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Pénale
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**International
Criminal
Court**

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Date: **15 September 2015**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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***

Confidential

**Motion for Severance or, in the Alternative, Adjournment or Appearance Pursuant to
Rule 134bis of the Rules**

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 requests severance or, in the alternative, adjournment of the present proceedings or appearance by video-conference pursuant to Rule 134*bis* of the Rules until the United Kingdom's Immigration and Asylum First-tier Tribunal has decided his pending application for judicial review of the denial of a family reunification visa.¹ If, as the UK indicates, this pending application must be deemed abandoned by virtue of Mr. Mangenda's travel to The Hague, the consequence is that Mr. Mangenda will never be able to claim the right to have this, nor any future denial of such a visa, subject to judicial scrutiny. Put shortly, Mr. Mangenda's attendance for his day in court in The Hague will mean the forfeiture of his right to a day in court in the United Kingdom.
2. Access to justice before a court must be considered one of the most essential and basic civil and legal rights. Abridging this right based on the pendency of charges against a person infringes a right in the ICC Statute: to be presumed innocent until proved guilty. That presumption compels no particular conclusion in the settlement of legal issues in other courts, but must preclude the impairment of access to those courts. The impairment of this legal right now, along with the subsequent consequences, will mean that Mr. Mangenda is deprived of his right under UK law to judicial review of an executive decision to deny his request for family reunification. The final say as to whether Mr. Mangenda is entitled under UK law to settle with his wife and three young children in the UK will, as a result, be decided by a civil servant, rather than a judge. The key prejudice that will be suffered by Mr. Mangenda is deprivation of his right to access a UK court.
3. Severance is a proportionate remedy that will cause less disruption to proceedings than would normally be the case in a joined trial. Eleven of the Prosecution's fifteen witnesses have little or nothing to say about Mr. Mangenda. Of the remaining four, two are experts or employees of the Office of the Prosecutor. The Defence hereby stipulates, in order to further reduce any inconvenience, that it would not oppose admission of any portions of the testimony by those four witnesses under Rule 68(3) of the Rules that does not concern the acts and conduct of Mr. Mangenda personally.

¹ The present submission is filed confidentially pursuant to Regulation 23*bis* (2) of the Regulations of the Court as it cites information and submissions of the same classification. The Defence, however, poses no objection to its reclassification as public.

Indeed, given the likelihood of a decision on Mr. Mangenda's pending judicial review application in the near future, there is every likelihood that severance would cause no delay in the issuance of a final judgement in Mr. Mangenda's case. If this remedy is deemed inappropriate, the alternative remedies of an adjournment of the proceedings as a whole, or appearance pursuant to Rule 134bis, is sought in the alternative. The latter remedy, which is sought as a last resort, will cause no prejudice to the Prosecution nor any disruption of proceedings.

II. PROCEDURAL HISTORY

4. Mr. Mangenda's wife resides lawfully in the UK as a refugee, and their three children reside there lawfully on the basis of her status. Prior to his arrest for the alleged offences that are the object of the present proceedings, Mr. Mangenda possessed a five-year multiple-entry visa for the UK on the basis of domestic immigration law provisions permitting entry to close family members of lawful residents.²
5. On 22 October 2015, the day after Mr. Mangenda's release from pre-trial detention was ordered, the UK revoked Mr. Mangenda's five-year multiple-entry visa.³ The reason given by a UK Immigration Officer (who is not a judge or judicial officer) was that information had "*now come to light*" that Mr. Mangenda had been arrested eleven months before:

On the 25 August 2010 [sic] you were issued with a multi entry visa valid until 25 August 2015. Information *has now come to light* which indicates that there has been a significant change in circumstances since your visa was issued. Your original visa was issued to facilitate a family visit. You stated that you would be staying in the UK for 7 days. *I am now aware that an arrest warrant was issued under seal on 20 November 2013.* You were arrested on 23 November 2013 and indicted by the International Criminal Court (ICC) charged with crimes under Article 70 of the Rome Statute relating to the tampering of witnesses and evidence in the ongoing ICC case of Jean Pierre Bemba. I consider that this is a significant change of circumstances since your entry clearance was issued. Accordingly, I have decided under paragraph 30A (ii) of the Immigration Rules, to revoke your multiple entry visit visa, issued on the 25 August 2010 [sic], on the grounds of a change of circumstances since the entry clearance was issued has removed the basis of your claim to be admitted to the United Kingdom.⁴

² Release Order, p. 6; Annex III to "Urgent Submission of the Authorities of the United Kingdom of Great Britain and Northern Ireland", ICC-01/05-01/13-719-Conf-AnxIII, 22 October 2014, p. 1.

³ *Id.*

⁴ Annex III to "Urgent Submission of the Authorities of the United Kingdom of Great Britain and Northern Ireland", ICC-01/05-01/13-719-Conf-AnxIII, 22 October 2014, p. 1 (italics added).

6. The Registry, to its great credit, forcefully protested against the cancellation of Mr. Mangenda's visa:

The Court could face a situation of illegal detention of a person who is still presumed innocent (the charges have not been confirmed against him so he has not been indicted) which will have an impact on the respect of the right of the defence, its proceedings, and its image. The situation is all the more sensitive in that the family of Mr. Mangenda is residing in the United Kingdom which makes it difficult for the Registry to approach other States with a request for interim release.⁵

7. Mr. Mangenda, who remained in detention notwithstanding the Pre-Trial Chamber's order for his release, requested release in The Netherlands as an initial remedial measure, while further negotiations could be conducted with Belgium and the United Kingdom for issuance of a proper entry visa.⁶ Mr. Mangenda noted that he could not safely return to his state of citizenship, the Democratic Republic of Congo, "*où il est menacé, ainsi que sa famille, à cause de sa participation à la défense de Monsieur Jean-Pierre BEMBA GOMBO, raison pour laquelle son épouse et ses enfants ont obtenu l'asile politique au Royaume Uni où il résidait avec eux.*"⁷
8. The first country to respond positively to the efforts of Registry was The Netherlands, which agreed to Mr. Mangenda's temporary release on its territory on 31 October 2014.⁸ The Registry continued to assist Mr. Mangenda in obtaining a visa to be reunited with his family in the UK, including facilitating Mr. Mangenda's application at the British Consulate in Amsterdam on 3 November 2014 for a new visa.⁹
9. On 18 December 2014, the UK authorities – in particular, an "entry clearance officer" which is also not a judicial office – denied Mr. Mangenda's application for a visa

⁵ Annex 15 to First Registry Report, ICC-01/05-01/13-722-Conf-Anx15, dated 24 October 2014, p. 2.

⁶ Requête extrêmement urgente en vue de la tenue d'une audience avec les représentants des Etats du Royaume Uni, des Pays Bas et de la Belgique par rapport au manque de coopération en vue de la mise en liberté ordonnée de Monsieur Jean Jacques KABONGO MANGENDA et à sa détention arbitraire, ICC-01/05-01/13-723-Conf, 28 October 2014, p. 6.

⁷ *Id.* p. 5.

⁸ 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"), p. 5.

⁹ Registry's Second 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-01/05-01/13-726-Conf, 29 October 2014, p. 3.

under Paragraph 352A of the UK Immigration Rules.¹⁰ Paragraph 352A provides as follows:

352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse civil partner of a refugee are that:

- (i) the applicant is married to or the civil partner of a person who is currently a refugee granted status as such under the immigration rules in the United Kingdom; and
- (ii) the marriage or civil partnership did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum; and
- (iii) the applicant would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and
- (iv) each of the parties intends to live permanently with the other as his or her spouse civil partner and the marriage is subsisting; and
- (v) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.¹¹

10. The entry clearance officer seems to have conceded that Mr. Mangenda falls within the scope of Paragraph 352A, but denied his request for a visa under this section on the basis that Mr. Mangenda's "entry to the UK unrestricted, in a category leading to settlement, is not conducive to the public good."¹² The specific basis for this determination was that "[y]ou face charges for a serious crime (witness tampering) before the International Criminal Court."¹³ Accordingly, the family reunification visa was denied on the express basis of pending charges against Mr. Mangenda before the ICC.

11. Despite finding that Mr. Mangenda's entry to the UK would not be "conducive to the public good", he was nevertheless granted a short-term six-month visa "outside the

¹⁰ *Bemba et al.*, Annex 2 to the Registry's Fifth Report on the Implementation of the "Decision ordering the release of Aimé Kilolo Muasmba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" (ICC-01/05-01/13-703), ICC-01/05-01/13-808-Conf-Anx2 ("Annex 2 to Fifth Registry Report"), p. 4.

¹¹ Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428684/Immigration_Rules_-_Part_11.pdf.

¹² Annex 2 to Fifth Registry Report, p. 4.

¹³ *Id.*

Immigration Rules.”¹⁴ No obligation to the ICC was cited as the reason for granting this visa, but rather the absence of justification for separating Mr. Mangenda from his family for “an indeterminate period”:

I have also considered your application outside the Immigration Rules and am aware that separation from your family for an indeterminate period is, on a balance of probabilities, unjustified. I am therefore prepared to grant leave, exceptionally for a limited period of six months.¹⁵

12. Section 82(1) of the UK Nationality, Immigration and Asylum Act of 2002 (“Act”) confers, as is the case in respect of many other types of decisions in the United Kingdom made by civil servants within a specific legal framework, a right of judicial review over many types of decisions by immigration officers. Judicial review is an indispensable attribute of the rule of law and good governance in many, if not all, European countries. It ensures that government officers instruct themselves properly as to legal rules, and that they exercise their discretion reasonably and with reference to relevant factors.
13. Section 84(1) of the Act enumerates the grounds that can be raised in a request for judicial review of an immigration decision, including – as is highly relevant to Mr. Mangenda’s pending appeal – whether the decision accords with section 6 of the Human Rights Act (requiring public authorities to comply with the European Convention of Human Rights; accords with immigration rules; and involves an exercise of discretion that should have been “exercised differently”). Section 92 of the Act permits a person to make a judicial review application under Sections 82 and 84 provided that they are present in the UK; Sections 89 and 95, while not categorically excluding such appeals from those outside the UK, reduces substantially the grounds on which such extra-territorial applications may be asserted. For practical purposes, Mr. Mangenda’s current application would not be permitted from outside the UK.
14. Indeed, Section 96 of the Act even states that an immigration officer can bar appeals under certain circumstances.¹⁶ The circumstances in which an appeal could be barred

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ “96(1): An appeal under section 82(1) against an immigration decision (“the new decision”) in respect of a person may not be brought if the Secretary of State or an immigration officer certifies — (a) that the person was notified of a right of appeal under that section against another immigration decision (“the old decision”) (whether or not an appeal was brought and whether or not any appeal brought has been determined); (b) that the

may encompass the situation where an appeal has been deemed abandoned. The Defence is not in a position at this stage to offer a definitive interpretation of this provision, but believes that there is a serious danger it could be used to Mr. Mangenda's detriment in light of the fact that the UK has not specifically guaranteed that such a decision will not be taken.

15. On 26 May 2015, the Defence wrote to the Registry requesting that it "exercise [its] good offices to ensure that the United Kingdom provides a formal assurance, well in advance of any potential travel to The Hague, that no prejudicial or negative consequences will be imposed on Mr. Mangenda as a result of his travel to The Netherlands to participate in trial proceedings."¹⁷ The Registry responded on 27 May 2015 that it "will liaise with the relevant UK authorities in relation to the two main points addressed in his letter and will keep [the Mangenda Defence] updated of any developments and/or difficulties."¹⁸ The Defence wrote again to the Registry on 10 July 2015, having heard nothing in relation to the matter in the meantime. On 14 July 2015, the Registry responded that it had refrained from such contacts on the understanding that the Trial Chamber had seized itself of the issue:

As the Chamber requested the States to provide information on the interim release pursuant to its decision dated 25 June (ICC-01/05-01/13-1029), we decided that since the matter was being addressed directly at the judicial level, it became the responsibility of the Chamber to decide on the obligations of the UK in terms of cooperation on this specific issue.¹⁹

16. On 20 July 2015, the Defence filed its Motion for Request for Cooperation of the United Kingdom, seeking various orders from the Trial Chamber. On 20 August 2015

claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision; and (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision."

¹⁷ Annex A.

¹⁸ Email from the Registry, "Letter to Mr Dubuisson from the Defence for Mr. Jean-Jacques Kabongo Mangenda", 27 May 2015, 13:37.

¹⁹ Annex C. The Trial Chamber's 24 June 2015 order, incidentally, confines itself to the issue of interim release: "ORDERS the Registry to invite the Kingdom of The Netherlands; the Kingdom of Belgium; the United Kingdom of Great Britain and Northern Ireland; the Democratic Republic of the Congo and the Republic of France to submit any observations on the interim release of the accused by 14 July 2015." *Prosecutor v. Bemba et al.*, Order Requesting Observations from Relevant States on Interim Release, ICC-01/05-01/13-1029, 24 June 2015, p. 4.

the Registry filed a document, which appears to have been based on consultations with the UK authorities seventeen days before²⁰ and setting out the information provided.

17. This Chamber, on 26 August 2015, denied the Defence Motion in its entirety. The Chamber correctly noted that “Mr Mangenda does not seek the Court’s intervention so as to safeguard his statutory rights in the context of the present proceedings. Rather, he seeks the Chamber’s support so that the UK authorities do not revoke his appeal in the context of domestic proceedings by virtue of his travel to the Court.”²¹ The Chamber held that it did not have the authority under the Statute to make the requests for cooperation sought by Mr. Mangenda, according specific weight to its understanding that the abandonment of Mr. Mangenda’s pending application for judicial review would not preclude a “new application before UK courts”:

The Chamber holds the view that it does not have the authority to issue direction, by they general or specific, obligating national tribunals to render judicial decisions in a certain timeframe or provide an exceptional interpretation of national laws. This entails that the ICC cannot direct domestic courts or authorities on matters which are outside the competence of this Court. The Chamber is also attentive to the assurance given by the UK that, should his appeal be considered abandoned by virtue of his departure from The Hague, this does not prevent him from lodging a new application before UK courts.²²

III. SUBMISSIONS

- (i) *Mr. Mangenda Will Be Divested of his Right of Access to UK Courts By the Abandonment of the Pending Application of Judicial Review*

18. The UK has correctly informed the Registry that if Mr. Mangenda’s pending judicial review request is abandoned, he could make a new visa application in the future, from which the UK implies that further appeals could be made. The UK has failed to inform the Registry of two other facts, however: (i) no judicial review (or appeal) exists under the Act for applicants whose entry into the UK is denied or who are otherwise not present on the territory; and (ii) subsequent appeals, where previous appeals have been

²⁰ Consultations with the United Kingdom of Great Britain and Northern Ireland on the legal status of Jean-Jacques Mangenda Kabongo, ICC-01/05-01/13-1164-Conf-Exp, 21 August 2015, (“Registry Consultations”) para. 6 (“the Registry received the following additional information from a representative of the UK Embassy in the Netherlands during a meeting held on 4 August 2015.”)

²¹ Decision on “Motion for Request for Cooperation of the United Kingdom Pursuant to Article 93 of the Statute,” ICC-01/05-01/13-1182-Conf, (“Cooperation Decision”) para. 23.

²² *Id.* para. 24.

lodged, may be barred by an immigration officer under certain circumstances. These facts, combined with the lengthy periods required before a judicial review decision is rendered, mean that no application will be judicially adjudicated for the foreseeable future, and certainly not before a final finding of guilt or innocence. Indeed, this seems to be precisely the UK's objective: repeated compelled abandonments of applications for judicial review upon each trip out of the UK will prevent adjudication of his claim, and then, upon completion of proceedings and regardless of their outcome, the UK could deny re-entry, which would bar recourse to a UK court.²³ The cumulative consequence, accordingly, is that Mr. Mangenda will have lost the right, which he is supposed to have under UK law to seek judicial review of certain immigration decisions affecting him.

19. The Chamber in its Cooperation Decision recognised the importance of access to judicial review. The Registry Consultations, with the greatest respect, did not properly inform the Chamber that the most salient consequence of the deemed abandonment of his pending application will be the loss – practically speaking – of his ability to access a UK court. Assuming that subsequent applications for judicial review are permitted, which is not certain given Section 96 of the Act, all such subsequent applications will likewise be deemed abandoned by any subsequent trips to The Hague. The cumulative effect of these deemed abandonments will be denial of access to UK courts until after the completion of proceedings. Mr. Mangenda, as a result, will have never been able to obtain a judicial determination as to whether the existence of the present proceedings at the ICC were a lawful and proper basis on which to deny his application for the family reunification visa, which would accord him certain rights and privileges that go beyond his current visa.
20. Suspending judicial determination of this issue will have substantial future consequences for Mr. Mangenda. The UK has all but announced its intention to deny Mr. Mangenda entry to the UK if he is convicted on any basis in these proceedings. The correctness of such a decision could never be challenged before a UK court because a denial of entry is not judicially appealable on the grounds that have been now asserted by Mr. Mangenda. Whether a denial of entry or denial of a family reunification visa is correct under UK law is not a matter for this Chamber; what is properly a matter for this Chamber, however, is whether the presumption of innocence

²³ Registry Consultations, para. 6(e).

in respect of proceedings before this Court is compatible with Mr. Mangenda being, *de facto* and *de jure*, denied access to a UK court for determination of this matter.

21. The issue now pending before the First Tier Tribunal (Immigration and Asylum Chamber) has a direct impact on that question. The current appeal has challenged the propriety and legality of the UK immigration officer's denial of a reunification visa on the grounds of pending ICC proceedings, while at the same time recognising that "separation from your family for an indeterminate period" would be "unjustified". Mr. Mangenda needs – and has the right – to have this issue adjudicated with reasonable promptness, not only because of its immediate consequences, but because of its future consequences as well.
22. It might be said that this curtailment of access to a court is no more than Mr. Mangenda deserves. It might also be said – and the UK has asserted – that Mr. Mangenda should not have had access to courts, since his entry to the UK was itself merely a dispensation to the ICC.²⁴
23. The latter claim is expressly contradicted by the entry clearance officer's decision, which states that he was being granted entry for humanitarian reasons – in particular, that "separation from your family for an indeterminate period is, on a balance of probabilities, unjustified."²⁵ Indeed, Mr. Mangenda had already been released from detention for more than six weeks at the time of this decision, which was properly motivated by the UK's obligatory human rights obligations in relation to family reunification. This decision was not a discretionary favour to the ICC.
24. The premise that Mr. Mangenda's legal rights in the UK can be curtailed because he is not really entitled to have been there in the first place, or that he is a bad actor, should be rejected. The assertion that Mr. Mangenda was not really entitled to have been there in the first place, itself, rests exclusively on the pending charges against Mr. Mangenda. These charges are unproven, and Mr. Mangenda is entitled to the presumption of innocence unless and until they are. Indeed, the European Court of Human Rights has declared that public officials violate this presumption by imputing

²⁴ Registry Consultations, para. 6(b) ("The multi-entry visa was granted solely due to the UK Government's support of the Court in the context of Mr. Mangenda's release").

²⁵ Annex 2 to Registry's Fifth Report, p. 4.

guilt to an accused,²⁶ let alone imposing prejudicial consequences based on the contrary presumption. While some legal consequences may permissibly arise from merely being charged with an offence, barring the door of the courthouse in defence of other vital legal rights is surely the one that must be viewed as the most inimical to the rule of law and the rights of the accused.

25. What is at stake for Mr. Mangenda is access to a court that can adjudicate a decision whose lasting consequence is that he now, and later, can be denied access to a court at the discretion of the UK government. The Chamber was correct in the Cooperation Decision to accord primary significance to Mr. Mangenda's ability to bring further claims "before UK courts" for adjudication;²⁷ a full review of applicable legislation, as well as the practical situation facing Mr. Mangenda, is that the abandonment of the currently-pending request for judicial review will mean divestment of his right to such access under UK law.

(ii) *Severance is a Proportionate, and Probably the Only Available, Remedy; In the Alternative, an Adjournment is Requested*

26. Mr. Mangenda, under the Rome Statute, has the right to be presumed innocent until proved guilty. He is nevertheless on the verge of suffering substantial prejudice to his legal rights in the UK by doing nothing more than fulfilling his obligations to this Court. This is not a prejudice he would suffer if the present proceedings were being heard in a UK court, nor would he suffer this prejudice if he were seeking an entry

²⁶ *Ismoilov v. Russia*, 2947/06, 24 April 2008, para. 166 ("the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty"); *Y.B. and others v. Turkey*, 48173/99 and 48319/99, 28 October 2004, ("50. Prise dans son ensemble, l'attitude des autorités policières, dans la mesure où elle reflète une appréciation préalable des charges pouvant être retenues contre les requérants et fournit à la presse des moyens matériels permettant facilement de les identifier, ne se concilie pas avec le respect de la présomption d'innocence. La conférence de presse ainsi réalisée, d'une part, incitait le public à croire en la culpabilité des requérants et, de l'autre, préjugait de l'appréciation des faits par les juges compétents"); *Khuzhin and others v. Russia*, 13470/02, 23 October 2008, para. 96 ("all three prosecution officials described the acts imputed to the applicants as a 'crime' which had been committed by them ... The Court considers that those statements by the public officials amounted to a declaration of the applicants' guilt and prejudged the assessment of the facts by the competent judicial authority. Given that those officials held high positions in the town and regional prosecuting authorities, they should have exercised particular caution in their choice of words for describing pending criminal proceedings against the applicants. However, having regard to the contents of their statements as outlined above, the Court finds that some of their statements could not but have encouraged the public to believe the applicants guilty before they had been proved guilty according to law. Accordingly, the Court finds that there was a breach of the applicants' presumption of innocence.")

²⁷ Cooperation Decision, para. 24.

visa for The Netherlands. Only the particular circumstances of the location of this Court, combined with the Chamber's lack of authority to order more direct measures, compels resort to the present remedy.

27. The Chamber, pursuant to Article 64(5) of the Statute, "may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused." This provision is much more flexible than its counterparts at the ICTY and ICTR, but the Appeals Chamber of the latter has underscored that "the decision on joinder or severance is discretionary and requires a complex balancing of intangibles in order to properly regulate the proceedings."²⁸ Another decision enumerated some of those intangibles:

Whether to order a separate trial of an accused is within the discretion of the Trial Chamber. The nature of the possible prejudice to an accused, the advantages of a joint trial, and the mechanisms for mitigating the claimed prejudice by means other than severance, must all be weighed in the exercise of this discretion. The advantages of a joint trial, which are not lightly outweighed, include the uniform presentation of evidence and procedure; the guarantee of consistent treatment of evidence, verdicts, sentencing, and other matters; and ensuring that witnesses need not be called repeatedly in separate trials.²⁹

28. The advantages of a joint trial are not overwhelming in the present case considering that most of the evidence being presented against Mr. Mangenda seems to be documentary. Only two witnesses, P-245 and P-260, are offering to provide any direct evidence against Mr. Mangenda. Witnesses P-361 and P-433, as an expert and employee of the OTP respectively, can reasonably be expected to be available without undue inconvenience. Mr. Mangenda, in order to further reduce the inconvenience arising from severance, is willing to stipulate that he would not oppose admission of any portions of the testimony by those four witnesses under Rule 68(3) of the Rules that do not concern the acts and conduct of Mr. Mangenda personally. The Defence might even be open to not opposing the admission of the testimony of P-361 and P-433 pursuant to Rule 68(2), depending on its content. The Defence also understands that any further proceedings would continue on the basis of all decisions up to the date of severance.

²⁸ *Bagosora et al*, Decision on Aloys Ntabakuze's Motion for Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution's Response Brief, 24 July 2009, para. 24. <http://41.220.139.198/Portals/0/Case%5CEnglish%5CBagosora%5Cdecisions%5C090724.pdf>

²⁹ *Bagosora et al*, Decision on Request for Severance by Accused Kabiligi, 24 March 2005, para. 13. <http://41.220.139.198/Portals/0/Case%5CEnglish%5CBagosora%5CTrial%20and%20Appeal%5C240305c.pdf>

29. The Defence believes, assuming that a decision by the UK tribunal is forthcoming shortly, that proceedings against Mr. Mangenda could even be completed by the same date as proceedings against the four other co-accused, given the likely interval that the Chamber will require for its deliberations.
30. In the alternative to severance, an adjournment of proceedings is requested pursuant to Rule 132(1). An adjournment is a “discretionary remedy arising from the Chamber’s responsibility to control the conduct of the proceedings in a fair and expeditious manner,”³⁰ the determination of which must be based on a “weighing of the interests of justice... *including the rights of the accused and the interests of victims.*”³¹ Adjournments of varying duration may be necessitated by a range of practical as well as legal factors,³² including permitting an accused to deal with an urgent domestic matter relating to national security.³³ Adjournments have likewise been granted where a participant has encountered difficulties in scheduling witnesses³⁴ or procuring and presenting its evidence.³⁵
31. The deprivation of Mr. Mangenda’s rights are so severe as to warrant an adjournment, especially in light of the requests by three other accused for an adjournment on other grounds.³⁶ The requested adjournment would probably not be long considering that the appeal for which a decision is awaited has been pending now for almost nine months, and that the First-Tier Tribunal has already indicated that the deadline for submissions

³⁰ *Kenyatta*, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, 31 March 2014, para. 76.

³¹ *Id.* para. 78 (emphasis added).

³² *Id.* para. 77.

³³ *Ruto and Sang*, Transcripts of hearing, ICC-01/09-01/11-T-37-Red-ENG, 23 September 2013, p. 6, l. 20 – p. 8, l. 24; *Ruto and Sang*, Transcripts of hearing, ICC-01/09-01/11-T-38-Red-ENG, 27 September 2013, p. 24, l. 7-19.

³⁴ *Bemba*, Decision postponing the commencement of the presentation of evidence by the legal representatives of victims, ICC-01/05-01/08-2180, 28 March 2012.

³⁵ *Kenyatta*, Order concerning the start date of trial, ICC-01/09-02/11-677, 7 March 2013, para. 10 (allowing an adjournment of three months to allow the Pre-Trial Chamber to address serious issues raised by the Defence that needed to be resolved prior to the commencement of trial and in consideration also of the very real impact of delayed disclosure which required resolution prior to trial”); *Kenyatta*, Public redacted version of ‘Decision on commencement date of trial’, ICC-01/09-02/11-763-Red, 20 June 2013, para. 40 (holding that the proceedings needed to be adjourned for one month due to scheduling conflicts, logistical and other constraints, including availability of courtrooms, arising from the other ongoing cases before the Court); *Kenyatta*, Decision adjourning the commencement of trial, ICC-01/09-02/11-847, 31 October 2013, para. 5 (adjourning the proceedings for two months in order to provide the Prosecution with additional time to investigate recent factual allegations raised by the Defence.)

³⁶ Requête conjointe de la Défense de M. Kilolo, M. Mangenda, M. Babala and M. Arido demandant le report du début du procès afin d’assurer l’équité du procès et les droits des prévenus, ICC-01/05-01/13-1228-Conf., 9 September 2015.

(to which the UK immigration authorities did not respond) has expired, and that its decision may be rendered at any time.

(iii) Appearance By Video-Link Pursuant to Rule 134bis Is Requested in the Further Alternative

32. Mr. Mangenda requests, in the further alternative and as a last resort, that he be permitted to appear by video-technology until a decision has been taken by the First Tier Tribunal in respect of his pending appeal. This possibility is expressly foreseen pursuant to Rule 134*bis*:

Rule 134 *bis* Presence through the use of video technology

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.
33. This remedy is sought as a matter of last resort given Mr. Mangenda's preference to be physically present during proceedings. The request is nevertheless justified and necessary given the serious prejudice he would suffer, as previously described, if obliged to abandon his pending appeal, which has already been pending for more than eight months.

IV. CONCLUSION AND RELIEF REQUESTED

34. The inter-jurisdictional relationship of the ICC and States poses difficulties that would not be confronted in a single legal system. Sometimes the consequence can be lack of efficiency and efficacy; at other times, the consequence can be infringements on fairness or the rights of the accused. The situation facing Mr. Mangenda is more than merely inconvenient. He is being deprived of access to a court in respect of an issue that is of the utmost importance to both his personal well-being and that of his family. The deprivation is occurring not because he has been found guilty of any offence, let alone crime, but because he has been charged with an offence before the ICC. The ICC has remedies at its disposal to remedy the infringement that would otherwise be occasioned to Mr. Mangenda's right to be presumed innocent until proved guilty. Since a direct remedy is unavailable, Mr. Mangenda requests severance of his

proceedings; in the alternative an adjournment of proceedings; or in the further alternative, that he be permitted to appear by video technology pursuant to Rule 134*bis*.



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Respectfully submitted this 15th of September 2015,

At The Hague, The Netherlands