

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **21 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Confidential

Prosecution Clarification of its Notice in relation to the Seized Material

Source: The Office of the Prosecutor

Document 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 the Defence of Jean-Pierre Bemba

Nicholas Kaufman

Counsel for the Defence of Aimé Kilolo Musamba

Ghislain Mabanga

Counsel for the Defence of Jean – Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Others
Section**

I. Introduction

1. The Office of the Prosecutor ("Prosecution") hereby files this clarification to its 10 January 2014 "Notice of Receipt of Communication from Dutch Authorities Concerning seized Material" ("Notice").¹

2. The Notice informed the Chamber and parties of the Dutch authorities' request that the Prosecution submit a list of keywords to facilitate their search for relevant information in the electronic data seized pursuant to the Pre-Trial Chamber's 20 November Warrant of Arrest.² The Notice further suggested that the parties' respective submission of keyword lists to the Chamber, which may in turn furnish the authorities with a consolidated list and protocol, may be the more efficient way to proceed in the circumstances.

3. However, given the Responses filed by the Bemba and Mangenda Defences, a clarification of the Notice is necessary in two respects: (1) the Notice's classification status and (2) the purpose of the Prosecution's suggested approach.

II. Classification

4. Pursuant to Regulation 23*bis* of the Regulations of the Court, this filing is classified as "Confidential" as it refers to matters at issue concerning previous submissions classified as such.

¹ ICC-01/05-01/13-77-Conf.

² ICC-01/05-01/13-1-Red2-tENG.

III. Submissions

A. Classification status of Notice

5. Although the Notice does not provide an explanation of its filing status, the reasons for its confidentiality are plain. First, the Prosecution's keyword list contains non-public and sensitive information, including the names of several individuals who may be endangered by the public revelation of their identities.³ Second, there is absolutely no compelling public interest in the revelation of either the details of the keyword list or of the Dutch Investigative Judge's letter requesting such intervention.

6. The Bemba Defence's further request for all contacts that the Prosecution has had with the Dutch authorities is unwarranted, particularly since it does not dispute the information in the Notice concerning the planned timing of the Dutch authorities' search of the seized material.⁴

B. Purpose of the Prosecution's suggested approach

7. The Defence's wholesale rejection of the Prosecution's suggested approach⁵ appears to be predicated on the right of silence and/or against self-incrimination.⁶

³ See *e.g.*, the Mangenda Defence's Response acknowledging the sensitive nature of the information contained in the Prosecution's keyword list, noting "[...] Celle-ci contient des noms de témoins et candidats-témoins de la Défense qui pourraient aider à retrouver des déclarations ou des notes les concernant, les mettant ainsi en danger." ICC-01/05-01/13-89-Conf, para. 8.

⁴ The Prosecution has no obligation to disclose wholesale to the Defence all its communications with national authorities. See *e.g.*, ICC-01/05-01/08-632, para. 26; and ICC-01/11-01/11-392-Red-Corr, para. 45. Additionally, the process of seeking and obtaining cooperation requires communications with States that, ordinarily, benefit from confidentiality. This is foreseen in the reciprocal duties of confidential treatment outlined in both how States will treat requests from the Court (Article 87(3)) as well as the duty of the Court to ensure the confidentiality of documents and information received from States (Article 93(8)(a)) except in both instances as required for the execution of the request. Chambers have a duty to protect confidential information, pursuant to Article 64(6)(c) and Rule 81.

⁵ ICC-01/05-01/13-83-Conf and ICC-01/05-01/13-89-Conf.

⁶ See, ICC-01/05-01/13-83-Conf, at para. 5 ("[t]he Defence declines to provide such search terms. It may 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."; ICC-01/05-01/13-89-Conf ("[l]a Défense souligne de plus que l'art 55.2.b du Statut de Rome statue que le prévenu a **droit au silence**, sans que ce silence peut être utilisé dans l'appréciation de sa

While this may be a strategic decision, it is important that the Prosecution's position is made clear.

8. First, the Notice is directed at accommodating the Dutch Authorities' request for assistance to identify *relevant* information in the seized material for transmittal to the Chamber in accordance with the terms of the Arrest Warrant.⁷ Clearly, relevant evidence encompasses incriminating information. However, it also encompasses exonerating information. The Notice is thus intended simply to alert the Defence to the possibility and opportunity directly to exploit material that is not within the Prosecution's possession or control, which may be material to their respective interests.

9. Second, the Prosecution's proposal is reasonable, given its obligations under Article 54(1) of the Statute, and considering that the respective Defences are best placed to identify that information in the possession of the Dutch authorities they may wish to make certain is transmitted to the Court. To ensure that the search terms that the Defence may propose remains unknown to the Prosecution the Notice suggests their provision to the Chamber directly.⁸

10. Separately, it appears that the timeframe within which the Dutch authorities intend to review the seized material will directly affect the Prosecution's ability to meet the Chamber's disclosure schedule. However, contrary to the Bemba Defence's Response, precluding the Prosecution's ability to rely on this material in these circumstances would be unconscionable. Rather, such an eventuality should result in a reasonable extension of the disclosure deadline.⁹

culpabilité ou de son innocence. Le Procureur n'est donc pas en droit á demander au concluant de faire quelque déclaration que ce soit.”).

⁷ ICC-01/05-01/13-1-Red2-tENG, pp. 16-17.

⁸ ICC-01/05-01/13-77-Conf, para. 3.

⁹ The Prosecution may seek to address this issue more fully in a separate filing.

IV. Conclusion

11. The Prosecution remains at the Chamber's disposal to provide any further clarification the Chamber may deem necessary or appropriate.



Fatou Bensouda, Prosecutor

Dated this 21st Day of January 2014
At The Hague, The Netherlands