

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **17 January 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

**Prosecution's Response to the Defence of Mr Mangenda's request for leave to
appeal decision ICC-01/05-01/13-48-Conf (ICC-01/05-01/13-86-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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Introduction

1. The Office of the Prosecutor ("Prosecution") opposes Mr Mangenda Defence's application for leave to appeal the 17 December 2013 "Decision on the 'Prosecution's request for recordings of telephone calls between Mssrs Bemba and Mangenda to be referred to Independent Counsel'" of the Single Judge of Pre-Trial Chamber II ("Impugned Decision").¹
2. First, the time limit to file the Application has expired and, second, the Defence fails to identify any issue meeting the requirements for granting leave to appeal pursuant to Article 82(1)(d). As such, the application should be rejected.

Procedural History

3. On 17 December 2013, the Single Judge of Pre-Trial Chamber II issued the Impugned Decision, denying the Prosecution's request to appoint an independent counsel to screen recorded phone calls between Jean-Pierre Bemba and Jean-Jacques Mangenda for privilege. The Impugned Decision further ordered the Prosecution to disclose to the Defence materials related to those calls on which the Prosecution intends to rely for the confirmation proceedings.²
4. On 13 January 2014, the Defence sought leave to appeal the Impugned Decision ("Application")³, asserting that it only gained access to the Decision on 10 January 2014 due to technical difficulties.⁴

¹ ICC-01/05-01/13-48-Conf.

² ICC-01/05-01/13-48-Conf, p.7.

³ ICC-01/05-01/13-86-Conf.

⁴ Application, para.3.

5. On 14 January 2014, the Single Judge requested observations from the Registry on the technical obstacles alleged,⁵ to which the Registry responded on 17 January 2014 ("Registry Observations").⁶

Submissions

The time limit has expired

6. The time limit to file the Application has expired and, on this ground alone, the Application should be rejected.⁷ The Defence's submissions that Counsel did not have access to the integral text of the Decision until 10 January 2014 do not appear accurate.⁸ According to the Registry, the Defence had access to the filings of the case in TRIM as of 27 November 2013.⁹ Moreover, Counsel confirmed receipt of several court records, including the Decision, sent to him by courier on 18 December 2013.¹⁰

The Application fails to meet the requirements for granting leave to appeal

7. The Defence advances three issues in support of the Application:
- (i) Whether conversations between Mr Mangenda (a lawyer and case manager), and Mr Bemba are confidential, and whether the Court is entitled to record or listen to them ("First General Issue"). The Defence then identifies two related "Sub-Issues": (i) May the mode of communication (line called as "non-confidential") "vitiates" a "potential"

⁵ ICC-01/05-01/13-91-Conf.

⁶ ICC-01/05-01/13-102-Conf.

⁷ Rule 155(1).

⁸ Application, para.3.

⁹ Registry Observations, p.5. In fact, the Defence sought leave to appeal a prior decision rendered on 10 December. See ICC-01/05-01/13-37.

¹⁰ Registry Observations, p.6.

- privilege; and (i) whether a case manager is bound by confidentiality as counsel is.¹¹
- (ii) Whether Mr Mangenda (a lawyer) is bound by confidentiality, as a member of the Defence team, notwithstanding his role as case manager ("Second Issue").¹²
- (iii) Whether the Court has authority to listen to confidential telephone conversations without the permission of local authorities ("Third Issue").¹³
8. Part of the First General Issue (i.e., the Court's right to listen to and record case manager-client conversations) and the Third Issue, referring to the ICC's authority to intercept lawyer-client phone conversations, do not arise from the Impugned Decision. Rather, the Impugned Decision is confined to the disposition of the Prosecution's request to appoint independent counsel to review the phone conversations between Mr Bemba and Mr Mangenda. It does not instruct the recording of any phone conversation. Any decision relating to the recording of phone conversations was issued *ex parte* in proceedings to which the Defence was not party.¹⁴ The Defence lacks standing to seek leave to appeal these rulings and cannot attempt to have them revisited now under the guise of a challenge to the Impugned Decision.
9. On the other hand, the first part of the First General Issue (i.e., case manager-client confidentiality), including the two Sub-Issues, and the Second Issue raise the question of whether the communications between Mr Bemba and Mr Mangenda, on the non-privileged line of the ICC Detention Center are

¹¹ Application, para.6 in page 7.

¹² Application, para.6 in page 7.

¹³ Application, para.6 in page 7.

¹⁴ In the *Kenya* situation, Pre-Trial Chamber II stated that the proceedings triggered by the Prosecution's application for a warrant of arrest or summons to appear are conducted on an *ex parte* basis. The only communication envisaged at the Article 58 stage is conducted between the Pre-Trial Chamber and the Prosecution and until the Chamber has ruled on the Prosecution's application, none of the persons under the Court's investigation is allowed to participate. See ICC-01/09-35, para.10 and ICC-01/09-43, para.9.

protected by legal privilege. In the Decision, the Single Judge took the position that these conversations are non-privileged given, *inter alia*, “the features of the line were adequately known to all the parties involved”,¹⁵ and the differences in responsibilities and in treatment in the statutory texts between case-managers and counsels.¹⁶ However, even if those issues arise, the Defence does not explain how they meet the requirements for leave to appeal under Article 82(1)(d). The Defence only provides general submissions regarding the purported impact of the Decision on the fairness of the proceedings.¹⁷ No arguments are provided with respect to the Decision’s impact on the other prongs of Article 82(1)(d).

Conclusion

10. For the above reasons, the Prosecution requests that the Chamber reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 17th Day of January 2014

At The Hague, The Netherlands

¹⁵ Decision, para.3.

¹⁶ Decision, paras.4-5.

¹⁷ Although the heading of the section also refers to “expeditiousness”, the arguments only relate to “fairness”.