

Ex Parte Status Conference
(OTP Only)

(Closed Session)

ICC-01/05-01/13

1 International Criminal Court
2 Pre-Trial Chamber II – Pre-Trial Courtroom
3 Situation in the Central African Republic
4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,
5 Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido
6 Ex Parte Status Conference (OTP only)
7 Wednesday, 26 March 2014
8 (The hearing starts in closed session at 9.49 a.m.)
9 SINGLE JUDGE TARFUSSER: Good morning. I won't say "be seated" because you
10 are seated already.
11 Could you please call the case for the record, Court Officer. Thank you.
12 THE COURT OFFICER: Thank you, your Honour.
13 Situation in the Central African Republic, in the case of The Prosecutor versus
14 Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Mr
15 Babala and Narcisse Arido, ICC-01/05-01/13.
16 SINGLE JUDGE TARFUSSER: This status conference was convened in order to
17 have some clarifications. We expected that we would have more clarification than
18 we have after your filing of yesterday. That's why we convened the hearing. So
19 we thought that the requested redactions would be much heavier as it is. But still
20 we have seen, I have seen the proposed redactions, and there are still a couple of
21 questions I would like to ask in order to take a decision.
22 There is some reference to (Redacted) in two, three parts.
23 Why is this -- has this to be redacted? That somebody (Redacted), I think it
24 shouldn't be quite a big issue.
25 MR VANDERPUYE: Thank you, Mr President. And good morning to

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1 you. Kweku Vanderpuye for the Prosecution. I'm here with --

2 SINGLE JUDGE TARFUSSER: I'm sorry.

3 MR VANDERPUYE: -- Olivia Struyven, trial lawyer, and Sylvia Vidinha, our case
4 manager.

5 To answer your question I think perhaps as briefly as I can, we've redacted certain
6 classes of information. This falls into a class of information you've identified that in
7 the context may place the anonymous informant at a particular location at a
8 particular time or place a suspect in -- not a suspect -- place an individual who the
9 anonymous informant identifies at a certain place at a certain time, which may tend
10 to reveal the identity of the anonymous informant if that information is found out.

11 We say that because of two reasons: One is that we are not entirely -- we don't have
12 any idea who the informant is, in fact, and we don't know what the informant's
13 relationship is to the individuals that are the subject of these proceedings or the
14 subject -- or the subject matter of what he's speaking about in the communications.

15 So when he says a certain person is (Redacted) at a certain time or when he says that
16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted) So that's the reason why we redacted this information.

22 I would add also that we don't believe that this particular information is in any way
23 prejudicial to the Defence to the extent that the Chamber may find that the material
24 is disclosable, which is of course a secondary issue in any event.

25 SINGLE JUDGE TARFUSSER: Thank you for this clarification, which seems to

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1 make sense somehow. The second one is I noted here on page 18, there are three
2 lines of proposed redactions, because we're talking about localities and the name of
3 this person, but just above we are also talking about things which I think fall in the
4 same -- we're talking about locations, we're talking about May 2012, détenu, well,
5 things which fall in the same, in the same range of possible redaction.

6 I wonder why part is redacted and the other one is not, there is no proposal for
7 redactions.

8 MR VANDERPUYE: Thank you, Mr President. If I could respond? That
9 information is information that is otherwise in the public domain. And what the
10 individual is describing here is the comings and goings, itinerary, as it were, of an
11 individual we believe is involved in this, in this scheme, and the movements of that
12 individual are public knowledge. This was published in the paper, I believe, and so
13 it was quite public, and so we didn't feel that there was any need to redact it from,
14 from the anonymous informant's e-mail, because it's not something that would be
15 exclusive to the anonymous informant. It would be, it would be within the
16 knowledge of a number of people, so it wouldn't necessarily give away his identity,
17 and that's the reason for the distinction here.

18 SINGLE JUDGE TARFUSSER: Thank you. You know that in the application by
19 the Defence counsel of Mr Bemba, the request was specifically to disclose the e-mail
20 account of the person, right?

21 MR VANDERPUYE: Yes.

22 SINGLE JUDGE TARFUSSER: That is exactly what you do not want.

23 MR VANDERPUYE: Yes.

24 SINGLE JUDGE TARFUSSER: Which is from some point of view understandable,
25 but could you just make some clarification on why you think it should be, the e-mail

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1 account should be redacted, kept redacted.

2 MR VANDERPUYE: Our position is that none of this information should be
3 revealed to the Defence fundamentally because it is not relevant to the proceedings,
4 and it's not material to the preparation of the Defence.

5 I think our position is quite clear that the information that is contained in the e-mails
6 as your Honour has had a chance to read is not information that is unique in any
7 way. It is information that is otherwise accounted for fully in the investigation, in
8 the materials that have been made available to the Defence to date, and it is also
9 material that is neither directly or indirectly relied upon to any extent in the
10 charging document as you will soon see. But certainly even in support of the --

11 SINGLE JUDGE TARFUSSER: Not as soon as we want.

12 MR VANDERPUYE: Not as soon as you want it. But even, even to the extent that
13 it underlies any information that was used in obtaining the warrant of arrest, at this
14 stage it was simply information that was the impetus for the investigation and not
15 the investigation itself or the fruit of the investigation itself.

16 So our position is simply the Defence, if they're entitled to anything at all, is entitled
17 to the fruit of the investigation and not the impetus or the reason for the
18 investigation, which is what the application seems to speak to.

19 In terms of disclosing the account information, the IP information or the account or
20 the pseudonym, if you will, used by the anonymous informant, we think that
21 revealing that information would run counter to the informant's stated security
22 interests that are set out in the e-mail.

23 SINGLE JUDGE TARFUSSER: The Defence counsel of Mr Bemba requested first,
24 before coming to the Chamber with an application, they requested this information
25 directly to the OTP, to the Prosecutor, to the Office of the Prosecutor, right? And

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1 initially the Office of the Prosecutor was prepared to disclose it to the Defence, and
2 suddenly the Prosecutor said, "Well, stop." So they -- so counsel came to the Judge,
3 to the Chamber. Can you just explain --

4 MR VANDERPUYE: I can explain, yeah.

5 SINGLE JUDGE TARFUSSER: -- why this happened?

6 MR VANDERPUYE: First of all, it didn't happen. It's not, it's not exactly accurate.

7 A request was made by Mr Kaufman to the Prosecution to receive a redacted copy of
8 the e-mail communications. And as you can see, that there are quite a number of
9 e-mail communications, my response to Mr Kaufman was that I would review the
10 material to see whether or not we could provide him with a copy of the redacted, a
11 redacted copy of the e-mail communications, which I did. And having done that
12 and having read them all, I concluded that there was nothing in the information that
13 entitled him to receive even a redacted copy of it, because the underlying
14 information itself was not disclosable under Rule 77, which I think, at least I thought
15 I made clear in my response to him, because we communicated by e-mail where I
16 said that I don't find that this information is in any way relevant to the proceedings,
17 because it's neither used directly or indirectly as evidence in support of the charges
18 or any contestable issue in effect that arises under the case.

19 And so there was never an understanding that we would disclose it and suddenly
20 changed our minds about that. It was simply a question of reviewing the material,
21 as you can see, and making a determination as to whether or not it's disclosable, and
22 if so, to what extent. And that's ultimately the decision that we took, which we've
23 of course articulated to the Court in our response.

24 SINGLE JUDGE TARFUSSER: Well, thank you very much. I'm aware that you
25 have -- I've no other questions or clarification to ask. But I heard, I'm aware that

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1 you want to put forward something to the Chamber.

2 MR VANDERPUYE: I do, I do, Mr President. There are a number of issues. And,
3 of course, you will guide me as to what may be appropriate or inappropriate for the
4 purposes of these proceedings. But before we leave the question of the anonymous
5 informant, I just wanted to point out, and you may have seen in our filing that
6 because of the absence of information we have concerning the informant, it's very
7 difficult for us to formulate precisely what present protective measures should be in
8 place for him.

9 But we do indicate in the filing and I do want to underscore that it's clear from the
10 filing, clear from the filing and clear from his e-mails that his desire to remain
11 anonymous is predicated on an apparently genuine security concern. Whether that
12 exists currently or not, we don't know because of -- because we don't know what his
13 relationship may be to the parties, that is, to the suspects, any given suspect. For all
14 we know, he could be (Redacted). We just have no idea who he is in relation
15 to those individuals, and that's the reason why we think it's appropriate to proceed
16 with an abundance of caution if you find that the material is disclosable in any event.
17 In terms of the other material, the other issues I wanted to discuss, one was a filing
18 or, rather, a decision that was reached on our application to obtain access to the
19 transcripts of Defence witnesses in evidence in the main case before Trial Chamber
20 III. I believe that we cross-filed our application so that you would be aware that we
21 had filed it. I'm not so sure that you're aware of the result of that application. And
22 to my knowledge or my recollection anyway, the decision has been classified as
23 confidential. So I won't go into -- I won't go into the details of the decision. I'm
24 sorry.

25 (Counsel confers)

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- 1 MR VANDERPUYE: I'm mistaken, it's public. So let me apprise you of it then, if
2 you haven't already. Essentially what they have done is they have allowed us to
3 disclose this material in this case before you, but to a limited extent. They have
4 limited that to disclosing redacted versions of this evidence, redacted based upon
5 submissions made by the Bemba Defence in that case, security concerns.
6 Our evaluation of that material suggests at least preliminarily that it covers material
7 that we would intend to use and rely on in the Article 70 case, and, in fact, we have
8 already cited to some of this material in the DCC that's actually quite well drafted.
9 So we have a problem. And it's unclear, we're not clear entirely as to what we
10 want -- how we want to proceed on it, but I did want to bring it to your attention,
11 because it's something that clearly affects the case directly under your management,
12 and it affects our ability obviously to disclose materials under Rule 77. It affects the
13 Defence rights, procedural rights anyway before, before you.
14 So our intention right now at least tentatively is to go back to Trial Chamber III to
15 see if we can actually get this wholesale access to the Defence witnesses, Defence
16 evidence in the main case. But I just wanted to flag that to you and let you know
17 that there is a problem, and we may have to figure out a different way to proceed.
18 That's it. It's just for information purposes at this point.
19 SINGLE JUDGE TARFUSSER: But they authorised the disclosure of the material in
20 this case, in our case here, but only redacted, by the Defence redacted versions of
21 these, of these --
22 MR VANDERPUYE: Proposed redactions.
23 SINGLE JUDGE TARFUSSER: -- proposed, yes, but proposed to the Chamber.
24 MR VANDERPUYE: Proposed to Trial Chamber III.
25 SINGLE JUDGE TARFUSSER: Then the Trial Chamber has got to evaluate them.

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1 MR VANDERPUYE: Yes. But what the Trial Chamber did is they said: As it is
2 now, you can disclose it. And the reason for it is, the reason for it was because at
3 the time they made the decision, it was very close to the deadline in order to file the
4 DCC, so I think they just released it so that we would be able to at least disclose
5 something by the time that the DCC was due.

6 So I'm not sure how much of that was the impetus for the decision or whether that's
7 what their final position was, but in any event, they have not ruled on the proposed
8 disclosures as such, only to say that you can disclose it as it has been proposed to be
9 redacted, and then we will evaluate it. And if you evaluate it and determine that
10 the redactions are inappropriate, then you can then come back to us and explain to
11 us why it is inappropriate.

12 SINGLE JUDGE TARFUSSER: Well, there is still some, there is still some place at
13 this point in time.

14 MR VANDERPUYE: There is space. The problem is though that the space is such
15 that by -- one of the reasons why we didn't articulate specifically the basis for each
16 potential variation or basis for disclosure in the case was to avoid contaminating or
17 tainting the Trial Chamber by identifying those witnesses that have serious problems
18 in -- before that Chamber to say we're going to use that evidence in the Article 70
19 case to prove that the accused before you in Trial Chamber III has tampered with
20 these specific witnesses.

21 But in a sense what they have done now by this decision is invited us to make
22 exactly that representation, which is quite problematic, and we'll have to figure out a
23 way to do it. But if it has to be done, it has to be done.

24 So I just wanted to let you know that that's where we are. Hopefully we'll
25 formulate something and be filing I guess within a week or two to kind of clarify this

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1 issue and such, but that's where we are.

2 SINGLE JUDGE TARFUSSER: Okay. Thank you. And there is some other
3 question?

4 MR VANDERPUYE: Yeah, there is more. We have the issue of -- we received
5 some materials yesterday as a result of a request for assistance to the French
6 government that was filed some months ago, I'll say January or so, February. But in
7 any event, it relates to the e-mail accounts of Arido, Babala and Mangenda and
8 Kilolo.

9 The material was received yesterday or the day before. Kilolo's material was
10 received separately. But Mangenda's material was received as I understand it on
11 either the same disc or same CD as that of Arido and Babala. That creates a concern
12 for us, because we believe that at least there is the potential that the Mangenda
13 material in this context is potentially privileged, and the Kilolo most likely is or
14 certainly could be.

15 So I wanted to bring that to your attention, one, to let you know that we've just
16 received it; two, to propose, and perhaps I can do this in a proper filing, but to
17 propose that that material be evaluated or separated out at least by the independent
18 counsel to avoid any possibility of tainting the Prosecution by having access or
19 accessing, rather, potentially privileged material.

20 I don't know how much it is yet. And I believe that the seal is still intact, because I
21 asked that the seal be kept intact until at least I've brought this to your attention.

22 And I don't know whether or not it's an avenue that is suitable to the Court or the
23 Court is willing to undertake. But that's why I thought I would raise that. Maybe
24 you can tell us how you think it's best for us to proceed.

25 SINGLE JUDGE TARFUSSER: First of all, I don't understand how the French, in

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1 which way the French authorities can have the material or e-mail accounts from the
2 other three, from the three persons which were not based in France. I understand
3 Arido, but I don't know how it can be for the other two.

4 MR VANDERPUYE: They simply have yahoo.fr e-mail accounts.

5 SINGLE JUDGE TARFUSSER: Oh, okay, okay. So it's e-mail accounts on their
6 name?

7 MR VANDERPUYE: Yes, yes, exactly.

8 SINGLE JUDGE TARFUSSER: It's not Arido having e-mail exchanges with the
9 others?

10 MR VANDERPUYE: That's correct.

11 SINGLE JUDGE TARFUSSER: Okay.

12 MR VANDERPUYE: It's in their name, yes.

13 SINGLE JUDGE TARFUSSER: Okay. So I would suggest you make a filing on that
14 and we, we decide separate -- well, we decide on the Kilolo, which seems to be quite
15 obvious, and the other three after having received your filing and evaluate what is in
16 there, okay?

17 MR VANDERPUYE: All right. Thank you. There is another issue.

18 SINGLE JUDGE TARFUSSER: There is another issue. Go ahead.

19 MR VANDERPUYE: I could go on and on. The other issue is this -- wait, I lost it.
20 Just a moment.

21 Yes. The other issue relates to the seized materials that you've ordered returned to
22 suspect Mr Arido. I was in contact with the Registry I think it was yesterday, yeah,
23 and in relation to that there were some concerns regarding the adequacy of the
24 report, the extraction report relative to those materials. The Registry has apparently
25 undertaken to produce a more refined or a more accurate report, which they have

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1 essentially done at this point.

2 We were not in favour of returning the material to the suspect until we had

3 assurances from the Registry that they had actually conducted the extraction process

4 appropriately, let's say in accordance with the prevailing norms, industry standards,

5 and so on and so forth. They have apparently conformed their reports to those

6 standards. And I was informed just this morning that our cyber investigative head

7 has had an opportunity now to verify that the information that was provided to us

8 by the Registry in fact conforms to the material that they held by examining the

9 hashtags and other identifying information. So we've cleared that hurdle, but I did

10 bring it to -- I wanted to bring it to your attention yesterday, because I wasn't sure

11 that we'd reached this point.

12 So I think at this moment we have no objection to the Registry returning the

13 materials to Mr Arido.

14 There are some other materials, however, that have not -- that have been now I think

15 sent back or over to the Dutch Forensic Institute for examination. These relate to

16 two telephones -- four telephones rather, two of which the Registry had previously

17 extracted materials. But I'm not sure that -- they're not sure I think about the

18 adequacy of the extraction process with respect to those, so they have sent those over

19 to the Dutch Forensic Institute together with two other phones that they were not

20 able to extract information from. I don't know when it will come back to us, but

21 that's the status of it so far.

22 SINGLE JUDGE TARFUSSER: So most of it can be given back to Arido except for

23 these two or three phones.

24 MR VANDERPUYE: Except for the phones, yeah, because we don't know what the

25 situation is with that. And besides, I don't think the Registry has them anymore.

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1 They're sending them off to the Dutch Forensic Institute in any event.

2 SINGLE JUDGE TARFUSSER: Some other issue?

3 MR VANDERPUYE: That's all I can remember at this moment. There was one
4 other. But yeah, at this moment, I don't have anymore.

5 SINGLE JUDGE TARFUSSER: Okay.

6 MR VANDERPUYE: Thank you, your Honour.

7 SINGLE JUDGE TARFUSSER: So I think if there is nothing else, we can close here
8 at this status conference. Thank you.

9 THE COURT OFFICER: All rise.

10 (The hearing ends in closed session at 10.17 a.m.)

11 RECLASSIFICATION REPORT

12 Pursuant to Pre-Trial Chamber II's Decision, ICC-01/05-01/13-746, dated 7 November
13 2014, the version of the transcript with its redactions becomes Public.

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