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Original: **English**

No.: **ICC-01/05-01/13**
Date: **10/05/2017**

THE APPEALS CHAMBER

Before: **Judge Silvia Fernández de Gurmendi, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

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 Annex A

Public Redacted Version of "Request for Judicial Notice"

Source: **Art. 70 Defence for Mr. 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. The Defence for Mr. Jean-Pierre Bemba respectfully requests the Honourable Appeals Chamber to judicially notice two decisions of the Dutch District Court, which were issued in October 2013 ("the Decisions").[1]

2. This request has been filed on a confidential basis due to the fact that it includes extracts from confidential correspondence. A public redacted version will be submitted forthwith.

Procedural History

3. On 19 February 2014, the Main Case Bemba Defence submitted a request to the Dutch authorities to be provided with all relevant particulars concerning the interception of members of the Bemba Defence team, and communications between them, and Mr. Bemba.[2] This request was channeled *via* the Registry, but the Main Case Defence received no response.

4. On 17 June 2015, the Mangenda Defence submitted a request to access specific records in the Dutch proceedings concerning the interception and collection of data from the telephone numbers of Mr. Kilolo and Mr. Mangenda.[3] The Prosecution responded that it did not possess the judicial records in question, and further posited that the Mangenda Defence, through Mr. Mangenda's Dutch lawyer, was better placed to obtain such records.[4]

[1] ICC-01/05-01/13-2144-Conf-AnxI.
[2] ICC-01/05-01/13-1749-Conf-AnxB, pp.10-11.
[3] ICC-01/05-01/13-1727-Conf, para.3.
[4] ICC-01/05-01/13-1727-Conf, para. 3.

5. The Mangenda Defence duly attempted to obtain such records directly from the Dutch Ministry of Justice and Security, but was informed that,[5]

[Redacted]

6. Concurrently, the Article 70 Bemba Defence requested the Prosecution to disclose any RFAs, decisions, correspondence and materials in its possession concerning the collection of the evidence by national authorities, including the Dutch interception process.[6] The Prosecution declined the request, arguing that the materials in question fell outside the scope of Rule 77.

7. The Bemba Defence and Mangenda Defence both seized the Trial Chamber of this issue,[7] and on 14 August 2016, the Chamber ordered the Prosecution to disclose "all material related to the assessment of the legality of the telephone surveillance of Mr Mangenda." [8]

8. At the same time, the Chamber found that the request from the Mangenda Defence for an order for judicial cooperation from The Netherlands was premature, and directed the Defence to first exhaust all efforts to obtain information concerning the Dutch proceedings from the Prosecutor.[9]

9. Although the disclosure order was framed broadly to encompass any 'materials' in the possession of the Prosecutor that were relevant to the legality of the collection of evidence, the Prosecution omitted to disclose key correspondence with the Dutch authorities, which was alluded to in the RFAs.

[5] ICC-01/05-01/13-1727-Conf, para. 4.
[6] ICC-01/05-01/13-1135-Conf-AnxC.
[7] ICC-01/05-01/13-1135-Conf; ICC-01/05-01/13-1082- Conf-Corr,

[8] ICC-01/05-01/13-1148-Conf
[9] ICC-01/05-01/13-1148-Conf.

10. When there was an interlude in proceedings, the Defence requested disclosure of the correspondence, and when faced once again with a refusal, seized the Chamber with a request for disclosure.[10]

11. On 12 January 2016, the Chamber granted the request on the basis that the the materials fell within the scope of the 2015 decision, which affirmed that all materials concerning the legality of the collection of evidence in The Netherlands fell within Rule 77 for the purposes of this case.[11]

12. Notwithstanding the clear terms of this decision, the Prosecution disclosed a selection of redacted emails, whilst withholding several emails that were alluded to in the disclosed materials. The Defence was therefore compelled once more to seize the Chamber with a request for further disclosure.[12]

13. Strangely, in its response, the Prosecution suggested that the request should be resisted as "it would equally require the Chamber to release its own communications with the Dutch authorities concerning, inter alia, the interception process".[13] The Prosecution further argued that:[14]

> 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

[10] ICC-01/05-01/13-1525-Red
[11] ICC-01/05-01/13-1542.
[12] ICC-01/05-01/13-1589-Conf
[13] ICC-01/05-01/13-1607-Red, para. 16.
[14] Para. 21.

14. Finally, the Prosecution argued that disclosure of the materials could:[15]

> 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.

15. In disposing of the request, the Chamber, once more, confirmed the clear terms of its disclosure order, and the ambit of Rule 77,[16] and ordered the Prosecution to disclose the requested materials. As concerns the pointed Prosecution comments regarding the implications for judicial correspondence, the Chamber "*emphasised that this Chamber has no such communications*."[17]

16. After receiving and reviewing the materials, it became apparent that there was a clear gap in information as concerns the position taken by the Dutch courts in relation to transmission of the [Redacted] intercepts to the ICC.

17. At the same time that the Defence attempted unsuccessfully to obtain this correspondence from the Prosecution, the Bemba, Mangenda and Kilolo teams attempted to contact the Dutch authorities in order to obtain information concerning the specific steps which had been taken in the interception process. A first attempt, which was routed *via* the Dutch lawyer who represented Mr. Mangenda, proved fruitless. Notwithstanding the fact that Dutch law provides that suspects have an enforceable right to access the case file, and receive copies of interception decisions,[18] the lawyer was informed by the Investigating Judge that [Redacted].[19]

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[15] Para. 22.
[16] ICC-01/05-01/13-1632.
[17] ICC-01/05-01/13-1632, para. 15.
[18] ICC-01/05-01/13-1749-Conf, paras.10-14.
[19] ICC-01/05-01/13-1727-Conf, para.13.

18. *Via* a public switchboard, the three teams also contacted the Dutch Prosecutor in order to inquire as to whether he would be willing to speak to the Defence, or respond to written queries concerning the specific legal steps that had been taken in the interception process.[20] The Prosecutor responded orally that he would consult with the ICC Prosecutor before responding.[21]

19. On 18 March 2016, the Bemba Defence received two letters from the Dutch authories *via* the Registry. The first letter, dated 15 March 2016 (received on 18 March 2016), stated that [Redacted]. The second letter (dated June 2014 but only transmitted on 18 March 2016), stated, in response to a Defence request channeled via the Registry, that [Redacted].[22]

20. Having failed to obtain these materials from either the Prosecution or the Dutch authorities, the Mangenda Defence reiterated its request for an order for judicial assistance directed to The Netherlands.[23] The Bemba Defence joined the request, setting out the specific difficulties that it had faced in obtaining the materials in question, and the particular relevance that the decisions could have as concerns the right of the monitored persons to challenge the legality of the process.[24]

21. On 5 April 2016, the Chamber granted the Mangenda request, and directed the Registry to submit a request for cooperation to The Netherlands to transmit the following judicial records in question.[25] The *Note Vebale* submitted by the Registry framed the relevant component of the request in the following terms:[26]

[20] ICC-01/05-01/13-1749-Conf-AnxB, p.6.
[21] ICC-01/05-01/13-1749-Conf-AnxB, p. 6.
[22] ICC-01/05-01/13-1749-Conf-AnxB
[23] ICC-01/05-01/13-1727-Conf
[24] ICC-01/05-01/13-1749-Conf
[25] ICC-01/05-01/13-1768
[26] ICC-01/05-01/13-1861-Conf-Anx1, p.4.

> Any record of the Dutch Prosecutor ([Redacted]), dated on or around 9 October 2013, answering to the investigating judge's inquiry about the absence of a written request for the interception of telephone number [Redacted] (Parketnummer : 09/767239-13)
>
> 2/ and any documents attached to those documents or which are integrally connected those documents.

22. At the same time, the Bemba Defence learned that the Kilolo Defence had received a copy of their client's case file from the Dutch lawyer appointed to represent Mr. Kilolo. The Chamber found that the materials were outside of the control of the Bemba Defence, and that good cause existed to extend the deadline for submitting an application to exclude evidence.[27] The Chamber nonetheless limited the additional time to two additional working days.

23. The case file was extremely voluminous, in Dutch, and not organised in a particular system. Despite its best efforts, the Defence was unable, within the limited time available, to locate any District Court decisions concerning the interception of the [Redacted] number for this time period. The Defence consequently noted in its Article 69(7) application that:

> The Defence has been unable to locate a District Court decision authorising the transmission to the ICC of the intercepts collected prior to 1 October 2013.The Defence reserves its right to submit further observations on this point should further decisions be transmitted by the Dutch authorities

[27] ICC-01/05-01/13-1774, para. 10.

24. The Chamber issued its decision concerning the Article 69(7) application on 29 April 2016.[28]

25. On 2 May 2016, the Registry filed the response from the Dutch authorities concerning the request for judicial cooperation.[29] The materials included correspondence with the ICC prosecution, which the Prosecution had failed to disclose previously.[30] The materials did not, however, include any decisions from the District Court. Moreover, although the Dutch Public Prosecutor submitted a rather adversarial styled justification of the steps taken domestically, the justification did not reference any District Court decisions.[31] This created the impression that the decisions did not exist.

26. During its preparation for the appeal, the Defence requested a Dutch intern to review the Kilolo case file. During this review, the intern located the Decisions (which had been appended to a document that did not appear to be directly relevant to this issue).

Submissions

27. Article 69(6) of the Statute provides that the "Court shall not require proof of facts of common knowledge but may take judicial notice of them".

28. This provision has been interpreted by both Trial Chamber III and Trial Chamber VII to extend to legal documents, such as legislation, transcripts, and decisions.[32] For the latter, the litmus test was whether the facts "are

[28] ICC-01/05-01/13-1855
[29] ICC-01/05-01/13-1861
[30] See ICC-01/05-01/13-1861-Conf-Anx2, p. 5.
[31] ICC-01/05-01/13-1861-Conf-Anx3.
[32] ICC-01/05-01/08-2012-Red, para. 81; ICC-01/05-01/13-1249; ICC-01/05-01/13-1473.

capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned".[33]

29. The Decisions fall squarely within the above categories of court records that have previously been afforded judicial notice. The existence and date of the Decisions are facts that cannot reasonably be questioned. The Prosecutor and Trial Chamber both averred that there was a District Court decision authorising transmissions of the [Redacted] intercept materials.[34] The Prosecution provided no identifying features or details regarding the timing and content of such a decision, and the Trial Chamber cited Prosecution exhibits, which were decisions of the Investigating Magistrate, rather than the District Court.[35]

30. The Decisions do not concern an issue pertaining to the charges, and the Defence is not seeking the admission of the Decisions for the "truth" of their contents. The Decisions are relevant to the appellate process insofar as they shed light on the procedural history concerning the collection of interception materials from a certain number belonging to Mr. Kilolo. The Defence is also only relying on them to establish the discrete point that the two decisions exist, and the timing of the decisions. Indeed, it would have been improper for the Defence to advance appellate arguments concerning the legal developments in The Netherlands without acknowledging the existence of the Decisions.

31. Trial Chamber VII further held that for the purpose of substantiating applications that do not pertain to the charges themselves (for instance, applications to exclude evidence), the supporting documentation does not

[33] ICC-01/05-01/13-1249,para. 5.
[34] ICC-01/05-01/13-1833-Red, para. 40; ICC-01/05-01/13-1855, para. 25.

[35] ICC-01/05-01/13-1855, fn. 34.

need to be tendered in accordance with the procedures set out in Article 69.[36] In line with this case law, the threshold for the admission of evidence on appeal would not apply to a request for judicial notice, concerning an issue that is not related to the charges.

32. It is also arguable that the use of the word "shall" in Article 69(6) circumscribes the Chamber's discretion to ignore facts of common knowledge. If the sky is blue, the judgment can hardly proceed on the basis that it is not. Similarly, if judicial decisions exist and the parties do not dispute their existence, it would be appropriate for their existence to be 'judicially noticed' for the purposes of the appellate proceedings.

33. It is, in any case, apparent from the above procedural history that the Defence acted diligently in its attempts to access the relevant domestic decisions and court records throughout the trial proceeding. The Prosecution also cannot claim to be prejudiced by this request. There was a considerable degree of interaction between the ICC Prosecution and their Dutch counterparts in connection with the domestic legal proceedings (both in 2013 and in 2016). The Prosecution confirmed that this contact encompassed the Defence request for access to Dutch judicial records and correspondence pertaining to the August –October 2013 time period.[37] The Dutch authorities also indicated that they were willing to fulfil requests for documentation, if the requests emanated from the ICC Prosecution (rather than the Defence).[38] The Prosecution thus had the means to obtain access the Decisions.

34. It can also be extrapolated from the fact that on 11 October 2013 (two days after the First District Court decision) the ICC Prosecution submitted a reformulated Request for Assistance (RFA) concerning the [Redacted]

[36] ICC-01/05-01/13-1753, paras. 11-12.
[37] Confidential Annex A.
[38] ICC-01/05-01/13-1749-Conf-AnxB, p. 3.

number, that they must have been informed that there was a domestic legal development, which necessitated the submission of the RFA. The fact that the Prosecution chose not to request the Decisions, or refer to them in any filings is not a valid basis for obscuring their existence.

Relief sought

35. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Appeals Chamber to judicially notice the Decisions (filed as ICC-01/05-01/13-2144-Conf-AnxI).

Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 10th day of May 2017
The Hague, The Netherlands

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