the closure of evidence" in that case and Mangenda's arguments in that regard, but concluded that "the outcome of the trial [...] and the impact of these proceedings on that trial is yet to be determined".⁴⁹ The Single Judge considered that there remains the possibility that *Bemba* will be re-opened and that not all potentially material evidence is necessarily beyond the suspects' reach.⁵⁰ He determined that there is a "persisting" risk that both proceedings in *Bemba* and this case might be obstructed or endangered,⁵¹ and further crimes committed in the process.⁵² Mangenda's

⁴⁶ See Appeal, para.11.

⁴⁷ See ICC-01/05-01/13-523-Conf, para.16.

⁴⁸ *Contra* Appeal, paras.12-13.

⁴⁹ Decision, para.18.

⁵⁰ Decision, para.18. See also para.19.

⁵¹ Decision, para.19.

⁵² Decision, para.18.

disagreement with this reasoning fails to identify any error in the Decision, and must be dismissed.⁵³

The Single Judge correctly and reasonably rejected Mangenda's application under Article 60(4)

19. The Single Judge noted Mangenda's argument that his interim detention is contrary to the presumption of innocence and his right to liberty,⁵⁴ and expressly considered whether Article 60(4) required Mangenda's release.⁵⁵ He correctly and reasonably concluded that it did not.⁵⁶ Mangenda's assertion that the Single Judge erred in law by not considering the length of the period Mangenda has already spent in custody⁵⁷ is incorrect. The assertion overlooks the three limbs of the Article 60(4) test which require i) that the Prosecutor caused delay, which is; ii) inexcusable, and; iii) results in detention for an unreasonable period. Being satisfied that the Prosecution had not caused any delay to the proceedings,⁵⁸ nor indeed the Court, the Single Judge was thus correct not to continue his analysis further. Furthermore, Mangenda's subjective disagreement with the Single Judge's assessment does not show error, nor could it materially affect the Decision since Mangenda does not show that Prosecution requests for additional time were "inexcusable".⁵⁹

20. Reference to international human rights law, applicable at this Court under Article 21(3), likewise does not assist Mangenda.⁶⁰ The jurisprudence of the European Court of Human Rights under Article 5(3) of the European Convention on Human Rights specifies that the assessment of a "reasonable" time for pre-trial

⁵³ *Contra Appeal*, paras.12-13.

⁵⁴ *See Decision*, para.25.

⁵⁵ *See Decision*, para.26.

⁵⁶ *Decision*, para.26.

⁵⁷ *Contra Appeal*, para.15.

⁵⁸ *Decision*, para.26.

⁵⁹ *Contra Appeal*, para.17.

⁶⁰ *Contra Appeal*, para.16. Mangenda erroneously seeks to rely on provisions of international human rights law under Article 21(1)(b) of the Statute.

detention cannot be assessed in the abstract but rather depends on the “special features” of the case showing whether “there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.”⁶¹ The procedure established under Article 60 of the Statute more than adequately meets this requirement, and the Decision has affirmed that there are specific grounds requiring Mangenda’s continued pre-trial detention. In this context, Mangenda’s speculation as to the length of any sentence he might receive if convicted, and his attempt to impose an arbitrary ratio between that estimate and his time in pre-trial detention, is neither logical nor dispositive.⁶²

The Single Judge properly exercised his discretion in considering Mangenda’s interim release subject to conditions

21. In criticising the Single Judge’s conclusion that interim release subject to conditions could not be ordered, Mangenda mistakes the nature and extent of the relevant judicial discretion. As is well established,⁶³ the contours of the Pre-Chamber’s discretion to order interim release subject to conditions is governed at least in part by State cooperation:

[I]n circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the Pre-Trial Chamber to consider conditional release. On the other hand, where no such proposals for conditional release are presented and none are self-evident, the Pre-Trial Chamber’s discretion to consider conditional release is unfettered.⁶⁴

⁶¹ See e.g. ECtHR, *Chraidi v. Germany*, 65655/01, 26 October 2006, para.35; ECtHR, *McKay v. the United Kingdom* [GC], 543/03, 3 October 2006, para.42; ECtHR, *Kudla v. Poland* [GC], 30210/96, 26 October 2000, para.110.

⁶² *Contra Appeal*, para.16.

⁶³ See e.g. ICC-02/11-01/11-278-Red OA, paras.76, 79, 87; ICC-01/05-01/08-631-Red OA2, paras.59, 105; ICC-01/05-01/08-1626-Red OA7, para.55. See also Decision, para.27.

⁶⁴ ICC-01/05-01/13-559, para.116 (citing ICC-02/11-01/11-278-Red OA, para.79).

22. Contrary to Mangenda's suggestion, the Pre-Trial Chamber is not obliged to take measures to clarify whether a State is able and willing to accept a detained person into its jurisdiction and to enforce conditions.⁶⁵ The Appeals Chamber has recently affirmed as much, concluding that, where "[n]o State had *expressly* offered to accept [a detained person] and to enforce conditions", the Pre-Trial Chamber "was not duty-bound to consider conditional release."⁶⁶ The fact that the Pre-Trial Chamber may on occasion seek clarification of a State's position *proprio motu* does not change this analysis.⁶⁷ It likewise follows that, even where a State has offered to accept a detained person, the Pre-Trial Chamber is "duty-bound" only "to *consider*" interim release with conditions, and is not obliged simply to order such release.⁶⁸

23. The Single Judge was both reasonable and correct to consider that the United Kingdom ("UK") had not made itself available to receive Mangenda into its jurisdiction for the purpose of interim release.⁶⁹ The Appeals Chamber has already endorsed this conclusion as "not unreasonable".⁷⁰ Although noting Mangenda's view that "the United Kingdom would be under an obligation to accept him [...] in light of his personal and family links to that country",⁷¹ the Single Judge reasonably gave this little weight since those links have not materially changed since the UK submitted its equivocal observations. Accordingly, even if the Single Judge declined to consider the possibility of Mangenda's interim release to the UK, subject to conditions, this would have fallen within his discretion and shows no error. Yet, in any event, the Single Judge did conduct such an analysis, concluding that he could not identify conditions which would mitigate the risks identified under Article 58(1)(b).⁷² Mangenda shows no error in this analysis. Nor, contrary to his claim, was

⁶⁵ *Contra Appeal*, paras.18-19.

⁶⁶ ICC-01/05-01/13-559, para.117 (emphasis added).

⁶⁷ *Contra Appeal*, para.18 (noting a request for clarification sent to the authorities of the DRC).

⁶⁸ ICC-01/05-01/13-559, para.117 (emphasis added).

⁶⁹ *See Decision*, para.29; Article 60(2) *Decision*, para.42.

⁷⁰ *Appeal Decision*, para.125.

⁷¹ *Decision*, para.29.

⁷² *See Decision*, paras.28-29.

the Single Judge incorrect in stating that Mangenda's observations in respect of the Article 60(3) review were "silent" as to any conditions which might be implemented regarding interim release to the UK.⁷³ Only on appeal does Mangenda explain his view that the conditions he proposed with regard to interim release to Belgium "*concernent également*" any interim release to the UK.⁷⁴ This was not readily apparent from the observations submitted to the Single Judge.⁷⁵ Nor in any event does Mangenda show how those conditions could (in light of the limited information afforded by the UK observations) have effectively mitigated the Article 58(1)(b) risks identified by the Single Judge.

24. The Single Judge was likewise reasonable and correct in his consideration of the possibility of Mangenda's interim release to Belgium, subject to conditions. Although noting the existence of a new "framework agreement" between the Court and the Kingdom of Belgium ("Belgium"), the Single Judge determined that this did not represent an "unconditional availability and willingness" to receive detained persons for interim release but rather remained subject to a case-by-case assessment by the Belgian authorities.⁷⁶ Yet even assuming the Belgian authorities' availability to receive Mangenda, the Single Judge determined that the conditions which they might enforce were "not suitable to effectively neutralise the risks listed in article 58(1)(b)."⁷⁷ In particular, the Single Judge expressed the view in the particular circumstances of this case that:

the availability of a thorough system of monitoring of all forms of communication available to the suspect is critical so as to make it possible to consider if, in principle, and in light of all relevant circumstances, such monitoring would be suitable to counteract the relevant risks, and in

⁷³ *Contra* Appeal, para.18.

⁷⁴ Appeal, para.18.

⁷⁵ See ICC-01/05-01/13-523-Conf, paras.14-15.

⁷⁶ Decision, para.32.

⁷⁷ Decision, para.33.

particular the risks that proceedings be interfered with or that future crimes be committed.⁷⁸

25. In the “complete absence” of such a system in Belgium, the Single Judge concluded that conditional release was “not only unwarranted, but also practically unfeasible”.⁷⁹ Mangenda’s complaint that the Single Judge did not convene a hearing on the specific issue of conditional release misstates the position of Belgium,⁸⁰ which had only requested such an audience *if* the Court were inclined to grant interim release to the territory of Belgium.⁸¹ Further, the Pre-Trial Chamber was not obliged to convene a hearing in these circumstances, consistent with the law described above. Mangenda’s speculation as to alternative conditions which could be imposed upon him, such as electronic tagging or surveillance, is not clearly supported by the observations he cites.⁸² These alternative conditions would not in any case be sufficient to prevent his flight, or to reliably contain the risk that he would endanger or obstruct the investigation or the Court’s proceedings or commit further crimes. Mangenda thus fails to show any error in the Single Judge’s analysis.

The Single Judge did not err in denying Mangenda’s request for an oral hearing

26. The Single Judge’s decision not to convene an oral hearing in conducting its first periodic review of Mangenda’s detention under Article 60(3) was not in error.⁸³ Nor in any event did this exercise of discretion materially affect the Decision. Rule 118(3) provides that, in respect of a “request for interim release”, the Pre-Trial Chamber “may decide to hold a hearing”, and must do so in any event “at least once every year.” This express discretion conferred upon the Pre-Trial Chamber cannot be understood to conflict with the fair trial rights guaranteed under Article

⁷⁸ Decision, para.34.

⁷⁹ Decision, para.34. *See also* para.33 (noting also that Belgium was limited in its ability to address the flight risk).

⁸⁰ *Contra* Appeal, para.19.

⁸¹ *See* ICC-01/05-01/13-605-Conf-AnxII, p.7, “C”.

⁸² *Contra* Appeal, para.19, especially text accompanying fns.29-30.

⁸³ *Contra* Appeal, para.20. *See also* Appeal Decision, para.130.

67(1) of the Statute. Mangenda does not identify any prejudice to his rights, especially in the context of the opportunity given to him to make relevant submissions in writing, in full equality with the Prosecution. Moreover, since he has not yet even approached one year in detention, Rule 118(3) does not yet entitle him to such a hearing. His argument should thus be dismissed.

Relief Sought

27. For these reasons, the Appeal should be dismissed. Mangenda should remain in detention pending trial.

Word count: 4,757⁸⁴



Fatou Bensouda, Prosecutor

Dated this 18th day of August 2014

At The Hague, The Netherlands

⁸⁴ It is hereby certified that this document contains the number of words specified and complies in all respects with the requirements of Regulation 36 of the Regulations of the Court. This statement (64 words), not itself included in the word count, is made in accord with the recent direction of the Appeals Chamber to “all parties” appearing before it: ICC-01/11-01/11-565, para.32.