

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 19 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, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU and NARCISSE ARIDO*

Public

Decision on the filing in the record of items seized upon the searches of the person and cell of Jean-Pierre Bemba Gombo

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

REGISTRY

Registrar

Herman von Hebel

Detention Section

Victims and Witnesses Unit

Other

Independent Counsel appointed pursuant to
ICC-01/05-01/13-41-Conf-Exp

**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 "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")¹, whereby the Single Judge *inter alia* tasked Independent Counsel with reviewing documentary and electronic material seized upon the searches of the person and cell of Jean-Pierre Bemba, with a view to identifying any item which might be privileged or otherwise obviously irrelevant for the purposes of these proceedings;

NOTING the "Rapport du Conseil indépendant suivant la Décision ICC-01/0501/13-41(Levée et copie d'une dernière pièce saisie et analyse des pièces saisies)" ("Independent Counsel's Report" or "Report") dated 8 April 2014², *inter alia* transmitting the results of such review;

NOTING the "Decision reclassifying documents in the record, lifting protective measures and taking additional measures related to the implementation of Decision ICC-01/05-01/13-41-Red" dated 17 April 2014³ ("17 April 2014 Decision"), *inter alia* (I) ordering Independent Counsel, with the assistance of the services of the Registry, (i) to prepare redacted versions of items where redactions were needed before they could be made available and (ii) to file in the record of the case items identified as non-privileged and relevant, on a confidential, *ex parte* basis reserved to the Defence for Jean-Pierre Bemba; (II) granting the Defence for Jean-Pierre Bemba 5 days thereafter to submit observations on the proposals submitted by Independent Counsel; and (III)

¹ ICC-01/05-01/13-41-Red.

² ICC-01/05-01/13-319-Conf.

³ ICC-01/05-01/13-347-Red.

deciding that the relevant items would only be made available to the Prosecutor and the other Defence teams after review by the Single Judge of any observations submitted by the Defence for Jean-Pierre Bemba;

NOTING the confidential, *ex parte* Independent Counsel and Defence for Jean-Pierre Bemba "Communication de documents suivant la Décision N° ICC-01/05-0113-347-Conf" dated 2 May 2014⁴, whereby Independent Counsel implemented the 17 April 2014 Decision *inter alia* by submitting his proposals for redactions of five documents, as contained in Annexes 1 to 5 thereto;

NOTING the confidential, *ex parte* Independent Counsel and Defence for Jean-Pierre Bemba "Registry transmission of documents following submission ICC-01/05-01/13-373-Conf-Exp" dated 2 May 2014⁵, whereby the Registrar implemented the 17 April 2014 Decision by filing in the record the remaining documents identified by Independent Counsel as non-privileged and as such suitable to be transmitted to the other parties in the proceedings, as contained in confidential, *ex parte* Annexes 1 to 14 thereto (hereinafter, the Annexes to filings ICC-01/05-01/13373 and ICC-01/05-01/13-374, collectively, the "Relevant Documents");

NOTING the confidential, *ex parte* "Defence implementation of decision ICC-01/05-01/13-347" dated 9 May 2014⁶, as well as the confidential *ex parte* Annex 1 thereto, whereby the Defence for Jean-Pierre Bemba "claims privilege over all documents" contained in the annexes to filings ICC-01/05-01/13-373-Conf-Exp and ICC-01/05-01/13-374-Conf-Exp, submitting that "for all documents which do not concern his private life ... privilege should be maintained for the simple fact

⁴ ICC-01/05-01/13-373-Conf-Exp with confidential *ex parte* Annexes 1 to 5.

⁵ ICC-01/05-01/13-374-Conf-Exp with confidential *ex parte* Annexes 1 to 14.

⁶ ICC-01/05-01/13-387-Conf-Exp with confidential *ex parte* Annex 1.

that they all pertain to defence team communications, defence strategy and defence deployment of resources, financial or otherwise, in case ICC-01/05-01/08”;

NOTING article 67(1)(b) of the Statute and rules 73 and 81 of the Rules and Procedure of the Court;

CONSIDERING that, as already stated by the Chamber, the right to professional privilege is instrumental to the need to obtain legitimate legal advice on a confidential basis;

CONSIDERING that, accordingly, no privilege can be claimed for the purposes of obstructing the investigation and prosecution of allegations of offences against the administration of justice, all the more so where a Chamber is satisfied that there are reasonable grounds to believe that such offences have been committed;

CONSIDERING that as many as 16 items of the Relevant Documents consist of either (i) pieces of paper containing single, or lists of, telephone numbers, in some instances with the mention of the person to whom that or those numbers pertain or (ii) lists of financial expenditures;

CONSIDERING, that, on the one hand, a telephone number or a list of expenses can hardly be said to refer to, or be revealing of, “defence strategy” and that, on the other hand, the knowledge of telephone numbers and logs used by and between the Suspects, as well as the tracing of financial transactions, were instrumental to the investigation leading to these proceedings;

CONSIDERING that the availability of these documents in the record of the case might assist the parties and the Chamber in making its determinations for the purposes of the confirmation of the charges;

CONSIDERING, as regards Annexes 12 and 13 to ICC-01/05-01/13-374-Conf-Exp, that, as explained by the Defence for Mr Bemba, they consist of “questionnaires prepared by defence team for potential witnesses”;

CONSIDERING that, since the corruption of witnesses is one of the offences alleged by the Prosecutor in these proceedings, the document might also assist the parties and the Chamber in making its determinations for the purposes of the confirmation of the charges;

CONSIDERING that making the lifting of the privilege on a seized document conditional upon the finding that "there is an actual as opposed to speculative link to the article 70 investigation", or requiring that evidence that the document was generated for an illegitimate purpose be found "in the documents themselves", as argued by the Defence for Mr Bemba, would be tantamount to virtually nullifying the usefulness of the seizure of documents and that, accordingly, the review of the material could only be meaningful if carried out by a person aware of the relevant context;

CONSIDERING further that the Independent Counsel's note to the effect that a reviewed document might be "relevant" is only instrumental to the lifting of the privilege and as such does not prejudice or otherwise influence the Chamber's determinations as to the relevance of that document;

CONSIDERING, as regards Annex 1 to ICC-01/05-01/13-373-Conf-Exp, that the document - consisting of drawings and handwritten notes exchanged between the Suspect and members of his defence team - shows no immediate relevance for the purposes of the investigation underlying these proceedings and, as such, should be treated as privileged;

NOTING, as regards Annexes 2 to 5 to ICC-01/05-01/13-373-Conf-Exp, that the Defence for Mr Bemba has stated his readiness to "waive privilege with respect to them in their entirety", were the Single Judge to approve such redactions;

CONSIDERING that the Single Judge is satisfied that the redactions proposed by Independent Counsel as regards Annexes 2 to 5 to ICC-01/05-01/13-373-Conf-Exp are warranted and adequate;

FOR THESE REASONS, THE SINGLE JUDGE

DECIDES that filings ICC-01/05-01/13-373-Conf-Exp and ICC-01/05-01/13-374-Conf-Exp shall be reclassified as confidential;

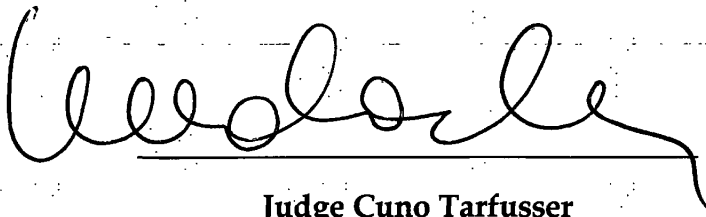
DECIDES that Annexes 1 to 14 to filing ICC-01/05-01/13-374 shall be reclassified as confidential;

GRANTS the Defence request that Annex 1 to ICC-01/05-01/13-373 be treated as privileged;

GRANTS the Defence request that Annexes 2 to 5 to ICC-01/05-01/13-373 be only made available to the parties with the redactions proposed by Independent Counsel in filing ICC-01/05-01/13-373-Conf-Exp;

ORDERS Independent Counsel, with the assistance of the services of the Registry, to file in the record of the case redacted versions of Annexes 2 to 5 to ICC-01/05-01/13-373, to which the redactions proposed by Independent Counsel shall be fully applied.

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

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

Judge Cuno Tarfusser

Single Judge

Dated this Monday, 19 May 2014

The Hague, The Netherlands