Dissenting Opinion of Judge Erkki Kourula

1. I respectfully dissent from the Majority opinion with respect to the findings of the Pre-Trial Chamber in relation to article 58 (1) (a) and (b) of the Statute for the reasons that follow.

2. First, I agree with the Majority's decision to address certain aspects of Mr Mangenda's first and second grounds of appeal together, considering that they raise somewhat overlapping issues relevant to whether the conditions of article 58 (1) (a) of the Statute, i.e. whether there are "reasonable grounds to believe" that Mr Mangenda committed the offences for which he has been charged, continue to be met. With respect to the first ground of appeal as addressed by the Majority, I agree that the fundamental human right to judicial review of the legality of an individual's arrest and detention is "entrenched in article 60 of the Statute" and that, therefore, the remedy of release is available only as provided for in article 60 of the Statute. Accordingly, I also agree that "the principal consideration is not whether a warrant of arrest has been illegally issued, but whether the conditions for detention under article 58 (1) of the Statute are presently met".

3. However, while I would agree that a successful challenge to the legality of an arrest warrant *as such* will not result in the remedy of release once a suspect has been surrendered to the Court, I consider that challenges to the legality of an arrest warrant can nonetheless be relevant to the analysis pursuant to article 58 (1) of the Statute. Whether and to what extent such arguments should be considered will depend on the circumstances of a specific case and the substance of the challenge.

4. In the present case, Mr Mangenda principally challenges the *legality* of the mandate of the Independent Counsel and, following from this alleged illegality, the admissibility of the evidence collected by that Independent Counsel, which was relied upon for the conclusion, pursuant to article 58 (1) (a) of the Statute, in both the Arrest Warrant Decision and indeed the Impugned Decision that there are "reasonable grounds to believe" that Mr Mangenda committed the offences for which he has been charged. In my mind, Mr Mangenda's arguments, and whether they are relevant to an assessment under article 58 (1) of the Statute, must be distinguished from a situation where a suspect attempts to challenge the probative value, reliability, etc. of evidence

relied upon in an arrest warrant and/or decision on interim release. In the latter situation, I would agree that such determinations should be made within the context of a decision on the confirmation of charges. The core of Mr Mangenda's argument, however, does not directly challenge the evidence as such. Rather, the exclusion of the evidence would be a potential result of a determination on the legality of the Independent Counsel's mandate. Given that a significant amount of the evidence relied upon for the article 58 (1) (a) conclusion could potentially be excluded based on such a *legal* determination, I consider that the legality of the Independent Counsel's mandate is a relevant factor that should have been substantively considered in the Impugned Decision. In this sense, I consider that, absent the ability to raise this legal issue, Mr Mangenda is not able to meaningfully challenge the legality of his arrest and detention nor can a meaningful review thereon be said to have taken place.

5. Furthermore, I do not find persuasive, as a reason not to consider the substance of Mr Mangenda's arguments, the fact that he attempted to appeal the decision appointing the Independent Counsel and was denied leave, as well as requesting reconsideration of that decision, which was also denied. I note in this context that the Pre-Trial Chamber held that, *inter alia*, Mr Mangenda did not have standing because the decision appointing the Independent Counsel was taken in *ex parte* proceedings and therefore Mr Mangenda was not a "party" in the sense of article 82 (1) (d) of the Statute. Without prejudice as to the correctness of these decisions, which are not before us in this appeal, I would simply note that I consider that, once a deprivation of liberty has taken place, all aspects underpinning that deprivation must be subject to challenge and review, regardless of if they could not be challenged at the time they were taken, which was, importantly in my view, *prior* to the deprivation of liberty.

6. For the above reasons, I disagree with the Majority's conclusion, addressed under the second ground of appeal, that it was reasonable for the Pre-Trial Chamber to defer consideration of the mandate of the Independent Counsel until the decision on the confirmation of the charges.

7. In addition to the above, I also find the Pre-Trial Chamber's conclusion to be unreasonable, within the context of the fundamental human right to challenge without

delay[1] the legality of one's arrest and detention, in the sense that there is no consideration therein regarding the amount of time that could elapse prior to the issuance of a decision on the confirmation of charges. In the context of the confirmation of charges, the fact that the legality of the mandate will be considered and the disputed evidence will be assessed at this later stage of the proceedings does not raise any concerns. However, even though these arguments can be raised and will be decided upon within this different context (confirmation of charges), the time frame for such a decision nonetheless may raise issues within the context of a deprivation of liberty, i.e. detention. In my view, this must be considered and should have been considered in the Impugned Decision. I consider that Mr Mangenda must be able to meaningfully challenge the basis for his continued detention, which can only be done by addressing the legality of the Independent Counsel's mandate, without delay, i.e. through the review provided for in article 60 of the Statute. To hold that a decision on the core of Mr Mangenda's arguments *related to his detention* can be deferred until the confirmation of charges decision is, in my view, unreasonable and raises serious concerns as to whether this delay complies with internationally recognised human rights.

8. Finally, I wish to specifically highlight the length of time that proceedings leading up to a decision on the confirmation of charges routinely take at the Court. In this regard, I also note that the maximum sentence Mr Mangenda could receive, if ultimately convicted, is five years. The reality of deferring a decision on Mr Mangenda's challenge to the legality of the mandate of Independent Counsel until the time of the decision on the confirmation of charges is that Mr Mangenda may have already spent a significant percentage of the *maximum* potential sentence in detention and without having been able to meaningfully challenge the legality of his arrest and detention.

9. With respect to article 58 (1) (b) of the Statute, I agree with the Majority's observations at paragraph 113 of the Judgment that the Pre-Trial Chamber's description of offences against the administration of justice as those "of the utmost

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[1] *See* ICCPR, art. 9 (4), which provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added).

gravity" is highly concerning, and that offences under article 70 of the Statute, while undeniably serious, cannot be considered to be as grave as the core crimes under article 5 of the Statute.

10. However, while the Majority considered the Pre-Trial Chamber's treatment of the gravity of the offences to be a discrete issue, in my view, this critically impacted upon the Pre-Trial Chamber's determination of whether the conditions under article 58 (1) (b) (i), (ii) and (iii) of the Statute continue to be met. In my view, the language used by the Pre-Trial Chamber in describing the offences for which Mr Mangenda was charged to be "of the utmost gravity" is an indication that it gave too much weight to the seriousness of the alleged offending in finding that the conditions under article 58 (1) (b) of the Statute continue to be met. This was compounded by the Pre-Trial Chamber's finding that the personal circumstances of Mr Mangenda, such as "education, professional or social status", were "*per se* neutral and inconclusive in respect of the need to assess the existence of flight risks", which I consider to mean that it gave little consideration to these factors. In my view, this is a further indication that the entire weighing exercise under article 58 (1) (b) of the Statute, conducted by the Pre-Trial Chamber, was tainted by its findings in relation to the gravity of the offences, and that it gave too much weight to factors favouring detention over those in favour of release. Indeed, I consider that Mr Mangenda's personal circumstances ought to have been given greater weight, given that the offences for which he has been charged are not at the higher end of the scale of seriousness.

11. Accordingly, I would have reversed the Impugned Decision and remanded the assessment of the grounds for detention under article 58 (1) (a) and (b) of the Statute, in their entirety, to the Pre-Trial Chamber.

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

Judge Erkki Kourula

Dated this 11th day of July 2014
At The Hague, The Netherlands