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Date: **24 August 2015**

TRIAL CHAMBER VII

Before: **Judge Bertram Schmitt**
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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

Prosecution's Response to the Mangenda Defence Motion to Declare Inadmissible Telephone Intercepts of Mr Mangenda

Source: **The Office of the Prosecutor**

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

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I. Introduction

1. The Defence's motion to preclude the admission of telephone intercepts lawfully collected from the Dutch authorities[1]— which unquestionably demonstrate Mangenda's guilt -- should be denied. None of the Prosecution's statements in either its *Request for Judicial Order to Obtain Evidence for Investigation under Article 70* ("Request") to the Single Judge of Pre-Trial Chamber II ("Single Judge")[2] or in its Request for Assistance ("RFA") to The Netherlands[3] were false or misleading. The Motion mischaracterises the Prosecution's Request, the decision by the Single Judge granting that request, and the RFA.

2. The Motion should be denied.

II. Background

3. On 19 July 2013, the Prosecution filed its Request, seeking, *inter alia*, an order from the Single Judge to contact Dutch and Belgian authorities to intercept the telephone communications of Kilolo and Mangenda.[4]

4. The Request was granted by the Single Judge on 29 July 2013.[5] In the Decision, the Single Judge authorised "the Prosecutor to seize the relevant authorities of Belgium and of the Netherlands, with a view to collecting logs and recordings of telephone calls placed or received by Mr Aimé Kilolo and Mr Jean-Jacques

[1] Corrigendum to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements By the Prosecution, ICC-01/05-01/13-1136-Conf-Corr ("Motion"). This Response is classified as "Confidential" as it responds to filings of the same designation. The Prosecution does not object to its reclassification as "Public".
[2] Request for Judicial Order to Obtain Evidence for Investigation under Article 70, ICC-01/05-51-Conf ("Request").
[3] CAR-D21-0005-0001 ("RFA").
[4] *See* Request, para.32.
[5] Decision on the Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70", ICC-01/05-52-Conf ("Decision"), para.5.

Mangenda."[6]

5. From 14 August 2013 until 23 November 2013, Dutch authorities intercepted the telecommunications of Kilolo and Mangenda. Subsequently, relevant communications falling under the crime-fraud exception to the attorney-client privilege were provided to the Single Judge of Pre-Trial Chamber II, and following their appropriate vetting, to the Prosecution and the Parties. They are tendered as evidence in this case in support of the charged offences.[7]

III. Submissions

A. The Motion fails to establish any material misstatements

The Prosecution's RFA accurately describes the scope of judicial authorisation

6. The Prosecution's RFA to the Dutch authorities did not contain any material misstatements concerning either its Request, or the Decision.[8] As reflected below, the language used in the RFA mimics, almost verbatim, the authorisation sought from the Chamber in the Prosecution's Request:

> *The Prosecution Request*: "The Prosecution now seeks [...] judicial authorization [...] to collect recordings of telephone intercepts from the Dutch and Belgian governments of Messrs. KILOLO, lead counsel and MANGENDA case manager."[9]

[6] Decision, p.7.
[7] *See generally* Prosecution's First Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1013-Conf and ICC-01/05-01/13-1013-Conf-AnxA.
[8] *Contra* Motion, paras.17-20.
[9] Request, para.3. *See also* paras.23, 32.

> *The Prosecution RFA*: "the Prosecution sought judicial authorization [...] to collect recordings of telephone intercepts of Mr KILOLO and Mr MANGENDA".[10]

The Prosecution also correctly informed the Dutch authorities that this "authorisation was granted" by the Decision.[11] The Decision repeated the above language twice when summarising the Prosecution's Request,[12] and then granted that Request; authorising "the Prosecutor to seize the relevant authorities of Belgium and of The Netherlands, with a view to collecting logs and recordings of telephone calls placed or received by Mr Aime Kilolo and Mr Jean-Jacques Mangenda."[13] Nothing in the Decision's reasoning or language suggests that the Single Judge intended to depart from granting the full scope of the Prosecution's Request.

7. The Defence's attempt to narrow the nature of the Prosecution's Request and the Decision is unpersuasive.[14] The Request and the Decision were intended to authorise the collection of telephone logs and recordings, thus necessitating surveillance by the Dutch authorities.[15] Such action was clearly contemplated in the Prosecution's Request, which expressly noted that the evidence received to-date suggested that "the Accused is in constant communication with the financiers of the scheme",[16] that the "Accused frequently speaks to the very individuals" making payments to Defence witnesses "at times for hours a day and several times a day",[17] that review of the conversations is "on-going" and that "the Prosecution continues to learn new information about the scheme from the calls".[18] The Prosecution thus sought authorisation "to collect recordings of telephone intercepts",[19] a request that

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[10] RFA at 0003, para.8.
[11] RFA, at 0003, para. 8.
[12] Decision, pp.3-4 and para.2.
[13] Decision, p.7.
[14] Motion, paras.18-20.
[15] *Contra* Motion, paras.18-20.
[16] Request, para.4.
[17] Request, para.14.
[18] Request, para.20.
[19] Request, paras.3, 23. *See also* para.32.

was deliberately broad enough to capture both past and future communications. Indeed, the term "intercept" by definition mandates surveillance.

8. There is no indication, and the Defence points to none, that the Single Judge sought to grant a more limited authority than that requested by the Prosecution. To the contrary, the language of the Decision is purposefully broad enough to authorise precisely the request sought by the Prosecution.[20] Indeed, the Pre-Trial Chamber has itself subsequently confirmed the Prosecution's understanding of the Decision, noting in its confirmation decision that "the interception of the telephone communications [...] [was] not unlawful" and, therefore, that it did not consider "that the evidence obtained as a result of the interception has been 'obtained by means of a violation of [the] Statute or internationally recognized human rights'".[21]

The Prosecution made accurate representations to the Single Judge in its Request

<u>Payments from Mangenda through Western Union</u>

9. The Prosecution accurately represented to the Single Judge that the evidence at that point in time suggested that Kilolo and Mangenda might have made payments to Defence witnesses.[22] The evidence collected by that time suggested that Kilolo and others were paying Defence witnesses without any legitimate explanation.[23] The same individuals who were paying Defence witnesses were also paying Mangenda.[24] This led to a reasonable suspicion that Mangenda may also be paying witnesses. This suspicion was also supported by the pattern of large Western Union payments received by Mangenda on dates coinciding with the testimony of several witnesses in

[20] *See* Decision, p.7.
[21] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, para.14.
[22] *See* Request, paras.14, 21-22. *Contra* Motion, paras.11-12.
[23] *See e.g.* Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70, ICC-01/05-44-Conf-Red2 ("First Request"), paras.3, 15, 16.
[24] First Request, para.21

The Hague.[25] None of the evidence possessed by the Prosecution at that time refuted these suspicions.[26] It was only after Mangenda's arrest -- and thus after issuing its Request -- that the Prosecution became aware of records refuting its well-founded suspicions that Mangenda had used the money he received by Western Union to pay Defence witnesses.[27]

10. The Prosecution's Request was carefully crafted to ensure that the Single Judge understood that the Prosecution's conclusions were based only on information it had reviewed to-date and that its conclusions were not definitive. For instance, the Prosecution stated that, "[t]he times and dates of the transfers of exact sums of money *suggest* that KILOLO and MANGENDA *may be* paying witnesses while they are at the seat of the Court."[28] Other parts of the Request were equally carefully crafted, noting that "the above evidence strongly indicates"[29] or "significantly strengthens the Prosecution's initial suspicion".[30] To underline the nature of the suspicions, the Prosecution candidly stated to the Single Judge that the evidence collected at that stage was "largely circumstantial" and that its understanding of the scheme was "incomplete".[31] It is within this context that the impugned representations should be read and understood. The only reasonable understanding of the language used throughout the Request demonstrates that the Prosecution's articulation of its suspicions, based on the fruits of its investigations, was made in good faith.

[25] *See* Request, para.21.
[26] *Contra* Motion, para.11.
[27] *See e.g.* Prosecution Request to Obtain Evidence from the Detention Centre, ICC-01/05-01/13-179, para.5. *See also Annexe: Rapport à la Chambre suite à la* «Décision on the 'Prosecution request to obtain evidence from the Detention Centre' dated 12 February 2014», ICC-01/05-01/13-218-Conf-Anx.
[28] Request, para.21 (emphasis added).
[29] Request, para.22.
[30] Request, para.14.
[31] Request, para.22.

Communications between Mangenda and Others

11. The Defence mischaracterises the Prosecution's representations to the Single Judge concerning what conclusions can be derived from Babala's call data records ("CDRs").[32] The Prosecution did not, as averred by the Defence, represent to the Single Judge that the CDRs showed that Mangenda was in communication with Defence witnesses.[33] Rather, the Prosecution clearly and unequivocally argued that the CDRs showed contact between Babala, not Mangenda, and Defence witnesses.[34]

12. The Defence's reading of the Prosecution's statements concerning Babala's CDRs betrays a profound misapprehension of the CDRs which, by definition, reflect calls to and from a given phone number. Babala's CDRs would thus, necessarily only reflect calls between Babala and others. The Prosecution's representations must be read in this context. Paragraph 16 of the Request thus states that the CDRs "show BABALA's frequent contact *with* KILOLO, MANGENDA, Caroline BEMBA, Robert NGINAMAU, and Defence witnesses".[35] Paragraph 15 of the Request states that "BABALA's records show frequent communication *between* KILOLO, MANGENDA, Caroline BEMBA, NGINAMAU, and Defence witnesses".[36] Although admittedly less precise than paragraph 16, taken in context, paragraph 15's meaning singularly reflects the relationship between Babala's phone and the listed individuals. This is supported by the fact that the remainder of paragraph 15 focuses on how communications between Babala and Kilolo confirm the inference that can be drawn from documents received from the Registry.

[32] Motion, paras.13-14. *See also* Request, paras.15-18.
[33] Motion, para.13. *See also* Request, paras.15, 16.
[34] *See* Request, paras.15, 16.
[35] Request, para.16 (emphasis added).
[36] Request, para.15 (emphasis added).

Payment of bribes by Mangenda

13. The Prosecution's assertion in its Request that "[b]oth Kilolo and Mangenda [...] received large Western Union payments on dates that coincide with the dates of testimony of several witnesses in The Hague"[37] was neither misleading nor inaccurate.[38] The Prosecution also provided examples of that pattern.[39]

14. The Defence's principal challenge, that the Prosecution should have exercised further diligence to dissuade the suspicion that could be drawn from that pattern before making the assertion in its Request,[40] ignores the preliminary nature of the Prosecution's evaluation at that stage. The very purpose of the Prosecution's investigation, including the Request, was to collect evidence substantiating or negating its well-founded suspicion, based on evidence received to-date, that Mangenda may have been bribing witnesses.[41] The Prosecution did not need to exhaust all other potential evidentiary sources before making its Request, and was fully justified in relying on inferences reasonably derived from the evidence received to-date.

B. The evidence should be admitted

15. Even if the Chamber were to find that Mangenda's privacy rights were breached -- which is not the case -- the Motion fails to establish that any such violation casts substantial doubt on the reliability of the evidence, or that its admission would be antithetical to and would seriously damage the integrity of the proceedings.[42]

[37] Request, para.21.
[38] *Contra* Motion, paras.15-16.
[39] *See* Request, para.21.
[40] Motion, para.15.
[41] *See* Request, paras.1-2, 4-5, 14, 23-24.
[42] *Contra* Motion, paras.2-8.

16. The Motion makes no submissions on the reliability of the evidence and fails to sufficiently explain how its admission would be antithetical to and would seriously damage the integrity of the proceedings. Instead, the Defence Motion implicitly acknowledges that it does not meet that bar, by arguing that article 69(7) should be interpreted differently in article 70 cases.[43] The Request thus posits that the Chamber should consider "the gravity of the underlying offence being adjudicated."[44] The Defence Motion cites to national cases urging the Chamber to accept that evidence may be excluded under elastic standards, but points to no support in the Court's statutory framework or its jurisprudence suggesting that article 69(7) may be applied differently in different types of cases.[45] The opposite is true. For instance, the *Lubanga* Trial Chamber held, in the context of admitting evidence from the bar table, that "the seriousness of the alleged crimes committed by the accused is not a factor relevant to the admissibility of evidence under Article 69(7)."[46]

17. Further, the rationale for the high threshold for the inadmissibility of evidence under article 69(7) outlined in the same decision[47] and others,[48] applies equally in this case. There is no indication that in the balancing exercise, "the need to respond to victims' and the international community's expectations"[49] should be given less weight because this is an article 70 case. On the contrary, admitting lawfully obtained evidence in a trial against persons who allegedly attempted to deny justice to the hundreds, potentially thousands, of victims of the crimes charged in the Main Case is consistent with both the Statute and with the fundamental mandate of this Court.

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[43] *See* Motion, para.7.
[44] *See* Motion, para.7.
[45] *See* Motion, para.7.
[46] Decision on the Admission of Material From the "bar table", ICC-01/04-01/06-1981 ("*Lubanga* Bar Table Decision"), para.44.
[47] *Lubanga* Bar Table Decision, paras.35-48.
[48] Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, paras.83-89 ("*Lubanga* Confirmation Decision"); Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, para.61.
[49] *Lubanga* Confirmation Decision, para.86.

18. The Request fails to make any credible submission why the integrity of the proceedings would be seriously damaged, and there is no coherent legal or principled justification offered for modifying the test for inadmissibility under article 69(7) in this case.

IV. Relief requested

19. The Motion should be denied.

Fatou Bensouda, Prosecutor

Dated this 24th Day of August 2015
At The Hague, The Netherlands