

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 27 January 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Confidential

**Prosecution opposition to the Defence request under Article 70(4)(b) and Rule
162(4)**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Others

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) hereby responds to the Mangenda Defence’s request to the Chamber to surrender its jurisdiction.¹ The Request fails for two reasons: (a) the law does not support the relief sought; and (b) the facts it cites are unpersuasive, inapposite or inappropriately raised. The Chamber should thus dismiss the Request.

II. Confidentiality

2. This document is filed confidentially as a response to a filing so designated.²

III. Submissions

A. The Request fails on the law

3. The contention that the Single Judge erred in the arrest warrant by failing to reference Rule 162(2)(a), (e) and (f) when assessing the Court’s jurisdiction over this case³ is legally unsound. Rule 162(2) states explicitly that, in deciding whether to exercise jurisdiction, the Chamber “may consider” a non-exhaustive list of six factors. The use and meaning of the word “may” – and not “shall” – is incontrovertible. The Chamber has total discretion to consider any, or all, of the six factors in its assessment. For this reason, the Request necessarily fails as a matter of law.

4. In effect, by attempting to shift the burden of proof to the Chamber to establish

¹ ICC-01/05-01/13-120-Conf, *Requête à la Cour de ne pas exercer sa compétence, en application de l’art. 70.4 (b) du Statut de Rome et de la règle 162.4, « Demande en dessaisissement »*, 22 January 2014 (“Request”).

² See Regulation 23bis(2) of the Regulations of the Court.

³ Request, paras. 8 and 10.

its jurisdiction,⁴ the Request constitutes an impermissible jurisdictional or admissibility challenge. This is despite the non-applicability of Part 2 of the Statute, pursuant to Rule 163(2). It also runs contrary to the wording of Rule 162(4) – “[i]f the Court decides *not* to exercise its jurisdiction”⁵ – evidencing the Chamber’s primary jurisdiction over Article 70 offences.⁶

B. The Request fails on the facts

5. Even if the Request was buttressed by the law – which it is not – the factual arguments advanced are unpersuasive, inapposite or inappropriately raised.

6. *First*, contrary to the Defence’s submissions, the Single Judge found persuasively in the arrest warrant that four of the six factors outlined in Rule 162(2) favour the Court exercising jurisdiction.

- **Rule 162(2)(b)**. The Single Judge found that the Court’s jurisdiction was supported by “the gravity of the Prosecutor’s allegations”.⁷
- **Rule 162(2)(d)**. The Single Judge found that there was a “clear urgency of the issue and the ensuing need to act forthwith”.⁸
- **Rule 162(2)(e)**. Contrary to the Request⁹ the Single Judge addressed this factor, finding that the Court’s exercise of jurisdiction was supported by 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”.¹⁰
- **Rule 162(2)(f)**. In contrast to the Defence’s submissions,¹¹ this criterion was canvassed. The Single Judge considered that he “has been following the

⁴ See Request, para. 10.

⁵ Emphasis added.

⁶ See Håkan Friman in Roy Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), pp. 610-12.

⁷ ICC-01/05-01/13-1-Red2-tENG, para. 8.

⁸ ICC-01/05-01/13-1-Red2-tENG, para. 8.

⁹ Request, para. 10.

¹⁰ ICC-01/05-01/13-1-Red2-tENG, para. 8.

¹¹ Request, para. 10.

Prosecutor's investigation for a number of months" – an evidentiary consideration – and was thus "best placed" to exercise jurisdiction.¹²

7. *Second*, the Request raises issues that are inapposite to the relief sought. For example, the Defence questions the Prosecution's ability to prosecute this case because of a purported conflict of interest with the main case.¹³ Not only does this argument fail to support its jurisdictional argument but, followed to its logical conclusion, it would mean that the Prosecution *never* has the ability to investigate and prosecute Article 70 crimes in *any* case, contrary to the express terms of Rule 165(1) and the jurisprudence of this Court.¹⁴

8. *Third*, the Request inappropriately raises issues in the main case concerning Prosecution and Court witnesses.¹⁵ This is not the correct forum.

IV. Conclusion

9. For the foregoing reasons, the Prosecution respectfully requests the Chamber to dismiss the Request.



Fatou Bensouda, Prosecutor

Dated this 27th day of January, 2014
At The Hague, The Netherlands

¹² ICC-01/05-01/13-1-Red2-tENG, para. 8.

¹³ Request, para. 11.

¹⁴ *See, e.g.*, ICC-01/04-01/06-T-350-Red2-ENG, pp. 11-18; ICC-01/04-01/07-T-190-Red-ENG, pp. 1 to 5; ICC-01/04-01/07-2731, para. 18.

¹⁵ Request, paras. 4-6.