

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 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,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE
BABALA WANDU and NARCISSE ARIDO***

Public Document

with confidential ex parte Annex A- Prosecutor and Registry only

**Decision on the “Prosecution’s Application for Redactions pursuant to Rule
81(2) of the Rules of Procedure and Evidence”**

Order 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

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

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Detention Section

Victims and Witnesses Unit

Others

**Victims Participation and
Reparations Section**

I, Judge Cuno Tarfusser, having been designated ¹ as Single Judge of Pre-Trial Chamber II (“Chamber”) 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;²

NOTING the status conference on issues relating to disclosure of evidence in the case held on 4 December 2013,³ during which the Single Judge issued an oral decision (“Oral Decision”) whereby he decided, inter alia, that the Prosecutor should, no later than Friday, 20 December 2013, disclose to the Defence all the evidence collected until 23rd November 2013 on which she intends to rely for the purpose of the confirmation of charges, or submit to the Chamber requests for redactions or other protective measures;

NOTING the “Prosecution’s Application for Redactions pursuant to rule 81(2) of the Rules of Procedure and Evidence” (“Prosecution’s Application”) and the Annexes attached thereto⁴, filed on 20 December 2013;

NOTING the “Réponse à la requête du Procureur visant la procédure “ex parte” et des expurgations en application de la règle 81.2”⁵, filed on 26 December 2013 by the Defence for Mr Mangenda Kabongo (Mr Mangenda’s Defence Reply) whereby the Defence requests the Single Judge to: (i) “déclarer la requête du Procureur irrecevable, parce que tardive et non motivée, pour le moins non fondée”; (ii) “dire pour droit que le Procureur ne sera pas en droit d’utiliser les

¹ICC-01/05-45-Conf-Exp.

² ICC-01/05-01/13-1-Red2-tENG.

³ ICC-01/05-01/13-T-2-CONF-ENG.

⁴ ICC-01/05-01/13-62 with Confidential, ex parte Prosecution and Registry only, Annexes A and B.

⁵ ICC-01/05-01/13-63.

pièces concernées dans le cadre de la procédure préliminaire sur base des motifs exposés” and (iii) “en ordre subsidiaire déclarer cette requête non fondée”;⁶

NOTING that the authorisation of non-disclosure of information shall be viewed as an exception, the overriding principle being that of full disclosure, and that decisions on non-disclosure shall be taken on a case-by-case basis, in accordance with the principles established by the Appeals Chamber;⁷

NOTING articles 54, 57(3)(c), 61, 67 and 68 of the Statute, rules 15, 76, 77, 81(2) and 121 of the Rules of Procedure and Evidence;

HEREBY RENDER THIS DECISION

Submissions of the parties

1. In her Application, the Prosecutor seeks authorisation, on the basis of rule 81(2), to redact some information from a 2012 document relating to the Prosecution’s investigations in the situation of the Central African Republic on which she may rely for the purposes of the confirmation hearing in this case (“Document”). The Prosecutor submits that the requested redactions are necessary in order to preserve the confidentiality of the identity of the source of the information contained in the Document, with a view to preventing prejudice to further or ongoing investigations⁸. Furthermore, the Prosecutor submits that the redactions requested would not be prejudicial or inconsistent with the rights of the Suspects, because the redacted version of the Document would still provide the Defence with the substantive information contained in it.⁹

⁶ ICC-01/05-01/13-63, p.8.

⁷ ICC-01/04-01/06-773 (OA5), ICC-01/04-01/06-568 (OA3), ICC-01/04-01/07-476 (OA2).

⁸ ICC-01/05-01/13-62, para.4.

⁹ ICC-01/05-01/13-62-Conf-Exp-AnxB, page 2.

2. The Defence for Mr Mangenda sets forth a number of complaints concerning alleged delays by the Registry in making the relevant material available to it, as well as the purported inadequacy of the amount of legal aid authorised by the Registrar and the ensuing lack of resources within the Defence team. It also submits a number of complaints of a procedural nature, in particular the following:

- a. the Prosecutor's request is "sans objet", since the relevant documents for which the authorisation of redactions is sought have already been submitted ex parte to the Chamber;
- b. the ex parte procedure is not provided for in the statutory texts of the Court and is therefore "en soi contestable quant à sa légalité";¹⁰
- c. rule 81(2) of the Rules is not applicable at the stage of the confirmation of charges;
- d. the Latin phrase "ex parte" "signifie littéralement 'en dehors des parties, de telle sorte que c'est à tort que le Procureur entend y prendre part'";
- e. the ex parte procedure "doit rester, de toute manière, tout à fait exceptionnelle, pour autant que légale, quod non"; and the interests pursued by the Prosecutor can be adequately taken care by the principle of "huis clos";
- f. the Prosecutor's Application "ne contient aucune motivation";
- g. the fact that the Prosecutor requested authorisation for redactions on 20 December 2013 violates the oral decision issued by the Single Judge on 4 December 2013 .

¹⁰ ICC-01/05-01/13-63, page 5.

Single Judge's observations and determinations on the submissions by the Defence for Mr Mangenda

3. Prior to addressing the merit of the Prosecutor's request, the Single Judge wishes to note his dismay at the amount of submissions included in Mr Mangenda's Defence Reply which are obviously incorrect or otherwise irrelevant.

4. First, it should be obvious to an experienced counsel before the Court that the reply to a request for authorisation of redactions is not the proper venue where complaints relating to the allocation of resources should be raised, as well as that such complaints can under no circumstances be used as "arguments" to support a request of a judicial nature.

5. Second, Counsel for Mr Mangenda shows a serious misunderstanding of the very nature of the procedure leading to a Chamber's decision as to whether the statutory grounds for making an exception to the principle of full disclosure to the Defence (as set forth, inter alia, in Rule 81(2) of the Rules) are met, as established now for many years before the Pre-trial Chambers. Such exception arises from the fact that, under limited and specific circumstances, the need to protect interests which are in conflict with the defence's interest to be granted full disclosure of the evidence is regarded by the statutory texts as prevailing. It is - and should be - obvious that, for the procedure leading to the Chamber's determination of a request to be effective, the specific, factual reasons underlying a request for redaction under rule 81 must only be submitted to the Chamber and not divulged to the other parties prior to the Chamber's determination as to whether the grounds set forth in rule 81 are met.

6. For these reasons, the Prosecutor's decision to submit such reasons in an ex parte Annex reserved to the Chamber is entirely appropriate and the

submission by Counsel for Mr Mangenda that the Prosecutor's Application "ne contient aucune motivation" is incorrect.

7. It should also be obvious that the interests underlying the need for an ex parte procedure cannot be adequately protected by the "huis clos" procedure, where it is only the public who is prevented from accessing the information. The Single Judge reiterates that, in full compliance with the procedure for the authorisation of redactions, as established before the Pre-Trial Chambers of the Court for many years, redaction remains the exception and disclosure the rule, unless adequate justification for redaction is submitted and, also in accordance with the aforementioned well-established procedure, redactions will be kept to the minimum necessary.

8. Finally, the Single Judge recalls that, pursuant to the Oral Decision, as regards the evidence collected until 23 November 2013, the Prosecutor was granted until 20 December 2013 to "disclose it to the Defence or submit to the Chamber requests for redactions or other protective measures" (emphasis added). Accordingly, the Prosecutor's Application was filed in compliance with the Oral Decision.

Single Judge's determinations on the Prosecutor's Request

9. All the redactions are requested under rule 81(2), entrusting the relevant Chamber with the authority to authorise non-disclosure of information when disclosure of such information may prejudice further or ongoing investigations.

10. In compliance with the established practice of the Pre-Trial Chambers¹¹, the Single Judge has identified three sub-categories in which the redactions requested by the Prosecutor can be grouped:

¹¹ ICC-01/04-02/06-117-Conf-Exp with confidential, ex parte Prosecution and VWU only, Annexes A and B; ICC-02/11-01/11-556 with confidential, ex parte only available to the Prosecutor, Annex I.

- A. Name and other identifying information relating to the person providing the information contained in the Document;
- B. Name and other identifying information of other persons present at the time of the formation of the Document;
- C. Specific location where the Document originated.

11. The following paragraphs provide the reasons underlying the decisions taken in respect of each category of redactions. A table attached to this decision as Annex A, *ex parte* and available only to the Prosecutor and the Registry, lists: (i) each redaction requested; (ii) the reasons provided by the Prosecutor for such redactions; (iii) the Single Judge's decision as to the request, including the specific sub-category in which the redaction falls.

A. Name and other identifying information related to the person providing the information contained in the Document

12. Based on the information submitted by the Prosecutor in her confidential, *ex parte* Annex B, the Single Judge is satisfied that, although revealing identifying information about the person providing the information contained in the Document would not result in personal danger, there are nevertheless circumstances warranting the redaction of such information for the purposes of rule 81(2). In particular, the fact that the person is known to other Defence witnesses could jeopardise the chances of securing additional information which might be relevant within the context of ongoing investigations in this case. Furthermore, the Single Judge equally agrees that non-disclosure at this stage of the proceeding is the least intrusive measure available and it does not collide with the rights of the suspect for a fair trial. Accordingly, the Single Judge grants authorisation to redact the name and all other identifying information of the person providing the information contained in the Document. The redactions falling within this category will be marked in the table with the letter A.

B. Name and other identifying information of other persons present at the time of the formation of the Document

13. Based on the information submitted by the Prosecutor in her confidential, ex parte Annex B, the Single Judge is satisfied that disclosing specific information including, inter alia, the nationality of other persons who were present at the time of the formation of the Document, might render identifiable the person providing the information contained in it. The Single Judge also agrees that, at this stage of the proceedings, the non-disclosure of such information is adequate and necessary with a view not to jeopardising the chances of securing additional information which might be relevant for ongoing investigations in this case, and is the least restrictive protective measure available. Therefore, the Single Judge grants authorisation to redact any and all specific information which would render identifiable other persons who were present at the time of the formation of the Document. The redactions falling within this category will be marked in the table with the letter B.

C. Specific location where the Document originated

14. Based on the information submitted by the Prosecutor in her confidential, ex parte Annex B, the Single Judge is satisfied that disclosing specific information on the location where the Document originated might likewise result in increasing the chances for the identification of the person providing the information contained in the Document, thereby possibly jeopardising the chances of securing additional information which might be relevant within the context of ongoing investigations in this case. Therefore, the Single Judge grants authorisation to redact any and all specific information which would render identifiable the location where the Document originated. The redactions falling within this category will be marked in the table with the letter C.

15. The Single Judge clarifies that, at this stage, he does not take any position as to the relevance of the information contained in the Document for the purposes of this case.

**FOR THESE REASONS, THE SINGLE JUDGE
DECIDES**

to grant the Prosecutor's Application and to authorise redactions of the following information:

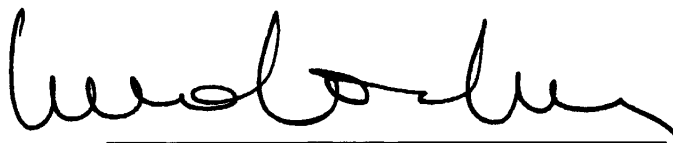
- (i) Name and other identifying information related to the person providing the information contained in the Document;
- (ii) Name and other identifying information of other persons present at the time of the formation of the Document;
- (iii) Specific location where the Document originated.

as set forth in the confidential, *ex parte* Prosecutor and Registry, Annex A to this decision;

DECIDES

that the Prosecutor shall make available to the Defence, no later than Friday 17 January 2014, the document contained in Annex A to the Prosecution's Application with the redactions granted in the present decision as set forth in the confidential, *ex parte* Prosecutor and Registry, Annex A hereto.

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



**Judge Cuno Tarfusser
Single Judge**

Dated this Wednesday, 15 January 2014
The Hague, The Netherlands