

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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29 July 2013

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

Public redacted version

**Decision on the Prosecutor's "Request for judicial order 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

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Jean-Jacques Badibanga

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
Section**

Other

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 First Request”),² whereby 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 Single Judge’s “Decision on the ‘Prosecutor’s Request for judicial assistance to obtain evidence for investigation under Article 70’” dated 8 May 2013,³ inter alia ordering 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”;

NOTING the “Request for judicial order to obtain evidence for investigation under Article 70” dated 19 July 2013 (“Prosecutor’s Second Request”),⁴ as well as the confidential annexes thereto,⁵ whereby the Prosecutor submits that the logs and recordings received from the Registry further to the Decision “strongly support the previously collected evidence of the scheme to bribe witnesses in exchange for false testimony and false documents” in violation of Article 70(1)(a)-(c) of the Statute and “indicate that the Accused is orchestrating the scheme, employing Aime KILOLO, Jean-Jacques MANGENDA, Fidèle BABALA, and [REDACTED] to facilitate [such] scheme”⁶ and, accordingly, seeks “judicial authorization for the Prosecution to

¹ ICC-01/05-45-Conf-Exp.

² ICC-01/05-44-Conf-Exp.

³ ICC-01-05-46-Conf-Exp.

⁴ ICC-01-05-51-Conf-Exp.

⁵ ICC-01/05-51-Conf-Exp-AnxA and ICC-01/05-51-Conf-Exp-AnxB.

⁶ ICC-01-05-51-Conf-Exp, paras. 1-2.

collect recordings of telephone intercepts from the Dutch and Belgian governments of Mssrs KILOLO, lead counsel and MANGENDA case manager”⁷ under article 57(3)(a) of the Statute;

issue this decision.

Prosecutor’s submissions

1. The Prosecutor submits that, since her First Request, evidence “has come to light” indicating inter alia “that the Accused is in constant communication with the financiers of the scheme, is aware of the Western Union payments, uses codes on the detention centre telephone to conceal discussions about the case and finances, and uses KILOLO’s status as counsel to circumvent telephone monitoring from the Registry”.⁸ Such evidence would significantly strengthen “the Prosecution’s initial suspicion that the Accused is orchestrating the scheme to bribe defence witnesses in exchange for false testimony and false documents”,⁹ in particular by indicating that the Accused “is using both KILOLO and MANGENDA to facilitate the scheme”¹⁰. More specifically, cross-referencing of information gathered from telephone logs of the Accused, of his counsel Kilolo and Fidèle Babala (one of the individuals allegedly taking part in the scheme) would show that “the Accused and KILOLO are circumventing the Registry’s monitoring system to discuss matters with third parties under the cloak of the lawyer-client communication privilege”. It is submitted that the logs would show “that calls of the accused to KILOLO and the calls of KILOLO to BABALA coincide on 13 occasions during the period of November 2012-february 2013, showing that the Accused is speaking to BABALA in concealed conference calls initiated on KILOLO’s phone line, despite being able to directly call BABALA”,¹¹ as well as that the same method has been used by the Accused “to speak to at least one identifiable defence witness”.¹² Due to the fact that codes are

⁷ ICC-01-05-51-Conf-Exp, para.3.

⁸ ICC-01-05-51-Conf-Exp, para.4

⁹ ICC-01-05-51-Conf-Exp, para.14.

¹⁰ ICC-01-05-51-Conf-Exp, para.14.

¹¹ ICC-01-05-51-Conf-Exp, para.15.

¹² ICC-01-05-51-Conf-Exp, para.16.

used by the parties, however, the Prosecutor maintains that her lack of access to the recordings of non-privileged calls prevents her from fully understanding “the scope of the conversations and thus the scheme”.¹³

2. Accordingly, the Prosecutor seeks authorisation “to collect recordings of telephone intercepts from the Dutch and Belgian governments of Messrs. KIOLOLO and MANGENDA”.¹⁴

Single Judge’s determinations

3. Based on the submissions contained in and the evidence attached to the Prosecutor’s Second Request, read also in light of the evidence supporting the Prosecutor’s First Request, the Single Judge is satisfied that at least some of the communications between the Accused and his counsel, overlapping as they are with calls made to individuals the Prosecutor has grounds to suspect involved in a bribery scheme aimed at perturbing the course of justice, might indeed not qualify as being “made in the context of the professional relationship between a person and his or her legal counsel” within the meaning and for the purposes of Rule 73 of the Rules of Procedure and Evidence. The statutory right to communicate freely and in confidence with counsel of his own choosing, as set forth in article 67(1)(b) of the Statute, is obviously forfeit whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice, the more so when – as in the present case – the counsel seems to be an accomplice in the scheme. This behaviour is to be regarded as an abuse of the statutory right and entails that neither the accused nor the lawyer are any longer entitled to the confidentiality which otherwise pertains to lawyer-client communications as a matter of course.

4. Although not explicitly stated in the Statute or the Rules, the fact that communications effected in furtherance of crime or fraud provide an exception to the principle of professional privilege is broadly accepted both at the national and the international level. Rule 163 of the Rules of Procedure and Evidence of the

¹³ ICC-01-05-51-Conf-Exp, para.20.

¹⁴ ICC-01-05-51-Conf-Exp, para.23.

Special Tribunal for Lebanon, under the heading “Legal Professional Privilege”, specifically lists the fact that “the client intended to perpetrate a crime and the communications were in furtherance of that crime” as an exception to the general principle of the privileged nature of communications between a person and his or her legal counsel. The Special Court for Sierra Leone has also recently upheld the exception in the case *The Prosecutor v. Bangura et al.* and highlighted that such exception is “well-recognised” in the common law jurisdictions.¹⁵

5. Based on the evidence submitted by the Prosecutor in support of her First and Second Requests, the Single Judge is satisfied that there are sufficient elements warranting access by the Prosecutor to those recordings which might have been instrumental to the furthering of the scheme under investigation, in spite of the fact that such recordings involve conversations to counsel for the Accused.

6. The Decision dated 8 May 2013 stated inter alia that, as long as the Prosecutor was only given access to logs and recordings of telephone calls which were not directed to counsel for the Accused, direct access could be provided to her and there was no need for an “independent counsel” to be appointed.¹⁶ The Prosecutor’s Second Request is instead aimed at accessing communications at least partly involving counsel for the accused. As stated, since such communications are ordinarily privileged unless an abuse is suspected or shown, the need for safeguards aimed at duly circumscribing the exception to the privilege now arises. Whenever an exception to the general principle of the privileged nature of the communications between an accused and her or her counsel is made, the scope of such exception must be determined in light of, and limited by, the specific reasons warranting such exception.

7. The Single Judge supports the Prosecutor’s suggestion that an independent counsel should be appointed and tasked with (i) identifying whether the logs show calls to parties connected to the investigation and (ii) reviewing the recordings of

¹⁵ SCSL-11-02-T, Trial Chamber II, Decision on the Prosecutor’s request for Subpoenas, 28 June 2012, Paras 13-4.

¹⁶ ICC-01-05-46- Conf-Exp, para. 4.

any such calls. However, the Single Judge takes the view that such counsel should be a really independent one, as opposed to one to be appointed by or acting in cooperation with the Prosecutor. The appointed counsel would have to review and screen all relevant recordings, with a view to identifying those providing elements which might be relevant for the limited purposes of the Prosecutor's investigation and delivering them to the Prosecutor. Accordingly, privilege would be strictly maintained on all such recordings which would not offer elements of interest or relevance for the purposes of the Prosecutor's investigation. Any question or issue which may arise in connection with the aforementioned review would have to be promptly submitted to the Single Judge for determination.

8. Following consultations with the relevant units of the Registry (namely, the Counsel Support Section), the Single Judge takes the view that [REDACTED] relevant professional requirements and skills (in particular, fluency in the Lingala language needed also for the expeditiousness of the proceedings) to adequately carry out the aforementioned task in an efficient manner.

FOR THESE REASONS, THE SINGLE JUDGE

AUTHORISES the Prosecutor to seize the relevant authorities of Belgium and of the Netherlands, with a view to collecting logs and recordings of telephone calls placed or received by Mr Aime Kilolo and Mr Jean-Jacques Mangenda;

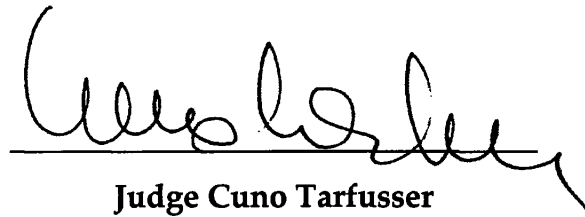
AUTHORISES the Prosecutor to transmit to such authorities any and all filings before the Court and/or documents which might be relevant, irrespective of their current level of confidentiality and with the understanding that such level of confidentiality be complied with by the relevant authorities;

APPOINTS, [REDACTED] as independent counsel tasked with (i) reviewing the logs of telephone calls either placed or received by Mr Aime Kilolo and Mr Jean-Jacques Mangenda made available by the relevant Belgian and Dutch authorities, with a view to identifying any calls received from or placed to parties connected

with the investigation; (ii) listening to the recordings of any and all such calls; (iii) transmitting to the Prosecutor the relevant portions of any and all such calls which might be of relevance for the purposes of the investigation;

ORDERS [REDACTED] to promptly submit to the Single Judge any issue which might arise in the context and for the purposes of the implementation of the aforementioned task.

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



Judge Cuno Tarfusser
Single Judge

Dated this Monday, 3 February 2014

At The Hague, The Netherlands