

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **21 June 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Redacted Document

Public redacted version of "Prosecution's Views for the purposes of the Review of the Detention of the Suspects pursuant to Rule 119(3) of the Rules of Procedure and Evidence", 20 October 2014, ICC-01/05-01/13-699-Conf

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell

Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Ms Beth Lyons

States Representatives

Competent authorities of:

The Kingdom of the Netherlands

The Democratic Republic of the Congo

The Kingdom of Belgium

The French Republic

The United Kingdom of Great Britain
and Northern Ireland

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Mr Patrick Craig

Victims Participation and Reparations Section Others

I. Introduction

1. Pursuant to the Single Judge's 16 October Decision,¹ the Office of the Prosecutor ("Prosecution") submits its views for the purposes of the Chamber's *proprio motu* review of the suspects' state of detention. No change in circumstances justifies the suspects' release under any conditions.

2. The conditions warranting the suspects' continued detention under Article 58(1) of the Rome Statute ("Statute") persist.

3. *First*, releasing the suspects carries with it an unacceptable risk of witness interference in this case. As gained through the confirmation process, the suspects' knowledge of the identities of the most important Prosecution witnesses, their evidence and the links they establish between the suspects and the charged offences, makes the need for their continued detention even more compelling. There is no condition of release which can effectively counteract the serious risk of the suspects' endangering the continued investigation of the case or their interference directly or indirectly with witnesses, particularly in light of the nature of the crimes charged and their alleged manner of commission. Further, none of the States invited by the Chamber to submit observations on conditional release is able to guarantee the effective management of either risk.

4. *Second*, the case against the suspects remains strong and fully known to them. It thus provides further impetus for them to avoid appearing for trial, should the charges be confirmed.

¹ ICC-01/05-01/13-697.

5. Separately, there has been no inexcusable delay by the Prosecution necessitating the Single Judge's consideration of release under Article 60(4) of the Statute.

6. The suspects should remain detained.

II. Confidentiality

7. This Submission is filed confidentially as it refers to material of the same designation.

III. Applicable Law

8. The Appeals Chamber has confirmed that when the conditions under Article 58(1) continue to be met, Article 60(2) of the Statute requires that the person must continue to be detained.² The conditions set out in Article 58(1)(b) include: (i) to ensure a person's appearance at trial; (ii) to prevent the obstruction or endangerment of the investigation or court proceedings; or (iii) to prevent continued criminal conduct by the same person. As confirmed by the Appeals Chamber, these three conditions are "in the alternative," such that the fulfillment of any one of them is sufficient to warrant detention.³

9. Article 60(3) of the Statute requires the Pre-Trial Chamber to periodically review its previous ruling on the release or detention of a person in order to ascertain whether there has been a change in the circumstances underpinning this ruling, and if so, whether this change has a bearing on the conditions under Article 58(1) such

² ICC-01/04-01/06-824 (OA 7), para. 134.

³ *Ibid.*, para. 139.

that the termination of their detention is warranted.⁴

10. Changed circumstances exist where there is a “change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.”⁵ Absent changed circumstances, “the Chamber is not required to further review the ruling on release or detention.”⁶

11. The Appeals Chamber has also held that the Prosecution need not have to re-establish circumstances that have already been established.⁷ For each periodic review of detention, the Prosecution must make submissions as to whether there has been any change in the circumstances that previously justified detention, bringing to the attention of the Chamber any other relevant information of which it is aware that relates to the question of detention or release.⁸ The Chamber must also consider any other information which has a bearing on the subject.⁹

IV. Submissions

12. There have not been any changes in the circumstances underlying the Single Judge’s decisions to detain the suspects,¹⁰ or any new facts that would necessitate a modification of these decisions.

13. The only new fact concerns the confirmation proceedings that took place between 30 June 2014 and 11 September 2014,¹¹ and which makes the need for the

⁴ ICC-01/05-01/08-1019 (OA 4), paras. 47-52 (citing ICC-01/04-01/07-572 (OA 4), para. 14) and ICC-01/05-01/08-1626-Red, para. 71.

⁵ ICC-01/05-01/08-1019 (OA 4), para. 51 and ICC-02/11-01/11-548-Red (OA 4), para. 40 (both citing ICC-01/05-01/08-631 (OA 2), para. 60).

⁶ ICC-02/11-01/11-548-Red (OA 4), para. 40 (citing ICC-01/05-01/08-2151 (OA 10), para. 1).

⁷ ICC-01/05-01/08-1019 (OA 4), para. 51.

⁸ *Ibid.*, paras. 2 and 51.

⁹ *Ibid.*, para. 52.

¹⁰ ICC-01/05-01/13-538; ICC-01/05-01/13-588; ICC-01/05-01/13-611; ICC-01/05-01/13-612.

¹¹ ICC-01/05-01/13-443, page 5 and ICC-01/05-01/13-610, page 4.

suspects' continued detention even more compelling.

A. Detention is necessary to ensure the investigation and court proceedings are not endangered or obstructed (Article 58(1)(b)(ii))

14. Through the confirmation proceedings, the suspects have been fully informed of the Prosecution's case, including the identities of the witnesses most relied on, their accounts and the links they set out between the suspects and the charged offences. The confirmation proceedings also clarified the reliance on other types of evidence, such as documentary evidence.

15. Releasing the suspects unconditionally carries with it the unacceptable risks that they will interfere with witnesses and/or tamper with the evidence.

16. Even if one would consider releasing them conditionally, the nature of the alleged crimes as well as the manner in which they were committed, make it difficult to conceive conditions that would address these risks properly.¹²

17. Only a system capable of monitoring all forms of communication available to the suspects could counteract the risks that witnesses or evidence may be interfered/tampered with. Absent this, the suspects should not be conditionally released.¹³ None of the state authorities requested to provide observations for the

¹² In respect of BABALA, KILOLO and MANGENDA the Single Judge found that: « [...] the nature of the crimes alleged in these proceedings and the alleged modalities of their commission (ie, by way of communications with the other suspects, or with third parties connected to them by reason of personal or professional links) are such as to make it difficult to conceive of measures which might effectively counteract the risks associated with the suspect's communications with the external world and that, accordingly, the detention centre is the only environment providing adequate guarantees for the effective management of those risks": ICC-01/05-01/13-538, para.18; ICC-01/05-01/13-611, para.20; ICC-01/05-01/13-612, para.28. In respect of ARIDO, the Single Judge moreover found that it appeared that he even committed some of the alleged crimes while in custody of the detention unit of the Court, and by means of an abuse of the communication system set up within it: ICC-01/05-01/13-588, paras.18, 21 and 26. See also ICC-01/05-01/13-586-Conf, page 5 where the Single Judge ordered the continued [REDACTED] with a view to ensuring the protection of witnesses.

¹³ See also ICC-01/05-01/13-611, para. 22 and ICC-01/05-01/13-612, para. 34.

purposes of the review of the detention of the suspects confirmed their respective abilities to implement such conditions adequately.

Observations of the British authorities

18. The British authorities observed that they could envisage “[REDACTED]” enforcing conditions set by the Court relating to Rule 119(1)(c) of the Rules of Procedure and Evidence (“Rules”).¹⁴ The concerns expressed by the British authorities preclude any conditional release of MANGENDA in the UK.¹⁵

Observations of the French authorities

19. The French authorities stated that [REDACTED].¹⁶ Moreover, they highlighted that they would not be in a position “[REDACTED]”.¹⁷ Any conditional release of ARIDO in France is therefore excluded.¹⁸

Observations of the Belgian authorities

20. The Belgian authorities also expressed concerns in respect of the implementation of conditions,¹⁹ including the fact that [REDACTED].²⁰ These impediments also preclude any conditional release of KILOLO or MANGENDA in Belgium.²¹

¹⁴ ICC-01/05-01/13-691-Conf-AnxI, page 4.

¹⁵ In line with the Single Judge’s first review of MANGENDA’s detention in which, on the basis of the prior observations of the British authorities (ICC-01/05-01/13-137-AnxIII, page 2), he concluded that “conditional release in the United Kingdom is both unwarranted and unfeasible”: ICC-01/05-01/13-612, para. 29.

¹⁶ ICC-01/05-01/13-691-Conf-AnxIII, page 4.

¹⁷ ICC-01/05-01/13-691-Conf-AnxIII, page 4.

¹⁸ In line with the Single Judge’s decision on ARIDO’s request for interim release in which, on the basis of similar observations (ICC-01/05-01/13-537-Conf-AnxII, page 2), he concluded that “no availability to accept Narcisse Arido on their territory in the event of his release, with or without conditions, has been shown by either the Netherlands or France, that is the State to which Narcisse Arido requested to be released”: ICC-01/05-01/13-588, para. 27. ARIDO also expressed an interest to be released in the Netherlands (ICC-01/05-01/13-695-Conf, para. 55). However, the Dutch authorities did not provide any observations on conditional release in the Netherlands: ICC-01/05-01/13-691-Conf-AnxII.

¹⁹ ICC-01/05-01/13-691-AnxIV.

²⁰ ICC-01/05-01/13-691-AnxIV, pages 12, 20 and 21.

²¹ In line with the Single Judge’s first review of MANGENDA and KILOLO’s detention in which, on the basis of identical observations (ICC-01/05-01/13-605-AnxII and ICC-01/05-01/13-605-AnxIII), he concluded that “The Single Judge takes the view that, indeed, the availability of a thorough system of monitoring of all forms of communication available to the suspect is critical so as to make it possible to consider if, in principle and in light

Observations of the Congolese authorities

21. The Congolese authorities informed the Chamber that its position remained unchanged, namely that the DRC [REDACTED].²² Taking into account the fact that BABALA only seeks to be released to the DRC,²³ any conditional release of BABALA is therefore impossible.²⁴

B. Detention is necessary to ensure the suspects' appearance at trial (Article 58(1)(b)(i))

22. The strength of the Prosecution's case provides the suspects' with a commensurate motivation to avoid appearing for trial, should the charges be confirmed. The material underlying the charges, which comprises witness statements, documentary evidence, and particularly damaging audio intercepts and recordings of the suspects themselves (save ARIDO), provides overwhelming evidence of their responsibility for the crimes charged in the Document containing the Charges.

23. In the circumstances, the risk of conviction alone substantially undermines the likelihood that, if released, the suspects will voluntarily appear at trial.

of all relevant circumstances, such monitoring would be suitable to counteract the relevant risks, and in particular the risks that proceedings be interfered with or that future crimes be committed. In the complete absence of such system, and in the presence of such risks, conditional release is not only unwarranted, but also practically unfeasible": ICC-01/05-01/13-611, paras.21 and 22 and ICC-01/05-01/13-612, paras.33 and 34.

²² ICC-01/05-01/13-694-Conf-Anx3, page 3: the previous observations were filed as ICC-01/05-01/13-512-Anx1.

²³ ICC-01/05-01/13-684, para. 35.

²⁴ In line with the Single Judge's first review of BABALA's detention in which, on the basis of similar observations (ICC-01/05-01/13-512-Anx1, page 3), he concluded that "the unequivocal statement of unavailability put forward by the DRC - make conditional release not only not justified in light of all relevant factors, but also practically unfeasible": ICC-01/05-01/13-538, para. 20.

C. The length of detention is not unreasonable due to inexcusable delay by the Prosecution (Article 60(4) of the Statute)

24. Finally, the suspects have neither been detained for an unreasonable period, nor are the periods of their detention due to inexcusable delay by the Prosecution in the conduct of the case. The Single Judge need not therefore consider release under Article 60(4) of the Statute.

25. The Appeals Chamber in *Lubanga* held that “the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case.”²⁵

26. Taking into account the complexity of this case including the painstaking precautionary measures required with regard to the handling of potentially privileged material; the fact that the case involves multiple alleged co-perpetrators who operated in different countries and jurisdictions; and the engagement of those diverse authorities in the seizure and transfer of related evidence, the current detention period is not unreasonable, or attributable to any inexcusable delay by the Prosecution. The Single Judge’s prior detention-related decisions confirm this unequivocally.²⁶

²⁵ ICC-01/04-01/06-824 (OA 7), para. 122.

²⁶ ICC-01/05-01/13-588, para.17; ICC-01/05-01/13-612, para.26.

V. Requested Relief

27. For the reasons set out above, the continued detention of the suspects is required under Article 60(2) of the Statute.



Fatou Bensouda, Prosecutor

Dated this 21st Day of June 2016
At The Hague, The Netherlands