

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 November 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 various filings related to two DVDs received from national
authorities**

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

Paul Djunga

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basilia

Counsel for Narcisse Arido

Göran Kimo 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

Other

Independent Counsel appointed

pursuant to ICC-01/05-01/13-41-Conf and ICC-

01/05-01/13-366-Conf

REGISTRY

Registrar

Herman von Hebel

Detention Section

I, Judge Cuno Tarfusser, having been designated as Single Judge of Pre-Trial Chamber II of the International Criminal Court;

NOTING the “Decision on the ‘Prosecution’s request to refer potentially privileged materials to Independent Counsel’” dated 25 April 2014 (“25 April 2014 Decision”)¹, whereby the Single Judge *inter alia* appointed Independent Counsel tasked with “(i) being present at the unsealing and the forensic acquisition of the DVDs” received by the Prosecutor from national authorities pursuant to a request for assistance, which DVDs contained the contents of e-mail accounts of suspects in the present case; “(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”;

NOTING the “Decision on the requests submitted by the Defence for Jean-Pierre Bemba Gombo on the forensic acquisition of DVDs and related filings” issued on 30 May 2014², whereby the Single Judge decided “that the transmission to the parties of the materials extracted from the DVDs will only 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 the 25 April 2014 Decision”;

NOTING the “Registry submissions related to the implementation of Decisions ICC-01/05-01/13-366-Conf and ICC-01/05-01/13-446” dated 12 June 2014³, whereby the Registrar *inter alia* informed that “DVD 1 is corrupted or damaged

¹ ICC-01/05-01/13-366-Conf.

² ICC-01/05-01/13-446.

³ ICC-01/05-01/13-490-Conf and confidential Annexes thereto.

making it impossible to extract all its data to make a forensic copy at this stage” and that “DVD 2 was successfully acquired”;

NOTING the “Rapport du Conseil indépendant suivant la Décision ICC-01/05-01/13-366-Conf (Analyse d’un premier lot d’emails)” dated 11 September 2014 (“Independent Counsel’s Report”)⁴, whereby Independent Counsel stated that he was “prêt à examiner le contenu de l’autre DVD [i.e. DVD 1] ... dès qu’il sera mis à sa disposition et à faire rapport à la Chambre tel que demandé” and submitted his proposals for redactions of sixteen e-mails extracted from Mr Kilolo’s account, as contained in DVD 2, considered “pertinents dans le cadre de la présente procédure”, as contained in Annex B thereto;

NOTING the “Second Registry submissions related to the implementation of Decisions ICC-01/05-01/13-366-Conf and ICC-01/05-01/13-446” dated 29 October 2014⁵, whereby the Registrar reported *inter alia* that (i) in the context of its forensic acquisition DVD 1 was found “corrupted or damaged”; (ii) accordingly, a new copy thereof had been requested and obtained from the relevant national authorities; (iii) the unsealing and forensic acquisition of this new copy of DVD 1 had been performed on 22 October 2014;

NOTING “Narcisse Arido’s request for a copy of DVD No. ICC-01/05-01/13-RPM-0016-0001” submitted on 7 November 2014 (“Mr Arido’s Request”)⁶, requesting the Single Judge “to order the Registry to provide a complete copy of all electronic records, information, emails, and/or log files transmitted to the Registry’s custody through the forensic acquisition of the DVD ICC-01/05-01/13-

⁴ ICC-01/05-01/13-670-Conf-Exp and confidential ex parte Annexes thereto.

⁵ ICC-01/05-01/13-724-Conf and confidential Annexes thereto.

⁶ ICC-01/05-01/13-745-Conf.

RPM-0016-0001 [i.e., the new copy of DVD 1], along with the necessary software required to view it”;

NOTING the “Observations concernant les DVD contenant les comptes e-mail”, dated 10 November 2014 (“Mr Mangenda’s Request”)⁷, whereby the Defence for Mangenda (I) observes that (i) “[l]es comptes e-mail ont vraisemblablement été saisis sans autorisation spécifique des autorités Françaises et plus spécifiquement du Bâtonnier de l’Ordre” (“First Issue”); (ii) “[i]l n’est pas clair si le Procureur a obtenu autorisation spécifique de la Chambre concernant ces saisies” (“Second Issue”); (iii) “[c]es comptes e-mail sont examinés par un conseil indépendant ... qui ne dispose d’aucun pouvoir légal à ce sujet” (“Third Issue”); (iv) “[c]et examen se déroule sous la direction d’un Juge qui fait partie du siège qui doit juger de la confirmation ou non des charges” (“Fourth Issue”); (v) “[c]et examen se fait en l’absence des parties concernées” (“Fifth Issue”); (vi) “[l]es comptes e-mail ne contiennent pas uniquement des éléments confidentiels mais aussi des éléments appartenant à la vie privée” (“Sixth Issue”); and (II) requests “qu’une audience soit tenue afin de clarifier les positions différentes des parties et de débattre des règles à suivre”;

NOTING the “Prosecution’s Response to ‘Observations concernant les DVD contenant les comptes e-mail’” dated 19 November 2014 (“Prosecutor’s Response”)⁸, whereby the Prosecutor opposes Mr Mangenda’s Request;

NOTING articles 57(3)(c) and 67(1)(b) of the Statute, rules 73 and 81 of the Rules of Procedure and Evidence;

⁷ ICC-01/05-01/13-748-Conf.

⁸ ICC-01/05-01/13-760-Conf.

CONSIDERING, as regards Independent Counsel's Report, that, according to the practice of this Chamber in these proceedings, it is necessary that the Defence for Mr Kilolo be given the opportunity to provide observations on the selection made and the redactions proposed by Independent Counsel, prior to any item being made available to the Prosecutor and the other Defence teams, if it so wishes;

CONSIDERING that, accordingly, the relevant items shall be made available to the Prosecutor and the other Defence teams only after the Single Judge has reviewed the observations made by the Defence for Mr Kilolo, if any;

CONSIDERING, as regards Mr Arido's Request, that it is premised on the speculative assertion that "there is no guarantee that [the e-mail account] current contents will necessarily correspond to the information that is contained in the DVD [i.e., DVD 1] and which may be raised as evidence against him at a possible later stage" and fails to identify any specific item which would satisfy the twofold requirement of being both no longer available to Mr Arido and relevant;

CONSIDERING that, accordingly, the Single Judge is not satisfied that providing Mr Arido with a copy of DVD 1 at this stage would qualify as an order necessary to assist the person in the preparation of his or her defence, within the meaning of article 57(3)(c) of the Statute;

CONSIDERING, as regards Mr Mangenda's Request, that:

- (i) the First Issue relates to the admissibility as evidence of items which might be extracted from the DVDs and relied upon by the parties; as such, it is no longer relevant to this stage of the proceedings, without prejudice to the fact that it might be raised anew in subsequent stages,

if and to the extent that any of the DVD's contents shall be relied upon by any of the parties;

- (ii) the Second Issue disregards the well-established fact that both DVDs were provided by the French authorities in response to and implementation of a request for assistance emanating from the Prosecutor;
- (iii) the Third, Fourth, Fifth and Sixth Issues are seeking to reopen the discussion on the lawfulness of Independent Counsel's appointment pursuant to the 25 April 2014 Decision, as well as on the adequacy and the appropriateness of measures taken therein with a view to preventing access by the Prosecutor to material and information of a privileged nature or otherwise obviously irrelevant for the purposes of these proceedings; as such, and since the material and information has yet to be recovered from the DVDs, they are no longer relevant to this stage of the proceedings, without prejudice to the fact that they might be raised anew in subsequent stages, if and to the extent that any of the DVD's contents shall be relied upon by any of the parties;

CONSIDERING that, accordingly, none of the issues raised by My Mangenda's Request warrants the holding of a hearing at this stage;

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS Mr Arido's Request;

REJECTS Mr Mangenda's Request;

DECIDES that ICC-01/05-01/13-670-Conf-Exp-AnxB shall be reclassified as confidential *ex parte* only Independent Counsel and Defence for Mr Kilolo;

DECIDES that the Defence for Mr Kilolo shall have 5 days to submit observations, if any, following the reclassification of ICC-01/05-01/13-670-Conf-Exp-AnxB pursuant to this decision.

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



Judge Cuno Tarfusser

Single Judge

Dated this Monday, 24 November 2014

The Hague, The Netherlands