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

Date: 20/01/2014

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
& NARCISSE ARIDO**

Public Document

Defence request for an order requiring the translation of evidence

Source: Defence for Jean-Pierre Bemba Gombo

Document 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

Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Introduction

The Defence for Jean-Pierre Bemba Gombo ("the Suspect") hereby requests that the learned Single Judge order the Prosecutor to ensure that all items of evidence on which she will rely during the confirmation proceedings are translated into one of the working languages of the International Criminal Court ("the Court").

Relevant Procedural Background

1. On 8 May 2013, the Single Judge rendered his "*Decision on the 'Prosecutor's Request for judicial assistance to obtain evidence for investigation under Article 70'*".¹ In so doing, the Single Judge ordered the Registrar to make available to the Prosecutor information on the Suspect's telephone communications at the detention centre.²

2. On 4 December 2013, the Single Judge held a status conference at which he fixed two disclosure deadlines and ordered that "... *disclosure between the parties will take place through the Registry and that any and all evidence disclosed for the purpose of the confirmation hearing shall be communicated to the Chamber*".³

3. On 20 December 2013, the Prosecutor met her first deadline, disclosing 775 items of incriminating evidence and 21 items of Rule 77 evidence while withholding one item in respect of which she requested redactions pursuant to rule 81(2) of the Rules of Evidence and Procedure. Of the 775 items of allegedly incriminating evidence, approximately 300 items comprise "*.wav" files which are recordings of intercepts performed on the Suspect's non-privileged telephone communications at the detention centre ("the Non-Privileged Intercepts").

¹ ICC-01/05-46-Conf-Exp.

² ICC-01/05-01/13-1-Red2-tENG at paragraph 2.

³ ICC-01/05-01/13-T-2-Red-ENG WT 04-12-2013 31/33.

4. On 15 January 2014, the Single Judge issued his "*Decision on the "Prosecution's application for redactions pursuant to Rule 81(2) of the Rules of Procedure and Evidence"*"⁴ and allowed the requested protective measures to be applied to the one item of evidence mentioned in paragraph 3 above.

5. On 15 January 2014, the Single Judge also issued his "*Décision sur la requête en communication de la version originale des enregistrements sonores et des entretiens téléphoniques visés par le Procureur dans la pièce ICC-01/05-01/13-19-Conf-AnxI.1*" submitted by the Defence for Mr Babala".⁵ In this decision, the Single Judge ordered the Prosecutor to disclose summaries of four outstanding conversations mentioned in Annex I.1 to the AWA by 17 January 2014.

6. On 17 January 2014, the Prosecutor purported to effect disclosure of four of the items of incriminating evidence mentioned in paragraphs 4 and 5 above⁶ to "the Defence"⁷ but, in fact, disclosed the said materials to Counsel for Fidèle Babala Wandu alone.⁸ Counsel recalls, in this respect, the logistical difficulty which he currently faces given that the Suspect has been denied legal assistance and has no administrative team present in The Hague. This matter is complicated by the fact that the Office of Public Counsel for the Defence is unable to perform the role of "case manager" for the Suspect declining to upload and/or transfer disclosure packages to the Suspect.⁹ Notwithstanding the aforementioned, Counsel has been able to examine and learn all materials disclosed to date via Ringtail in E-Court.

7. On 31 January 2014, the Prosecutor will be required to meet her second and final pre-confirmation disclosure deadline when she will be expected to transmit to the Defence all materials on which she intends to rely at confirmation and which were seized after 23 November 2013.

⁴ ICC-01/05-01/13-98.

⁵ ICC-01/05-01/13-99.

⁶ The Prosecutor clarified that Single Judge's decision ICC-01/05-01/13-99 contained a typographical error and that one of the items had, in fact, already been disclosed.

⁷ ICC-01/05-01/13-104.

⁸ ICC-01/05-01/13-104-AnxA-Conf.

⁹ ICC-01/05-01/13-54 at paragraph 7.

Submission

8. The "*Prosecution's Application for a Warrant of Arrest*" against the Suspect ("AWA")¹⁰ was based, inter alia, on 22 of the Non-Privileged Intercepts of telephone conversations conducted between the Suspect and, so it is alleged, Fidèle Babala Wandu. The aforementioned 22 Non-Privileged Intercepts, however, form a small fraction (7.3%) of the total number of Non-Privileged Intercepts disclosed to the Defence as incriminating evidence on 20 December 2013. Moreover, a considerable portion, if not the vast majority, of the 300 or so Non-Privileged Intercepts disclosed on 20 December 2013 are of conversations conducted, for the most part, in Lingala. While this language is understood by a prominent member of the Prosecution's team on case ICC-01/05-01/08, it is most likely not understood by more than one or two other individuals in the Office of the Prosecutor. In addition to the aforementioned, it should be noted that the intercepted communications are not fully audible; while the Suspect's voice is quite clear – that of his interlocutor is not.

9. In any event, the allegedly incriminating aspects of the aforementioned 22 Non-Privileged Intercepts are to be found in Annex I.1 to the AWA and are styled "*Summaries of Audio Extracts of Detention Centre Recordings*".¹¹ Article 61(5) of the Rome Statute does, of course, stipulate that "[t]he Prosecutor may rely on documentary or summary evidence" at confirmation. The provision of summaries is, nevertheless, subject to the tests of admissibility and fairness as set out in article 69(4) of the Rome Statute.

10. Regulation 59(2) of the Regulations of the Office of the Prosecutor provides a certain degree of clarification on how and when the Prosecutor should provide summary evidence at confirmation: "*[t]he Office shall consider relying on documentary or summary evidence at the confirmation hearing pursuant to article 61, paragraph 5, in particular when this may assist in the efficient presentation of material, and taking into account the rights of the defence and the interests of victims and witnesses*". Regulation

¹⁰ ICC-01/05-01/13-19-Conf.

¹¹ ICC-01/05-01/13-19-Conf-AnxA at page 3.

59(3) goes even further and states that "[t]he Office shall ensure that any summary evidence presented during the confirmation hearing pursuant to article 61, paragraph 5 is self-sufficient and contains a concise and objective representation of the evidence or testimony, to the extent that it is relevant to the case".

11. It should not be neglected that pursuant to article 54(1)(a) of the Rome Statute, the Prosecutor is obliged to "*investigate incriminating and exonerating circumstances equally*". In disclosing the 300 or so Non-Privileged Intercepts as "incriminating evidence", the Prosecutor is, effectively, submitting to the Court that she and her Lingala speaking cohort have reviewed each and every one of those telephone conversations and have concluded that they are all, without exception, incriminating. This is, indeed, an impressive feat. Counsel sincerely hopes that the Prosecutor will display the fruits of such intensive labour in an in-depth analysis chart, if only to dispel the possible charge that these conversations were disclosed to the Defence and to the Court wholesale – just for good luck.

12. However, quite apart from expecting that equality of arms be assured through the provision of an in-depth analysis chart, Counsel submits that the Court should ensure that the Prosecutor's summaries comply with her duty to respect the rights of the Defence. With this in mind, the Court should be entitled to examine whether the summaries of the Non-Privileged Intercepts detailed in Annex I.1 to the AWA are "objectively representative" of both the 22 conversations to which they relate and of the entirety of the Lingala conversations disclosed on 20 December 2013 as incriminating evidence and for which there exists no transcription and no translation. More pertinently, the Court is expected to assure itself that the allegedly incriminating and unwitting admissions summarized in the 22 Non-Privileged Intercepts are not tempered by exculpatory comments to be found elsewhere in the remaining 92.7% of the Non-Privileged Intercepts disclosed on 20 December 2013. The Court and the Defence may only faithfully perform such an analysis if the

entirety of incriminating evidence on which the Prosecutor will rely is disclosed in one of the working languages of the Court.

13. It goes without saying that materials disclosed for use at confirmation should be translated into either English or French. The Prosecutor should not be allowed to bombard Counsel and the Court with such an enormous quantity of recorded material two months in advance of the confirmation proceedings without ensuring, at the very least, that it is intelligible to those parties to the judicial process who do not understand Lingala. Counsel suggests that such a barrage of untranslated information could conceivably verge on an abuse of process – especially since the Prosecutor is fully aware that two of the non-Lingala speaking lawyers defending the suspects in the present affair are presently forced to work "solo" with their appointed financial and administrative support ranging from the pitiable to the non-existent.

14. In the present instance, the Single Judge specifically ordered that disclosure *"will take place through the Registry"*. Regulation 39(1) of the Regulations of the Court states that *"[a]ll documents and materials filed with the Registry shall be in English or French, unless otherwise provided in the Statute, Rules, these Regulations or authorised by the Chamber or the Presidency. If the original document or material is not in one of these languages, a participant shall attach a translation thereof"*.

15. Furthermore, article 69(4) of the Rome Statute obliges the Single Judge to consider the admissibility of evidence in light of any prejudice that the said evidence may cause to a "fair trial". In this context, judicial precedent of the Court has recognized that the translation of evidence into one of the working languages of the Court is an essential requirement for its admissibility. In the Lubanga case, for example, the Single Judge unequivocally ruled as follows: *"CONSIDERING, however, that under no circumstances may evidence not translated into one of the working languages of the Court at the time of commencement of the confirmation hearing be admitted into evidence insofar as the Chamber must be in a position to fully understand the evidence on which the parties intend to rely at the hearing; and considering, therefore, that pursuant to article 69(4)*

of the Statute, video excerpts (i) which are not translated into one of the working language of the Court by Thursday 9 November 2006 at 9h30 and (ii) whose translation is not made available to the Chamber and the Defence by that time must be declared inadmissible".¹²

16. Similarly, Pre-Trial Chamber I sitting in the *Katanga & Ngudjolo* case found as follows: *"The Chamber recalls that it has previously decided that a prerequisite for the admissibility of evidence before the Court is translation into one of its working languages. Although the Chamber takes note that the Prosecution has translated what it considers to be the relevant parts of the video, since the Chamber must be in a position to fully understand the evidence on which the parties intend to rely at the confirmation hearing, it must receive all the evidence presented in one of the working languages of the Court. For these reasons, the Chamber decides that the video is inadmissible as evidence".¹³* Based on this precedent, Counsel submits that it is not sufficient for the Prosecutor to provide a translation of those portions of an audio recording which she deems to be relevant. If the Prosecutor wishes to submit an audio recording as evidence – she should provide a translation of the whole recording and not an excerpt therefrom.

Relief Sought

17. In light of all the aforementioned, the Single Judge is requested to set a deadline for the Prosecutor to provide the Defence and the Court with translations of all the intercepted communications on which she proposes to rely during the confirmation proceedings. The Single Judge is requested to find that the obligation of translation applies to the entirety of every "*.wav" file on which the Prosecutor intends so to rely– even if she only deem part of it relevant.

18. The Single Judge is further requested to order that any evidence which is not translated and provided to the Court and to the Defence by the stipulated deadline should be deemed inadmissible for the purposes of confirmation.

¹² ICC-01/04-01/06-676.

¹³ ICC-01/04-01/07-717 at paragraph 129.

Regulation 35(2) of the Regulations of the Court

19. In order to prevent any delay to the timetable set in advance of the confirmation process, the Single Judge is requested to find that "good cause" exists for reducing the time limit for the Prosecutor's response to this application.

A handwritten signature in black ink that reads "Nicholas Kaufman". The signature is written in a cursive, slightly slanted style. Below the signature is a solid horizontal line.

Nicholas Kaufman

Counsel for Jean-Pierre Bemba Gombo

Jerusalem, Israel
Monday, January 20, 2014