



Original: **English**

No.: ICC-01/05-01/13
Date: 18 September 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

Public

**Decision on 'Motion for Severance or, in the Alternative, Adjournment or
Appearance Pursuant to Rule 134bis of the Rules'**

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

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

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

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 and 64(5) of the Rome Statute ('Statute'), Rules 132(1), 134 *bis* and 136(1) of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* (3) of the Regulations of the Court issues the following 'Decision on "Motion for Severance or, in the Alternative, Adjournment or Appearance Pursuant to Rule 134*bis* of the Rules"'.

I. Procedural History and Background

1. On 15 July 2015, the Chamber received the observations of the United Kingdom of Great Britain and Northern Ireland ('UK') in relation to the Chamber's prospective decision on interim release of the accused.¹ Therein, the UK, to which Jean-Jacques Mangenda ('Mr Mangenda') had been provisionally released previously, 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'.² The UK also informed the Chamber that Mr Mangenda's family reunification visa application was refused, which Mr Mangenda appealed before domestic courts.³ The UK further emphasised that, for the purposes of assisting the Court by facilitating the ability of 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 2016.⁴ 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

¹ Observations from the 5 host States on Interim Release, ICC-01/05-01/13-1088, together with five confidential annexes I to V. The observations of the UK are contained in Annex II.

² ICC-01/05-01/13-1088-Conf-AnxII, p. 4.

³ ICC-01/05-01/13-1088-Conf-AnxII, p. 4.

⁴ ICC-01/05-01/13-1088-Conf-AnxII, p. 4.

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'.⁵

2. On 20 July 2015, Mr Mangenda submitted a request for cooperation from the UK⁶ requesting the Chamber, *inter alia*, to issue a 'specific request to the UK to refrain from imposing any negative 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'.⁷
3. On 17 August 2015, the Chamber rendered the 'Decision Regarding Interim Release' ('Interim Release Decision')⁸ ordering the continued release of, *inter alia*, Mr Mangenda to the UK, subject to certain conditions. One of the conditions was that Mr Mangenda must '[a]bide by all instructions [...] including an order from this Chamber for [him] to be present at [his] trial'.⁹
4. On 26 August 2015, the Chamber issued the Decision on the 'Motion for Request for Cooperation of the United Kingdom Pursuant to Article 93 of the Statute' ('26 August 2015 Decision'). The Chamber stated that it was 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'.¹⁰ However, as regards whether the Court should issue specific requests to the UK, the Chamber held that it 'does not have the authority to issue directions, be they general or

⁵ ICC-01/05-01/13-1088-Conf-AnxII, p. 4.

⁶ Motion for Request for Co-operation of the United Kingdom Pursuant to Article 93 of the Statute, ICC-01/05-01/13-1091-Conf together with two confidential ex parte annexes A and B.

⁷ ICC-01/05-01/13-1091-Conf, para. 29.

⁸ ICC-01/05-01/13-1151.

⁹ ICC-01/05-01/13-1151, para. 28.

¹⁰ 26 August 2015 Decision, ICC-01/05-01/13-1182-Conf, para. 22.

specific, obligating national tribunals to render judicial decisions in a certain timeframe or provide an exceptional interpretation of national laws'.¹¹

5. On 15 September 2015, the defence of Mr Mangenda ('Mangenda Defence') filed the 'Motion for Severance or, in the Alternative, Adjournment or Appearance Pursuant to Rule 134bis of the Rules' ('Request').
6. On 17 September 2015,¹² the defence of Fidèle Babala Wandu ('Babala Defence')¹³ and the Office of the Prosecutor ('Prosecution')¹⁴ responded.
7. On 18 September 2015, the Chamber was notified of the 'Request for Leave to Reply to Prosecution Response to Motion for Severance or, in the Alternative, Adjournment or Appearance Pursuant to Rule 134bis of the Rules' ('Requets for Leave to Reply') submitted by the Mangenda Defence.¹⁵

II. Submissions

A. Mangenda Defence

8. The Mangenda Defence submits that if his appeal before UK courts were deemed abandoned on the grounds that he attends the trial at the Court, 'the consequence is that Mr Mangenda will never be able to claim the right to have this, nor any future denial of such visa, subject to judicial scrutiny'.¹⁶ The Mangenda Defence agrees that if Mr Mangenda's domestic appeal were to be deemed abandoned, he could apply for a visa before UK authorities anew; however, it interprets Section 96(1) of the UK Nationality, Immigration and

¹¹ 26 August 2015 Decision, ICC-01/05-01/13-1182-Conf, para. 24.

¹² The parties were instructed to submit their responses to the Request, if any, by Thursday, 17 September 2015, see Email from Trial Chamber VII Communications to the parties on 15 September 2015 at 18h34.

¹³ Réponse de la Défense de M. Fidèle Babala Wandu à « Motion for Severance or, in the Alternative, Adjournment or Appearance Pursuant to Rule 134bis of the Rules » (ICC-01/05-01/13-1253) déposée le 15 septembre 2015, ICC-01/05-01/13-1260-Conf.

¹⁴ Prosecution Response to the 'Motion for Severance or, in the Alternative, Adjournment or Appearance Pursuant to Rule 134bis of the Rules', ICC-01/05-01/13-1266-Conf.

¹⁵ Request for Leave to Reply to Prosecution Response to motion for Severance, or, in the Alternative, Adjournment or Appearance Pursuant to Rule 134bis of the Rules, ICC-01/05-01/13-1267-Conf.

¹⁶ Request, ICC-01/05-01/13-1253-Conf, paras 1-2.

Asylum Act of 2002 ('UK Act')¹⁷ to entail that a subsequent judicial review of a second negative decision on a renewed visa application may be barred for Mr Mangenda since he will have been presumed to have abandoned his previous appeal.¹⁸ More concretely, it confirms that it 'is not in a position at this stage to offer a definitive interpretation of this provision, but believes that there is a serious danger it could be used to Mr. Mangenda's detriment in light of the fact that the UK has not specifically guaranteed that such a decision will not be taken'.¹⁹ The Mangenda Defence also purports that repeated compelled abandonments of applications for judicial review upon each trip out of the UK will prevent adjudication of Mr Mangenda's claim for family reunification.²⁰ It is of the view that the cumulative effect of these regarded abandonments will be 'denial of access to UK courts until after the completion of [ICC] proceedings'.²¹ Mr Mangenda maintains that he would never have been able to obtain a judicial determination 'as to whether the existence of the present proceedings at the ICC were a lawful and proper basis on which to deny his application for the family reunification visa'.²²

9. It further alleges that abridging that right on the basis that ICC charges are pending against Mr Mangenda infringes his statutory right of the presumption

¹⁷ Section 96(1) of the UK Act stipulates: 'An appeal under section 82(1) against an immigration decision ('the new decision') in respect of a person may not be brought if the Secretary of State or an immigration officer certifies – (a) that the person was notified of a right of appeal under that section against another immigration decision ('the old decision') (whether or not an appeal was brought and whether or not any appeal brought has been determined); (b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision; and (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision'.

¹⁸ Request, ICC-01/05-01/13-1253-Conf, para. 14.

¹⁹ Request, ICC-01/05-01/13-1253-Conf, para. 14; see also para. 18.

²⁰ Request, ICC-01/05-01/13-1253-Conf, para. 18.

²¹ Request, ICC-01/05-01/13-1253-Conf, para. 19.

²² Request, ICC-01/05-01/13-1253-Conf, para. 19.

of innocence.²³ Yet, that right ‘must preclude the impairment of access to [UK] courts’ *de jure* and *de facto*.²⁴

10. As regards the severance request, the Mangenda Defence alleges that it would cause ‘less disruption to proceedings’.²⁵ In this context, it is also argued that 11 of the 15 Prosecution witnesses ‘have little or nothing to say about Mr Mangenda’²⁶ and that most of the evidence against Mr Mangenda appears to be documentary in nature.²⁷ The Mangenda Defence also argues that in case a UK court decision is rendered timely, the ICC proceedings against Mr Mangenda could be completed by the same date as the proceedings against the other accused in this case.²⁸

11. In the alternative, the Mangenda Defence requests that the trial be adjourned or, as a last resort, Mr Mangenda be present at trial through the use of video technology.²⁹ With respect to the adjournment request, the Mangenda Defence concedes that adjournment is within the Chamber’s discretion. However, it maintains that adjournments ‘of varying duration may be necessitated by a range of practical as well as legal factors’.³⁰ It is alleged that the deprivation of Mr Mangenda’s rights ‘are so severe as to warrant an adjournment’.³¹ It is also submitted that adjournment would not be long ‘considering that the appeal for which a decision is awaited has been pending now for almost nine months’.³²

12. In respect of the request to be permitted to appear through the use of video technology, the Mangenda Defence proposes that this arrangement be maintained ‘until a decision has been taken by the [UK courts] in respect of his

²³ Request, ICC-01/05-01/13-1253-Conf, paras 2 and 24.

²⁴ Request, ICC-01/05-01/13-1253-Conf, paras 2, 20 and 34.

²⁵ Request, ICC-01/05-01/13-1253-Conf, para. 3.

²⁶ Request, ICC-01/05-01/13-1253-Conf, para. 3.

²⁷ Request, ICC-01/05-01/13-1253-Conf, para. 28.

²⁸ Request, ICC-01/05-01/13-1253-Conf, para. 29.

²⁹ Request, ICC-01/05-01/13-1253-Conf, paras 3 and 32.

³⁰ Request, ICC-01/05-01/13-1253-Conf, para. 30.

³¹ Request, ICC-01/05-01/13-1253-Conf, para. 31.

³² Request, ICC-01/05-01/13-1253-Conf, para. 31.

pending appeal'.³³ Nevertheless, Mr Mangenda avers that he would prefer to be physically present during the proceedings in The Hague.³⁴

B. The Babala Defence

13. The Babala Defence agrees with the arguments raised by the Mangenda Defence.³⁵

C. The Prosecution

14. The Prosecution submits, *inter alia*, that the conditions of Mr Mangenda's provisional release 'unequivocally require his physical present in The Hague for his trial'.³⁶ It also submits that in the present circumstances the Chamber should 'reconsider its assessment of the risk of Mr Mangenda's non-appearance' as this risk 'has substantially changed since his conditional release was granted'.³⁷ The Prosecution requests that the Chamber 'should thus take such affirmative and immediate steps as is necessary to ensure that [Mr] Mangenda abides by the terms and conditions of his release, and to prevent his failure to do so from derailing the trial proceedings'.³⁸

D. The Mangenda Defence Request for Leave to Reply

15. The Mangenda Defence requests that leave be granted to address (i) the property of assessing flight risk based on legal submissions on behalf of an accused; and (ii) the definition of 'presence' espoused by the Prosecution.³⁹

³³ Request, ICC-01/05-01/13-1253-Conf, para. 32.

³⁴ Request, ICC-01/05-01/13-1253-Conf, para. 33.

³⁵ ICC-01/05-01/13-1260-Conf, para. 5.

³⁶ ICC-01/05-01/13-1266-Conf, para. 2.

³⁷ ICC-01/05-01/13-1266-Conf, para. 3.

³⁸ ICC-01/05-01/13-1266-Conf, para. 5.

³⁹ Request for Leave to Reply, ICC-01/05-01/13-1267-Conf, para. 1.

III. Analysis

16. As a preliminary matter, the Chamber does not deem it necessary to receive further submissions on the matter and, therefore rejects the Request for Leave to Reply.
17. The Court's statutory documents establish a presumption for joint trials for persons accused jointly.⁴⁰ That said, the Chamber is also vested with discretionary powers to sever charges in joint trials, pursuant to Article 64(5) of the Statute. That discretionary power is further concretised by Rule 136(1) of the Rules which foresees separate trials 'in order to avoid serious prejudice to the accused, to protect the interests of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2'. Of relevance in this case is the first alternative provided in Rule 136(1) of the Rules since the Request is premised on the argument that Mr Mangenda would incur serious prejudice unless the trial is separated.
18. The alleged 'serious prejudice' to the accused must arise from the continuation of a joint trial with others. It must relate to the accused's exercise of his or her rights under the Statute.⁴¹ Not every inconvenience for the accused is to be considered prejudicial. As Rule 136(1) of the Rules dictates, the prejudice must be 'serious' to warrant separation of joint trials.
19. The prejudice that Mr Mangenda purports to face in the future is related to his legal status in UK domestic proceedings due to his appearance at trial in The

⁴⁰ The presumption for joint trials is reinforced by the opening wording of Rule 136(1) of the Rules which uses the words 'shall be tried together'; see also Appeals Chamber, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, 9 June 2008, ICC-01/04-01/07-573 (OA6), para. 7; Pre-Trial Chamber I, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, ICC-01/04-01/07-257, page 7.

⁴¹ See also Trial Chamber I, Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters, 11 March 2015, ICC-02/11-01/15-1, paras 58-62; Trial Chamber II, *The Prosecutor v. Germain Katanga*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG, paras 61-62.

Hague before the Court, and provided a certain interpretation of its national laws is adopted by UK authorities and courts.⁴² It is not related to his prosecution as co-accused in the current proceedings. Crucially, Mr Mangenda is presumed innocent before this Court and entitled to all rights arising under the Statute. No adverse consequence is discernible from his position as co-accused before the ICC. The fact that the majority of witnesses do not concern Mr Mangenda, even assuming that this assertion were correct, is not a relevant consideration in this context. As the prejudice alleged is not related to any infringement of Mr Mangenda's statutory rights in the joint trial before the Court, the Chamber fails to identify any 'serious prejudice' within the meaning of Rule 136(1) of the Rules. The request for severance is therefore rejected.

20. As regards the first alternative request to adjourn the hearing, the Chamber finds that Mr Mangenda actually seeks the postponement of the start of the trial *sine die*. Indeed, he cannot provide a date on which UK courts will deliver their decision and the ICC proceedings could commence. As the Chamber recently held, when deciding on a postponement request under Rule 132(1) of the Rules 'the Chamber must ensure the overall fairness and expeditiousness of proceedings, bearing in mind the various competing interests at stake'.⁴³ Admittedly, a postponement of the trial could assist Mr Mangenda in allowing him to pursue his appeal before UK courts. But the Chamber must also pay heed to the rights of the other co-accused who are entitled, pursuant to Article 67(1)(c) of the Statute, to be tried without undue delay. Mr Mangenda's postponement request would significantly encroach upon this right of co-accused. In addition, postponement could also prolong the duration of detention of one of the co-

⁴² The Chamber does not engage with the possible interpretations of UK law relevant to Mr Mangenda's domestic proceedings in appealing a refusal of family reunification visa. This is a matter for UK authorities and courts to clarify. See also 26 August 2015 Decision, ICC-01/05-01/13-1182-Conf, para. 24.

⁴³ Decision on Defence Request to Postpone the Commencement of the Trial, 15 September 2015, ICC-01/05-01/13-1254, para. 15.

accused. On balance, the Chamber concludes that the alternative postponement request must be rejected.

21. As regards the second alternative request to be present through the use of video-technology, the Chamber recalls that a combined reading of Article 63 and Rule 134 *bis* of the Rules establishes the rule that the accused be physically present during trial in principle. As the wording of Rule 134 *bis* of the Rules clarifies, the presence through video technology of the accused is an exception to this rule. Significantly, the use of the words 'to be allowed' in Rule 134 *bis* (1) of the Rules and the fact that this decision is to be taken on a 'case-by-case basis', as indicated in Rule 134 *bis* (2) of the Rules, highlight that the Chamber is vested with discretionary powers when deciding on such matter. The accused is not entitled to choose whether he or she is physically present during trial, absent any authorisation of the Chamber. Rather, compelling reasons must be advanced which will move the Chamber to conclude that derogation of this rule is warranted. The exceptionality of this measure is further underlined by the fact that the accused may attend only 'part or parts' of the trial through video link, as set out in Rule 134 *bis* (1) of the Rules.

22. The Chamber attaches weight to the fact that the delivery of the expected UK court decision cannot be indicated with certainty. Consequentially, as matters stand today, it is unforeseeable whether only 'part of parts' of the trial will be conducted through the use of video technology, or – possibly – the entire trial. As was already determined in the 26 August 2015 Decision, Mr Mangenda is free to travel from and to the UK in order to attend his trial in The Hague. He holds a visa valid until January 2016, with the possibility of renewal.⁴⁴ Therefore, there is no impediment for Mr Mangenda to be physically present during his trial.

⁴⁴ See 26 August 2015 Decision, ICC-01/05-01/13-1182-Conf, para. 21.

23. It is also borne in mind that charges were confirmed against Mr Mangenda for offences against the administration of justice before this Court. The alleged conduct in this case is quite serious and, as the Chamber has held previously, goes to the integrity of the Court's judicial process.⁴⁵ The Chamber does not find it appropriate that, in the present circumstances, an exception to the rule to be physically present be made, in particular in light of a speculative hope that an appeal in unrelated domestic proceedings might be ruled upon in his favour. In light of the foregoing, the second alternative postponement request must also be rejected.

24. Finally, the Chamber recalls that Mr Mangenda's provisional release was granted under the condition, amongst others, that he be present in The Hague for trial, scheduled to commence on Tuesday, 29 September 2015. The Chamber herewith refers Mr Mangenda to paragraph 28(i) of the Interim Release Decision and Rule 119(4) of the Rules. Considering Mr Mangenda's expressed preference to be physically present during trial, the Chamber does not find that further steps, at this stage, are warranted to secure his presence at trial.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Reply;

REJECTS the Request; and


ORDERS the Registry to reclassify as 'public' the following documents and decision: ICC-01/05-01/13-1091-Conf (without annexes); ICC-01/05-01/13-1182-Conf; ICC-01/05-01/13-1253-Conf; ICC-01/05-01/13-1260-Conf, ICC-01/05-01/13-1266-Conf; and ICC-01/05-01/13-1267-Conf.

⁴⁵ Interim Release Decision, ICC-01/05-01/13-1151, para. 23.


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



**Judge Bertram Schmitt,
Single Judge**



Judge Marc Perrin de Brichambaut



Judge Raul Pangalangan

Dated 18 September 2015

At The Hague, The Netherlands