

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **14 August 2015**

TRIAL CHAMBER VII

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

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***

Confidential

Decision on Mangenda Defence Request for Cooperation

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII (the 'Chamber') of the International Criminal Court (the 'Court'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 57(3)(b), 61(11) and 64(6)(a) of the Rome Statute and Rules 77 and 116 of the Rules of Procedure and Evidence (the 'Rules'), issues the following 'Decision on Mangenda Defence Request for Cooperation'.

I. Background and Submissions

1. On 14 July 2015, the defence for Mr Mangenda ('Mangenda Defence') filed an application to issue a request for cooperation to the government of the Kingdom of The Netherlands ('Request').¹ It requests that the Kingdom of The Netherlands be requested to provide to the Mangenda Defence all documents and information pertaining to the authorisation and execution of telephone surveillance of Mr Mangenda. This includes all submissions of the Office of the Prosecutor (the 'Prosecution') to an official requesting electronic monitoring, any decision relevant to the authorisation of surveillance, any document relevant to the production of any records and 'any documents relevant to the production of any records from any source' ('Requested Material').²
2. On 20 July 2015, the Prosecution filed its response ('Response'), requesting that the Request be rejected.³
3. On 24 July 2015, the defence for Mr Kilolo submitted its response, supporting the Request.⁴

¹ Request for Order for Disclosure of Information, ICC-01/05-01/13-1082-Conf-Corr, with two confidential Annexes. A corrected version was filed on the same day and notified on 15 July 2015, ICC-01/05-01/13-1082-Conf-Corr.

² Request, ICC-01/05-01/13-1082-Conf-Corr, para.10.

³ Prosecution's Observations on the Mangenda Defence's Request for Disclosure of Information, ICC-01/05-01/13-1082-Conf-Corr, ICC-01/05-01/13-1090-Conf.

4. The Mangenda Defence argues that the Requested Material is necessary to verify if the material stemming from the telephone surveillance of Mr Mangenda conducted between August to November 2013 was acquired lawfully.⁵ According to the Mangenda Defence, since the Prosecution has already announced its intention to use this material during trial, the Requested Material is needed to assess if a possible request to declare the material stemming from the telephone surveillance as inadmissible for 'violations of this Statute or internationally recognized human rights' could be filed.⁶
5. Further, the Mangenda Defence submits that they are not privy to most documents relating to the authorisation of the telephone surveillance and are only aware of the existence of these filings because of the Prosecution's and independent counsel's reference to them throughout the prior proceedings.⁷ It annexes a list to the Request with the documents to which reference has been made to on previous occasions.⁸
6. The Prosecution submits that the Request lacks the necessary prerequisites of materiality, necessity and specificity for a request for state cooperation.⁹ It argues that the Mangenda Defence fails to show that there are any signs of unlawfulness in the execution of the telephone surveillance. Therefore, in the opinion of the Prosecution, the Mangenda Defence has not substantiated why the Request is material.¹⁰ Further, the Prosecution avers that the Mangenda Defence already has sufficient information to verify the lawfulness since it was involved in the national proceedings concerning the

⁴ Réponse de la Défense de M. Kilolo à la « Corrected version of Request for Order for Disclosure of Information » (ICC-01/05-01/13-1082-Conf-Corr), ICC-01/05-01/13-1102-Conf.

⁵ Request, ICC-01/05-01/13-1082-Conf-Corr, paras 4 and 5.

⁶ Request, ICC-01/05-01/13-1082-Conf-Corr, paras 4 and 5.

⁷ Request, ICC-01/05-01/13-1082-Conf-Corr, para. 6.

⁸ ICC-01/05-01/13-1082-Conf-AnxA.

⁹ Response, ICC-01/05-01/13-1090-Conf, para. 5.

¹⁰ Response, ICC-01/05-01/13-1090-Conf, para. 6.

telephone intercepts.¹¹ Additionally, the Prosecution is of the view that the Request is impermissibly broad.¹²

7. The Prosecution further avers that there is no violation of Dutch law, the Rome Statute or internationally recognised human rights.¹³ Finally, it submits that the Mangenda Defence did not 'exhaust[.] all available avenues to obtain the documents sought'.¹⁴

II. Analysis

8. The Chamber notes the jurisprudence of this Court, according to which the term 'material to the preparation of the Defence' in Rule 77 of the Rules is to be interpreted broadly.¹⁵
9. The Chamber observes that the Mangenda Defence intends to use the Requested Material to determine if the audio-recordings resulting from the telephone surveillance of Mr Mangenda – which the Prosecution intends to rely on during trial – were obtained lawfully.
10. The Chamber considers that material which enables the defence to assess the legality of evidence which the Prosecution intends to rely upon at trial is relevant to the preparation of the defence. It therefore falls under the Prosecution's disclosure obligations as set out in Rule 77 of the Rules. It is not necessary for the defence to demonstrate the illegality of the proposed evidence, since this is precisely the reason why the material is sought.
11. The Prosecution's disclosure obligations extend to any material in the possession of the Prosecution which would assist the Mangenda Defence in

¹¹ Response, ICC-01/05-01/13-1090-Conf, paras 7-11.

¹² Response, ICC-01/05-01/13-1090-Conf, para. 17.

¹³ Response, ICC-01/05-01/13-1090-Conf, paras 12-14.

¹⁴ Response, ICC-01/05-01/13-1090-Conf, para. 15.

¹⁵ Appeal Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008", 11 July 2008, ICC-01/04-01/06-1433 (OA 11), paras 77-78.

determining the legality of the audio-recordings. However, as to the Mangenda Defence's request to disclose 'any documents relevant to the production of any records from any source' the Chamber considers that this description is too vague to substantiate materiality in the sense of Rule 77 of the Rules or to justify a request for cooperation.

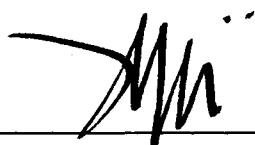
12. Most or all of the documents cited in annex A to the Request, which appear to be related to the authorisation and execution of the telephone surveillance, seem to be in the possession of the Prosecution. The Mangenda Defence does not explain what steps, if any, it has undertaken to seek these kinds of documents from the Prosecution. The Mangenda Defence should first seek to obtain these documents in accordance with Rule 77 of the Rules before seeking the assistance of the Chamber.¹⁶ After having received the relevant material from the Prosecution, it is still open to the Mangenda Defence to submit further applications, should it deem it necessary.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

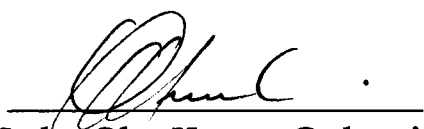
ORDERS the Prosecution to disclose to the Mangenda Defence all material related to the assessment of the legality of the telephone surveillance of Mr Mangenda, in accordance with paragraphs 10 and 11 above.

¹⁶ See Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on "Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union", 1 July 2011, ICC-02/05-03/09-170, paras 21-28.

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

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Judge Chile Eboe-Osuji
(Presiding)

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Judge Olga Herrera Carbuca

A handwritten signature in black ink, with a large, bold 'B' followed by several loops and a final horizontal stroke.

Judge Bertram Schmitt

Dated 14 August 2015

At The Hague, The Netherlands