Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No: **ICC-01/05-01/13**
Date: **15 July 2016**

TRIAL CHAMBER VII

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
Judge Olga Herrera Carbuccia
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 Redacted Version

Corrigendum to Reply to "Prosecution's Observations on the Accused's Detention" (ICC-01/05-01/13-1044-Conf)

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

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-Jacques Kabongo Mangenda
Mr Christopher Gosnell

Counsel for Jean-Pierre Bemba Gombo
Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba
Mr Paul Djunga Mudimbi

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

Counsel for Narcisse Arido
Mr Charles Achaleke Taku
Mr Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Prosecution has not opposed the continuation of Jean-Jacques Mangenda's interim release,[1] but requests the imposition of "stringent conditions",[2] including requiring Mr. Mangenda to: (i) "post a bond or provide real or personal security or surety"; (ii) report to the Registrar "any overnight travel from the location where [he is] presently residing"; (iii) report to the Registrar any change of address; (iv) "be monitored by the relevant State authorities"; (v) appear when so required by the Trial Chamber; (vi) "not commit new offences"; (vii) refrain from "harassing, intimidating, threatening, or otherwise interfering with witnesses in this case" or the *Bemba* case; (viii) have no contact with any witness in this case or the *Bemba* case, and to report any such contacts to the Registrar.[3]

2. None of these conditions is reasonable, appropriate or necessary. Mr. Mangenda has not, despite the absence of these conditions, fled over the last nine months of interim release. Proposed condition (iv) is procedurally improper and without any factual justification. Proposed conditions (v)-(viii) are independent legal requirements already and, thus, otiose.

3. Accusations have been made that "Prosecution witnesses *in this case* have been interfered with during its pendency",[4] and that lack of flight may reflect the defendants' "confidence in having already successfully corruptly influenced witnesses *in this case*."[5] These accusations can be relevant to interim release only if they concern influence of witnesses *qua* witnesses in *this case* – an allegation for which not one shred of evidence is presented in respect of Mr. Mangenda. These unsupported accusations should be accorded no weight at all.

[1] *Prosecutor v. Bemba et al.,* Prosecution's Observations on the Accused's Detention, ICC-01/05-01/13-1044-Conf, 29 June 2015 ("Observations"). See *Prosecutor v. Bemba et al.,* Submissions on Continuation of Interim Release, ICC-01/05-01/13-1017, 19 June 2015 ("Mangenda Submissions"). This submission is a public redacted version prepared pursuant to the Chamber's direction in its *Decision Closing the Submission of Evidence and Further Directions,* ICC-01/05-01/13-1859, 29 April 2016.
[2] Observations, para. 6.
[3] *Id.* para. 47 (a) – (i).
[4] *Id.* para. 45 (italics added).
[5] *Id.* para. 17.

II. SUBMISSIONS

(i) The Prosecution's Attempt To Contrive Flight Risk Based On Mr. Mangenda's Failure To Travel To A Status Conference At Which His Attendance Was Optional, Is Unfounded

4. The Prosecution argues that flight risk is "raise[d]" because Mr. Mangenda did not travel to the status conference held by the Trial Chamber on 24 April 2015.[6] Mr. Mangenda expressed his wish to attend that status conference, but refrained from doing so after being informed by the Registry that the United Kingdom had refused, *inter alia*, to promise that he would be granted re-entry from The Netherlands. The Prosecution claims that this raises the prospect of Mr. Mangenda using such issues in the future as a pretext to fail to attend when so required by the Trial Chamber.

5. The Prosecution's surmise is unfounded and illogical. The Trial Chamber expressly indicated that the defendants were not required to be present at the status conference.[7] The Prosecution, along with all other parties, was informed that the defendants were not required to be present. Mr. Mangenda's inability to attend the status conference therefore evinces no intention to flee.

6. On the contrary, Mr. Mangenda's evident concern to avoid transgressing United Kingdom immigration requirements demonstrates an intention not to flee the territory of a State Party. Furthermore, there is no indication – nor any reason to assume, as the Prosecution does – that Mr. Mangenda would simply choose, in the future, "not to appear [at trial] rather than jeopardise his immigration prospects."[8] The issue should not even arise if the United Kingdom acts with a minimum degree of comity towards the International Criminal Court.

[6] *Id.* para. 26.
[7] Email from Trial Chamber VII Communications to All Parties, "Attendance of accused at status conference", 25 March 2015, 15:23 ("[REDACTED].") The Prosecution was amongst the recipients of this email.
[8] Observations, para. 27.

7. Mr. Mangenda's status in the United Kingdom is not "unclear."[9] The Registry has reported on the basis of Mr. Mangenda's entry to, and residence in, the United Kingdom.[10] The Prosecution is a party to that filing. Mr. Mangenda has, in addition, applied to regularise his status in the United Kingdom, including by applying for permanent residence based on family re-unification provisions. An initial decision denying that application has been appealed, and an appellate decision is expected in due course. That application, and Mr. Mangenda's manifest concern with its success, is a further indication of the absence of any intention to flee. The Prosecution also does not dispute Mr. Mangenda's strong family ties in the United Kingdom, which is an additional circumstance weighing strongly against any risk of flight.

8. The Prosecution's failure to comment on the United Kingdom's failure to actively facilitate Mr. Mangenda's travel to The Hague is a matter of concern. Imagine that a State Party were to inform the Prosecution that one of its witnesses might be denied re-entry to his or her country of temporary residence after testifying before the ICC. Would the Prosecution request the issuance of a subpoena against the witness? The imposition of surveillance measures on the witness? Or would it insist, relying on the provisions of Part IX of the Statute, that the State Party must not impede the witnesses' travel to The Hague? The Prosecution, as one of the organs of this institution, should insist that the United Kingdom honour its obligations to the International Criminal Court, including by facilitating the travel of a defendant who wishes to attend a court hearing in his case and to consult with his counsel in The Hague.

9. The United Kingdom's stance on Mr. Mangenda's re-entry is not only a matter of concern to him personally. The United Kingdom's sudden revocation of Mr. Mangenda's five-year multiple entry visa immediately after the Pre-Trial Chamber granted him interim release, combined with The Netherlands' refusal to permit him to be present on its territory, caused Mr. Mangenda to be detained by the ICC illegally

[9] *Id.* para. 27.
[10] *Prosecutor v. Bemba et al.,* Registry's Fifth 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-01/05-01/13-808-Conf-Anx1, 2 February 2015.

for ten days.[11] The Netherlands eventually agreed to Mr. Mangenda's presence on its territory, subject to certain guarantees and undertakings of the ICC. The United Kingdom's failure to guarantee Mr. Mangenda's re-entry after the status conference could have led to a similarly embarrassing and disorderly situation that is contrary to the interests of justice.

10. The Prosecution cites no authority, moreover, from any international court supporting the imposition of a bond or other surety as a form of guarantee of appearance.

11. The Prosecution's allegation that Mr. Mangenda's failure to attend the status conference is indicative of a risk of flight is therefore without merit and should be rejected.

(ii) The Prosecution's Previous Failure To Request Surveillance Is Indicative Of The Absence Of Reasonable Grounds To Suspect Any Ongoing Offences

12. The Prosecution argues that it failed to previously request electronic surveillance of Mr. Mangenda because doing so "would have circumvented the Pre-Trial Chamber's Order."[12] The Prosecution asserts, on this basis, that its failure to have requested such measures is not indicative of an absence of reasonable grounds to suspect the commission of any crime.[13]

13. This claim is incorrect. Nothing in the Pre-Trial Chamber's decision[14] precludes such a request. Nothing on the pages of the Release Decision cited by the Prosecution[15] precludes such a request. The Prosecution submission therefore has no merit. The only reasonable inference is that the Prosecution's failure to previously request surveillance indicates the absence of reasonable grounds on which to suspect the continuation of any offence so as to justify such surveillance.

---

[11] *Prosecutor v. Bemba et al.,* Request for Compensation for Unlawful Detention, ICC-01/05-01/13-921-Conf, 21 April 2015, paras. 11-14.
[12] Observations, para. 29.
[13] Mangenda Submissions, para. 14.
[14] *Prosecutor 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").
[15] Observations, fn. 29 (purporting to cite "pp.6-7" of the Release Decision but without any quotation and without any indication on those pages that such a request was being pre-emptively rejected or precluded).

(iii) *The Prosecution's Belated Request For Surveillance Of Communications As A Condition Of Interim Release Is Procedurally Improper And Unfounded*

14. The Prosecution now claims, however, that "the Accused's communications must be monitored by the relevant State authorities"[16] as a condition of continued interim release.

15. The request, as an initial matter, is vague. Is the Prosecution asking the Trial Chamber to order States to perform this surveillance, or is the Prosecution declaring what States should do, and which is to be requested by the Prosecution through other channels? If the former, the Prosecution has not cited any provision of Article 93 pursuant to which it believes that a Trial Chamber could order a State to engage in electronic surveillance, and on what basis; if the latter, then the Prosecution offers no explanation as to what measures it has independently requested of States, and how this Trial Chamber could make such surveillance (which is outside of its control) a condition of interim release (which is within its control).

16. In any event, the basis for the Prosecution's request is manifestly deficient. The only grounds presented are: (i) the existence of the Confirmation Decision;[17] and (ii) the absence of proof that Mr. Mangenda is <u>not</u> interfering with ongoing Prosecution investigations.[18]

17. The notion that intrusive electronic surveillance should be legally authorised on the basis of charges pending against a defendant for alleged previous conduct, combined with the absence of dis-proof of criminal conduct, is unacceptable. While the standards for authorising surveillance at the international level may be open to discussion, the minimum standard must at least be some credible and substantial basis to believe that surveillance of such communications is necessary to discover commission of a crime. Unproven allegations of past crimes are obviously not sufficient, and would not be accepted in any civilised legal system. The issue is not

[16] *Id.* para. 47(e).
[17] *Id.* para. 30.
[18] *Id.* para. 28.

the defendants' "trustworthiness," as the Prosecution claims,[19] but whether the Prosecution has demonstrated a proper basis on which to believe that interference is occurring in *this* case.

18. The Prosecution on several occasions implies that Mr. Mangenda *is* interfering with investigations in this case:

> Indeed, the Accused's lack of flight may reflect no more than confidence in having already successfully corruptly influenced witnesses in this case. Given the confirmed facts and circumstances concerning the conduct underlying the charges, this is hardly unrealistic.[20]
> …
> Given the nature of the criminal conduct with which he has been charged and the surreptitious manner in which the Accused allegedly carried out the offences, that his interfering with witnesses or evidence is not yet apparent does not mean that: (a) that [*sic*] he is not doing so, or (b) that there is no risk that he might.[21]
> …
> Prosecution witnesses in this case have been interfered with during its pendency.[22]

19. The first two passages are premised on the view that the defendants should be deemed to be engaging in criminal conduct unless such an inference is "unrealistic," or unless there is "no risk" that it *might* take place. Such standards are legally unsound, and provide no basis on which this Trial Chamber should draw any consequences, legal or otherwise.

20. The third passage is more categorical and unequivocal, implying that the Prosecution has some basis to believe that the witnesses in this case have been "interfered with" for the purposes of this case. If the Prosecution has any basis for such an allegation in respect of Mr. Mangenda, then it should be brought forward immediately. If no basis for such a claim exists, then it should be withdrawn.

---

[19] *Id.* para. 30.
[20] *Id.* para. 17.
[21] *Id.* para. 28.
[22] *Id.* para. 45.

(iv) Proposed Conditions (v) through (viii) Are Already Legal Obligations Incumbent On Mr. Mangenda That Require No Reiteration In The Context Of An Interim Release Decision

21. Mr. Mangenda already has an independent obligation to appear before the Trial Chamber, to refrain from committing offences, and to refrain from contacting Prosecution but not, incidentally, prospective Defence witnesses. Imposing those obligations as conditions of interim release are redundant and unnecessary.

22. The proposed condition that Mr. Mangenda report any contacts that he might have with Prosecution witnesses is contradictory and would violate his right against self-incrimination. The Prosecution cites no authority of any such proactive obligation ever having been ordered in any previous case.

III. CONCLUSION

23. The Prosecution has correctly not opposed the continuation of Mr. Mangenda's interim release, but its requests for the imposition of "stringent conditions" of continued release are without merit and should be rejected.

Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Dated this 15 July 2016,
At The Hague, The Netherlands