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THE PRESIDENCY

Before: **Judge Silvia Fernández de Gurmendi, President**
Judge Joyce Aluoch, First Vice-President
Judge Kuniko Ozaki, Second Vice-President

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

Public Redacted Version of Request for Compensation for Unlawful Detention

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**

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I. INTRODUCTION

1. Jean-Jacques Kabongo Mangenda hereby requests compensation¹ for his unlawful detention following the Single Judge's order for his release on 21 October 2014² and the Appeals Chamber's decision the next day confirming that the order was immediately enforceable.³ Mr. Mangenda, notwithstanding these judicial decisions, was detained for a further nine days before being released.

2. The quantum of compensation should fully reflect both the harm to Mr. Mangenda and the flagrant nature of the violation of his rights. The unlawfulness of the detention was fully apparent at the time. Its cause was a combination of factors, including: (i) the [REDACTED] revocation [REDACTED]⁴ of Mr. Mangenda's five-year entry visa to the United Kingdom the day after the Release Order; (ii) the Registry's failure to ensure in advance that Mr. Mangenda could be released to an alternative State if need be; and (iii) the Host State's failure to facilitate prompt relief. The unlawful detention was therefore avoidable and arose from a wilful obstruction of judicial orders by at least one State Party. An appropriate level of compensation in the circumstances is €3,000.00 per day of unlawful detention, to be deposited in a trust fund for the education of Mr. Mangenda's children.

¹ Pursuant to Regulation 23*bis* of the Regulations, the present filing is filed as confidential as it relates material and communications currently classified as confidential. The Defence does not object to this Request being reclassified as public, if the Presidency so orders.

² 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 Order").

³ 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 ("Appeals Chamber Decision").

⁴ [REDACTED].

II. FACTUAL BACKGROUND

A. THE UNLAWFUL DETENTION

3. On 21 October 2014, the Single Judge ordered:

that Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido shall be released, subject to the following order;

ORDERS the Registrar to ensure that, prior to their leaving the Detention Centre of the Court, each of the Released Persons 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 will be staying;

ORDERS the Registrar to file the signed declarations in the record of the case; ORDERS the Registrar to promptly make all the practical arrangements which are necessary and appropriate for the purposes of the enforcement of this decision.⁵

4. On 22 October 2014, both Pre-Trial Chamber II⁶ and the Appeals Chamber⁷ denied Prosecution requests to suspend enforcement of the Single Judge's Order. From that moment on, the Single Judge's Release Order was immediately enforceable and there was no longer any proper legal basis for Mr. Mangenda's continued detention. Two of the three other defendants subject to the Release Order were released immediately;⁸ the third was released very early the next morning.⁹

⁵ Release Order, ICC-01/05-01/13-703.

⁶ Decision on the Prosecutor's "Urgent Motion for Interim Stay of the 'Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido'", ICC-01/05-01/13-711, 22 October 2014.

⁷ Appeals Chamber Decision, ICC-01/05-01/13-718.

⁸ [REDACTED].

⁹ [REDACTED].

5. Mr. Mangenda, however, was not released from detention until after 18h30 on 31 October 2014¹⁰ – nine days after the Single Judge’s Release Order was immediately enforceable.

B. THE REASONS FOR THE UNLAWFUL DETENTION

6. As of the date of the Release Order, Mr. Mangenda possessed a valid five-year multi-entry visa for the United Kingdom, where his wife and children lawfully reside.¹¹ [REDACTED].¹²

[REDACTED].¹³

7. Mr. Mangenda was concerned about the potential equivocation in this statement and, three days later, urgently requested that the Single Judge, *inter alia*, convene a hearing with representatives of the United Kingdom to ensure that there would be no misunderstandings that might delay his immediate entry to the United Kingdom upon release.¹⁴
8. The Release Order of 21 October 2014 denied the request for a hearing on the basis that the United Kingdom had raised no objection to Mr. Mangenda’s immediate entry apart from concerns about enforcing special conditions of release, such as monitoring his communications. Since no such conditions were imposed in the Release Order, there was no obstacle to his immediate release to the United Kingdom without any further consultation:

CONSIDERING that all the Released Persons are legitimate holders of documents entitling them to return to the countries of

¹⁰ [REDACTED].

¹¹ Release Order, p. 6; [REDACTED].

¹² [REDACTED]; [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

which they are nationals, or where they were residing at the time of their arrest, as follows: [...] ii. Jean-Jacques Mangenda Kabongo, a national of the Democratic Republic of the Congo, is the holder of a visa expiring in August 2015 for the United Kingdom, where his family resides and where he seeks to be released [...];

CONSIDERING that, accordingly, since no additional conditions are imposed to the release, there is no need for the Chamber to further consult with the relevant States, whether in writing or by way of a hearing.¹⁵

9. The Registry [REDACTED]:

[REDACTED]¹⁶

10. The next day, and without any advance warning, the United Kingdom revoked Mr. Mangenda's five-year multiple-entry visa. The UK Immigration Officer's ostensible basis for doing so was that information had "**now come to light**" that Mr. Mangenda had been arrested eleven months before:

On the 25 August 2010 [sic] you were issued with a multi entry visa valid until 25 August 2015. Information **has now come to light** which indicates that there has been a significant change in circumstances since your visa was issued. Your original visa was issued to facilitate a family visit. You stated that you would be staying in the UK for 7 days. **I am now aware that an arrest warrant was issued under seal on 20 November 2013.** You were arrested on 23 November 2013 and indicted by the International Criminal Court (ICC) charged with crimes under Article 70 of the Rome Statute relating to the tampering of witnesses and evidence in the on-going ICC case of Jean Pierre Bemba. I consider that this is a significant change of circumstances since your entry clearance was issued. Accordingly, I have decided under paragraph 30A (ii) of the Immigration Rules, to revoke your multiple entry visit visa, issued on the 25 August 2010 [sic], on the grounds of a change of circumstances since the entry clearance was issued has removed the basis of your claim to be admitted to the United Kingdom.¹⁷

¹⁵ Release Order, p. 6.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

11. The Registry [REDACTED].¹⁸ As a result:

[REDACTED]¹⁹

12. The Registry [REDACTED]. [REDACTED].²⁰

13. Mr. Mangenda protested his illegal detention and called upon the Pre-Trial Chamber to release him first on the territory of The Netherlands, and then to be granted entry to either the United Kingdom or Belgium.²¹ Mr. Mangenda noted that he could not safely return to his state of citizenship, the Democratic Republic of Congo, *“où il est menacé, ainsi que sa famille, à cause de sa participation à la défense de Monsieur Jean-Pierre BEMBA GOMBO, raison pour laquelle son épouse et ses enfants ont obtenu l’asile politique au Royaume Uni où il résidait avec eux.”*²²

14. [REDACTED].²³

15. After further appeals by Mr. Mangenda to the United Kingdom immigration authorities, he was eventually granted limited leave to enter the United Kingdom outside the immigration rules.²⁴ Mr Mangenda entered the United Kingdom on 22 December 2014.²⁵

III. LEGAL SUBMISSIONS

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

A. STATUTORY BASIS FOR COMPENSATION

16. Article 85(1) of the Rome Statute provides that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” This provision mirrors Article 9(5) of the International Covenant on Civil and Political Rights and Article 5(5) of the European Convention on Human Rights. The Human Rights Committee’s most recent General Comment on Article 9(5) declares compensation to be “a matter of enforceable right and not as a matter of grace or discretion. The remedy must not exist merely in theory, but must operate effectively and make payment within a reasonable period of time.”²⁶
17. Rules 173 and 174 of the ICC Rules prescribe certain procedural requirements for the submission of a claim, all of which are fulfilled by the present request.²⁷

B. THE DETENTION WAS UNLAWFUL

18. Mr. Mangenda’s detention from 22 October 2014 until 31 October 2014 had no lawful basis. The Release Order was unequivocal, stating that Mr. Mangenda “*shall* be released.”²⁸ The Appeals Chamber, in denying the Prosecution’s request for suspension of the Release Order, specifically noted that “the four suspects have an interest to be released immediately.”²⁹ Mr. Mangenda was at all times prepared to sign the declaration required by the second operative paragraph of the Release Order.³⁰

²⁶ General Comment No. 35 - Article 9 (Liberty and security of person), CCPR/C/GC/35, 28 October 2014, para. 50.

²⁷ See also ICC Regulations of the Court, Regulation 38(2)(f).

²⁸ Release Order, p. 6 (emphasis added).

²⁹ Appeals Chamber Decision, ICC-01/05-01/13-718, para. 7.

³⁰ Release Order, p. 6 (“each of the Released Persons shall 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 will be staying”).

19. Administrative or practical difficulties are no excuse for a person's continued detention in the absence of any proper legal basis. The European Court of Human Rights has held that "administrative formalities connected with release cannot justify a delay of more than several hours" in releasing a detainee.³¹ The prompt release of all three other defendants demonstrates that Mr. Mangenda's tardy release was avoidable, whether by obtaining in advance a more definite commitment from the United Kingdom that it would honour Mr. Mangenda's multi-entry visa, and/or by making alternative arrangements with The Netherlands should that become necessary. The period of unlawful detention was therefore neither necessary nor justified.

C. QUANTUM OF DAMAGES

i. General Principles

20. The absence of ICC case law applying Article 85(1), let alone in the specific context of a facially unlawful detention, justifies recourse to the general principles reflected in regional and national practice as to both the rationale for, and the appropriate quantum of, compensation for such a violation.

21. The primary remedy available to the European Court of Human Rights ("ECtHR") is an award of compensation to those whose rights have been violated. Compensation falls into two categories: (i) pecuniary damages for financial losses caused by the violation;³² and (ii) non-pecuniary damages. Non-pecuniary damages have been understood broadly as responding to both

³¹ ECHR, *Nikolov v. Bulgaria*, App. no. 38884/97, Judgment, 30 January 2003, para. 82; *see also Labita v. Italy*, App. no. 26772/95, Judgement, 6 April 2000, paras. 166-174 (administrative delays must be kept to a minimum).

³² ECHR, *Shalya v. Russia*, App. no. 27335/13, Judgment, 13 November 2014 ("*Shalya*") paras. 29, 31; ECHR, *Abashev v. Russia*, App. no. 9096/09, Judgment, 27 June 2013, paras. 45, 47 ("*Abashev*").

moral damages (such as emotional and psychological harm)³³ as well as compensation for the deprivation of the right itself.³⁴ Hence, substantial awards have been made for unlawful deprivation of liberty even in the absence of any showing of moral damages based exclusively on the “fundamental importance” of the right violated.³⁵

22. The Supreme Court of Canada has offered a convenient overview of the three main purposes of compensating violations of fundamental rights:

This reflects itself in three interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual’s *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.³⁶

23. Similar principles have been identified under Trinidadian law:

In the context of constitutional violation, compensation can be seen to perform two functions. It may, of course, provide redress for the *in personam* damage suffered. But it may also be an essential part of the vindication of the constitutional right. This has a broader concept than compensation for the personal wrong [...]The sense of having been wronged, the uncertainty over one’s status as a consequence of the discriminatory conduct and the distress associated with having to resort to litigation in order to have the discrimination exposed and corrected can all be

³³ ECHR, *Göç v. Turkey* [GC], 36590/97, Judgment, 11 July 2002, para. 51 (“In the Court’s opinion, the applicant should have been afforded an opportunity to explain orally to the Karsiyaka Assize Court the moral damage which his detention entailed for him in terms of distress and anxiety. The essentially personal nature of the applicant’s experience, and the determination of the appropriate level of compensation, required that he be heard.”)

³⁴ *Shalya*, para. 20 (finding that “reparations” available under national law for time spent in detention pending trial did not fully compensate the claimant unless there was an “acknowledgement in these proceedings, either express or implied, that it had been excessive or in breach of Article 5 § 3” of the ECHR); ECHR, *Kaboulov v. Ukraine*, App. no. 41015/04, Judgment, 19 November 2009, Operative Paragraph 13 (a).

³⁵ ECHR, *Khudayakova v. Russia*, App. no. 13476/04, Judgment, 8 January 2009, para. 107.

³⁶ Canada, *Vancouver (City) v. Ward*, [2010] 2 SCR 28 (“*Ward*”) para. 25.

recognised as damage, perhaps not in the conventional personal injury sense, but damage nonetheless.³⁷

24. The “vindication” purpose pertains not only to the specific harm visited on the victim of the rights violation, but also the harm caused “to the state and to society” by such violations.³⁸ English and Canadian courts have spoken of calibrating damages in order to “provide the necessary degree of encouragement to public authorities”³⁹ and at “influencing government behaviour in order to secure state compliance [...] in the future.”⁴⁰ This in no way implies an improper windfall to a plaintiff, but merely a full measure of the importance of a violation of individual rights. While such damages are sometimes characterized as “exemplary” or “punitive”, their true nature is merely to ensure that the award is large enough to fully reflect the importance of the violation both in its individual and systemic dimensions.⁴¹

25. Violations of the right to liberty fall at the top end of the scale of damages for rights violations, and can involve substantial awards even in respect of very short periods of detention. As stated in *Thompson v. Commissioner of Police of the Metropolis*:

While there is no formula which is appropriate for all cases and the precise form of a summing-up is very much a matter within the discretion of the trial Judge...[i]n a straightforward case of wrongful arrest and imprisonment or malicious prosecution the jury should be informed of the approximate figure to be taken as

³⁷ *Trinidad & Tobago, Romauld James v. Attorney General of Trinidad and Tobago v. Ramanoop*, [2010] UKPC 23, para. 26.

³⁸ *Ward*, para. 28.

³⁹ England, *Anufrijeva v. Southwark LBC*, [2004] Q.B. 1124 (Court of Appeal (Civil Division)), 16 October 2003, para. 77.

⁴⁰ *Ward*, para. 29.

⁴¹ See e.g., Canada, *R v. R.G.F.*, 1991 CanLII 7553 (Nfld Supreme Court Trial Division) (awarding “punitive damages” in order to “bring home to the Crown that every conceivable caution must be exercised when the rights and liberties of citizens are affected. There must be nothing cavalier, careless or capricious in the treatment of persons charged with criminal offences”); Canada, *Brandon v. Canada*, 131 D.L.R. (4th) 761 (Federal Court of Canada – Trial Division, 1996) (awarding “exemplary or punitive damages” for violation of the claimant’s liberty interest).

the correct starting point for basic damages for the actual loss of liberty or for the wrongful prosecution, and also given an approximate ceiling figure [...] the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for twenty-four hours should for this alone normally be regarded as entitled to an award of about £3,000.⁴²

26. Knowledge of the unlawful nature of the detention is an aggravating factor in assessing the proper amount of compensation. In *Le Bar v. The Queen*, a claimant was kept in detention for five weeks after the prison authorities knew, or should clearly have known, that he was subject to release.⁴³ The court awarded “exemplary damages”, explaining that “an adequate mark of the Court's disapproval of such deliberate ignoring of the law and oppressive, abusive and deliberate disregard of Le Bar’s entitlement to liberty was \$10,000.”⁴⁴

27. French courts have also ordered robust awards for even very short periods of provisional detention whose unlawfulness was, or should have been, entirely evident. Hence, five claimants were awarded between €1500 and €4000 in compensation for periods of detention as short as 55 hours.⁴⁵

⁴² England, *Thompson v. Commissioner of Police of the Metropolis* [1997] EWCA Civ 3083, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/1997/3083.html>.

See also Northern Ireland, *Dodds v. Chief Constable of the RUC* [1998] NI 393 (“...bearing in mind that each case depends upon its own particular circumstances and that guidance must be applied sensibly and with sensitivity we would suggest: 1. In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £600 for the first hour during which the plaintiff has been deprived of his or her liberty. 2. A period of one day (24 hours) should normally attract an award of about £4,000-£5,000 depending upon circumstances.”)

See also Northern Ireland, *Oscar v. Chief Constable of the of The Royal Ulster Constabulary* [1992] NI 209, (defining £600 per hour as an appropriate award for the first 12 hours of an unlawful detention).

⁴³ Canada, *Le Bar v. Canada*, [1987] 1 F.C. 585 (T.D.).

⁴⁴ *Id.*, para. 3.

⁴⁵ France, Cour d’appel de Rennes, 22 janvier 2008, N° 05/02117.

28. Even without the aggravating element of knowledge of unlawfulness, substantial compensation has been awarded for unlawful detention. The ECtHR awarded €5,000 in non-pecuniary damages for seventeen days of detention that were declared unlawful retrospectively.⁴⁶

ii. *The Specific Circumstances of Mr Mangenda's Unlawful Detention*

29. The unlawfulness of Mr. Mangenda's on-going detention after 22 October 2014 was fully apparent. [REDACTED].⁴⁷ The fact that this unlawful detention arose from the unexpected behaviour of a State Party, which had every opportunity to provide advance notice of any intention to revoke Mr. Mangenda's entry visa, in no way diminishes the wrongfulness of the detention or Mr. Mangenda's right to compensation.

30. €3000 per day of unlawful detention is a relatively modest sum given the egregious circumstances of Mr. Mangenda's detention, which includes the following factors:

- contemporaneous knowledge by the Registry and the States Parties involved that Mr. Mangenda's continued detention was unlawful;
- a "sudden" revocation of Mr. Mangenda's entry visa that was evidently prompted only by the Release Order;
- the Registry's failure to have prospectively taken all possible measures in the days or weeks preceding the Release Order to ensure that it could be executed immediately;

⁴⁶ *Abashev*, paras. 17 and operative paragraph 3(a).

⁴⁷ [REDACTED].

- the psychological strain on and mental distress suffered by Mr. Mangenda of having to watch all his co-defendants leave the UNDU while he was obliged to remain behind for no lawful reason; and
- the evident need to send a clear signal to States Parties that orders of the International Criminal Court should not be deliberately frustrated and obstructed.

IV. CONCLUSION AND REMEDY

31. Mr. Mangenda requests that a total sum of €27,000.00 be awarded for his unlawful detention between 22 October 2014 until 31 October 2014. He requests that this amount be held on trust by the ICC until arrangements are made to set up a trust for the education of his children, to which the amount awarded shall be paid.

Respectfully submitted,



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Dated this 1 May 2015,

At The Hague, The Netherlands