

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
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,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO,
FIDÈLE BABALA WANDU and NARCISSE ARIDO***

Public

Decision on Request to declare telephone intercepts inadmissible

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

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Participation/Reparation**

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Trial Chamber VII ('Chamber') of the International Criminal 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 Article 69(7) of the Rome Statute ('Statute') and Regulation 24(4) and (5) of the Regulations of the Court ('Regulations'), issues the following 'Decision on Request to declare telephone intercepts inadmissible'.

I. Procedural History and Submissions

1. On 10 August 2015, the defence for Mr Mangenda ('Mangenda Defence') filed a request to declare all telephone intercepts of Mr Mangenda inadmissible ('Request').¹
2. On 24 August 2015, the defence for Mr Arido ('Arido Defence') and the defence for Mr Bemba ('Bemba Defence') filed their responses, supporting the Request ('Arido Response' and 'Bemba Response', respectively).²
3. On the same day, the Office of the Prosecutor ('Prosecution') also filed its response, submitting that the Request be rejected ('Prosecution Response').³
4. On 28 August 2015, the Mangenda Defence filed a request for leave to reply to the Prosecution Response ('Leave to Reply Request').⁴ The Prosecution filed

¹ 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, a corrigendum was filed on 13 August 2015, ICC-01/05-01/13-1136-Conf-Corr.

² Narcisse Arido's Response to "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), ICC-01/05-01/13-1178-Conf; Defence Response 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), ICC-01/05-01/13-1179-Conf.

³ Prosecution's Response to the Mangenda Defence Motion to Declare Inadmissible Telephone Intercepts of Mr Mangenda, ICC-01/05-01/13-1180-Conf.

⁴ Request for Leave to Reply to Prosecution Response to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda, ICC-01/05-01/13-1194-Conf.

its response to the Leave to Reply Request, on 1 September 2015, submitting that it should be rejected.⁵

5. On 2 September 2015, the Prosecution filed a response to the Arido and Bemba Response. Alternatively, in case its submissions are not considered as a response, it requested that leave to reply is granted to the Arido and Bemba Response ('Prosecution Further Submissions').⁶
6. The Mangenda Defence submits that all telephone intercepts which were obtained as a result of the 'Prosecution's request to the Trial Chamber [sic] of 19 July 2013' ('Request to Obtain Evidence')⁷ should be declared inadmissible.⁸ It argues that the Request to Obtain Evidence contains material misstatements, which influenced the decision⁹ of the Single Judge of Pre-Trial Chamber II ('Decision on the Request to Obtain Evidence' and 'Single Judge', respectively) and the authorities of the Kingdom of the Netherlands ('Dutch Authorities') to authorise the surveillance of Mr Mangenda and in consequence vitiates all material stemming from this surveillance ('Telephone Intercepts').¹⁰
7. In particular, the Mangenda Defence submits that the Request to Obtain Evidence contains four misstatements: (i) the Prosecution claimed falsely that Mr Mangenda was paying defence witnesses through western union,¹¹ (ii) the

⁵ Prosecution's Response to the "Request for Leave to Reply to Prosecution Response to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda", ICC-01/05-01/13-1206-Conf.

⁶ Prosecution's Response, or in the alternative, Request to seek Leave to Reply to Bemba's and Arido's Submissions to the Mangenda Defence Motion to Declare Inadmissible Telephone Intercepts of Mangenda (ICC-01/05-01/13-1136-Conf-Corr), ICC-01/05-01/13-1210-Conf, with confidential annex A.

⁷ Request for Judicial Order to Obtain Evidence for Investigation under Article 70, 19 July 2013, ICC-01/05-51-Conf, a public redacted version was filed on 12 February 2014, notified on 13 February 2015, ICC-01/05-51-Red.

⁸ Request, ICC-01/05-01/13-1136-Conf-Corr, paras 1 and 31.

⁹ Decision on the Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70", ICC-01/05-52-Conf, 29 July 2013. A public redacted version was issued on 3 February 2014, ICC-01/05-52-Red2.

¹⁰ Request, ICC-01/05-01/13-1136-Conf-Corr, paras 1 and 31.

¹¹ Request, ICC-01/05-01/13-1136-Conf-Corr, paras 10-12.

Prosecution claimed falsely that mobile phone records of Mr Babala showed communication between Mr Mangenda and defence witnesses,¹² (iii) the Prosecution presented a hypothesis that Mr Mangenda was paying bribes to defence witnesses which could have been refuted as false with the exercise of minimum diligence¹³ and (iv) the Prosecution misrepresented the Decision on the Request to Obtain Evidence in its request for assistance to the Dutch Authorities ('Request for Assistance').¹⁴

8. The Mangenda Defence argues that due to these misstatements admitting the Telephone Intercepts would be antithetical to and would seriously damage the integrity of the proceedings and should therefore not be admitted into evidence, pursuant to Article 69(7) of the Statute.¹⁵
9. In support of this argument, the Mangenda Defence submits that the telephone surveillance, which ensued from the Request to Obtain Evidence, was highly intrusive to Mr Mangenda's right to privacy.¹⁶ Further, it avers that the Prosecution's misstatements 'suggest an element of knowledge and wilfulness', indicating either that the Prosecution knew or could have easily discovered the falsehood of the statements which were put forward.¹⁷
10. Finally, the Mangenda Defence argues that exclusion of this evidence is the only deterrent against misstatements leading to human rights violations.

¹² Request, ICC-01/05-01/13-1136-Conf-Corr, paras 13-14.

¹³ Request, ICC-01/05-01/13-1136-Conf-Corr, paras 15-16.

¹⁴ Request, ICC-01/05-01/13-1136-Conf-Corr, paras 17-20.

¹⁵ Request, ICC-01/05-01/13-1136-Conf-Corr, paras 1, 31.

¹⁶ Request, ICC-01/05-01/13-1136-Conf-Corr, para. 23

¹⁷ Request, ICC-01/05-01/13-1136-Conf-Corr, para. 24.

11. In its response, the Arido Defence provides an overview of comparative law aimed at demonstrating why telephone intercepts that were obtained through a warrant based on material misstatements should be excluded.¹⁸
12. In its response, the Bemba Defence argues that the Decision on the Request to Obtain Evidence was limited to cases of misuse of the privileged phone line of Mr Bemba, thus creating an exception to the counsel-client privilege. Accordingly, in the view of the Bemba Defence, the Prosecution was not allowed to request access to all recordings of Mr Kilolo and Mr Mangenda but only the ones constituting an exception to the client-counsel privilege.¹⁹ It submits that in consequence the ensuing intercepted telecommunications are inadmissible pursuant to Article 69(7) of the Statute.²⁰
13. In detail, it avers that in Article 70 proceedings the threshold for exclusions is lower,²¹ that the above-mentioned misrepresentation constitutes a serious violation of human rights which mandates an exclusion of the Telephone Intercepts²² and that the alleged improper actions of the Prosecution equally constitute a violation of the Statute which also mandate the exclusion of evidence.²³
14. The Prosecution, in opposing the Request, argues that it did not make material misstatements in its Request to Obtain Evidence.²⁴ Further, it avers that it did not misrepresent the Request to Obtain Evidence or the Decision on the Request to Obtain Evidence in its request for Request for Assistance.²⁵

¹⁸ Arido Response, ICC-01/05-01/13-1178-Conf, paras 3-14.

¹⁹ Bemba Response, ICC-01/05-01/13-1179-Conf, paras 15-20.

²⁰ Bemba Response, ICC-01/05-01/13-1179-Conf, paras 22-89.

²¹ Bemba Response, ICC-01/05-01/13-1179-Conf, paras 74-89.

²² Bemba Response, ICC-01/05-01/13-1179-Conf, paras 22-44.

²³ Bemba Response, ICC-01/05-01/13-1179-Conf, paras 45-73.

²⁴ Prosecution Response, ICC-01/05-01/13-118080-Conf, paras. 9-14.

²⁵ Prosecution Response, ICC-01/05-01/13-118080-Conf, para. 6.

15. The Prosecution further argues that even if the Chamber were to find that the privacy rights of Mr Mangenda were breached, the grounds for exclusion under Article 69(7) of the Statute are not fulfilled. In its view, a potential violation would not cast doubt on the reliability of the evidence, nor would its admission be antithetical to and would seriously damage the integrity of the proceedings.²⁶

II. Analysis

1. *Preliminary matter*

16. As a preliminary matter, the Chamber notes the Leave to Reply Request and the Prosecution Further Submissions. Pursuant to Regulation 24(4) of the Regulations, participants may not file a response to any other document which itself is a response. Thus, the Chamber will only consider the Prosecution Further Submission if it grants leave to reply to the responses submitted by the Arido and Bemba Response. In light of the information available to the Chamber, it does not find it necessary to receive further submissions in order to adjudicate the Request and, accordingly, rejects both requests.

2. *Violation of the Statute or an internationally recognised human right*

17. The Chamber considers Article 69(7) of the Statute to be two-pronged: first, the Chamber needs to determine if evidence has been obtained by either a violation of the Statute or internationally recognised human rights. Only if

²⁶ Prosecution Response, ICC-01/05-01/13-118080-Conf, paras 15.

such violation is established by the Chamber, will it conduct an inadmissibility assessment under Article 69(7)(a) or (b) of the Statute.²⁷

18. The Mangenda Defence submits that material misstatements were made in the course of obtaining judicial authorisation for the Telephone Intercepts. This, in the view of the Mangenda Defence, led to violations of the Statute and Mr Mangenda's right to privacy, which is an internationally recognised human right. The Chamber recognises this right of Mr Mangenda to privacy in accordance with the highest international standards.²⁸ Only if the represented arguments are sufficiently substantiated the Chamber will enter into the assessment if the evidence was obtained by violation of the Statute or an internationally recognised human right occurred. The Chamber also emphasises that it is not pre-judging its assessment of the merits of the case, but is merely analysing whether the Prosecution's statements while obtaining judicial authorisation were either false or justifiable on the information which it had available at the time. The Chamber will consider each of the allegations, as well as the point brought forward by the Bemba Defence, to determine whether any improprieties occurred.

The assertion that in the Request to Obtain Evidence statements were made that the phone records from Mr Babala showed communication between Mr Mangenda and defence witnesses

²⁷ See also, Decision on Kilolo Defence Motion for Inadmissibility of Material, ICC-01/05-01/13-1257, 16 September 2015, para. 9; Trial Chamber I, *Prosecutor v Thomas Lubanga Dyilo*, Decision on the admission of material from the "bar table", 24 June 2009, ICC-01/04-01/06-1981, para. 41.

²⁸ See, Art. 17 of the International Convention of Civil and Political Rights; art. 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art. 11 of the Inter-American Convention on Human Rights; art. 21(1) of the Arab Charter on Human Rights and the corresponding jurisprudence, *inter alia*, European Court of Human Rights, *Klass and others v. Germany*, 6 September 1978; European Court of Human Rights, *Kennedy v. UK*, 18 August 2010, Aalmoes and others vs. The Netherlands, 25 November 2004. Inter-American Court of Human Rights, *Case of Tristán Donoso v. Panamá*, Judgment, 27 January 2009 and Inter-American Court of Human Rights, *Escher et al. v. Brazil*, 6 July 2009.

19. The Mangenda Defence submits that the Prosecution, by stating that 'BABALA's records show frequent communication between KILOLO, MANGENDA, Caroline BEMBA, NGINAMAU, and Defence witnesses'²⁹ falsely claimed that the mobile phone records of Mr Babala indicate that Mr Mangenda contacted defence witnesses.³⁰
20. The Chamber is not convinced that the Prosecution made this assertion in the Request to Obtain Evidence. It is true that the sentence cited by the Mangenda Defence leaves the possibility to interpret the statement in this sense, due to the usage of 'communication between' and 'and' before 'Defence witnesses'. However, the context makes it clear that the 'and' used in the sentence was intended as a conjunction for the entire group of persons with whom Mr Babala had had contact with. This becomes evident in the following paragraph of the same request, where the Prosecution states for the same materials that they 'show [...] frequent contact with'³¹ for the same group of persons. Further, it seems reasonable to interpret this submission as the Prosecution making an argument with regard to Mr Babala's communication with different people when invoking his call records, rather than communications between different people that do not include him at all, particularly when taking into account the annex filed in support of the Request to Obtain Evidence.³²

The assertion that in the Request to Obtain Evidence statements were made that Mr Mangenda was paying witnesses through Western Union and the Prosecution's hypothesis brought forward in its request that Mr Mangenda was paying bribes to witnesses

²⁹ Request, ICC-01/05-01/13-01136-Conf, para.13 citing to: Request to Obtain Evidence, ICC-01/05-51-Conf, paras 15.

³⁰ Request, ICC-01/05-01/13-01136-Conf, para.14.

³¹ Request to Obtain Evidence, ICC-01/05-51-Conf, paras 16.

³² Annex A to ICC-01/05-52-Conf, ICC-01/05-01/13-51-Conf-AnxA.

21. The Mangenda Defence submits that the Prosecution misrepresented facts by stating that 'The Accused frequently speaks to the very individuals, including KILOLO and MANGENDA, who have sent Western Union payments to Defence witnesses, as times for hours a day and several times a day'³³ and could have known that its hypothesis that he was bribing defence witnesses was false, if it had exercised the necessary diligence.

22. The Chamber is of the view that the reading of this sentence alone could create the impression that the Prosecution is representing a connection of Mr Mangenda and Western Union payments as a fact. However, considering the Request to Obtain Evidence as a whole, it becomes apparent that the Prosecution did not present the situation as an established fact but as an intermediate result of an on-going investigation. The Prosecution submits that '[t]he times and dates of the transfers of exact sums of money *suggest* that [...] Mangenda *may* be paying witnesses.'³⁴ In summarising the results of its investigation the Prosecution submits that the evidence 'strongly indicates' a number of people (among them Mr Mangenda) are involved in a witness interference scheme, but admits that 'the evidence is largely circumstantial and the Prosecution has a fair but incomplete understanding of the scheme.'³⁵ In fact, the need to fully understand the alleged bribery scheme was advanced by the Prosecution as a reason why the interception of telephone calls should be granted³⁶ and ultimately taken up by the Single Judge in his Decision on the Request to Obtain Evidence.³⁷

23. As regards the Mangenda Defence's argument that the hypothesis relied on by the Prosecution could have been easily corrected if it had exercised the

³³ Request, ICC-01/05-01/13-01136-Conf, para.10 citing to: Request to Obtain Evidence, ICC-01/05-51-Conf, paras 14.

³⁴ Request to Obtain Evidence, ICC-01/05-51-Conf, paras 21, (emphasis added).

³⁵ Request to Obtain Evidence, ICC-01/05-51-Conf, paras 22.

³⁶ Request to Obtain Evidence, ICC-01/05-51-Conf, paras 20.

³⁷ Decision on Request to Obtain Evidence, ICC-01/05-52-Conf, paras 1.

necessary diligence, the Chamber is of the view that the information at the disposition of the Prosecution at that moment in time was supported by sufficient circumstantial evidence to have been reasonably brought forward.

24. The Mangenda Defence raises a further argument in a response to a different motion made by the Prosecution, by submitting that the Prosecution had access to two audio filings at the time of the filing of the Request to Obtain Evidence, which refuted the Prosecution's hypothesis ('Mangenda's Additional Argument').³⁸ The Chamber will not discuss the propriety to make such submissions in the response to a different motion but, on an exceptional basis, consider the submission made, due to the importance of the alleged violation. The Chamber notes that, unlike purported by the Mangenda Defence, the Prosecution was not in possession of the relevant audio-filing when they issued the Request to Obtain Evidence.³⁹ Accordingly, the Chamber finds that the contention raised in the Mangenda's Additional Argument is not convincing.

The misrepresentation of the Decisions on the Request to Obtain Evidence in the Request for Assistance to the Dutch Authorities

25. The Chamber is not of the view that the Prosecution misrepresented the Decisions on the Request to Obtain Evidence in the Request for Assistance and mislead the Dutch Authorities, as suggested by the Mangenda Defence. The Mangenda Defence's argument, in essence, is that the Prosecution gave the impression to the Dutch Authorities that a judicial decision on the legality of the collection of the Telephone Intercepts had already been taken and that this led to a reduced judicial control by the Dutch Authorities. However, the

³⁸ Response to "Prosecution's Second Request for the Admission of Evidence from the Bar Table", 31 August 2015, ICC-01/05-01/13-1200-Conf, paras 1, 8-16.

³⁹ CAR-OTP-0079-0334 and CAR-OTP-0079-0336 were made available by the Registry to the Prosecution on 28 October 2013.

Request for Assistance can only be read as the Prosecution seeking judicial authorisation from the Dutch Authorities to collect the recordings, not merely informing them that such authorisation had been granted by the Single Judge. This view is also supported by the fact a Dutch examining magistrate granted authorisation with regard to Mr Mangenda's telephone numbers mentioned in the Request for Assistance.⁴⁰ Further, the Dutch district court issued several decisions affirming the legality of the authorisation of for telephone interception and the deliverance of the selected taped conversations to this Court.⁴¹ In its decision of 28 April 2014, the Dutch district court specifically verified if the compliance with the Request for Assistance was done in conformity with Dutch law. Correspondingly, the Dutch Authorities responded in a manner consistent with the assumption that the Request for Assistance was a request for judicial authorisation.

26. Accordingly, taken into account all of the above, the Chamber is not of the view that the Prosecution formulated the Request for Assistance in a way to bypass a judicial authorisation or a full judicial scrutiny by the Dutch Authorities.

The impermissible expansion of the scope of the Single Judge's Decision on Request to Obtain Evidence

27. The Bemba Defence argues that the Decision on Request to Obtain Evidence must be interpreted in a way of giving the Prosecution only the permission to request Intercepted Telecommunication for cases where an exception to the client-counsel privilege is applicable. The Bemba Defence submits that the

⁴⁰ See, Annex to Second Registry submissions related to the implementation of Decision, ICC-01/05-01/13-424-Anx1, para. 1.

⁴¹ Annex to Second Registry submissions related to the implementation of Decision, ICC-01/05-01/13-424-Anx1, page 4, mentioning a prior decision by the district court and the entire annex as such.

Single Judge's order did not give the Prosecution '*carte blanche* to request access to all recordings' of Mr Kilolo and Mr Mangenda.⁴²

28. At the outset, the Chamber notes that the Single Judge's decision granted the Request to Obtain Evidence in full. There are no signs that the Single Judge intended to limit the scope of the decision by rejecting part of the request.

29. The argument that the initial suspicion of the Prosecution to an alleged witness interference – the fact Mr Bemba used the privileged line to his counsel, to talk to Mr Babala – meant that the Prosecution limited its request only to communication where the privilege was misused, cannot be followed. Indeed, the Single Judge, when summarising the submissions of the Prosecution in the Decision on the Request to Obtain Evidence, stated that Prosecution put forward that the lack of access to non-privileged communications (of Mr Kilolo and Mr Mangenda) prevents it from fully understanding the alleged bribery scheme.⁴³ This shows that the Single Judge interpreted the Request to Obtain Evidence to include all communications by Mr Kilolo and Mangenda, privileged and non-privileged, without any limitation. This approach is understandable, given the safeguards the Single Judge set out for filtering out privileged information in these materials once they had been obtained by the Court.⁴⁴

30. Further, the contention that the Single Judge's explanation of the role the independent counsel and his task to determine if the privileged line has been misused is an indication that the Decision on the Request to Obtain Evidence was limited in the sense the Bemba Defence purports, lacks any logical foundation. The reason that the independent counsel's role is limited to such

⁴² Bemba Response, ICC-01/05-01/13-1179-Conf, paras 13-21.

⁴³ Decision on Request to Obtain Access, ICC-01/05-52-Red, para. 1, citing to Request to Obtain Access, ICC-01/05-51-Conf, para. 20.

⁴⁴ Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, ICC-01/05-01/13-1257, paras 13-14, 18 (discussing the importance of these safeguards).

instances is due to the fact that for non-privileged communication no such extra vetting is necessary. Accordingly, the Single Judge did not discuss this scenario because it simply was not warranted.

31. Considering the above, the Chamber finds that the Prosecution did not misrepresent the Decision on the Request to Obtain Evidence to the Dutch Authorities in this regard, as alleged by the Bemba Defence.

Conclusion

32. In summary, the Chamber does not find that any of the allegations advanced by the defence teams are substantiated. As such, based on the arguments brought forward in the Request, the Chamber cannot conclude that the Prosecution obtained the Telephone Intercepts in a manner amounting to a violation of the Statute or an infringement to Mr Mangenda's right to privacy. In consequence, it will not determine if there are grounds for inadmissibility of the Telephone Intercepts under Article 69(7)(a) or (b).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

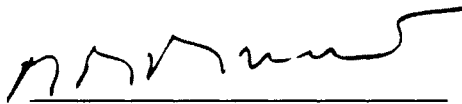
REJECTS the Request; and

REJECTS the Request for Leave to Reply and the Prosecution Further Submissions.

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



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul Pangalangan

Dated 24 September 2015

At The Hague, The Netherlands