

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05-01/13**
Date: **18 December 2013**

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, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU and NARCISSE ARIDO*

Confidential

Decision on “Demande d’autorisation d’interjeter appel contre la ‘Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings’ (ICC-01/05-01/13-41-Conf-Red)”

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Florence Darques Lane

Counsel for Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Jean-Pierre Kilenda Kakengi Basila

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Prof Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

States Representatives

Others

REGISTRY

Registrar

Herman von Hebel

Detention Section

Victims and Witnesses Unit

Others

**Victims Participation and
Reparations Section**

I, Judge Cuno Tarfusser, having been designated as Single Judge of Pre-Trial Chamber II of the International Criminal Court;

NOTING the “Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” issued on 20 November 2013;

NOTING the “Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings” dated 13 December 2013;¹

NOTING the “Demande d’autorisation d’interjeter appel contre la ‘Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings’(ICC-01/05-01/13-41-Conf-Red)” dated 17 December 2013 (“Mr Kilolo’s Defence Application”)², whereby the Defence of Aimé Kilolo Musamba submits that the 13 December 2013 Decision “viole l’équité de la procédure” and requests to be granted leave to appeal it in respect of two issues;

NOTING, more specifically, that Mr Kilolo’s Defence Application requests leave to appeal the 13 December Decision in respect of two issues, namely (i) that the Independent Counsel is not provided under the Court’s statutory texts and is therefore *contra legem* (“First Issue”) and (ii) that “les actes du Conseil indépendant sont illégaux et irréguliers” and, accordingly, “de nature à affecter l’équité du procès, la légalité et la régularité de toute la procédure”, in particular since the issues of professional privilege arising in connection with the fact that Mr Kilolo is a lawyer “relèvent de la stricte confidentialité et sont arbitrées par les autorités ordinales qui seules peuvent être présentes lors des perquisitions au

¹ ICC-01/05-01/13-41-Conf-Red.

² ICC-01/05-01/13-45-Conf.

cabinet d'avocats et qui en ont qualité parce que compétentes pour démêler les documents privilégiés de ce qui ne l'est pas"("Second Issue");

NOTING articles 57 and 82(1)(d) of the Statute, as well as the established jurisprudence of the Court on the requirements for granting leave to appeal;

CONSIDERING, as regards the First Issue, that the Independent Counsel was appointed in the exercise of the Pre-Trial Chamber's powers to provide for the preservation of evidence pursuant to article 57(3)(c) and that the determination of the nature and appropriateness of measures adopted pursuant to this provision falls within the purview of the discretion of the Pre-Trial Chamber;

CONSIDERING that the broad formulation of the powers vested in the Pre-trial Chamber pursuant to article 57 is precisely aimed at allowing a degree of flexibility enabling the Chamber to provide for the needs arising in connection with the proceedings and to preserve their fairness and that, accordingly, in most instances measures taken pursuant to article 57 will not be expressly provided for in the Statute;

CONSIDERING that, accordingly, the mere fact that a given measure is not expressly provided for in the statutory texts of the Court cannot per se entail that that measure is in violation of, or has otherwise an impact on, the fairness of the proceedings;

CONSIDERING that, accordingly, the First Issue does not affect the fairness of the proceedings within the meaning and for the purposes of article 82(1)(d);

CONSIDERING, as regards the Second Issue, that it is premised on the assumption that, in the view of Mr Kilolo's Defence, the Independent Counsel "n'est pas au fait des règles déontologiques régissant la profession d'avocats ou, quand bien même les connaîtrait, n'a pas qualité pour s'atteler à la tâche qui lui

est confiée par la Chambre étant donné le fait qu'il n'a pas la qualité d'un membre de l'Ordre des avocats auquel appartient Me Aimé Kilolo Musamba";

CONSIDERING that, in light of the fact that the name of the Independent Counsel appointed by the Single Judge is known neither to the Defence for Mr Kilolo, nor to any other party to the proceedings, the assumption underlying the Second Issue is of a purely speculative nature;

CONSIDERING furthermore that, as repeatedly stated in previous decisions, as well as during the status conference held in the case, the Single Judge is perfectly aware of the sensitive issues arising in this case in light inter alia of the links to the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* and of the professional status of Mr Kilolo;

CONSIDERING that the person appointed as Independent Counsel meets all the criteria set forth by the Defence of Mr Kilolo as required for the purposes of preserving the fairness of the proceedings;

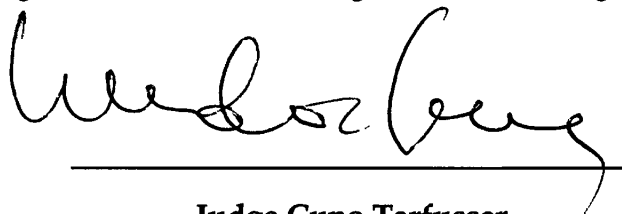
CONSIDERING that, accordingly, the Second Issue is premised on an erroneous factual assumption and as such cannot be said to be an "issue" within the meaning of article 82(1)(d) of the Statute, as interpreted by the Appeals Chamber;

CONSIDERING that, since the requirements of article 82(1)(d) of the Statute are cumulative, it is unnecessary to consider any subsequent criteria in relation to Mr Kilolo's Defence Application;

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS Mr Kilolo's Defence Application.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

**Judge Cuno Tarfusser
Single Judge**

Dated this Wednesday, 18 December 2013

The Hague, The Netherlands