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# "Defense Perspectives" | Africa and the ICC: Lessons Learned and Synergies Ahead

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## Cooperation – Provisional Release

This year has seen some welcome developments in cooperation in the first Memorandum of Understanding signed agreement concerning the interim release of detainees, made between the ICC and the Belgian government (10 April 2014). Belgian became the first country to indicate a willingness to accept suspects and accused on provisional release. The terms indicate that they can receive detainees of the Court on its territory on a temporary basis and under conditions established by the competent Chamber.

This effort was a long-time in the making. The OPCD would like to insist and encourage the work of the Court on framework agreements or arrangements, or any other means in areas such as interim release, final release, and sentence enforcement which may be essential to ensuring the rights of the accused in article 67 of the Rome Statute and guaranteeing the rights of convicted persons and urges al States Parties to consider strengthening cooperation in these areas; the signature of such agreements would be a clear sign by States that they want a Court that is impartial and respectful of the right of the defence. Further, this would indicate a willingness of cooperation by the States with both parties – not simply for cooperation of the Prosecution requests as issued by the Chambers, such as arrest warrants and freezing of assets. Such developments demonstrate the respect for the entirety of the process which includes a presumption of

innocence and the right to a fair trial. For this, we must recall that the upheld principle is one of release of suspects pending trial, with detention as the exception.

Prior to the signing of this MoU, and even subsequently, there have been clear examples of where States Cooperation, in this regard, were simply not there.

**Bemba, Ntaganda, Gbagbo**

The most easily cited example is that of Mr. Jean-Pierre Bemba, who was detained in July 2008 and was actually granted provisional release in 2009 (14 August), but has remained in detention due to a lack of State willing to host him.

In other cases, the lack of a State to host was only one consideration in denying interim release, but still a relevant factor. Take, for instance, the cases of Bosco Ntaganda and Laurent Gbagbo. Mr. Ntaganda has made request of interim relief after he surrendered himself to the Court and Mr. Gbagbo has made repeated applications for provisional release, including for medical reasons. All are denied.

**Article 70** Most notably, in the Article 70 case, four of the suspects have requested interim release with several States being called upon to host the suspect if other conditions were met. Among them, no less than five States (Netherlands, U.K., France, Belgium, and DRC) were called upon to submit observations about taking on a specific suspect on provisional release. None of them stepped forward indicating willingness. For example, in rejecting Mr. Babala's request for interim release (request: 12 January 2014), the Chamber noted that several conditions were not fulfilled, but underlined: "no availability to accept Fidèle Babala on their territory in the event of his release, with or without conditions, has been shown by either the Netherlands or the Democratic Republic of the Congo, that is the State to which Fidèle Babala 2/3 requests to be released" (decision: 14 March 2014; referenced in confirming the decision on appeal: 11 July 2014). The reason for calling this case, the Bemba et al. case, to mind when discussing the importance of State cooperation in provisional release is because we must remember that these are not allegations of war crimes or crimes against humanity, but rather, crimes against the administration of justice. Further, these four men making the requests are still suspects awaiting a confirmation of charges decision. The maximum penalty they can be given – if the charges are confirmed and, thereafter, if they are convicted – is five (5) years in custody and/or a fine (Art. 70(3)). To date, they have been in custody as suspects for over 9 months, in part, because no State is willing to accept them for interim release.

All these proceedings show that the Court needs to work on a real cooperation with States to reach agreements that can be called upon where there are appropriate candidates for provisional release.

**Acquittals — Ngudjolo** Equally important is to find an alternative solution if the Host State authorities refuse to take the responsibility of the person acquitted. This need is highlighted by the case of Mr. Ngudjolo, who was in asylum-seekers' custody for nearly five (5) months following his acquittal on 18 December 2012. A Court such as this, founded on principles of fair trials with a presumption of innocence and requirement of findings of guilt beyond reasonable doubt, must be prepared for some acquittals. Just as the States are called upon in the Rome Statute to assist in, inter alia, surrender/arrest/transfer, these same States must assist in processes, as guided by the Chambers, which allow men and women to retain certain liberties until a case against can be proven otherwise.

**Cooperation – Inability**

to investigate In addition to release issues, an area of State cooperation that is, without doubt, one of the most critical to the process is facilitating the ability to investigate. The semi-adversarial process outlined in the Rome Statute requires investigation to be made by the parties, rather than an investigating judge. As a result, it is both parties – the Prosecution and the Defence – who are beholden to State cooperation in investigations. Three cases in the last year have highlighted State cooperation issues for the parties.

**Kenyatta** Perhaps the most recently visible, is the Kenyatta case. In its notice last week, the Prosecution has asked the Court to adjourn the trial start date "until the GoK executes the Prosecution's Revised Request for records in full" (filing: 5 September). This case, as you all will be aware, has been held in the balance for the better part of the last year over what the Prosecution has deemed as cooperation issues. But this instance is just one of many cooperation negotiations the Court faces.

**Banda & Katanga** Take, for instance, the Banda case, which is set to start on 18 November of this year. In its long pre-trial, this case has faced numerous issues of inability to investigate, culminating in a 2012 request for stay of proceedings based on inability to investigate and "Defence investigations [] compromised by a lack of cooperation of States" (filing: 5 November 2012). Needing States' assistance for the actual trials to run, it remains how this trial will be able to function in an efficient manner if such States' assistance cannot be achieved.

**Cooperation – Non-compliance**

And what about assessment of non-cooperation of States? There are two poignant examples of noncooperation that stand out this year which highlight how the Court is relying on the States' cooperation to effectuate its mandate.

**DRC** The first example is one of the failure to arrest Mr. al-Bashir in his many travels (in this year alone, the Prosecutor has filed regarding his travel to numerous countries, including

Quatar, DRC, Chad, Kuwait, and Ethiopia). In one instance of travel to the DRC, the Chamber found that the DRC deliberately failed to cooperate with the Court in its non-arrest of al-Bashir and referred its Decision to the U.N. Security Council and the Assembly of States Parties (decision: 9 April 2014).

**Libya** At the same time, the participants here will be well aware of the unsuccessful attempts of the Court to ensure that Mr. Saif Gaddafi is handed over to the ICC custody for his trial. Following the final decision on admissibility (decision: 21 May 2014), the Government of Libya has failed to hand Mr. Gaddafi over to the ICC for his trial. Indeed, they were directed to hand him over at several junctures and even reminded of this obligation following the trial-level decision over one-year ago; but even after this final decision, nearly four (4) months have passed. In addition, the State remains in non-compliance with the order to hand over the originals of Defence materials illegally seized from former Counsel. The Defence have repeatedly asked for referral of the Government of Libya to the U.N. Security Council and Assembly of States Parties, but the Court has not yet done so.

In assessing some of these cases as to what may constitute 'non-cooperation' by a State, it becomes clear that while Article 87(7) and Court Regulation 109 outline the remedy for failure to comply, the standard for what constitutes non-compliance may be something that requires further discussions between the Court and the States Parties. In particular in this arena of surrender and arrest — should time-specific deadlines apply across-the-board, or is it truly something that must be assessed on a case-by-case basis.

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