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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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

**Corrigendum to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda
Obtained Pursuant to a Judicial Order Based on Material Misstatements By the
Prosecution**

Source: Defence for Jean-Jacques Kabongo Mangenda

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean-Jacques Kabongo Mangenda

Mr Christopher Gosnell
Mr Arthur Vercken

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku
Mr Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Mr. Jean-Jacques Mangenda¹ requests the exclusion of any telephone intercepts obtained on the basis of the Prosecution's request to the Trial Chamber of 19 July 2013, which contains material misstatements. These material misstatements were known by the Prosecution to have no factual basis, or were discoverable as false with the exercise of minimum diligence at the time they were made. Allowing the Prosecution to rely on such misstatements to obtain an ICC Judge's approval of a warrant to engage in one of those most severe invasions of privacy, and then use it in a criminal proceeding without consequence, would be antithetical to, and damage the integrity of, proceedings. This Trial Chamber is the only bulwark against such practices, and a robust remedy is required to ensure that they are firmly discouraged.

II. APPLICABLE LAW

2. Article 69(7) of the ICC Statute provides that:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

3. The right to privacy, and the protection of that right against invasions by State authorities, is an "internationally recognized" human right. Article 17 of the International Covenant on Civil and Political Rights declares:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

¹ This submission is a public redacted version prepared pursuant to the Chamber's direction in its *Decision Closing the Submission of Evidence and Further Directions*, ICC-01/05-01/13-1859, 29 April 2016.

4. Article 8 of the European Convention of Human Rights provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

5. National legal systems protect these rights by requiring that State agents – i.e., the police or prosecution – obtain judicial authorization before listening in to someone’s communications or reading their email. That prior judicial authorization would be made a mockery if State agents could obtain it based on false statements, or statements known to have no factual basis. Many national systems require, as a safeguard against such abuses, that any submissions to a court seeking such authorization: (i) be given under oath, as a guarantee of truthfulness and diligence; (ii) be specific, so that the judicial authority can exercise its own judgment, rather than merely accepting the conclusion of the State agent; and (iii) disclose all relevant facts. When judicial authorization is induced by a material misstatement, many national systems, depending on the circumstances, will not permit any information obtained as a result of such a violation to be used as evidence.

6. Article 69(7) of the ICC Statute, like many national systems, adopts a non-categorical approach to exclusion of information obtained in violation of fundamental human rights. Such exclusion is mandatory (“shall not be admissible”) only “if” the violation casts doubts on the reliability of the information itself, or its admission would be “antithetical to, and would seriously damage, the integrity of the proceedings.”

7. Various criteria are considered in evaluating whether the admission would be antithetical to the integrity of proceedings. One factor is the gravity of the violation itself. In the *Lubanga* case, the Pre-Trial Chamber in relying on European Court of Human Rights jurisprudence, commented that in “international human rights jurisprudence,” though not reflecting any “consensus,” the “majority view is that only

a serious human rights violation can lead to the exclusion of evidence.”² National case-law has elaborated that “seriousness” can be evaluated in two ways: (i) the seriousness of the State’s conduct in violating the right in question;³ and (ii) the seriousness of the effects on the person whose rights have been violated, including whether the evidence would have been obtained anyway.⁴

8. Other factors are clearly relevant as well, however. A second notable consideration is the gravity of the underlying offence being adjudicated. The *Lubanga* Pre-Trial Chamber highlighted that the “fight against impunity”⁵ – i.e., the seriousness of the underlying crime – was a factor weighing against exclusion.⁶ This echoes the sentiment expressed in *Brdjanin* that “considering the seriousness of the crimes that this Tribunal is entrusted to adjudicate, it would be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.”⁷ Conversely, human rights violations should be less easily overlooked where the crime is of lesser gravity, as confirmed in national jurisprudence that also apply a balancing test.⁸ Indeed, the gravity of the underlying offence is so important a factor in relation to invasions of privacy that some legal systems expressly enumerate the crimes for which “[t]elecommunications may be intercepted” – thus categorically prohibiting surveillance even when there is a well-founded suspicion of a crime of lesser gravity.⁹

² *Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007 (“*Lubanga* Confirmation Decision”), para. 86.

³ Canada, Supreme Court, *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, para. 73 (“This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led to the breach. The concern of this inquiry is not to punish the police or to deter Charter breaches, although deterrence of Charter breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the Charter.”)

⁴ South Africa, Supreme Court of Appeal, *Magwaza v. The State*, (20169/2014) [2015] ZASCA 36, para. 15 (“was such infringement serious or merely of a technical nature and would the evidence have been obtained in any event.”)

⁵ *Lubanga* Confirmation Decision, para. 86.

⁶ *Id.*

⁷ *Brdjanin*, IT-99-36-T, Decision on the Defence “Objection to Intercept Evidence”, 3 October 2003 (“*Brdjanin* Decision”), para. 63(7).

⁸ Canada, Supreme Court, *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, per Deschamps J, para. 221 (“assessing the seriousness of the offence is as important as determining whether the evidence is reliable or essential. To disregard this factor would make as little sense as to disregard the fact that an accused who is granted a stay of proceedings will not be prosecuted.”)

⁹ See e.g. German Code of Criminal Procedure, § 100a (“(1) (1) Telecommunications may be intercepted and recorded also without the knowledge of the persons concerned if [...] the offence is one of particular gravity in the individual case as well [...] (2) Serious criminal offences for the purposes of subsection (1), number 1, shall be:”, etc.). See Meyer-Gossner/Schmitt, *Strafprozessordnung mit GVG und Nebengesetzen*, 57th edn. (2014), marginal note to §100a (“9: Precondition for surveillance is reasonable suspicion of one of the expressly

9. A third consideration is whether the proposed remedy is the only way to deter human rights violations in the future. The *Brdjanin* Trial Chamber noted that violations of the right to privacy in a situation of armed conflict would not be restrained by excluding any evidence obtained thereby in a subsequent international prosecution.¹⁰ Violations of the right of an accused to be informed of the right to counsel, even in the absence of showing of oppressive conduct or involuntariness during the subsequent questioning, have led to exclusion even of that most highly important piece of evidence: a statement of an accused.¹¹ The Trial Chamber excluded the statement, not because it was unreliable, but rather because the:

right to counsel during a custodial interrogation is closely intertwined with the exercise of the right to silence; the right to be cautioned that any statement made may be used against the detainee in evidence at trial, and the right [...] ‘not to be compelled to testify against himself,’ noted that “it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being “antithetical to, and would seriously damage, the integrity of the proceedings”.¹²

On the one hand, this statement could be viewed as describing the gravity of the violation; on the other hand, the gravity of the violation arises from the systemic impact that non-enforcement of the right would have on the ensemble of other rights that are so important to protect the integrity of any legal system. If statements of accused persons were not excluded in such circumstances, there would be no disincentive against well-intentioned investigators of the Office of the Prosecutor cutting corners in the advice of rights given to a client, or in the submissions provided to a court to procure judicial authorization for surveillance, in order to obtain useful evidence.

mentioned catalogue crimes; 15: The list cannot be extended by the court, no analogies. 12: Surveillance allowed not only with respect to perpetrators of a catalogue crime but also assistants; however, not obstruction of justice or assisting after the fact. 21: the telephone connection of defence counsel shall, as a rule, not be subject to surveillance. This applies even where counsel is under suspicion of contempt or obstruction of justice, regardless of Section 160a. 21a: Defence counsel and similar persons are generally protected by Section 160a STPO. Against these individuals and their assistants, no surveillance measures may be taken if those measures concern information about which the individuals would not have to testify because of privilege”).

¹⁰ *Brdjanin* Decision, para. 63(9).

¹¹ *Bagosora et al.*, ICTR-98-41-T, Decision on the Prosecutor’s Motion for the Admission of Certain Materials Under Rule 89(C), 14 October 2004, paras. 19-21.

¹² *Id.* para. 21.

III. SUBMISSIONS

(i) The Prosecution Made Four Material Misstatements In Obtaining Judicial Authorizations to Conduct Surveillance of Mr. Mangenda's Telephone Communications

a. The Prosecution Falsely Claimed that it Had Evidence that Mr. Mangenda Was Paying Witnesses Through Western Union

10. The Prosecution's "Request for a Judicial Order to Obtain Evidence for Investigation under Article 70," dated 19 July 2013, makes the following statement:

The Accused [presumably referring to Mr. Bemba] frequently speaks to the very individuals, including KILOLO and MANGENDA, who have sent Western Union payments to Defence witnesses.¹³

11. Mr. Mangenda has never paid any Defence witness by Western Union. The Prosecution had no evidence on 19 July 2013 that Mr. Mangenda had paid any witness through Western Union. The Prosecution has no evidence today that Mr. Mangenda paid any witness through Western Union. The allegation has no basis in the Prosecution's own evidence today, and it had no basis in the Prosecution's own evidence at the time of its *ex parte* application to the Pre-Trial Judge more than two years ago. The Prosecution's claim that Mr. Mangenda "sent Western Union payments to Defence witnesses" was not only false; the Prosecution must have known it to be false, since it already possessed the Western Union payment records upon which it made this claim. The claim that Mr. Mangenda had made these payments was either knowingly false, or was made recklessly.
12. The misstatement was highly material to the Prosecution's *Ex Parte* Application, which does not otherwise rely on the content of Mr. Mangenda's communications with Mr. Bemba to substantiate its request for surveillance of Mr. Mangenda's telephone.

b. The Prosecution Falsely Claimed That "Babala's Records" Showed

¹³ Situation in the Central African Republic, Request for Judicial order to Obtain Evidence for Investigation under Article 70, ICC-01/05-51-Conf, 19 July 2013 ("Prosecution's *Ex Parte* Application"), para. 14.

Communication Between Mr. Mangenda and Defence Witnesses

13. The Prosecution's *Ex Parte* Application claims, more than once, that "BABALA's records show frequent communication between KILOLO, MANGENDA, [REDACTED], [REDACTED], and Defence witnesses."¹⁴ The Prosecution then asserts that the circumstances of these alleged contacts, as reflected in "BABALA's records", "suggest possible arrangements for payments."¹⁵
14. Whatever these records may or may not show, they certainly provide no indication of any contact between Mr. Mangenda and any Defence witness. This was a material misstatement to the Single Judge that the Prosecution must have known was false, or that was made in reckless disregard of its truth or falsity.

c. The Prosecution's Hypothesis That Mr. Mangenda Was Paying Bribes to Witnesses In The Hague Was, With the Exercise of Minimal Diligence, Demonstrably False

15. The Prosecution describes a correlation between payments to Mr. Mangenda by Western Union and the appearance of three witnesses in The Hague. This leads the Prosecution to assert that "[t]he times and dates of the transfers of exact sums of money suggest that KILOLO and MANGENDA may be paying witnesses while they are at the seat of the Court."¹⁶
16. The Prosecution, with even the most minimal exercise of diligence, would have discovered that the payments made to Mr. Mangenda were followed promptly by deposits by Mr. Mangenda of the same amounts into Mr. Bemba's account at the Detention Unit for personal expenses such as food and telephone credit.¹⁷ The Prosecution's assertion that these funds went through Mr. Mangenda's hands to Defence witnesses in The Hague, leaving aside the feebleness of the reasoning, was discoverably false at the time this allegation was made.

¹⁴ Prosecution's *Ex Parte* Application, para.15.

¹⁵ *Id.* para.16.

¹⁶ *Id.* para. 21.

¹⁷ See *Bemba et al.*, Annex A to Defence provision of information pursuant to decision ICC-01/05-01/13-185, ICC-01/05-01/13-198-Conf-Anx-A, 16 February 2015; CAR-OTP-0080-0296, at 0298.

d. The Prosecution Misrepresented the Nature of the Single Judge's Order In its Request for Assistance to the Dutch Authorities

17. The Prosecution's "Request for Assistance" (RFA) dated 6 August 2013 to the Dutch authorities makes the following claim:

[REDACTED].¹⁸

18. This assertion is partially incorrect – or at least does not fully explain the nature of the Prosecution's request to the Single Judge, or the nature of the Single Judge's Order. While it is true that the Prosecution's *Ex Parte* Application had requested that "the Chamber authorize the Prosecution to collect recordings of the telephone conversations of Messrs. KILOLO and MANGENDA from the Belgian and Dutch authorities,"¹⁹ the Prosecution does not explain that its application was expressly focused on only the potential violation of Mr. Bemba's lawyer-client privilege, rather than on the privacy rights of Mr. Kilolo or Mr. Mangenda. Hence, the Prosecution's *Ex Parte* Application asserted:

Under Article 54(3) the Prosecution may collect and examine evidence and seek the cooperation of States to obtain evidence. Generally the Prosecution need not seek judicial approval for the routine collection of evidence. Furthermore, the investigative action that the Prosecution is seeking would ordinarily involve judicial overview as part of the process of execution of the request for assistance in the Requested State. However the intended collection of evidence in this instance implicates members of a defence team acting in a case currently at trial before the Court and consequently the likely collateral collection of privileged communications between lawyer and client. In these exceptional circumstances, the Prosecution considers it appropriate to seek independent judicial approval within the Court for the intended evidence collection. The Prosecution notes the sensitive and serious nature of this investigation and thus will erect sufficient safeguards, described below, in the collection of the above evidence to ensure that no recordings of legitimate lawyer-client privileged communications comes into the possession or knowledge of the Prosecution.²⁰

19. The suggestion here is that the Single Judge need only be concerned about the privilege issue; that safeguards are in place to ensure no wrongful disclosure of privileged information; and that any concerns relating to the privacy rights of Mr. Kilolo and Mr. Mangenda will be addressed by the national authorities. The Pre-Trial

¹⁸ CAR-D21-0005-0001, at 0003, para. 8.

¹⁹ *Id.* para. 32.

²⁰ Prosecution's *Ex Parte* Application, para. 3.

Judge's order was accordingly limited to authorizing the Prosecutor "to *seize* the relevant authorities [...] *with a view to* collecting" the conducting the surveillance requested:

AUTHORISES the Prosecution to *seize* the relevant authorities of Belgium and of the Netherlands, *with a view to* collecting logs and recordings of telephone calls placed or received by Mr. Aime Kilolo and Mr. Jean-Jacques Mangenda.²¹

20. This language does not constitute an authorization to conduct surveillance, but rather an authorization to *seize the national authorities with a request* to conduct such surveillance, and to inform them that modalities were in place to protect non-disclosure of privileged information. The Prosecution, however, baldly asserted before the national authorities that "[REDACTED]" to "[REDACTED]".²² This would have implied to the Dutch authorities that the Single Judge had already evaluated whether the invasion of Mr. Kilolo's and Mr. Mangenda's privacy rights were being properly protected, whereas the Prosecution, had submitted before the Single Judge that this was a matter to be addressed by national courts. The result of these incongruent submissions before the Single Judge and the national authorities was that neither appears to have squarely addressed whether the invasion of those rights was justified. This occurred because of Prosecution submissions that fell short of complete forthrightness.
21. The Prosecution, in summary, made four material misstatements in obtaining judicial authorization to listen to Mr. Mangenda's telephone communications:
 - the incorrect assertion that the Prosecution had evidence that Mr. Mangenda had made Western Union payments to witnesses;
 - the incorrect assertion that Babala's phone records showed any contact by Mr. Mangenda with any witness;
 - the assertion, easily discoverable as false, that Mr. Mangenda had paid funds into the hands of witnesses in The Hague; and
 - the assertion to the Dutch court that the Single Judge had authorized electronic surveillance of Mr. Mangenda, without clarifying that the

²¹ *Situation in the Central African Republic*, Decision on the Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70", ICC-01/05-52-Conf, p. 7 (italics added).

²² CAR-D21-0005-0001, at 0003, para. 8.

authorization was limited to the issue of protecting privilege, and was predicated upon further review of Mr. Kilolo's and Mr. Mangenda's privacy rights.

22. The Prosecution's *Ex Parte* Application is otherwise facially deficient for being unsupported by any sworn affidavit and being mostly vague and conclusory, thus substituting the Prosecution's conclusions for that of the Single Judge.

(ii) The Only Appropriate Remedy Is to Deny Admission of All Telephonic Communications Obtained On the Basis of these Material Misstatements

23. The violation of Mr. Mangenda's rights is serious. The surveillance of Mr. Mangenda's telephone was highly intrusive. All telephone calls are believed to have been recorded and listened to, in their entirety, without any *ex ante* restrictions on subject-matter or interlocutor.
24. The Prosecution's misstatements suggest an element of knowledge and wilfulness. The Prosecution knew that it had no foundation for some of the claims it was making, or should have easily discovered that the assertions it was putting forward were false. The misstatements concerned issues of central importance, in respect of which maximum diligence should have been exercised. The Prosecution also deliberately refrained from providing full information or presented information in a manner most favourable to ensuring the issuance of judicial authorization, without ensuring that the judicial authorities concerned were fully apprised of the circumstances. The Prosecution also never corrected these statements.
25. Private communications fall near the highest end of the spectrum of importance for human dignity. As stated by the European Court of Human Rights:

tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a "law" that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.²³

²³ ECtHR, *Kopp v. Switzerland*, 13/1997/797/1000, Judgment, 25 March 1998, para. 72.

26. Privacy, like the right to counsel, is a pre-condition for the exercise of numerous other individual rights:

Because of the levers of power the State wields, such access can engender a deep feeling of unease and can result in a “chilling effect” on various other human rights.²⁴

27. Australian courts have likewise identified the broad societal ramifications of such measures, even when they only come to light in specific criminal proceedings:

The numbers will be greater as the technology of eavesdropping and interception available to police and other officials expands. People overheard may carry on conversations, revealing aspects of their private lives and business affairs, which have absolutely nothing to do with the State or its agencies. They may do so upon the assumption that the occasion is private. To the extent that the necessity for the serious invasion of privacy which listening devices permits is not taken into account, as required by par (b), a vital protection for the individual enacted by Parliament is not fulfilled. Moreover, a safeguard for the protection of the privacy of uninvolved third parties is set at naught. If this became, *or was believed to be, common it would have a serious effect on the confidence of citizens in the privacy of their conversations.* Cases exist where the power of interception and intrusion has been abused by officials. Vigilance and strictness are the proper responses of the courts.²⁵

28. Exclusion of evidence obtained is often the only appropriate response to incursions on privacy obtained by way of material misstatements. In Canada, where a test similar to Article 69(7) of the ICC Statute applies to exclusion of evidence in general, there is a specific statutory prohibition on the admission of intercepts of “[a] private communication” that were not “lawfully made.” This has been interpreted as including situations where a warrant was issued on the basis of a material misstatement.²⁶

29. Any latitude that could apply in respect of the investigation of very serious crimes²⁷ in the chaos of a war-zone²⁸ does not apply to the investigation of Article 70 offences in The Netherlands. The crimes in question would not be serious enough in some

²⁴ STL, *Ayyash et al.*, STL-11-01/T/AC/AR126.9, Decision on Appeal By Counsel for Mr Oneissi Against the Trial Chamber’s Decision on the Legality of the Transfer of Call Data Records, 28 July 2015, para.55.

²⁵ Australia, High Court of Appeal, *Ousley v. The Queen*, (1997) 192 CLR 69, p.156-157.

²⁶ Canada, Supreme Court, *R. v. Garofoli*, [1990] 2 S. C.R. 1421, paras. 69-72.

²⁷ STL, *Ayyash et al.*, STL-11-01/T/AC/AR126.9, Decision on Appeal By Counsel for Mr Oneissi Against the Trial Chamber’s Decision on the Legality of the Transfer of Call Data Records, 28 July 2015, para.51.

²⁸ *Karadžić*, IT-95-5/18-T, Decision on Accused’s Motion for Reconsideration of Chamber’s Decision on Motion to Exclude Intercepted Conversations, 18 April 2012; *Stanišić & Župljanin*, IT-08-91-T, Decision Denying the Stanišić Motion for Exclusion of Recorded Transcripts, 6 December 2009, para. 21; *Brdanin* Decision.

countries to justify this form of highly intrusive surveillance under any circumstances – or only barely.²⁹ Where resort is had to these extraordinary measures, especially in respect of offences whose gravity is not overwhelming, the least that should be expected is that State agents act with the utmost care and accuracy in their *ex parte* submissions requesting the invasion of important human rights.

30. The only way to deter such conduct is exclusion of evidence. The ICC does not, unlike national jurisdictions, have the authority or jurisdiction to impose criminal or civil sanctions on unlawful surveillance. Without excluding evidence, there will be no disincentive against repeated occurrences of the misstatements that have occurred in the present case which have, in turn, engendered a serious violation of human rights.

IV. CONCLUSION AND REMEDY REQUESTED

31. The Prosecution induced the judicial authorization of surveillance of Mr. Mangenda by making material misstatements to both the Single Judge and the Dutch authorities. The ensuing violation of rights was serious. Permitting evidence to be admitted on the basis of these material misstatements would be antithetical to, and would seriously damage, the integrity of these proceedings and the ICC as a whole. The only appropriate remedy is to deny admission of any intercepted communications of Mr. Mangenda. A declaration is sought from the Trial Chamber that any and all intercepted communications of Mr. Mangenda are inadmissible in these trial proceedings.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Dated this 15 July 2016,

At The Hague, The Netherlands

²⁹ French Code of Criminal Procedure, art. 100: (“En matière criminelle et en matière correctionnelle, si la peine encourue est égale ou supérieure à deux ans d'emprisonnement, le juge d'instruction peut, *lorsque les nécessités de l'information l'exigent*, prescrire l'interception, l'enregistrement et la transcription de correspondances émises par la voie des télécommunications. Ces opérations sont effectuées sous son autorité et son contrôle”.)