

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 11 February 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

“Defence request for an order requiring the translation of evidence”

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

Ghislain Mabanga

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of Victims

Legal Representatives of Applicants

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

States Representatives

REGISTRY

Registrar

Herman von Hebel

Detention Section

I, Judge Cuno Tarfusser, having been designated as Single Judge of Pre-Trial Chamber II (“Chamber”) of the International Criminal Court;

NOTING the “Defence request for an order requiring the translation of evidence” submitted by the Defence of Jean-Pierre Bemba Gombo on 20 January 2014 (“Mr Bemba’s Defence Request”);¹

NOTING the “Decision shortening the time limit for responses to the ‘Defence request for an order requiring the translation of evidence’” dated 21 January 2014, granting the Prosecutor and the other Defence teams until Friday 24 January 2014 to respond to Mr Bemba’s Defence Request;²

NOTING the “Prosecution’s response to ‘Defence request for an order requiring the translation of evidence’” dated 24 January 2014;³

NOTING that no other Defence team responded to Mr Bemba’s Defence Request;

hereby issue this decision.

Submissions by the Defence for Mr Bemba

1. The Defence for Mr Bemba submits that
 - i. the warrant of arrest in this case was based inter alia on summaries of “22 of the Non-Privileged Intercepts of telephone conversations conducted between the Suspect and, so it is alleged, Fidèle Babala Wandu”, which “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”;

¹ ICC-01/05-01/13-108-Corr.

² ICC-01/05-01/13-115.

³ ICC-01/05-01/13-128.

- ii. “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”;
- iii. the Court should “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” and “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”.

2. In the view of the Defence for Mr Bemba, such an analysis can only be “faithfully” performed by the Court and the Defence “if the entirety of incriminating evidence on which the Prosecutor will rely is disclosed in one of the working languages of the Court”. It refers to regulation 39(1) of the Regulations of the Court and to article 69(4) of the Statute, as well as to case law of pre-trial chambers of the Court, as the legal basis for the Prosecutor’s obligation to provide translation of evidence into one of the working languages of the Court. Accordingly, the Single Judge is requested (i) to grant the Prosecutor a time limit “to provide the Defence and the Court with translations of all the intercepted communications on which she proposes to rely during the confirmation proceedings” in their entirety, “even if she only deem part of it relevant” and (ii) “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”.

Submissions by the Prosecutor

3. In her Response, the Prosecutor asserts inter alia that
 - i. Mr Bemba’s Defence’s reliance on regulation 39(1) as a basis for her alleged obligation to translate into one of the working languages of the Court the entirety of each intercepted communication relied upon for the purposes of the confirmation hearing is misplaced, since that provision only governs “filings, submissions and their supporting materials”, as opposed to evidence, and that “materials” only encompasses “annexes and appendixes attached to the document filed”;
 - ii. it is ultimately for the Chamber “to define the necessity and extent of the translation required for disclosure”;
 - iii. she will provide, within the time limit of 30 days prior to the confirmation hearing, “appropriate translations or transcriptions” of “limited extracts of the recorded phone conversations ... including any relevant context” on which she intends to rely for the purposes of confirmation;
 - iv. the statutory language requirements are set in the interest of the suspect, and not of counsel, and a suspect’s right to be adequately informed of the charges under article 67(1) of the Statute is met when he or she is provided with “a detailed description of the charges and list of evidence in a language he/she fully understands

and speaks”; more specifically, when the document containing the charges, the list of evidence, the Prosecutor’s Application and the statements of the Prosecutor’s witnesses are provided in such language.

4. Furthermore, the Prosecutor observes that the material for which translation is requested consists of conversations of the suspects in languages common, and therefore perfectly intelligible, to all of them. Finally, she submits that “disclosure of the entirety of telephone conversations for the purpose of completeness, even where only a small segment of the conversation is key, should not create the obligation to translate the whole of the conversation”; moreover, only once she will have made her final selection of the evidentiary materials on which she intends to rely for the purposes of the confirmation hearing, will she “be in a position to decide precisely which evidentiary elements” should be translated. Accordingly, the Prosecutor requests that Mr Bemba’s Defence be denied “to the extent that it seeks the translation of all of the intercepted communications disclosed in their entirety”.

Single Judge’s determinations

5. The Single Judge notes articles 57(3)(b), 67(1)(a), 67(1)(f) and 69(4) of the Statute; rule 121(3) of the Rules of Procedure and Evidence; regulation 39(1) of the Regulations of the Court.

6. It is beyond controversy that the standard set by the Statute in providing the accused with the right “to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks”, is a high one, as also confirmed in the relevant case law of the Appeals Chamber of the Court. By the same token, it also appears

beyond controversy, in light of article 67(1)(f), that this right does not *per se* translate into the right to obtain the translation of any and all documents which are used in the context of proceedings before the Court and are not in a language which the accused “fully understands and speaks”: the only translations the accused is entitled to obtain are “such translations as are necessary to meet the requirements of fairness”. The translation of a given document is a right for the accused only insofar as it can be held that, without the translation of that particular document in a language that he or she fully understands and speaks, the accused (who is, as clarified by the Appeals Chamber, the exclusive “subject of understanding”) would not be able to understand the nature, cause and content of the charge and thus to adequately defend himself or herself, thereby prejudicing the fairness of the proceedings. As previously stated by this Chamber, “the accused shall not be served with all documents in a language he fully understands or speaks but only with those documents which are *essential* for his proper preparation to face the charges presented by the Prosecutor and which form the basis of the determination by the Chamber of those charges” (emphasis added).⁴

7. The Single Judge sees no reason to depart from this holding. It is not only fully consistent with the established practice of international human rights courts and other international criminal tribunals, but also vital to the preservation of the required expeditiousness of the proceedings, which is instrumental to the right of the accused to be tried without undue delay.

8. The circumstances of the present case, where a substantial part of the evidence presented by the Prosecutor consists of large amounts of intercepts of

⁴ ICC-01/05-01/08-307, para. 12.

telephone calls and other communications between and among the suspects, make it clear that such evidence was disclosed to the suspects in a language which they “fully understand and speak”. As observed by the Prosecutor, the suspects are parties to these communications, which occurred between and among them and were therefore by definition held in one (or more) language(s) which they “fully understand and speak”, namely Lingala and French. Accordingly, the Single Judge takes the view that disclosure of the entirety of the communications between and among the suspects available to her adequately discharges the Prosecutor’s obligations *vis-à-vis* the suspects arising from article 67(1)(a). The provision enshrined in Regulation 39(1) of the Regulations of the Court, requiring that “all documents and materials filed with the Registry shall be in English or French”, is expressly subject to the possibility that it be “otherwise provided” in the Statute, Rules, Regulations or authorised by the Chamber or the Presidency. It cannot obviously be construed so as to overturn and undermine the clear restriction to the right to translations set forth under article 67(1)(f) of the Statute.

9. Conversely, whilst the statutory instruments do not make it mandatory for the Prosecutor to provide translation of disclosed evidence into one of the working languages of the Court, the need for translation into a working language of the Court does indeed arise in respect of any portion of evidentiary item which is relevant to the nature, cause and content of the charges and upon which the Prosecutor intends to rely for the purposes of the confirmation hearing and will therefore include in her list of evidence. Those items will form the basis for the Chamber’s determination on the charges brought by the Prosecutor and must therefore be submitted in a working language of the Court.

10. The statutory limitation of the right to translation to the requirement that the fairness of the proceedings be preserved, coupled with the need to also preserve the expeditiousness and the very feasibility of the proceedings, entails that no right to translation arises in respect of those portions of communications which have no bearing on or relation to the nature, cause and content of the charges (typically, those consisting of exchanges of pleasantries, relating to family or other personal matters or expressing views on issues unrelated to the charges, such as the weather). The fairness of the proceedings is adequately preserved by making sure that the Defence will have been *disclosed* the entirety of any communication on which the Prosecutor relies for the purpose of the confirmation of the charges, whether such reliance is in whole or in part. Since those communications are perfectly intelligible to the suspects, their disclosure will enable the Defence not only to challenge the portions included in the Prosecutor's list of evidence, but also to otherwise rely on other portions of the same conversations which it might identify as relevant and decide to bring to the attention of the Chamber. Whilst the Prosecutor is under a strict obligation to provide the Defence with the entirety of the materials it considers relevant, thereby making the Defence fully aware of the nature, cause and content of the charges, the Defence cannot abdicate its duty and responsibility to examine such materials, which examination is necessary for it to be in a position to decide whether to challenge the evidence or its reading by the Prosecutor, as well as to identify portions which it deems relevant for the purposes of the Chamber's determinations under article 61(7) of the Statute.

11. The Single Judge emphasizes that holding otherwise, by requiring the translation of every single intercept communication in their entirety, including of those passages which are irrelevant or neutral to the charges and therefore of no

use to either party or to the Chamber, would be tantamount to making it impossible to ever conduct proceedings within a reasonable time-frame. It would also result in creating exorbitant costs, while serving no appreciable or worthwhile interest. Far from being instrumental to the fairness of the proceedings, as prescribed by article 67(1)(f), such translations would only unnecessarily overburden the parties and the Chamber, thereby defeating the very objective of fairness – a fundamental tenet of which is the expeditiousness of the proceedings - which they are ultimately supposed to serve. Whenever a significant amount of evidentiary material is at stake (such as it is the case here, and must expected to be the case in all proceedings before the Court), they would also unnecessarily and unreasonably increase the cost of justice, providing an example of misguided use of available resources which, limited as they are, the Court is mandated to carefully manage as a matter of basic economy. By no standard can proceedings which are delayed by the time required to translate irrelevant documents be regarded as “fair”. The availability of translations into a working language of the Court of all those (and only those) passages which are *relevant* to the nature, cause and content of the charges is all that is required for the Chamber to be able to make an objective, proper and thorough determination.

12. Accordingly, an integral translation of the conversation(s) relied upon by the Prosecutor will only be required when, in her view, the whole of such conversation(s) is to be regarded as relevant. The translation of all (and only) the relevant portions of the evidentiary items will result in meeting Mr Bemba’s Defence request, namely that “the entirety of incriminating evidence on which the Prosecutor will rely is disclosed in one of the working languages of the Court”.

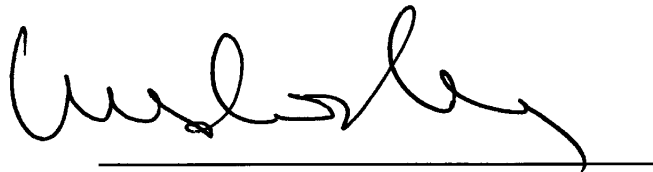
13. Pursuant to rule 121(3) of the Rules of Procedure and Evidence, the Prosecutor is required to provide the Chamber and the person for whom the confirmation of the charges is sought with the document containing the charges and the list of evidence on which she intends to rely 30 days before the date of the confirmation hearing. Whilst the need to properly organise the disclosure process and to enhance its efficiency to the extent possible led to the setting of intermediate deadlines for the disclosure of specific batches of evidence, the Single Judge finds no compelling reason to set a deadline other than the one set forth under rule 121(3) of the Rules for the submission by the Prosecutor of translations into a working language of the Court of the relevant portions of evidentiary items which she intends to rely upon, which will have been disclosed to the Defence teams in their original and integral form.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS Mr Bemba's Defence Request;

ORDERS the Prosecutor to provide by Tuesday 18 March 2014 translations into a working language of the Court of the relevant portions of evidentiary items which she will include in her list of evidence.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', is written over a horizontal line.

**Judge Cuno Tarfusser
Single Judge**

Dated this Tuesday, 11 February 2014

The Hague, The Netherlands