

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05

Date: 27 May 2013

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

Confidential, *ex parte* Prosecutor and Registry only

Decision on the "Registry's Observations pursuant to regulation 24 *bis* of the Regulations of the Court on the implementation of the 'Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70"""

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Fatou Bensouda, Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Herman von Hebel, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I, Judge Cuno Tarfusser, having been designated¹ as Single Judge of Pre-Trial Chamber II ("Chamber") of the International Criminal Court responsible for addressing and determining the issues arising in connection with the Prosecutor's "Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70" dated 3 May 2013 ("Prosecutor's Request");²

NOTING that, in her Request, the Prosecutor submitted that her office was investigating potential offences against the administration of justice under article 70 of the Rome Statute ("Statute") and rule 165 of the Rules of Procedure and Evidence ("Rules") in the case of The Prosecutor v. Jean-Pierre Bemba Gombo ("Accused"), and that such investigation would require a number of additional investigative measures;

NOTING the "Decision on the Prosecutor's 'Request for judicial assistance to obtain evidence for investigation under Article 70'", dated 8 May 2013 (the "Decision"), whereby the Single Judge (i) ordered the Registrar to verify whether any of the telephone numbers listed in paragraphs 25 and 41 (sub a) of the Prosecutor's Request was included in the Registry's records for the purposes of the functioning of the monitoring of telephone conversations held by the Accused at the detention centre and, in the affirmative, to provide the Prosecutor with all the available details pertaining to those numbers ("First Order"); (ii) ordered the Registrar to make available to the Prosecutor the complete log of all telephone calls placed or received by the Accused during his stay at the detention centre, as well as any available recording of all non-privileged calls either placed or received by him ("Second Order"); (iii) authorised the Prosecutor to contact and interview Defence witnesses for the limited purposes of the investigation evoked in her Request, without prejudice to all the limitations set forth in the protocol for contact with witnesses

¹ ICC-01/05-45-Conf-Exp.

² ICC-01/05-44-Conf-Exp.

established by Trial Chamber III, which remained otherwise applicable and in force ("Third Order");³

NOTING the "Registry's Observations pursuant to regulation 24 *bis* of the Regulations of the Court on the implementation of the 'Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70'", whereby the Registrar submits a number of observations in relation to the implementation of the Decision;⁴

NOTING the 'Prosecution's Submissions on the Registry's Observations on the Implementation of the "Decision on the Prosecutor's Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70";⁵

issue this decision.

The Registry's submissions

1. First ("Registry's First Observation"), the Registry notes that the Second Order contained in the Decision (i.e., to make available to the Prosecutor the complete log of all telephone calls placed or received by the Accused during his stay at the detention centre, as well as any available recording of all non-privileged calls either placed or received by him) "is raising some technical difficulties" and that "the extracting of all [relevant] telephone calls ... will require 28 days". Accordingly, it proposes that the scope of the information to be transmitted to the Prosecutor under the Second Order be limited "to relevant information as described by OTP in the Request and, where necessary, clarified by further consultation with the OTP"⁶.

³ ICC-01/05-46-Conf-Exp.

⁴ ICC-01/05-48-Conf-Exp.

⁵ ICC-01/05-49-Conf-Exp.

⁶ ICC-01/05-48-Conf-Exp, paragraph 3.

2. Second ("Registry's Second Observation"), the Registry submits that, notwithstanding the Single Judge's finding that the appointment of an independent Counsel, for the purposes of the Prosecutor's Request, was not necessary, it is "considering the possibility of appointing an ad hoc Counsel in order to represent and protect the interests of the Defence at the early stage of the investigation"⁷.
3. Third ("Registry's Third Observation"), the Registry observes that the Victims and Witnesses Unit, "because of its neutrality requirement... should not be requested to facilitate or otherwise assist the Prosecution in contacting defence witnesses without informing the Defence of VWU's operations pertaining to those witnesses" as required by the Protocol governing contact with witnesses established by Trial Chamber III⁸.
4. Accordingly, the Registry "seeks guidance from the Single Judge as to the best way of implementing the Decision"⁹.

The Prosecutor's observations

5. As to the Registrar's First Observation, the Prosecutor notes that she has no wish to receive the recordings of all of the Accused's calls, but rather (1) the full log of telephone calls of the Accused and (2) recordings of only those calls the Prosecution would deem pertinent and relevant after reviewing the log and considering other information available to it. Since the Decision simply ordered that log and communications be "made available" to the Prosecutor, the Prosecutor submits that no amendment of the Decision is required¹⁰.
6. As to the Registrar's Second Observation, the Prosecutor submits that the appointment of an ad hoc Counsel in order to represent and protect the interests of the defence at the early stage of the investigation is "both unnecessary and

⁷ ICC-01/05-48-Conf-Exp, paragraph 5.

⁸ ICC-01/05-48-Conf-Exp, paragraph 6.

⁹ ICC-01/05-48-Conf-Exp, paragraph 7.

¹⁰ ICC-01/05-49-Conf-Exp, paragraph 11.

completely outside the role and mandate of the Registry" and, accordingly, requests the Single Judge to order the Registry to refrain from such appointment¹¹.

7. As to the Registrar's Third Observation, the Prosecutor notes inter alia that the authorisation granted by the Single Judge was clearly instrumental to "the specific and limited purposes of the investigation into the scheme" alleged in her Request; that prior notification to the Defence of the envisaged contact would "hinder the Prosecution's investigation into this matter"; and that the circumstances often require the Registry to provide assistance to one of the parties to the proceedings without informing the other. Accordingly, the Prosecutor requests the Single Judge to order the Registry to assist her with limited interviews with defence witnesses for the purposes of the investigation evoked in her Request, without informing the Defence.¹²

Single Judge's determinations

8. As to the Registry's First Observation, the Single Judge observes that nothing in the Decision should be read as an obstacle to the Registry liaising with the Prosecutor with a view to allowing the latter to obtain swift access to the materials which she considers as possibly relevant to the investigation evoked in her Request. Indeed, submitting the log of the calls to the Prosecutor first, with a view to allowing her to identify those telephone calls for which she might be interested in having the recordings, might be an efficient way to serve the interests and the objectives underlying the order issued by the Single Judge. Accordingly, the Single Judge sees no reason to object to this way of proceeding. What matters, and should be preserved, is the Prosecutor's right to access all those non-privileged recordings which she considers relevant to the investigation evoked in her Request.

9. As to the Registry's Second Observation, the Single Judge wishes to clarify that the Decision was aimed at exercising the Chamber's powers under article 57(3)(a) of the Rome Statute, with a view to providing the Prosecutor with access to

¹¹ ICC-01/05-49-Conf-Exp, paragraph 12.

¹² ICC-01/05-49-Conf-Exp, paragraphs 14-15.

information which, in her view, might assist her in carrying out and furthering the investigation of a possible offence under article 70 of the Statute. As such, it appears appropriate to remind that, at this stage, the proceedings triggered by the Prosecutor's Request are to be regarded as separate and autonomous vis-à-vis those relating to the case of the Prosecutor v. Jean-Pierre Bemba. The very premise of the Prosecutor's Request – i.e., the fact that the Prosecutor needed the assistance of the Chamber in accessing information – shows that the Office of the Prosecutor, whilst working on an investigative scenario, has not yet come to a determination as to whether there are reasonable grounds to believe that an offence within the context of article 70 has indeed been committed, and even less has identified one or more individuals which might be charged with such offence.

10. Based on the above, the Single Judge reiterates that the main purpose for recording telephone conversations from and to the detention centre is to allow the relevant authorities to access them at a later stage when the reasonable suspicion as to the commission of a crime arises and that the only calls which are not subject to this rule are those enjoying privileged status. Accordingly, as long as they are not directed to counsel and as such privileged, the conversations entertained by the Accused at the detention centre can be legitimately directly accessed by the Prosecutor for the purposes of her investigation and there is accordingly no need for an "independent counsel" to be appointed. Only once, and if, the Prosecutor will have determined that there are reasonable grounds to believe that an offence has indeed been committed, will the relevant suspect be entitled to rely on the assistance of counsel of his or her choice.

11. As to the Registry's Third Submission, the Single Judge observes that it appears based on a misunderstanding of the Decision, and in particular of the clause that the Protocol established by the Trial Chamber would remain "otherwise in force". As it should have been clear, having found good reasons supporting the Prosecutor's request to contact defence witnesses without prior notice to the Defence, authorisation to such direct contact for the limited purposes of the investigation evoked in the Prosecutor's Request has been granted by the Single

Judge and thereby an exception to the operation of the Protocol has been created. Accordingly, the Registry, as service provider of the Court, should duly take note of such exception and provide the Prosecutor with all the assistance which is necessary and appropriate for that exception to be applied and to function smoothly.

FOR THESE REASONS, THE SINGLE JUDGE

ORDERS the Registrar to make available to the Prosecutor without delay the complete log of all telephone calls placed or received by the Accused during his stay at the detention centre, as well as any available recording of all non-privileged calls either placed or received by him;

ORDERS the Registrar to liaise with the Prosecutor to identify the best way to practically carry out the abovementioned order;

ORDERS the Registrar, directly and through its specialised units (in particular, the Victims and Witnesses Unit) to provide the Prosecutor with all the assistance that might be necessary and appropriate with a view to allowing her to implement the authorisation to contact defence witnesses for the limited purposes of the investigation evoked in her Request.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', with a long horizontal stroke extending to the right.

Judge Cuno Tarfusser

Single Judge

Dated this Monday, 27 May 2013

At The Hague, The Netherlands