

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 August 2015

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***

Confidential

**Decision on the 'Motion for Request for Cooperation of the United Kingdom
Pursuant to Article 93 of the Statute'**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

Competent authorities of the United Kingdom

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court ('Court' or 'ICC'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 63, 64(2), 67(1)(d), 86 and 93 of the Rome Statute ('Statute'), renders this 'Decision on the "Motion for Request for Cooperation of the United Kingdom Pursuant to Article 93 of the Statute"'.

I. Procedural History and Background

1. On 21 October 2014, the Single Judge, acting on behalf of Pre-Trial Chamber II, ordered the immediate release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo ('Mr Mangenda'), Fidèle Babala Wandu and Narcisse Arido ('Four Accused').¹ Following practical arrangements of the Court's Registry, the Four Accused were released from detention.
2. On 29 May 2015, the Appeals Chamber reversed the Single Judge decision to release the accused.² Determinations under Article 60 of the Statute were remanded to this Chamber as a consequence of these rulings. As to whether the Four Accused needed to be re-arrested, the Appeals Chamber found that 'it would not be in the interests of justice for the suspects to be re-arrested because of the reversal' and decided, 'in view of the exceptional circumstances, to maintain the relief ordered [in the reversed decision], i.e. the release of the suspects, pending the Trial Chamber's determination on this matter.'³
3. On 24 June 2015, the Chamber requested the relevant States, including the United Kingdom of Great Britain and Northern Ireland ('United Kingdom' or 'UK'), to which Mr Mangenda had been released, to submit their observations

¹ Pre-Trial Chamber II, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 21 October 2014, ICC-01/05-01/13-703.

² Appeals Chamber, 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, 29 May 2015, ICC-01/05-01/13-969 (OA5, OA6, OA7, OA8 and OA9).

³ ICC-01/05-01/13-969, para. 57.

for the purposes of the Chamber's prospective decision on interim release of the accused.⁴

4. On 15 July 2015, the Chamber received, *inter alia*, the observations of the United Kingdom.⁵ Therein, the UK informed the Court that it had cancelled Mr Mangenda's 'previous visitor visa when notified of his interim release, as the circumstances and thus entitlement to the previous visitor visa he had for the UK had changed as a result of the charges against him'.⁶ The State also informed the Chamber that Mr Mangenda's 'family reunification visa application was refused', which Mr Mangenda appealed before domestic courts.⁷ The UK further emphasised that, for the purposes of assisting the Court by facilitating the ability for Mr Mangenda to depart and return to the UK during trial, he 'was exceptionally granted 6 months limited leave valid until 19 June 2015', which was extended until January 2016.⁸ As regards his 'family reunification appeal', the UK clarified that '[o]n leaving the UK his current family reunification appeal will lapse on account of him leaving the common travel area as per section 104 of the Nationality, Immigration and Asylum 2002 Act'. The Chamber was informed that this would, however, not prevent Mr Mangenda 'from lodging subsequent applications, nor does it prevent him from being able to come and go from the UK in order to attend his trial proceedings'.⁹

⁴ Order Requesting Observations from Relevant States on Interim Release, 24 June 2015, ICC-01/05-01/13-1029.
⁵ Observations from the 5 host States on Interim Release, 15 July, ICC-01/05-01/13-1088, together with five confidential annexes I to V.
⁶ ICC-01/05-01/13-1088-Conf-AnxII, page 4.
⁷ ICC-01/05-01/13-1088-Conf-AnxII, page 4.
⁸ ICC-01/05-01/13-1088-Conf-AnxII, page 4.
⁹ ICC-01/05-01/13-1088-Conf-AnxII, page 4.

5. On 20 July 2015, the defence for Mr Mangenda ('Mangenda Defence') submitted a request for cooperation of the United Kingdom ('Application').¹⁰ requesting the Chamber to:

first, [consult] with the Registrar with a view to seeking an amicable agreement with the United Kingdom as regards Mr Mangenda's purported travel restrictions;

second, [issue] a general direction to the [United Kingdom] to co-operate in resolving the (...) issue; and

third, if necessary, (...) issue a specific request to the [United Kingdom] to refrain from imposing any negative legal consequences on Mr. Mangenda for his travel to The Netherlands, and in particular, to refrain from deeming abandoned his pending appeal from a decision refusing a family reunion visa.¹¹

6. On 21 July 2015, the Chamber held consultations with the Registry on the Application.¹² The Registry was directed to consult with the relevant UK authorities in order to ensure that there are no impediments to Mr Mangenda's appearance at trial. Also, the Registry was ordered to inform the Chamber and parties as to the results of these consultations in a report.
7. On 17 August 2015, the Chamber rendered the 'Decision Regarding Interim Release' ordering the continued release of, *inter alia*, Mr Mangenda to the UK, subject to certain conditions.¹³ One of the conditions is that Mr Mangenda must '[a]bide by all instructions [...] including an order from this Chamber for [him] to be present at [his] trial'.¹⁴

¹⁰ Motion for Request for Co-operation of the United Kingdom Pursuant to Article 93 of the Statute, 20 July 2015, ICC-01/05-01/13-1091-Conf together with two confidential *ex parte* annexes A and B.

¹¹ Application, ICC-01/05-01/13-1091-Conf, para. 29.

¹² See Email from Trial Chamber VII Communications to Registry and all parties dated 21 July 2015 at 16:35.

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

¹⁴ ICC-01/05-01/13-1151, para.28.

8. On 20 August 2015, the Registry filed a consolidated report summarising the outcome with its consultations with the UK authorities (the 'Report').¹⁵

II. Submissions

1. *The Mangenda Defence*

9. The Mangenda Defence takes issue with the announcement of the UK that any travel of Mr Mangenda outside the UK, including his travel to the seat of the Court for trial, will be considered as abandonment of his pending judicial review (appeal) of a domestic decision dated 18 December 2014 denying him family reunion residence in the UK. The appeal was lodged on 6 January 2015 and a decision has not been rendered yet.¹⁶
10. It requests the Chamber to request the UK 'to refrain from imposing negative legal consequences on Mr. Mangenda's travel to The Netherlands to participate in the ICC proceedings' as it considers such measures to interfere with the processes of the ICC and to constitute a violation of the express or necessarily implied obligations of cooperation pursuant to the Rome Statute.¹⁷ In the Defence's view, any legal impediment with the right of Mr Mangenda to be present at trial, as enshrined in Articles 63(1) and 67(1)(d) of the Statute, would be an interference with the administration of justice.¹⁸
11. The Mangenda Defence submits that the UK argument that Mr Mangenda's continued presence on UK territory was a concession to cooperation with the ICC is erroneous.¹⁹ In the view of the Defence, Mr Mangenda's presence is not linked to cooperation with the ICC, as evidenced by the UK immigration

¹⁵ Consultations with the United Kingdom of Great Britain and Northern Ireland on the legal status of Jean-Jacques Mangenda Kabongo, ICC-01/05-01/13-1164-Conf-Exp (notified 21 August 2015).

¹⁶ Application, ICC-01/05-01/13-1091-Conf, para. 20. At the time of submitting the Application, the Defence submits that the appeal was pending for 195 days, Application, ICC-01/05-01/13-1091-Conf, para. 21.

¹⁷ Application, ICC-01/05-01/13-1091-Conf, para. 1.

¹⁸ Application, ICC-01/05-01/13-1091-Conf, para. 11.

¹⁹ Application, ICC-01/05-01/13-1091-Conf, para. 12.

authority's decision of 18 December 2014 granting Mr Mangenda temporary entry to the UK outside the UK Immigration Rules.²⁰ The Defence argues that, even if such cooperation obligations had any role, 'this would not in any way alter the scope of Mr. Mangenda's legal privileges and rights arising under UK immigration law' which is further 'subject to UK and European human rights law'.²¹

12. Moreover, the Defence maintains that any revocation of Mr Mangenda's appeal by virtue of his travel to the ICC would constitute a substantial prejudice for him and his family.²² With a view to contextualising this argument, the Defence recalls the UK authorities' revocation of Mr Mangenda's five-year multiple-entry permit to the UK upon his release from detention by the Single Judge.²³ It also makes reference to Mr Mangenda's application for a new multi-entry family reunion visa on 25 October 2014 which was denied on 18 December 2014.²⁴

13. The Mangenda Defence argues that any revocation of the appeal would be prejudicial to Mr Mangenda as he 'wishes, and is entitled, to have the immigration officer's discretion judicially reviewed'.²⁵

14. To avoid the announced legal consequence to Mr Mangenda's travel, the Defence avers that other measures could be adopted to ensure that he is not deprived of his right to judicial review in the UK, including (i) a request to the competent domestic court to render a decision on Mr Mangenda's appeal prior to his travel to The Hague; (ii) consideration that the appeal will be 'automatically re-instated upon Mr Mangenda's return to the UK'; and (iii) the interpretation of the notion 'leave' within the meaning of section 104 of the

²⁰ Application, ICC-01/05-01/13-1091-Conf, paras 13-14 and 19.

²¹ Application, ICC-01/05-01/13-1091-Conf, para. 15.

²² Application, ICC-01/05-01/13-1091-Conf, sub-heading (iii) and para. 28.

²³ Application, ICC-01/05-01/13-1091-Conf, para. 17.

²⁴ Application, ICC-01/05-01/13-1091-Conf, para. 19.

²⁵ Application, ICC-01/05-01/13-1091-Conf, para. 21.

Nationality, Immigration and Asylum 2002 Act to exclude any travel to the ICC.²⁶

15. The Mangenda Defence recalls that the decisions of domestic authorities to revoke Mr Mangenda's previous visa and refuse a new one relate to the 'pendency of ICC charges' against him.²⁷ It therefore claims a particular responsibility of the ICC to ensure that Mr Mangenda's rights under the Statute are preserved.²⁸ It contends that, as a consequence, the Court must have the authority under article 93 'to ensure that States do not impose negative legal consequences on individuals for actions that they are *obliged* to take under the ICC Statute'.²⁹

2. Registry Report on UK Consultations

16. In the Report, the Registry reported the following information from the UK Authorities:

- (a) It is likely that the decision on the family-reunification visa appeal of Mr Mangenda will not be taken before the beginning of the trial.
- (b) The multi-entry visa dated 18 December 2014 was granted outside of immigration rules and solely due to the UK Government's support of the Court in the context of Mr Mangenda's release.
- (c) The fact that the appeal may be cancelled in case of departure from the UK is not related to Mr Mangenda's specific situation but is by way of application of general immigration provisions under UK law. There is no discretion for the authorities to deviate from this automatic operation of UK immigration law.

²⁶ Application, ICC-01/05-01/13-1091-Conf, para. 22.

²⁷ Application, ICC-01/05-01/13-1091-Conf, para. 24.

²⁸ Application, ICC-01/05-01/13-1091-Conf, para. 25.

²⁹ Application, ICC-01/05-01/13-1091-Conf, para. 25 (emphasis in original).

(d) While Mr Mangenda's status in the UK remains dependent on the issuing of a visa granted outside of the immigration rules pending determination on the new application, nothing prevents him from filing a new application for family reunification visa should his appeal against the current decision lapse.

(e) While Mr Mangenda will be able to exit and enter the UK freely during the period of the trial due to the multi-entry visa he currently holds, he may not be able to return to the UK on the basis of the specific visa he is currently in possession of upon a guilty verdict if this is considered to impact on his visa status. An application for a new visa for family reunification will need to be lodged outside of the UK.³⁰

17. On the basis of this information, the Registry submits that '[t]here is no impediment to Mr Mangenda attending his trial. His attendance will have negative but not irremediable consequences on his separate visa application for family reunification.'³¹

III. Applicable Law and Analysis

18. Article 63 of the Statute stipulates that the 'accused shall be present during trial'. Likewise, Article 67(1)(d) of the Statute provides that the accused has the right 'to be present at trial'. The right to be present at trial implies that the accused, if not detained, must be free to travel from the State (on whose territory he or she is present) to the Court.

19. This translates into an obligation on the part of States Parties to take all necessary steps to facilitate the appearance of the accused before the Court. In the view of the Chamber, and contrary to the submission of the Defence, such obligation to cooperate cannot be read into Article 93(1)(e) of the Statute, as the

³⁰ See Report, ICC-01/05-01/13-1164-Conf-Exp, para. 6.

³¹ Report, ICC-01/05-01/13-1164-Conf-Exp, para. 7.

accused is neither a witness nor an expert. Rather, the obligation to take all necessary steps to facilitate the appearance of the accused before the Court emanates from the general obligation of States Parties to 'cooperate fully' with the Court as enshrined in Article 86 of the Statute.

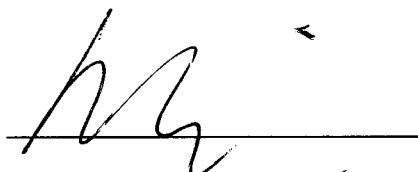
20. Turning to the case at hand, the Chamber observes that Mr Mangenda, after having been released from ICC detention, resides in the UK together with his family. His family reunification visa has been denied by the UK immigration authorities on 18 December 2014. This negative decision is currently being judicially reviewed by domestic courts; a decision is still pending.
21. Yet, the Chamber also notes that Mr Mangenda has been provided with a six-month multi-entry visa outside UK immigration rules. According to the UK Observations, the visa is valid until January 2016, with the possibility for it to be renewed. The Chamber is also attentive to the assurance of the UK that with this visa Mr Mangenda is able 'to come and go from the UK in order to attend his trial proceedings' in The Hague.
22. On the basis of the information before it, the Chamber is satisfied that the UK is not impeding the proceedings in this case. With the six-month multi-entry visa, Mr Mangenda may travel to the Court and exercise his statutory right under Article 67(1)(d) of the Statute and travel back to the UK. In other words, as regards Mr Mangenda's right to appear before the Court, the UK is compliant with its obligations vis-à-vis the Court and does not interfere with the administration of justice before the ICC.
23. However, Mr Mangenda does not seek the Court's intervention so as to safeguard his statutory rights in the context of the present proceedings. Rather, he seeks the Chamber's support so that the UK authorities do not revoke his appeal in the context of domestic proceedings by virtue of his travel to the Court.

24. The Chamber holds the view that it does not have the authority to issue directions, be they general or specific, obligating national tribunals to render judicial decisions in a certain timeframe or provide an exceptional interpretation of national laws. This entails that the ICC cannot direct domestic courts or authorities on matters which are outside the competence of this Court. The Chamber is also attentive to the assurance given by the UK that, should his appeal be considered to be abandoned by virtue of his departure to The Hague, this does not prevent him from lodging a new application before UK courts.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

REJECTS the Application.

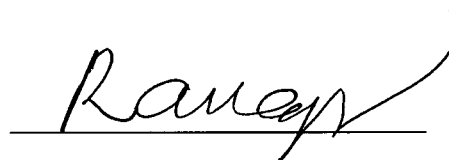
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul Pangalangan

Dated 26 August 2015

At The Hague, The Netherlands