

**Cour
Pénale
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**International
Criminal
Court**

Original: **English**

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

Date: **20 July 2015**

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Confidential Document

**Prosecution's Observations on the Mangenda Defence's Request for Disclosure of
Information, ICC-01/05-01/13-1082-Conf-Corr**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") submits its observations on the request of the Defence for Jean-Jacques Mangenda Kabongo ("Mangenda") for an order directing the government of The Netherlands to provide "any and all information" concerning the electronic surveillance of Mangenda's communications ("Request").

2. Although the relief requested is within the discretion of the Trial Chamber VII ("Chamber"), having regard to the circumstances of the case, the Request is not justified or sufficiently specific and should be denied

II. Confidentiality

3. This filing is classified as "Confidential" as it concerns a filing of the same designation. The Prosecution does not object to its reclassification as "Public."

III. Submissions

A. The Request fails to show sufficient justification for the issuance of an order

4. The Request fails to demonstrate a sufficient factual or legal basis for an order requiring the government of The Netherlands to produce the material sought.

5. Although Mangenda is free to petition the Chamber for an order, as may be necessary to assist him in the preparation of his defence under article 57(3)(b) of the Rome Statute ("Statute") and rule 116(1) of the Rules of Procedure and Evidence ("Rules"), he is not entitled to such relief merely upon the asking. Here, the Request

fails to establish the requisite materiality, necessity and specificity of the documents and records sought.¹

i. The Request does not meet the requirements of rule 116 of the Rules

a. The Request advances an untenable claim of materiality

6. *First*, the Request advances no colourable claim substantiating the “materiality” of the information sought. Specifically, Mangenda asserts that this material is needed to “verify”, (a) whether the execution of the wiretap by the Dutch authorities was carried out in compliance with domestic law, as the Prosecution contends;² and (b) “whether the surveillance that yielded the audio-files arose in circumstances which could lead to its inadmissibility”.³ Neither ground justifies the requested relief, especially absent even a cursory allegation in the Request that Mangenda is *actually* aggrieved.

7. *Second*, Mangenda already has sufficient information at his disposal to determine whether the Dutch authorities complied with domestic law in implementing the relevant electronic surveillance measures. In particular, Mangenda has access to ICC-01/05-01/13-424-Anx1, a translation of the Decision of The Hague District Court granting the Public Prosecutor leave to “deliver to the International Criminal Court in the Hague the tapped calls and the historical data for the period up to and including 23 November 2013, for which the examining magistrate granted authorization pursuant to Section 126aa(2) of the Dutch Code of Criminal Procedure, for [*inter alia*, Mangenda’s attributed phone numbers]”⁴ (“District Court Decision”).

¹ ICC-02/05-03/09-170, para.13 (noting the requirement of establishing materiality in respect of requests for cooperation under Part 9 in furtherance of an application pursuant to article 57(3)(b)) of the Statute) and para.14; *see also* ICC-02/05-03/09-504-Red, paras.6-7.

² ICC-01/05-01/13-1082-Conf-Corr, paras.4-5 (citing ICC-01/05-01/13-1013, para.25).

³ ICC-01/05-01/13-1082-Conf-Corr, para.5.

⁴ ICC-01/05-01/13-424-Anx1, p.10.

Although the Request omits reference to this filing, Mangenda has had access to it since at least 26 May 2014.

8. The District Court Decision expressly assessed and ruled on Mangenda's several challenges to the legality of the wiretaps and the propriety of their transmission by the Dutch authorities to the Court under domestic law; this includes Mangenda's contention that his immunities were breached,⁵ however incompatible that is with his present assertion that the wiretaps concerned "[t]hree telephone numbers *purportedly attributable to Mr. Mangenda*."⁶

9. Despite his allegedly "extremely limited" participation in the national proceedings,⁷ Mangenda availed himself of the opportunity to litigate the propriety of the wiretaps, and is aware of the basis of their legality.

10. The District Court Decision states that, "[t]he court heard the application by the public prosecutor and the complaints in chambers on 14 April 2014. The complainants Mangenda Kabongo and his counsel, Mr. I van Straalen, as well as complainant Kilolo Musamba and his counsel, Mr. S.T. van Berge Henegouwen, appeared at the hearing."⁸ The Request does not even begin to explain why the District Court Decision is insufficient for Mangenda to "verify" whether "the manner and basis upon which [the wiretap recordings] [were] collected"⁹ comply with Dutch law.

11. Mangenda's mere disagreement with the outcome of the arguments he raised before the Dutch courts, cannot substitute for a well-founded basis to call into

⁵ ICC-01/05-01/13-424-Anx1, p.5.

⁶ ICC-01/05-01/13-1082-Conf-Corr, para.4 (emphasis added).

⁷ ICC-01/05-01/13-1082-Conf-Corr, para.8.

⁸ ICC-01/05-01/13-424-Anx1, pp.3-4.

⁹ ICC-01/05-01/13-1082-Conf-Corr, para.5.

question the legality of the District Court Decision, or create an issue under article 69(7) of the Statute for which he asserts the information sought is material.

- b. There has been no violation of Dutch law, the Statute, or any internationally recognised human right

12. Had Mangenda alleged a violation of Dutch law, the Statute or an internationally recognised human right in respect of the wiretap process and evidence it would be illusory, given the record in this case. Conversely, the lack of such an allegation in the Request fails to place the issue in contest, and thus undermines the materiality of the information he seeks.

13. As Mangenda is aware, the wiretap process and the resultant evidence were the product of carefully circumscribed and regulated procedures observed both by this Court, and the District Court of The Hague. Both the Pre-Trial Chamber and the Dutch authorities implemented several safeguards to ensure the fairness of the judicial process, of which Mangenda is well aware and from which he benefited. The propriety of the process at the national level was ensured, *inter alia*, by the Public Prosecutor, Investigative Judge, the Independent Counsel, the Dean of the Bar, the above-mentioned hearing, and the considered judgement of the District court.

14. Further, the Dutch authorities manifestly cooperated with the Court under the terms of the Statute in good faith. There is nothing about the process — one in which Mangenda was afforded an opportunity to participate and did so — even suggestive of a violation of the Statute or an internationally recognised human right. As noted, the Request does not allege that the Dutch authorities actually breached any right of Mangenda's, but instead seeks to "verify" whether they might have. Without even a cursory allegation that the Dutch authorities violated Mangenda's rights in any way, the Request amounts to a "fishing expedition".

ii. *The Request fails to show the necessity of the material sought*

15. Absent any assertion that the materials sought are otherwise *unavailable* to the Mangenda Defence through the exercise of reasonable diligence, the Request falls short of justifying the Chamber's issuance of an order to the government of The Netherlands.¹⁰ The necessity requirement for the Chamber to seek cooperation from State Parties, is not satisfied absent a showing that the Defence have "exhausted all available avenues to obtain the documents sought", before resorting to the Chamber's intervention.¹¹

16. Mangenda's assertion that "[n]o documents concerning the basis of the electronic surveillance have ever been disclosed to him by the Dutch authorities" does not demonstrate their unavailability through the exercise of reasonable diligence. The Request (1) does not exclude the possible provision of the relevant materials to Mangenda's counsel in the national proceedings, Mr van Straalen; (2) does not set out any efforts made by his Defence in this case to obtain the material from counsel van Straalen; and (3) does not establish that Mangenda has been prevented from obtaining the documents in the national proceedings or in any other way, since becoming aware of the adverse District Court Decision on 26 May 2014, at the latest.¹² As such, the Request fails.

iii. *The Request is impermissibly overbroad*

17. Finally, to the extent that the Request broadly seeks that the government of The Netherlands produce, (a) "any and all information relevant to its authorisation

¹⁰ ICC-02/05-03/09-170, para.14; ICC-02/05-03/09-504-Red, para.4.

¹¹ ICC-02/05-03/09-504-Red, para.7; *see also*, ICC-02/05-03/09-170, para.26.

¹² *See* ICC-01/05-01/13-424; *see also* ICC-01/05-01/13-400-Anx, pp.24-37 (filed in the original Dutch on 19 May 2014).

and execution of electronic surveillance of Mr. Mangenda's communications"¹³; (b) "any warrants or similar orders issued by the Dutch authorities to any third parties for the production of any information whatsoever" ;¹⁴and (c) "any orders issued by the Dutch authorities to any private entity for the production of information";¹⁵ it is insufficiently specific and unduly onerous.¹⁶

IV. Conclusion

18. For the foregoing reasons, the Prosecution does not consider that the Request establishes a sufficient basis for the Chamber to issue an order to the government of The Netherlands to produce the requested documents.



Fatou Bensouda, Prosecutor

Dated this 20th Day of July 2015
At The Hague, The Netherlands

¹³ ICC-01/05-01/13-1082-Conf-Corr, para.1.

¹⁴ ICC-01/05-01/13-1082-Conf-Corr, para.1.

¹⁵ ICC-01/05-01/13-1082-Conf-Corr, para.9.

¹⁶ See ICC-02/05-03/09-170, paras.14-16 and 20.