

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05

Date: 8 May 2013

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

Confidential, *ex parte* Prosecutor and Registry only

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

Fatou Bensouda, Prosecutor

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 Request");²

NOTING that, in her Request, the Prosecutor submits that her office is 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, that accordingly, the Prosecutor requests the Chamber to exercise its powers under article 57(3)(a) of the Statute (i.e., to issue "orders and warrants as may be required for the purposes of an investigation") and to decide as follows:³

"a) Order the Registry to verify whether any of [a series of telephone numbers] are listed in Registry records and, if so, to whom they belong" ("First Request");

"b) Order the Registry to provide to an independent counsel appointed by the Prosecution access to the Accused's telephone logs and to existing recordings" of all calls made to, or through, Fidèle Babala ("a close confidant of the Accused within the *Mouvement de Libération du Congo* political leadership and his chef-de-cabinet during his tenure as vice-president of the Democratic Republic of the Congo"⁴), and to provide only relevant information to the Prosecution from his or her review of the telephone logs and pertinent recordings of telephone calls" ("Second Request");

¹ ICC-01/05-45-Conf-Exp.

² ICC-01/05-44-Conf-Exp.

³ ICC-01/05-44-Conf-Exp, paragraph 41.

⁴ ICC-01/05-44-Conf-Exp, paragraph 15.

"c) Should the Chamber find that Regulation 92 of [the] Regulations [of the Court] applies, order pursuant to Regulation 92(4) that there be no disclosure to the Accused until such time that disclosure would not prejudice the investigation" ("Third Request");

"d) Vary the terms of the protocol governing contact with defence witnesses to allow the prosecution to conduct interviews with Defence witnesses who received payments as set forth in the Western Union records without prior notice to the Defence" ("Fourth Request").

issue this decision.

Prosecutor's submissions

1. The Prosecutor submits being in possession of evidence (some of which is attached to the Request as confidential annex) indicating that Jean-Pierre Bemba, his associates and/or members of his Defence team "are involved in a scheme to provide benefits to defence witnesses in exchange for false testimony and false documents".⁵ In particular, the relevant evidence would show that individuals associated with the Accused, and/or his Defence Team, transferred non-negligible amounts of money to Defence witnesses in the case, for which transfers no legitimate explanation could be found.⁶
2. Furthermore, "reliable information" would suggest that the Accused "may be using the Detention Centre telephone system to contact supporters";⁷ that telephone numbers currently registered as pertaining to counsel for the Accused might be or have been used to call other associates (in particular, Fidèle Babala, chef-de-cabinet of the Accused during his tenure as vice-president of the Democratic Republic of the Congo and whom the Prosecutor considers key to the alleged scheme), with a view to benefiting from the privileged status attached to conversations between an

⁵ ICC-01/05-44-Conf-Exp, paragraph 1.

⁶ ICC-01/05-44-Conf-Exp, paragraphs 3 and 4.

⁷ ICC-01/05-44-Conf-Exp, paragraph 3.

accused and his counsel;⁸ and that a system of conference calls may be or have been used with a view to circumventing the monitoring system set up at the detention centre of the Court.⁹

3. The First, Second, Third and Fourth Requests to the Chamber are all aimed at enabling the Prosecutor to further and complete her investigation of the matter.

Single Judge's determinations

The First and the Second Requests

4. On the basis of the information submitted, the Single Judge is satisfied that access both to the log of telephone calls either placed or received by the Accused during his stay at the detention centre, as well as to any recordings which may exist of non-privileged telephone calls,¹⁰ may be of essence for the Prosecutor to be able to shed further light on the relevant facts. As long as such calls are not directed to counsel for the Accused, however, they can be legitimately directly accessed by the Prosecutor for the purposes of her investigation and there is accordingly no need for an "independent counsel" to be appointed. The Registry is therefore instructed to provide the Prosecutor with direct access to both the complete telephone log and all existing recordings of non-privileged telephone calls pertaining to the Accused.

5. The Single Judge is also satisfied that it is important that the Prosecutor be in a position to determine whether a series of numbers she has identified as pertaining to Fidèle Babala are currently on file with the Registrar as pertaining to counsel for the Accused. The Registry is therefore instructed to verify whether any of the telephone numbers listed in paragraphs 25 and 41 (sub a) of the Prosecutor's Request are on file with the relevant authorities at the detention centre and, in the affirmative, to provide the Prosecutor with all details pertaining thereto.

⁸ ICC-01/05-44-Conf-Exp, paragraph 24.

⁹ ICC-01/05-44-Conf-Exp, paragraph 23.

¹⁰ Information submitted by the Registry to the Single Judge shows that privileged calls placed or received by detainees at the detention centre are not registered.

6. Accordingly, the Single Judge grants the Prosecutor's First and Second Requests, as amended in the operative part of this decision.

The Third Request

7. The Prosecutor's Third Request is submitted in the event that the Single Judge may consider that recordings of telephone calls made and received by an accused at the detention centre are part of the "detention record" of an accused within the meaning and for the purposes of regulation 92 of the Regulations of the Court ("Regulations") and that, accordingly, their disclosure is subject to the accused being given the opportunity to submit his or her views. The Prosecutor argues that regulation 92 of the Regulations should not apply to the recordings of telephone conversations and, in support, quotes a precedent of the Chamber¹¹, purportedly stating the principle.

8. First, the Single Judge wishes to draw the Prosecutor's attention to the mistake made in referring to such precedent. A careful reader would unfailingly notice that, rather than directly establishing (or "recalling", as the Prosecutor puts it) a general principle that transcripts of telephone conversations "fall [...] outside the scope of the detention record as such", paragraph 8 and paragraph 12 of that decision are respectively devoted to summarise (in paragraph 8) a submission made by the Registry, to the effect that the transcripts of telephone conversations are not part of the detention record, and to "observe" (in paragraph 12) a "finding", likewise made by the Registry, as to whether the information at stake in that particular phase of the proceedings would or would not belong to the detention record as such.

9. Coming to the merits of the issue, the Single Judge observes that there is no reason that recordings of the telephone conversations made or received by an accused at the detention centre be governed by the same confidentiality and disclosure regime governing the detention record, in light of the specific purpose each of them respectively serves. The detention record is aimed at preserving all information pertaining to the period in which the accused remained in the custody

¹¹ ICC-01/05-01/08-325.

of the Court; as can be easily evinced inter alia by reading regulation 189 of the Regulations of the Registry, such information consists most notably of personal information of a confidential nature, as well as of information on salient events occurring during such stay. Recordings of telephone conversations are made and maintained for purposes which are other than those of establishing a complete documentation of all relevant facts pertaining to the custody of the accused, and which can easily be appreciated precisely under the circumstances evoked by the Prosecutor's Request. Whenever a suspicion as to the behaviour 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.

10. Accordingly, the Third Request is moot.

The Fourth Request

11. The Prosecutor submits that "at an appropriate time in its investigation" she will "seek to interview, simultaneously to the extent possible, those key Defence witnesses" who may have benefited from the alleged scheme.¹² Accordingly, the Chamber is requested to "vary the terms of the protocol governing contact with defence witnesses to allow the Prosecution to conduct interviews with defence witnesses who received payments ... without prior notice to the Defence".

12. The Single Judge observes that there is no need for the Chamber to "vary" the order issued by Trial Chamber III concerning contact with witnesses, nor, consequently, to determine whether such variation may or may not be in the purview of the Chamber's powers. What the Prosecutor requires from this Chamber in order to achieve her goals, and should therefore have requested, is rather a special authorisation to contact Defence witnesses for the specific and limited purposes of the investigation into the scheme alleged in her Request. In light of the Prosecutor's submission, the Single Judge grants this limited authorisation.

¹² ICC-01/05-44-Conf-Exp, paragraph 38.

FOR THESE REASONS, THE SINGLE JUDGE

ORDERS the Registrar to verify whether any of the telephone numbers listed in paragraphs 25 and 41 (sub a) of the Prosecutor's Request is included in the Registry's records for the purposes of the functioning of the monitoring of telephone conversations held by the Accused at the detention centre and, in the affirmative, to provide the Prosecutor with all the available details pertaining to those numbers;

ORDERS 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;

AUTHORISES the Prosecutor to contact and interview Defence witnesses for the limited purposes of the investigation evoked in the Prosecutor's Request, without prejudice to all the limitations set forth in the protocol for contact with witnesses established by Trial Chamber III, which remain otherwise applicable and in force.

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



Judge Cuno Tarfusser

Single Judge

Dated this Wednesday, 8 May 2013

At The Hague, The Netherlands