

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 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*

Public

Decision on the “Demande en autorisation d’appel de la décision ICC-01/05-01/13-48 conf du 17 décembre 2013 sur la requête du Procureur de soumettre les conversations téléphoniques entre Messieurs BEMBA et MANGENDA au «Conseil indépendant»” submitted by the Defence for Mr Mangenda on 13 January 2014

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 “Decision on the ‘Prosecution’s request for recordings of telephone calls between Messrs Bemba and Mangenda to be referred to Independent Counsel’”, dated 17 December 2013 (“17 December 2013 Decision”);¹

NOTING the “Demande en autorisation d’appel de la décision ICC-01/05-01/13-48-conf du 17 décembre 2013 sur la requête du Procureur de soumettre les conversations téléphoniques entre Messieurs BEMBA et MANGENDA au «Conseil indépendant»” by the Defence for Mr Mangenda, dated 11 January 2014 and submitted to the Court Records Office on 13 January 2014, at 8:52 hours (“Defence Application for leave to appeal”);²

NOTING the “Order requesting observations from the Registry on the ‘Demande en autorisation d’appel de la décision ICC-01/05-01/48 conf du 17 décembre 2013 sur la requête du Procureur de soumettre les conversations téléphoniques entre Messieurs BEMBA et MANGENDA au “Conseil indépendant”” submitted by the Defence for Mr Mangenda”, dated 14 January 2014;³

NOTING the “Registry Observations as instructed in the ‘Order requesting observations from the Registry on the ‘Demande en autorisation d’appel de la décision ICC-01/05-01/48 conf du 17 décembre 2013 sur la requête du Procureur de soumettre les conversations téléphoniques entre Messieurs BEMBA et MANGENDA au “Conseil indépendant”” submitted by the Defence for Mr Mangenda’”, dated 16 January 2014 (“Registry’s Observations”);⁴

¹ ICC-01/05-01/13-48-Conf.

² ICC-01/05-01/13-86-Conf.

³ ICC-01/05-01/13-91-Conf.

⁴ ICC-01/05-01/13-102-Conf, with confidential annexes 1 to 3.

NOTING the “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)” dated 17 January 2014, whereby the Prosecution requests that the defence Application for leave to appeal be rejected, because (i) the time limit to file the Application has expired and (ii) “the Defence fails to identify any issue meeting the requirements” of article 82(1)(d) of the Statute;⁵

NOTING article 82(1)(d) of the Statute, rule 155(1) of the Rules of Procedure and Evidence and regulation 35 of the Regulations of the Court;

CONSIDERING that an application under article 82(1)(d) of the Statute must be made “within five days of being notified” of the decision that the party wishes to appeal;

CONSIDERING that the 17 December 2013 Decision was notified on 17 December 2013 at 16:52 hours and that, accordingly, the time limit for applying for leave to appeal the 17 December 2013 Decision expired on Monday 23 December 2013;

NOTING that the Defence for Mr Mangenda submits *inter alia*

- (i) only having had “un accès limité aux ‘court records’ qu’à partir du 10 janvier 2014, date à partir de laquelle le greffe a rentré la présente affaire dans le système informatique”;
- (ii) that, as a consequence, it is only starting from 10 January 2014 that he was able to “prendre connaissance du texte intégral de la décision du 17 décembre 2013”;
- (iii) that the 17 December 2013 Decision “n’a pas été notifiée à la défense de Monsieur Jean-Jacques Mangenda Kabongo”;

⁵ ICC-01/05-01/13-106-Conf.

- (iv) that “les annexes au mail envoyé le 17 décembre 2013 à l’adresse e-mail privée du Conseil de la défense ne pouvaient être ouverts”; and
- (v) that, on 17 December 2013, Counsel for Mr Mangenda did not yet have an e-mail account “privilegiée au sein de la Cour”, which privileged account was only created on 20 December 2013;

NOTING that the Defence for Mr Mangenda made additional submissions as regards his alleged limited access to the court records of the case in another unrelated filing, namely his “Demande en reconsidération de la décision du 19 décembre 2013 sur la requête en autorisation d’appel de la décision ICC-01/05-01/13-41-Conf-Red” dated 10 January 2014 and submitted on 13 January 2014,⁶ stating that he only had access, “à ce jour”, “qu’aux documents envoyés par le Greffe par mail à partir du 19 décembre 2013” and that “les disques mis à sa disposition par le Greffe sont inaccessibles avec les mots de passe mis à disposition”;

NOTING the Registry’s Observations, submitting inter alia

- (i) that the record of the case was created on 20 November 2013 and “made visible and accessible to all authorized persons on 27 November 2013”, and not on 10 January 2014;
- (ii) that Counsel for Mr Mangenda contacted the Registry to indicate difficulties with his access to court records on 9 January 2014;
- (iii) that the specific technical difficulty raised on 9 January 2014 by Counsel for Mr Mangenda (ie, absence of the case name from the drop-down list of the search page) was resolved on 10 January 2014 by the Registry, who informed him by email;

⁶ ICC-01/05-01/13-85-Conf.

- (iv) that the 17 December 2013 Decision, being a confidential decision, was not attached to the email sent to the Counsel's private email address, but put on a CD and dispatched by DHL on 18 December 2013, together with several other court records;
- (v) that Counsel for Mr Mangenda confirmed reception of the DHL parcel on 19 December 2013, by personally signing the relevant receipt, which is attached to the Registrar's Observations as confidential annex 2;
- (vi) that contacts between the Registry and Counsel for Mr Mangenda relating to Counsel's problems in accessing TRIM and his EPN account occurred between 17 December 2013 and 9 January 2014, during which period the Registry assisted him, including by supplying him with an ICC laptop on 24 December 2013;
- (vii) that, in spite of these contacts, Counsel for Mr Mangenda "only contacted the Registry on 15 January 2014 with regards to difficulties opening the contents of the CDs sent to him in December 2013";

CONSIDERING, accordingly, that Counsel for Mr Mangenda provides an incomplete, and to a great extent inaccurate, description of the situation relating to his access to the relevant court records;

CONSIDERING in particular that, in light of the DHL receipt, duly signed by Counsel for Mr Mangenda on 19 December 2013, relating to discs containing inter alia the 17 December 2013 Decision, his statement to the effect that the 17 December 2013 Decision was "not notified to him" is untrue;

NOTING article 24 of the Code of Professional Counsel ("Code"), setting forth the duties of counsels before the Court;

CONSIDERING it appropriate to remind Counsel for Mr Mangenda of his duty not to “deceive or knowingly mislead the Court”, pursuant to article 24(3) of the Code;

CONSIDERING that, in light of a counsel’s duty “to represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings” (article 24(5) of the Code), Counsel for Mr Mangenda was under a specific duty not only to immediately open the CD received by him on 19 December 2013 and review its contents, but also to promptly raise the issue of the alleged malfunctioning of the passwords provided for accessing them, instead of waiting until as late as 15 January 2014 to do so;

CONSIDERING that, in light of the above, Counsel for Mr Mangenda has failed to comply with the minimum diligence required from counsel;

CONSIDERING that, accordingly, no “good cause” within the meaning of regulation 35(2) of the Regulations for the variation for the time-limit expiring on Monday 23 December 2013 has been shown;

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Defence Application for leave to appeal the 17 December 2013 Decision.

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



Judge Cuno Tarfusser
Single Judge

Dated this Monday, 20 January 2014 in The Hague, The Netherlands