



Original: English

No.: ICC-01/05-01/13

Date: 06/04/2016

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 with Confidential Annexes A, B

**Public Redacted Version of Bemba Defence Response to the “Second Request for
Disclosure of Information from Dutch Authorities”**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for Aimé Kilolo Musamba

Paul Djunga Mudimbi

Steve Powles

Counsel for Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Charles Achaleke Taku

Beth Lyons

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Introduction

1. The Defence for Mr. Jean-Pierre Bemba hereby submits its response¹ in support of the 'Second Request for Disclosure of Information from Dutch Authorities' ("the Second Request"),² which was submitted on behalf of the Defence for Mr. Jean-Jacques Mangenda.

2. The Second Request:

- a. concerns sufficiently detailed information, which is relevant to the preparation of the Defence;
- b. is consistent with the provisions of Dutch law; and
- c. presents sufficient justification concerning the need for judicial intervention.

3. The requirements for judicial assistance are thus met.

Submissions

4. Over two and half years have elapsed since communications between Me. Kilolo, Mr. Mangenda and Mr. Bemba were intercepted by the Dutch authorities.

5. The Trial Chamber has repeatedly underscored that the Defence have a right to receive information concerning the legality of the collection of evidence. Nonetheless, notwithstanding that the fact of interception is public, and there is no ongoing investigation or need for secrecy, the three defendants have yet to be provided with key filings and decisions concerning the evidential and legal basis for the interception process.

¹ This filing has been filed on a confidential basis in order to confirm to the classification of the Request. If authorised, the Defence response can be reclassified as public (although the annexes should remain as confidential).

² ICC-01/05-01/13-1727-Conf.

6. In particular, due to the Prosecution's apparent failure to either compile contemporaneous records of its interactions with the Dutch authorities,³ or request the transmission of Dutch judicial records, the Defence has not received critical information concerning the interception process through the ICC Prosecution.

7. At the same time, the Dutch authorities have indicated that they will not provide the requested information to the Defence in the absence of a prosecutorial or judicial request from the ICC.⁴

8. "The international division of labour in prosecuting crimes must not be to the detriment of the apprehended person";⁵ the fact that the defendants' interception was conducted by Dutch authorities at the request of the ICC Prosecution should not give rise to a legal black hole as concerns the defendants' right to be apprised of the legal and factual basis for specific interception filings and decisions.⁶

9. Given that the interception process is no longer "secret", there also does not appear to be any legal impediment as concerns the transmission of the requested information to the Defence.

³ Annex A.

⁴ [REDACTED].

⁵ Prosecutor v. Kajelijeli Appeals Judgment, ICTR-98-44A-A, 23 May 2005, at para. 220.

⁶ See also *Ocalan v Turkey* concerning the fact that mutual cooperation must be conducted in a manner which respect human rights set out in the European Convention on Human Rights (*Application no. 46221/99*, para. 86 (Grand Chamber)). The Explanatory Memorandum concerning the Netherlands Cooperation Agreement with the ICC also underscores the obligation of The Netherlands to implement any cooperation requests from the ICC in a manner which is consistent with its obligations under the Convention: See G. Sluiter, 'International Criminal Proceedings and the Protection of Human Rights', *New England Law Review*, Vol 37; 4,p 935 at p. 948 <http://www.nesl.edu/userfiles/file/lawreview/vol37/4/sluiter.pdf>.

10. As specified in the Prosecution's request for assistance (RFA), the request for interception was issued pursuant to Article 54 and Part 9 of the Rome Statute.⁷ According to the general rule provided in Article 99(1) of the Rome Statute, the execution of such requests shall be executed "in accordance with the relevant procedure under the law of the requested State".

11. The relevant procedure in The Netherlands is governed by the Dutch Code of Criminal Procedure ("CCP").⁸ Article 24(4) of the CCP provides that "the decision shall, unless otherwise provided, be immediately sent to the defendant and other participants in the proceedings".⁹

12. Article 30 regulates the suspect's access to the casefile in the investigative stage. Restriction can only be placed on access if the interests of the investigation so require.¹⁰ In such a case, the suspect shall be notified in relation to the incompleteness of the documents he is inspecting.¹¹

⁷ CAR-OTP-0090-1922 at 1923.

⁸ <http://wetten.overheid.nl/BWBR0001903/2015-11-17>.

⁹ Draft Defence English translation of "4 *De beschikking wordt, tenzij anders is voorgeschreven, onverwijld toegezonden aan de verdachte en andere procesdeelnemers.*"

¹⁰ Article 30(3): "*Niettemin kan de officier van justitie, indien het belang van het onderzoek dit vordert, de verdachte de kennisneming van bepaalde processtukken onthouden.*" Draft Defence translation: "Nonetheless, the public prosecutor may withhold certain case documents from a suspect, if required in the interest of the investigation."

¹¹ Article 30(4): "*De verdachte wordt in het geval, bedoeld in het derde lid, schriftelijk medegedeeld dat de hem ter inzage gegeven stukken niet volledig zijn. De verdachte kan binnen veertien dagen na dagtekening van de mededeling, bedoeld in de vorige volzin, en daarna telkens na periodes van dertig dagen, een bezwaarschrift indienen bij de rechter-commissaris. Alvorens te beslissen, hoort de rechter-commissaris de officier van justitie en stelt hij de verdachte in de gelegenheid om opmerkingen te maken.*" Draft Defence translation: "In the case referred to in the third paragraph, the suspect should be notified in writing that the documents given to him for inspection are not complete. The suspect may, within fourteen days of the date of the notification referred to in the previous sentence, and then after every period of thirty days, submit an objection to the magistrate. Before deciding, the magistrate shall hear the public prosecutor and shall give the suspect an opportunity to comment."

13. Article 126aa(5) further provides that “the suspect or his lawyer may request from the prosecutor in writing seeking the identified *procès-verbal* or other objects in the procedural documents.”¹²

14. These provisions are consistent with the right to a reasoned decision,¹³ which is tied to the right to an effective remedy.¹⁴

15. It is, however, clear that the Defence will not be in a position to obtain the requested information without a judicial order.

16. The Defence teams have attempted - without success - to obtain the requested information concerning the domestic interception process *via*:

- i. The Prosecution;
- ii. Requests addressed to the Dutch authorities *via* the Registry;¹⁵
- iii. Dutch authorities involved in the interception process; and

¹² Draft Defence English translation of “5 *De verdachte of diens raadsman kan de officier van justitie schriftelijk verzoeken bepaalde door hem aangeduide processen-verbaal of andere voorwerpen bij de processtukken te voegen.*”

¹³ “[A]fter the surveillance has been terminated, the question of subsequent notification of surveillance measures is inextricably linked to the effectiveness of remedies before the courts and hence to the existence of effective safeguards against the abuse of monitoring powers. There is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his or her knowledge and thus able to challenge their legality retrospectively (see *Klass and Others*, cited above, § 57, and *Weber and Saravia*, cited above, § 135) or, in the alternative, unless any person who suspects that his or her communications are being or have been intercepted can apply to courts, so that the courts’ jurisdiction does not depend on notification to the interception subject that there has been an interception of his communications (see *Kennedy*, cited above, § 167)”: *Zakharov v Russia (Application no. 47143/06)*, para. 234. See also para. 298.

¹⁴ “Clearly it is necessary for individuals who claim to have been adversely affected by the exceptional powers of security and intelligence agencies, such as surveillance or security clearance, to have some avenue for redress”; the Report on the Democratic oversight of the Security Services adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) (CDL-AD(2007)016-e, para. 241. See also *Lambert v. France* judgment of 24 August 1998, Reports of Judgments and Decisions 1998-V, paras. 29-41 concerning the Court’s finding that Article 8 had been contravened due to the fact that the applicant had been denied *locus standi* to challenge the contested measures.

¹⁵ [REDACTED].

- iv. Petitions to Dutch judicial authorities, submitted on behalf of the lawyers who were appointed to represent the defendants in the Dutch proceedings.

17. ICC judicial intervention is particularly necessitated to cut the Gordian knot that:

- i. [REDACTED]; and
- ii. Dutch Counsel have been informed that they have no standing to request information through Dutch processes because they do not represent the defendants at the ICC.

18. Notwithstanding these contradictions, the Dutch authorities have confirmed that they will provide the requested information if so requested by the “International Criminal Court”.¹⁶ It is therefore clear that the information is sufficiently particularised, and that there is no legal or practical impediment as concerns the ability of the Dutch authorities to execute such an order.

Relief sought

19. For the reasons set out above, the Defence for Mr. Bemba requests the Trial Chamber to grant the request submitted by the Defence for Mr. Mangenda.



Melinda Taylor

Counsel of Mr. Jean-Pierre Bemba

Dated this 6th day of April, 2016

The Hague, the Netherlands

¹⁶ [REDACTED].