

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 13 May 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 Response to the Bemba Defence's Request to Compel the Attendance
of the Independent Counsel for Examination during the Confirmation Proceedings**

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

Counsel for Narcisse Arido

Göran Sluiter

Legal Representatives of Victims

Legal Representatives of Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Others

I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the Bemba Defence's request to compel the attendance of the Independent Counsel for examination during the confirmation proceedings ("Request").¹ The Request lacks any legal or factual basis for an oral confirmation process, much less for compelling the Independent Counsel's attendance, and should thus be rejected.

II. Confidentiality

2. This filing is classified as "Confidential" as it responds to a filing of the same designation.

III. Submissions

3. The Request, which seeks to "compel the attendance of 'Independent' Counsel" during the confirmation proceedings, lacks any legal or factual foundation. First, the Request fails to establish that the interests of justice require an oral confirmation process; and second, it provides no justification for compelling testimony.

A. The Request fails to establish that the interests of justice require an oral confirmation proceeding

4. In setting out the legal basis for the Request, the Defence inexplicably ignores the Rules of Procedure and Evidence ("Rules") particular to Article 70 proceedings, and the Pre-Trial Chamber II ("Chamber")'s prior decisions.

¹ ICC-01/05-01/13-384-Conf.

5. The Chamber has determined on at least three separate occasions that the confirmation of charges proceedings will take place on the basis of written submissions, in accordance with Articles 61 and 70(2) of the Rome Statute ("Statute") and Rule 165(3) of the Rules.²

6. With respect to offences under Article 70 of the Statute, Rule 165(3) of the Rules provides:

"For the purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interest of justice otherwise require."

7. Here, the Defence erroneously presumes an oral confirmation process,³ or unjustifiably fails to allege that the interests of justice provided for in Rule 165(3) of the Rules require such proceedings. Notably, the Request does not allege anything of the sort concerning the *viva voce* evidence of the Independent Counsel. As the oral nature of a proceeding is a prerequisite for the attendance of any witness to provide testimony, the Request's failure to establish a legitimate basis for an oral confirmation process is fatal to its demand to compel the Independent Counsel's attendance thereof for examination.

8. The Defence's reliance on the *Ruto and Sang* Summons Decision⁴ for the proposition that "the Single Judge now has the 'legal capacity' to 'order' the attendance of a witness"⁵ is, in respect of the confirmation proceedings in this case, inapposite.

² See ICC-01/05-01/13-T-1-ENG CT, p. 14, l. 20-p. 15, l. 4; ICC-01/05-01/13-93 (confirming the Pre-Trial Chamber's Decision of 27 November 2013); ICC-01/05-01/13-205; ICC-01/05-01/13-363.

³ ICC-01/05-01/13-384-Conf, para. 4 (contending that "[n]othing in the Court's legal texts or precedent . . . prevents a Suspect from calling whatever witnesses he wishes . . .").

⁴ ICC-01/09-01/11-1274-Corr2 ("Summons Decision").

⁵ ICC-01/05-01/13-384-Conf, para. 7.

9. First, in *Ruto and Sang*, Trial Chamber V (A)'s Summons Decision concerned the on-going trial, where the presentation of oral evidence is the principal modality of the proceedings. The Summons Decision therefore relates to the attendance of witnesses in this context.⁶ Second, the circumstances which gave rise to the exercise of the Chamber's power to compel witnesses to testify in *Ruto and Sang* extended far beyond the Bemba Defence's inability to secure an interview with the Independent Counsel; which, insufficient as it is, is the core basis for the Request.⁷

B. The Request fails to demonstrate a factual basis for compelling the Independent Counsel's testimony during the confirmation proceedings

10. The Defence's inability to prevail upon the Independent Counsel for an interview⁸ cannot justify changing the modalities of the confirmation process from one based on written submissions to an oral hearing.

11. More than half of the Defence's submissions, which all fall under the rubric of a "factual basis for the request",⁹ place the cart before the horse. Submissions on what the Independent Counsel can be questioned upon his compelled attendance presupposes that he can be brought to court in the first place. The core question here is whether the Independent Counsel can be compelled to testify during a confirmation process that otherwise neither requires nor provides for the attendance of any witnesses. On this dispositive issue, the Request is hollow.

12. The Defence provides no reason why it needs to "explore",¹⁰ "put to"¹¹ or "examine" the Independent Counsel "on the witness-stand",¹² as opposed to

⁶ ICC-01/09-01/11-1274-Corr2, paras. 20 and 26.

⁷ ICC-01/05-01/13-384-Conf, para. 16.

⁸ ICC-01/05-01/13-384-Conf, para. 13.

⁹ ICC-01/05-01/13-384-Conf, p. 5 (see heading number II).

¹⁰ ICC-01/05-01/13-384-Conf, paras. 9, 12, 13 and 14.

¹¹ ICC-01/05-01/13-384-Conf, para. 10.

introducing his evidence in written form during the confirmation proceedings. Nothing prevents the Defence from tendering whatever evidence it may obtain from the Independent Counsel in accordance with the modalities of the confirmation process established by the Chamber. The fact that the Defence does not yet have the evidence from the Independent Counsel that it seeks does not require changing the nature of the confirmation process. Further, the Request fails to identify how proceeding on the basis of written submissions either prejudices the Defence or diminishes the fairness of the process. Indeed, written evidence before the Court “[is] not *a priori* accorded a lesser probative value” than *viva voce* witnesses.¹³ The Request advances nothing to the contrary.

13. The Request demonstrates no procedural right of the Defence to call the Independent Counsel, let alone provides a convincing reason to compel his attendance at proceedings neither requiring nor contemplating *viva voce* evidence altogether. Further, nothing in the Request rebuts the Chamber’s express assessment that a written process “is the most appropriate course of action in this case”,¹⁴ having undoubtedly considered the issues attendant to an oral process such as its organisation and expeditiousness,¹⁵ given the number of parties in this case. The Defence thus fails to advance any colourable legal or factual basis for the Request.

14. Contrary to the Request,¹⁶ there is no reason to doubt the ‘independence’ of the Independent Counsel. His limited role as defined by the Single Judge, namely to screen all potentially privileged communications under the auspices of the Court and subject to the Single Judge’s ultimate determination, such that “privilege would be strictly maintained on all such recordings which would not offer elements of interest

¹² ICC-01/05-01/13-384-Conf, paras. 13 and 16.

¹³ ICC-01/09-01/11-221, para. 14.

¹⁴ ICC-01/05-01/13-T-1-ENG CT, p. 15, l. 4; see also ICC-01/05-01/13-363, p. 4 (noting that, given the object and purpose of the confirmation of charges, the presentation of evidence in documentary form is the preferred modality by which evidence is introduced at this stage).

¹⁵ ICC-01/09-01/11-221, para. 15.

¹⁶ ICC-01/05-01/13-384-Conf, para. 17.

or relevance for the purposes of the Prosecutor's investigation", gives rise to no other reasonable inference or basis for his compulsion.

IV. Requested Relief

15. For the foregoing reasons, the Prosecution requests that the Defence Request be dismissed.



Fatou Bensouda, Prosecutor

Dated this 13th Day of May 2014
At The Hague, The Netherlands