

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No: **ICC-01/05-01/13**

Date: **19 June 2015**

**TRIAL CHAMBER VII**

**Before:** Judge Chile Eboe-Osuji, Presiding Judge  
Judge Olga Herrera Carbuccion  
Judge Bertram Schmitt

**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**

**Submissions on Continuation of Interim Release**

**Source:** Defence for Jean-Jacques Kabongo Mangenda

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court***  
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**Victims Participation and Reparations  
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## I. INTRODUCTION

1. Jean-Jacques Mangenda requests continuation of his interim release as ordered by the Pre-Trial Chamber on 21 October 2014.<sup>1</sup> Since being released, Mr. Mangenda has conducted himself impeccably. He has not attempted to abscond; not done anything to obstruct or endanger investigations or proceedings; and not continued any offence with which he is charged – or committed any other offence for that matter. The stringent requirements for provisional detention set out in Article 58(1)(b) of the Rome Statute are inapplicable to Mr. Mangenda. No further provisional detention, accordingly, is justified.

## II. APPLICABLE LAW

2. Articles 60 (2) and (3) of the Statute provide that:

A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

...

The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. Detention is only justified under Article 58(1)(b) if the Pre-Trial Chamber is “satisfied” that it:

appears necessary:

- (i) To ensure the person’s appearance at trial;
- (ii) To ensure that the person does not obstruct or endanger the

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<sup>1</sup> *Prosecution v. Bemba et al.*, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13-703, 21 October 2014 (“Release Decision”); *Prosecution v. Bemba et al.*, Order requesting the parties’ observations under Article 60 of the Statute, ICC-01/05-01/13-980, 1 June 2015 (“Orders the defence teams for the five accused to submit any observations on detention or release (with or without conditions) by the filing deadline on 19 June 2015”).

investigation or the court proceedings; or

(iii) 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.

5. Article 21(3) of the Statute requires that the “application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.”
6. A “fundamental principle” recognized in ICC jurisprudence is that “deprivation of liberty is the exception and not the rule.”<sup>2</sup> The *International Covenant on Civil and Political Rights* prescribes, in terms, that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.”<sup>3</sup> Recently-revised General Comment No. 35 of the Human Rights Committee elaborates that:

It should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as “public security”. Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.<sup>4</sup>

### III. PROCEDURAL HISTORY

7. Mr. Mangenda was ordered to be provisionally released by the Single Judge on 21 October 2014, 332 days after having been arrested<sup>5</sup> on the strength of a warrant alleging that he had aided and abetted the offences of presenting false or forged

<sup>2</sup> *Prosecutor v. Bosco Ntaganda*, Decision on the Defence's Application for Interim Release, ICC-01/04-02/06-147, 18 November 2013, para. 33.

<sup>3</sup> International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), 16 December 1966, Article 9(3).

<sup>4</sup> Human Rights Committee, General Comment No. 35 - Article 9 (Liberty and security of person), CCPR/C/GC/35, 28 October 2014 (“General Comment No. 35”), para. 38.

<sup>5</sup> Release Decision, p. 4.

evidence and corruptly influencing a witness.<sup>6</sup> The Appeals Chamber denied a request for a stay of that decision:

The Prosecutor has an interest to ensure that the purpose of her appeal is not potentially defeated by the immediate implementation of the Impugned Decision, while the four suspects' have an interest to be released immediately. In balancing these competing interests, the Appeals Chamber notes that the four suspects alleged to have committed offences under article 70 of the Statute, which carry a maximum penalty of five years imprisonment, and that they have already spent several months in pre-trial detention. On balance, and in these specific circumstances, the Appeals Chamber does not consider it appropriate to exercise its discretion to grant suspensive effect.<sup>7</sup>

8. The Single Judge had twice previously denied Mr. Mangenda's provisional release,<sup>8</sup> the second of which was on appeal before the Appeals Chamber at the time of the Release Decision on 21 October 2014.<sup>9</sup>
9. The Appeals Chamber reversed the Release Decision on 29 May 2015, following an appeal by the Prosecution, on the basis that: (i) the Pre-Trial Judge had placed mistaken reliance on Article 60(4) of the Statute; and (ii) failed to give sufficiently full reasons explaining why its view of the potential risks under Article 58(1)(b) of the Statute had changed since its previous denials of release on 17 March and 5 August 2014.<sup>10</sup> Despite this reversal, the Appeals Chamber declined to order the defendants' re-arrest and instead remanded the matter to the Trial Chamber for re-evaluation:

However, given the specific situation of the suspects in this case, i.e. that they were ordered to be released on 21 October 2014, to which

<sup>6</sup> *Prosecution v. Bemba et al.*, Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13-1-Red2-tENG, 20 November 2013, pp. 4-5.

<sup>7</sup> *Prosecution v. Bemba et al.*, Decision on the Prosecutor's urgent request for suspensive effect of the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" of 21 October 2014, ICC-01/05-01/13-718, 22 October 2014, para. 7.

<sup>8</sup> *Prosecution v. Bemba et al.*, Decision on the "Requête de mise en liberté" submitted by the Defence for Jean-Jacques Mangenda, ICC-01/05-01/13-261, 17 March 2014 ("17 March 2014 Decision"); Decision on the first review of Jean-Jacques Mangenda Kabongo's detention pursuant to article 60(3) of the Statute, ICC-01/05-01/13-612, 5 August 2014 ("5 August 2014 Decision").

<sup>9</sup> *Prosecution v. Bemba et al.*, 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, ICC-01/05-01/13-626-tENG, 11 August 2014; *Prosecution v. Bemba et al.*, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, ICC-01/05-01/13-969, 29 May 2015 ("Appeal Judgment"), para. 9.

<sup>10</sup> Appeal Judgment, paras. 39, 49, 50.

suspensive effect was not granted by the Appeals Chamber, and the length of time that has passed since their release, the Appeals Chamber finds that it would not be in the interests of justice for the suspects to be re-arrested because of the reversal of the Impugned Decision. Accordingly, despite reversing the Impugned Decision, the Appeals Chamber decides, in view of the exceptional circumstances, to maintain the relief ordered therein, i.e. the release of the suspects, pending the Trial Chamber's determination on this matter.<sup>11</sup>

10. A procedural issue that remains open is which decision should be the reference point for assessing “changed circumstances” pursuant to Rule 60(3). The Appeals Chamber seems to have presumed that the reference point should be the 5 August 2014 Decision, and makes several references thereto.<sup>12</sup> However, Mr. Mangenda's appeals against the 5 August 2014 Decision, were declared by the Appeals Chamber to be “moot.”<sup>13</sup> Although that approach is understandable in the circumstances, Mr. Mangenda's appeal against the 5 August 2014 Decision remains unadjudicated. It is therefore respectfully submitted that the legal and factual correctness of that decision remains unconfirmed by the Appeals Chamber. Accordingly, the only firm reference point for assessing “changed circumstances” under Article 60(3) is the 17 March 2014 Decision. For the reasons that follow, however, the issue is mainly of academic significance.

#### IV. SUBMISSIONS

*(i) Mr. Mangenda's Conduct Since His Release on 31 October 2014 Demonstrates That None of the Conditions For Continued Detention Exist*

11. Mr. Mangenda's conduct over the last eight months has been unimpeachable. He has not attempted to flee; he has not attempted to interfere with ongoing investigations; and he has not attempted to continue any offence with which he has been charged. These circumstances alone are decisive.<sup>14</sup> They constitute compelling “changed

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<sup>11</sup> Appeal Judgment, para. 57.

<sup>12</sup> Appeal Judgment, paras. 49, 50 (referring to “seven decisions” as having been previously made on the issue, which would include those for which an appeal was pending at the time of the Release Decision), fn. 86 (referring expressly to the 5 August 2014 decision).

<sup>13</sup> Appeal Judgment, para. 58.

<sup>14</sup> Conduct during previous periods of release have been accorded substantial if not decisive weight at the ICTY. See *Prosecutor v. Perišić*, IT-04-81-T, Decision on Mr. Perišić's Motion for Provisional Release, 31 March 2010, para. 19 (“the Trial Chamber also takes into account the personal undertaking of the Accused and his conduct during previous periods of provisional release”).

circumstances”<sup>15</sup> under Article 60(3), regardless of any errors that may have infected the Release Decision. Those changed circumstances justify continued release from detention and demonstrate that none of the necessary conditions for detention under Article 58(1)(b) are satisfied.

12. Evidence of this unimpeachable conduct, if any is required in the absence of any allegation to the contrary, is found in the Registry’s Fourth Report on the implementation of the Release Decision, reflecting that Mr. Mangenda did not flee after being released from detention.<sup>16</sup> On the contrary, Mr. Mangenda was in “regular contact” with the Registry and followed through on the steps prescribed by the UK government for his re-entry there to re-join his wife and three children (one of whom was born while Mr. Mangenda was in custody).<sup>17</sup>
13. Furthermore, Mr. Mangenda strongly wished to attend the Status Conference held on 24 April 2015 but, as is reflected in the attached annex, was unable to do so because the UK authorities informed the ICC Registry that his departure from their territory could result in the automatic rejection of his appeal requesting a family re-unification visa.<sup>18</sup> Indeed, Mr. Mangenda’s vigorous pursuit of the family re-unification visa – which would allow him to permanently settle with his wife and three children who are residents of the United Kingdom – is a further strong indication that there is no risk of flight.
14. No allegation has been made by the Prosecution or anyone else that Mr. Mangenda has done anything since his release to interfere with any ongoing investigations. The Prosecution has made no request for any monitoring of Mr. Mangenda’s

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<sup>15</sup> *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled “Decision on the defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’”, ICC-01/05-01/08-2151-Red, 5 March 2012, para. 31 (“[i]f there are changed circumstances, the Pre-Trial Chamber or Trial Chamber will need to consider their impact on the factors that form the basis for the decision to keep the person in detention”).

<sup>16</sup> *Prosecution v. Bemba et al.*, Registry’s Fourth Report on the Implementation of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” (ICC-01/05-01/13-703), ICC-01/05-01/13-751-Conf, 12 November 2014, paras. 3, 5.

<sup>17</sup> *Id.* para. 4.

<sup>18</sup> Annex A, p. 1 (“Les autorités britanniques ont levé l’équivoque dont vous parlez ci-dessous et m’ont informé par téléphone que votre sortie du territoire aurait pour conséquence d’annuler automatiquement votre appel contre la décision de refus de délivrance d’un visa pour regroupement familial.”)

communications,<sup>19</sup> which implies that it does not consider that there are reasonable grounds to suspect that he is obstructing or endangering investigations or proceedings as required by Article 58(1)(b)(ii).

15. No reasonable basis exists to believe that Mr. Mangenda will obstruct court proceedings by improper contacts with witnesses; on the contrary, the absence of any such efforts over last eight months shows decisively that there is no such risk. Even if there was any basis for such a risk, then measures other than incarceration, such as witness protection measures (if justified), would more effectively safeguard the integrity of such evidence while respecting the principle that pre-trial detention should be the exception rather than the rule.
16. The Appeals Chamber confirmed in the decision remanding this matter to the Trial Chamber that “[t]he potential penalty for the offence charged may be a factor to take into account in assessing whether the time in detention is reasonable,” but that this consideration must be weighed “in light of all the circumstances of the case.”<sup>20</sup> As stated by Judge Ušacka after Mr. Mangenda has been in detention for only seven months:

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.<sup>21</sup>

17. Returning Mr. Mangenda to detention, given his impeccable conduct over the last eight months, and having already served what will likely be a substantial percentage of his likely maximum sentence, would be disproportionate and punitive. The likely

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<sup>19</sup> *Prosecution v. Bemba et al.*, Prosecution’s Response to the Bemba and Kilolo Defence pursuant to the Trial Chamber VII’s 24 April 2015 Order, ICC-01/05-01/13-927, 1 May 2015, para. 1 (“In compliance with Trial Chamber VII’s (“Chamber”) 24 April 2015 order and in response to the Bemba and Kilolo Defence’s requests regarding the monitoring of communications set out in their respective observations on the first status conference (“Requests”), the Office of the Prosecutor (“Prosecution”) confirms that: (1) other than what is already known to the parties, the Prosecution has not monitored, nor requested any national authority to monitor the Accused, Counsel or anyone concerning this case; and (2) the Prosecution is not aware whether national authorities have otherwise undertaken such activities.”)

<sup>20</sup> Appeal Decision, para. 46.

<sup>21</sup> Dissenting Opinion of Judge Anita Ušacka, *Prosecution v. Bemba et al.*, Judgment on the appeal of Mr. Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled “Decision on the ‘Requête de mise en liberté’ submitted by the Defence for Jean-Jacques Mangenda”, ICC-01/05-01/13-560-Anx2-Corr, 14 July 2014, para. 17.



maximum sentence creates little or no incentive to flee or engage in any of the other conduct mentioned in Article 58(1)(b).

(ii) *Previous Findings About “Networks” Are Unsubstantiated and Should Be Accorded No Weight*

18. Previous allegations about Mr. Mangenda’s alleged connections with “Bemba’s wider support network”,<sup>22</sup> upon which the Single Judge relied to maintain provisional detention,<sup>23</sup> should now be accorded no weight. The Single Judge improperly reversed the burden of proof in declaring: “The Single Judge is not persuaded that the links that Jean-Jacques Mangenda was able to establish with various members of that network over the years are now severed by the mere fact of his arrest, or his ensuing withdrawal from the defence team of Mr. Bemba’s [sic] in the Main Case.”<sup>24</sup> The ICTY Appeals Chamber has disapproved such presumptions as a basis for continued provisional detention:

In its Appeal, the Prosecution fails to subsequently provide specific information as to the Accused’s alleged contacts; instead, it merely argues that the Accused’s prior senior position assumes such connections and that he retains them. It states that such specific additional information is only required for low-level accused. The Appeals Chamber does not agree. Furthermore, even if the Trial Chamber failed to give sufficient attention to the fact that the Accused, due to his prior senior position, is likely to still have important connections in Bosnia and Herzegovina or elsewhere, the Prosecution has failed to provide any evidence showing that the Accused would represent a concrete risk of harm to victims and witnesses upon release. No information has been provided showing that he has influenced or threatened them in the past or intends to do so in the future.<sup>25</sup>

19. No lesser a standard of proof should apply at the ICC when it comes to detaining individuals presumed innocent. General allegations of collusion with witnesses almost two years previous cannot, without more concrete information, substantiate a present or future intention to intimidate or otherwise influence other witnesses. Accepting such a proposition would, in effect, permit the indefinite detention of anyone charged

<sup>22</sup> *Prosecution v. Bemba et al.*, Prosecution Response to the «*Requête de mise en liberté*» of 8 January 2014 (ICC-01/05-01/13-71), ICC-01/05-01/13-127-Conf, 24 January 2014, para. 39.

<sup>23</sup> 17 March 2014 Decision, para. 29.

<sup>24</sup> 17 March 2014 Decision, para. 29.

<sup>25</sup> *Prosecutor v. Mićo Stanišić*, IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005 (“*Stanišić Appeal Decision*”), para. 27.

with an Article 70 offence. Such a result would not only be perverse, but violate the Human Rights Committee's injunction that pre-trial detention should not be mandatory "for all defendants charged with a particular crime."<sup>26</sup>

(iii) *The Advanced State of Disclosure Should Be Accorded No Weight In Favour of Provisional Detention*

20. The Appeals Chamber reproved the Pre-Trial Chamber for having failed to adequately address the "advanced stage of disclosure which enhanced the suspects' knowledge of the Prosecution case and was therefore potentially relevant to the right of flight."<sup>27</sup> This was never a valid basis for Mr. Mangenda's continued detention. Rather than according this factor any weight, the Trial Chamber is requested to expressly reject this consideration. As stated by the ICTY Appeals Chamber in respect of the same argument:

the Appeals Chamber dismisses the Prosecution's argument that the Trial Chamber erred in failed to take into account the Accused's recently obtained knowledge of potential Prosecution witnesses as an indicator of the increased risk that the Accused will pose to witnesses. As there was no evidence before the Trial Chamber that the Accused has the contacts or intent necessary for exerting influence over witnesses, victims or other persons, it was not obliged to take into account the fact that material recently disclosed to the Accused by the Prosecution provided him with knowledge of potential Prosecution witnesses. In any event, the Appeals Chamber notes that if the Accused has retained the high-level contacts the Prosecution claims he has, it would be reasonable to conclude that he would have been able to identify potential witnesses prior to obtained this knowledge from the Prosecution, and could have threatened them before the issuance of his indictment and his transfer to the Tribunal. Again, there is no information that he has done so or that he intends to do so. The fact that he has been informed by the Prosecution of potential witnesses does not provide support for the argument that he now has that intent.<sup>28</sup>

21. If Mr. Mangenda has a "network" as alleged, then he likewise would have the means to infer the identities of witnesses and would have engaged in threats or intimidation during the last eight months of release. The fact that he has not done so demonstrates

<sup>26</sup> General Comment No. 35, para. 38.

<sup>27</sup> Appeal Judgment, para. 51.

<sup>28</sup> *Stanišić* Appeal Decision, para. 28.

that this factor, even assuming that it was ever correctly relied upon, should now be accorded no weight.

**V. CONCLUSION**

22. Mr. Mangenda should not be returned to detention. The last eight months of release demonstrates that there is no risk of the occurrence of any of the necessary conditions for detention set out in Article 58(1)(b) of the Statute.



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**Counsel for Mr. Jean-Jacques Kabongo Mangenda**

Dated this 19 June 2015,  
At The Hague, The Netherlands