

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 24 March 2014

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng

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
Appeal Brief**

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

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

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1. Background

1. On 8 January 2014, the Appellant filed an “Application for Release” with the Single Judge of Pre-Trial Chamber II.¹

The Single Judge rejected the application by decision of 17 March 2014.² Mr Jean-Jacques Kabongo Mangenda appealed this decision by application of 20 March 2014.

1.1 Substance – grounds of appeal – main submission: unlawfulness and nullity of the 20 November 2013 warrant of arrest; unlawful detention; immediate release; errors of fact and law in the impugned decision

2. In his Application for Release, the Appellant explained the formal and substantive conditions that an arrest warrant should fulfil.³

3. In the impugned decision, the Single Judge merely indicated that the warrant contains “‘extensive’ and specific references to the facts, and their circumstances of time and space”,⁴ but did not specify those references. Needless to say, this does not fulfil the requirement that a court decision affecting a person’s fundamental rights must be reasoned. The Appellant could not find those particulars.

¹ ICC-01/05-01/13-71-tENG, 08.01.2014 with confidential annexes A and B.

² ICC-01/05-01/13-261, 17.03.2014.

³ ICC-01/05-01/13-71-tENG, 08.01.2014, para. 3: “In respect of a request for provisional arrest, article 92(2)(b) of the same Statute prescribes a statement of the facts alleged to constitute those crimes, **‘including, where possible, the date and location of the crime’**. [...] The condition accords with article 6(3) of the European Convention on Human Rights (ECHR): ‘Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and **in detail**, of the nature and cause of the accusation against him.’ Hence the ‘facts’ **cannot be stated in vague terms**. The suspect must be privy to the ‘facts’ to which the charges pertain for the purposes of his defence. This corresponds to ‘**in detail**’ in the European Convention Human Rights. This does not hold true for the warrant for the Applicant’s arrest. The warrant **contains only charges**, not facts. The ‘narrative’ of the ‘facts’ is confined to restating the charges: Presentation and filing of false or forged documents (which documents?); ‘Coaching’ (how?) of ‘witnesses’ (whom?) to give ‘false’ testimony; ‘Money transfers’ (in what amounts?) to ‘several’ Defence witnesses (to whom and when?). The ‘narrative’ merely ‘notes’ a ‘criminal scheme’, allegedly headed by Mr Jean-Pierre Bemba.”

⁴ ICC-01/05-01/13-261, 17.03.2014, p. 5, para. 3.

Failure to specify **dates, places, precise amounts or specific witnesses**.⁵

The statement of the facts is a formal⁶ and substantive condition for a warrant of arrest which, moreover, affects a suspect's fundamental rights. Failure to meet those conditions cannot be cured by evidence, which, moreover, and contrary to the Judge's claims, has thus far failed to prove anything, thereby compelling the Prosecution to request deferment of the confirmation of charges.⁷

As a result, after four months in detention, the Applicant is not in a position to ascertain the circumstances of his detention and is therefore unable to mount his defence. All he knows **are charges**. It is the warrant of arrest, the **commitment order**, which must set out the **factual circumstances** of pre-trial detention.⁸

4. The Single Judge committed an error of law in his response to the above where he avers that the Appellant cannot rely on the validity of the warrant of arrest at this stage, as no provision is made therefor in article 60(2) or in any other statutory texts, the only remedy being the right to compensation as set out in article 85.

5. **First**, the Appellant's main application cannot be considered to be an application for "interim" release, as construed by Prosecution and the Single Judge. Article 60(2)

⁵ ICC-01/05-01/13-71-tENG, 08.01.2014, para. 4: "What is more, in the 20 November 2013 warrant of arrest the Single Judge was compelled to note the '**the lack of concision**' which 'marks the Application' and the 'decision to articulate the counts **in generic terms**' (para. 11). The Single Judge's remark that 'a statement of the **necessary temporal and geographic circumstances** in which the crimes were allegedly committed would have been preferable, even at this early juncture' is contradictory in that 'necessary' statements cannot be 'preferable'. As such, the warrant of arrest is **contradictory** in that it enumerates the essential conditions which the statement of the facts must satisfy, yet countenances its absence."

⁶ De Hert, Paul; Flamme, Jean; Holvoet, Mathias ; Struyven, Olivia. Code of International Criminal Law and Procedure – Annotated. Larquier, 2013. p. 244.

⁷ ICC-01/05-01/13-71-tENG, 08.01.2014, para. 5: "In issuing the warrant of arrest, the Judge cannot refer to evidentiary material to compensate for the absence of the relevant particulars, since this is a formal (and substantive) requirement. However, this is what the Single Judge does (ICC-01/05-01/13-1-Red2, p.9/17). Indeed the Single Judge considers himself '... able to navigate the body of evidence tendered by the Prosecutor, relying also on Independent Counsel's work' (ICC-01/05-01/13-1-Red2, para. 11). [...] A general reference to evidence cannot cure the aforementioned nullity of the warrant of arrest. From such reference, it is further apparent that the Prosecutor ought to be able to set out the facts in detail ('objective [...] information and details') but did not. From this it is clear, all the more so, that the warrant of arrest is unlawful and null."

⁸ Van den Wyngaert, Chris. *Strafrecht en strafprocesrecht in hoofdlijnen*. Maklu, p. 1089.

of the Statute is hence not applicable thereto. The Single Judge erred in ignoring article 21(b) of the Rome Statute and, *inter alia*, article 9(4) of the New York Covenant of 19/12/1966. The Appellant's main prayer should be viewed purely and simply as an application for **immediate** release on the ground of unlawful arrest.⁹ By incorrectly characterising the application, crystal clear as it is, the Single Judge denied the Appellant his right to seise a court specifically with regard to the lawfulness of his arrest and pre-trial detention, regardless of whether the charges *per se* were confirmed. By conflating the two issues artificially, the impugned decision denies the Appellant his fundamental rights. Those rights consist in the ability to **immediately** seise a court concerning his right to liberty, without having to wait for a far-off decision on whether or not the charges are to be confirmed, especially as the confirmation was deferred for four months because the evidence tendered was considered insufficient, but was deemed sufficient to order his arrest and detention, which is contradictory. **The Appellant therefore prays the Appeals Chamber to urgently examine the issue of legality.**

6. Second, the Single Judge erred in law in finding that the **only** remedy for unlawful arrest and detention is the *right to compensation*.¹⁰ He thereby denied the Appellant the **right to be released**, the **primary remedy**. **The Appellant prays the Appeals Chamber to grant the primary remedy.**

7. The warrant of arrest is null and void in other respects.

The Single Judge makes several references to the work of "**Independent Counsel**" to enhance his conviction as regards the issuance of the warrant of arrest.

⁹ Paulussen, Christophe. *Male captus bene detentus?* Surrendering Suspects to the International Criminal Court. Antwerp; Oxford; Portland: Intersentia 2010, p.160 "4.2. Remedies: [...] The first is financial compensation and can be found in, for example para 5 of art. 9 of the ICCPR and of article 5 of the ECHR. [...] The second is **release** and can be found in paragraphs 4 of both articles which are also virtually identical. These paragraphs start with **the right of a person to go to the Court**. The words that follow are somewhat different, but they both stipulate the same, namely that the Court 1) must decide on the lawfulness of the arrest and the detention and 2) **must release** the person if (the arrest or) the detention is deemed unlawful."

¹⁰ *Ibidem*, p. 160.

Therefore “Independent Counsel”, who was appointed by decision of 29 July 2013,¹¹ appears to perform **investigative duties** concurrently with the Prosecutor, as per the instructions contained in the same decision, doing so “*ultra petita*” in comparison to what the Prosecutor requested (see *infra*).

Yet, **no instrument** provides for the intervention of an “independent counsel”. Under the Rome Statute system, investigative powers are vested solely with the Court’s Prosecutor, who shall investigate incriminating and exonerating circumstances equally.¹²

The Prosecutor may not delegate such powers to any other body.

Moreover, there is **no established procedure** in this instance, and the operating procedure “Independent Counsel” follows in the execution of his illegal “mission” is thus unclear. For example, is he required to investigate exonerating circumstances? In any event, the aforementioned decision is silent on this. It should be pointed out that Independent Counsel listens to, selects excerpts, translates freely and makes observations which are deductive rather than inductive, and subjective rather than objective. The fact that translation is not entrusted to an independent sworn translator and is unverifiable because the original texts are not specified means that independent counsel’s reports are not reliable, or for that matter legal. The Defence made submissions to this effect in its application.¹³

Criminal law is a matter of mandatory application and cannot therefore be “supplemented” by the bench. The Single Judge breached article 69(7) of the Statute

¹¹ ICC-01/05-52-Red2, 03.02.2014, pp. 7-8.

¹² Article 54 of the Rome Statute.

¹³ ICC-01/05-01/13-71-tENG, 08.01.2014, para. 6: “The Defence must therefore point out that the warrant of arrest is at least partially (see *supra*) based on the investigations of a person who has no legal or judicial mandate. The right to liberty is the rule and no one shall be deprived of his liberty save in accordance with a procedure prescribed by law (Article 5, ECHR; Article 9, International Convention on Civil and Political Rights). It emerges therefrom that it is not for the judiciary to create extrajudicial organs which may investigate with a view to the arrest of a person. In that regard, the warrant of arrest, with its explicit and categorical references (ICC-01/05-01/13-261, 17.03.2014 , p. 9, para. 13) to reports by an ‘independent counsel’ is therefore unlawful and null (article 69.7 of the Statute of Rome)”.

by relying on purported evidence which was unlawfully obtained, and which seriously impairs the fairness of the proceedings. The Single Judge committed an error of law in finding that this only related to whether or not the charges would be confirmed. He thereby acted in breach of article 60 of the Statute.

8. According to the Prosecutor, the work of “Independent Counsel” dealt exclusively with lawyers’ professional conduct, especially vis-à-vis confidentiality.¹⁴ While this premise is correct, the measure requested, is not.

In her request for appointment, the Prosecutor clearly attempted to compensate for a fundamental lacuna in the Court’s system, namely the **lack of an independent professional association of lawyers**, as envisioned by the United Nations Principles on the Role of Lawyers (Havana, 1990) which **make it mandatory to establish an independent professional association of lawyers for courts and tribunals**.¹⁵

Those principles are also echoed in the Charter of Core Principles of the European Legal Profession, for example at principles (a) and (j).¹⁶

It must therefore be concluded that there is a **global consensus** on those core principles, which **guarantee lawyers’ independence vis-à-vis the State**. Such independence also includes the **protection of their lawyer-client privilege**, which may be lifted only subject to very strict independent safeguards. Already in March 2010, the Presidency of the ICC noted the lack of an independent professional association of lawyers, as well mechanisms for guidance on professional ethics, and even instructed the Registry to consider the possibility of devising such mechanisms. That being said, the ICC regime, whereby exercise of the legal profession is regulated exclusively by the Registry, and hence the Court, is contrary to the aforementioned principles, and therefore the lawyers working at the Court do not

¹⁴ ICC-01/05-51-Red, 13.02.2014, p.13, para. 28.

¹⁵ United Nations Principles on the Role of Lawyers (Havana 1990): “**professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements.**”

¹⁶ www.ccbe.eu CCBE Code of Conduct Charter.

enjoy the amount of independence they require for the practice of their profession. As such, the regime is **unlawful**. The Appellant is a lawyer and also a member of the Kinshasa-Matete bar association. Insofar as he practises in Europe, all those core principles apply to him.

9. Thus the Prosecutor requested the appointment of counsel to perform duties that are normally, **exclusively** and obligatorily the responsibility of an independent professional association of lawyers elected by its membership, for the purpose of overseeing, *inter alia*, professional conduct only, for example in respect of confidentiality, another core principle contained in paragraph (b) of the principles.

Having been appointed by the Court, counsel cannot possibly be considered as “independent”. The “procedure” followed, which was not envisaged in the statutory texts, did not comply with the conditions prescribed in the aforementioned principles.

It was therefore for the **Dean of the The Hague professional lawyers’ association** to perform the tasks requested by the Prosecutor, given that the dean has been involved and is still involved in determining whether or not to lift the confidentiality of the documents seized during the Dutch authorities’ search of the office of the Defence for Mr Jean-Pierre Bemba Gombo. This signals **recognition by the Court**.

10. However, the problem also arises at another **level, in that** the tasks the Single Judge entrusted to “Independent Counsel”¹⁷ **only** comprise the investigative acts described above and **not oversight over confidentiality** as requested by the Prosecutor only. This is confirmed by the fact that in his reports, Independent Counsel is silent on **the key issue of the confidentiality of the conversations he/she has selected**.^{18 19}

¹⁷ ICC-01/05-52-Red2, 03.02.2014, pp. 7-8.

¹⁸ ICC-01/05-64-Conf-Exp-Anx, 25.10.2013, pp. 1-22.

¹⁹ ICC-01/05-66-Conf-Exp-Anx-Corr, 27.11.2013, pp. 1-50.

The Single Judge has therefore **omitted to put in place the necessary safeguards in respect of the Appellant's lawyer-client privilege both** as a member of Mr Bemba's Defence and as a member of the Kinshasa-Matete professional lawyers' association, as the Prosecutor nevertheless requested, in **recognition** of the lawyer-client privilege and the necessary mechanisms for its safeguard.²⁰

To the extent that it is based on the (unlawful) reports of "Independent Counsel", the warrant of arrest is itself unlawful under (article 69(7) of the Statute, and so is the detention arising from it. The Judge therefore committed an error of law.

11. The Single Judge committed a further error of law in deferring issues on the validity and legitimacy of the mandate vested in "Independent Counsel" to the hearings on the determination to be made for the purposes of deciding whether charges will have to be confirmed,²¹ in that examination of those issues goes to the validity and legitimacy of the investigative methods used in determining whether reasonable grounds existed to issue a warrant of arrest. This is moreover confirmed *a contrario* by the fact that the Pre-Trial Chamber has the obligation to periodically review its ruling on the detention.²²

The Single Judge's reasoning infringed both this legal provision and the Appellant's fundamental right to liberty.

12. Moreover, the Defence noted in its 8 January 2014 Application for Release²³ that the Single Judge's "satisfaction" "[TRANSLATION] may be largely based on the monitoring of telephone conversations between lawyers and between the client and lawyers", and **voiced a great deal of concern** about the lawfulness of the monitoring, as it is antithetical to the very notion of confidentiality. The Defence indicated that it

²¹ ICC-01/05-01/13-261, 17.03.2014, p. 6, para. 5.

²² Article 60.3 of the Rome Statute.

²³ ICC-01/05-01/13-71, para. 9.

“reserv[ed] the right to examine the motions and decisions which found such monitoring and of which it remain[ed] unapprised.”²⁴

The Single Judge was completely oblivious to this in the impugned decision.

However, the warrant of arrest refers to the Appellant’s participation in telephone conversations²⁵ and to the work of “independent counsel”.²⁶ In the impugned decision, the Single Judge re-emphasises this by referring to the reports of “independent counsel”.²⁷

The Defence for the Appellant opines that monitoring confidential telephone conversations between lawyers, as ordered by the Single Judge’s decision of 29 July 2013,²⁸ is **unlawful**, for two reasons.

13. First, it must be emphasised that the Prosecution’s application of 19 July 2013 for permission to monitor telephone conversations of Counsels Kilolo and Mr Kabongo (Mangenda) was mainly based on the unauthorised, hence unlawful, monitoring of the telephone conversations between Mr Bemba Gombo and Mr Kabongo Mangenda which were **systematically recorded by the Registry without authorisation, hence unlawfully**. The Registry forwarded the recordings to the Prosecution in breach of the 8 May 2013 decision²⁹ ordering the Registry to forward any *non-confidential* conversations to the Prosecution. Moreover, the Prosecution accepted them in violation of the same decision. Telephone conversations by the Appellant are

²⁴ *Idem*.

²⁵ ICC-01/05-01/13-1-US-Exp-tENG, 20.11.2013, p. 11, para. 17.

²⁶ ICC-01/05-01/13-US-Exp, 20.11.2013, p. 9, para. 11 *in fine*.

²⁷ ICC-01/05-01/13-261, 17.03.2014, p. 9, para 13: “The Single Judge was also able to rely on two reports submitted by Independent Counsel, respectively on 25 October 2013 (First Report) and on 17 November 2013 (Second Report), stating *inter alia* that the conversations between Aimé Kilolo and Jean-Jacques Mangenda showed that both ‘ont vraisemblablement, directement ou indirectement, donné des instructions à des témoins sur les propos qu’ils devaient tenir lors de leur déposition’, as well as including transcripts of telephone calls between Aimé Kilolo and Jean-Jacques Mangenda in the course of which they discussed about what the witnesses had said during their testimony, or what future witnesses would say, the amount of ‘soutien financier’ to be given to the witnesses’ families, or money transfers which should be made to them, including by Fidèle Babala.”

²⁸ ICC-01/05-52-Red2, 03.02.2014.

²⁹ ICC-01/05-46-Conf-Exp, 08.05.2013.

confidential, on the one hand, under regulation 97 of the Regulations of the Court, regulation 174(1) of the Regulations of the Registry, articles 7(4) and 8 of the Code of Professional Conduct for Counsel, as well as basic international rules, including Article 16 and especially Article 22 of the United Nations Principles on the Role of Lawyers (Havana 1990), and, on the other hand, by virtue of the fact that the Appellant **is a lawyer**. This was **legally recognised** by the Prosecutor in her 19 July 2013 request of³⁰ where she cited the **need to seek authorisation** in view of the fact that the Appellant's telephone calls are confidential. The Prosecutor cannot therefore maintain that the Appellant's calls to Mr Bemba Gombo are not confidential without contradicting herself. As the ground for the 19 July 2013 request was defective, the decision arising from it is also defective. Given that the monitoring authorised was unlawful, so also is the resultant warrant of arrest.

14. Second, it is worth noting that the Prosecutor did not request **the lifting of the Appellant's immunity** before seeking authorisation to monitor his telephone conversations, thereby rendering the monitoring unlawful. This in itself is another reason why the monitoring the cited telephone conversations between Mr Bemba Gombo and the Appellant is unlawful. The Defence was unaware of this when it filed its Application for Release, since the Presidency's 20 November decision to waive immunity had not been declassified by then.

As the warrant of arrest was mainly based on unlawful monitoring of confidential conversations, moreover, between persons who are entitled to immunity, and on review of the unlawful monitoring thereof by "Independent Counsel", it is hence both unlawful and null and void,³¹ in that it violates article 69(7) of the Statute. The Single Judge omitted to take this into account and therefore committed an error of law. He also infringed articles 25 and 30 of the Headquarters Agreement.

³⁰ ICC-01/05-51-Red, 13.02.2014, pp. 3-4, para. 3.

³¹ Violation of Articles 25 and 30 of the Headquarters Agreement.

15. Insofar as the warrant of arrest is null and void, the Applicant's pre-trial detention is also unlawful and thus infringes his right to liberty.

The only remedy is to **release the Applicant**.^{32 33} In refusing to release the Applicant, the Single Judge has violated the Appellant's fundamental right to liberty.

The Applicant has the inalienable right to seek court review of the lawfulness of his arrest and detention.³⁴ The Single Judge committed an error of law in finding that the Appellant's application is in fact an "appeal" against the warrant of arrest, an appeal that is not envisioned by the statutory texts. It would indeed be absurd to suggest that the Court may issue unlawful warrants of arrest without the possibility of judicial review, as this would render devoid of meaning the provisions of articles 58 and 60 of the Statute, as well as the relevant international instruments set out in article 21 of the Statute.

The Appellant therefore requests the Appeals Chamber to order his release.³⁵

2.2 In the alternative: conditions for pre-trial detention; application for release

2.2.1 The conditions for issuance of a warrant of arrest were not met

16. **A combined reading of** Articles 58 and 60 of the Rome Statute clearly reveals that the conditions laid down in article 58 in respect of the arrest and pre-trial detention of a suspect must be met for the entire duration of the detention.

2.2.1.1 Reasonable grounds to believe that the Applicant has committed a crime

³² Paulussen, Christophe. *Male captus bene detentus?* Surrendering Suspects to the International Criminal Court. Antwerp, Oxford, Portland: Intersentia, 2010, p. 160.

³³ Article 9(4) of the International Covenant on Civil and Political Rights: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his **release** if the detention is not lawful."

³⁴ C. Paulussen, *op.cit.*, p. 161 and references supplied.

³⁵ *Idem*.

17. The Defence notes in this regard that the warrant of arrest contains **errors of fact** in addition to the formal and substantive errors described above. The warrant states, *inter alia*, that

(i) **He frequently appears to receive money transfers via Western Union, particularly when Defence witnesses appear in court**

18. The Appellant has made submissions on this subject, including and especially about the existence of a record³⁶ of the monies deposited by the Appellant.³⁷

Having initially refused to allow this record to be communicated to the Defence³⁸ on incomprehensible ground that it relates to the “main case”, the Single Judge violated the “equality of arms” principle, given that he subsequently granted the Prosecution’s request, whereas the Prosecution had recognised failure to meet its obligation to investigate incriminating and exonerating circumstances equally.³⁹ The record reveals that the monies received via Western Union **were not used to corruptly influence witnesses to give false testimony**. The Single Judge therefore committed an error of fact and law in refusing to rely on this record, even though it was prepared by the Court, and continued to maintain that the Appellant

³⁶ ICC-01/05-01/13-198-Conf-AnxA, 17.02.2014.

³⁷ ICC-01/05-01/13-73, paras. 14-15: “14. In this respect, it must be recalled that the Applicant is alleged to ‘frequently [...] receive’ money transfers, described as essentially continuous and therefore not solely or mainly coinciding with the appearance of witnesses in court. Hence, the transfer of money *per se* in no way proves the accusation brought by the Prosecutor. At no point does the warrant of arrest mention any proof whatsoever of the Applicant transferring such sums to witnesses, in all likelihood in The Hague – the Prosecutor’s application, the Judge notes, fails to specify the locations or dates of the crimes alleged (see *supra*) – on a date unspecified.

15. Further, it must be recalled or pointed out that the sums received by the Applicant in his capacity as Case Manager were on every occasion transferred to the detention centre administration in Scheveningen for payment to Mr Jean-Pierre Bemba’s account to cover his needs in prison. The Prosecutor, who is, nonetheless duty-bound to investigate incriminating and exonerating circumstances equally, therefore failed to request that the detention centre administration list the amounts deposited by the Applicant from 2011 until 2013. The Prosecutor thereby misled the Single Judge, who manifestly was not informed of the purpose of the money, impelling the conclusion that the existence of money transfers *per se* to the Applicant in no way proves the particularly serious count of corruptly influencing witnesses. Furthermore the question arises as to how it would have been possible to corruptly influence witnesses with an account which the detention centre administration manages.”

³⁸ ICC-01/05-01/13-73.

³⁹ ICC-01/05-01/13-185.

“appeared” to have been the source of the monies transferred to witnesses, without giving details (dates, payment methods, the witnesses concerned) or indeed any proof of his assertion.⁴⁰ Accordingly, **there is no evidence of the alleged procurement of witnesses to give false testimony**, whereas this was the main ground for issuing a warrant for the arrest of the Appellant.

ii) He works very closely with Aimé Kilolo in respect of coaching witnesses and devising instructions to be issued to them

19. The Defence found this imprecisely articulated reasoning rather surprising.⁴¹ The Single Judge committed an error of fact in omitting to respond to the contention that it would have been impossible for the Appellant to aid, abet or otherwise assist in the influencing of witnesses given that he had no contact with them, and in failing to counter the contention by way of specific evidence. The Single Judge simply referred to the reports of independent counsel,⁴² without indicating which specific passages he was referring to in relation to the Appellant. The Judge is therefore partial in this respect, as **none of the selected** conversation excerpts shows any complicity in issuing specific instructions to a witness, containing facts that he would not have presented of his own accord, or provided proof that the witness also “followed”

⁴⁰ ICC-01/05-01/13-261, 17.03.2014, pp. 10-11, para. 17.

⁴¹ ICC-01/05-01/13-71-tENG, para. 16: “That the Applicant worked ‘closely’ with Mr Kilolo, his supervisor in Mr Jean- Pierre Bemba’s Defence team, is self-evident. It is worth recalling that the Applicant was the team’s Case Manager, and as such, performed the role of **executor**, taking instructions from Lead Counsel, Mr Kilolo, and Co-Counsel, Mr Haynes. Attention must also be drawn to the fact that the litigation strategy was, as is appropriate, determined by those two persons, and not the Applicant, who had no part in the interviews with witnesses, and therefore could not have influenced them in any way. Lead Counsel, Co-Counsel and the Legal Assistant, Ms Kate Gibson, but not the Applicant, travelled to meet the witnesses. The Registry of the Court is very well aware that the Applicant took part in only two trips: to Cameroon and the CAR (see visas) and strictly for the purpose of the ‘handover’ of witnesses. On that occasion, he had no personal contact with any of the witnesses. The Defence requests that the Registry be ordered to provide further information in this regard. Since the warrant of arrest does not spell out his purported role in ‘coaching’ witnesses ‘to provide false testimony’, it is impossible to fathom how an executor such as the Applicant could have ‘influenc[ed]’ witness, let alone ascertain the alleged means he employed to do so. Coaching would perforce have taken place in The Hague, which the warrant of arrest fails to state, despite the crucial importance of such information.”

⁴² ICC-01/05-01/13-261, 17.03.2014, p. 10, para. 15.

such “instructions”. The repetitive, standardised comments of counsel,⁴³ covering all manner of offences, are never adapted to the excerpt concerned and expose his furtively deductive rather than inductive approach, his lack of independence and his bias. The reports contain no concrete proof about the Appellant. The Single Judge therefore committed errors of fact in finding them “probative” without stating the specific facts relied upon.

20. As regards the charge of “presenting evidence that the party knows is false or forged” by aiding, abetting or otherwise assisting therewith – the Defence pointed out that the warrant of arrest mentions no “fact”, but simply a charge.⁴⁴ Moreover, the charge had not been established (see ongoing unadjudicated matter at bar in the main case). The Single Judge therefore committed an error of fact. Moreover, in the meantime the Trial Chamber may have issued a decision on the matter. The Single Judge omitted to verify this, whereas he should have done so. The Appellant prays the Appeals Chamber do undertake the verification.

iii) He takes part in certain privileged conference calls with Jean-Pierre Bemba and Fidèle Babala

⁴³ ICC-01/05-66-Conf-Exp-Anx-Corr, 27.11.2013, pp. 25, 27-28: “[TRANSLATION] In all likelihood concerning the coaching of witnesses, the fabrication of testimony, the production of false testimony, corruptly influencing witnesses and/or interfering with the attendance or testimony of a witness”.

⁴⁴ ICC-01/05-01/13-71-tENG, 08.01.2014 para. 1: “In this respect, the Defence would point out that the discussion on the purported ‘forgery’ of a certain number of exhibits, which mainly come from one witness, was pending before the Chamber and that no decision had hitherto been taken on this issue critical to the ‘second level’ instituted artificially by the Prosecutor. It is striking that the challenge raised against the lack of authenticity of the exhibits concerned was first and foremost written by Co-Counsel, Mr Peter Haynes, who had also cross-examined the witness in question on the matter. Said witness then confirmed the content of his or her written statements, thereby contradicting in factual terms the purported ‘lack of authenticity’. The problem nonetheless lay in the witness’s self-incrimination in writing. In any event, the Applicant’s role in this issue was purely ‘passive’, as befits a case manager, who merely introduces documents given by counsel into the system. The Defence must note that it is, to say the least, bizarre to cast the Case Manager as an accomplice to the purported ‘forgery’ of documents **coming from a witness**, whereas those who went on mission to interview the witness and wrote the submissions concerning the exhibits’ apparent lack of authenticity raised by the Prosecutor, Mr Haynes and Ms Gibson, have not been pursued. Further, where an issue at bar has been not adjudged, the Defence cannot countenance the Prosecutor’s ‘pre-emptive action’ by bringing criminal charges and thereby ‘forcing the hand’ of the Chamber, which has yet to dispose of this delicate matter. Manifestly, the ensuing risk is that the Chamber may no longer be able to adjudicate the matter objectively.”

21. Participation by the Applicant in telephone conversations is not in and of itself “suspicious”. Yet the Single Judge based his finding thereupon. However, the Appellant has stated that he did not participate in **any** of the conversations in question. The Single Judge did not give specific details about his accusations (dates?).

Equally noteworthy is the fact that the warrant of arrest refers to “privileged” as an incriminating element. Yet, their privileged status is a **legal requirement** which applies to the defence team in its entirety and cannot be viewed as “suspicious”, given that it is mandatory.

It must therefore be concluded that the warrant of arrest **does not specify or establish the “reasonable grounds”** and hence the Applicant cannot mount his defence based on concrete facts. As matters now stand, the purported “grounds” cannot be presumed to exist. It is not sufficient for the Judge to simply assert that he is “satisfied”.

2.2.1.2 Condition for the necessity for the arrest

a) To ensure the person’s appearance at trial

22. The warrant of arrest states that the Applicant is in possession of “identity documents” enabling him to travel freely “not only throughout the Schengen area, but also to non-States parties to [the] Statute”. In the impugned decision,⁴⁵ the Single Judge should have recognised implicitly that it would be incorrect to assert that the Appellant can still travel freely outside the Schengen area given that his passport is with the Registry. It was therefore incorrect to cite that the Applicant could travel to non-States Parties, as stated in the warrant of arrest, as is proof of the risk of “flight”.

With regard to the contention that the Registry is also holding the Applicant’s sole residence permit – the MFA card issued by the Ministry of Foreign Affairs of The

⁴⁵ ICC-01/05-01/13-261, 17.03.2014, p. 14, para. 27.

Netherlands, which is the only valid document connected to his passport allowing him free movement within the Schengen area, the Single Judge opines that it would be possible to travel within the Schengen area without the need to show proof of identity or a residence. Needless to say, it is unrealistic to assert that a non-European lawyer can travel in Europe without the need to show such proof. But above all, the inability to travel outside the Schengen area is the decisive factor, given that the Appellant could not seek refuge in non-party States and therefore could be re-arrested at any time if he failed to appear when summoned.

Hence, pre-trial detention is no longer necessary, if at all it ever was, *quod non*. The Single Judge therefore committed an error of fact and of law.

He committed a further error of law in referring to the gravity of the alleged crimes in his assessment of the risk of absconding, in that he infringed the presumption of innocence, as well as article 58 of the Statute, as it does not list the gravity of the crimes as a criterion.

23. The same holds true for the accusation that the Applicant “[is]” part of a “network” which could furnish him with the financial resources to “abscond the jurisdiction of the Court”.

As argued above, membership of a “network” has not been established. The Applicant received funds in entirely legal fashion, and he has also explained that those funds were used for legal purposes (see *supra*), and were not put to personal use.

24. The Appellant has also identified traits of his personality which indicate that he is not a “flight” risk.⁴⁶ The Single Judge committed an error of law in dismissing this

⁴⁶ ICC-01/05-01/13-71-tENG, 08.01.2014, para. 21: “The Applicant is a member of the Kinshasa Bar and as such has dedicated his career to justice and the International Criminal Court in particular, where he has worked continuously since the time of the arrest of the first person to stand accused, Mr Thomas Lubanga Dyilo, in 2006. His professional integrity is beyond reproach and court proceedings have never been brought against him. He dearly wishes his professional integrity to remain untarnished. Hence, it is inconceivable that the Applicant would not appear at proceedings brought against him, when from the outset he has claimed his innocence. Reference in the warrant of arrest to the

as a criterion.⁴⁷ The risk of flight should be assessed in reliance on a number of factors (see *infra*). These may include the personality of the person concerned.

25. The Appellant made submissions on this subject in his application.⁴⁸ The Single Judge did not respond to those submissions concerning means and motivation and thereby committed an error of fact and law in determining whether the arrest was “necessary”, yet it was not.

26. The following is also noteworthy: The Applicant’s travel within the Schengen Area, almost exclusively for the purpose of visiting the United Kingdom, where his wife and two infant children live, could, under no circumstances, even were it still possible, be construed as an attempt to “abscond”, simply because all the States concerned are States-Parties and are duty-bound to cooperate with the Court, as the very swift arrests have demonstrated.

That the Applicant’s young family lives in Europe is in itself a guarantee that he will appear promptly for trial whenever summoned. The Single Judge did not take this into account and thereby committed an error of fact.

‘possibility’ of the Applicant’s absconding from justice disregards this fact. Thus, the Applicant finds it regrettable that Prosecutor, who is very well acquainted with him, was not content to simply issue the summons to appear contemplated in article 58(7) of the Rome Statute.”

⁴⁷ ICC-01/05-01/13-261, 17.03.2014, p. 13, para. 25

⁴⁸ ICC-01/05-01/13-71-tENG, 08.01.2014, para. 22: “In the alternative, it is submitted that the warrant of arrest mentions only a ‘possibility’ of the Applicant’s absconding from justice. Such possibility, which disregards the Applicant’s personality, is insufficient in law to meet the condition of necessity of an arrest to ensure the Applicant’s appearance. Appraisal of the condition of necessity entails an element of prognosis and hence conjecture, admittedly. Yet such ‘conjecture’ must respond to specific and verifiable criteria concerning essentially the ‘**means and motivation**’. As regards the ‘**means**’, the Applicant has already stated categorically: they are non-existent. The Movant’s sole source of income was his earnings from the International Criminal Court – clearly insufficient to arrange an ‘absconson’. [...] It is also certain that the Applicant will not, as the Prosecutor postulates, receive any external ‘assistance’, since the assets of Mr Jean-Pierre Bemba Gombo and Fidèle Babala Wandu were frozen after issuance of the warrant of arrest. In addition, it must be considered that the Applicant is a lawyer, not a politician, and as such is isolated, with no ‘network’ to potentially ‘take [him] in’ or offer him any ‘succour’ whatsoever. As to the ‘**motivation**’, the Applicant was equally categorical: he has every interest in seeing all suspicion cast on him in this matter dispelled and therefore in defending himself. The future of his career lies at stake. Therefore there can be no such ‘motivation’ to abscond justice and the jurisdiction of the Court. In any event, the warrant of arrest makes no mention of any motivation and is therefore in this sense ill-grounded.”

b) To ensure that the person does not obstruct or endanger the investigation or the court proceedings

27. The Single Judge acknowledged that the investigation is almost completed, and that seizures have been carried out, but then went on to assert that the Appellant informed Mr Kilolo of an ongoing investigation concerning both of them, adding that this could signal Mr Kilolo's intention "to take action".⁴⁹ The Single Judge committed an error of fact and in the assessment of the evidence. Stating that an investigation is underway does not constitute criminal intent. This reasoning is hard to fathom, and should not be upheld.

c) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances

28. The warrant of arrest states that "in all likelihood" the "crimes" continue to date. The Appellant pointed out that the assertion regarding "likelihood" was baffling.⁵⁰ The Judge simply responded by way of hypotheses, asserting for example that the main trial could be re-opened (which is obviously not the case) and that crimes might be committed in respect of these proceedings (which crimes?). He thus committed an error of fact.

29. Accordingly, the Defence maintains that the conditions set out in article 58 in regard to a person's arrest were not met at the time of his arrest, as the arrest was not

⁴⁹ ICC-01/05-01/13-261, 17.03.2014, p. 16, para. 36.

⁵⁰ ICC-01/05-01/13-72, 08.01.2014, para. 25: "The Defence must note that the main trial was coming to a close and that all the Defence witnesses had been heard. The last witness finished giving evidence on 22 November 2013, shortly before the Applicant's arrest. The Prosecutor's 'timing' in this case is therefore most astounding. Of further note is that the Pre-Trial Chamber lifted the restrictions, in clear contradiction with a scenario of continuing criminality. Further still, continuation of the main trial seems unfeasible, whilst the current proceedings brought by the Prosecutor have not been disposed of in their entirety. Indeed, how can a trial proceed in which the validity of certain evidence is the subject of other proceedings? It must be further underscored that by virtue of his arrest, the Applicant is, at least *de facto*, no longer part of Mr J.P. Bemba's Defence team. How, then could he 'continue' to 'influence' witnesses, assuming that some remain to be heard, which is not so. It is therefore clear that there is no risk of continuation of the crimes in question, had they been established, which is not the case."

necessary. The Appellant is therefore confident in his application for immediate release.

2.2.2 As a further alternative: application for interim release

30. The Defence submits that, at the very least, the mandatory conditions for continued pre-trial detention, as set forth in article 58 of the Rome Statute, are **no longer** met (see *supra*). In such a circumstance, article 60(2) of the Statute prescribes the interim release of the suspect.

The Single Judge committed a an error of fact and law, and ignored the principle that texts must be construed in accordance with their actual terms when he asserted⁵¹ that the United Kingdom would not be willing to accept the Appellant on its territory. The letter in question does not say this. Moreover, the law entitles the Appellant and his family to live together.^{52 53} By virtue of the presumption of innocence, they cannot be denied this right.

The Defence has argued in respect of the Applicant that there are further reasons why he should be reunited with his family. The Applicant is the father of two infant children, little boys who need him to be around, particularly since his wife is expecting a third child around 14 April 2014.

The Applicant's young family therefore has a pressing need for his presence and support. Moreover, the pre-trial detention, currently **disproportionate**, puts the young family under a great deal of pressure, both emotional and financial.

These humanitarian reasons were not considered by the Single Judge. The fact that the Appellant did not propose conditions [for release]⁵⁴ is no impediment to his being accorded interim release. The Single Judge committed an error in law. Neither article 60 of the Statute nor rule 119 states that conditions [for release] need to be

⁵¹ ICC-01/05-01/13-261, 17.03.2014, p. 18, para. 42.

⁵² New York Covenant, 20.11.1989, Article 8.

⁵³ European Directive 2004/38/EC of 29.04.2004, Article 2.

⁵⁴ ICC-01/05-01/13-261, 17.03.2014, p. 18, para. 40.

proposed. It is within the Court's discretion to impose such conditions where necessary.

2.2.3 Request for a hearing (rule 118(3))

31. The Defence requested that a hearing be held in accordance with rule 118(3).⁵⁵ The Single Judge did not respond to this legal argument.

⁵⁵ ICC-01/05-01/13-71, para. 28: "In matters of pre-trial detention, a hearing is the absolute rule and rule 118(3) mandates an annual hearing. It follows that a hearing must also be held at the very least at the outset of pre-trial detention, when the weighty matters of validity and lawfulness first and foremost arise. It is inconceivable that the first hearing on arrest and pre-trial detention be held one year after the suspect's arrest, particularly since the arrest itself raises discrete and very specific issues which must be canvassed there and then and not one year down the line."

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER TO:

Find the appeal admissible and with merit;

Order the immediate release of suspect Jean-Jacques Kabongo Mangenda.

In the alternative, order the interim release of said suspect, while attaching any conditions that the Single Judge may deem necessary;

Take formal note that the Applicant proposes to stay in the United Kingdom with his family, at 25 Radcliffe Street, in Manchester;

Order a hearing.

[signed]

Jean Flamme, Counsel for the Defence

of

Jean-Jacques Kabongo Mangenda

Dated this 24 March 2014 at Ghent, Belgium