Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/05-01/13**
Date:**12 March 2014**

THE APPEALS CHAMBER

Before: **Judge Akua Kuenyehia, Presiding Judge**
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Usacka
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

Confidential

Response to the 3 March 2014 "Request for disqualification of the Prosecution from the investigation and prosecution of Aimé Kilolo Musamba and Jean-Jacques Kabongo Mangenda"

Origin: 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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Legal Representatives of Victims

Legal Representatives of Applicants

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

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Amicus Curiae

REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section **Others**

1. Background

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

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.

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. On 22 January 2014, the applicant's Defence Counsel filed a request with the Single Judge of Pre-Trial Chamber II "for the Court to decline jurisdiction", which is still pending.

3. On 3 March 2014, the Defence for Mr Aimé Kilolo filed a request for "disqualification" of the Prosecutor.

2. Facts

3. The charges brought pursuant to article 70 of the Rome Statute concern 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") the authenticity of certain exhibits was under discussion, including the written statement of a senior officer, who, by reason of his potential self-incrimination in said exhibit, subsequently recanted whereas he had in fact confirmed the exhibit's content during his in-court testimony.

At the time of the arrests in the case at bar, the Chamber had yet to rule on the matter.

It is therefore most astonishing that the Prosecutor did not even await the Chamber's decision before seeking the arrests.

5. Furthermore, in the main case, the Defence obtained a copy of a letter made public and dated 7 June 2013[1] from a Prosecution witness to the Presiding Judge of Trial Chamber III, the President of the ICC, the Secretary-General of the United Nations, Human Rights Watch and the Prosecutor, amongst other bodies and/or persons.

In that letter, the witness laid claim to **money which the Prosecutor had promised him** and around twenty of her other witnesses for school fees, allowances, rent, a rental deposit, loss of earnings, resumption of business activities, a fence for a residential property and family security – **very significant amounts of money**, it would appear.

In a confidential motion dated 11 November 2013, the Defence sought disclosure of an unredacted version of the letter, including details of payments already effected. The Defence also requested that the witness be recalled for questioning on the subject.

It is disturbing that the suspect was arrested while this matter was *sub judice*.

[1] ICC-01/05-01/08-2827-Conf-AnxA.

6. These are not "isolated events". The problem of payments by the Prosecutor to intermediaries and/or witnesses arose previously 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.

3. 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 […] 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

[2]ICC-01/04-01/06-2843 14-3-2012 8/17

> 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.

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.

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

In this case, however, the same Prosecutor is the adversary of the suspects in an ongoing case, in which the parties (Defence and Prosecutor) accuse each other of corruptly influencing witnesses and impeding the course of justice (see *supra*).

Furthermore, the Prosecutor has a manifest **interest** 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** to which the Trial Chamber adverted 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.

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

9. A further reason exists as to why the Prosecutor should not investigate and prosecute this case, namely, the principle of **equality of arms**.

Empowered to investigate incriminating circumstances vis-à-vis her adversaries in the main case, namely 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 also hangs over them. The "**balance of forces**", essential to a fair trial, is thus rendered **non-existent**.

The question even arises as to the independence of those unprosecuted counsel in a defence team which stands charged with the 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 on 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 the witnesses raised by the Prosecution without also risking the same prosecution?

Evidently not.

They therefore 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 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 trial, meaning that "criminal proceedings must await the outcome of criminal proceedings"(*see* warrant of arrest). The Prosecutor has therefore in a sense entered a

[4]United Nations–Basic Principles on the Role of Lawyers- Havana 1990 – Article16.

"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 however guarantees.

10. The Prosecutor's conflict of interest and her lack of impartiality are immediately apparent from her approach to the case at bar.

The Prosecutor's duties in the ICC regime carry with them an obligation of **objectivity and fairness** when tendering evidence that mirrors her duty to investigate exonerating circumstances. In that, her obligations are similar to those of investigating judges in the Romano-Germanic jurisdictions.

11. It is noteworthy that in her 19 July 2013 request,[5] the Prosecutor refers to the monitoring of telephone conversations between Mr Jean-Pierre Bemba Gombo and the applicant, recorded unlawfully and systematically by the Registry, referring to Pre-Trial Chamber II's 8 May 2014 decision ordering, *inter alia*, that recordings of **non-privileged** calls be made available to the Prosecution.

It was on the basis of that unlawful monitoring that, by a decision of 2 July 2013,[6] the Prosecution was authorised to monitor privileged telephone calls placed between lawyers.

The Registry is mistakenly of the view that professional privilege does not apply to the telephone calls of a case manager, the position held by the applicant in Mr Bemba Gombo's defence team.

That position constitutes a breach of regulation 97 of the Regulations of the Court and regulation 174(1) of the Regulations of the Registry, as well as Article 7(4) and 8 of the Code of Professional Conduct for counsel and basic international rules,

[5]ICC-01/05-51-Red 13-02-2014.
[6]ICC-01/05-52-Red2 03-02-2014.

including the United Nations Basic Principles on the Role of Lawyers (Havana 1990), articles 16 and 22, and article 2.3 of the Code of Conduct for European Lawyers (CCBE).

Those principles suggest that the obligation of and right to confidentiality extends (naturally) to all members of a defence team. That makes perfect sense because Counsel would otherwise be unable to communicate with members of his team. It applies even more so to the case manager, since all information input into the data processing system must go through that manager. He is therefore familiar with the whole Defence strategy.

There is another reason for such confidentiality: as both the Registry and the Prosecutor must have known, the applicant is a **member** of the Kinshasa-Matete Bar and as such was bound by a duty of confidentiality.

In making those completely unauthorised recordings of those conversations and forwarding the recordings to the Prosecutor, a crime was undoubtedly committed as the Prosecutor was aware or should have been aware, especially since in her request of 19 July 2013 she was preparing to seek authorisation to monitor calls made by the same applicant in Belgium and the Netherlands and, in that same request, the appointment of an independent counsel to ensure that privileged conversations did not come into her possession.[7]

By seeking that authorisation also in respect of Mr Jean-Jacques Kabongo Mangenda, case-manager,[8] the Prosecutor has admitted that he was legally covered by rules of confidentiality.

By collecting and listening to telephone calls between Mr Jean-Pierre Bemba Gombo, unlawfully recorded for years by the Registry in violation of the decision of 8 May 2013 which authorised only the remittance of recordings of *non-privileged* calls, the Prosecutor was complicit in the violation of that same duty of confidentiality.

[7]ICC-01/05-51-Red 13-02-2014 13/14.
[8]ICC-01/05-51-Red 13-02-2014 3/14.

The Prosecutor thus violated her duty of fairness in tendering evidence and clearly demonstrated her conflict of interest, which caused her to ignore completely the constraints by which she subsequently claimed to be bound in her request of 19 July 2013. By obtaining the recordings of the said telephone calls between the applicant and Mr Jean-Pierre Bemba Gombo over a number of years, the Prosecutor knowingly caused the Registry to provide her with the most **private thoughts of the Defence,** which was clearly her aim, but which she attempted to disguise in her 19 July 2014 request by seeking therein, for the future, the appointment of an independent counsel (also unlawful for a variety of other reasons), to whom she would not however submit past unauthorised recordings.

12. But there is yet more. When undertaking all those investigative acts, the Prosecutor failed to take account of the **immunity** enjoyed by the applicant. The Prosecutor sought the lifting of that immunity only in her request of 19 November 2013, on the eve of the arrests.

13. Moreover, in her application seeking the issuance of the warrants of arrest, the Prosecutor systematically misled the Single Judge of Pre-Trial Chamber II.

The warrant of arrest of 20 November 2013 was based essentially on payments made to the applicant through WESTERN UNION and on the *assumption* that those amounts were used to corruptly influence witnesses.

However, in this regard, there could have been no suspicion in the Prosecutor's mind. The Prosecutor knew, or should have known, that the Registry keeps a record of the amounts deposited over the years by the applicant into Mr Jean-Pierre Bemba Gombo's account managed by the detention centre administration.

The transfers thus made by the applicant correspond exactly to the amounts received via WESTERN UNION. It should therefore have been obvious to the Prosecutor that it would have been impossible to corruptly influence witnesses using funds from an account managed by the detention centre administration.

Thus, the Prosecutor **falsified** the evidence submitted to the Single Judge in connection with the allegations of corruptly influencing witnesses, by failing to submit to the Single Judge the record kept by the Registry.

That would be inconceivable were it not for the manifest interest of the Prosecutor, who has thus added yet another unforgivable error to the list.

14. It is also worthy of note that in her obsession to "save" the main case "at any price", the Prosecutor conjured up a "Congolese" conspiracy with Mr Jean-Pierre Bemba Gombo at its centre, and manufactured a second case so as to ensure that Mr Bemba Gombo would remain in custody. That is why, in her purely politically motivated prosecutions of Mr Jean-Pierre Bemba Gombo, she arrested only the Congolese members of his Defence team, including the case manager, who, however, has no responsibility and is a mere aide who has no personal contact whatsoever with defence witnesses.

Responsibility for such contacts lies essentially and exclusively with Lead Counsel, Mr Aimé Kilolo, Co-Counsel, Mr Peter Haynes, and the legal assistant, Ms Kate Gibson. That could be ascertained from the record of trips made. The applicant appeared on that record only twice, during the purely administrative "hand-over" of two witnesses in the presence of the Registry.

It is equally noteworthy that most of the written submissions of the Defence in the main case relating to the authenticity of the exhibits had originally been drafted in English, and therefore by the English speaking members of the team, namely Mr Peter Haynes and Ms Kate Gibson.

However, some of the allegations involve the forgery of exhibits.

Had exhibits had been forged with the complicity of the Defence, is it conceivable that not only would the English speaking members of the team not have known but moreover, would have defended their authenticity? That makes no sense.

Therefore, by failing to also pursue those members of the team while prosecuting a team member who has no responsibility but who is Congolese, the Prosecutor has once again revealed her subjectivity and her total lack of independence and objectivity.

15. The Court cannot allow the continuation of an investigation conducted in such a subjective and partial manner and resulting in the pre-trial detention of several people for what will soon be four months.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER TO

Grant the request for disqualification of the Office of the Prosecutor filed by the Defence for Mr Aimé Kilolo Musamba.

Grant this also in respect of Mr Jean-Jacques Kabongo Mangenda.

[signed]

Jean FLAMME, Counsel for the Defence of

Jean-Jacques Mangenda Kabongo

Dated this 12 March 2014

At Ghent, Belgium