

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 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

Corrected version of "Prosecution's Response to the Arido Defence's Request for Stay of Investigation by the NFI and Response to Second Addendum to Registry Submissions ICC-01/05-01/13-299-Conf (ICC-01/05-01/13-369-Conf)", 21 May 2014, ICC-01/05-01/13-416-Conf

Source: The Office of the Prosecutor

Document to be notified in accordance with Regulation 31 of the Regulations of the Court to:

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the Arido Defence's request for a stay of the NFI's analysis of the suspect's mobile phones seized from him pursuant to the Pre-Trial Chamber II ("Chamber")'s 20 November 2013 arrest warrant ("Request").¹ First, the requested stay is without a sufficient legal or factual basis; second, the Defence's intention to litigate the propriety of the NFI's custody and forensic examination of the mobile phones before the domestic courts is of no consequence to the admissibility of their content before the Court; and third, granting the stay would unjustifiably impede the on-going investigation and delay pre-trial proceedings. The Chamber should thus dismiss the Request.

II. Confidentiality

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

III. Submissions

A. The requested stay is without a sufficient legal or factual basis

3. The requested stay of the NFI's examination of the seized mobile phones is not foreseen in the Rome Statute ("Statute") or the Rules of Procedure and Evidence ("Rules").

4. Although a conditional stay of proceedings can be imposed pursuant to Article 21(3) of the Statute, the Request falls far short of meeting the requisite legal threshold established by the Appeals Chamber - namely, that "breaches of the rights of the

¹ ICC-01/05-01/13-401-Conf.

accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place".²

5. The Request makes no case that any potential "breaches of the rights of the [suspect may lead] to an objectively irreparable and incurable situation."³ Accordingly, the Request lacks a sufficient legal or factual basis for a stay.

B. The Defence's intended litigation of the NFI's custody and examination of the seized mobile phones would not affect the admissibility of their content

6. The outcome of any Defence litigation before Dutch courts concerning the legality of the NFI's custody of the seized mobile phones will have no impact on the admissibility of their content before the Court.

7. First, contrary to the Request,⁴ the NFI's possession of the mobile phones seized from Arido pursuant to his arrest is legal. The seizure, executed pursuant to the arrest warrant,⁵ has lawfully dispossessed the suspect of his phones. The Court/Registry thus possess this material to the exclusion of the Suspect's proprietary interests. The Suspect's consent to the disposition of this material, particularly in the context of its forensic examination in an on-going criminal investigation, is neither required nor appropriate.

8. Second, the Request fails to demonstrate that the NFI's possession of the mobile phones involves any issue meeting the threshold requirements for the inadmissibility of evidence under Article 69(7) of the Statute. Specifically, nothing in the Request suggests that the seized material or the information derived from it was, or will be,

² ICC-01/04-01/06-1486, para. 78.

³ ICC-01/04-01/06-1486, para. 79.

⁴ ICC-01/05-01/13-401-Conf, para. 9.

⁵ ICC-01/05-01/13-1-Red2-tENG, p. 16.

“obtained by means of a violation of this Statute or internationally recognized human rights”.⁶

9. To the contrary, the Request alleges that the NFI's custody of the seized material violates Dutch law singularly because: (1) the Suspect was not able to provide his views before the items were transferred to the NFI;⁷ and (2) the NFI has no valid legal title under Dutch law to the phones, or to investigate or modify them.⁸

10. Whether Dutch law supports these contentions is unclear, given the Defence's failure to cite any applicable provisions thereof and, in any case, immaterial. What is clear is that the factual and legal circumstances as pled in the Request in no way affect the admissibility of the seized devices' content or any derivative information under the Statute or the Rules.

C. Granting the requested stay would unjustifiably impede the on-going investigation and delay pre-trial proceedings

11. The requested stay, no matter how narrowly construed, would affect the pre-trial proceedings as a whole because it bears directly on the availability of potential evidence. A stay would seriously delay access to such evidence, as well as the Prosecution's continuing investigation and any related disclosure. In turn, this would negatively affect the remaining four suspects' ability to obtain and to assess any such material, impacting their preparedness and delaying the proceedings contrary, *inter alia*, to Article 67(1)(c) of the Statute and Rules 101 and 162(d) of the Rules.

12. Given the infirmity of the Request, the consequences of a stay to the expeditious conduct of the proceedings are unjustified and disproportionate.

⁶ See Article 69(7) of the Statute.

⁷ ICC-01/05-01/13-401-Conf, para. 9.

⁸ ICC-01/05-01/13-401-Conf, para. 9.

IV. Requested Relief

13. For the foregoing reasons, the Prosecution requests the Chamber to dismiss the Request.



Fatou Bensouda, Prosecutor

Dated this 22nd Day of May 2014

At The Hague, The Netherlands