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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 Version with Confidential Annexes A through J
Second Request for Disclosure of Information from Dutch Authorities

Source: Defence for Jean-Jacques Kabongo Mangenda

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

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I. INTRODUCTION

1. Jean-Jacques Mangenda requests the Trial Chamber to require the government of The Netherlands to produce and disclose the five documents identified in Confidential Annex A, which are relevant to the process by which certain documents tendered by the Prosecution in this case were obtained. The documents include, *inter alia*, upon information and belief, the first order by the Dutch magistrate authorising and defining the modalities of such surveillance. The Defence has now exhausted all possible avenues for obtaining these materials, whether from the Dutch government or other possible sources. The relevant Dutch official, in response to an inquiry channelled through Mr. Mangenda's former Dutch counsel, recently refused to provide the requested documents on the basis that such documents "[REDACTED]."¹ The intervention of this Trial Chamber is, accordingly, necessary to obtain this information, which is manifestly relevant to the legality of the procedures by which telephonic surveillance was conducted by Dutch authorities on behalf of the International Criminal Court.

II. PROCEDURAL HISTORY

2. Starting no later than 17 June 2015, the Defence has requested disclosure from various sources of, *inter alia*, the following documents:
 - The Dutch examining magistrate's (first) authorisation to surveil and record telephone conversations, dated on or about 14 August 2013;
 - The Dutch examining magistrate's (second) authorisation to surveil and record telephone conversations, dated on or about 3 September 2013;
 - The Dutch examining magistrate's decision to extend the surveillance and recording of telephone number [REDACTED] for a period from 13 to 30 September 2013, dated on or about 9 September 2013; and
 - The Dutch prosecutor's response (or responses), if any, to the Dutch examining magistrate's request for clarification concerning the lack of a written request to authorise the surveillance and recording of telephone number [REDACTED].

¹ Confidential Annex B, Letter of Dutch magistrate to Mr. van Straalen, "Provision of Documents", 18 February 2016, p. 3.

3. The first such request, dated 17 June 2015, was directed to the Office of the Prosecutor.² The request was so directed because of the Prosecution's claim in its first bar table motion that recordings of telephone conversations had been "obtained in accordance with judicial authorisation and implemented in accordance with Dutch law."³ The Prosecution responded on 18 June 2015 that it did not possess the requested information, and suggested that Mr. Mangenda's former counsel in the Dutch proceedings, Mr. van Straalen, would be "[REDACTED]."⁴
4. On 19 June 2015, the Defence addressed a request to the Dutch Ministry of Security and Justice seeking, *inter alia*, the documents indicated above.⁵ On 30 June 2015, the Ministry responded that "[REDACTED]."⁶
5. On 14 July 2015, the Defence filed a motion before the Trial Chamber requesting the Trial Chamber "[REDACTED]."⁷ The request included a list of specific documents sought as Annex A, which included the four documents cited above. The Prosecution opposed the motion on the basis that, *inter alia*, the motion had failed to demonstrate "the exercise of reasonable diligence" in seeking the information by other means, including from Mr. van Straalen.⁸ The Trial Chamber decided the motion as follows:

[REDACTED]⁹

6. The Prosecution disclosed some further documents after the Trial Chamber's order,¹⁰ but not the specific documents identified above. The Prosecution further noted that it did not possess any order, decision or record of the Dutch Courts concerning the

² Confidential Annex C, Letter from Mangenda Defence to the Prosecution, Re: Request for Disclosure of Information Relevant to Legality of Interception of Telephone Communications, 17 June 2015 ("[REDACTED].")

³ *Bemba et al.*, Prosecution's First Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1013-Conf, 16 June 2015 ("Prosecution's First Bar Table Motion"), para. 25.

⁴ Confidential Annex D, Letter from the Prosecution to Mangenda Defence, Ref: OTP/PD/150618/KV, 18 June 2015 ("[REDACTED].")

⁵ Confidential Annex E, Letter from Mangenda Defence to Ministry of Security and Justice, Re: Request for Disclosure of Information Relevant to Legality of Interception of Telephone Communications, 19 June 2015 ("[REDACTED]").

⁶ Confidential Annex F, Letter from Ministry of Security of Justice to Mangenda Defence, Concerning Letter dd. 19th of June 2015 concerning request for disclosure, 30 June 2015.

⁷ *Bemba et al.*, Corrected version of Request for Order for Disclosure of Information, ICC-01/05-01/13-1082-Conf-Corr, 14 July 2015 ("First Request"), para. 10.

⁸ *Bemba et al.*, Prosecution's Observations on the Mangenda Defence's Request for Disclosure of Information, ICC-01/05-01/13-1082-Conf-Corr, ICC-01/05-01/13-1090-Conf, 20 July 2015, para. 15.

⁹ *Bemba et al.*, Decision on Mangenda Defence Request for Cooperation, ICC-01/05-01/13-1148-Conf, 14 August 2015 ("Decision on Request for Cooperation"), para. 12.

¹⁰ *Bemba et al.*, Prosecution's Notice of Compliance with "Decision on Mangenda Defence Request for Cooperation" ICC-01/05-01/13-1148-Conf, ICC-01/05-01/13-1233-Conf, 10 September 2015.

legality of the intercepts to which the Defence did not already have access, and thus considered that, by virtue of its 28 August 2015 disclosure of the Dutch RFAs, it had complied with the 14 August Decision.¹¹

7. On 7 December 2015, the Defence for Mr. Bemba wrote to the Prosecution noting that a document disclosed by the Prosecution following the Trial Chamber's order indicated that there had been "[REDACTED]".¹² The Prosecution replied on 11 December 2015, asserting that it "has discharged its disclosure obligations regarding this matter." In respect of the specific request of the Bemba Defence, the Prosecution did not deny that it possessed the documents requested, but that "[REDACTED]".¹³
8. The Bemba Defence then filed a motion on 15 December 2015 seeking disclosure of these emails¹⁴ and, over the Prosecution's opposition,¹⁵ the Trial Chamber ordered their disclosure.¹⁶ The Trial Chamber reaffirmed its previously-stated instruction to the Prosecution that "it is imperative that the Defence be able to test the reliability of the procedures employed in collecting the evidence against them."¹⁷
9. The Prosecution disclosed, on 22 January 2016, eleven emails between the Prosecution and the Dutch Prosecutors.¹⁸
10. On 26 January 2016, the Bemba Defence requested the disclosure of further emails that had not been disclosed, but that were referenced in some of the emails that were disclosed.¹⁹ On 28 January 2016, the Prosecution responded that the Trial Chamber

¹¹ *Id.* paras. 5, 9-10 ("[REDACTED]").

¹² Confidential Annex G, Email from Bemba Defence to the Prosecution, [No subject], 7 December 2015, 16:43 ("[REDACTED]").

¹³ Confidential Annex H, Email from the Prosecution to Bemba Defence, Re: [No subject], 11 December 2015, 16:45.

¹⁴ *Bemba et al.*, Defence Request for Correspondence with the Dutch Authorities, ICC-01/05-01/13-1525-Conf, 15 December 2015, paras. 2-3.

¹⁵ *Bemba et al.*, Prosecution's Response to the Bemba Defence's Request for Correspondence with the Dutch Authorities (ICC-01/05-01/13-1525), ICC-01/05-01/13-1528-Conf, 17 December 2015.

¹⁶ *Bemba et al.*, Decision on the Bemba Defence Request for Disclosure of Communication with the Dutch Authorities, ICC-01/05-01/13-1542-Conf, 12 January 2016 ("12 January 2016 Decision"), para. 11. *See also Bemba et al.*, Decision on 'Defence Request for Disclosure and Judicial Assistance', ICC-01/05-01/13-1166-Conf, 21 August 2015; *Bemba et al.*, Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses, ICC-01/05-01/13-1172, 24 August 2015; *Bemba et al.*, Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews, ICC-01/05-01/13-1234, 10 September 2015.

¹⁷ 12 January 2016 Decision, para. 11. *See also Bemba et al.*, Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews, ICC-01/05-01/13-1234-Conf, para. 13.

¹⁸ Prosecution Trial Rule 77 – Pack 39.

¹⁹ Confidential Annex I, Email from Bemba Defence to the Prosecution, Request for disclosure from the Bemba Defence, 26 January 2016, 17:43.

decision did not encompass all materials concerning the interception process or the legality of the collection of evidence and did not require disclosure of these other emails.²⁰

11. On 2 February 2016, the Bemba Defence filed yet another motion seeking disclosure of the information requested,²¹ which was once again opposed by the Prosecution.²² On 17 February 2016, the Trial Chamber found that the Prosecution's narrow interpretation of its disclosure obligations was contrary to the Chamber's previous rulings and ordered disclosure of all records concerning the legality of the collection of telecommunication evidence in its possession.²³
12. Concurrent with these efforts, the Mangenda Defence in January 2016 sought disclosure of documents from Mr. van Straalen. None of the documents cited above were in his files. On 12 February 2016, at the request of the Mangenda Defence, Mr. van Straalen addressed a request for the four specific documents to the Dutch investigating magistrate.
13. On 18 February 2016, the Dutch investigating magistrate refused Mr. van Straalen's request on the basis that "[REDACTED]" and that "[REDACTED]".²⁴ Further, the Magistrate emphasised that Mr. van Straalen's mandate was limited to the Dutch procedure in respect of "seized items" – not telephonic surveillance – and that Mr. van

²⁰ Confidential Annex J, Email from the Prosecution to Bemba Defence, "160128 – PD's Response to the Bemba Defence Request for disclosure on 26 January 2016", 28 January 2016, 15:44("[REDACTED]").

²¹ *Bemba et al.*, Defence Request for Further Orders of Disclosure, ICC-01/05-01/13-1589-Conf, 2 February 2016; *Bemba et al.*, Corrigendum of "Defence Request for Further Orders of Disclosure", ICC-01/05-01/13-1589-Conf-Corr, 3 February 2016. *See also Bemba et al.*, Defence Request for Leave to Reply to Prosecution Response to "Corrigendum of the Defence Request for further Orders of Disclosure" (ICC-01/05-01/13-1607), ICC-01/05-01/13-1611-Conf, 9 February 2016.

²² *Bemba et al.*, Prosecution Response to "Corrigendum of the 'Defence Request for further Orders of Disclosure'", ICC-01/05-01/13-1607-Conf, 8 February 2016, paras. 7-10; *Bemba et al.*, Prosecution Response to Defence Request ICC-01/05-01/13-1611-Conf, ICC-01/05-01/13-1616-Conf, 10 February 2016, para. 9 ("[REDACTED]").

²³ *Bemba et al.*, Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence, ICC-01/05-01/13-1632, 17 February 2016, para. 15 ("[t]he Prosecution's limited reading of the 12 January 2016 Decision cuts completely against the course set out in these previous rulings. It is in this spirit that the Single Judge considered as disclosable all material 'concerning the monitoring of one of the Dutch numbers of Mr Kilolo [,,] and any other related records'. As a result, the Single Judge grants the Bemba Defence request. All records concerning the legality of the collection of telecommunication evidence by the Dutch authorities, which are in the Prosecution's possession, must be disclosed. As a side note, the Single Judge also notes the Prosecution's submission that, if the defence teams are entitled to all such material, the Chamber must also provide its relevant communications with the Dutch Authorities. It is emphasized that this Chamber has no such communications. Even assuming *arguendo* that this submission was true, it cannot under any circumstances diminish the existing disclosure obligations of the Prosecution.")

²⁴ Annex B, p. 3.

Straalen and Mr. Mangenda had been “[REDACTED].”²⁵ The Magistrate underscored that “[REDACTED].”²⁶

14. The position of the examining magistrate is therefore that: (i) only the ICC’s judicial organs may request disclosure of information relevant to the execution of requests for cooperation; and (ii) that even if it were otherwise, Mr. Mangenda has no standing to request information about surveillance of telephone calls.

III. APPLICABLE LAW

15. Article 64(6)(b) of the Rome Statute authorises the Trial Chamber to “[r]equire [...] the production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute.” A similar power is conferred under Article 57(3)(b) for the specific purpose of “assist[ing] the person in the preparation of his or her defence”, exercisable by a Trial Chamber by virtue of the operation of Articles 64(6)(a) and 61(11). Article 93(1)(i) imposes upon States a corresponding obligation²⁷ to “comply with requests by the Court to provide the following assistance,” including “[t]he provision of records and documents, including official records and documents.”
16. This Chamber has affirmed in its previous rulings that material enabling the defence to assess the legality of evidence on which the Prosecution seeks to rely upon is relevant to preparation of the defence. Further, the Defence need not, as a condition of such requests, demonstrate the illegality of the proposed evidence, since this is precisely the reason why the material is sought.²⁸

²⁵ *Id.* p. 4.

²⁶ *Id.* See also p. 3 (“[REDACTED].”)

²⁷ See *Ruto & Sang*, Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 102 (“the Trial Chamber is competent to make that request of Kenya; and Kenya is obligated to employ compulsory measures against the witness in order to perform the demands of the request”).

²⁸ *Bemba et al.*, Decision on Mangenda Defence Request for Cooperation, ICC-01/05-01/13-1148-Conf, 14 August 2015, para. 11; *Bemba et al.*, Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses, ICC-01/05-01/13-1172, 24 August 2015, para. 17; *Bemba et al.*, Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence, ICC-01/05-01/13-1632, 17 February 2016, paras 13-15; *Bemba et al.*, Public redacted version of Decision on the Bemba Defence Request for Disclosure of Communication with the Dutch Authorities, ICC-01/05-01/13-1542-Red, 12 January 2016, para. 11; *Bemba et al.*, Decision on ‘Joint Defence Request for remedies for disclosure violations’, ICC-01/05-01/13-1308-Conf, 28 September 2015, para. 13; *Bemba et al.*, Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews, ICC-01/05-01/13-1234-Conf, 10 September 2015, para. 11.

IV. SUBMISSIONS

17. The Prosecution has tendered 281 audio-recordings²⁹ obtained on the basis of blanket surveillance by Dutch authorities of private telephone numbers for a period of more than three months.³⁰ The Prosecution has asserted that this surveillance was “obtained in accordance with judicial authorisation and implemented in accordance with Dutch law.”³¹
18. The Defence, by various means, has sought disclosure of the key decisions by the Dutch examining magistrate to put that claim to the test. The Prosecution has not assisted this effort; on the contrary, the Prosecution has adopted the narrowest possible interpretation of its disclosure obligations and the Trial Chamber’s decisions. The Prosecution has also mistakenly assumed that Mr. Mangenda’s Dutch counsel had access to the Dutch telephone surveillance procedures. Mr. Mangenda’s participation in proceedings under Dutch law, on the contrary, was limited to reviewing electronic files on computers seized physically by Dutch authorities.³²
19. The information sought is material to the preparation of the Defence. The Defence wishes to know whether the modalities of surveillance and review of telephone conversations conformed to the procedures required under Dutch law and, more generally, whether those procedures complied with international human rights standards. The Defence also wishes to see whether any representations by the Office of the Prosecutor are referred to, or even specifically attached, to the documents whose disclosure is sought. There can no longer be any reasonable dispute, given the Trial Chamber’s previous decisions, that these documents are material to the Defence and

²⁹ Prosecution’s First Bar Table Motion (requesting admission of 96 intercepted voice calls); *Bemba et al.*, Prosecution’s Second Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1113-Conf, 31 July 2015 (requesting admission of 162 audio recordings); *Bemba et al.*, Prosecution’s Third Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1170-Conf, 21 August 2015 (requesting admission of 2 audio recordings); and *Bemba et al.*, Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1498-Conf, 27 November 2015 (requesting admission of 21 audio recordings).

³⁰ Situation in the Central African Republic, Premier rapport du Conseil indépendant (période du 15 au 30 août 2013), ICC-01/05-64-Conf, 25 October 2013 (“First IC Report”); Situation in the Central African Republic, Second Report of Independent Counsel (covering the period between 23 August and 16 October 2013), ICC-01/05-66-Conf-tENG, 14 November 2013 (“Second IC Report”); *Bemba et al.*, Troisième rapport du Conseil indépendant (période du 16 octobre au 23 novembre 2013), ICC-01/05-01/13-421-Conf, 22 May 2014 (“Third IC Report”).

³¹ Prosecution’s First Bar Table Motion, para. 25.

³² Annex B, p. 4 (“[REDACTED].”)

should be disclosed. Such information would be routinely disclosed in domestic criminal proceedings as a safeguard of fundamental rights.³³

20. The Defence has exhausted all possible avenues for obtaining the material. Indeed, the relevant Dutch authority has expressly indicated, now for the second time, that such requests can be made only via the “[REDACTED].”³⁴
21. In addition to the four documents previously identified, a fifth document is now sought as well:
 - a 6 September 2013 filing by the Dutch Prosecutor, at the possible request of the ICC Prosecutor, requesting the historical data of eleven phone numbers from 6 August 2012 to 6 August 2013.
22. The five documents sought, for ease of reference, are enumerated in Annex A, with additional reference information that will facilitate the search for the documents in question.
23. The Defence, in addition to these five documents, also requests the disclosure of: (i) any documents attached to these documents; and (ii) any documents that are integrally connected to understanding the requested documents. For example, the Defence also requests any correspondence from the Dutch prosecutor or any organ of the ICC that directly triggered the issuance of the five documents listed above.
24. The request does not place an undue burden on the Dutch authorities. The request is narrowly circumscribed and specifically defined. The Prosecution cannot reasonably contend, as it has in previous submissions,³⁵ that this request imperils future cooperation with the Dutch authorities by, for example, imposing upon them an undue burden. Any burden is more than proportionate to the need to scrutinise the legality of a highly intrusive investigative method.

³³ See e.g., Canada, *R. v Durette*, [1994] 1 S.C.R. 469, paras. 41, 57-58 (affidavits upon which a warrant for surveillance was issued were required to be disclosed in unredacted form in order to respect the right to full answer and defence).

³⁴ Annex B, p. 3 (“[REDACTED].”)

³⁵ *Bemba et al.*, Prosecution Response to “Corrigendum of the ‘Defence Request for further Orders of Disclosure’”, ICC-01/05-01/13-1607-Conf, 8 February 2016, paras. 22-23.

V. CONCLUSION AND RELIEF REQUESTED

25. The Trial Chamber is requested to require or request the Government of The Netherlands, pursuant to Articles 57(3)(b), 64(6)(b) and 93(1)(i) of the Statute, to produce and disclose the documents identified in Annex A. The Trial Chamber is also requested to order the disclosure of any documents: (i) attached to those documents; or (ii) that are integrally connected to those documents such as, for example, any request that resulted in the issuance thereof.



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Respectfully submitted this 5 April 2016,
At The Hague, The Netherlands