



Original: English

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

Date: 13/05/2014

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-01/05-01/13-392

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
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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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

The Defence for Jean-Pierre Bemba Gombo ("the Suspect") hereby responds to the *Prosecution's Communication of Incriminatory Evidence and Rule 77 Materials Disclosed to the Defence on 12 May 2014*.¹

Submission

1. The Prosecutor continues, unabated, to disclose materials on which she wishes to rely, as incriminating evidence, at confirmation.
2. The Single Judge's decision to vary the time limits for the confirmation proceedings (ICC-01/05-01/13-255) did not permit the Prosecutor to introduce new materials. Such new materials, it is submitted, would include translations of pre-existing materials.
3. The Single Judge is requested to note the unfair manner in which the Prosecutor has conducted the disclosure of the "non-privileged" intercepts executed on the Suspect's telephone line at the ICC detention facility ("the Intercepts").²
4. The Single Judge is also reminded of the Suspect's submission in ICC-01/05-01/13-108-Corr where the latter argued as follows:

"The "Prosecution's Application for a Warrant of Arrest" against the Suspect ("AWA") was based, inter alia, on 22 of the Non-Privileged Intercepts of telephone conversations conducted between the Suspect and, so it is alleged, Fidèle Babala Wandu. The aforementioned 22 Non-Privileged Intercepts, however, form a small fraction (7.3%) of the total number of Non-Privileged Intercepts disclosed to the Defence as incriminating evidence on 20 December 2013. Moreover, a considerable portion, if not the vast majority, of the 300 or so Non-Privileged Intercepts disclosed on 20 December 2013 are of conversations conducted, for the most part, in Lingala.

¹ ICC-01/05-01/13-392.

² ICC-01/05-46.

While this language is understood by a prominent member of the Prosecution's team on case ICC-01/05-01/08, it is most likely not understood by more than one or two other individuals in the Office of the Prosecutor. In addition to the aforementioned, it should be noted that the intercepted communications are not fully audible; while the Suspect's voice is quite clear – that of his interlocutor is not.

5. When she disclosed the Intercepts on 20 December 2013, it is suggested that the Prosecutor did so without comprehending the meaning of 92.7% of what she was disclosing. The possibility, of course, does exist that, after a crash-course in colloquial Lingala (unavailable to the Defence for denial of budget), the Prosecutor herself or Mr. Jean-Jacques Badibanga, with almost herculean skill, managed to analyze the totality of the disclosed Intercepts. Perhaps, in this very way, the Prosecutor was able to sign off on an official court filing to the Single Judge declaring that each and every Intercept she had disclosed was incriminating in nature. The Suspect doubts it. Should, however, he be mistaken, his Counsel sincerely apologizes for grievously underestimating the Prosecution's linguistic capacities and eagerly awaits a fully hyperlinked list of evidence. Maybe in such a document, the Prosecutor will elucidate why she so firmly believed that each and every one of the Intercepts incriminated the Suspect.

6. Counsel thinks that it is more probable that the Intercepts were disclosed indiscriminately as incriminating evidence, without full appreciation of their contents. This was done, specifically, in order to facilitate the future disclosure of translations on a rolling basis. Daunted by the disclosure deadlines fixed by the Single Judge at the very first status conference, it is suggested that the Prosecutor literally dumped a morass of unintelligible information on the Defence in the hope that, one day in the future, she would be able to admit some "choice" translations.

7. In refusing the Suspect's application for translation of the Intercepts into one of the working languages of the Court for the benefit of his counsel, the Single Judge ruled as follows:

"Pursuant to rule 121(3) of the Rules of Procedure and Evidence, the Prosecutor is required to provide the Chamber and the person for whom the confirmation of the charges is sought with the document containing the charges and the list of evidence on which she intends to rely 30 days before the date of the confirmation hearing. Whilst the need to properly organise the disclosure process and to enhance its efficiency to the extent possible led to the setting of intermediate deadlines for the disclosure of specific batches of evidence, the Single Judge finds no compelling reason to set a deadline other than the one set forth under rule 121(3) of the Rules for the submission by the Prosecutor of translations into a working language of the Court of the relevant portions of evidentiary items which she intends to rely upon, which will have been disclosed to the Defence teams in their original and integral form".³

8. The Single Judge's decision ICC-01/05-01/13-255, however, did not alter any pre-existing deadline other than to permit the introduction of an additional report from the "Independent" Counsel:

"...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".

³ ICC-01/05-01/13-177 at paragraph 13.

9. The Single Judge did not permit a variation of the confirmation deadlines, however, in order to authorize the Prosecutor to introduce newly translated transcripts which, themselves, require review and comparison with the original recordings.

10. To permit such a prosecutorial tactic at such a late date and so close to confirmation is unfair to the Defence.

Relief Sought

11. The Single Judge is requested to deny the Prosecution the ability to rely, at confirmation, on the incriminating evidence which it disclosed on 12 May 2014.



Nicholas Kaufman

Counsel for Jean-Pierre Bemba Gombo

Jerusalem, Israel
Tuesday, May 13, 2014