Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/05-01/13**
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THE APPEALS CHAMBER

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

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 Document

Response to the Prosecutor's grounds of appeal against decision ICC-01/05-01/13-703 21-10-2014 of the Single Judge of Pre-Trial Chamber II on Jean-Jacques Kabongo Mangenda's release

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

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1. Subject of the appeal

1. By judgment ICC-01/05-01/13-703 of 21 October 2014 ("the decision"), the Single Judge of Pre-Trial Chamber II reviewed his decision to continue the detention of Mr Jean-Jacques KABONGO MANGENDA ("the movant").

He ruled that the applicant would be released.

The movant considers the Prosecutor's appeal to be frivolous and vexatious.

Her grounds of appeal seek to limit the debate artificially to an interpretation of the principles governing the possible duration of pre-trial detention which is "minimalist" and inconsistent with the most basic universally recognised rights.

Furthermore, it should be noted that this issue cannot be limited to the application of article 60(4) of the Rome Statute, as the Prosecutor seeks artificially to do.

In the alternative, it should be noted that, in adjudging the merits of the impugned decision, the Appeals Chamber cannot restrict itself to the legal framework in which the impugned decision arose in accordance with the Prosecutor's erroneous argument, but must consider the issue from the wider perspective of the principles governing the issue.

2. The Prosecutor's grounds of appeal

2.1 Alleged misapplication of article 60(4) of the Rome Statute

2. The Prosecutor seeks to circumscribe the issue to the purportedly restrictive condition of an "inexcusable delay by the Prosecutor", whilst claiming that the decision made a finding to the contrary. This is incorrect.

The Chamber merely reasons to the general effect that the absence of any inexcusable delay by the Prosecutor does not relieve it of the obligation to ensure that the length of detention does not become unreasonable.

Furthermore, had that been the case, the Single Judge would have been wrong to consider that the delay could not be ascribed to the Prosecutor.

As a matter of fact, it was **the Prosecutor** who, on two occasions, **sought further time**, as she was unready.

It would also be wrong to ascribe the delay to the ongoing proceedings in the Netherlands, as the Prosecutor seeks to do.

In fact, at the 4 December 2013 status conference the Prosecutor duly announced that she could fulfil her undertakings concerning disclosure in prospect of a confirmation hearing to be held on 18 March 2014.[1]

This constituted an acknowledgement.

It follows therefrom that, at that juncture, the Prosecutor considered that she had sufficient evidence, which was also the view of the Single Judge, as stated in the warrant of arrest.

[1] ICC-01/05-01/13-T-2-conf-FRA ET 04-12-2013 9/29 lines 4-6.

Of further note is that the illegal recordings of telephone conversations, the mainstay of Prosecution evidence, were disclosed by the Dutch authorities very promptly.

The pre-trial proceedings will soon have lasted one full year. It cannot be claimed that this still is a "reasonable period", since in proceedings relating to the most serious crimes that period has often been shorter.

2.2 Allegation that article 60(4) of the Statute was applied exclusively

3. The Single Judge rightly did not limit himself to this article, contrary to the Prosecutor's assertion.
Indeed, the Single Judge referred to, among others, article 67(1)(c) of the Rome Statute.[2]
The Single Judge would have erred in law had he considered the duration of pre-trial detention only in respect of the regime of article 60(4) of the Rome Statute.

The movant is also entitled to be tried without undue delay as regards the confirmation of charges and the duration of his pre-trial detention, given the probable duration of a term of imprisonment, should he ever be convicted.

Of note is that from the outset, the Single Judge underscored the importance of expeditious proceedings and in that vein decided to bring this exclusively written phase to a close on 2 May 2014.[3]

The Single Judge has, however, postponed that date on three occasions, twice at the request of the Prosecutor and once on his own initiative, deferring the confirmation of charges **by a total of five months**.

[2] ICC-01/05-01/13-703 21-10-2014 5/7.
[3] ICC-01/05-01/13-T-1-FRA ET WT 27-11-2013 13/22 line 27.

The Defence was not even heard in relation to the last two deferments. The most recent, on 5 August 2014, was ordered on the day of the Prosecutor's request, absent any opportunity for the Defence to respond, in flagrant breach of its rights.

Regard must further be had in this respect to Judge Anita Ušacka's dissent,[4] which, akin to the 11 July 2014 Appeals Chamber decision, not only underlines that the crimes under article 70 of the Rome Statute are entirely unconnected to those under article 5, but also observes that were the movant to be convicted, the sentence passed could be considerably shorter than the maximum five-year term and amount only to a fine.

It is therefore certain that the duration of pre-trial detention, now already extended by five months by a series of rulings in favour of deferment, cannot exceed a certain proportion of the maximum sentence without causing irremediable prejudice to the movant's fundamental right to liberty and without prejudging, and casting on the trial bench a considerable burden of appraisal, which would undermine its independence.

Articles 9(3) ICCPR and 5(3) ECHR safeguard the right of every person not to be subjected to unreasonably long pre-trial detention, **a right which is not subordinate to prosecutorial conduct**.
The Prosecutor wrongly refers to "[TRANSLATION] the routine of proceedings" and investigative needs, including those of the Dutch judicial authorities.

Furthermore, the Single Judge was duty-bound to apply these instruments accordingly, pursuant to article 21(1)(b) and 21(3) of the Rome Statute.
For this reason, then, the restrictive framework which the Prosecutor seeks to impose is inconsistent with the most basic principles governing the right to liberty.

[4] ICC-01/05-01/13 OA 4.

4. Furthermore, the Prosecutor "overlooks" the provisions of article 60(3) of the Statute, which bind the Chamber to modify its ruling as to pre-trial detention if it is satisfied that "**changed circumstances so require**".
The Chamber did just this in the instant case.

"Changed circumstances" are of course established when the prolongation of the "reasonable" duration of pre-trial detention is disproportionate to the maximum sentence applicable for the alleged crimes at issue.
In this respect, the argument that the maximum five-year prison term could apply to each discrete offence under article 70 of the Statute, rather than to the offences as a whole, is just pure speculation on the part of the Prosecutor, and is entirely inconsistent with the plain language of article 70(3) of the Statute.
Clearly, the passage of time does not of itself constitute the changed circumstance, as the Prosecutor ventures to claim, thereby distorting the issue; rather, it is the fact that the duration becomes unreasonable over time which constitutes the new circumstance. So the decision must be read.

5. The Prosecutor's argument[5] that, by their conduct, the Accused have "**already**" "broken obligations […] owed to the Court" demonstrates the mentality of the Prosecutor, who is using pre-trial detention "**punitively**", thereby **subverting** it, which is antithetical to the principle of the presumption of innocence and contrary to every recognised principle (see above).
This why the Defence describes the pending appeal as frivolous and vexatious.
Once again, the Prosecutor is in breach of her obligation of objectivity.

[5] ICC-01/05-01/13-727 29-10-2014 12/18.

6. The Prosecutor also errs in arguing that article 58(1) conditions are present.

Whereas pre-trial detention becomes excessive over time, it also becomes disproportionate with regard to the original objectives, and the presumption of innocence and the right to liberty must take precedence over any need for detention, if indeed (ultimately, and if applicable) such a need "still" exists, which it does not (see below).

2.3 In the alternative: absence of conditions set forth at article 58(1) of the Rome Statute

7. The Single Judge previously circumscribed his review of the conditions laid down by article 58(1) of the Rome Statute, *inter alia* by determining that he should not confine himself to the arguments raised by the detained person and must afford consideration to the Prosecutor's submissions and have regard to "**any other information**" which has a bearing on the subject.[6]

Otherwise put, the Single Judge was, in the alternative, duty-bound to review, on his own motion, the matter *in toto*, and specifically to consider the effect of any new circumstance and piece of information connected to the need to continue or discontinue pre-trial detention, which must remain an exceptional measure, due consideration afforded to the presumption of innocence.

In that appraisal, it behoved the Single Judge to take account of the grounds of the 11 July 2014 appeals judgment, which, at the outset, held that offences under article 70, whilst serious, can by no means be considered as grave as the core crimes set forth at article 5 of the Rome Statute, the most serious crimes of concern to humanity.[7]

[6] ICC-01/05-01/13-612 05-08-2014 5/17, para. 2.
[7] ICC-01/05-01/13 OA 4 3/48.

It is expedient here to have particular regard to Judge Anita Ušacka's dissent, which is even more to the point, inasmuch as for that reason, she cast doubt on the lawfulness of the decision then impugned.

The Single Judge would then have been compelled to rule that there had been a material change to the initial circumstances requiring him to release the movant.

2.3.1 Reasonable grounds to believe that the movant committed a crime

2.3.1.1 Corruptly influencing and bribery of witnesses - total absence of reasonable grounds

8. At the outset the **mainstay** of the Prosecutor's evidence consisted of the payments made to the movant via **Western Union**, whereby, it is alleged, Mr Mangenda corruptly influenced witnesses.[8]

The movant nonetheless established through the list of monies deposited in the account held by Mr Bemba Gombo at the detention centre[9] – a list which was initially withheld from the Defence by the Single Judge, whereas it was subsequently imparted to the Prosecutor in complete contravention of the principles of equality of arms and adversariality – that the sums concerned had been paid into that account.[10] [11]

It was manifestly impossible to corruptly influence witnesses using an account managed by the detention centre.

Most striking is the Prosecutor's dereliction of the duty to investigate exonerating circumstances and to disclose exonerating evidence, which was nonetheless available to her at the Registry of the ICC, and that it was only at the instigation of the Defence

[8] ICC-01/05-01/13-US-Exp 20-11-2013 11/17 para. 17.
[9] ICC-01/05-01/13-198-Conf-AnxA.
[10] CAR-OTP-0080-0296.
[11] ICC-01/05-66-Conf-Anx-Corr 16-12-2013 pp. 36 & 38, excerpt of conversation 16/9/2013, 16:00: "[TRANSLATION] JJM calls the detention centre to give notice of his arrival to bring money to the Accused."

that the Prosecutor ultimately sought disclosure of the list which she had initially kept "concealed".

More tellingly, although apprised of that crucial material, the Prosecutor **deliberately** omitted it from her initial charges and therefore **falsified** the evidence vis-à-vis the movant, who is incarcerated on the basis of false material, a fact which the Court now implicitly recognises.

Such conduct also seals the **nullity of the proceedings** and pre-trial detention, requiring the bench to make a finding of **abuse of process** and to order an end to the proceedings and the immediate release of the movant.

The regime of the Rome Statute casts on the Prosecutor a duty of "**objectivity**", breach of which wholly vitiates and voids the proceedings, irremediably violating fundamental rights, including the right to liberty.

Thenceforth, the Prosecutor desisted, *de facto*, from mentioning these acts held against the movant in the indictment, **dropping, at least implicitly, the charge of "corruptly influencing" levied against him**.

No further mention is made of the movant in respect of any of the purported payments relied on by the Prosecutor.[12]

This also holds true for the summary table appended,[13] **in which he is unmentioned**, save for his photograph, for the purposes of the case.

Furthermore, out of the 14 witnesses relied on by the Prosecutor to substantiate the charges[14] no mention is made of those to whom the movant allegedly gave money.

[12] ICC-01/05-01/13-526 conf annex B1 14/81 paras. 33-34, 41/81 para. 115, 46/81 paras. 124-125.
[13] ICC-01/05-01/13-526 conf annex C1.
[14] ICC-01/05-01/13-526-conf pp. 66-70.

Therefore from the indictment itself and, moreover, the submissions of the parties, it is apparent that the movant had no part in payments for the purposes of corruptly influencing witnesses, assuming the payments were proven, which is not so.

Therefore, the circumstances have changed dramatically in that the Prosecutor desisted from reference to these acts in her indictment, *de facto* dropping the charge of corruptly influencing witnesses held against the movant.

2.3.1.2 Instructions to witnesses to give false testimony

9. The Prosecutor's written submissions and disclosures do not cite any concrete example of any such instruction on the part of the movant or to which he may have contributed in any way, and which may have been aimed at influencing a witness to give false testimony, which is also purported to have happened.

That matter has been addressed in submissions to which the Single Judge was privy in advance of the decision impugned. The Single Judge should, therefore, in the alternative and had the need arisen, have afforded it consideration.

2.3.1.3 Participation in certain conversations between Mr Bemba and Mr Babala

10. Such participation never took place, and the Prosecutor makes no mention of any such conversation, not even in her 30 July 2014 submissions.[15]

The Single Judge should have, potentially and as appropriate, afforded these factors consideration, given the submissions on the merits filed in the meantime.

[15] ICC-01/05-01/13-597-Conf.

2.3.1.4 Filing of false or forged documents

11. In the decision, the Single Judge should have, as appropriate, relied on rulings of Trial Chamber III of 17 March and 2 and 7 April 2014 as "new circumstances", in that they concern the objections raised by Prosecutor in the main case as to the authenticity of the documents herein impugned, which have, however, been authenticated in the main case in the meantime.

Indeed, it must first and foremost be remarked that the position of the Prosecutor, on which the charges in the present case rest, specifically in respect of whether documents were false and/or forged, was dismissed by a ruling which constitutes ***res judicata***.

Save where set aside or amended on appeal or by a decision remitting it for reconsideration, this ruling remains therefore **the sole judicial truth**.
By refusing to comply with this ruling and by maintaining the fallacious allegation of forgery and use of forged documents, the Prosecutor is in breach of her obligation to comply with judicial decisions of the ICC itself.
The Defence is greatly disconcerted by this state of affairs and considers that by so acting the Prosecutor **is committing an abuse of rights and abuse of process**.

Conclusion

12. The Prosecutor, moreover, does not in any way specify the other concrete reasonable grounds to believe that the movant committed a crime.

She merely adverts to his decision on the issuance of a warrant of arrest,[16] whereas the scant factual considerations relied on therein are no longer applicable.

[16] ICC-01/05-01/13-612 8/17 para. 11.

A decision to continue pre-trial detention must be clearly grounded in the conditions for which article 58(1) of the Rome Statute makes provision, which must be continually re-evaluated throughout the pre-trial detention period.

The Single Judge's discernment of changes in the case should therefore have compelled him to find an absence of reasonable grounds and release the movant accordingly.

2.3.2 Alternative submission: necessity of pre-trial detention

2.3.2.1 To ensure the person's appearance at trial (article 58(1)(b)(i))

13. Contrary to the Prosecutor's submissions, the Single Judge was right to consider that signature of an undertaking to appear would constitute a sufficient guarantee.

In fact, in the meantime and as of the 17 March 2014 decision, the movant fathered a third child, who was born in April 2014 (see birth certificate appended to the 30 June 2014 submissions).

The event is indeed a new, decisive consideration since it is quite clear that the wife of the movant, who is still a student and not employed, is no longer able singlehandedly to run a household of three young children, including an unweaned infant.

This factor is not only a guarantee that the movant will not abscond – where to we are not told; His wife and children are political refugees as a result of his activities in the Bemba case – but also that the family depends on his employment, which he has every interest in keeping, such that he has to appear in court to defend himself, since his burgeoning career is at stake.

This holds particularly true in that the movant comes from a family of lawyers: his father practised before the Court of Cassation of the DRC and his uncle, Mr Mbuyi Mbiye, who is on the ICC list of Counsel, is the current President of the National Bar of the DRC.

The latter considerations, of which the Defence was unapprised at the time of applying for release, are therefore also new and had yet to be raised.

However this factor concerning the birth and the needs of the young and expanded family of the movant and his wife, argued in the 30 June 2014 submissions, is quite clearly decisive.

Furthermore, the Prosecutor appears to deny that it is customary for a lawyer to be taken at his word and that he has a professional reputation to defend.

This demonstrates, as, moreover, does the Prosecutor's entire conduct throughout the case in respect of two lawyers, and the Defence in general, the Prosecutor's attitude towards the Defence, with whom she finds faults for that in which she herself unreservedly engages: corruptly influencing witnesses.

2.3.2.2 To ensure that the person does not obstruct or endanger the investigation or the court proceedings (article 58(1)(b)(ii))

14. The Single Judge should have accordingly ruled that there are new and manifest circumstances, which are that the Prosecutor has clearly ended the investigation, whereas in the main case, investigations and written submissions have been brought to a close.

It is inconceivable that the movant, who has never even had any personal contact with the witnesses in the case (see Defence brief[17]), could "obstruct the investigation".

This risk, a pure abstraction, which is now immaterial to the measures taken, could, in any event, be averted by the prescription of specific conditions, to which, moreover, the Prosecutor no longer objects, as she herself proposes some conditions at the end of her appeal brief, thus abandoning *de facto* her request for continued detention.

2.3.2.3 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 (article 58(1)(b)(iii))

15. The crime at bar concerns *viva voce* and documentary evidence in the main case. The movant refers to the aforegoing.

That the main case has since reached a stage where it is no longer possible to commit such crimes also constitutes a new circumstance vis-à-vis the 17 March 2014 decision.

A reopening of said trial, as previously postulated by the Single Judge, is pure conjecture, which, moreover, does not presuppose a scenario allowing the commission of further crime.

The Single Judge should therefore have accordingly ruled that the situation described by article 58(1)(b)(iii) of the Statute does not exist or no longer exists.

[17] ICC-01/05-01/13-594 30-07-2014, pp. 68-70/106.

2.4 In the final alternative: conditions

16. In her appeal brief, the Prosecutor states in closing that she no longer objects to further conditions.

Indeed, she even proposes some of her own.

It follows that she no longer objects *de facto* to release.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER TO

Dismiss the Prosecutor's appeal.

[signed]

Jean Flamme, Counsel for the Defence
of
Jean-Jacques Mangenda Kabongo

Dated this 4 November 2014

At Ghent, Belgium