# Dissenting Opinion of Judge Anita Ušacka*

1. I respectfully dissent from the decision of the majority of the Appeals Chamber to confirm the Impugned Decision.

2. At the outset, I would like to note that I disagree with the majority's approach to the first ground raised by Mr Mangenda (*see* paragraphs 47 and 48 of the judgment). In my view, Mr Mangenda's arguments in relation to the first ground of appeal should have been rejected *in limine* because they are not properly before the Appeals Chamber. This is because they are essentially challenging the correctness of the Arrest Warrant Decision itself, which, however, is not the subject of the present appeal. If Mr Mangenda had wished to appeal the Arrest Warrant Decision, he should have sought leave to appeal it under article 82 (1) (d) of the Statute,[1] within the relevant time limit.[2] He cannot bring arguments in relation to the Arrest Warrant Decision in an appeal brought under article 82 (1) (b) of the Statute, directed against a decision issued under article 60 (2) of the Statute.

3. Nevertheless, I would reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber for a new decision. For the reasons that follow, I am of the view that the Pre-Trial Chamber did not consider every part of the relevant applicable law (pursuant to article 21 (1) (a) of the Statute, in the first place, the Statute and the Rules of Procedure and Evidence) and therefore failed to properly interpret the legal framework for its decision when assessing Mr Mangenda's Request for Interim Release. This error taints the Impugned Decision as a whole.

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* Corrected version, issued on 14 July 2014.

[1] I recall in this regard that the Prosecutor sought, and was granted, leave to appeal an arrest warrant decision in the *Al Bashir* case; *see* Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on the Prosecutor's Application for Leave to Appeal the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", 24 June 2009, ICC-02/05-01/09-29.

[2] *See* rule 155 (1) of the Rules of Procedure and Evidence.



A. Ušacka

# I. RELEVANT LEGAL FRAMEWORK AND CONTEXT

4. This is one of the first appeals[3] relating to proceedings in respect of offences against the administration of justice under article 70 of the Statute. For that reason, it is convenient to recall the legal framework in that regard.

5. Article 70 (1) (a) to (f) sets out the specific offences against the administration of justice over which the Court shall have jurisdiction. It is noteworthy that the 1994 Draft Statute of the International Law Commission[4] did not give the Court jurisdiction over such offences. Rather, its article 44 (2) provided for an obligation of the States Parties to extend their perjury laws to perjury committed before the Court. The International Law Commission noted that "[t]he statute does not include a provision making it a crime to give false testimony before the court. On balance the Commission thought that prosecutions for perjury should be brought before the national courts".[5]

6. This position changed in the further drafting process of the Rome Statute and it was agreed to give the Court, alongside States, jurisdiction over perjury etc. committed in the proceedings before the Court.[6] However, at the Rome Conference, no agreement could be reached as to the procedure to be applied by the Court in respect of the investigation and prosecution of offences against the administration of justice. In particular, there was a debate as to whether the procedure applicable to the investigation and prosecution of the "core crimes", i.e. the genocide, crimes against humanity, war crimes and the crime of aggression, should also regulate the investigation and prosecution of offences against the administration of justice.[7] For that reason, the decision as to the applicable procedure was left to be decided in the Rules of Procedure and Evidence.[8]

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[3] The other appeals raising the same questions are the appeals *Bemba et al.* OA 2 and OA 3.
[4] International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)*, UN Doc. A/49/10 (hereinafter: "1994 Draft Statute"), pp. 20 *et seq.*
[5] 1994 Draft Statute, p. 59.
[6] *See* D.K. Piragoff, "Article 70 Offences against the administration of justice", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edition), pp. 1337 *et seq.* (hereinafter: "Triffterer-Piragoff, Article 70"), at margin numbers 3-4.
[7] Triffterer-Piragoff, Article 70, margin number 4.
[8] *See* article 70 (2) of the Statute, which provides as follows: "The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court

7. The Rules of Procedure and Evidence include a separate Chapter 9 on "Offences and misconduct against the Court", the first section of which is devoted to "Offences against the administration of justice under article 70 of the Statute".[9] Rules 162 to 167 contain specific procedural provisions regarding the investigation and prosecution of such offences, which in many respects differ from those applicable to the investigation and prosecution of core crimes. It is only "[u]nless otherwise provided" that the procedural provisions in relation to core crimes also apply to offences against the administration of justice.[10]

8. The drafting process of article 70 of the Statute and the Rules of Procedure and Evidence demonstrates that offences against the administration of justice are not comparable to core crimes. Rather, the Court's jurisdiction over such offences is distinct.[11] Importantly, the gravity of offences against the administration of justice is in no way equivalent to the gravity of core crimes. The latter are, in the words of the Statute's Preamble, among "the most serious crimes of concern to the international community as a whole", amounting to "unimaginable atrocities that deeply shock the conscience of humanity".[12] In contrast, while offences under article 70 of the Statute are undoubtedly directed against an important value – the proper and efficacious administration of international criminal justice – their gravity does not even come close to that of the core crimes.

9. The significant difference in gravity finds expression not least in the relevant provisions regarding the sentences that may be imposed. For core crimes the maximum sentence is 30 years of imprisonment, or life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".[13] In contrast, for offences under article 70, the maximum sentence is five years of imprisonment or a fine.[14] The difference in gravity also finds expression in

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with respect to its proceedings under this article shall be governed by the domestic laws of the requested State."

[9] On the drafting of this Chapter *see* H. Friman, "Chapter 11 - Offences and misconduct against the Court", in: R. S. Lee (ed.), *The International Criminal Court/Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 605 *et seq.* (hereinafter: "Friman").

[10] Rule 163 (1) of the Rules of Procedure and Evidence.

[11] *See* Friman, p. 606.

[12] Preamble of the Statute, paras 4 and 2.

[13] Article 77 (1) of the Statute.

[14] Article 70 (3) of the Statute.

the fact that, while there is no prescription period for core crimes,[15] offences under article 70 of the Statute are subject to a period of limitation of merely five years.[16]

10. In this regard, the practice of the *ad hoc* international criminal tribunals and internationalised courts is also of relevance. It shows that the sanctions imposed for "contempt of court" (the equivalent of "offences against the administration of justice" at the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") and the International Criminal Tribunal for Rwanda) in comparable cases are often relatively lenient.[17] For instance, in the *Tadić* case, in one of the first cases of contempt of court adjudicated before the ICTY, that tribunal imposed a fine of 15.000 Dutch Guilders against the former counsel of Mr Tadić,[18] a decision that was confirmed on appeal.[19] The former counsel was found to have put forward a case on appeal which he knew was false and to have manipulated witnesses; it is noteworthy that he was not placed in detention during the proceedings against him. At the Special Court for Sierra Leone (hereinafter: "SCSL"), an internationalised jurisdiction, in the case of *Independent Counsel v. Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu and Brima Bazzy Kamara,* relating to contempt of court for bribing witnesses or inducing them to recant testimony, the accused were sentenced to prison terms between eighteen months and two years; in relation to one of the accused, the sentence was suspended.[20]

11. Similarly, several national jurisdictions domesticating offences under article 70 of the Statute consider them to be only of moderate or low gravity, as expressed in the maximum sanction. In *Germany*, the relevant offences (perjury etc.) under general

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[15] *See* article 29 of the Statute.
[16] Rule 164 (2) of the Rules of Procedure and Evidence.
[17] At the ICTY, the applicable punishment for "contempt of court" is set out in rule 77 of the Rules of Procedure and Evidence. This rule has undergone several changes. In its original version (IT/32, 14 March 1994), rule 77 (A) provided for imprisonment not exceeding six months or a fine not exceeding 10.000 US Dollars. Both the maximum term of imprisonment and the fine were subsequently augmented. In its current version (IT/32/Rev. 49, 22 May 2013), rule 77 (G) of the ICTY Rules of Procedure and Evidence provides for imprisonment not exceeding seven years or a fine not exceeding 100.000 Euros, or both.
[18] ICTY, *Prosecutor v. Duško Tadić,* Appeals Chamber, "Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin". 31 January 2000, IT-94-1-A-R77.
[19] ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, "Appeal Judgement on Allegations of Contempt of Court Against Prior Counsel, Milan Vujin", 27 February 2001, IT-94-1-A-AR77.
[20] Special Court for Sierra Leone, Trial Chamber II, "Sentencing Judgement in Contempt Proceedings", 11 October 2012 (filed 16 October 2012), SCSL-11-02-T; available at: http://www.rscsl.org/Documents/Decisions/Contempt/2011-02/071/SCSL-11-02-T-071.pdf

criminal law are also applicable if committed before an international court.[21] Most of the relevant offences are classified as "Vergehen", i.e. they are less serious offences carrying a minimum penalty of less than a year of imprisonment or a fine.[22] They are punishable by fines or imprisonment of, depending on the offence in question, a maximum of three to five years.[23] Similarly, in *England and Wales*, the International Criminal Court Act 2001[24] makes the relevant domestic offences applicable if committed before the Court.[25] With respect to perjury, the maximum prison sentence is two years.[26] In *The Netherlands*, domestic provisions on perjury were equally made applicable to cases of perjury before the Court.[27] The maximum sentence here is a term of imprisonment of no longer than six years.[28] The *Italian* Criminal Code includes separate provisions domesticating offences under article 70 of the Statute into Italian law, stipulating maximum prison sentences between three and six years.[29] In *Belgium*, the maximum sentence for offences against the administration of justice is six years of imprisonment.[30] While this is by no means meant to be an exhaustive comparative analysis, and while there are also jurisdictions that provide for higher maximum sentences for the domesticated article 70 offences,[31] the practices in

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[21] *See* section 162 (1) of the German Criminal Code; available at http://www.gesetze-im-internet.de/stgb/.
[22] *See* section 12 of the German Criminal Code.
[23] Sections 153-154, 156, 160-161 of the German Criminal Code.
[24] http://www.legislation.gov.uk/ukpga/2001/17/contents (hereinafter: "United Kingdom ICC Act").
[25] *See* sections 54 and 61 of the United Kingdom ICC Act.
[26] *See* United Kingdom Perjury Act 1911, article 1 (1), available at http://www.legislation.gov.uk/ukpga/Geo5/1-2/6.
[27] *See* The Netherlands, Acts Amending Provisions of the Penal Code, articles 200, 208A, 361, as referred to in G. Sluiter, "The Netherlands", in: C. Kress et al. (eds), *The Rome Statute and Domestic Legal Orders: Constitutional Issues, Cooperation and Enforcement*, Volume II (Nomos Verlagsgesellschaft, 2005), pp. 203 *et seq.* at pp. 229-230.
[28] *See* article 207A of the Dutch Criminal Code; available at http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelIX/Artikel207a/geldigheidsdatum_30-06-2014.
[29] *See* articles 368, 371-*bis*, 372, 374-*bis*, 377, 378 and 380 of the Italian Criminal Code; available at http://www.altalex.com/index.php?idnot=36764
[30] *See* article 41 of the *Loi concernant la coopération avec la Cour pénale internationale et les tribunaux pénaux internationaux* of 29 March 2004 (entry into force: 1 April 2004), available at http://www.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/4C99B5CC190A33DBC1256EF5004E807F/TEXT/Belgium%20-%20ICC%20Cooperation%20Law%2C%202004.pdf
[31] *See*, for instance, Australia, where perjury before the Court carries a maximum prison sentence of ten years, other offences against the administration of justice carry penalties of imprisonment between five and ten years, *see International Criminal Court (Consequential Amendments) Act*, 2002, para. 268.102 *et seq.*, available at: http://www.comlaw.gov.au/Details/C2004A00993; and Canada, where the domesticated offences under article 70 of the Statute are punishable by maximum prison terms of up to fourteen years, *see* article 16-23 of the Crimes Against Humanity and War Crimes Act, available at:http://laws-lois.justice.gc.ca/eng/acts/C-45.9/page-8.html#h-8.

Germany, England and Wales, The Netherlands, Italy and Belgium amply demonstrate that those domestic jurisdictions consider offences against the administration of justice not to be of the highest gravity.

12. The above may be summarised as follows: offences against the administration of justice are distinct from core crimes. While they are directed against an important value, they are significantly less serious than core crimes. Under the Rules of Procedure and Evidence, specific procedural rules apply to the investigation and prosecution of such offences, and the procedural rules applicable to core crimes apply only "[u]nless otherwise provided".

## II. THE APPROACH IN THE IMPUGNED DECISION

13. Against this background I shall now turn to the approach adopted in the Impugned Decision, which, for the reasons further elaborated below, failed to appreciate the distinct character of offences against the administration of justice.

14. At the outset, it is of note that the Pre-Trial Chamber failed to identify the full legal basis for the Impugned Decision. While the Pre-Trial Chamber referred to articles 58 (1) and 60 (2) of the Statute, it failed to mention, except in passing and indirectly in the section of the Impugned Decision dealing with article 58 (1) (a) of the Statute, that at issue were offences against the administration of justice under article 70 (1) of the Statute and not core crimes.[32] Critically, the Pre-Trial Chamber also failed to refer to, and analyse, rule 163 (1) of the Rules of Procedure and Evidence, without which articles 58 (1) and 60 (2) of the Statute would not even be applicable to the case at hand. This omission is a clear indication that the Pre-Trial Chamber considered Mr Mangenda's Request for Interim Release just as any other request for interim release by a suspect who is alleged to be criminally responsible for core crimes.

15. This is also evidenced by the fact that the Pre-Trial Chamber relied, without any critical analysis, on previous decisions and judgments of the Court – including of the Appeals Chamber – that deal with interim release in the context of alleged core crimes. For instance, the Pre-Trial Chamber referred to, and relied on, judgments of

[32] Impugned Decision, paras 11, 12.

the Appeals Chamber issued in the *Lubanga* case,[33] the *Gbagbo* case[34] and the *Katanga* case.[35] Yet the suspects in these cases were alleged to have committed crimes against humanity or war crimes – crimes that are, as set out above, in no way comparable to offences against the administration of justice, which Mr Mangenda is alleged to have committed. In addition, several of the suspects were already detained before being surrendered to the Court based on allegations of very serious crimes.

16. Most problematic in the Pre-Trial Chamber's approach is its uncritical reliance on previous judgments of the Court – made in the context of alleged core crimes – when discussing whether the continued detention of Mr Mangenda appeared necessary for any of the three reasons listed in article 58 (1) (b) of the Statute. For instance, as to the risk of the commission of future crimes, the Pre-Trial Chamber referred to a judgment by the Appeals Chamber in the *Gbagbo* case.[36] The Pre-Trial Chamber, however, did not consider whether the fact that in the *Gbagbo* case the "future crimes" at issue were core crimes had any impact on the transferability of the holdings of the Appeals Chamber to the case at hand.

17. In relation to the risk of absconding, at paragraph 30 of the Impugned Decision, the Pre-Trial Chamber noted that "[b]oth the Appeals Chamber and the Pre-Trial Chambers of the Court have previously found the existence of a network of supporters behind a suspect to be a relevant factor in the determination of the existence of a risk of flight, because it might indeed facilitate absconding".[37] In the same paragraph, the Pre-Trial Chamber recalled that it had recently found in the *Ntaganda* case that the availability of financial means through a network was a relevant factor in determining whether there was a flight risk. Yet the Pre-Trial Chamber failed to refer to the fact that the offences Mr Mangenda is alleged to have committed carry a significantly lower maximum sentence than core crimes. If the sentencing practice of the ICTY and SCSL is taken as a yardstick, it is likely that, even if Mr Mangenda were found guilty and convicted, the actual sentence imposed could remain significantly below the maximum penalty of five years.

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[33] *See* Impugned Decision, footnotes 18, 19, 39 referring to ICC-01/04-01/06-824, paras 124, 134, 139.
[34] *See* Impugned Decision, footnotes 14, 15, 19, 47, 57 referring to ICC-02/11-01/11-278-Red, paras 23, 26, 27, 49, 70.
[35] *See* Impugned Decision, footnote 41 referring to ICC-01/04-01/07-572, paras 21.
[36] *See* Impugned Decision, para. 54, referring to ICC-02/11-01/11-278-Red, para. 70.
[37] Footnote omitted.

18. For the above reasons, the principles developed and interpretations adopted in relation to articles 58 (1) and 60 (2) of the Statute in the context of alleged core crimes cannot simply be transferred to the context of alleged offences against the administration of justice. Rather, it has to be carefully assessed whether they are applicable in the specific circumstances of this case, or whether alternative principles and interpretations ought to be developed and adopted. This type of careful analysis is entirely lacking in the Impugned Decision, which contended itself with finding that it would decide Mr Mangenda's "request for interim release in light of those principles which are now consolidated in the case-law of the Appeals Chamber of the Court and have constantly been upheld by this Chamber".[38] This gives the impression that based its decision on an inappropriate and improper analogy.[39]

19. Article 21 (2) of the Statute gives the Chambers of this Court the power to "apply principles and rules of law as interpreted in its previous decisions". Yet this must not be done out of context and without a careful evaluation as to whether the previous jurisprudence regarding interim release of suspects alleged to have committed core crimes are actually comparable to the case at hand.[40]

20. I also recall that, pursuant to article 21 (3) of the Statute, the Statute must be applied and interpreted "consistent with internationally recognized human rights". The Impugned Decision rejected Mr Mangenda's request to be released from pre-trial detention, thereby affecting his most fundamental right to personal liberty. When assessing questions of pre-trial detention, a Chamber is obliged to ensure that continued detention is actually justified and reasonable *in the circumstances of the case*. Factors that may be relevant to detention in cases of alleged core crimes may have less or no relevance if considered in the context of offences against the administration of justice. The overarching consideration must always be that

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[38] Impugned Decision, para. 6.
[39] *See* in this regard also article 22 of the Statute, which establishes the principle of legality and, at paragraph (2), specifically prohibits the extension of the definition of a crime by way of analogy.
[40] In this regard, *see Prosecutor v. Laurent Gbagbo,* "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo"'", 26 October 2012, ICC-02/11-01/11-278-Red, pp. 37 *et seq.*, "Dissenting Opinion of Judge Anita Ušacka" (hereinafter: "Gbagbo Dissenting Opinion"), para. 13, emphasising that "where a detention decision is at issue that requires a risk analysis based on the facts before the Chamber, this risk analysis may not only be based on abstract factors, but must be supported by concrete evidence and relate specifically to the circumstances of the person who was arrested."

continued detention is not unreasonable or leads to an arbitrary or disproportionate outcome.[41]

## III. CONCLUSION

21. For the reasons set out above, I am of the view that the Pre-Trial Chamber failed to appreciate sufficiently that the matter at hand concerned allegations of offences against the administration of justice and not core crimes. By relying extensively on jurisprudence and the test developed in relation to core crimes, the Pre-Trial Chamber did not give sufficient consideration to the fact that offences against the administration of justice are in no way comparable to core crimes, and that this necessarily impacts on the analysis as to whether continued detention is justified. In addition, the Pre-Trial Chamber's approach bears the inherent risk of undue reliance on abstract factors and formulistic language, as opposed to a proper assessment of the concrete circumstances of the case.[42]

22. In my view, this error of the Pre-Trial Chamber taints the entire Impugned Decision. It is therefore unnecessary to address the further and more detailed arguments raised in Mr Mangenda's Document in Support of the Appeal. As the Pre-Trial Chamber did not consider every part of the relevant applicable law and therefore failed to properly interpret the legal framework for its decision, it could well be that the conclusion it reached was erroneous and that Mr Mangenda should have been released. However, the present appeal is not the opportune occasion to consider the merits of Mr Mangenda's Request for Interim Release. Rather, the Pre-Trial Chamber should reconsider the matter. For that reason, I would reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber for a new decision on Mr Mangenda's Request for Interim Release.

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[41] *See*, for example, European Court of Human Rights, *Khodorkovskiy v. Russia*, "Judgment", 31 May 2011, application no. 5829/04, para. 136; *see* also *Ladent v. Poland*, "Judgment", 18 March 2008, application no. 11036/03, paras 55-56.
[42] *See* Gbagbo Dissenting Opinion, para. 39.

23. Finally, I would like to recall my separate concurring opinion to the recent decision of the Plenary of Judges on the application for the disqualification of Judge Cuno Tarfusser from the present case.[43] At footnote 11, I stated as follows:

> It is noted that for the purposes of considering the Waiver Application, the Presidency was composed of three Judges of the Appeals Chamber, Judges Song, Monageng and Kuenyehia, which could be problematic for the purpose of future related appeals.

24. I note that in their capacity of being members of the Presidency, these three Judges have issued three decisions that are related to the present case.[44] In light of this fact, I regret that my colleagues did not request to be recused from sitting on the present appeal.[45]

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

**Judge Anita Ušacka**

Dated this 11th day of July 2014

At The Hague, The Netherlands

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[43] "Decision of the Plenary of Judges on the Defence Applications for Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*", dated 20 June 2014 and registered on 23 June 2014, ICC-01/05-01/13-511-Anx, paras 45-49.

[44] *See Situation in the Central African Republic,* "Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19 November 2013 for the waiver of the immunity of lead defence counsel and the case manager for the defence in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*", 20 November 2013, ICC-01/05-68; ICC-01/05-70-US-Exp (note that no public version of that decision is presently available); and *Prosecutor v. Jean-Pierre Bemba et al.,* "Decision on the 'Defence Request for the Automatic Temporary Suspension of the Single Judge Pending Decision on Defence Submission ICC-01/05-01/13-372'", 19 May 2014, ICC-01/05-01/13-407.

[45] *See* article 41 (2) (a) of the Statute, which reads in relevant part as follows: "A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court [...]".