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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 Redacted with Confidential Annexes A, B and C

Public Redacted Version of Defence Request for Further Orders of Disclosure

Source: Counsel for Jean-Pierre Bemba Gombo

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

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Introduction

1. Disclosure should not be the equivalent of finding the needle in the haystack. Yet, for the last six months, the Defence has been compelled to reconstruct an extremely piece-meal and fragmented picture of what occurred in 2013, and read the fine print of every disclosed document in order to verify whether it has received all information requested. Again, and again the Prosecution has come up short as concerns the full implementation of its disclosure obligations.

2. Time is short. The Defence has no wish to delay the commencement of the Defence case. However, the Chamber has recognized that the Defence has the right to obtain information for the purpose of assessing the legality of the interception process in The Netherlands.

3. The right must be effective and not illusory, particularly since the interception procedures were requested, decided and implemented on an *ex parte* basis.

4. The Defence for Mr. Jean-Pierre Bemba therefore respectfully requests the Trial Chamber to order the Prosecution to:

- i. Disclose all material and records concerning the legality of the collection of telecommunication evidence by the Defence authorities, which is in its possession; and
- ii. Lift the Rule 81(1) redactions to the content of the emails.

Procedural History

5. On 18 December 2015, the Defence for Mr. Bemba requested an order for the Prosecution to disclose,

communication with the Dutch authorities concerning the monitoring of one of the Dutch numbers of Mr Kilolo, [Redacted] ('Telephone Number'), and any other related records ('Requested Material').¹

6. In the resultant decision, the Single Judge found that the Requested Material was relevant, and ordered the Prosecution to disclose it, subject to any redactions implemented in accordance with the redactions protocol.²

7. The decision was thus not confined to email correspondence, but extended to "any other related records".

8. At 19h14 on 21 January 2016 (the deadline for the submission of Defence evidence), the Prosecution finally disclosed a handful of emails between members of the Bemba Main Case Prosecution team and the Dutch prosecutors assigned to the case.

9. Notwithstanding the fact that the emails refer to meetings concerning the interception process, and appear to suggest contemporaneous telephone contacts, no records concerning such contacts were disclosed. The content of several emails was also redacted pursuant to Rule 81(1), which applies exclusively to internal work product, and not external communications with third parties.

10. On 26 January 2016, the Defence for Mr. Bemba requested the Prosecution to disclose the records of any ancillary meetings, or communications concerning the interception of this number.³ The Defence also contested the legal basis for the redactions to the content of the emails, and queried whether the number of emails disclosed constituted full disclosure.

11. On 28 January 2016, the Prosecution responded that:

¹ ICC-01/05-01/13-1542-Conf, para. 4.

² ICC-01/05-01/13-1542-Conf, para. 12.

³ Annex A.

- a. The Single Judge's order did not encompass correspondence concerning the collection of CDRs concerning the telephone number in question;
- b. The Prosecution did not consider redacted information to be relevant to the Defence request.⁴

12. The Prosecution did not address the issue as to disclosure of the records of meetings or contemporaneous telephone communications. The Defence is therefore not in a position to ascertain the specific basis for the Prosecution's failure to disclose such records.

13. The Prosecution did aver that "as the email exchange on 28 August 2013 makes clear, this was the first time the interception of Kilolo's [REDACTED] number was suggested. There exist no preceding relevant correspondences."

14. The RFA dated 11 October 2013 nonetheless asserts that the number in question may have been intercepted previously "on the basis of the verbal discussions held and emails sent by the OTP".⁵

15. The Defence is therefore left with the ambiguity as to whether the Prosecution adopted an overly restrictive definition of "correspondences" such that it excludes notes or records of meetings, or the information included in the 11 October 2013 RFA.

⁴ Annex B.

⁵ CAR-OTP-0090-1941 at 1943.

Submissions

Request for all records concerning the legality of the collection of telecommunication evidence by the Dutch authorities

16. If nothing else, the above procedural history underscores the level of ambiguity concerning what happened, when it happened, and why it happened as concerns the [REDACTED] number, and the collection of telecommunication evidence in general in The Netherlands.

17. This state of affairs is directly contrary to the finding of the Single Judge that,

it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them'. The Single Judge repeats that this particularly holds true if the Prosecution, as in the present case, relies to a large extent on intercepted data and communications.⁶

18. The ambiguity and confusion concerning the nature, and content of such communications can only be dispelled through full and transparent disclosure of all records concerning the legality of the collection of telecommunication evidence, irrespective as to whether the record is comprised of emails, letters, or notes of meetings and conversations, and irrespective as to whether the record concerns 'interception', or other types of requests for information.

19. This is exactly what the Trial Chamber's decision of 14 August 2015 contemplated; that the Prosecution should disclose "all material related to the assessment of the legality of the telephone surveillance of Mr Mangenda."⁷

⁶ ICC-01/05-01/13-1542-Conf, para. 11.

⁷ ICC-01/05-01/13-1148-Conf, p. 6.

20. Although both this and subsequent decisions contemplated that the Defence may need to seize the Prosecution with discrete requests for information due to newly discovered issues arising from disclosure, neither the 14 August 2015 decision or its subsequent interaction imposed any fetter as concerns the relevance of “material related to the assessment of the legality of the telephone surveillance”.

21. It follows that if the Prosecution is aware that it is in possession of information concerning the legality of this process, it should disclose it. By the same token, if the Defence requests information which falls within the parameters of the 14 August 2015 decision, it would be improper for the Prosecution to decline to effect disclosure simply because the Defence request pertained to the 12 January 2016 decision.

22. As things stand, the Defence is being forced to jump through multiple hoops in order to obtain information which should have been disclosed at least seven months ago.

23. It appears from the chain of custody in ringtail that the Main Case Bemba Prosecution team transmitted the emails to the Dutch authorities to the Article 70 Prosecution team on 4 August 2015; that is, at the same period that the Prosecution collated and disclosed the Dutch RFAs to the Defence.

24. The Prosecution was therefore aware that the emails related to the legality of the interception process, but nonetheless declined to either disclose them or seek authorisation from the Trial Chamber to withhold disclosure.

25. At the current juncture, although the Single Judge’s decision made clear that the Defence was entitled to receive the records of all interactions with the Dutch authorities concerning the [REDACTED] number, the Prosecution has failed to

disclose any records of meetings or phone calls, even though such meetings purportedly formed the basis of the interception of this number.

26. Moreover, upon review of recently obtained records of the Dutch proceedings, the Defence has also discovered that additional emails between the Prosecution and the Dutch formed the basis of decisions issued by the Dutch authorities.

27. For example, the September 2013 decision of the District Court concerning the transmission of the historical data of several numbers refers to email correspondence between the ICC Prosecution and the Dutch Prosecution dated 6 September 2013.⁸ However, although this correspondence directly concerned the [REDACTED] number, it was not disclosed to the Defence, presumably, because it related to the collection of “historical data” rather than “interception” *stricto sensu*.

28. The mere possibility that such records concern the collection of CDRs rather than the interception of this number does not constitute a basis to withhold disclosure. Firstly, materials concerning the collection of CDRs would be covered by the decision of 14 August 2015.⁹ Secondly, the possibility that such records only concern the collection of CDRs rather than interception is, in itself, relevant to the legality of the interception of this number.

29. This pedantic insistence that each specific Defence request must reflect the exact contents of the requested documents is simply not consistent with the directive of the Appeals Chamber that the Prosecution’s obligations under Rule 77 must be interpreted “broadly”,¹⁰ and are triggered “independently of any request from the defence”.¹¹

⁸ Annex C : [REDACTED]

⁹ ICC-01/05-01/13-1234-Conf.

¹⁰ ICC-02/05-03/09-501, para. 38.

¹¹ ICC-02/05-03/09-501, para. 34.

30. It is abundantly clear that the Defence is not engaging in a fishing expedition. Each request has concerned a specific facet of the domestic proceedings, and has unearthed information which is of direct relevance and import to the legality of this process. The Trial Chamber and Single Judge have, moreover, confirmed the right of the Defence to obtain such information, which should have eliminated any room for further debate or equivocation on this subject.

31. Apart from the fact that this constant back and forth between the Defence and the Prosecution as concerns clearly disclosable information is an inefficient and unnecessary use of Defence resources, it also delays Defence preparation, and potential investigative steps in advance of the Defence case.

Request for the lifting of redactions

32. Although the Single Judge permitted the Prosecution to redact the materials in accordance with the Redaction Protocol, the redactions applied to the body text of the emails are legally and factually founded.

33. The Prosecution's reliance on Rule 81(1) is misconceived. Rule 81(1) concerns internal work product; it does not apply to communications between the Prosecution and external entities, such as national authorities.¹² Any such internal privilege is automatically displaced when it is transmitted to the third party in question. Indeed, it is quite concerning that the Prosecution would either suggest that Dutch authorities are part of the internal infrastructure of the ICC prosecution

¹² ICC-01/05-01/08-632, para. 34; ICC-01/04-01/06-3017, para. 11 – finding that the Prosecution's Rule 77 obligations could extend to any "document in the possession or control of the Prosecutor" addressed to a State authority, apart from "reports, memoranda or other internal documents prepared by the Prosecutor falling under rule 81 (1) of the Rules of Procedure and Evidence." See also ICC-01/11-01/11-392-Red, para. 43, as concerns the Prosecution's withdrawal of its initial assertion that correspondence with a State could be covered by Rule 81(1), as opposed to Rule 81(2) or (4).

in matters concerning the interception of Defence phone numbers, or that the Dutch have a greater entitlement to receive Prosecution product concerning the telephone numbers of Me. Kilolo, then either the Defence for Mr. Bemba or Me. Kilolo.

34. The Memorandum of Understanding between The Netherlands and the ICC Prosecution also establishes no form of general privilege for such correspondence.¹³ If either party wishes to assert such a privilege, it is incumbent on them to explicitly label such correspondence or information as privileged/non-disclosable to the Defence.

35. Apart from the fact that Rule 81(1) does not apply to the content of correspondence with third parties, the Redactions Protocol does not permit the Prosecution to implement redactions *proprio motu* on the basis that the Prosecution deems discrete components of a document to be irrelevant to the Defence.¹⁴

36. To the contrary, the Appeals Chamber has emphasised that once a document falls within the ambit of Rule 77, full disclosure is the rule, redactions are the exception.¹⁵ The burden also falls on the Prosecution to justify that the redactions are both necessary, and do not occasion any prejudice to the Defence.¹⁶

37. In line with the Trial Chamber's finding that the Defence have the right to receive "all material" (emphasis added) which concerns the assessment of the legality of the collection of telecommunication evidence,¹⁷ there is no basis for redacting any of the information which was transmitted to or received by the Dutch

¹³ Section 4, Memorandum of Understanding Between The Netherlands and the Office of the Prosecutor of the International Criminal Court on International Co-Operation and Judicial Assistance',

[http://www.coe.int/t/dlapil/cahdi/Source/ICC/4th%20Consult%20ICC%20\(2006\)%2016%20E%20Memorandum%20of%20understanding%20-%20Netherlands.pdf](http://www.coe.int/t/dlapil/cahdi/Source/ICC/4th%20Consult%20ICC%20(2006)%2016%20E%20Memorandum%20of%20understanding%20-%20Netherlands.pdf)

¹⁴ CC-01/05-01/13-959-Anx.

¹⁵ ICC-01/04-01/06-568, para. 39; ICC-01/04-01/07-475, para. 61; ICC-01/04-01/06-3115-Red, para. 5.

¹⁶ ICC-01/04-01/06-3031, para. 10.

¹⁷ ICC-01/05-01/13-1148-Conf, p. 6.

authorities as part of this process, particularly as some of the emails were cited in subsequent RFAs, and were relied upon in submissions to the Dutch Courts.

38. Mr. Bemba has an obvious right to receive the full content of interactions between the Main Case Prosecution team¹⁸ and the Dutch prosecution in relation to the collection of evidence concerning members of his Defence team, which was occurring while the Defence case was ongoing. The need for full transparency regarding all facets of this process is, moreover, heightened by the *ex parte* nature of the initial collection of telecommunication evidence.¹⁹

Relief Sought

39. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Trial Chamber to:

- i. Disclose all material and records concerning the legality of the collection of telecommunication evidence by the Defence authorities, which is in its possession; and
- ii. Lift the Rule 81(1) redactions to the content of the emails.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 2nd day of February 2016

The Hague, The Netherlands

¹⁸ [REDACTED].

¹⁹ The Appeals Chamber has emphasized in this regard that where information is withheld from the Defence on an *ex parte* basis, there is a greater need to transmit proper reasoning as concerns the process in order to ensure that the Defence is placed in an effective position to subsequently challenge the process: ICC-01/04-01/06-774, para. 33.