



Original: **English**

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

Date: **11/03/2014**

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
& NARCISSE ARIDO**

Public Document

Defence response to the Prosecution's request for a delay of the confirmation proceedings by four months (ICC-01/05-01/13-234)

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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1. Jean-Pierre Bemba Gombo ("the Suspect") hereby files his most strenuous objection to the Prosecutor's request for a four month extension of the deadlines set by Pre-Trial Chamber II for the conduct of the confirmation proceedings.¹

2. In fixing those deadlines on 27 November 2013, the Single Judge commented as follows:

"It is the view of the Chamber, and I consulted on the issue with my two colleagues, of course, that this - and I mean by this the written confirmation - is the most appropriate course of action in this case. This said, and obviously subject to changes which may become necessary in light of developments relating to the surrender of other two persons for whom the warrant of arrest was issued, the Single Judge, on behalf of the Chamber sets the date of 18 of March 2014, for the filing of the document containing the charges and the list of evidence by the Prosecutor".²

3. According to the Prosecutor, five factors merit the extension sought: (i) continuing lack of access to "relevant evidence", seized pursuant to the Warrant of Arrest; (ii) delayed access to "evidence" only recently and partially made available by the Registry; (iii) the consequential inability timely to discharge obligations arising under Articles 54 and 67 of the Rome Statute ("Statute") and Rule 77 of the Rules of Evidence and Procedure ("Rules"); (iv) the consequential inability to proceed to the confirmation process in a 'trial ready' posture, and; (v) the imminent transfer of the fifth suspect (Narcisse Arido) to the seat of the Court. Each of these factors will be examined and rejected in turn.

¹ ICC-01/05-01/13-234-Red.

² ICC-01/05-01/13-T-1-ENG CT WT 27-11-2013-15/25 at line 2 *infra*.

Continuing lack of access to "relevant evidence" seized pursuant to the arrest warrant

4. Even at the Suspect's initial appearance, the Prosecutor foresaw that she would have a problem in accessing materials seized pursuant to the execution of the arrest warrant:

"In relation to the date of the [confirmation] hearing, we take note of that and we will make our best effort to make sure that we arrive prepared to that date. I only note that it's not only an issue of the pending surrender of the other persons, including the warrant of arrest to this Court, but it's also an issue of the transmission of the ... material to the Office of the Prosecutor. By this I mean both the material that is currently within the possession of the registry and the material that is still in possession of the national authorities and that will most likely be subject to a scrutiny to ensure that the office does not receive any privileged material erroneously.

Now this is a process that the Office of the Prosecutor does not role and making may affect, undoubtedly, our ability to fully complete the investigation before the confirmation process".³

5. Notwithstanding the aforementioned, the Single Judge ruled as follows:

"About the date of the confirmation, I know that the date is, according to what happens in -- what happened in the past, quite a short date, but we have to be aware that this is a different type of crime which must be treated also in a bit different way, and I will be very, very, very strict in handling with the timing" [emphasis added].⁴

³ ICC-01/05-01/13-T-1-ENG CT WT 27-11-2013 17/25.

⁴ ICC-01/05-01/13-T-1-ENG CT WT 27-11-2013 22/25 at line 16 *infra*.

6. With this triply enhanced judicial warning ringing in his ears, the Prosecutor's representative later declared that the materials seized by the Dutch and Belgian authorities would not comprise the "*principal evidence*" for the purpose of the confirmation proceedings but rather "*possible additions*".⁵ Indeed, when asked by the Single Judge to clarify with what evidence the Prosecutor would seek to confirm the charges, the following information was proffered:

"In terms of the evidence that the Prosecution intends to rely on in response to the Chamber's first inquiry. Fundamentally, the evidence is that evidence that was used to support the arrest warrant of which the Chamber is -- to which the Chamber is privy. These include reports that were prepared by independent counsel as well as the underlying audio materials. In addition, there are other audio materials that were also used to support the arrest warrant, particularly in relation to Mr Babala, and those we intend to use as well, as well as the evidence of financial transactions as are detailed in the arrest warrant, public version of the Chamber's decision".⁶

7. It is worth noting that the Prosecutor justifies her request for a four month extension with a number of imponderables. **Firstly**, the period of extension requested is merely an estimate. No "*certain indication*"⁷ is provided as to when the materials will, indeed, be transferred to the Court. **Secondly**, the Prosecutor argues that she has continuing lack of access to "*relevant evidence*". This is seriously misleading. With respect to the information in the custody of the Dutch and Belgian authorities the Prosecutor admits that she "*has never had access to it*".⁸ In the circumstances, therefore, it is hard to fathom how the Prosecutor can argue that the materials sought can be relevant if she has never

⁵ ICC-01/05-01/13-T-2-Red-ENG WT 04-12-2013 8/33 at line 7 *infra*.

⁶ ICC-01/05-01/13-T-2-Red-ENG WT 04-12-2013 7/33 at line 3 *infra*.

⁷ ICC-01/05-01/13-234 at paragraph 12.

⁸ *ibid*.

seen them.⁹ **Thirdly**, as the master (or mistress) of her own case, the Prosecutor is, quite astoundingly, unable to state what materials were seized from the suspects at the time that the arrest warrants were executed:

*"The Prosecution is not in possession of a comprehensive list of items, but estimates that the materials comprise at least the following electronic devices....".*¹⁰

8. As for the anticipated report of the Independent Counsel;¹¹ the matter is subject to the unique discretion of the Pre-Trial Chamber. To the best of the Suspect's knowledge, the Single Judge did not order the Independent Counsel to produce a further report in advance of the final deadline for disclosure.

9. To summarise; the quantity and nature of the materials retained by the Dutch and Belgian authorities are unknown and their probative value - to coin the Prosecutor's turn of phrase - is *"anyone's guess"*!¹² The potential for the delayed transfer of seized materials was fully known to the Single Judge from the very start of the proceedings and one can only assume that he took this factor into account when setting the disclosure deadlines. Accordingly, the Single Judge must reject the nebulous argument that there is lack of access to "evidence" as a reason for extending the confirmation deadlines.

Delayed access to "evidence" only recently and partially made available by the Registry

10. It will be recalled that Single Judge set a very stringent schedule for pre-confirmation disclosure:

⁹ This is not the first time that the Prosecution has sought to introduce evidence of a "hypothetical" nature. A similar tardy application was rejected by Trial Chamber III: *c.f.*; ICC-01/05-01/08-680 at paragraphs 32 & 35.

¹⁰ ICC-01/05-01/13-234 at paragraph 19.

¹¹ *ibid* at paragraphs 24-26.

¹² *ibid* at paragraph 21.

"...as regard the evidence collected until 23rd November 2013, on which she intends to rely for the purpose of the confirmation hearing, no later than Friday, 20 December 2013, the Prosecutor shall disclose it to the Defence or submit to the Chamber requests for redactions or other protective measures.

As regard all evidence collected between 23 November 2013 and 31st January 2014 on which the Prosecutor intends to rely for the purpose of the confirmation hearing, no later than Friday, 31st of January the Prosecutor shall disclose it to the Defence or submit to the Chamber requests for redactions or other protective measures".¹³

11. All of the materials currently in the possession of the Registrar were "collected" within the prescribed deadlines. Consequently, these materials must, by judicial order, be disclosed by 18 March 2014 should the Prosecutor seek to rely on them at confirmation.

12. Explanations for the Prosecutor's inability to analyse some of these materials are either lacking or unsatisfactory. For example, extracted copies of Fidèle Babala's USB stick and I-Pad were provided to the Prosecutor on 29 January 2014 and 11 February 2014 respectively. Additionally, an extracted copy of Narcisse Arido's laptop was provided to the Prosecutor on 11 February 2014 and access to his "Yahoo" mail accounts were made available for review on 23 January 2014. Although having had more than a month to review the majority of these materials, the Prosecutor does not explain why she failed to complete her analysis in the allotted time. As for the other materials seized from Narcisse Arido, no indication is even given as to when the Prosecutor expects to obtain access to them.

¹³ ICC-01/05-01/13-T-2-Red-ENG WT 04-12-2013 32/33 at line 4 *infra*.

13. The Prosecutor, furthermore, complains that an "*extraction report recently made available by the Registry*" lacks chain of custody information. The Suspect suggests that the Registrar should not be faulted for failing to perform what is essentially a duty incumbent on the Prosecutor. It is the Prosecutor's job to prove the pedigree of the evidence on which she seeks to rely and it is she alone who bears the responsibility to prove chain of custody. In other words, the Prosecutor should have ensured that the Registrar was given appropriate instructions on how to record a satisfactory chain of custody when processing the materials seized from the suspects. It should not be forgotten that the Defence requested the Single Judge to order the Registrar to make his observations on the Prosecution request by 10 March 2014. Since the Single Judge declined to rule on this application, it is unknown what exactly transpired between the Prosecutor and the Registrar. Notwithstanding, it is hoped that any apportion of blame to the Registrar will be ignored.

Consequential inability to assess and analyse newly received evidence

14. As mentioned above, the Prosecutor states that certain materials were made available to her on 23 January 2014 and 29 January 2014. Given the passage of time, the Suspect submits that it is wholly unsatisfactory for the Prosecutor to come before the Single Judge on 3 March 2014 and to complain, at such a relatively late stage, that she has had insufficient time to review the said materials. The present application should have been filed at the beginning of February 2014 or, at the latest, on 12 February 2014.¹⁴ Such dilatory conduct on the part of the Prosecutor has already been the subject of judicial reprimand when the Single Judge previously refused an extension of time sought for the purpose of disclosing evidence pertaining to the Suspect and Jean-Jacques Mangenda Kabongo.¹⁵ Mindful of this decision, it would now be unfair to allow the Prosecutor to profit from an extension for the "necessary translation and

¹⁴ After the disclosure of the additional materials (the quantity of which is unknown) on 11 February 2014.

¹⁵ ICC-01/05-01/13-80-Conf.

transcription" of materials which she has had had in her possession for more than a month.

Consequential inability to proceed to confirmation in a "trial ready" posture

15. At paragraph 44 of her request, the Prosecutor argues that if she is to proceed "*without even having seen the fruits*" of her investigation, this would "*undermine the purpose of the seizure in the first place*". This argument flatly contradicts the Prosecutor's previous assertions as to her readiness for the confirmation proceedings and the sufficiency of her investigation for that purpose. On 28 November 2013, Trial Chamber III held a status conference at which the Prosecutor's representative asserted as follows:

"As your Honours are well aware of, there is an Article 70 case ongoing against former -- or still actual members of the Defence team. The Office of the Prosecutor has almost completed its investigation".¹⁶

16. Similarly, at a status conference held on 4 December 2013, the Prosecutor's assistant made the following representation:

"We do intend to continue investigating the case, but this is not for the purposes of expanding the scope of the investigation itself, rather for closing the investigation and tying up any loose ends that may be there"
[emphasis added].¹⁷

17. The Prosecutor is accustomed to remind the Single Judge that she is to be presumed to act in good faith. By the same token, when the Prosecutor alleged that she was "tying up loose ends" she should be understood as doing just that and not requesting to embark on a new investigative enterprise.

¹⁶ ICC-01/05-01/08-T-359-ENG ET WT 28-11-2013 7/15.

¹⁷ ICC-01/05-01/13-T-2-Red-ENG WT 04-12-2013 9/33.

The imminent transfer of the fifth suspect

18. The imminent surrender of Narcisse Arido is not a reason to set aside the present deadlines. The staggering of the initial appearances of the suspects was well contemplated at the very first status conference and the Single Judge had the following to say:

"I can also say that I thought about the other two suspects, and the timing of their possible surrender to the court. If this timing is not -- does not comply with -- the timing of the surrender does not comply with the timing of the dates I set, it could also be that one separates the cases and makes up two trials on the same issue in order just to speed up this trial, but we'll see what happens in the future. I can't say it now".¹⁸

19. The power to direct a joinder or severance is to be found in article 64(5) of the Rome Statute and rule 136 of the Rules of Procedure and Evidence. Neither of these provisions provides guidance as to when such a power will be exercised. As the Single Judge correctly noted, however, the power to direct a severance exists even at the pre-trial stage of the proceedings¹⁹ and will most commonly be ordered for the sake of procedural efficiency and in order to protect a suspect's right, as stipulated under article 67(1)(c), to be tried without undue delay. More generally, the Single Judge will be required to determine whether the severance will cause prejudice to any of the suspects.²⁰

¹⁸ ICC-01/05-01/13-T-1-ENG CT WT 27-11-2013 22/25 at line 20 *infra*.

¹⁹ ICC-01/04-01/07-257, 10 March 2008, at paragraphs 8 and 9 where Pre-Trial Chamber I ruled that "although article 64(5) of the Statute and rule 136 of the Rules are included in Chapter VI of the Statute and of the Rules which deals with the 'Trial Procedure', the Chamber considers that the contextual interpretation of such provisions, in light of the above-mentioned provisions relating to the Pre-Trial proceedings of a case before the Pre-Trial Chamber included in Chapter V of the Statute and the Rules, does not preclude joint proceedings at the Pre-Trial stage, but rather supports the general rule that there is a presumption of joint proceedings for persons prosecuted jointly".

²⁰ The ICC statutory framework does not give guidance on when a joinder or severance will be ordered. Notwithstanding, it is worth noting the policy adopted by the ad hoc tribunals. See, for example, rule 82(B) of the ICTR Rules of Procedure which provides that "[t]he Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice". See, also,

20. Counsel avers that severance will cause absolutely no prejudice to the Suspect. To the contrary, it will permit him to ask for prompt dismissal of the baseless allegations of forgery and witness corruption which continue to prejudice the trial in case ICC-01/05-01/08. The Single Judge, in fact, noted the close connection between the two cases when issuing his arrest warrant and rejecting national jurisdiction under rule 162(2) – all in the name of expediency:

"...Trial Chamber III ("the Trial Chamber") 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".²¹

21. The Single Judge's above cited comments cut both ways. A four month extension will leave the suspicions levelled at the Suspect unfairly hanging in the balance. Consequently, should the Prosecutor be unable to raise "substantial" grounds to believe that the Suspect committed forgery or witness corruption, more than a year after "poisoning the well" in case ICC-01/05-01/08, it is only right and proper that this information be factored into Trial Chamber III's decision making process as quickly as possible.

Prosecutor v. Mathieu Ndirumapatse et al., ICTR-98-44-I, "Decision on the prosecutor's motion for joinder of accused and on the prosecutor's motion for severance of the accused", 29 June 2000 where the "protection of the interests of justice" was defined so as to include "(1) the right to be tried fairly; (2) the right to be tried without undue delay; and (3)[avoidance of] long and complicated cases".

²¹ ICC-01/05-01/13-1-Red2-tENG at paragraph 8.

22. Neither will a severance cause prejudice to Narcisse Arido. Conducting Arido's confirmation process at a later date will allow his defence team, as the Prosecutor herself admits, "*to come up to speed*".²²

The Prosecutor must not profit from an extension & the Suspect must not be prejudiced

23. Should the Single Judge be minded to grant the extension sought by the Prosecutor - despite the strenuous Defence objection - the Suspect requests that the Single Judge ensure that he suffers no prejudice.

24. The negative effect of granting the extension sought will be the fact that the Suspect will remain subject to an arrest warrant in the present case for four months longer than the Single Judge deemed appropriate when he set the schedule for the confirmation process. Indeed, should the extension be granted in order to allow the continued review of materials mentioned in paragraph 12 above, the Single Judge will be specifically requested to rule that the failure to timely analyse those materials is "inexcusable delay" attributable to the Prosecutor for the purpose of article 60(4) of the Rome Statute.

Aimé Kilolo Musamba's pending request to disqualify the Prosecutor

25. The Suspect has not, to date, responded to Aime Kilolo Musamba's request to disqualify the Prosecutor ("the Kilolo Request").²³ Should the Kilolo Request be successful, the Suspect acknowledges that there would be a consequential need for a continuance in order to permit a new prosecutor to familiarise himself with the case. This, however, is not a reason for holding up the confirmation proceedings for those suspects who like the Suspect, at this present juncture, do not intend to support the Kilolo Request. As mentioned above, the Single Judge may sever the proceedings and direct a joinder of those suspects who support the Kilolo Request to the Arido confirmation process.

²² ICC-01/05-01/13-234 at paragraph 55.

²³ ICC-01/05-01/13-233.

Conclusion

26. The Prosecutor's current reflection on the nature of the Dutch and Belgian authorities' assistance is a far cry from the lavish praise she heaped on them when the Suspect was arrested:

"I am extremely grateful for the excellent cooperation received from all States involved in facilitating the smooth execution of the arrests and related investigative operations" [emphasis added].²⁴

27. The true reason for requesting an extension of deadlines is abundantly clear. The Prosecutor does not presently believe that she has sufficient evidence to make out a "substantial" case against the Suspect. As a consequence, she will attempt to exploit any extension granted in a vain attempt to "fish" for evidence to bolster what the Defence alleges to be her mistaken suspicions.

28. While the Defence agrees that an arrest warrant may be issued where there are "reasonable grounds to believe" that a suspect has committed an offence, the present scenario has highlighted the problem of allowing the Prosecutor unfettered discretion to seek such an arrest warrant when she is uncertain as to whether she can proceed to the higher evidentiary standard required for the confirmation of charges. The Prosecutor has a duty of due diligence before seeking the arrest of a suspect. In the specific circumstances of the present case, that duty is attenuated given the fact that the execution of the arrest warrant has led both to the disruption of an ongoing trial and the arrest of the Suspect's previous lawyer.

29. In the circumstances, Counsel suggests that the Single Judge should weigh up two considerations; on the one hand, the prejudice caused to the Suspect by granting the extension and, on the other hand, the need to allow the

²⁴ http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/statement-OTP-24-11-2013.aspx

Prosecutor to perform her article 54(1)(a) duties within a reasonable time limit. In the present instance, the potential prejudice should settle the matter to the Suspect's advantage. As the Single Judge is fully aware, the article 61(8) of Rome Statute permits the Prosecutor to repetition the Court, at a later date, with fresh evidence should she wish to take "a second bite at the cherry".

30. For the time being, however, the Suspect finds it remarkable that even with the generous manpower, resources and budget at her fingertips, the Prosecutor still feels that she is entitled to the indulgence of the Court despite having first confronted Trial Chamber III with her accusations of forgery and witness corruption more than a year ago. By contrast, Counsel, who has no investigator but his own intuition, no translator but "google-translate" (which lacks a Lingala facility) and no budget apart from the contents of his own pocket, is ready for confirmation and will prove that the charges levelled at the Suspect are totally false.

Relief Sought

31. The Single Judge is requested to reject the Prosecution application for an extension of the deadlines for the conduct of the confirmation proceedings. Should the application for an extension, nevertheless, be granted, the Single Judge will be requested to find that the resulting delay is "inexcusable" and attributable to the Prosecution for the purpose of article 60(4) of the Rome Statute.



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Tuesday, March 11, 2014