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

Date: **8 March 2017**

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, AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND
NARCISSE ARIDO

Public

Request for Continued Provisional Release Pending Appeal

Source: Defence for Jean-Jacques Mangenda Kabongo

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

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**Unrepresented Applicants
(Participation/Reparation)**

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I. INTRODUCTION

1. Jean-Jacques Mangenda, out of an abundance of caution concerning the possible interpretation and applicability of Article 81(3)(a), requests that the Trial Chamber continue his provisional release upon pronouncement of sentence on 22 March 2017. The Trial Chamber has already declared that it “does not consider that Article 81(3)(a) of the Statute applies in present circumstances.”¹ It follows that Article 81(4) entails that, barring an order to the contrary, provisional release is to continue during appeal proceedings.
2. The consequence dictated by Article 81(4) is particularly appropriate given the absence of any change of material circumstance since provisional release was last re-affirmed by the Trial Chamber on 19 October 2016.² Mr Mangenda continues to pose no flight risk. His family ties remain firm, his demonstrated commitment to remaining in the country of his family ties endures, and his cooperation with the Court – as reflected in his attendance at the sentencing submissions and his anticipated presence at the pronouncement of sentence – continues. Article 81(4), especially when read in contrast with Article 81(3)(a), mandates continuation of the *status quo* in respect of provisional release during appeal proceedings. Indeed, the right of appeal conferred by Article 81 would be defeated by ordering immediate enforcement of a sentence that will, in all likelihood, have been served by the time the appeals are decided.

II. APPLICABLE LAW

3. Article 60(2) of the Statute states 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.

4. Article 81 provides that:

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

¹ ICC-01/05-01/13-T-51-ENG. All further citations are to the case ICC-01/05-01/13 unless otherwise indicated.

² T-51 32:21-34:16.

- (b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

[...]

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

III. PROCEDURAL HISTORY

5. Mr. Mangenda was first provisionally released by the Pre-Trial Judge on 21 October 2014, after 332 days in custody.³ The Appeals Chamber, having denied a Prosecution request that the release be suspended pending appeal, later reversed this decision on legal grounds and remanded the issue for *de novo* evaluation by the Trial Chamber.⁴ The Trial Chamber's *de novo* determination was that provisional release, subject to conditions, should continue.⁵
6. On 19 October 2016, following pronouncement of Judgment, the Prosecution again requested that Mr Mangenda be remanded into custody. The Prosecution argued that Mr Mangenda was "in the Court's custody" and that, hence, Article 81(3)(a) applied.⁶ The Trial Chamber rejected this argument:

The Chamber does not consider that Article 81(3)(a) of the Statute applies in the present circumstances. The four convicted persons at issue were not in custody when the judgment was rendered, so they do not, quotation of the provision, "remain in custody pending an appeal."⁷

7. The Trial Chamber denied the Prosecution motion to remand Mr. Mangenda into custody, applying the criteria provided in Articles 60 and 61 of the Statute, on three grounds:

³ 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.

⁴ 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, para. 57.

⁵ Decision Regarding Interim Release, ICC-01/05-01/13-1151, 17 August 2015, p. 15.

⁶ T-51 26:3-4 ("[t]hey cannot leave the courtroom. They are in the Court's custody. They go nowhere unless you say so. That's custody. And then question then is: Does Article 81(3)(a) say that their custody should be continued if they [are] convicted? And the answer is yes. The language is plain.")

⁷ T-51 32:25-33:3.

First, Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido at no point in time have shown any indication that they will not face the trial or attend hearings scheduled by the Chamber. All convicted persons have been cooperating with the Court and complying with the Chamber's orders and its decisions in this respect.

Second, the Chamber notes that most of the convicted persons currently live with their families and have established a life in their current locations. They are integrated in their places of residency, all of which militates against them suddenly fleeing.

The Chamber considers this to be an encouraging factor when it comes to the question if they will continue to abide by the Chamber's orders during the sentencing phase.

Third, the Chamber takes note that the maximum sentence for offences under Article 70 is a term of imprisonment of five years or a fine or both. Further, the Chamber notes that Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido have already spent 11 months in custody.

For the reasons above, there is no evidence that the convicted persons will attempt to flee the jurisdiction of the Court, even knowing that they have been convicted.

The Chamber is persuaded that the aforementioned convicted persons will continue to abide by all instructions and orders from this Chamber and the Court in general throughout the sentencing phase.

Accordingly, the Chamber does not consider it necessary or that it appears to the Chamber necessary to issue an order of detention to secure the convicted persons' presence during sentencing.⁸

IV. SUBMISSIONS

(i) Mr. Mangenda Does Not Pose a Flight Risk

8. No circumstances material to flight risk have changed since the Trial Chamber's oral decision of 19 October 2016. In fact, Mr Mangenda's subsequent conduct has confirmed the Trial Chamber's assessment. He attended sentencing submissions at the Court eight weeks after the pronouncement of the Judgment. This appearance and his (anticipated) appearance at the pronouncement of sentence on 22 March 2017 are (and will be) compelling indicators that Mr Mangenda's past commitment to full voluntary cooperation with the Court remains unchanged.
9. The other factors upon which the Trial Chamber relied on 19 October 2016 are also unchanged. Mr Mangenda still has extensive family ties in the country where he now resides. Mr Mangenda continues to follow every legal avenue available to him to

⁸ T-51 33:14-34:13.

maintain those family ties and his residential status in that country. His current visa in that country depends on continued cooperation with the Court. He has an established life whose value manifestly outweighs the relatively limited sentence, even assuming a worst-case scenario for Mr Mangenda, to be avoided by becoming a fugitive. Conversely, Mr Mangenda has already made a substantial down-payment on that sentence as reflected in his 11 months and 7 days in custody, especially considering the reasonable possibility of early release.

10. These factors, viewed in their totality, demonstrate that Mr Mangenda is not a flight risk, even assuming the imposition of the maximum sentence.

(ii) *Article 81(3)(a) Is Inapplicable*

11. Article 81(3)(a) remains as inapplicable now as it was found to have been on 19 October 2016. Mr Mangenda will no more be “in custody” at the time of the issuance of the sentence than he was at the time of the pronouncement of Judgement. The word “remain” denotes an express preference for the *status quo*, unless the Trial Chamber “orders otherwise.” The *status quo* in the present case is that Mr Mangenda is at liberty on provisional release.
12. The one major change that will have occurred as compared to 19 October 2016 is that, upon pronouncement of sentence, trial proceedings will be at an end. Furthermore, appeal proceedings have already commenced, thus arguably bringing the issue of provisional release under the rubric of Part 8 of the Statute (“Appeal and Revision”), rather than Part 6 (“The Trial”). Article 81(4) expressly governs situations not governed by Article 81(3)(a) or (b):

Subject to the provisions of paragraph 3(a) and (b), *execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.*

13. The plain meaning of Article 81(4) is that it applies “subject to” the potential application of Article 81(3)(a) nor (b). Neither do apply in the present circumstances. The former encompasses convicted persons “remain[ing]” in custody, and the latter convicted persons whose time in custody exceeds their sentence. As neither of these provisions apply the applicable provision that must govern Mr Mangenda’s provisional release is Article 81(4).

(iii) *Suspending Execution of the Decision and Maintaining Provisional Release Secures Mr Mangenda's Right of Appeal*

14. Even assuming that the sentence requested by the Prosecution (which exceeds the statutory maximum) were to be imposed on Mr Mangenda, there is little to no prospect that his appeal or appeals will have been decided before the expiry of any sentence imposed, especially when the prospect of early release is taken into account. Article 81(4), accordingly, secures the right of appeal, which is the purpose and object of Article 81. Ordering immediate execution of sentence, and revoking provisional release, would, for most practical purposes, render the appeal moot. This would not be a just outcome for a person who has already served more than 11 months in pre-trial detention, and who, through his actions subsequent to release, has demonstrated his consistent commitment to faithful cooperation with the Court.

V. CONCLUSION AND RELIEF REQUESTED

15. Mr. Mangenda respectfully requests that the Trial Chamber refrain from altering the *status quo* in respect of Mr Mangenda's provisional release.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 8 March 2017,
 At The Hague, The Netherlands