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

Date: 25/04/2014

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

Defence response to Prosecution filing ICC-01/05-01/13-360

Source: Defence for 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
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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
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States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

1. Any proposal intended to streamline the presentation of evidence is to be most warmly welcomed. Jean-Pierre Bemba Gombo ("the Suspect") thus notes the stimulating comments made in paragraph 6 of the *Prosecution's Request in respect of Access to the Defence to certain Materials* (The Prosecutor's Request).¹

2. Such ostensibly benevolent intent, however, should not serve as a "Trojan horse" for introducing evidence or even "potential" evidence² at confirmation in contravention of the deadlines for disclosure set by the Single Judge on 4 December 2013.³ Nor should judicial approval of such a suggestion, anticipated by the Prosecutor's present crafty request, be used as a precedent to rectify earlier OTP conduct which contravenes the aforementioned disclosure schedule.

3. As the Single Judge quite clearly stated: "*disclosure between the parties will take place through the Registry and that any and all evidence disclosed for the purpose of the confirmation hearing shall be communicated to the Chamber*".⁴ In other words, no incriminating evidence collected before 31 January 2014 should have been entered into E-Court for judicial consumption and potential use at confirmation after 31 January 2014. Similarly, no incriminating evidence collected between 31 January 2014 and 18 March 2014 (the date originally set for the presentation of the Prosecutor's document containing the charges) should have been entered into E-Court after 18 March 2014 thereby rendering it accessible to Chambers. The only exception to the aforementioned schedule for disclosure was mandated by decision ICC-01/05-01/13-255 whereby the Single Judge granted

¹ ICC-01/05-01/13-360.

² See footnote 6 below and the relevant provisions of the E-Court protocol.

³ ICC-01/05-01/13-T-2-Red-ENG WT 04-12-2013 32/33 at line 4: "*Decides that as regard the evidence collected until 23rd November 2013, on which she intends to rely for the purpose of the confirmation hearing, no later than Friday, 20 December 2013, the Prosecutor shall disclose it to the Defence or submit to the Chamber requests for redactions or other protective measures. As regard all evidence collected between 23 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 of January the Prosecutor shall disclose it to the Defence or submit to the Chamber requests for redactions or other protective measures*".

⁴ ICC-01/05-01/13-T-2-Red-ENG WT 04-12-2013 31/33 at line 25.

the Prosecutor a variation of the deadline for submitting her document containing the charges and permitted only the introduction of materials falling within the purview of the Independent Counsel's third and last report.⁵

4. E-Court, after all, is a depository for "potential evidence"⁶ and, to this very day, the Prosecutor has continued, assiduously, to disclose incriminating evidence entering it into E-court despite herein undersigned Counsel's declaration to the Prosecutor's representative that he will strenuously oppose any attempt to rely, during the confirmation proceedings, on incriminating evidence disclosed without judicially ordained deadlines. Indeed with respect to the logs and audio-recordings of telephone conversations made or received by the Suspect pursuant to order ICC-01/05-46-Conf-Exp⁷ and disclosed as incriminating evidence on 10 March 2014,⁸ Counsel informed the Prosecutor's representative as follows: "*With respect to the intercepts, perusal of the metadata reveals that they were quite clearly in your possession on 17 December 2013 when they were received either by [OTP LAWYER] or [OTP LAWYER]. Accordingly, I am of the opinion that you may not rely on any of them at confirmation unless they were included in INCRIM disclosure packages on or predating 31 January 2014.*"⁹

5. Moreover, the desire of the Prosecution to create a uniform mode of reference for the Defence teams as mentioned, in paragraph 6 of the Prosecutor's Request, can be achieved with ease and without entering the materials into E-Court for judicial consumption by requesting the Registrar to

⁵ ICC-01/05-01/13-255 at p. 7: "*CONSIDERING that the only "good cause" shown by the Prosecutor in support of her request for postponement consists therefore of the persisting unavailability of the final report by Independent Counsel and that, accordingly, postponement should be strictly and precisely correlated with the need to ensure its availability to the Court and to the parties, in particular with a view to allowing the latter to peruse and include it, as appropriate, in the document containing the charges and in the other submissions to be prepared for the purposes of the confirmation of the charges in writing in lieu of hearing*".

⁶ ICC-01/05-01/13-35-Anx at II A paragraph 6: "*Upon the receipt of the potential evidence, evidence and material and the related metadata in electronic form, the Registry will upload all data into the electronic system*".

⁷ p. 8. The Decision was later reclassified as 'Public' by decision ICC-01/05-01/13-147.

⁸ INCRIM package 6.

⁹ e.g. Email from Counsel to the Prosecutor's representative sent on 3 April 2014 at 11:04.

open up a unique directory in Registry Ringtail to which access rights will be restricted to the parties.

6. On a final note, Counsel wishes to stress that nothing in this filing should be understood as acquiescence with respect to the continuing role of the Independent Counsel. The Independent Counsel, as respectfully submitted elsewhere, should be immediately disqualified for a perceived lack of independence and his appointment declared illegal.

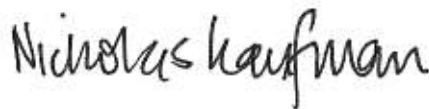
Relief Sought

7. In light of all the aforementioned, the Single Judge is respectfully requested to:

1. **REJECT** the Prosecutor's request that the materials emanating from the Independent Counsel's third and last report be entered into E-Court before the Single Judge has ruled on questions raised elsewhere concerning the said Independent Counsel's perceived lack of independence.
2. **REJECT**, failing the relief sought in paragraph 1, the application that the materials mentioned in the Prosecutor's Request be entered into E-Court except for those materials previously permitted by virtue of decision ICC-01/05-01/13-255 - without prejudice to Counsel's submission, at confirmation, that the Independent Counsel was illegally appointed.
3. **ORDER** the Prosecutor to withdraw from E-Court all incriminating materials collected and subsequently entered into E-Court after the deadlines clearly set out at the status conference held on 4 December

2013 and to submit a report to the Single Judge detailing her compliance with such an order for withdrawal;

4. **ORDER** the Prosecutor in her "*footnoted and hyperlinked*"¹⁰ document containing the charges to make specific reference to the date of collection and date of disclosure of each specific item of evidence on which she shall rely during the confirmation proceedings;
5. **ORDER** the Registrar to make available to the Prosecution and Defence teams only, by way of access rights to Registry Ringtail, all materials rejected and withdrawn pursuant to paragraphs 2 and 3 hereinabove.
6. **ORDER** the Registrar, for the sake of creating a uniform mode of reference, to assign to the rejected and withdrawn materials mentioned in paragraph 5 above the following ID: "CAR-REG-XXXX-XXXX" and not "CAR-ICC-XXXX-XXXX" as envisaged by the Prosecutor.¹¹



Nicholas Kaufman

Counsel for Jean-Pierre Bemba Gombo

Jerusalem, Israel
Friday, April 25, 2014

¹⁰ ICC-01/05-01/13-134 at paragraph 8.

¹¹ As similar identification system was used in the Mbarushimana case for the contents of the numerous hard drives seized from the Suspect's house.