

**Cour
Pénale
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**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

**Public redacted version of "Prosecution Response to Corrigendum of the
Defence Request for further Orders of Disclosure", 8 February 2016,
ICC-01/05-01/13-1607-Conf**

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

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I. Introduction

1. The Bemba Defence's Request for Further Orders of Disclosure¹ ("Request") should be denied. The Prosecution has complied with Trial Chamber VII's ("Chamber") Decision on the Bemba Defence Request for Disclosure of Communication with the Dutch Authorities ("12 January Decision"),² and has disclosed all "communications with the Dutch authorities concerning the monitoring of one of the Dutch numbers of Mr Kilolo, [REDACTED], and any other related records"³ in its possession. The Request is impermissibly overbroad, exceeds the scope of the applicable appellate standard for disclosure, and creates new and untenable obligations for the Prosecution, as well as the Chamber.

2. *First*, the Defence fails to show that the records it seeks are *prima facie* material. The right to disclosure is not unlimited. Granting the Request, however, would upend the disclosure standards set by the Appeals Chamber and extend the Prosecution's obligations far beyond the requirements of rule 77 of the Rules of Procedure and Evidence ("Rules"), creating an untenable obligation for the Prosecution to disclose virtually all records in its possession that relate in any way to the collection of any evidence irrespective of requirements of materiality or specificity.

3. *Second*, the Bemba Defence's actions belie the generic claims of materiality it puts forward at this late stage. Its inertia in respect of this material to date reveals that the Request is nothing more than a dilatory strategy, rather than motivated by a genuine *need* for the records to prepare the Defence.⁴ The Chamber should dismiss the Request on this basis alone.

¹ ICC-01/05-01/13-1589-Conf-Corr, 03 February 2016.

² ICC-01/05-01/13-1542-Conf.

³ ICC-01/05-01/13-1542-Conf, para. 4.

⁴ See the French text of rule 77 of the Rules: "(...) *qui sont nécessaires à la préparation de la défense de l'accusé* (...)" (emphasis added).

4. *Third*, accepting the interpretation of the parameters of disclosure advanced in the Request would similarly require the Chambers that have been seized of this case, to produce to the Parties their own communications with States – or any other entity – whenever these touch upon the collection of evidence, particularly considering the nature of the procedures used in collecting the intercepted communications in this case, as the product of judicial authorisation and direct supervision.

5. *Fourth*, granting the Request could have far-reaching consequences for the Court's cooperation with States Parties and its ability to obtain evidence relevant for the determination of the truth. Given that the requested materials concern communications with The Kingdom of The Netherlands ("Netherlands"), the Chamber should invite the Dutch authorities to provide its views on this matter prior to issuing any further rulings.

II. Confidentiality

6. This filing is classified as "Confidential" as it responds to a filing of the same designation. A "Public Redacted" version will be filed. Annex A to this filing is classified as "Confidential, *ex parte*, only available to the Prosecution" as it contains unredacted versions of emails disclosed to the Defence.

III. Submissions

A. The Prosecution has complied with the 12 January Decision

7. The Prosecution has disclosed all materials in its possession that were the subject of the 12 January Decision. The Defence's allegation that "the Prosecution did not address the issue as to disclosure of the records of meetings or contemporaneous

telephone communications”⁵ is wrong. In its 28 January 2016 email to the Defence, the Prosecution stated:

Prosecution has disclosed *all materials* that, in its view, fall within the ambit of order ICC-01/05-01/13-1542-Conf, namely “the communications with the Dutch authorities concerning the monitoring of one of the Dutch numbers of Mr Kilolo, [REDACTED], and any other related records” (para. 4).⁶

The Prosecution’s response was clear and unambiguous,⁷ leaving no basis to speculate about the existence of further relevant records.

8. To assist the Defence, the Prosecution also corrected several misconceptions that the Defence appeared to have in relation to the disclosed materials, which had led it to reach incorrect factual conclusions. For example, the Prosecution made clear to the Defence that the 28 August 2013 emails reflected the first time the interception of Kilolo’s Dutch number was suggested. In addition, as the Request for Assistance (“RFA”) sent to the Dutch authorities on 11 October 2013⁸ makes plain, the exchanges that took place between 28 and 30 August 2013 were the ones referred to in it. These emails are also the only records referred to in the RFA that are in the Prosecution’s possession.

9. To summarise, the Prosecution disclosed all the relevant materials it had in its possession, including communications not expressly mentioned in the 11 October 2013 RFA related to the interception of Kilolo’s Dutch number. Conversely, no records of meetings or telephone contacts were disclosed to the Defence because the Prosecution does not possess them. Thus, the Prosecution has complied in full with the Chamber’s 12 January Decision.

⁵ Request, para. 12.

⁶ ICC-01/05-01/13-1589-Conf-AnxB, p. 2 (emphasis added).

⁷ Cf. Request, paras. 14-15.

⁸ See CAR-OTP-0090-1941 at 1943, paras. 8-9. See Annex B, communications on 28, 29 and 30 September 2013.

10. Finally, the information redacted in the disclosed emails is neither pertinent, nor related to the interception of Kilolo's Dutch number in any way. As ordered, the Prosecution attaches the unredacted versions of these emails and their attachments at Confidential, *ex parte* Annex A with highlighted portions of the text that was redacted to the Defence. The Chamber may thus confirm that the only redactions applied concern information unrelated to the 12 January Decision.

B. Granting the Request would impermissibly expand the scope of the required disclosure

11. The Request, while appearing to seek materials that the Prosecution allegedly failed to disclose pursuant to the 12 January Decision, is in fact a new request aimed at the disclosure of "all material and records concerning the legality of the collection of telecommunication evidence by the Dutch authorities, which is in its possession".⁹ This Request is vague and fails to establish the requisite materiality and specificity of the records sought. For these reasons, the Request fails.

i. The Request is vague and fails to show the prima facie materiality of the records sought

12. While disclosure obligations are broad, they are "not unlimited"¹⁰ and depend on the "specific circumstances of the case".¹¹ The Defence must establish the *prima facie* materiality of the requested items to its preparations,¹² with a particularised explanation of the materiality of the requested items; generalised explanations are insufficient.¹³

⁹ Request, paras. 1, 39.

¹⁰ ICC-01/05-01/08-3100, para.11; *see also* ICC-02/05-03/09-501, para.39; ICC-01/09-01/11-1465, para. 12(v).

¹¹ ICC-02/05-03/09-501, para. 39. *See also* similar submissions made in *e.g.*, ICC-01/05-01/13-1156-Conf, paras. 8-10.

¹² *See, inter alia*, ICC-02/05-03/09-501, para.42; ICC-01/05-01/08-3100, para. 11.

¹³ ICC-01/05-01/08-3100, para. 29.

13. The Chamber's finding that the Defence has the right to "test the reliability of the procedures employed in collecting the evidence against them"¹⁴ cannot mean, when interpreted in this context and in view of the Appeals Chamber's clear rulings, that the Defence has the unlimited right to *all material* merely 'related to' the collection of any given category of evidence. Yet, this is precisely what the Defence seeks. Although the Request refers to all records "concerning the legality" of the telecommunications evidence collected, its vagueness breaches any reasonable limitation, contrary to the Court's established jurisprudence. The Defence cannot abdicate its responsibility to identify the sought materials to the Prosecution, as the Chamber's prior ruling does not release the Defence from the burden of specifying the *prima facie* materiality of the actual records it now seeks. Nor, does it entitle the Defence to claim the Prosecution's violation of its disclosure obligations. To the contrary, in evaluating the Request, the Chamber cannot lose sight of the Defence's unmitigated and unexplained failure to request records that it now contends are *material* to its preparation¹⁵ during the more than two-year pendency of this case. The Defence has not met its burden.

14. The Request appears to be largely predicated on purported confusion resulting from the disclosed Dutch communications.¹⁶ However, as explained above, this is entirely misplaced. Moreover, the Defence is not necessarily entitled to know "what happened, when it happened, and why it happened",¹⁷ particularly where such information is not in a "tangible" form.¹⁸ Here, the Request utterly fails. It does not substantiate on what basis the material sought – to the extent even discernible – is relevant in any way to the interception of Kilolo's Dutch number,¹⁹ nor does the Request explain on what basis such material might bear on testing the legality of the

¹⁴ ICC-01/05-01/13-1234-Conf, para.13; *see also* ICC-01/05-01/13-1542-Conf, para. 11.

¹⁵ *Cf.* Request, paras. 21-22.

¹⁶ Request, para. 18.

¹⁷ Request, para. 16.

¹⁸ *See* rule 77 of the Rules (referring to "books, documents, photographs and other *tangible* objects in the possession or control of the Prosecutor") (emphasis added).

¹⁹ Request, paras. 16-18.

procedures through which all of the telecommunications evidence in this case was collected. Moreover, apart from referring to “telecommunications evidence in general”,²⁰ the Request does not further identify the type of information sought.²¹

15. Accepting the Defence’s interpretation of the Chamber’s rulings on disclosure would mean the unlimited disclosure of all records in the Prosecution’s possession merely ‘related to’ the collection of any evidence in this case. Such an interpretation runs directly afoul of the disclosure standards set out by the Appeals Chamber, and renders meaningless the requirements of specificity and materiality. As stated above, the Defence’s failure to specify the records it seeks, and to show their *prima facie* materiality cannot be substituted for the obligation for the Prosecution to disclose any records whatsoever – as this is exactly what the Appeals jurisprudence rejects.

16. Finally, such an interpretation would potentially derail the proceedings because, on its face, to ensure the fairness of the trial, it would equally require the Chamber to release its own communications with the Dutch authorities concerning, *inter alia*, the interception process, absent any demonstration by the Defence as to their materiality to its preparedness.²² Surely, this is neither what the Chamber intended, nor what the Statute requires.

ii. The Defence’s own actions belie the claims of materiality of the sought records

17. The Defence complains about having been forced to “reconstruct an extremely piecemeal and fragmented picture of what occurred in 2013, and read the fine print of every disclosed document in order to verify it has received all information

²⁰ Request, para. 16.

²¹ The Request is aimed at “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”, but this does not aid in identification of which of these records would go to the issue of “legality” of their collection, and how. See Request, para. 18.

²² See article 64(2) of the Statute: “The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the right of the accused (...)”. Finding that the Defence has the right of access to all communications with the Dutch authorities in this case, and not granting it at the same time access to all of its own communications on the same issue, would run afoul of this duty. See *below* para. 21.

requested”.²³ Irrespective of the Defence’s duties as one of the parties in the case,²⁴ this contention is incorrect.

18. The Defence has been aware that communications between the Prosecution and the Dutch regarding the interception process took place since Bemba’s arrest in 2013. Bemba’s present Counsel would have been aware of these communications at the latest, since her direct representation of Bemba in this case began in January 2015.²⁵ Further, the Defence has known since at least 14 July 2015²⁶ of the existence of the 28 August 2013 email regarding the interception of Kilolo’s Dutch number. Finally, the Defence has been in possession of the Prosecution’s RFAs to the Dutch authorities regarding the interception of the number in question since at least 28 August 2015.²⁷

19. Despite all this, the Defence has never requested relevant emails or other records from the Dutch authorities. Similarly, the Defence waited until 7 December 2015²⁸ to request, for the very first time, the materials related to the interception of Kilolo’s Dutch number, and until 26 January 2016, to request yet more materials regarding the collection of telecommunications evidence.²⁹

20. The Chamber cannot ignore these circumstances in evaluating the Prosecution’s statutory obligations. The Defence’s actions plainly show that none of the emails or other records of communications now being requested are genuinely material to its preparation. Were this so, the Defence would have sought them long ago. Instead,

²³ Request, para. 1.

²⁴ This is precisely the responsibility of the Defence, however, and one which it cannot simply abdicate — *i.e.*, to review carefully the material disclosed in view of the objectives of the Defence. There are no shortcuts. *See*, in this regard, the words of Single Judge Judge Tarfusser in the pre-trial stage of this case, made in the context of a Defence request for translation of all intercepted evidence, but equally applicable to this situation: “Whilst the Prosecutor is under a strict obligation to provide the Defence with the entirety of the materials it considers relevant, thereby making the Defence fully aware of the nature, cause and content of the charges, *the Defence cannot abdicate its duty and responsibility to examine such materials*, which examination is necessary for it to be in a position to decide whether to challenge the evidence or its reading by the Prosecutor, as well as to identify portions which it deems relevant”. ICC-01/05-01/13-177, para. 10 (emphasis added).

²⁵ *See* ICC-01/05-01/13-796 and ICC-01/05-01/13-796-Anx.

²⁶ *See* ICC-01/05-01/13-1082-Conf-Corr and ICC-01/05-01/13-1082-Conf-AnxA.

²⁷ *See* ICC-01/05-01/13-1195 and ICC-01/05-01/13-1195-Conf-AnxB.

²⁸ *See* ICC-01/05-01/13-1525-Conf, *in particular*, para. 13.

²⁹ ICC-01/05-01/13-1589-Conf-AnxB, p. 3.

what the Chamber has before it, in the latest of the Defence's staggered requests for documents that are not identifiably *prima facie* material, is but a strategy to derail the trial. The Chamber should not indulge such gamesmanship.

iii. *The Chamber has already implicitly acknowledged that it does not consider all the records concerning the collection of evidence to be prima facie material*

21. The procedures used to collect, *inter alia*, the intercepted evidence in this case were conducted with the Court's authorisation and under its supervision. As such, this Chamber and/or Pre-Trial Chamber II possess or have control over certain communications with the Dutch authorities regarding the collection of the intercept evidence. While the Prosecution's disclosure obligations are unique to it and do not apply to the Chamber, the fact that the Chamber has not released its own communications with the Dutch authorities concerning the collection of the intercept materials, given its overriding duty to ensure the fairness of the proceedings, underscores that not all documents 'concerning' the collection of telecommunications evidence in this case are *prima facie* material. Thus, clearly, the Chamber's prior rulings cannot be read in the manner advanced by the Defence.

C. Granting the Request could adversely affect future cooperation with The Netherlands

22. The Request, on the tails of the Chamber's related preceding decisions,³⁰ involves the disclosure of all exchanges with the Dutch authorities made in furtherance of the implementation of Prosecution RFAs. By definition, they potentially affect the interests of The Netherlands. They also potentially affect the Prosecution's relations with the Dutch authorities, and could adversely impact the Court's ability to engage The Netherlands in similar cooperative activities in the future.

³⁰ ICC-01/05-01/13-1542-Conf; ICC-01/05-01/13-1234-Conf; ICC-01/05-01/13-1148-Conf.

23. Accordingly, the Prosecution considers that before reaching a final decision, the Chamber should invite the Dutch authorities to provide their observations on the matter, and in particular, on the effect of the requested broad divulgation of their communications with the Court on future cooperation.

IV. Relief Requested

24. For the reasons above, the Prosecution requests that the Chamber deny the Defence Request and invite the Dutch authorities to submit their observations on the scope of the requested disclosure and its impact on future cooperation with the Court.



Fatou Bensouda, Prosecutor

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