

**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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

Public Redacted Document
with
Confidential Annex A

**Public redacted version of “Prosecution’s Response to the Bemba Defence’s
Request for Correspondence with the Dutch Authorities”, 17 December 2015, ICC-
01/05-01/13-1528-Conf**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the**Court to:****The Office of the Prosecutor**

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Bemba Defence’s Request for Correspondence with the Dutch Authorities (“Request”).¹ The Request should be rejected because (1) it is unsubstantiated and impermissibly tries to re-litigate a decided issue before Trial Chamber VII (“Chamber”), and (2) it fails to demonstrate the *prima facie* materiality of the documents and correspondence sought.

II. Confidentiality

2. This filing is classified as “Confidential”, as it responds to a filing of the same designation. A “Public Redacted” version will be filed.

III. Submissions

A. The Request is unsubstantiated and impermissibly re-litigates a decided issue before the Chamber

3. The Request simply rehashes an *inter partes* disclosure request made by the Mangenda Defence for communications regarding the Dutch interception process, and specifically the telephone number “[REDACTED]” at issue. The Request presents nothing new regarding the litigation of this matter before the Chamber, which transpired between July and 28 September 2015, when the Chamber ruled on the joint Defence request for disclosure violations.²

4. Mangenda’s 17 June 2015 *inter partes* request began the Parties’ litigation on the Prosecution’s disclosure of correspondence with the Dutch authorities regarding

¹ ICC-01/05-01/13-1525-Conf (“Correspondence Request”).

² ICC-01/05-01/13-1308-Conf (“28 September Decision”).

intercepted communications. The Prosecution responded to this request on 18 June.³ The Bemba Defence, among others, was copied on both the request and the response.⁴ Bemba's present contention that this information is urgently required "to conduct follow up investigative steps"⁵ is belied by his full awareness of this issue for the last six months and his active participation in its litigation.⁶

5. Following its June 2015 disclosure request, the Mangenda Defence further sought the Chamber's intervention to obtain correspondence and documents concerning the interception process directly from the Dutch authorities in a 14 July 2015 filing.⁷ That request — which the Chamber disposed of on 14 August 2015⁸ — concerned, *inter alia*, the same documents and records now sought by the Bemba Defence.

6. In its 14 August Decision, the Chamber required the Prosecution to disclose "all material related to the assessment of the legality of the telephone surveillance of Mr Mangenda."⁹ After careful review of this material, including correspondence and records now sought by the Bemba Defence, the Prosecution filed a notice of compliance on 10 September 2015,¹⁰ following its 28 August disclosure to the Defence of judicial requests for assistance ("RFAs") to the authorities of The Netherlands pertinent to the legality of the interception process.¹¹

7. The Chamber's 28 September Decision disposed of the Defence's joint request for disclosure violations which, *inter alia*, referenced the Chamber's 14 August

³ See [REDACTED] (Annex A).

⁴ *Ibid.*

⁵ Request, para. 4.

⁶ See ICC-01/05-01/13-1265-Conf.

⁷ ICC-01/05-01/13-1082-Conf-AnxA (see specifically references to CAR-D21-0005-0035, p. 3; and CAR-D21-0005-0023, p. 4).

⁸ ICC-01/05-01/13-1148-Conf ("14 August Decision").

⁹ 14 August Decision, p. 6.

¹⁰ ICC-01/05-01/13-1233-Conf.

¹¹ See ICC-01/05-01/13-1195-Conf, para. 4, fn. 5.

Decision and challenged the Prosecution's notice of compliance.¹² The Chamber found no disclosure violation on the Prosecution's part, including in respect of the intercepted materials, and granted the joint defence request only to the extent that the Prosecution was directed to disclose further RFAs in its possession.¹³ As such, the Request fails to meet the standard for reconsideration, in effectively trying to re-litigate the 28 September Decision.

B. The Request seeks information that is not material to the preparation of the defence and duplicative of material it possesses

8. The Request is predicated on the erroneous suggestion that rule 77 of the Rules of Procedure and Evidence requires disclosure of material that is duplicative of that already available to the Defence. It does not.

9. The Bemba Defence's assertion that "[t]he Appeals Chamber has ruled that the fact that information is duplicative is not in itself grounds to refuse disclosure" is both incorrect and misguided.¹⁴ To the contrary, the Appeals Chamber has held that "the right to disclosure is not unlimited."¹⁵ And, it is in that context that "the Chamber may also take into account whether the defence has already received relevant documents from the Prosecutor" in deciding "whether the information sought continues to be material to the preparation of the defence."¹⁶

10. Here, the blanket assertion that Bemba intends to use the requested documentation to conduct follow up investigative steps does not demonstrate the *prima facie* materiality of the material and correspondence sought, particularly as the

¹² See 28 September Decision, paras. 2-3. See *e.g.*, ICC-01/05-01/13-1265-Conf, paras. 6-7, 11, 18-21.

¹³ See 28 September Decision, p. 9.

¹⁴ See Request, para. 17 (*citing* ICC-02/05-03/09-501, para. 40).

¹⁵ ICC-02/05-03/09-501, para. 39.

¹⁶ ICC-02/05-03/09-501, para. 40 (emphasis added); see also *e.g.*, ICC-01/05-01/13-1234-Conf, para. 14 (noting that absent any indication that written statements are inaccurate, there is no reason why disclosure of the underlying audio recordings are warranted).

fact of such correspondence, the parties involved, and its subject matter is already clearly known to the Defence. Similarly, the Bemba Defence's assertion that the disclosed information "does not allow a full consideration of the legality by which information was intercepted or transmitted" is unsubstantiated, as the disclosed RFAs, as well as the determinations of the Investigative Judge and the judgements of the Dutch courts clearly do.

11. Moreover, as noted in the Prosecution's 11 December 2015 response to Bemba's request for the disclosure of correspondence and records of meetings referred to in the Prosecution's 11 October 2013 RFA,¹⁷ the contacts between the OTP and the Dutch authorities regarding the interception process are sufficiently reflected in the disclosed RFAs. The material sought is duplicative. Absent any colourable indication to the contrary, the Request plainly fails to demonstrate the *prima facie* materiality of the requested documents and correspondence.

IV. Relief Requested

12. For the foregoing reasons, the Chamber should dismiss the Request.



Fatou Bensouda, Prosecutor

Dated this 12th Day of January 2016
At The Hague, The Netherlands

¹⁷ See Request, para. 13; see also CAR-OTP-0090-1941, at 1943, paras. 8-9.