

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 17 December 2013

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 the "Prosecution's request for recordings of telephone calls between Messrs Bemba and Mangenda to be referred to Independent Counsel"

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

Florence Darques Lane

Counsel for Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Jean-Pierre Kilenda Kakengi Basila

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Prof Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Legal Representatives of 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

Others

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 “Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” issued on 20 November 2013;

NOTING the “Prosecution’s request for recordings of telephone calls between Messrs Bemba and Mangenda to be referred to Independent Counsel” dated 5 December 2013” (“Prosecutor’s Request”),¹ whereby the Prosecutor (i) submits not having accessed telephone calls between Mr Jean-Pierre Bemba Gombo and Mr Jean-Jacques Mangenda made on a non-privileged line, recorded at the Detention Centre and made available by the Registrar pursuant to a Single Judge decision dated 29 July 2013 (“29 July 2013 Decision”)² and (ii) requests that an independent counsel be appointed and tasked with reviewing such calls, with a view to ensuring “that the confidentiality of any legitimately privileged communications concerning the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Main Case”) remains intact”;

NOTING articles 57(3), 61 and 67 of the Statute; rules 22 and 73 of the Rules of Procedure and Evidence; regulations 67 and 68 of the Regulations of the Court; article 32 of the Code of Professional Conduct for Counsel;

issue this decision.

Prosecutor’s submissions

1. The Prosecutor submits that, starting in July 2013 and pursuant to the 29 July 2013 Decision, the Registry provided the Prosecution with access to audio

¹ ICC-01/05-01/13-33-Conf.

² ICC-01/05-52-Conf-Exp.

files of conversations held between Mr Bemba and Mr Mangenda on the non-privileged line of the Detention Centre, as recorded by the Detention Unit ("Mangenda Calls"). She also submits having, to date, refrained from accessing or reviewing the Mangenda Calls, with a view to avoiding "any inadvertent exposure to potentially privileged information". In her view, despite the fact that they occurred on the non-privileged line, the Mangenda Calls "could nevertheless contain privileged information related to the Main Case", in light of Mr Mangenda's role as Mr Bemba's case manager in the Main Case. Accordingly, she requests (i) that an independent counsel be appointed, tasked with reviewing the Mangenda Calls prior to the Prosecution having access to them and with providing all non-privileged information contained in the Mangenda Calls to the Prosecution on a rolling basis; (ii) that, as a consequence, the Mangenda Calls be "excepted from the timetable for disclosure established for materials collected through 23 November" 2013 and (iii) that a new timetable for disclosure for the Mangenda Calls be set once the results of the work of the independent counsel are transmitted to the Prosecutor and the latter has been afforded a reasonable opportunity to review any released material.

Single Judge's determinations

2. The Single Judge takes the view that the Prosecutor's Request is premised on an excessively broad approach to the issue of professional privilege. It is true, as the Prosecutor argues, that "it is principally the participants and subject matter of a communication that determines whether it is privileged, rather than the modalities of the communication". It is likewise true, however, that, as also stated by the Prosecutor, "the mode of communication may also vitiate a potential privilege", especially where "the privilege holder has no reasonable expectation of privacy or confidentiality". Accordingly, the specific

features of the calls at stake, as well as the role played by the relevant parties, are of relevance for the purposes of this decision.

3. It is beyond controversy that the Mangenda Calls were placed on a line which was considered non-privileged by the Registry, and treated accordingly for all purposes, including, in particular, for the purposes of recording. It is also beyond controversy that the features of the line were adequately known to all the parties involved. In light of this, the Single Judge takes the view that the parties to the Mangenda Calls were not entitled to any legitimate expectation of privacy or confidentiality.

4. The Prosecutor takes the view that the parties to the Mangenda Calls might have nurtured a reasonable expectation of privacy or confidentiality and that therefore, at the very minimum, "it is not sufficiently clear whether the Mangenda Calls are in fact legally non-privileged". In so doing, she seems to place the case manager on a par with counsel, at least for the purposes of the right to privilege. The Single Judge takes the view that this approach is not warranted by the status respectively granted to counsels, on the one hand, and case managers, on the other hand. Whilst it is not necessary, for the purposes of this decision, to embark upon a full-fledged analysis of the features and nature of the role of case manager, as opposed to the role of counsel, a mere glance at the statutory texts highlights major differences between the two. Suffice it to say that no specific mention of "case managers" is made in the statutory texts of the Court, whereas the Rules of Procedure and Evidence (rule 22) and the Regulations of the Court (regulations 67 and 68) set forth in detail the requirements to be met by counsels and assistants to counsel, including by way of reference to the Regulations of the Registry. Furthermore, article 32 of the Code of Professional Conduct for counsel provides that counsel is responsible for

“instructing” his or her assistants or staff in the standards of the Code and that counsel shall be liable for misconduct by his or her assistants or staff when he either orders or approves the conduct involved or knows or has information suggesting that violations may be committed and takes no reasonable remedial action.

5. This difference in treatment appears fully in line with the duties and responsibilities typically vested in case managers: broadly speaking, they are limited to the administrative management of a given case, and may range from organising, filing and preparing of documents or evidence, including for the purposes of disclosure, to providing assistance to counsels and assistants to counsels for the purposes of identifying and retrieving information pertaining to the case. This role is obviously very different in nature, scope and purpose from the one played by counsels and their assistants.

6. Accordingly, and even without considering the need to ensure that proceedings are conducted as expeditiously as feasible, the Single Judge takes the view that the measures requested by the Prosecutor are not warranted by the nature and legal status of the Mangenda Calls.

7. As regards the need to preserve the integrity of the Main Case, the Single Judge takes the view that this need is adequately taken care of by the fact that the prosecution teams respectively in charge of the Main Case and of the present proceedings are composed by different lawyers and professional staff.

8. Finally, the Single Judge is mindful that the Prosecutor's belief that the Mangenda Calls might be of a privileged nature led her to commendably refrain from analysing, or even accessing, those calls until the present day. This makes it appropriate to grant the Prosecutor a limited extension of the deadline for

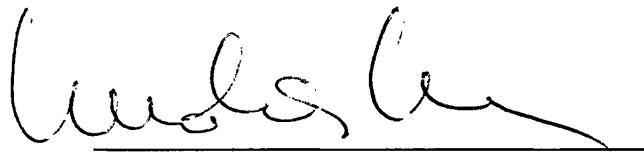
Mangenda Calls on which she intends to rely for the purposes of the confirmation hearing.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Prosecutor's Request;

DECIDES that the Prosecutor shall have until Friday 10 January 2014 to disclose to the Defence teams any material pertaining to the Mangenda Calls on which she intends to rely for the purposes of the confirmation hearing.

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



Judge Cuno Tarfusser
Single Judge

Dated this Tuesday, 17 December 2013

The Hague, The Netherlands