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

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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

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 Document

Defence request for leave to appeal decisions ICC-01/05-46 and ICC-01/05-50

Source: Defence for Mr. Jean-Pierre Bemba Gombo

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. Pursuant to Article 82(1)(d) of the Rome Statute, Mr. Jean-Pierre Bemba Gombo ("the Suspect") hereby seeks leave to appeal two decisions which were ordered to be disclosed to his Defence Counsel on 3 February 2014 and notified the day thereafter:

- 1) The *Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70"* (ICC-01/05-46) ("the First Impugned Decision"), and;
- 2) The *Decision on the 'Registry's Observations pursuant to regulation 24 bis of the Regulations of the Court on the implementation of the 'Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70" of 27 May 2013 (ICC-01/05-50) ("the Second Impugned Decision").*

2. By virtue of these two decisions, the practical effect of which is identical, the appointed Single Judge ordered "the Registrar to make available to the Prosecutor, without delay, the complete log of all telephone calls placed or received by the [Suspect] during his stay at the detention centre, as well as any available recording of all non-privileged calls either placed or received by him".¹

3. Although, the Impugned Decisions were issued in the record of "Situation ICC-01/05", they were, nevertheless, rendered public and accessible to the Defence by virtue of a decision taken in case ICC-01/05-01/13.² Mindful of precedent which would deem the Suspect to lack standing in the Situation, the Defence requests that the Impugned Decisions and this request for leave to appeal be considered part of the record of the case ICC-01/05-01/13.

¹ ICC-01/05-50 at page 8.

² ICC-01/05-01/13-147.

4. As required under Rule 155 of the Rules of Evidence and Procedure, this request for leave to appeal is filed within five court days of notification of the Impugned Decision to the Defence.

5. In satisfying the conditions for requesting leave to appeal, the Defence will submit that the two Impugned Decisions sanctioned highly invasive investigative measures in breach of the Suspect's right to privacy and on the basis of an erroneous evidentiary standard. In the circumstances, the two Impugned Decisions have prejudiced the fairness of the article 70 process initiated against the Suspect. Accordingly, immediate rectification of the Impugned Decisions by the Appeals Chamber is necessary and will materially advance the proceedings.

6. Given the importance of this application for leave to appeal and the fundamental issues that it raises, the Defence respectfully requests that a decision be taken by Pre-Trial Chamber II as a whole and not by the Single Judge alone.

Submission

7. Article 82(1)(d) of the Rome Statute sets out the requirements to be satisfied when bringing an application for leave to appeal an interlocutory decision:

"Either Party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

.....

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial Chamber or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

The existence of “issues” arising out of the Impugned Decisions

8. The Defence respectfully submits that the issues that it will raise on appeal arise directly out of the Impugned Decisions. It is settled precedent of the International Criminal Court that an issue for which leave to appeal is sought should comprise a topic which is subject to judicial determination³ and must not express a mere disagreement with the findings of the Impugned Decisions.⁴ Accordingly, the Defence identifies the following issues for appeal:

Issue 1: Whether the Single Judge erred by finding that he had the power under article 57(3)(a) of the Rome Statute to permit the Prosecutor access to a log and to the intercepted recordings of the Suspect's non-privileged telephone conversations in the Court's detention facility;

Issue 2: Assuming that he had such a power, whether the Single Judge erred by permitting the Prosecutor access to a log and to the intercepted recordings of the Suspect's non-privileged telephone conversations in the absence of reasonable grounds/basis to believe that the Suspect had committed an offence against the administration of justice;

Issue 3: Whether the Single Judge erred by finding that "as long as they are not directed to counsel and as such, privileged, the conversations entertained by the Accused at the detention centre can be legitimately directly accessed by the Prosecutor for the purposes of her investigation...".⁵

9. It will be recalled that Trial Chamber III has stipulated that “[o]n applications under Article 82(l)(d), the Chamber’s assessment of the merits of the proposed appeal is an

³ Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at paragraph 9.

⁴ ICC-01/04-01/06-915 at paragraph 22.

⁵ ICC-01/05-50 at paragraph 10.

irrelevant consideration".⁶ Accordingly, in determining whether the issues raised for appeal affect the fairness of the proceedings, the Pre-Trial Chamber should refrain, so it is submitted, from relying upon its own assessment of the propriety of the decisions that the Single Judge took.

Issue 1

10. Fabricio Guariglia and others have noted that for the purposes of article 57(3)(a) "there is no provision specifying which investigative measures require an order or a warrant".⁷ The Defence suggests that the investigative measures sought have to be of such a nature that failure to request an order or warrant for their performance would render them illegal. The Defence, in particular, suggests that the said investigative measures sought have to be envisaged as available to the Prosecutor under the statutory framework of the Court. Such measures, so it is submitted would include requesting an arrest warrant, in court protective measures, redactions, and the various procedures set out in article 93 of the Rome Statute.

11. Where the statutory framework of the Court, however, provides a specific mechanism for performing a measure which is liable to impact on a Suspect's fundamental rights, it is submitted that the Court cannot issue an order the effect of which is to otherwise circumvent such a mechanism lawfully established. Such is the case with access to recorded telephone communications. Regulation 175(2) of the Regulations of the Registry specifically stipulates that "[t]he Registrar **alone** may order that all telephone calls from the detained person....be monitored for a period considered necessary..." [emphasis added]. Furthermore, Regulation 175(10) states that "[a]ny offending conversation which is transcribed shall be retained by the Registrar. Such transcripts shall not be handed over **as evidence of contempt of the Court** without prior notice and disclosure to counsel for the detained person" [emphasis added]. Consequently, should leave to appeal be granted, the Defence will

⁶ ICC-01/05-01/08-1169.

⁷ Triffterer, Commentary on the Rome Statute of the International Criminal Court (2nd ed) at page 1123.

seek a ruling from the Appeals Chamber on whether or not the Single Judge was entitled to order the production of the log and recordings of intercepted communications or whether the Registrar "alone" ought to have dealt with the matter in accordance with the regime set out in Regulation 175 of the Regulations of the Registry – including the right of the Suspect to be heard.

12. Should it, nevertheless, be argued, in the alternative, that the Court, as distinct from the Registrar, can be seized of a prosecutorial application to order the production of the log and recordings of a Suspect's telephone conversations at the detention centre, the Defence will submit that such an application should be viewed as an application to regulate the Suspect's contacts with another party. As such, the Prosecutor's petition should have been governed by the provisions set out Regulations 101(2) and (3) of the Regulations of the Court and the Suspect should have been provided, once again, with the opportunity to be heard.

13. The Appeals Chamber will thus be requested to rule that the regimes fixed either in Regulation 175 of the Regulations of the Registry or Regulation 101 of the Regulations of the Court would have struck a reasonable balance between the Suspect's right to privacy and the Prosecutor's obligation to investigate interference with the administration of justice. No prejudice would have been caused to the Prosecutor given that the desired log and recordings would have remained in the custody of the Registrar and would have been available even after hearing and rejecting the Suspect's representations.

14. For the sake of completeness, Counsel will submit that should the Prosecutor have wished to build her case without giving "advance notice" to the Suspect, she should have petitioned the Single Judge for an order seeking the cooperation of the authorities of The Netherlands in authorising the production of the requested materials - without the Suspect's knowledge and in full compliance with Dutch law. It is, after all, to be assumed that the unauthorized monitoring of private

communications in the Court's detention facility is just as much a criminal offence for the attention and regulation of the Dutch police as the illegal possession of or dealing in controlled substances elsewhere on the Court's premises. Indeed, Dutch jurisdiction over criminal offences does not lapse just because they are committed on the Court's premises especially, as in the present case, when the Suspect's intercepted communications partly involved the use of the Dutch telecommunications infrastructure.⁸

Issue 2

15. Implicit in the Second Impugned Decision is the finding that "reasonable grounds"/ "reasonable suspicion" / "probable cause" is not a necessary prerequisite for ordering the requested measures albeit a necessary prerequisite for charging a Suspect with offences under article 70 of the Rome Statute. More specifically, the Single Judge ruled as follows:

"...The very premise of the Prosecutor's Request - i.e., the fact that the Prosecutor needed the assistance of the Chamber in accessing information - shows that the Office of the Prosecutor, whilst working on an investigative scenario, has not yet come to a determination as to whether there are reasonable grounds to believe that an offence within the context of article 70 has indeed been committed, and even less has identified one or more individuals which might be charged with such offence.

Based on the above, the Single Judge reiterates that the main purpose for recording telephone conversations from and to the detention centre is to allow the relevant authorities to access them at a later stage when the reasonable suspicion as to the commission of a crime arises and that the only calls which are not subject to this rule are those enjoying privileged status".

⁸ Article 8 of the Headquarters Agreement between the International Criminal Court and the Host State provides as follows: "Except as otherwise provided in this Agreement, the laws and regulations of the host State shall apply on the premises of the Court". It should be added that the privileges and immunities stipulated elsewhere in the Headquarters agreement are a defence to prosecution of a Court official but not a bar to initiation of an investigation for unlawful wiretapping.

16. Should leave to appeal be granted, the Appeals Chamber will be requested to decide whether the statutory framework of the Court permits the interception of telecommunications on the basis of an evidentiary standard less than "reasonable suspicion" and if so, what that evidentiary standard should be.

17. Counsel for the Suspect is aware that Rule 165 of the Rules of Procedure and Evidence precludes the application of articles 15(3) and 53(1)(a) of the Rome Statute which are the two sources for the "reasonable basis" requirement to initiate an ICC investigation. Notwithstanding, the Defence will argue that article 21 of the Rome Statute should oblige the Appeals Chamber to conform to recognized national and international human rights standards in deciding how to regulate the interception of detention facility communications.⁹ Moreover, Regulations 175(1) of the Regulations of the Registry and Regulation 101(2) of the Regulations of the Court, with their specific references to "reasonable grounds", would seem to imply that the same "probable cause" evidentiary standard should also apply to the ICC judiciary when ordering similar interception.¹⁰

Issue 3

18. Should leave to appeal be granted, the Defence will also argue that the approval given to the Prosecutor to access the log and recordings of all the Suspect's

⁹ *e.g.*, 18 U.S. Code § 2518 - **Procedure for interception of wire, oral, or electronic communications**

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting ... if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is **probable cause for belief** that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is **probable cause for belief** that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

¹⁰ *c.f.*, for example, the judicial dicta in IT-03-67-PT, Prosecutor v. Vojislav Šešelj, where the President of the ICTY opined as follows: "I agree that it is for the Prosecutor to assess, in making such a request to the Registrar, whether there is a reasonable basis for conditions to be attached to an accused's contacts with others. However, the Registrar does have an obligation to satisfy himself that the request of the Prosecutor is not arbitrary and is made on the basis of credible information. It is not sufficient for the Registrar to take any such Request made by the Prosecutor at face value, rather the Registrar has an obligation to ensure that any request which would result in the infringement of the rights of the accused is justified and made on reasonable grounds."

telephone conversations at the detention facility ignored the principles of necessity, proportionality and/or other procedural safeguards – especially when the Single Judge rejected the Registrar's suggestion that *ad hoc* Counsel be appointed to protect the rights of the Suspect.

19. For example, the Defence will argue that before resorting to the transfer of the Suspect's logs and telephone recordings, the Single Judge should have verified, even *ex parte*, the possibility of obtaining the evidence required to substantiate the Prosecutor's suspicions without recourse to the breach of the Suspect's right to privacy. Nothing in the materials disclosed to date suggests that such a possibility was entertained or discussed with the Prosecutor.

20. The Defence submits that it would be a serious breach of privacy (to which a person presumed innocent is entitled) if it was assumed that passive monitoring was carried out just because "[w]hensoever a suspicion as to the behavior of an accused arises, recordings of telephone conversations can be of the essence in allowing the relevant authorities to properly investigate and determine the matter".¹¹ Such a breach of privacy is further compounded if it is accepted, as the Single Judge ruled, that the log and recordings of intercepted communications may be transferred to the Prosecutor merely in order to allow her to pursue a preliminary working hypothesis or "investigative scenario"¹² in order to ground reasonable suspicion.

Impact on the outcome of the trial, the fair and expeditious conduct of the proceedings and the necessity for immediate resolution of the identified issues

21. Decisions taken on procedural issues without allowing the Defence or the Suspect the right to be heard are inherently unfair. In the present instance, should the Appeals Chamber find that the Impugned Decisions afforded the Prosecutor unlawful access to the log and transcripts of the Suspect's communications in the

¹¹ ICC-01/05-46 at paragraph 9.

¹² ICC-01/05-50 at paragraph 9.

detention facility, the integrity of the whole article 70 process will be compromised. Indeed, were it not for the Impugned Decisions, it is most likely that the Prosecutor would not have been able to substantiate her later requests for even more invasive intercepts of the Suspect's telecommunications with his former legal advisers.

22. It will be recalled that the Appeals Chamber has previously ruled as follows:

"A wrong decision on an issue in the context of Article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances, the proceedings will not be advanced but on the contrary they will be set back."¹³

23. The case against the Suspect is built, primarily, on intercepted evidence. Accordingly, the Defence submits that immediate resolution by the Appeals Chamber of the identified issues is necessary to provide clear guidance on the propriety of procedure whereby the intercepts were gained and to obviate the need for time-consuming challenges to the admissibility of evidence at trial.

Relief Sought

24. In light of all the aforementioned, the learned Single Judge is hereby requested to grant the Defence leave to appeal the three issues identified as arising out of the Impugned Decisions.



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Monday, February 10, 2014

¹³ ICC-01/04-168 at paragraph 16.