

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 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 requests submitted by the Defence for Jean-Pierre Bemba
Gombo on the forensic acquisition of DVDs and related filings**

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

Other

Independent Counsel appointed pursuant to ICC-01/05-01/13-41 and ICC-01/05-01/13-366-Conf

REGISTRY

Registrar

Herman von Hebel

Detention Section

Victims and Witnesses Unit

Others

**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 “Defence request to be present at the forensic acquisition of material pursuant to decision ICC-01/05-01/13-366-Conf”, dated 30 April 2014 (“Mr Bemba’s First Request”)¹, whereby the Defence for Jean-Pierre Bemba *inter alia* (i) submits that having been denied financial legal assistance twice results in him being unable to exercise “his right” to be present to the forensic acquisition of DVDs received from national authorities containing the contents of email accounts of suspects in the present case, including Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo, pursuant to a request for assistance dated 22 November 2013 (“DVDs”), pursuant to the “Decision on the ‘Prosecution’s request to refer potentially privileged material to Independent Counsel’” (“25 April 2014 Decision”)² and, accordingly, (ii) requests the Single Judge “to rule, forthwith, on the third Defence request for loan *in lieu* of legal assistance” or, “[f]ailing the aforementioned, ... to order the suspension of the forensic acquisition until the Suspect is provided with the financial means to permit him to pay herein undersigned Counsel to be in attendance at the said procedure”;

NOTING the “Defence request to cancel the forensic examination of DVDs fixed on 8 May 2014 and to rule on ICC-01/05-01/13-371-Conf”, dated 6 May 2014³ (“Mr Bemba’s Second Request”; Mr Bemba’s First and Second Requests, collectively, “Mr Bemba’s Requests”, or the “Requests”), whereby the Defence for Jean-Pierre Bemba requests the single Judge to rule on his First Request, in light of the proposed date of 8 May 2014 for the forensic acquisition;

¹ ICC-01/05-01/13-371-Conf.

² ICC-01/05-01/13-366-Red.

³ ICC-01/05-01/13-378-Conf.

NOTING the “Prosecution omnibus response to the Bemba Defence submissions on attending the unsealing and forensic acquisition of the DVDs”, dated 6 May 2014⁴ (“Prosecutor’s Response”), submitting *inter alia* that (i) she “does not oppose Counsel attending the unsealing and forensic acquisition of DVDs, but opposes any delay to accommodate his wish to attend”; (ii) “if counsel is unable to represent adequately Mr Bemba’s interests it is incumbent upon him to withdraw immediately from further representation to preserve the integrity of the proceedings”; (iii) Mr Bemba’s representation could be adequately assured by the Office of Public Counsel for the Defence”;

NOTING the “Rapport intérimaire concernant la mise en œuvre de la décision n°ICC-01/05-01/16-366-Conf” dated 8 May 2014, whereby Independent Counsel informs that, in light of Mr Bemba’s Requests, the forensic acquisition has been suspended *sine die*;⁵

NOTING “Narcisse Arido’s Observations on the Prosecution’s Omnibus Response to the Bemba Defence Submissions on Attending the Unsealing and Forensic Acquisition of the DVDs (ICC-01/05-01/13-379-Conf)”, submitted on 9 May 2014⁶, whereby the Defence for Narcisse Arido (i) asserts Mr Arido’s right, in light of his role as a Defence witness in case ICC-01/05-01/08 (the “Main Case”), to confidential and privileged communications with the calling party and, accordingly, (ii) requests the Single Judge to “ensure that the information contained on the DVDs are not given to the Prosecution prior to his review of the reports submitted by the Registrar and the Independent Counsel on the operations carried out in implementation of his 25 April 2014 decision”;

⁴ ICC-01/05-01/13-379-Conf.

⁵ ICC-01/05-01/13-382-Conf-Exp.

⁶ ICC-01/05-01/13-389-Conf.

NOTING the “Defence request for leave to reply to Prosecution filing: ICC-01/05-01/13-379-Conf” dated 11 May 2014 (“Mr Bemba’s Request for Leave to Reply”), whereby the Defence for Mr Bemba requests leave to reply to the Prosecution’s Response, addressing a number of issues concerning the forensic acquisition and the Suspect’s representation;

NOTING the Presidency’s “Decision on the ‘Defence application to the Presidency for judicial review of the Registrar’s second decision on legal assistance dated 27 February 2014’” dated 20 May 2014, ordering the Registrar “to advance legal fees for the payment [sic] Suspect’s defence in case ICC-01/05-01/13 for a period of four months to the amount deemed appropriate at this stage of the proceedings” (“Presidency Decision”);

NOTING the “Decision on the ‘Third request for loan *in lieu* of legal assistance’”, dated 27 May 2014, rejecting Mr Bemba’s request for loan⁸;

NOTING articles 57(3)(c), 67(1)(b) and 69(5) of the Statute, rule 73 of the Rules of Procedure and Evidence and regulation 24 of the Regulations of the Court;

CONSIDERING that, as stated in the 25 April 2014 Decision:

- (i) it is appropriate that the parties be allowed to be present at the time when the operations instrumental to the forensic acquisition of the DVDs are carried out by Independent Counsel with the cooperation of the relevant services of the Registry;
- (ii) it is necessary and appropriate that the operations instrumental to the proper acquisition of the DVDs be carried out expeditiously, without prejudice to the determinations the Chamber will be called to make as to the admissibility and the relevance of any materials which might be retrieved and relied upon by the parties;

⁷ ICC-RoC85-01/13-21-Conf-Exp.

⁸ ICC-01-05-01/13-441-Conf-Exp.

- (iii) it is necessary to ensure that no additional delays will affect the timely closure of the pre-trial phase of the proceedings and that, accordingly, the implementation of the procedures envisaged in the 25 April Decision shall not delay, or otherwise impact, the calendar for the confirmation of the charges;

CONSIDERING that, by the same token, the presence of one or more of the parties at the time when the operations instrumental to the forensic acquisition of the DVDs are carried out is to be regarded as an option offered to the parties, as opposed to a requirement for the forensic acquisition to take place;

CONSIDERING that, accordingly, in the event that either of the Defence teams shall not be able to attend the forensic acquisition as scheduled, the interests of the defence shall be represented by the Principal Counsel of the Office of Public Counsel for the Defence, without this entailing – contrary to the submission made by Counsel for Mr Bemba – any denial of the suspect's right to counsel of his own choice;

CONSIDERING further that, by virtue of the Presidency Decision, the financial issues allegedly preventing Counsel for Mr Bemba from benefitting from the option to attend the forensic acquisition no longer stand;

CONSIDERING, as also stated in the 25 April 2014 Decision, that arguments relating to the admissibility of some of the evidentiary materials that might be relied upon in this case (including materials which might be extracted from the DVDs) will be thoroughly addressed in the context of the determinations to be made for the purposes of the confirmation of the charges and, accordingly, it is not appropriate at this stage to entertain any submission as to the admissibility or, more broadly, the evidentiary relevance of the items which might be retrieved from the DVDs;

CONSIDERING that all of the issues on which the Defence for Mr Bemba requests leave to reply either relate to the admissibility and relevance of the items which might be retrieved from the DVDs, or to issues which are no longer outstanding due to procedural developments in the case;

CONSIDERING that the concerns underlying Mr Arido's Request are adequately met by the terms of the mandate vested in Independent Counsel pursuant to the 25 April 2014 Decision, and in particular by the order that Independent Counsel review the DVDs, with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of these proceedings, and promptly submit a report to the Single Judge as to the results of the review;

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

DECIDES that document ICC-01/05-01/13-382-Conf-Exp shall be reclassified as confidential;

REJECTS Mr Bemba's First and Second Requests;

REJECTS Mr Bemba's Request for Leave to Reply;

REITERATES the determinations made in the 25 April 2014 Decision, as follows:

ORDERS Independent Counsel to promptly liaise with the relevant sections of the Registry, with a view to scheduling a suitable calendar for the unsealing, the forensic acquisition and the review of the DVDs to be carried out and completed as expeditiously as feasible;

ORDERS the relevant sections of the Registry to liaise with the Prosecutor and the Defence teams, with a view to making it possible for them to be present upon the implementation of the operations for the unsealing and forensic acquisition of the DVDs as scheduled;

DECIDES 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 and of this decision;

DECIDES that, in the event that either of the Defence teams shall not be able to attend the forensic acquisition as scheduled, the interests of the Defence shall be represented by the Principal Counsel of the Office of Public Counsel for the Defence.

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

A handwritten signature in black ink, consisting of a series of loops and flourishes, positioned above a horizontal line.

Judge Cuno Tarfusser
Single Judge

Dated this Friday, 30 May 2014

The Hague, The Netherlands