

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/05-01/13 OA 9**

**Date: 22 October 2014**

**THE APPEALS CHAMBER**

**Before:** Judge Sanji Mmasenono Monageng, Presiding Judge  
Judge Sang-Hyun Song  
Judge Akua Kuenyehia  
Judge Erkki Kourula  
Judge Anita Ušacka

**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**

**URGENT**

**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**



**Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Ms Helen Brady

**Counsel for Jean-Pierre Bemba Gombo**  
Mr Nicholas Kaufman

**Counsel for Aimé Kilolo Musamba**  
Mr Paul Djunga Mudimbi

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

**Counsel for Fidèle Babala Wandu**  
Mr Jean Pierre Kilenda Kakengi Basila

**Counsel for Narcisse Arido**  
Mr Göran Sluiter

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014 (ICC-01/05-01/13-703),

Having before it the “Prosecution’s Notice of Appeal of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014 and Urgent Request for Suspensive Effect of the Decision pending Appeal” of 22 October 2014 (ICC-01/05-01/13-706), in which a request for suspensive effect is made,

*Renders* the following

## DECISION

The above-mentioned request for suspensive effect is rejected.

### REASONS

#### I. PROCEDURAL HISTORY

1. On 21 October 2014, Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) rendered the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido”<sup>1</sup> (hereinafter: “Impugned Decision”), in which it, *inter alia*, ordered: 1) the release of Mr Aimé Kilolo Musamba (hereinafter: “Mr Kilolo”), Mr Jean-Jacques Mangenda Kabongo (hereinafter: “Mr Kabongo”), Mr Fidèle Babala Wandu (hereinafter: “Mr Babala”) and Mr Narcisse Arido (hereinafter: “Mr Arido”); 2) the Registrar to ensure that, prior to leaving the Detention Centre of the Court, Mr Kilolo, Mr Kabongo, Mr Babala and Mr Arido sign an individual declaration (i) stating their commitment to appear at trial, or whenever summoned by the Court, and (ii) indicating the address at which they would be staying and; 3) the Registrar to promptly make all the practical

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<sup>1</sup> ICC-01/05-01/13-703.

arrangements that are necessary and appropriate for the purposes of enforcing the Impugned Decision.<sup>2</sup>

2. On 22 October 2014, the Prosecutor submitted the “Prosecution’s Notice of Appeal of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014 and Urgent Request for Suspensive Effect of the Decision pending Appeal”<sup>3</sup> (hereinafter: “Notice of Appeal”). In the Notice of Appeal, the Prosecutor requests suspensive effect pursuant to article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence, to the extent that the Impugned Decision ordered the release of the suspects subject only to the conditions that they indicate their commitment to appear at trial or whenever summoned by the Court, as well as the address at which they will be staying.<sup>4</sup> In support of this request and with reference to earlier decisions of the Appeals Chamber, the Prosecutor argues that denying the request “would cause irreparable prejudice to the [Prosecutor] by defeating the purpose of its appeal” and that granting the request “is necessary to prevent irreversible consequences to the proceedings against the four suspects caused by their release”.<sup>5</sup>

3. The Prosecutor argues that releasing the suspects “would have “far reaching”, “adverse and possibly dire consequences” on the proceedings against the suspects” (footnotes omitted).<sup>6</sup> The Prosecutor further refers to the previous recognition of flight risks, the existence of a network of supporters behind them and the availability of financial means which, in her view, could facilitate their absconding from the Court’s jurisdiction.<sup>7</sup> According to the Prosecutor, under these circumstances, “there is a real

<sup>2</sup> Impugned Decision, pp. 6-7.

<sup>3</sup> ICC-01/05-01/13-706.

<sup>4</sup> Notice of Appeal, paras 4-5.

<sup>5</sup> Notice of Appeal, paras 2-3, referring to *Prosecutor v. Thomas Lubanga Dyilo*, “Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the “Decision on the release of Thomas Lubanga Dyilo””, 22 July 2008, ICC-01/04-01/06-1444 (OA 12) (hereinafter: “*Lubanga OA 12 Decision*”), paras 9-10 and *Prosecutor v. Thomas Lubanga Dyilo*, Dissenting Opinion of Judge Pikis to the “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008”, 22 April 2008, ICC-01/04-01/06-1290 (OA 11) (hereinafter: “*Dissenting Opinion of Judge Pikis*”), para. 9.

<sup>6</sup> Notice of Appeal, para. 4, referring to *Prosecutor v. Thomas Lubanga Dyilo*, ““Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I’s Decision on Victim’s Participation of 18 January 2008”, 22 May 2008, ICC-01/04-01/06-1347 (OA 9 OA 10), paras 22-23; Dissenting Opinion of Judge Pikis.

<sup>7</sup> Notice of Appeal, para. 4 referring to *Prosecutor v. Jean-Pierre Bemba Gombo et. al.*, “Decision on “Narcisse Arido’s request for interim release””, ICC-01/05-01/13-588, paras 13-14; *Prosecutor v.*

danger that they may not appear at trial or when summoned by [the] Court, frustrating the entire purpose of the proceedings against them”.<sup>8</sup> The Prosecutor further submits that “[t]here is no guarantee the suspects could be arrested again” and that “it may be impossible to bring them back into the Court’s jurisdiction”.<sup>9</sup> The Prosecutor finally submits that “[a]ny potential reversal of the [Impugned Decision] by the Appeals Chamber would be rendered futile if the Court were unable to secure their re-arrest or if the suspects were to interfere with the investigation or renew any commission of crimes within the jurisdiction of the Court”.<sup>10</sup>

4. On 22 October 2014, pursuant to an order issued by the Appeals Chamber,<sup>11</sup> Mr Jean-Jacques Mangenda Kabongo, Mr Aimé Kilolo Musamba, Fidèle Babala Wandu and Narcisse Arido filed their respective responses to the request for suspensive effect, submitting that it be rejected.<sup>12</sup>

## II. MERITS

5. Article 82 (3) of the Statute provides that, upon request, the Appeals Chamber may order suspensive effect. The Appeals Chamber has held that “when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its

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*Jean-Pierre Bemba Gombo et al.*, “Decision on the “Requête de mise en liberté” submitted by the Defence for Jean-Jacques Mangenda”, ICC-01/05-01/08-261, paras 29-31; *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, “Decision on the “Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu””, ICC-01/05-01/08-258, paras 18-20; *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, “Decision on the “Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu””, ICC-01/05-01/08-259, para. 22.

<sup>8</sup> Notice of Appeal, para. 4.

<sup>9</sup> Notice of Appeal, para. 4.

<sup>10</sup> Notice of Appeal, para. 4.

<sup>11</sup> “Order on the filing of a response by Mr Jean-Jacques Mangenda Kabongo, Mr Aimé Kilolo Musamba, Fidèle Babala Wandu and Narcisse Arido to 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”, 22 October 2014, ICC-01/05-01/13-709 (OA 9).

<sup>12</sup> “Réponse de Monsieur Jean-Jacques KABONGO MANGENDA à la demande de suspension de la décision II-01/05-01/13-703 21-10-2014”, ICC-01/05-01/13-714; “Réponse à la requête du Procureur visant à assortir de l’effet suspensif la décision du Juge Unique de la Chambre préliminaire II ordonnant la remise en liberté provisoire de Me Aimé Kilolo-Musamba”, ICC-01/05-01/13-712; “Réponse de la Défense de Monsieur Fidèle Babala Wandu à “Urgent Motion for Interim Stay of the “Decision ordering the Release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu et Narcisse Arido” (ICC-01/05-01/13-705)”, ICC-01/05-01/13-715-Conf; “Narcisse Arido’s Response to the Prosecution’s Urgent Request for Suspensive Effect of its Notice of Appeal Against the Single Judge’s Interim Release Decision of 21 October 2014 (ICC-01/05-01/13-706 OA9)”, ICC-01/05-01/13-713.

discretion under these circumstances”.<sup>13</sup> The Appeals Chamber has summarised the circumstances in which it has previously exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) “would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant”, (ii) would lead to consequences that “would be very difficult to correct and may be irreversible”, or (iii) “could potentially defeat the purpose of the appeal”.<sup>14</sup> [Footnotes omitted.]

6. The Appeals Chamber recalls that it has previously granted requests for suspensive effect in cases concerning the release of an individual.<sup>15</sup> Nevertheless, the Appeals Chamber emphasises that, notwithstanding those precedents, the decision as to whether or not to grant suspensive effect is always discretionary and depends upon the individual circumstances of the case.<sup>16</sup>

7. Turning to the circumstances of the present case, the Appeals Chamber considers that it has to balance the competing interests at stake. 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 are 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>13</sup> *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on Mr William Samoei Ruto’s request for suspensive effect”, 17 June 2014, ICC-01/09-01/11-1370 (OA 7 OA 8), para. 6, referring to previous jurisprudence.

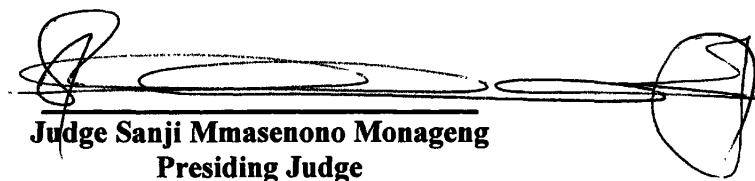
<sup>14</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the “Decision on the Admissibility and Abuse of Process Challenges””, 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 11.

<sup>15</sup> *Lubanga OA 12 Decision; Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of the Prosecutor for Suspensive Effect”, 3 September 2009, ICC-01/05-01/08-499 (OA 2); *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecutor’s request to give suspensive effect to the appeal against Trial Chamber I’s oral decision to release Mr Thomas Lubanga Dyilo”, 23 July 2010, ICC-01/04-01/06-2536 (OA 17).

<sup>16</sup> *See Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of the Prosecutor for Suspensive Effect”, 3 September 2009, ICC-01/05-01/08-499 (OA 2), para. 11.

8. For the above reasons, and without prejudice to the Appeals Chamber's eventual decision on the merits of the Prosecutor's appeal against the Impugned Decision, the request for suspensive effect is rejected.

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



**Judge Sanji Mmasenono Monageng**  
**Presiding Judge**

Dated this 22nd October 2014

At The Hague, The Netherlands