Annex A

Cour
Pénale
Internationale

International
Criminal
Court

Original: **French**

No.: **ICC-01/05-01/13**
Date: **22 January 2014**

PRE-TRIAL CHAMBER II

Before: **Judge Cuno Tarfusser, Single Judge**

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

Request for the Court to decline jurisdiction pursuant to article 70(4)(b) of the Rome Statute and rule 162(4), "Application for relinquishment of jurisdiction"

Source: **Counsel for the Defence of Jean-Jacques Mangenda Kabongo**

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

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1. Background

1. Mr Jean-Jacques Mangenda Kabongo was arrested in The Hague by the Dutch authorities on 23 November 2013 at the request of the International Criminal Court, in execution of the 20 November 2013 warrant of arrest specifically.

He was transferred to the detention centre in Scheveningen on 3 December 2013 and the Single Judge held a first appearance hearing on 5 December 2013.

2. At the first appearance hearing, Defence Counsel made a number of observations on jurisdiction, contesting, *inter alia*, the investigation of this case by the Prosecutor, whose interest therein is clear, in light of the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, which, as the warrant of arrest states, is still ongoing.

2. Facts

3. The charges brought pursuant to article 70 of the Rome Statute entail corruptly influencing witnesses to provide false testimony (count 1) and presenting evidence that the party knows is false or forged (count 2).

4. As regards the second count, it must be underscored that in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("the main case") [redacted] was under discussion [redacted]

5. Furthermore, in the main case, the Defence [redacted]

[1] [redacted]

[redacted]

[redacted] It is disturbing that the Suspect was arrested while this matter was *sub judice.*

6. These are not "isolated events". The problem of payments by the Prosecutor to intermediaries and/or witnesses arose before in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. The Chamber concerned had directed the Prosecutor to undertake the necessary investigations in this regard under article 70 of the Rome Statute, but to ensure "that […] **a conflict of interest [wa]s avoided**".[2]

Prosecutorial diligence in this regard would appear to have been lacking

The Prosecutor also appears to have independent funds with which to effect some of these payments.

To date there is absolutely no clarity concerning the Prosecutor's payments to some of her witnesses, save for the fact that at times they involved very considerable amounts of money, and sometimes very significant "benefits in kind".

The Defence questions the independence of a witness who received any such payment and/or benefits.

[2] ICC-01/04-01/06-2843, 14-3-2012, 9/17.

2. As to the merits

7. In the warrant of arrest (p. 7/17) the Single Judge raises the question as to whether it is expedient for the Court, pursuant to rule 162 of the Rules of Procedure and Evidence, to exercise jurisdiction.

The Single Judge believes so, citing in support the need "to act forthwith […] [and] the close and manifest connections between the investigation which gave rise to the Prosecutor's Application and the trial in the Case before the Court, as well as by the gravity of the Prosecutor's allegations." The Single Judge further reasons:

> Trial Chamber III […] is about to embark on its deliberation on the Case, and, were the Prosecutor's allegations to be correct, several pieces of evidence tendered at trial would be vitiated to the extent that their reliability would be seriously compromised. Hence the need to avoid the delays entailed by consultations held by the Court with State authorities, and whose duration would, to say the least, be uncertain.

8. Therefore, the Single Judge makes explicit that the outcome of the main case is contingent on the outcome of the Prosecutor's investigations in the case at bar.

The Single Judge however neglects to appraise the matter contemplated under rule 162(2)(e) and (f), insofar as he appraises it only against the yard-stick of the need "to act forthwith" and the "gravity of the allegations".

9. It must first be pointed out that "forthwith" action may contravene the peremptory provisions of article 67(1)(b) of the Rome Statute, which vest the Suspect with the inalienable right to have adequate **time** and facilities for the preparation of the defence.

These fundamental rights cannot be trumped by the requirements of another case.

In this respect, the Defence notes that, in light of the foregoing, it will require access to a greater part of the main case, which it does not yet have.

As yet, it does not even have access to all of the procedural history of the case at bar, particularly prior to 21 November 2013, such that it is unable to verify fully the lawfulness of the arrest and pre-trial detention.

10. Secondly, it must be remarked that the rule 162(2)(e) criterion differs from the sub-rule (d) requirement to "expedite" proceedings and in which "forthwith" is, however, unmentioned.

In that sense, rule 162(2)(d) merely confirms the "reasonable time". Indeed, it must be so: the Rules of Procedure and Evidence cannot take precedence over the Rome Statute.

Rule 162(2)(e), however, concerns "evidentiary considerations".

The Defence notes the Single Judge's disregard for the provision, whereas this criterion is crucial to the case at bar.

At the same time, the Single Judge does not observe rule 162(2)(a) criterion: "The availability and effectiveness of prosecution in a State Party".

Had the Single Judge substantiated the "need" for the ICC to exercise jurisdiction, this would naturally have been an ancillary criterion, but no such justification appears in the warrant of arrest. Manifestly, the ground of necessary forthwith action, (a hallmark of all criminal proceedings), and the gravity of the offences do not suffice to substantiate the need for the Court's exercise of jurisdiction.

The pending main case may instead constitute an argument to the contrary in this respect (cf. *infra*).

The Defence takes the view that there are compelling reasons to consider the two criteria together.

11. The first criterion concerns evidentiary matters and hence **modes of investigation**.

Investigation, of **incriminating and exonerating circumstances equally,** is, in the ICC regime, the preserve of the Prosecutor.[3]

[3] Article 53 *et seq.* of the Rome Statute.

It is however the case that that same Prosecutor is the adversary of the suspects in an ongoing case, wherein the parties (Defence and Prosecutor) accuse each other of corruptly influencing witness and impeding the course of justice (see *supra*).

Furthermore, the Prosecutor has a manifest **<u>interest</u>** in establishing that the evidence brought by the Defence is vitiated or even false. In fact the Defence evidence is instead likely to establish Mr Jean-Pierre Bemba's innocence.

This therefore is a clear case of the **conflict of interest** which the Trial Chamber adverted to in the case of *The Prosecutor v. Thomas Lubanga*.

With investigation in the main case now complete, it no longer behoves the Prosecutor to investigate exonerating circumstances, meaning that her office is compelled to attempt to "win" the case by any means available. Such is her role.

Yet, therein lies the conflict of interest.

That role in the main case **precludes** the duty to investigate exonerating circumstances which still exists in the case at bar. There is therefore a **contradiction** between the Office of the Prosecutor's two roles in each separate case, such as to **preclude the tendering of evidence**.

In most Romano-Germanic jurisdictions, investigation in the present case would have fallen within the purview of an independent investigating judge [*juge d'instruction*] who would be unconnected to the main case. However, no such figure exists at the ICC.

These constitute the compelling reasons why the ICC must **decline** jurisdiction over the present case and refer it to the host State, the Netherlands.

12. A further reason exists, namely the principle of **equality of arms.**

Empowered to investigate incriminating circumstances vis-à-vis Defence counsel and even to have them incarcerated, the Prosecutor enjoys a major "advantage" in the main case, where she may even hold unprosecuted counsel "at her mercy" by the "threat" which clearly hangs over them. "**The balance of forces**", essential to a fair trial, is thus **non-existent**.

The question even arises as to the independence of those unprosecuted counsel in a defence team which stands charged of very serious criminal offences of corruptly influencing witnesses, forgery of evidence and complicity therein in the main case, in which the discussion at hand was supposed to take place upon completion of the present case (see warrant of arrest).

Can they continue to challenge the lack of authenticity of the exhibits and the credibility of Prosecution witnesses alleged without also risking the same prosecution?

Evidently not.

They no longer have the requisite **independence**[4] to perform their duties. The Prosecutor herself is clearly responsible for this "Gordian knot".

Indeed, it would have been advisable to await the outcome of the trial proceedings before the Trial Chamber and a ruling on the impugned exhibits and *viva voce* evidence before instituting disciplinary and/or criminal proceedings.

However the Prosecutor wished to "anticipate", to "take pre-emptive action", and, to a certain degree, even to "force the hand" of the Trial Chamber, since, manifestly, and as the warrant of arrest states, that Bench must perforce await the end of the new case, meaning that "criminal proceedings must await the outcome of criminal proceedings" (see warrant of arrest). The Prosecutor has therefore in a sense entered a "motion of no-confidence" in respect of the Trial Chamber in the main case, by divesting it of its power to adjudge the matter.

It ensues from the foregoing that as matters now stand the Suspect will not benefit from the proper investigation of "incriminating and exonerating circumstances" which the Rome Statute guarantees.

12. This leads to the second important criterion: availability and effectiveness of prosecution in a State Party.

[4] United Nations, Basic Principles on the Role of Lawyers, Havana 1990, article 16.

By a law promulgated on 16 November 2001 the Netherlands adapted its penal code to allow prosecution of crimes committed on its territory under article 70 of the Rome Statute.

The stated grounds for the legislative amendment specify that the Netherlands, as host State and the State where offences against the administration of justice defined in article 70 of the Rome Statute may be committed shall exercise jurisdiction over such offences.

Moreover the legal system of the Netherlands enjoys worldwide renown for its independence and celerity.

The Defence submits that under the circumstances there are compelling grounds for the International Criminal Court to relinquish jurisdiction over the case at bar and remit it to the Netherlands, as article 70(4)(b) of the Rome Statute and rule 162(4) of the Rules of Procedure and Evidence provide.

FOR THESE REASONS,

MAY IT PLEASE THE SINGLE JUDGE TO

Order relinquishment of jurisdiction by the International Criminal Court.

Request the Netherlands to submit the present case to its competent authorities for the purpose of investigation and possible prosecution in accordance with article 70(4)(b) of the Rome Statute and rule 162(4) of the Rules of Procedure and Evidence.

[signed]

Jean Flamme, Counsel for the Defence

of

Jean-Jacques Mangenda Kabongo

Dated this 22 January 2014
At Ghent, Belgium