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No.: **ICC-01/05-01/13**
Date: **11 August 2014**

THE APPEALS CHAMBER

Before:

Judge Sang-Hyun Song, President
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng

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

Public Document

Brief on appeal, pursuant to article 82(1)(b) of the Rome Statute, of decision ICC-01/05-01/13-612 05-08-2014 of the Single Judge of Pre-Trial Chamber II concerning the first review of the pre-trial detention of Jean-Jacques KABONGO MANGENDA

Source: Defence Counsel 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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1. Subject of the present appeal

1. By judgment ICC-01/05-01/13-612 of 05-08-2014 ("the decision"), the Single Judge of Pre-Trial Chamber II reviewed his decision to continue the detention of Mr Jean-Jacques KABONGO MANGENDA ("the movant").

He ruled that the applicant would remain in detention.

The movant considers the decision under appeal to be fraught with legal and factual error and that it must be set aside.

2. Grounds of appeal

2. The Single Judge circumscribed his review of the conditions laid down by article 58(1) of the Rome Statute, *inter alia* by determining that he should not confine himself to the arguments raised by the detained person and must afford consideration to the Prosecutor's submissions and have regard to "***any other information***" which has a bearing on the subject.[1]

Otherwise put, the Single Judge was duty-bound to review, on his own motion, the matter *in toto*, and specifically to consider the effect of any new circumstance and piece of information connected to the need to continue or discontinue pre-trial detention, which must remain an exceptional measure, due consideration afforded to the presumption of innocence.

In that appraisal, it behoved the Single Judge to take account of the grounds of the 11 July 2014 appeals judgment, which, at the outset, held that offences under article 70, whilst serious, can by no means be considered as grave as the core crimes set forth at article 5 of the Rome Statute, the most serious crimes of concern to humanity.[2]

It is expedient here to have particular regard to Judge Anita Ušacka's dissent, which is even more to the point, inasmuch as for that reason, she cast doubt on the lawfulness of the decision then impugned.

[1] ICC-01/05-01/13-612 05-08-2014 5/17 para. 2.
[2] ICC-01/05-01/13 OA 4 3/48.

3. Without further explanation, the Single Judge ruled that since the 17 March 2014 decision, from which appeal was previously taken, no change in the circumstances underpinning that decision had occurred.[3]

To so rule constitutes a manifest error and shows that the Single Judge failed to review the matter as it behoved him (see *supra*).

The movant will himself undertake the review of the matter in light of any changes, as an alternative submission, however.

2.1 Main submission: manifest absence of impartiality on the part of the Single Judge

4. First and foremost, it must be stated that review presupposes that in appraising reasonable grounds, the bench no longer contemplates the time of the arrest – whereas the Single Judge explicitly did so –[4] but instead has regard to the time of review so as to appraise **contemporaneous** material on record, such material having changed since the earlier point in time of the arrest, as the pre-trial phase has since proceeded.

This is particularly relevant in that not only was the Prosecutor's indictment of 30 June 2014 placed before the Single Judge, but also, and significantly, the 30 July 2014 submissions from the Defence for all suspects.
Even though these documents concern the confirmation of charges, they also hold considerable importance to the reappraisal of the reasonable grounds, lest participation of the Defence be rendered meaningless, in light of the principle of equality of arms.

Of note in this respect is that the movant raised doubts as to the independence of the Single Judge on the basis of fresh facts which were such that he should have recused himself from the case, as the Defence for Mr Jean-Pierre BEMBA GOMBO so moved on 30 July 2014.[5]

In this regard, the movant refers to his 30 July 2014 Defence brief.[6]

[3] ICC-01/05-01/13-612 9/17 para. 14
[4] ICC-01/05-01/13-612 8/17 para. 11
[5] ICC-01/05-01/13-599-conf 30-07-2014 pp. 3-4/67.
[6] ICC-01/05-01/13-594 p.10/106.

To the mind of the Single Judge, not only are there reasonable and even substantial grounds to believe that crimes were committed but, further still, **the charges are proven and crimes were committed**.

The grounds stated at paragraph 23 of his 27 July 2014 decision[7] to deny the application for the release of Mr Narcisse ARIDO are most clear in this regard.
The decision herein impugned is therefore *de jure* unlawful for this sole reason, in that the sitting Judge no longer has the requisite independence to adjudicate and wrongfully prejudged, whilst denying the movant fair proceedings as regards the review which forms the subject of this appeal.

To the foregoing must be added the plethora of grounds for the disqualification of the judge raised by the Defence in its 29 April 2014 motion to this end,[8] which was denied by decision of 20 June 2014, but unduly so, as it now appears. The grounds are restated here and supplemented by the new, decisive ground, which substantiates all the others but suffices alone.

Accordingly, his pre-trial detention is unlawful and he must be released pursuant to articles 40(1) and 41(2) (a) of the Rome Statute. To proceed in such circumstances would amount to an abuse of process in which the Court could have no part.
Indeed the prejudice occasioned by the unlawful detention is irremediable.

2.2 Alternative submission: errors of fact and law.

2.2.1 Reasonable grounds to believe that the movant committed a crime

2.2.1.1 Corruptly influencing and bribery of witnesses - total absence of reasonable grounds.

[7] ICC-01/05-01/13-588 para. 23.
[8] ICC-01/05-01/13-367.

5. At the outset the **mainstay** of the Prosecutor's evidence consisted of the payments made to the movant via **WESTERN UNION**, whereby, it is alleged, Mr Mangenda corruptly influenced witnesses.[9]

The movant nonetheless established through the list of monies deposited in the account held by Mr BEMBA GOMBO at the detention centre[10] − a list which was initially withheld from the Defence by the Single Judge, whereas it was subsequently imparted to the Prosecutor in complete contravention of the principles of equality of arms and adversariality – that the sums concerned had been paid into that account.[11] [12]

It was manifestly impossible to corruptly influence witnesses using an account managed by the detention centre.

Most striking is the Prosecutor's dereliction of the duty to investigate exonerating circumstances and to disclose exonerating evidence, which was nonetheless available to her at the registry of the ICC, and that it was only at the instigation of the Defence that the Prosecutor ultimately sought disclosure of the list which she had initially kept "concealed".

More tellingly, although apprised of that crucial material, the Prosecutor **deliberately** omitted it from her initial charges and therefore **forged** the evidence vis-à-vis the movant, who is incarcerated on the basis of false material, a fact which the Court now implicitly recognises.

Such conduct also seals the **nullity of the proceedings** and pre-trial detention, compelling the bench to make a finding of **abuse of process** and to order an end to the proceedings and the immediate release of the movant.

[9] ICC-01/05-01/13-US-Exp 20-11-2013 11/17 para. 17.
[10] ICC-01/05-01/13-198-Conf-Anx A.
[11] CAR-OTP-0080-0296.
[12] ICC-01/05-66-Conf-Anx-Corr 16-12-2013 pp. 36 & 38, excerpt of conversation 16/9/2013, 16:00: "[TRANSLATION] JJM calls the detention centre to calls the detention centre to give notice of his arrival to bring money to the Accused."

The regime of the Rome Statute casts on the Prosecutor a duty of "**objectivity**", breach of which wholly vitiates and voids the proceedings, irremediably violating fundamental rights, including the right to liberty.

Thenceforth, the Prosecutor desisted, *de facto*, from mentioning these acts held against the movant in the indictment, **dropping, at least implicitly, the charge of "corruptly influencing" levied against him.**

No further mention is made of the movant in respect of any of the purported payments relied on by the Prosecutor.[13]

This also holds true for the summary table appended,[14] **in which he is unmentioned**, save for his photograph, for the purposes of the case.

Furthermore, out of the 14 witnesses relied on by the Prosecutor to substantiate the charges[15] no mention is made of those to whom the movant allegedly gave money.

Therefore from the indictment itself and, moreover, the submissions of the parties, it is apparent that the movant had no part in any payments for the purposes of corruptly influencing witnesses, assuming the payments were proven, which is not so.

The Single Judge was privy to all these recent documents at the time of his ruling but afforded them no consideration. He therefore erred in fact and in law in holding that the reasonable grounds still stood in respect of the subornation charge.

More specifically, he erred in fact and law (paragraph 16 of the decision) in holding that the arguments concerning subornation pertain to circumstances already extant at the time of the initial decision of 17 March 2014.

Quite the contrary: the circumstances have since changed dramatically in that the Prosecutor desisted from reference to these acts in his indictment, *de facto* dropping the charge of corruptly influencing witnesses held against the movant.

2.2.1.2 Instructions to witnesses to give false testimony

[13] ICC-01/05-01/13-526 conf annex B1 14/81 paras. 33-34, 41/81 para. 115, 46/81 para. 124-125.
[14] ICC-01/05-01/13-526 conf annex C1.
[15] ICC-01/05-01/13-526-conf pp. 66-70.

6. The Prosecutor's written submissions and disclosures do not cite any concrete example of any such instruction on the part of the movant or to which he may have contributed in any way, and which may have been aimed at influencing a witness to give false testimony, which did also happen.

That matter has been addressed in submissions to which the Single Judge was privy in advance of the decision impugned. The Single Judge does not advert to this state of affairs which has arisen in the record of the case and affords it no consideration, thereby erring in fact and law.

2.2.1.3 Participation in certain conversations between Messrs BEMBA and BABALA

7. Such participation never took place and the Prosecutor makes no mention of any such conversation, not even in his 30 July 2014 submissions.[16]

The Single Judge does not advert to this factual state of affairs which has arisen in the record of the case and does not afford it any consideration. He thereby errs in fact and in law.

2.2.1.4 Filing of false or forged documents

8. In the decision, the Single Judge relies on rulings of Trial Chamber III of 17 March and 2 and 7 April 2014 as "new circumstances" and rightly so in that they concern the objections raised by Prosecutor in the main case as to the authenticity of the documents herein impugned.

He however errs in law in holding that this factor is not decisive, given the possibility of a "reopening" of the main case, further to "other [possible] evidentiary items" or the powers of the Appeals Chamber to "call evidence".

9. Indeed, it must first and foremost be remarked that the position of the Prosecutor, on which the charges in the present case rest, specifically in respect of whether documents were false and/or forged, was dismissed by a ruling which ***constitutes res judicata.***

Save where set aside on appeal or remitted for review, this ruling remains therefore **the sole judicial truth**.

[16] ICC-01/05-01/13-597-Conf.

The decision of the Single Judge **violates that truth**, so as to establish – but, moreover, advancing no evidence in support, which matters not given the finality of the ruling − an antithetical judicial "truth", which gravely perturbs the judicial equilibrium.

10. It must be further underscored that the Single Judge **relies on conjecture** in an attempt to overlook *res judicata*, which cannot be done.

The "other evidentiary items" are, in a judicial sense, non-existent in that the Prosecutor has not even tendered them.
To so act runs counter to the provisions of article 58(1)(a), which requires "reasonable grounds to believe that a person committed a crime".

To establish these grounds, the Prosecutor must **lead evidence**.

Yet, the evidence led by the Prosecutor was rejected by the decisions cited in the main case.

Further still, the Judge cannot draw on non-existent and untendered evidence, as he does – to do so contravenes the requirements of article 54 of the Rome Statute, which mandates that the Prosecutor "***establish***" the truth. He therefore errs in law by upholding charges which are unestablished, even in respect of "*reasonable grounds*".

Conclusion

11. The Single Judge, moreover, does not in any way specify the other concrete reasonable grounds to believe that the movant committed a crime.

He merely adverts to his decision on the issuance of a warrant of arrest,[17] whereas the scant factual considerations relied on therein are no longer applicable.

A decision to continue pre-trial detention must be clearly grounded in the conditions for which article 58(1) of the Rome Statute makes provision. The Single Judge has erred in fact and law by merely stating the "status quo".

His discernment of changes in the case should have compelled him to find an absence of reasonable grounds and release the movant. His errors therefore considerably affected his decision.

[17] ICC-01/05-01/13-612 8/17 para. 11.

2.2.2 Alternative submission: necessity of pre-trial detention

2.2.2.1 To ensure the person's appearance at trial (article 58(1)(b)(i))

12. The Single Judge commits a factual error in ruling (paragraph 22) that no new circumstances have arisen in this respect.

In fact, in the meantime and as of the 17 March 2014 decision the movant fathered a third child, who was born in April 2014 (see birth certificate appended to the 30 June 2014 submissions).

The Single Judge does not consider the event as a new circumstance liable to alter the grounds previously relied on (paragraph 23 of the decision) – wrongly so, however.

The event is indeed a new, decisive consideration since it is quite clear that the wife of the movant, who is still a student and not employed, is no longer able singlehandedly to run a household of three young children, including an unweaned infant.

This factor is not only a guarantee that the movant will not abscond – where to we are not told – but also that the family depends on his employment, which he has every interest in keeping, such that he has to appear in court to defend himself since his burgeoning career is at stake.

This holds particularly true in that the movant comes from a family of lawyers: his father practised before the Court of Cassation of the DRC and his uncle, Mr MBUYI MBIYE, who is on the ICC list of Counsel, is the current President of the National Bar of the DRC.

The latter considerations, of which the Defence was unapprised at the time of applying for release, are therefore also new and had yet to be raised.

However this factor concerning the birth and the needs of the young and expanded family of the movant and his wife, argued in the 30 June 2014 submissions, is quite clearly decisive and should have prompted the Single Judge to rule otherwise.

This factor, combined with the personality of the movant, a lawyer and a father, should have prompted the Single Judge to order his interim release.

Furthermore, it is incorrect to assume that the movant could travel without a passport or identification. Without those documents he could not even leave the United Kingdom.

He would never be shielded from arrest in Schengen territory. Furthermore, that risk (see the observations of Belgium) could be averted by electronic tagging, on which the Single Judge does not even comment.
The movant could therefore keep his driving license as his sole identification.[18]

2.2.2.2 To ensure that the person does not obstruct or endanger the investigation or the court proceedings (article 58(1)(b)(ii))

12. The Single Judge is silent on the matter, whereas the new and manifest circumstances are that the Prosecutor has clearly ended the investigation, whereas in the main case investigations and written submissions have been brought to a close.

It is inconceivable that the movant, who has never even had any personal contact with the witnesses in the case (see Defence brief),[19] could "obstruct the investigation".

This risk, a pure abstraction, which is now immaterial to the measures taken, could, in any event, be averted by the prescription of specific conditions (see *infra*).

2.2.2.3 Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances (article 58(1)(b) (iii))

13. The crime at bar concerns *viva voce* and documentary evidence in the main case.
The movant refers to the aforegoing (paragraphs 10 and 12).

That the main case has since reached a stage where it is no longer possible to commit such crimes also constitutes a new circumstance vis-à-vis the 17 March 2014 decision.

[18] ICC-01/05-01/13-605-conf-anxII, point B.3 third guarantee proposed.
[19] ICC-01/05-01/13-594 30-07-2014 p 68-70/106.

A reopening of said trial, as postulated by the Single Judge, is pure conjecture, which, moreover, does not presuppose a scenario allowing the commission of further crime.

The movant notes that the Single Judge does not even advert to the situation described in article 58(1)(b)(iii) of the Statute and this new state of affairs. He therefore errs in fact, whereas it behoved him to rule that it is impossible, or at least beyond the bounds of probability, that further crime would be committed.

2.2.3 Duration of pre-trial detention

2.2.3.1 Articles 21& (b) and 67(1)(c) of the Rome Statute

14. The Single Judge errs in law in considering the duration of pre-trial detention only in respect of the regime of article 60(4) of the Rome Statute.

The movant is also entitled to be tried without undue delay as regards the confirmation of charges and the duration of his pre-trial detention, given the probable duration of a term of imprisonment, should he ever be convicted.

15. Of note is that from the outset, the Single Judge underscored the importance of expeditious proceedings and in that vein decided to bring this exclusively written phase to a close on 2 May 2014.[20]

The Single Judge has, however, postponed that date on three occasions, twice at the request of the Prosecutor and once on his own initiative, deferring the confirmation of charges **by a total of five months**.

The Defence was not even heard in relation to the last two deferments. The most recent, on 5 August 2014, was ordered on the day of the Prosecutor's request, absent any opportunity for the Defence to respond, in flagrant breach of its rights.

The decision under appeal was handed down on the same date and the Single Judge was therefore apprised of the new circumstance, to which he gave no consideration, in flagrant contradiction with the purview of the appraisal which he had defined at paragraph 2 of his decision.

[20] ICC-01/05-01/13-T-1-FRA ET WT 27-11-2013 13/22 line 27.

16. Regard must further be had in this respect to Judge Anita Ušacka's dissent,[21] which, akin to the 11 July 2014 Appeals Chamber decision, not only underlines that the crimes under article 70 of the Rome Statute are entirely unconnected to those under article 5, but also observes that were the movant to be convicted, the sentence passed could be considerably shorter than the maximum five-year term and amount only to a fine.

It is therefore certain that the duration of pre-trial detention, now already extended by five months through rulings in favour of deferment, cannot exceed a certain proportion of the maximum sentence without causing irremediable prejudice to the movant's fundamental right to liberty and without prejudging, and casting on the trial bench a considerable burden of appraisal, which would undermine its independence.

The Single Judge pays no heed to such considerations, and errs in fact and in law by violating article 21.1 (b) of the Rome Statute.

Articles 9(3) ICCPR and 5(3) ECHR safeguard the right of every person not to be subjected to unreasonably long pre-trial detention, a right which is not subordinate to prosecutorial conduct.

2.2.3.2 Article 60(4) of the Rome Statute

17. The Single Judge wrongly considers that the delay cannot be ascribed to the Prosecutor.

As a matter of fact, it was the Prosecutor who, on two occasions, sought further time as she was unready.

The Single Judge is wrong to ascribe the delay to the ongoing proceedings to the Netherlands.

In fact, at the 4 December 2013 status conference the Prosecutor duly announced that she could fulfil her undertakings concerning disclosure in prospect of a confirmation hearing to be held on 18 March 2014.[22]

[21] ICC-01/05-01/13 OA 4.
[22] ICC-01/05-01/13-T-2-conf-FRA ET 04-12-2013 9/29 lines 4-6.

It follows therefrom that at that time, the Prosecutor considered that she had sufficient evidence, which is also the view of the Single Judge, as stated in the warrant of arrest and the aforegoing decision at issue (paragraph 4) concerning Mr Narcisse ARIDO's pre-trial detention.

Of further note is that the recordings of telephone conversations, the mainstay of Prosecution evidence, were disclosed by the Dutch authorities very promptly.

The Single Judge therefore committed a factual error in attributing the extensions of time to procedures in Netherlands, whereas, they are, on the contrary, attributable to the Prosecutor.

2.2.4 Alternative submission: application for interim release

2.2.4.1 Interim release in the United Kingdom

18. The movant has enumerated reasons in favour of interim release in said State:

- The movant's family has been residing legally in Great Britain for a number of years;[23]
- The movant's **right** to live with his family,[24] which vests in article 8 ECHR, article 9 of the New York Convention of 20 November 1989 and article 2 of European Directive 2004/38/EG of 29 April 2004, and, furthermore, to the presumption of innocence;
- The movant has strong social ties to Great Britain, since, in addition to his family, all of his brothers live there, some of whom have British nationality.
- Lastly the movant holds a valid, long-term, multiple entry visa for Great Britain.

[23] ICC-01/05-01/13-71 08-01-2014 confidential annexes A and B.
[24] See items appended: marriage and birth certificates.

- All of the foregoing finds support in the new circumstance of the birth of a new child.

The last-mentioned new circumstance is naturally decisive, contrary to the Single Judge's assertion which disregards the primal, parental instinct and emotion experienced by both men and women.

The Single Judge discounts this possibility by neglecting to address the legal arguments raised in respect of the legal obligation of the United Kingdom to receive the movant and by unfoundedly misconstruing the response of the United Kingdom as negative, thereby erring in law in this respect.

Equally erroneous is the statement by the Single Judge that the movant did not put forward any conditions. This is incorrect. Conditions were advanced at paragraph 15 of his observations and also concern release on the territory of the United Kingdom, as evidenced by the movant's offer to stay only at "[TRANSLATION] ***one*** *of the stated addresses*", whereas the other address given during the proceedings is that of his family in the United Kingdom.

Furthermore in "[TRANSLATION] *to surrender his passport to the* ***authorities*** *concerned*", the plural form quite clearly denotes the authorities of the United Kingdom. The Judge therefore commits a factual error.

The Judge, it is submitted in the alternative, also errs in law in implicitly holding that the conditions to be laid down should be *requested* in order to be admissible.

Rule 119(1) vests the Pre-Trial Chamber with the discretion to set conditions **of its own accord** and *ex proprio motu* and, furthermore, itemises possible conditions only by way of illustration through use of the word "*including*".

Lastly, and to dispel any doubt as to the interpretation of the observations of the United Kingdom, the question arises as to why the Single Judge did not make inquiries, as he did for the DRC in relation to Mr BABALA and for Belgium as regards Mr KILOLO.

He should have done so of his own motion, rather than "interpreting" the response as negative, in spite of the peremptory international instruments cited by the Defence for the movant: the adjudicator of pre-trial detention remains first and foremost the guardian of the fundamental rights of every citizen.

Accordingly, the Single Judge has erred in fact and law, depriving the movant of his right to interim release on the basis of assumptions.

The fundamental right to liberty is so paramount as to not be decided on the basis of mere assumptions.

2.2.4.2 Interim release in Belgium

19. The Single Judge's decision to discard Belgium's proposal for a hearing for the purposes of fine-tuning possible conditions and to thereby declare the agreement concluded between the ICC and Belgium futile is a most regrettable precedent, which risks deterring other States from concluding such agreements.[25]

The Single Judge should have held the hearing and even also invited the United Kingdom to take part (see the observations of Belgium concerning the United Kingdom as the main country concerned). He erred in law and in fact by declining such a hearing, which could have resulted in conditions that could avert any risk of abscondment and hence in a decision in favour of interim release.

By denying the requested hearing, the Judge has once again shown his lack of impartiality, by favouring the exceptional measure of detention and by blocking the possibility of conditional release, whilst violating the fundamental principle of the movant's right to liberty.

This is particularly so in that Belgium states no objection in principle to the Court's possible choice of the Kingdom of Belgium as the site of implementation of a decision to grant interim release, "[TRANSLATION] provided that the Court grants the

[25] ICC-01/05-01/13-605-conf-anxII, point C.

Defence application and it is established that it is not incumbent on the United Kingdom to receive the person".[26]

The Judge therefore errs in fact and in law, by not requesting further observations of the United Kingdom, as he did for the DRC in respect of Mr Babala and for Belgium in relation to Mr Kilolo, and furthermore by not ordering that a hearing be held "[TRANSLATION] for the purpose of considering the practicalities and the conditions attached to interim release", as requested by Belgium.

Indeed, Belgium was intending to undertake a thorough analysis of the conditions to lay down in light of any views which might have been voiced at the hearing and only upon whose conclusion, the Judge would have been in a position to take an informed decision, which was not so in the case of the impugned decision.

The ECHR has ruled that pre-trial detention is only acceptable where certain conditions are met **and only** absent alternative measures which could provide solutions.[27]

Measures less restrictive than detention must first be considered, such as release on bail, electronic tagging, house arrest or prohibition from leaving the country etc.[28]

The Single Judge therefore errs in law by not so obliging, particularly at the invitation of Belgium, which had responded favourably, as, moreover, had the United Kingdom.

He commits a further factual error in his appraisal (paragraph 33 of the decision) of the scenario postulated by Belgium, entailing the movant leaving its territory in a very short space of time, by disregarding the following excerpt from the observations of Belgium:

"[TRANSLATION] Nonetheless, article 20bis of the law of 29 March 2004 concerning cooperation with the ICC and the International Criminal Tribunals, introduced by virtue of an amendment act of 26 March 2014, empowers the *juge d'instruction*

[26] ICC-01/05-01/13-605-conf-anxII, conclusions, p. 7.
[27] *Patsuria v. Georgia* (30779/04) ECHR (2007), paras. 75-76.
[28] *Kaszczyniec v. Poland* (59526/00) ECHR (2007), para. 57.

[investigating judge], where so moved by the *ministère public* [Public Prosecutor's Office], or acting *sua sponte* or where so requested by the Central Authority, to issue a Belgian warrant of arrest against a person who has been conditionally released, where said person has not complied with the conditions."[29]

An exchange of views at a hearing would have furthermore allowed the Single Judge to take cognizance that the further condition of electronic tagging could have averted the scenario raised.

As regards telephone monitoring, the Single Judge erred in fact by discounting the further observations from Belgium:

"[TRANSLATION] However, if during conditional release, the Office of the Prosecutor in the course of its investigations advised the competent Belgian authorities to effect monitoring or other surveillance for prosecutorial purposes, it would need only to address a request for cooperation to that end to the Central Authority pursuant to articles 86, 87 and 93 combined of the Rome Statute."[30]

The Single Judge therefore erred in law and in fact in considering that the necessary monitoring would not be possible.

2.2.5 Hearing

20. Rule 118(3) vests the movant with the right to a hearing at least once a year.
In violation of article 67(1) of the Rome Statute, the Single Judge denied the Accused the hearing, just as he denies him any hearing, his prime concern being to avoid any publicity.
He thus erred in law.

[29] ICC-01/05-01/13-605-anxII, point A. General comments, 1) *in fine*, 01-08-2014, 4/8.
[30] ICC-01/05-01/13-605-conf-anxII, point B.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER TO

Find the present appeal of decision ICC-01/05-01/13-612 05-08-2014 of the Single Judge of Pre-Trial Chamber II admissible and meritorious;

To set the judicial process aright and order the release of the movant; in the alternative, order his interim release, with conditions where necessary;

In the further alternative, remit the case to the Pre-Trial Chamber, *en banc* sitting and duly constituted, and order that a hearing be held pursuant to rule 118(3) of the Rules of Procedure and Evidence.

[signed]

Jean FLAMME, Defence Counsel for
Jean-Jacques MANGENDA KABONGO

Dated this 11 August 2014, at Ghent, Belgium.