

**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 "Defence request for leave to appeal decision 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 "Defence request for leave to appeal decision ICC-01/05-01/13-41-Conf-Red" submitted on 17 December 2013 by the Defence of Jean-Pierre Bemba Gombo ("Mr Bemba's Defence Application")², requesting to be granted leave to appeal the 13 December 2013 Decision in respect of the following issues:

Issue 1: Whether the learned Single Judge erred in law by crafting a procedure for reviewing the Seized Materials without hearing the Defence's views on the matter in breach of the universally recognised principle: "*audi alteram partem*" ("First Issue");

Issue 2: Whether the learned Single Judge erred in law by appointing an independent counsel ("the Independent Counsel") to review potentially privileged materials in the absence of an explicit statutory power permitting such an appointment and by not entrusting the task to the Defence or, in the alternative, to the Office of Public Counsel for the Defence ("OPCD") ("Second Issue");

Issue 3: Whether the mechanism proposed by the learned Single Judge for the review of privileged materials - including the use of computerised keyword

¹ ICC-01/05-01/13-41-Conf-Red.

² ICC-01/05-01/13-47-Conf.

searches - will ensure that privileged material is not disclosed to the Prosecution and to the Chamber ("Third Issue"), and;

Issue 4: Whether the learned Single Judge erred in law by redacting the name of the said Independent Counsel ("Fourth 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 that the First Issue is premised on the assumption that failing to hear the Defence in adopting procedures or measures which are not specifically provided for in the Statute may *per se* affect the fairness of the proceedings;

CONSIDERING that the right to be heard, whilst indeed a fundamental principle, does not extend so far as to prevent under any circumstances that decisions might be taken *inaudita altera pars* and that, accordingly, the mere fact that one decision is taken *inaudita altera pars* cannot *per se* be held as significantly affecting the fairness of the proceedings;

CONSIDERING, more specifically, that the 13 December 2013 Decision was taken in full awareness of the rights of the defence and of the sensitive issues potentially arising in this case, in light inter alia of the links to the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*;

CONSIDERING that the Second Issue seems to revolve around the idea that the adoption of procedures or measures which are not expressly provided for in the statutory texts may *per se* affect the fairness of the proceedings;

CONSIDERING 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 a significant impact on, the fairness of the proceedings;

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

CONSIDERING, as regards the Third Issue, that it is premised on the assumption that "keyword searches are an inadequate means of ensuring the identification of privileged materials", in particular since "they might encourage the Independent Counsel to avoid performing a 'regular' naked-eye perusal of each and every document";

CONSIDERING that nowhere in the 13 December 2013 Decision is it said that keywords to be provided to the Independent Counsel will become the only tool through which such Independent Counsel will perform the assigned tasks;

CONSIDERING that, accordingly, the Third Issue is premised on an erroneous and speculative 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, as regards the Fourth Issue, that it is not unusual, in the proceedings before the Court, that information be withdrawn from the parties whenever security reasons (which, for their very nature, are not to be disclosed) make such withdrawal necessary, and provided that it is proportionate to the need;

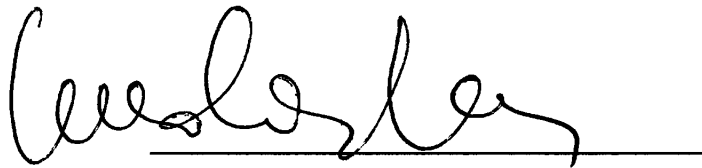
CONSIDERING that, accordingly, it cannot be said that the withdrawing of information on the identity of the Independent Counsel significantly affects the fairness of the proceedings, especially in light of the neutrality of the role entrusted to the Independent Counsel by the Single Judge;

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 the Mr Bemba 's Defence Application;

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS Mr Bemba '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