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Original: **English** No.: **ICC-01/05-01/13**
Date: **30 October 2015**

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, AIME KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO

Public

Public redacted version of "Prosecution response to Jean-Jacques Mangenda Kabongo's request for compensation", 30 October 2015, ICC-01/05-01/13-1439

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Introduction

1. Jean-Jacques Mangenda Kabongo's claim for compensation for the nine days he remained in the Court's detention centre following the Single Judge's decision on 21 October 2014 ordering his interim release[1] should be dismissed *in limine*. Mangenda was not "unlawfully detained" at the Court. Nor is he entitled to any compensation. Instead, any additional time taken for his actual release can only be attributed to Mangenda's own failure to promptly meet the conditions governing his release.

2. Although Mangenda's release was contingent upon satisfying the Single Judge's conditions, he failed to meet these terms. The Single Judge required him to provide, prior to his release, "the address at which [he] will be staying".[2] Mangenda was thus obliged to provide an address where he was both willing and able to reside. Instead, he gave an address within the United Kingdom ("UK") where he may well have been willing to reside,[3] but was unable to do so. Upon being denied permission to enter the UK,[4] Mangenda was unable to meet this condition for his release. His mere desire to reside in the UK was also clearly insufficient to meet this condition. In contrast, the nine days required to effect his actual release were necessary and reasonable to accommodate Mangenda's insistence that he be released to the UK. In these circumstances, he cannot be considered to have been "unlawfully detained".

[1] [REDACTED]; ICC-01/05-01/13-921-Red ("Request"). *See also* ICC-01/05-01/13-703 ("Interim Release Decision" or "Decision"). The Prosecution appealed the Interim Release Decision. *See* ICC-01/05-01/13-706 OA9 ("Prosecution's Notice of Appeal of the Interim Release Decision"); ICC-01/05-01/13-727 OA9 ("Prosecution's Appeal of the Interim Release Decision"). On 29 May 2015, the Appeals Chamber reversed the Interim Release Decision. The Appeals Chamber found that (i) the Pre-Trial Chamber incorrectly interpreted article 60(4) of the Statute; (ii) the Pre-Trial Chamber failed to properly balance the duration of the suspects' detention against the risks set out in article 58(1)(b) of the Statute; and (iii) the Pre-Trial Chamber failed to conduct a proper assessment of the risks set out in article 58(1)(b) of the Statute. (*See* ICC-01/05-01/13-969 OA5 OA6 OA7 OA8 OA9 ("Appeal Decision on Interim Release"), p. 3, paras. 39, 40-57.
[2] Interim Release Decision, p. 6.
[3] *See e.g.*, ICC-01/05-01/13-71-tENG ("Application for Release"), p. 20; [REDACTED]
[4] *See* ICC-01/05-01/13-719 ("UK Urgent Submissions"), p. 4 and ICC-01/05-01/13-719-AnxII ("UK *note verbale* of 22 October 2014"), showing that on 22 October 2014, the UK revoked Mangenda's multiple entry visa with immediate effect.

3. Because Mangenda fails to meet his basic burden to show that he was unlawfully detained under article 85(1) of the Statute, his Request needs no further scrutiny. Even if the Request were admissible, Mangenda fails to justify his claim for € 27,000.[5] The proposed amount is both arbitrary and unwarranted.

Level of Confidentiality

4. The Prosecution files this response as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court, because it responds to a confidential filing. It will file a public redacted version of its response.

[5] *Contra* Request, paras. 20-31.

Submissions

A. Before he can request any compensation, Mangenda must first demonstrate that he was "unlawfully detained"

5. Mangenda's request for compensation under article 85(1) cannot succeed unless he demonstrates that he was "unlawfully detained" in violation of either the Statute or internationally recognised human rights law. The text of article 85(1) is clear.[6] So too are the views of commentators on the Statute.[7] And Mangenda bears the burden of showing that the detention was unlawful. If he fails to do so, the Request is inadmissible.

6. Contrary to the Request,[8] no "enforceable right to compensation" exists until the detention is established as unlawful. Obtaining a finding on "the unlawfulness of the detention" is the first crucial step to advancing any compensation request. Without such a finding, no compensation can flow. Commentaries to the Statute support this two-stage determination of a compensation request under article 85. Indeed, views on this "double procedure" under article 85 are uniform.[9] *Ad hoc*

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[6] Article 85(1) states "[a]nyone *who has been the victim of unlawful arrest or detention* shall have an enforceable right to compensation." (emphasis added).

[7] *See* Staker, C, "Article 85: Compensation to an arrested or convicted person", p. 1500, stating "[p]aragraph 1 of this article adopts verbatim the wording of article 9 para.5 of the ICCPR. In the context of the ICC, this provision would apply in cases where a person is arrested or detained in violation of specific provisions of the Statute (in particular, article 55 para.1 (d) of the Rules), and presumably, where the arrest or detention was unlawful under other applicable rules of international law." *See also* Brady, H and Jennings, M, "Appeal and Revision", p. 303, stating "[d]elegations agreed a person who has been *the subject of an unlawful arrest or detention, in violation of either the Statute or internationally recognised human rights law*, shall have a right to compensation from the Court. This is reflected in Article 85(1)."(emphasis added).

[8] *Contra* Request, para. 16. *See also* General Comment No. 35—Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para. 49, stating "[p]aragraph 5 of article 9 of the Covenant provides that anyone who has been the victim of *unlawful arrest or detention* shall have an enforceable right to compensation." (emphasis added); para. 50, "[p]aragraph 5 does not oblige States parties to compensate victims *sua sponte*, but rather permits them to leave commencement of proceedings for compensation to the initiative of the victim."

[9] *See* Zappalà, S, "Compensation to an arrested or convicted person", p. 1583, stating "[r]ule 173, relies by way of principle on the system of the double procedure. First, the interested person must obtain a decision of the Court affirming that the arrest or detention is unlawful (Article 85(1)) […]. Moreover, the request shall contain all the elements justifying the request and the amount requested."; Bitti, G, "Compensation to an Arrested or Convicted Person" , p. 627, stating "[d]elegations acknowledged that the trigger for the presentation of a request for compensation was the existence of a prior decision of the Court stating that the arrest or detention was unlawful, or reversing a previous conviction, or releasing the person from custody because there has been a

tribunal case law accords with this understanding. It requires that a decision establishing the basis of the compensation must precede any decision awarding any such compensation.[10] Equally, this case-law shows that persons are entitled to compensation only if they demonstrate that their rights have been violated.[11]

7. Sound policy reasons which protect the Court's time and resources also support the adoption of the "double procedure": interpreting article 85(1) otherwise would put the cart before the horse, in the sense that it would enable a discussion on compensation without any prior verification of its necessary precondition. It would also negate the intended statutory bulwark against frivolous claims for compensation, and expose this Court to irresponsible and time consuming proceedings. Indeed, as Chambers of the *ad hoc* tribunals have cautioned, awarding compensation without a clear violation of the accused's rights, "might open the floodgates to an unmanageable host of compensation claims."[12]

8. Even if the Request were found to be admissible (absent a showing that Mangenda was unlawfully detained), it must still fail. It is unfounded in law and fact, and significantly, denies Mangenda's role in prolonging his detention. More generally, and in the particular circumstances of this case, any right to compensation is by no means a foregone conclusion. Mangenda has not justified his claim that compensation is owed to him, let alone the amount sought.

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grave and manifest miscarriage of justice." *See also* Zappalà, S, *Human Rights in International Criminal Proceedings*, p. 75, stating "[t]he Rules have opted for a separation of the proceedings on determination of unlawfulness and the decision on compensation (Rule 173.2 ICC Rules)."

[10] *See* ICTR: *Rwamakuba* Decision of 13 September 2007, paras. 23-24, emphasising that Trial Chamber II recognised the existence of these violations, and the Appeals Chamber indicated that Mr Rwamakuba could "seek reparation" for them; ICTR: *Zigiranyirazo* Decision of 26 February 2013, para. 8, where the Appeals Chamber found that no compensation was warranted because "[n]othing in the Appeals Judgement could be reasonably interpreted as authorising a claim for compensatory damages."

[11] ICTR: *Zigiranyirazo* Decision of 18 June 2012, paras. 49-51; *Zigiranyirazo* Decision of 26 February 2013, paras. 7-8; *Rwamakuba* Decision of 31 January 2007, paras. 14-18; *Rwamakuba* Decision of 13 September 2007, paras. 31-32.

[12] *See e.g.*, *Zigiranyirazo* Decision of 18 June 2012, para. 21.

B. Mangenda was not unlawfully detained

9. Mangenda's Request fails to meet the first limb of article 85(1): it does not demonstrate that he was unlawfully detained at the Court. Instead, both the law and the facts contradict his claim.

- First, the Request misunderstands the Interim Release Decision and its conditions.
- Second, the Request fails to acknowledge that Mangenda's further stay at the Court's premises was of his own making.
- Third, far from being unlawful, the additional nine days were necessary and reasonable to enable [REDACTED]. Following the Interim Release Decision, [REDACTED]

The Court is not at fault. Mangenda's claim, on the other hand, fails in law and fact.

i. The Request is wrong in law

10. As a matter of law, the Request misunderstands the Interim Release Decision. The Request fails to acknowledge the conditional nature of the Interim Release Decision.[13] The Interim Release Decision did not entitle Mangenda to immediate release. To the contrary, and as the Decision clearly stipulates,[14] Mangenda's interim release was subject to his signing an individual declaration:

(i) stating his commitment to appear at trial, or whenever summoned by the Court, and

(ii) indicating the address at which he will be staying.

Prior to his release, Mangenda was required to satisfy both these conditions.

[13] *See* Request, para. 18, stating "[t]he Release Order was unequivocal, stating that Mr Mangenda 'shall be released'."
[14] Interim Release Decision, p. 6.

11. Although Mangenda provided a UK based address, and may well have wanted to reside there during his interim release,[15] on the day of the Interim Release Decision, he only held a visa for the UK. Holding a visa to a particular country, however, does not confer the holder with an automatic right to enter that country. Even with a visa, Mangenda would still need the UK authorities' approval at the border. Furthermore, on the very next day, Mangenda lost whatever potential access he had to the UK. On 22 October 2014, the UK revoked the multiple entry visit visa Mangenda had been holding—with immediate effect—because of his prior arrest and pending charges under article 70.[16] Mangenda was thereby unable to meet one of the conditions for his interim release—namely, that he would be staying at the address provided on his signed declaration. His mere desire to reside in the UK, likewise does not amount to providing an address "at which he will be staying."[17]

12. When his entry to the UK was disallowed, Mangenda could have suggested an alternative address, within a State where he could enter and stay. Until he could satisfy this condition, his release was not merited. His claim that absent special conditions of release such as monitoring his communications "there was no obstacle to his immediate release to the [UK]"[18] over-simplifies the Interim Release Decision. Mangenda fails to explain why the absence of monitoring conditions would relieve him from complying with the existing conditions imposed by the Decision.

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[15] *See e.g.*, [REDACTED]; Interim Release Decision, p. 6, noting that "Mangenda, a national of the Democratic Republic of the Congo, is the holder of a visa expiring in August 2015 for the United Kingdom, where his family resides and where he seeks to be released."
[16] UK Urgent Submissions. p. 4. *See also* UK *note verbale* of 22 October 2014 and [REDACTED]
[17] *See e.g.*, ICC-01/05-01/08-631-Red OA2 ("*Bemba* Interim Release Appeal Decision of 2 December 2009"), para. 106 and ICC-01/05-01/08-1626-Red OA7 ("*Bemba* Provisional Release Appeal Decision of 19 August 2011"), para. 48, where the Appeals Chamber stated that for conditional release to be granted, a State willing to accept the person concerned and enforce related conditions is necessary. *See also* ICC-01/05-01/13-1151, ("Decision of 17 August 2015"), para. 28, where the Trial Chamber reiterated that the accused were to provide their addresses and contact information as one condition for interim release. As the Chamber noted, "[…] a change in address may amount to a material change in circumstances of continuing interim release."
[18] Request, para. 8.

13. Equally, Mangenda misapprehends his obligations under the Interim Release Decision. He attributes to several entities—the UK, the Court's Registry, even other States Parties—the duty to find a suitable address for him to stay during his interim release.[19] But Mangenda himself was obliged to fulfil the condition of providing such an address. His readiness to sign the declaration does not discharge him of this burden.[20] Deflecting responsibility onto other entities obfuscates the real issue: Mangenda's own failure to satisfy the conditions for his release.

ii. The Request is wrong in fact

14. The Request also misstates several relevant facts—all of which undermine its claim of "unlawful detention". Mangenda claims that his detention was unlawful because of "(i) the "[REDACTED] revocation" of his five-year entry visa to the UK the day after the Interim Release Decision; (ii) the Registry's failure to ensure in advance that Mangenda could be released to an alternative State if need be; and (iii) the Host State's failure to facilitate prompt relief."[21] As shown below,[22] all of these alleged factors misstate the facts and are therefore incorrect. As such, Mangenda's claim that he was unlawfully detained is not sustained.

a) Mangenda had notice of the UK's hesitation to permit his interim release to its territory

15. Contrary to the Request,[23] Mangenda was left in no doubt about the UK's reluctance to house him during the period of his interim release. Indeed, Mangenda knew—as early as January 2014—that the UK would consider the article 70 charges

[19] *See e.g.*, Request, paras. 6-15.
[20] *Contra* Request, para. 18.
[21] Request, paras. 2, 6-15, 18-19.
[22] The Prosecution's response to "the factors" is organised to assist the Chamber and to promote clarity of its submissions. It does not therefore use the same terminology and order as the Request.
[23] *Contra* Request, e.g., para. 2, stating "the '[REDACTED] revocation' of Mr. Mangenda's five-year entry visa to the United Kingdom the day after the Release Order"; para. 10, stating "[t]he next day, and without any advance warning, the United Kingdom revoked Mr. Mangenda's five year multiple-entry visa."

against him "when considering any application for entry clearance or leave to enter the UK (*notwithstanding any pre-existing form of entry clearance Mr Mangenda currently holds*)".[24] [REDACTED][25] By this date, a positive decision by the UK to admit Mangenda on interim release was by no means therefore settled. At best, the UK's position on whether they would accept him was still equivocal.

16. Not only was the UK consistently tentative about Mangenda's release to its territory, the Pre-Trial Chamber—and the Appeals Chamber—likewise recognised the UK's uncertain position. At least twice the Pre-Trial Chamber found that the UK's observations signalled neither its willingness nor availability to accept Mangenda if he were released.[26] The Appeals Chamber upheld the reasonableness of the Pre-Trial Chamber's finding.[27] Mangenda thus knew that if granted interim release, his entry to the UK was not guaranteed. His claim that his UK visa was "suddenly revoked" is therefore unfounded.

17. The claim is also ambiguous: on the one hand, Mangenda claims that the UK revoked his visa "without any advance warning".[28] On the other hand, he acknowledges that [REDACTED][29] [REDACTED][30] Mangenda was well acquainted with the situation. The UK's multiple submissions highlighting its wariness in accepting him could not have escaped his attention. Mangenda concedes as much.[31]

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[24] ICC-01/05-01/13-137-AnxIII (emphasis added) ("United Kingdom's observations of 24 January 2014").
[25] [REDACTED].
[26] ICC-01/05-01/13-261 ("Article 60(2) Decision"), para. 42; ICC-01/05-01/13-612 ("Article 60(3) Decision"), para. 29.
[27] ICC-01/05-01/13-560 OA4 ("Article 60(2) Appeal Decision"), para. 125.
[28] Request, para. 10.
[29] Request, paras. 6, 7, 11.
[30] [REDACTED]
[31] *See e.g.*, Request, para. 7, stating "Mr. Mangenda was concerned about the potential equivocation in this statement[…]".

18. Mangenda claims that "a more definite commitment from the UK that it would honour [his] multi-entry visa" should have been obtained in advance.[32] However, this claim—similar to his earlier submissions[33]—refuses to acknowledge that the UK retained the discretion to revoke his visa, and did so. Moreover, such claims do not demonstrate that he was unlawfully detained. Indeed, a decision by a State to withdraw a prior authorisation to a foreign national to enter its territory is immaterial for the purposes of analysing the lawfulness of detention by the Court: the Court cannot be attributed responsibility for the consequences of this type of sovereign decision made by a State. Nor could such a decision somehow force the Court to amend a decision for conditional release and morph it into an unconditional release ruling, unless other circumstances so justify it. Finally, and significantly, despite the UK's legitimate caution in taking in a person suspected of serious criminal offences,[34] Mangenda could have timely explored other feasible and available options to effect his immediate interim release.

b) The Court made exhaustive efforts to accommodate Mangenda's preferences and ensure his speedy release

19. Mangenda's continued nine-day stay in the detention centre was of his own making. Mangenda could have been released as early as 22 October 2014, but he

[32] *See e.g.*, Request, para. 19.

[33] *See also* ICC-01/05-01/13-288-tENG OA4 ("Mangenda Appeal of article 60(2) Decision"), para. 30, where Mangenda disputed the Single Judge's conclusions on whether the UK was willing to accept him, claiming that "the letter in question does not say this."; ICC-01/05-01/13-626-tENG OA7 ("Mangenda Appeal of article 60(3) Decision"), pp. 14-16, where Mangenda once again contested the Single Judge's interpretation of the UK's observations as "negative" and claimed that the Single Judge should have made enquiries of the UK on the matter; [REDACTED]

[34] *See* ICC-01/05-01/13-1182 ("Decision of 26 August 2015"), para. 4, noting later observations from the UK (dated 15 July 2015) that it had "[…] informed the Court that it had cancelled Mr Mangenda's previous visitor visa when notified of his interim release, as the circumstances and thus entitlement to the previous visitor visa he had for the UK had changed as a result of the charges against him". It also informed the Chamber "that Mr Mangenda's 'family reunification visa application was refused', which Mr Mangenda appealed before domestic courts." [REDACTED]

chose not to. Instead, by persisting with the UK as the place of release and rejecting another viable alternative, he opted to prolong his stay at the Court's premises.

20. The Court cannot compel a State to accept Mangenda. Neither can it venture into the sovereign domain of a State's immigration policies.[35] The Court has no obligation of result. If at all, the Registrar's responsibility is limited to making the necessary "diplomatic, logistical and physical arrangements for such release [from the detention facility] taking into consideration, to the extent possible, and as appropriate, the requests of the […] person."[36]

21. This it did. The Court spared no effort in ensuring his immediate release. [REDACTED][37] [REDACTED].[38] [REDACTED][39] [REDACTED][40] Thus, even if only temporarily, Mangenda could have ended his detention and returned to his own country. And he knew this on the day following the Interim Release Decision.

22. Yet, he rejected the Court's solution out of hand, [REDACTED][41] However, nothing in his Request establishes that his release to the DRC was genuinely not viable. Neither do Mangenda's unsubstantiated allegations in previous filings satisfy his present burden to demonstrate the admissibility of his claim. Moreover, even if Mangenda deemed that release to the DRC was a difficult choice for him, it was still one available to him to end his detention. Further, even if Mangenda could demonstrate that his release to the DRC was untenable in the circumstances, the

[35] *See* ICTR: *Zigiranyirazo* Decision of 18 June 2012, paras. 55-56; *Ntagerura* Decision of 18 November 2008, paras. 13-19; *see also* Decision of 26 August 2015, para. 24, noting that "[the Chamber] does not have the authority to issue directions, be 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."
[36] *Zigiranyirazo* Decision of 18 June 2012, paras. 55-56, also citing *Ntagerura* Decision of 18 November 2008, paras. 14-15.
[37] [REDACTED]
[38] [REDACTED]
[39] [REDACTED]
[40] [REDACTED]
[41] [REDACTED]

Request fails to show why his release to any other place he could lawfully go as a DRC national was not possible. Absent the latter, the Request fails to exclude that Mangenda's continued stay in detention was the product of his own strategic decisions.

23. The Request fails to explore any of these questions. Instead, the Chamber is asked to rely on Mangenda's cursory subjective assessment on why release to the DRC was not possible. In this respect, Mangenda only alleged that he could face security risks if released to the DRC—stemming from his involvement in defending Jean-Pierre Bemba Gombo before the Court.[42] No further detail was provided. Even the Defence Motion filed a week after the Interim Release Decision barely articulates this concern. It cursorily stated that Mangenda could not return to the DRC "*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*."[43]

24. Although Mangenda may have intended to discuss the issue more fully at an oral hearing before the Single Judge, he had no such right.[44] He could not therefore, have expected to reserve such discussion for any such potential hearing. Mangenda is not relieved from properly substantiating why he rejected the DRC as a place of release merely because he had requested a hearing. Moreover, the Request itself only repeats Mangenda's earlier brief submission, but with no further detail.[45] When Mangenda's reasons for rejecting return to his own country lack both objectivity and detail, they cannot persuade. Further, although the Request hails the

[42] [REDACTED]
[43] ICC-01/05-01/13-723-Red ("Defence Request for Hearing"), para. 6.
[44] *Contra* Defence Request for Hearing, para. 6; [REDACTED]. *See* ICC-01/05-01/08-3249-Red OA11 ("*Bemba* Provisional Release Appeal Decision of 20 May 2015"), para. 88, where the Appeals Chamber found that a Trial Chamber is under no general obligation to seek observations in case of doubt as to submissions by a State in relation to interim release, let alone in a situation such as the present where the State has not indicated its willingness or ability to receive the said person.
[45] Request, para. 13.

"prompt release of all three other defendants",[46] it fails to acknowledge that two of the three remaining suspects were released to their own countries.[47]

25. In the absence of another State's willingness to receive him, and despite Mangenda's cursory rejection of the DRC, the Registry stood ready to make appropriate arrangements [REDACTED].[48] At the same time,[49] [REDACTED].[50] However, regardless of Mangenda's preferences, [REDACTED] and the UK remained sovereign in determining his entry into their respective territories.[51] Given his particular status as an accused before this Court, Mangenda could not expect to impose his will on them.

26. Moreover, although Mangenda refers to "the Host State's failure to facilitate prompt relief",[52] he does not elaborate. The Request fails to demonstrate the purported failure, nor how this may be attributed to the Court as such. Moreover, the Host State—the Kingdom of Netherlands—was not obliged to accept Mangenda for interim release.[53] [REDACTED][54] [REDACTED] Article 47 of the Headquarters Agreement between the ICC and the Host State makes that clear.[55] Apart from its limited obligations under the Headquarters Agreement to "facilitate the transfer of persons granted interim release into a State other than the [h]ost State",[56] the Host State was under no different obligation from other sovereign States to accept

[46] Request, para. 19.
[47] Aimé Kilolo Musamba, a Belgian national, was released to the Kingdom of Belgium. Fidele Babala Wandu, a national of the DRC, was released to that country. *See* Interim Release Decision, pp. 5-6;[REDACTED].
[48] [REDACTED]
[49] [REDACTED]
[50] [REDACTED]
[51] [REDACTED]
[52] Request, paras. 2,14.
[53] [REDACTED]
[54] [REDACTED]
[55] Article 47 of the Headquarters Agreement states *inter alia*: (1) The host State shall facilitate the transfer of persons granted interim release into a State other than the host State. (2) The host State shall facilitate the re-entry into the host State of persons granted interim release and their short-term stay in the host State for any purpose related to proceedings before the Court. *See also* article 48, Headquarters Agreement on "Release without conviction".
[56] Article 47, Headquarters Agreement.

Mangenda for interim release. [REDACTED][57] [REDACTED][58] The Request fails to properly acknowledge that the Host State assisted in this respect in facilitating his interim release.

iii. In the circumstances, Mangenda's stay for an additional nine days was necessary and reasonable.

27. As shown above,[59] the Request is flawed in law and fact. In particular, the Request fails to acknowledge both the conditional nature of the decision granting Mangenda interim release, and that he failed to properly meet the conditions for his interim release, including by fully exploring *all* options available to him, significantly the DRC. To the contrary, given that Mangenda refused to return to the DRC and that no other State was willing to accept him, the nine days used by the Registry to execute the Decision was both necessary and reasonable.

28. The Request wrongly characterises the challenges in finding a State for Mangenda's release as mere "administrative or practical difficulties".[60] To the contrary, this Court's case law requires—as a matter of law—that a State willing and able to receive the person is identified prior to any interim release.[61] Therefore, contrary to Mangenda's arguments,[62] until such a State could be identified, his interim release could not be executed. Mangenda—with his prior familiarity with

[57] [REDACTED]
[58] [REDACTED]
[59] *See* paras. 9-26.
[60] *See* Request, para. 19.
[61] *See Bemba* Interim Release Appeal Decision of 2 December 2009, para. 106 where the Appeals Chamber stated "in order to grant conditional release the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary. Rule 119 (3) of the Rules of Procedure and Evidence obliges the Court to seek, *inter alia* the views of the relevant States before imposing or amending any conditions restricting liberty. *It follows that a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release*." (emphasis added). *See also Bemba* Provisional Release Appeal Decision of 19 August 2011, para. 48, stating "[f]or conditional release to be granted, a State willing to accept the person concerned and enforce related conditions is necessary."
[62] *Contra* Request, para. 19, claiming "[a]dministrative or practical difficulties are no excuse for a person's continued detention in the absence of any proper legal basis."

the intricacies of this Court—would have known that. Yet, by significantly limiting the Registry's search for an appropriate State to the narrow framework of his own preferences, Mangenda complicated the process and thus also extended the search time, and his own detention.

29. The Request also wrongly claims that the Interim Release Decision was "immediately enforceable".[63] Yet, the Interim Release Decision stipulated conditional release. It could not therefore be "immediately enforceable". By denying suspensive effect, the Appeals Chamber only rejected a stay of the Interim Release Decision: it did not eliminate the conditions for his release.[64] Thus, only those suspects meeting the conditions were released.

30. The Interim Release Decision did not set out a time frame for its execution. Any such time frame must be reasonable. [REDACTED],[65] [66] [67] Accordingly, reasonable assessments turning on the circumstances at hand must prevail.

31. Mangenda's claim that he was unlawfully detained by the Court for nine days lacks merit. The Registry's passing speculation that [REDACTED][68] is hardly determinative. Any assessment by the Registry must defer to the weight of the established law, and this Chamber's own assessment of the matter.

C. Mangenda fails to justify the quantum of compensation sought

32. Since the Request fails to show Mangenda was unlawfully detained, as required by article 85(1), there is no basis for compensation, much less the arbitrary

[63] *See* Request, paras. 4, 5.
[64] ICC-01/05-01/13-718 ("AC Decision denying suspensive effect"), paras. 7-8; *Contra* Request, para. 4.
[65] [REDACTED]
[66] [REDACTED]
[67] [REDACTED]
[68] *Contra* Request, para. 11; [REDACTED]

amount of € 27,000 (€ 3,000 per day).[69] Although the Request relies on various amounts that may fit certain specific domestic situations,[70] these are not necessarily warranted in the international criminal context. The Request correctly recognises that "[t]here is no formula which is appropriate for all cases".[71] In international criminal cases, where interim release pivots on an individual State's acceptance of the accused, this lack of uniformity is even more accentuated. Cases at the ICC are therefore different.[72] More significantly, Mangenda fails to show any violation or harm warranting such amount. Of the five factors proposed as justification,[73] three are factually and legally flawed, and two are irrelevant.

33. Three of the five factors that Mangenda relies on misunderstand the facts and the law. First, Mangenda has not shown that his UK visa was "suddenly revoked" and that this "was evidently prompted only by the Release Order."[74] Mangenda knew at least 10 months prior to the Interim Release Decision that his possible re-entry to the UK was uncertain.[75] Only 11 days before the Decision the UK expressed hesitation about accepting him. He cannot now claim he was surprised that his visa was revoked. Second, contrary to the Request,[76] the Court exhaustively consulted with Mangenda on his preferences and explored—within the framework of his preferences—all available possibilities for his immediate release. Moreover, in claiming that the Registry should "have prospectively taken all possible measures in the days or weeks preceding the Release Order", Mangenda implies that the Registry should have anticipated the outcome of the Interim Release Decision even

[69] *Contra* Request, paras. 30-31.
[70] Request, paras. 20-28.
[71] Request, para. 25.
[72] *See e.g.*, De Meester, K, "Investigation, coercive measures, arrest, and surrender", p. 326 (noting that, while "personal assurances are a factor that is taken into account when assessing the risk of flight, they do not carry much weight", and characterising guarantees by national authorities as "essential for obtaining provisional release" in practice.).
[73] Request, para. 30.
[74] Request, para. 30.
[75] *See* paras. 14-18.
[76] Request, para. 30.

before it was rendered. This is illogical. It also ignores Mangenda's own role in rejecting the Court's proposals. Third, Mangenda's insistence that he "was obliged to remain behind for no lawful reason"[77] yet again ignores the express conditions for his interim release. His co-accused left the detention centre when they were able to fulfil the conditions of release, as did he. No matter the "psychological strain" and "mental distress",[78] the Court's orders must be followed.

34. The two further factors that Mangenda relies on are equally flawed and irrelevant. First, Mangenda cursorily claims that the Registry and States Parties had "contemporaneous knowledge" that his detention was "unlawful". Such speculation is irrelevant. [REDACTED][79] If anything, the Registry's brief opinion can only be construed as the by-product of a collateral diplomatic effort—it was not remotely a legal determination of the situation. Indeed, the Registry cannot make legal findings on such matters. Only the Chambers of this Court may make legal findings on the potential unlawfulness of any detention. And in any event, no such unlawful detention has been shown in Mangenda's case.[80] Second, and equally irrelevant is Mangenda's argument that there is an "evident need to send a clear signal to States Parties" that the Court's orders "should not be deliberately frustrated and obstructed."[81] As shown above,[82] Mangenda's failure to satisfy the conditions for his release is wholly unconnected with the States Parties' roles. More so, States Parties retain discretion in allowing non-citizens who are accused of crimes on their territories. This submission requires no further scrutiny.

35. Because none of the proposed factors support Mangenda's claim, no compensation is warranted.

[77] Request, para. 30.
[78] *Contra* Request, para. 30.
[79] *Contra* Request, para. 11.
[80] *See* paras. 9-31.
[81] Request, para. 30.
[82] *See* paras. 9-31.

Relief Sought

36. Mangenda fails to establish that he was "unlawfully detained". His Request for compensation is inadmissible and should be dismissed *in limine.* Even if the Request were admissible, it should still be denied. In the circumstances of his interim release, Mangenda fails to justify that *any* amount of compensation is due to him, let alone that the amount claimed is warranted.

Fatou Bensouda, Prosecutor

Dated this 30th day of October 2015

At The Hague, The Netherlands