

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 14 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

Joint decision on applications for leave to appeal decisions issued in the situation following their reclassification, submitted by the Defence for Mr Mangenda, the Defence for Mr Kilolo and the Defence for Mr Bemba

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

Counsel for Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Ghislain Mabanga

Catherine Mabilie

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

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 ‘Prosecutor’s ‘Request for judicial order to obtain evidence for investigation under Article 70’” (“29 July 2013 Decision”) issued as confidential, ex parte Prosecutor and Registrar on 29 July 2013,¹ of which a “confidential redacted” version was filed on 13 December 2013² and a “public redacted” version on 3 February 2014³ pursuant to the Single Judge’s “Decision on the reclassification of documents in the record of the situation and of the case”⁴;

NOTING the “Requête en autorisation d’appel de la décision publique ICC-01/05-52-Red2 03-02-2014 du 3 février 2014 sur la requête du Procureur d’obtenir des éléments de preuve sous le régime de l’article 70” dated 4 February 2014, (“Mr Mangenda’s Application”),⁵ whereby the Defence for Mr Mangenda requests leave to appeal the 29 July 2013 Decision on the following issues: (i) “la légalité de cette décision, dont l’objet n’est prévu par aucun texte”; et (ii) “la légalité des écoutes autorisées par le Juge unique”;

NOTING the “Requête aux fins d’autorisation d’appel de la ‘Decision on the Prosecutor’s request for judicial order to obtain evidence for investigation under Article 70’ (ICC-01/05-52-Red2)” dated 10 February 2014 (“Mr Kilolo’s Application”),⁶ whereby the Defence for Mr Kilolo requests leave to appeal the 29 July 2013 Decision on the following issues: (i) whether the Pre-trial Chamber has “compétence pour: autoriser l’interception des communications téléphoniques d’un Conseil à la Cour au motif d’atteintes présumées à

¹ ICC-01/05-52-Conf-Exp.

² ICC-01/05-01/13-39-Conf, confidential Annex A.

³ ICC-01/05-52-Red2.

⁴ ICC-01/05-01/13-147.

⁵ ICC-01/05-01/13-149.

⁶ ICC-01/05-01/13-169.

l'"administration de la justice" and (ii) whether the Pre-trial Chamber has "compétence pour ... nommer un Conseil indépendant avec mission d'exercer un pouvoir d'enquête sur lesdites communications";

NOTING the "Prosecution's response to the Defence of Mr Mangenda's request for leave to appeal decision ICC-01/05-52-Red2(ICC-01/05-01/13-149)" dated 10 February 2014,⁷ whereby the Prosecutor opposes Mr Mangenda's Application on the following grounds: (i) Mr Mangenda's Defence "lacks standing to seek leave to appeal the Impugned Decision, which was issued in the context of ex parte proceedings"; and (ii) Mr Mangenda's Application fails to meet the requirements set forth in Article 82(1)(d);

NOTING the "Defence request for leave to appeal decisions ICC-01/05-46 and ICC-01/05-50" dated 11 February 2014 ("Mr Bemba's Application"),⁸ whereby the Defence for Mr Bemba seeks leave to appeal (i) the "Decision on the Prosecutor's 'Request for judicial assistance to obtain evidence for investigation under Article 70'" dated 8 May 2013 ("8 May 2013 Decision")⁹ and (ii) 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'" dated 27 May 2013 ("27 May 2013 Decision")¹⁰, both of which were issued on a confidential, ex parte basis and reclassified as public on 3 February 2014 pursuant to the Single Judge's "Decision on the reclassification of documents in the record of the situation and of the case"¹¹, on the following issues:

⁷ ICC-01/05-01/13-174.

⁸ ICC-01/05-01/13-170-Corr.

⁹ ICC-01/05-46.

¹⁰ ICC-01/05-50.

¹¹ ICC-01/05-01/13-147.

- *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";*

NOTING the "Réponse de la Défense de Monsieur Jean-Jacques KABONGO MANGENDA à la requête d'autorisation d'appel du 10 février 2014 de Monsieur Jean-Pierre BEMBA GOMBO, à la requête d'autorisation d'appel de Maître Aimé KILOLO MUSAMBA du 10 février 2014 et à la requête d'autorisation d'appel de Monsieur Fidèle BABALA WANDU de la même date " dated 12 February 2014 ("Mr Mangenda's Defence Response"), whereby the Defence for Mr Mangenda requests the Single Judge (i) to "accorder l'autorisation d'appel des décisions attaquées" and (ii) to "ordonner au Procureur de communiquer à la Défense les motifs du refus d'écoutes téléphoniques par les autorités belges";¹²

CONSIDERING that the issues raised by Mr Mangenda's, Mr Kilolo's and Mr Bemba's Applications are similar in nature and that it is therefore appropriate to address and determinate them jointly, for the purposes of the expeditiousness of the proceedings;

¹² ICC-01/05-01/13-184-Conf.

NOTING that, as a preliminary matter, the Defence for Mr Bemba Application requests that a decision on his Application be taken by the full Chamber, given its “importance” and “the fundamental issues that it raises”;

NOTING article 57(2)(a) of the Statute, listing the orders and rulings which “must be concurred in by a majority” of a Chamber’s judges;

CONSIDERING that, pursuant to this Chamber’s practice, since the Chamber designated the Single Judge to carry out its functions subject to article 57(2)(a) of the Statute and a decision under article 82(1)(d) does not fall within the ambit of that provision, the Single Judge shall address Mr Bemba’s Application on behalf of the Chamber;¹³

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 the 8 May 2013 Decision, the 27 May 2013 Decision and the 29 July 2013 Decision were all issued in the situation of the Central African Republic, at a time when the identification of possible suspects and the opening of the present case were yet to come;

CONSIDERING that the right to request leave to appeal a decision pursuant to article 82(1)(d) of the Statute is restricted to “either party” to that decision;

CONSIDERING that this Chamber has since long clarified that even proceedings triggered by a Prosecutor application under article 58 “are to be conducted on an ex parte basis”,¹⁴ with no “procedural means to challenge the relevance and/or the probative value of the evidence and information submitted by the Prosecutor ... or the intrinsic quality of his investigation”¹⁵ and that it “does not consider a person, against whom a summons to appear has been

¹³ ICC-01/09-01/11-74, para. 10.

¹⁴ ICC-01/09-35, para. 10; ICC-01/09-42, paras 13, 18 and 23.

¹⁵ ICC-01/09-35, para. 10.

requested, as having *locus standi*, nor does it recognize him as a ‘party’ to the proceedings, within the meaning of article 82(1)(d) of the Statute”¹⁶;

CONSIDERING that these findings are even more compelling in respect of proceedings *preceding* the submission of an application under article 58 of the Statute (such as those leading to the issuance of the 8 May 2013, 27 May 2013 and 29 July 2013 Decisions), which pertain strictly to the phase of the investigation and by their very nature must be conducted on an *ex parte* basis;

CONSIDERING that neither the Defence for Mr Mangenda, nor the Defence for Mr Kilolo or the Defence for Mr Bemba were a party either to the 8 May 2013, 27 May 2013 and 29 July 2013 Decisions, or to the proceedings leading to their issuance, and cannot become a “party” thereto on an *ex post* basis, by mere virtue of the subsequent filing of a “public redacted” version thereof;

CONSIDERING that neither the reclassification of a decision by the creation of a public redacted version thereof, nor the fact that regulation 25(4) of the Regulations of the Registry requires that the redacted version of a document “shall reflect the date of filing” or the “notification(s)” entailed by such reclassification can result in creating “new”, autonomous decisions for the purposes of their appeal under article 82(1)(d), and that holding otherwise would result in undermining the necessary certainty in determining the time limits set forth by the statutory texts;

CONSIDERING, as stated by the Prosecutor in her Response, that “[t]he fact that the Defence became a party to those proceedings at a later stage, and was given access to prior decisions when the grounds for the[ir] original classification as *ex parte* no longer existed, does not retroactively confer the right to challenge them” and that “[t]o conclude otherwise would turn the Court’s criminal process

¹⁶ ICC-01/09-43, para. 9.

into a highly unstable set of procedural steps which, instead of moving forward in a sequential manner, may be revisited or ‘turned back’ at any point in time by the simple inclusion of a new participant”;

CONSIDERING that being or not being party of given proceedings is a matter of substance rather than of formal labelling, and that, accordingly, it would not be possible to contradict or otherwise overturn the fact that Mr Mangenda, Mr Kilolo and Mr Bemba were not parties to the 8 May 2013, 27 May 2013 and 29 July 2013 Decisions, or to the proceedings leading to their issuance, by simply “considering” those decisions as “part of the record of the case ICC-01/05-01/13”, as requested by the Defence for Mr Bemba;

CONSIDERING that, accordingly, neither the Defence for Mr Mangenda nor the Defence for Mr Kilolo have *locus standi* to request leave to appeal the 8 May 2013, 27 May 2013 and 29 July 2013 Decisions under article 82(1)(d) of the Statute;

CONSIDERING that, in light of the above and with a view to preserving the efficiency of the proceedings, it is unnecessary for the Single Judge to address the merits of the issues raised by Mr Mangenda’s, Mr Kilolo’s and Mr Bemba’s Defence Applications and to determine whether one or more of them would qualify as “appealable issues” within the meaning and for the purposes of article 82(1)(d) of the Statute;

NOTING regulation 24 of the Regulations of the Court and article 24 of the Code of Professional Conduct for Counsel;

CONSIDERING that Mr Mangenda’s Defence Response (i) is erroneously labelled as “response”, when it is instead a reply to the Prosecutor’s Response to Mr Mangenda’s Application; (ii) fails to indicate any reason in support of its classification as “confidential”; (iii) contains a request to the Single Judge to order the Prosecutor to indicate to the Defence the reasons why the Belgian authorities would have rejected her request for intercept of telephone calls; (iv) refers in its

title and text generically to filings and requests made by the Defence of Mr Bemba, Mr Kilolo and Mr Babala, without ever making a specific reference to their number of registration in the record;

CONSIDERING that, pursuant to regulation 24 of the Regulations of the Court, participants may only reply to a response with the leave of the Chamber, and that, accordingly, Mr Mangenda's Defence Response should *per se* be disregarded as inadmissible;

CONSIDERING that, however, the Single Judge finds it necessary to underscore his serious concern at the amount of procedural, substantial and formal irregularities affecting Mr Mangenda's Defence Response, in particular (i) the inclusion in a reply of issues obviously falling outside the scope of an application for leave to appeal, such as the request relating to the outcome of the Prosecutor's request for cooperation addressed to the Belgian authorities; (ii) the failure to clearly identify the filings it is referring to, and this in a case involving as many as four defence teams and totalling as many as 186 entries to this day, where a typical day involves multiple submissions by more than one party, and sometimes by one and the same party (this making the simple reference to the date of a filing utterly insufficient and inadequate for the purposes of its precise identification); (iii) the lack of precision in the arguing, where, under the heading "Position de la défense quant à la demande de Maître Kilolo Musamba concernant la designation d'un conseil indépendant", all the reader may find is a reference to the Defence for Mr Babala¹⁷, in respect of a filing which is otherwise only generically referred to in the title of Mr Mangenda's Defence Response;

CONSIDERING that all of these conducts fall gravely short of the professional standards required from Counsel before the Court, and in particular of Counsel's

¹⁷ Section 2.2, paras 6-7.

duties to “take all necessary steps to ensure that his or her actions ... are not prejudicial to the ongoing proceedings” and to “represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings”;

CONSIDERING that this lack of precision and professionalism entails an enormous amount of otherwise unnecessary work, whether by the Chamber or by the other parties, to the serious detriment of the efficiency and expeditiousness of the proceedings and hence of all parties and all Defence teams;

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS Mr Mangenda’s, Mr Kilolo’s and Mr Bemba’s Defence Applications.

DECIDES that Mr Mangenda’s Defence Response shall be reclassified as public.

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

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

**Judge Cuno Tarfusser
Single Judge**

Dated this Friday, 14 February 2014

The Hague, The Netherlands