

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05-01/13**

Date: **12/01/2014**

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

Confidential

Defence response to Prosecution Filing: ICC-01/05-01/13-77-Conf

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

1. The Defence for Mr. Jean-Pierre Bemba Gombo ("the Suspect") hereby files its response to the document ICC-01/05-01/13-77-Conf: *"Prosecution's Notice of Receipt of Communication from Dutch Authorities Concerning Seized Material"* ("the Prosecution Notice").

2. At the outset, the Defence requests that the learned Single Judge reclassify this response and the Prosecution Notice as public. The Prosecution Notice contains no justification for its confidential classification. Given the extraordinary nature of the proceedings in this case, there is no reason why the Prosecutor should be entitled to hide her more "innovative" applications under a cloak of secrecy.

3. In the matter presently at hand, we are notified that a Dutch Investigating Magistrate (acting as the long-arm of the Prosecutor) has copied "a large amount of digital data". In order to make the first "selection" of material of "interest for the investigation" in a "practically feasible" manner, the Dutch Investigating Magistrate requires the provision of "search terms" from which "it is expected that relevant data can be selected".

4. The Prosecutor now petitions the Single Judge with the rather curious request that the parties assist her in supplying such "search terms" to the Dutch Investigating Magistrate.

5. The Defence declines to provide such search terms. It may seem rather trite to say so – but the burden of proof rests on the Prosecutor. Counsel should not be required to assist her to incriminate his client.

6. The Defence feels it appropriate to add that nowhere is the exact nature of the digital information clarified and from which devices it was extracted. Furthermore, although the Prosecution Notice makes representations concerning "material seized in relation to the arrest of Jean-Jacques MANGENDA and Jean-Pierre BEMBA attached at Confidential Annex A", it is not clear from the said annex what "digital information" was seized from the Suspect – if at all. Additionally, it not clear what forensic means were employed to copy such digital data and whether a record of the Dutch Investigating Magistrate's dealings with the materials has been kept for the benefit of Counsel for the Defence.

7. Counsel reminds the learned Single Judge of the ruling that he issued at the Status Conference held on 5 December 2013:

"As regard all evidence collected between 23rd November 2013 and 31st January 2014 on which the Prosecutor intends to rely for the purpose of the confirmation hearing, no later than Friday 31st January 2014, the Prosecutor shall disclose it to the Defence or submit to the Chamber requests for redactions or other protective measures" [emphasis added].¹

8. It has not escaped Counsel's notice that the Prosecution Notice states that the Dutch Investigating Magistrate intends to perform the relevant search on 30 January 2014. Despite the fact that Confidential Annex A discloses no such date, it would appear unrealistic to expect that the results of the search and any appropriate redaction requests will be filed by 31 January 2014. This is even more so the case given that the Prosecutor appears to have acquiesced to the performance of a second search to be executed by the Dutch Investigating Magistrate.

Relief Sought

9. In the circumstances, the learned Single Judge is requested reclassify the Prosecution Notice and this response as public. In addition, and without prejudice to the Prosecutor's ongoing duty to identify exculpatory information, the Single Judge is requested to reject the suggestion that Counsel for the Defence supply the Dutch Investigating Magistrate with "search terms". Furthermore, the Single Judge is requested to clarify that the Prosecutor shall not rely on any digital data currently in the hands of the Dutch Investigating Magistrate which is not disclosed or submitted for redaction approval by 31 January 2014. Finally, the Single Judge is requested to order the Prosecutor to disclose the full nature of her communications with the Dutch Investigating Magistrate since it is apparent that the exchange detailed in paragraph 4 of the Prosecution Notice is not contained in the letter appended at Confidential Annex A.



Nicholas Kaufman
Counsel for Jean-Pierre Bemba Gombo

Jerusalem, Israel
Sunday, January 12, 2014

¹ ICC-01/05-01/13-T-3-Red-ENG WT 05-12-2013 13/23 WN PT.