

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/05-01/13
Date: 26 February 2016

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

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 request for compensation for unlawful detention

Decision 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 James Stewart

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Counsel for Jean Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

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Mr Jean-Pierre Kilenda Kakengi Basila

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Legal Representatives of Victims

The Office of Public Counsel for Victims

States' Representatives

Legal Representatives of Applicants

The Office of Public Counsel for the Defence

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 VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ('Bemba et al. case'), having regard to Article 85(1) of the Rome Statute ('Statute'), Rules 173-175 of the Rules of Procedure and Evidence ('Rules') and Regulation 24(5) of the Regulations of the Court ('Regulations'), issues the following 'Decision on request for compensation for unlawful detention'.

I. Procedural History

1. On 21 October 2014, the Single Judge of Pre-Trial Chamber II ('Single Judge') ordered that Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido shall be released from the custody of the Court ('Release Order'),¹ subject to the Registry ensuring that 'prior to their leaving the Detention Centre of the Court, each of the [persons to be released] 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'.²
2. On 22 October 2014, the Appeals Chamber rejected the Office of the Prosecutor's ('Prosecution') urgent request³ for suspensive effect of the Release Order ('Suspensive Effect Decision').⁴
3. On 21 April 2015, the defence team for Mr Mangenda ('Defence') submitted a request to the Presidency of the Court seeking compensation for the

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

² Release Order, ICC-01/05-01/13-703, p. 6.

³ Prosecution's Notice of Appeal of the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" of 21 October 2014 and Urgent Request for Suspensive Effect of the Decision pending Appeal, 21 October 2014, ICC-01/05-01/13-706 OA9.

⁴ 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 OA9.

unlawful detention of Mr Mangenda following the Release Order and the Suspensive Effect Decision during the period from 22 October to 31 October 2014 ('Request').⁵

4. On 2 October 2015, the Presidency referred the Request to the Chamber.⁶
5. On 13 October 2015, the Chamber set a deadline of 30 October 2015 for any response to the Request and ordered the parties to indicate, by the same deadline, any additional confidential filings in the *Bemba et al.* case record which they considered should be made available to the Chamber for the purposes of adjudicating the Request.⁷
6. On 30 October 2015, the Prosecution and the Defence submitted to the Chamber the lists of filings they consider necessary for the Chamber to adjudicate the Request.⁸
7. On the same day, the Prosecution filed its response opposing the Request ('Prosecution Response').⁹
8. On 6 November 2015, the Defence filed a request for leave to reply ('Request for Leave to Reply'), seeking authorisation to reply to six discrete issues: (i) the existence of an 'address' requirement; (ii) Mr Mangenda's efforts to avoid the impasse that extended his detention; (iii) Mr Mangenda's efforts to overcome the impasse; (iv) the Prosecution's claim that Mr Mangenda should have made a choice between continued

⁵ Request for Compensation for Unlawful Detention, ICC-01/05-01/13-921-Conf. A public redacted version was filed on 1 May 2015 (ICC-01/05-01/13-921-Red).

⁶ Decision referring the "Request for Compensation for Unlawful Detention" to Trial Chamber VI, ICC-01/05-01/13-1329.

⁷ Email from Legal Officer of the Chamber to the parties on 13 October 2015 at 13:46.

⁸ Email from the Defence to the Chamber on 30 October 2015 at 12:17; Email from the Prosecution to the Chamber on 30 October 2015 at 12:19. On 16 November 2015, the Chamber directed the Registry to make the relevant filings available to it (email from Legal Officer of the Chamber on 16 November 2015 at 10:21).

⁹ Prosecution response to Jean-Jacques Mangenda Kabongo's request for compensation, ICC-01/05-01/13-1439-Conf. A public redacted version was filed on the same day (ICC-01/05-01/13-1439-Red).

detention or ejection to the Democratic Republic of the Congo ('DRC'), or to states with which he has no connection; (v) the Prosecution's claim that the Court and States Parties have no obligation to ensure and protect the rights of persons affected by the Court's actions; and (vi) the Prosecution's submissions concerning quantum.¹⁰

II. Submissions

Defence

9. The Defence requests compensation in the amount of € 27,000 pursuant to Article 85(1) of the Statute for Mr Mangenda's 'unlawful detention' between 22 and 31 October 2014.¹¹
10. The Defence submits that Mr Mangenda's detention after 22 October 2014 had no legal basis, arguing that after the Suspensive Effect Decision his release was to be implemented 'immediately'.¹² The Defence bases its submission on the arguments that (i) the Release Order was 'unequivocal', (ii) the Appeals Chamber specifically noted that 'the four suspects have an interest to be released immediately', and (iii) Mr Mangenda was 'at all times prepared to sign the declaration' required by the Release Order.¹³ The Defence further submits that 'administrative or practical difficulties' do not justify Mr Mangenda's continued detention which could have been avoided by obtaining a more definite commitment from the United Kingdom, or in the alternative, making prior arrangements with the Netherlands.¹⁴

¹⁰ Request for Leave to Reply to "Prosecution response to Jean-Jacques Mangenda Kabongo's request for compensation", ICC-01/05-01/13-1467-Conf.

¹¹ Request, ICC-01/05-01/13-921-Red, paras 1-2.

¹² Request, ICC-01/05-01/13-921-Red, paras 1, 4-5.

¹³ Request, ICC-01/05-01/13-921-Red, para. 18.

¹⁴ Request, ICC-01/05-01/13-921-Red, para. 19.

11. With regard to the quantum of the damages sought, the Defence by relying on ‘general principles reflected in regional and national practice’ submits that ‘compensation’ pursuant to Article 85(1) of the Statute includes pecuniary as well as non-pecuniary damages, resulting in an ‘appropriate’ amount of € 3,000 per day.¹⁵

Prosecution

12. The Prosecution requests the Chamber to dismiss the Request *in limine*,¹⁶ submitting that Article 85(1) of the Statute, in conjunction with Rule 173(2) of the Rules, requires a request for compensation to be preceded by a determination of unlawful detention which has not been done in this case, rendering the Request inadmissible.¹⁷
13. The Prosecution further submits that Mr Mangenda’s detention was not unlawful because: (i) he failed to meet a material condition to his release, namely providing the Court with an address at which he would be staying during the period of his release;¹⁸ (ii) the Release Order was not ‘immediately enforceable’, but to be executed within a ‘reasonable timeframe’ which may vary depending on an assessment of the circumstances at hand;¹⁹ (iii) the Court was under a legal obligation to release Mr Mangenda to a state, and immigration policy remains the sovereign domain of each State, with which the Court cannot interfere;²⁰ and (iv) Mr Mangenda’s prolonged detention was exclusively attributable

¹⁵ Request, ICC-01/05-01/13-921-Red, paras 20-30.

¹⁶ Prosecution Response, ICC-01/05-01/13-1439-Red, paras 1 and 36.

¹⁷ Prosecution Response, ICC-01/05-01/13-1439-Red, paras 5-7.

¹⁸ Prosecution Response, ICC-01/05-01/13-1439-Red, paras 1-2, 10-11.

¹⁹ Prosecution Response, ICC-01/05-01/13-1439-Red, paras 29-30.

²⁰ Prosecution Response, ICC-01/05-01/13-1439-Red, paras. 20, 26, 28.

to his own behaviour, in particular, in refusing available alternatives, such as being released to the DRC.²¹

14. With regard to the amount of compensation, the Prosecution submits that the requested amount is arbitrary and that reliance on specific domestic situations is unwarranted in international criminal cases.²²

III. Legal Framework

15. Article 85(1) of the Statute states that ‘anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.’
16. Rule 173(2) states that a ‘request for compensation shall be submitted not later than six months from the date the person making the request was notified of the decision of the Court concerning [...] [t]he unlawfulness of the arrest or detention under article 85, paragraph 1’.

IV. Analysis

Request for Leave to Reply

17. As a preliminary matter, pursuant to Regulation 24(5) of the Regulations, the Chamber recalls that participants may only reply to a response with the leave of the Chamber. The Chamber does not consider that it would have been assisted by further submissions on any of the identified issues. Additionally, the Chamber observes that the first issue, in particular, should have been anticipated by the Defence when it initially filed its Request in the context of addressing the unlawfulness of the detention. The Chamber therefore rejects the Request for Leave to Reply.

²¹ Prosecution Response, ICC-01/05-01/13-1439-Red, paras. 14-18, 21-27.

²² Prosecution Response, ICC-01/05-01/13-1439-Red, paras. 32-35.

Requirements of Rule 173(2) of the Rules

18. In the prior jurisprudence of the Court, Rule 173(2) of the Rules has been read to require there to be a decision on the unlawfulness of the detention prior to the making of a request for compensation.²³ Nonetheless, Trial Chamber II in the case of *The Prosecutor v. Mathieu Ngudjolo Chui* held that, notwithstanding the absence of a prior decision on the unlawfulness of the detention, it would, in the circumstances of that case and ‘in the interest of justice’, proceed to itself address the question of the lawfulness of detention.²⁴ Noting, *inter alia*, the language of Article 85(1) of the Statute, which provides for an enforceable right to compensation, the Chamber concurs with Trial Chamber II that such an approach may be warranted in certain circumstances.
19. The Chamber observes that the Defence in this case has not identified any prior decision that determined Mr Mangenda’s detention to be unlawful, nor does it appear to have sought to obtain any such decision prior to submitting the Request. Rather, the Defence merely argues in the Request that the detention ‘had no lawful basis’.²⁵

²³ See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 4; *The Prosecutor v. Bemba et al.*, Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber I of 17 March 2014 entitled “Decision on the ‘Requete de mise en liberte’ submitted by the Defence for Jean-Jacques Mangenda”, 11 July 2014, ICC-01/05-01/13-560, para. 48; *The Prosecutor v. Germain Katanga*, Public redacted version of the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” of 20 November 2009 (ICC-01/04-01/07-1666-Conf-Exp), 3 December 2009, ICC-01/04-01/07-1666-Red-tENG, paras. 65-66; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the application for a ruling on the legality of the arrest of Mr Dennis Ole Itumbi, 19 November 2012, ICC-01/09-02/11-534, para. 7.

²⁴ *The Prosecutor v. Mathieu Ngudjolo Chui*, Trial Chamber II, Décision sur la “Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome”, 16 December 2015, ICC-01/04-02/12-301, para. 16.

²⁵ Request, ICC-01/05-01/13-921-Red, para. 18. See also para. 29 submitting that the unlawfulness of the detention was ‘fully apparent’.

20. The relief sought in the Request could be dismissed on this basis alone. Notwithstanding, in the circumstances, the Chamber finds it is in the interests of justice for it to proceed to consider the lawfulness of Mr Mangenda's detention.

Unlawfulness of the detention

21. The Chamber notes the Defence submission that the alleged unlawfulness of the detention resulted from the Release Order not being 'immediately' enforced. The Chamber recalls, however, the wording of the Release Order, which provided that the relevant persons 'shall be released, *subject to the following order*', and then enumerated two conditions that the Registry was to ensure were fulfilled prior to the individuals' departure from the Court's Detention Centre.²⁶ In the Chamber's view, the Release Order was clearly conditional in nature, and the release was only to be implemented upon fulfilment of the specified conditions.²⁷
22. Moreover, the Chamber considers that the Defence misconstrues the Appeals Chamber's findings to the extent it argues that that the Appeals Chamber confirmed the Release Order as 'immediately enforceable'. While the Appeals Chamber did observe that 'the four suspects have an interest to be released immediately',²⁸ it cannot be inferred that, as a result, the administrative and legal procedure required for the release should have been dispensed with.
23. Most relevant, in this instance, was the condition that each of the persons to be released, including Mr Mangenda, provide the address at which they

²⁶ Release Order, ICC-01/05-01/13-703, p. 6 (emphasis added).

²⁷ See similarly Decision on the Plainte à charge du Greffier et des membres du Bureau du Greffe pour incarcération arbitraire (Règle 26 du Règlement de procédure et de preuve), 9 January 2015, ICC-01/05-01/13-793-Conf, para. 12.

²⁸ Suspensive Effect Decision, ICC-01/05-01/13-718, para. 7.

would be staying. In the Chamber's view, a requirement of this nature constitutes a reasonable and foreseeable pre-condition to release pending trial,²⁹ noting especially that the Release Order had indicated that Mr Mangenda would have to appear at trial 'whenever summoned by the Court'.³⁰ The Chamber notes that Mr Mangenda refused the option of being released to the DRC, and had no immediate entitlement to enter any other country.³¹ Mr Mangenda consequently failed, at that stage, to fulfil one of the pre-conditions to his release. The Chamber therefore finds that Mr Mangenda had no entitlement to immediate and unconditional release as of 22 October 2014.

24. The continuation of Mr Mangenda's detention after that date constituted an extension of his lawful detention pursuant to the initial arrest warrant of 20 November 2013 and the conditions identified in the Release Order.³² In this regard, noting that the Release Order required the identification not just of an address where Mr Mangenda intended to stay, but rather where he would in fact be staying during the period of his release, the Chamber considers the Defence submission that Mr Mangenda was 'at all times prepared to sign the declaration required' by the Release Order³³ to be irrelevant.
25. It was nonetheless incumbent upon the Registry to urgently and actively assist Mr Mangenda in securing the necessary conditions for his release.³⁴

²⁹ See also Rule 119 of the Rules setting out a non-exhaustive list of possible restrictions on liberty which may be set by a Pre-Trial Chamber in granting conditional release.

³⁰ Release Order, ICC-01/05-01/13-703, p. 6.

³¹ Registry's 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), 27 October 2014, ICC-01/05-01/13-722-Conf, paras 22-32.

³² Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO, ICC-01/05-01/13-1-Red-tENG.

³³ Request, ICC-01/05-01/13-921-Red, para. 18; Release Order, ICC-01/05-01/13-703, p. 6.

³⁴ See, for example, Release Order, ICC-01/05-01/13-703, p. 7 (ordering that the Registry 'promptly make all practical arrangements which are necessary and appropriate for the enforcement of this decision').

In this regard, the Chamber notes that the Registry provided a detailed account of its continuous and eventually successful diplomatic efforts with the British, Belgian and Dutch authorities in order to accommodate Mr Mangenda's release preferences.³⁵ In the circumstances, the Chamber finds that the Registry, in conformity with the Release Order, did everything in its power to secure Mr Mangenda's release as promptly as possible following the issuance of the Release Order. The Chamber does not consider that the Registry was either in a position, or under an obligation, to anticipate the Release Order.

26. In light of the above, the Chamber concludes that there is no basis for finding that the continued detention of Mr Mangenda between 22 October and 31 October 2014 was unlawful. Having so found, it is unnecessary for the Chamber to proceed to consider the submissions with regard to compensation.

³⁵ Registry's 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), 27 October 2014, ICC-01/05-01/13-722-Conf; Registry's Second 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), 29 October 2014, ICC-01/05-01/13-726-Conf; Registry's Third 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), 31 October 2014, ICC-01/05-01/13-732-Conf; Registry's Fourth 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), 12 November 2014, ICC-01/05-01/13-751-Conf; 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), 2 February 2015, ICC-01/05-01/13-808-Conf.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Reply; and

REJECTS the Request.

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

A handwritten signature in black ink, appearing to be 'RF', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

Two handwritten signatures in black ink, one on the left and one on the right, each written over a horizontal line.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated 26 February 2016

At The Hague, The Netherlands