

ANNEX

Public



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Date: 09/05/2014

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

**Defence Urgent Request for Disclosure of Non-Privileged Telephone
Communications**

Source: Defence for Mr. Jean-Pierre Bemba Gombo in case ICC-01/05-01/08

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

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A. INTRODUCTION

1. The Defence for Mr. Jean-Pierre Bemba Gombo in the Main Case respectfully requests the Single Judge to order the Registrar to provide a copy to the Defence of all Detention Unit recordings of Mr. Bemba, which were transmitted to the Prosecution pursuant to the order of the Single Judge (the Request).

2. The Defence is aware that conversations between Mr. Bemba and Mr. Mangenda have been transmitted to the Prosecution. Although it has been disclosed the conversations, which the Prosecution considers to fall under either Rule 77 or Article 67(2), it cannot be excluded that the Prosecution might be in possession of other conversations between the two.

3. If that is the case, then the Defence has the right to be apprised of the specific contents of these conversations so that it can make an assessment as to whether any information concerning Defence strategy, working methods, research or preparation for the Final Brief have been revealed to the Prosecution.

4. The Defence also has the right to be informed as to whether any communications between Mr. Bemba and other members of the Defence, who might not have been registered on the privileged telephone list, were provided to the Prosecution.

5. Mr. Bemba, as a participant in these conversations, is aware of the contents of the conversations. He is also aware that he telephones calls were monitored, and provided to the Prosecution.

6. Disclosure of the specific calls and their contents therefore occasions no prejudice to the Prosecution at this juncture.

B. PROCEDURAL HISTORY

7. On the 8 May 2014, the Single Judge ordered 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".¹

8. In a subsequent decision, the Single Judge further instructed the Registry to liaise with the Prosecution in relation to the modalities of the execution of the 8 May 2013 decision.²

9. Pursuant to the terms of the 8 May 2013 decision, the Registry disclosed recordings of conversations between Mr. Bemba and his case manager, Mr. Mangenda.

10. On 19 March 2014, the Registry informed the Defence for Mr. Bemba that the recordings of Mr. Mangenda had been transmitted to the Prosecution due to the fact that Mr. Mangenda was not included on the privileged telephone list.³ At the same time, the Registrar also informed the Defence that Dr. Guenael Mettraux was not included on the same list, and as such, any communications between Dr. Mettraux and Mr. Bemba were not covered by privilege.

11. On 8 April 2014, the Defence requested the Registry to inform the Defence as to the specific content of the recordings which were transmitted to the Prosecution, and to confirm in particular, whether the recordings of any members of the former or present Defence team were transmitted directly to the Prosecution (the Requested Information).⁴

12. On 16 April 2014, the Registry responded that they were unable to provide the Requested Information due to the fact that the Registrar's actions had been taken pursuant

¹ ICC-01/05-46.

² ICC-01/05-50.

³ Decision of the Registrar in relation to the detention complaint of Mr. Bemba, dated 19 March 2014, Annex A.

⁴ Letter from Mr. Peter Haynes Q.C. to Mr. Marc Dubuisson, Annex B.

to the Decision of the Single Judge, dated 8 May 2013.⁵ The Registry's rejection appears to be predicated on the position that the Requested Information is *ex parte* to the Defence: in essence, that the Decision of 8 May 2013 prevents the Registrar from disclosing this information to anyone other than the Chamber or the Prosecution.

13. In such circumstances, Regulation 23*bis*(3) in conjunction with Regulation 42(3) of the Regulations of the Court, permit the Defence to apply to the Single Judge to request a variation of the level of confidentiality of the Requested Information.

14. The Defence hereby seizes the Single Judge of the Request.

C. SUBMISSIONS

15. The specific Regulations of the Court and the Registry, which govern detention matters, recognise that the Defence has a right to be informed of the specific measures taken against him, including whether particular calls have been actively monitored,⁶ and which specific transcripts of recordings have been transmitted to the Prosecution.⁷

16. These procedural requirements are underpinned by principle of natural justice,⁸ and the general requirement that any incursion of detention rights must comply with the principles of necessity and proportionality.⁹

17. As such even if the Single Judge determined in his 8 May 2013 decision that these Regulations were not, *per se*, applicable, the underlying requirement of natural justice, and compliance with the principles of necessity and proportionality, still apply *per* Article 21(3) of the Statute.

⁵ Letter from Mr. Marc Dubuisson to Mr. Peter Haynes Q.C., Annex C.

⁶ Regulation 175(3) of the Regulations of the Registry.

⁷ Regulation 175(10) of the Regulations of the Registry.

⁸ ICC-RoR221-02/09-6-Corr, para. 14; *Prosecutor v. Seselj*, 'Decision on Appeal Against the Registrar's Decision of 19 October 2006', 23 November 2006, <http://www.icty.org/x/cases/seselj/presdec/en/061123.htm>.

⁹ ICC-RoR221-02/09-6-Corr, para. 45.

18. In particular, since the fact that Mr. Bemba's conversations were recorded and transmitted to the Prosecution in connection with an Article 70 investigation is now a matter of public record, there is no investigative exigency which would warrant depriving Mr. Bemba of the right to be apprised as to which recordings were transmitted to the Prosecution.

19. It is thus neither necessary nor proportionate to withhold this information from the Defence.

20. Apart from the fact that Mr. Bemba has a right to be informed of this information, the information is also material to the preparation of the Defence team.

21. Although the Prosecution has disclosed some recordings between Mr. Bemba and Mr. Mangenda to the Defence in the Article 70 case, it cannot be excluded that the Prosecution is in possession of other recordings between Mr. Bemba and non-privileged members of the Defence, which upon review, were found not to concern information that is relevant to the Article 70 case, but which may contain information or details pertaining to the Main Case.

22. The Main Case is in its final stages, and the Defence is in the process of drafting its final brief.

23. It is self-evident that the Defence had the right to discuss the strengths and weaknesses of its case with Mr Bemba, and possible strategies concerning the focus and content of submissions to the Court, including the Final Brief.

24. Nonetheless, the provision of any information concerning potential Defence strategy or internal debate to the Prosecution – no matter how peripheral the issues may be - can impact on the potency of that particular strategy or line of argument.

25. Disclosing the specific recordings, which were transmitted to the Prosecution, will therefore materially assist the preparation of the Defence, by enabling the Defence to make an informed decision as to whether to adjust the focus or strategy for its final submissions in the Main Case.

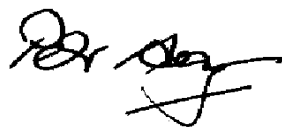
26. In light of Mr. Bemba's right to an expeditious trial, it is imperative that the Defence can make any adjustments to its strategy at the earliest possible juncture. To that end, the Defence respectfully requests the Single Judge to issue an urgent ruling on the Request.

D. RELIEF SOUGHT

27. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba Gombo respectfully requests the Single Judge to

ISSUE AN URGENT ORDER to the Registrar to provide the Defence with all non-privileged recordings between Mr. Bemba and others, which the transmitted to the Prosecution in accordance with the Decision of 8 May 2013.

The whole respectfully submitted.



Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

09 May 2014