

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 25 April 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***

Confidential

**Decision on the "Prosecution's Request to Refer Potentially Privileged
Materials to Independent Counsel"**

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

Counsel for Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Ghislain Mabanga

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Göran Sluiter

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

States Representatives

Independent Counsel

Fidel Nsita Luvengika

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 "Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel" ("Prosecution's Request" or "Request")¹ submitted on 2 April 2014 whereby the Prosecutor *inter alia* (I) states having received on 21 March 2014 "two DVDs" from national authorities "containing the contents of email accounts of suspects in the present case, including Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo", pursuant to a request for assistance dated 22 November 2013 ("DVDs"), and (II) requests the Single Judge to "issue an order: (i) appointing an independent counsel to review the email accounts of Mangenda and Kilolo for potentially privileged and/or legally protected confidential information, and to provide all non-privileged information contained therein to the Prosecution on a rolling basis as and when they are reviewed; and (ii) instructing the Registry to copy/extract Arido's and Babala's email accounts in the presence of the independent counsel, and to promptly transmit the copied/extracted material to the Prosecution";

NOTING that, in light of Mr Kilolo's and Mr Mangenda's roles respectively as lead counsel and case manager in the case *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Main Case") and with a view to ensuring the confidentiality of any legitimately privileged communications concerning the Main Case, the Prosecutor submits having preserved "packaged and sealed as received" the DVDs, since they "might potentially contain privileged or legally protected information";

NOTING the "Defence response to Prosecution filing: ICC-01/05-01/13-310-Conf" dated 3 April 2014, submitted by the Defence for Jean-Pierre Bemba

¹ ICC-01/05-01/13-310-Red.

Gombo², opposing the Request and requesting to be permitted, together with Counsel for Jean-Pierre Bemba in the Main Case, to review the DVDs and to filter out any potentially privileged materials;

NOTING the “Réponse à la requête du Procureur du 3 avril 2014 concernant les comptes de courrier électronique saisis ICC-01/05-01/13-310-Red – 03-04-2014” dated 6 April 2014 (“Mr Mangenda’s Response”)³, whereby the Defence for Jean-Jacques Kabongo Mangenda submits *inter alia* that the Prosecutor’s action in respect of the DVDs “constitue ... un abus manifeste du pouvoir” and, accordingly, opposes it;

NOTING the “Prosecution Request for Leave to Reply to Mangenda Defence’s ‘Réponse à la requête du Procureur du 3 avril 2014 concernant les comptes de courrier électronique saisis ICC-01/05-01/13-310-Red – 03-04-2014’”, dated 9 April 2014 (“Prosecution Request for Leave to Reply of 9 April”)⁴, requesting to reply with a view to “clarifying the law and correcting factual misrepresentations” contained in Mr Mangenda’s Response;

NOTING the “Réponse de la Défense à ‘Public Redacted version of “Prosecution’s Request to Refer to Potentially Privileged Materials to Independent Counsel”’ du 2 April 2014 (ICC-01/05-01/13-310-Conf)” dated 10 April 2014⁵, whereby the Defence for Fidèle Babala Wandu *inter alia* argues that the Request is deprived of legal basis and opposes it ;

NOTING “Narcisse Arido’s Response to ‘Prosecutor’s Request to Refer Potentially Privileged Material to Independent Counsel’ (ICC-ICC-01/05-01/13-310-Conf)” dated 13 April 2014⁶, whereby the Defence for Narcisse Arido

² ICC-01/05-01/13-311-Red.

³ ICC-01/15-01/13-316.

⁴ ICC-01/05-01/13-325.

⁵ ICC-01/05-01/13-329.

⁶ ICC-01/05-01/13-334.

likewise objects to the granting of the Prosecutor's Request as deprived of legal basis and requests the Single Judge to take a number of alternative measures;

NOTING the "Response to the 'Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel (ICC-01/05-01/13-310-Conf)'" , dated 14 April 2014⁷, whereby the Defence for Aimé Kilolo Musamba, in opposing the Request, *inter alia* requests that the Prosecutor be instructed to destroy all the materials referred to in her Request and that the relevant national authorities be ordered to resubmit materials relevant to these proceedings following their screening in accordance with relevant legislation on professional secrecy and legal privilege;

NOTING further the Prosecutor's "Addendum to Prosecution's request to refer potentially privileged materials to Independent Counsel"⁸ dated 15 April 2014, whereby the Prosecutor, in annexes A to C thereto⁹, filed photographs of the DVDs and the documents issued by the relevant national authorities in the context and for the purposes of the implementation of her request for assistance;

NOTING the "Observations concernant la réponse du Procureur du 15 avril 2014 relative aux comptes de courrier électronique saisis" dated 16 April 2014¹⁰, whereby the Defence for Jean-Jacques Mangenda submits that the Prosecutor's Addendum constitutes a reply to a response, as such subject to the leave of the Chamber, and therefore requests that it be dismissed;

NOTING the "Prosecution Request for leave to reply the the Arido Defence's 'Response to "Prosecutor's Request to Refer Potentially Privileged Materials to

⁷ ICC-01/05-01/13-335-Conf.

⁸ ICC-01/05-01/13-341-Conf.

⁹ ICC-01/05-01/13-341-Conf-AnxA-Corr, ICC-01/05-01/13-341-Conf-AnxB, ICC-01/05-01/13-341-Conf-AnxC.

¹⁰ ICC-01/05-01/13-343.

Independent Counsel" (ICC-01/05-01/13-310-Conf)'" dated 23 April 2014¹¹, ("Prosecutor's Request for Leave to Reply of 23 April") wherein the Prosecutor requests to reply in a view to clarify *inter alia* the legal basis for the appointment of the Independent Counsel;

NOTING articles 57(3)(c), 67(1)(b) and 69(5) of the Statute, rule 73 of the Rules of Procedure and Evidence and regulation 24 of the Regulations of the Court;

CONSIDERING that the Prosecutor's Addendum, rather than seeking to reply to one or more of the responses to her Request submitted by the Defence teams, is aimed at making available to the parties and to the Chamber documents supplementing the information contained in the Request in respect of the DVDs and of their origin;

CONSIDERING further that, whilst it might have been preferable for the Prosecutor to file the documents contained in the Addendum as annexes to her Request, this is not tantamount to saying that the Addendum amounts to a reply to a response within the meaning of regulation 24 of the Regulations of the Court;

CONSIDERING that, accordingly, it is appropriate to receive the Prosecutor's Addendum;

NOTING that rule 73(1) of the Rules provides that "communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure";

CONSIDERING that, whilst having been received in response to and implementation of a request for assistance emanating from the Prosecutor, the acquisition and transmission of the DVDs for the purposes of these proceedings raise issues very similar in nature to the ones arising in connection with the

¹¹ ICC-01/05-01/13-358-Conf.

acquisition and transmission of the materials seized upon the arrest of the suspects in this case, in particular of Mr Bemba and of Mr Kilolo, for which the Single Judge had devised the system enshrined in his "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 ("13 December 2013 Decision")¹²;

CONSIDERING, as already stated in the 13 December 2013 Decision, that:

- (i) the proper acquisition and, as appropriate, disclosure of any all material which might be relevant to the determination of the charges is of essence for the purposes of the proper and expeditious conduct of the proceedings in this case; and
- (ii) appropriate measures need to be taken, with a view to preventing undue access by either party to information of a privileged nature, as well as to ensuring that information of a private nature, or otherwise obviously irrelevant for the purposes of these proceedings, be promptly returned to their legitimate owners;

CONSIDERING that these observations and principles are also applicable to the DVDs which are the subject of the Prosecutor's Request;

CONSIDERING it therefore appropriate, with a view to preserving the integrity of proceedings in this case and in the Main Case, to appoint an Independent Counsel responsible for (i) being present at the place and time when representatives of the Registry will proceed to the unsealing and the forensic acquisition of the DVDs; (ii) reviewing the DVDs, with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of

¹² ICC-01/05-01/13-41-Red.

these proceedings; (iii) promptly submitting to the Single Judge a confidential, *ex parte* Registrar report detailing the results of the aforementioned review;

CONSIDERING it also appropriate that the same person already appointed as Independent Counsel entrusted with carrying out the operations envisaged in the 13 December 2013 Decision be appointed as Independent Counsel for the purposes of the acquisition and review of the DVDs, both in light of the relevant professional requirements and skills and of the need to ensure that this supplementary operations be carried out as expeditiously as feasible;

CONSIDERING further that, as already stated during the status conference held on 30 August 2013¹³, the Independent Counsel can appoint a person of his trust to assist him during the operation and that the identity of this person has to be communicated to the Chamber;

CONSIDERING that, at this stage of the proceedings, establishing a system of acquisition, review and transmission of the DVDs other than the one devised in the 13 December 2013 Decision, including by adhering to either of the alternative models proposed by the Defence for Narcisse Arido and the Defence for Aimé Kilolo, would inevitably entail significant delays, likely to jeopardise the very possibility that the contents of the DVDs be eventually made available for the purposes of these proceedings;

CONSIDERING that it is appropriate, since the identity of Independent Counsel is known to the parties, that they be allowed to be present at the time when the operations instrumental to the forensic acquisition of the DVDs are carried out with the cooperation of the relevant services of the Registry;

CONSIDERING that the substantive arguments raised and developed in the Defence Responses (in particular, in Mr Arido's and Mr Kilolo's Responses)

¹³ ICC-01/05-T-2-CONF-Red-ENG ET 30-08-2013 22/26 SZ PT.

pertain to critical and fundamental issues relating to the admissibility of some of the evidentiary materials that might be relied upon in this case (including materials which might be extracted from the DVDs) and, as such, will be thoroughly addressed in the context of the determinations to be made for the purposes of the confirmation of the charges;

CONSIDERING that, accordingly, the Single Judge does not deem it appropriate to entertain any submission as to the admissibility or, more broadly, the evidentiary relevance of the items which might be retrieved from the DVDs in the context of this decision, and that, for this reason, it is not necessary to obtain further submissions on this matter as proposed by the Prosecutor in her requests for leave to responses by the Defence;

CONSIDERING it necessary and appropriate that the operations instrumental to the proper acquisition of the DVDs be carried out expeditiously, without prejudice to the determinations the Chamber will be called to make as to the admissibility and the relevance of any materials which might be retrieved and relied upon by the parties;

CONSIDERING, by the same token, that it is necessary to ensure that no additional delays will affect the timely closure of the pre-trial phase of the proceedings;

CONSIDERING that it is unknown, at this stage, how extensive the materials contained in the DVDs are and therefore how long the completion of the operations finalised to their proper acquisition, analysis and, if appropriate, transmission might take;

CONSIDERING that, accordingly, it is necessary to clarify that, whilst Independent Counsel is instructed to carry out the mandate with the utmost efficiency and expeditiousness, the specific time-frame required by the implementation of the procedures envisaged in this decision will not delay, or

otherwise impact, the calendar for the confirmation of the charges as it now stands;

CONSIDERING that the transmission to the parties of the materials extracted from the DVDs will be decided by the Single Judge upon reception of the Registrar's and the Independent Counsel's report on the operations carried out in implementation of this decision;

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS Mr Mangenda's Defence request to reject the Prosecutor's Addendum and the Annexes thereto;

REJECTS the Prosecutor's Request for Leave to Reply of 9 April;

REJECTS the Prosecutor's Request for Leave to Reply of 23 April;

GRANTS the Prosecutor's Request;

DECIDES to appoint, through the Registrar, Fidel Nsita Luvengika as Independent Counsel tasked with (i) being present at the unsealing and the forensic acquisition of the DVDs; (ii) reviewing the DVDs, with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of these proceedings; (iii) promptly submitting a report to the Single Judge as to the results of such review;

ORDERS Independent Counsel to promptly liaise with the relevant sections of the Registry, with a view to making it possible for the unsealing, the forensic acquisition and the review of the DVDs to be carried out and completed as expeditiously as feasible;

ORDERS the relevant sections of the Registry to liaise with the Prosecutor and the Defence teams, with a view to making it possible for them to be present upon

the implementation of the operations for the unsealing and forensic acquisition of the DVDs, if they so wish.

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

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Judge Cuno Tarfusser
Single Judge

Dated this Friday, 25 April 2014

The Hague, The Netherlands