

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/05-01/13**
Date: **12 January 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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

**Decision on the Bemba Defence Request for Disclosure of Communication with
the Dutch Authorities**

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-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Others

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Rule 77 of the Rules of Procedure and Evidence (the 'Rules'), issues the following 'Decision on the Bemba Defence Request for Disclosure of Communication with the Dutch Authorities'.

I. Procedural History and Submissions

1. On 15 December 2015, the defence for Mr Bemba ('Bemba Defence') filed a motion that the Office of the Prosecutor ('Prosecution') be ordered to disclose certain communications with the Dutch authorities ('Request').¹
2. On 18 December 2015, the Prosecution filed its response, submitting that the Request be rejected ('Response').²
3. On 21 December 2015,³ the Bemba Defence filed its reply to the Response ('Reply').⁴
4. The Bemba Defence requests that the communication with the Dutch authorities concerning the monitoring of one of the Dutch numbers of Mr Kilolo,

¹ Defence Request for Correspondence with the Dutch Authorities, ICC-01/05-01/13-1525-Conf with confidential annex A.

² 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, with confidential annex A.

³ The Bemba Defence filed its 'Request for leave to reply to "Prosecution's Response to the Bemba Defence's Request for Correspondence with the Dutch Authorities (ICC-01/05-01/13-1525)"' on 18 December 2015, ICC-01/05-01/13-1529-Conf. The Chamber granted the leave to reply request via email from Trial Chamber VII Communications, on 22 December 2015, at 9:23.

⁴ Reply to "Prosecution's Response to the Bemba Defence's Request for Correspondence with the Dutch Authorities (ICC-01/05-01/13-1525-Conf)", ICC-01/05-01/13-1532-Conf. A public redacted version was filed on 6 January 2015, ICC-01/05-01/13-1532-Red.

[REDACTED] ('Telephone Number')⁵, and any other related records ('Requested Material') are disclosed to the defence.

5. The Bemba Defence explains that, in October 2013, the Prosecution formally requested from the Dutch Authorities the interception of the Telephone Number and to obtain any resultant recordings for the period of 30 August to 30 September 2013. The Defence explains that in this request for assistance ('RFA'), the Prosecution references prior discussions about the interception of the Telephone Number and follow-up emails on the matter.⁶ The Prosecution explains in this RFA that it did not submit a formal request earlier due to an oversight and is therefore making a 'post hoc request'.⁷
6. The Bemba Defence maintains that the Requested Material is disclosable since it pertains to the legality of submitted evidence and the Bemba Defence intends to conduct further investigations on the matter.⁸
7. In its Response, the Prosecution submits that the question of disclosure of the Requested Material has already been ruled upon by the Chamber and that the criteria for reconsideration are not fulfilled.⁹ Further, it argues that the Requested Material is not material to the preparation of the defence, since it is duplicative of material already disclosed. In this regard, the Prosecution avers that the Bemba Defence knows the parties involved, the subject matter of the Requested Material and the fact that the RFA sufficiently reflects the Requested Material.

⁵ The Bemba Defence mentions the number [REDACTED] in the Request. However, the referenced documents contain the number [REDACTED]. The Single Judge assumes that this discrepancy is due to an oversight in the Request and proceeds under the assumption that the number in question is the one referenced in the underlying material.

⁶ Request, ICC-01/05-01/13-1525-Conf, paras 10-12.

⁷ CAR-OPT-0090-1941, at 1943.

⁸ Request, ICC-01/05-01/13-1525-Conf, paras 2.

⁹ Response, ICC-01/05-01/13-1528-Conf, paras 3-7.

8. In its Reply, the Bemba Defence disputes that it seeks a reversal of any previous factual or legal finding.¹⁰ Further, it repeats that the Requested Material falls under the Prosecution's disclosure obligations and is not duplicative.¹¹

II. Analysis

9. As a preliminary matter, the Single Judge notes that only confidential versions of the Request and Response were filed. The Single Judge orders the Bemba Defence and the Prosecution to submit public-redacted versions of these filings forthwith.
10. As to the Request, the Single Judge notes that the decisions¹² relied on by the Prosecution in support of its argument that the Request is a request for reconsideration do not rule on the same subject matter. The specific question of the disclosability of the Requested Material is not discussed in either of the decisions. The Single Judge further emphasises that a general finding rejecting a request to warn the Prosecution about the potential consequences of disclosure violations¹³ cannot be interpreted, as suggested by the Prosecution, to mean that the Single Judge positively stated that the Prosecution does not have to disclose any further material related to the RFAs.
11. The Single Judge recalls the previous decisions on Rule 77 requests and the principles laid out therein.¹⁴ The Single Judge also recalls his prior finding that 'it is imperative that the Defence be able to test the reliability of the procedure

¹⁰ Reply, ICC-01/05-01/13-1532-Conf, paras 4-14.

¹¹ Reply, ICC-01/05-01/13-1532-Conf, paras 18-20.

¹² Decision on Mangenda Defence Request for Cooperation, 14 August 2015, ICC-01/05-01/13-1148-Conf and Decision on 'Joint Defence Request for remedies for disclosure violations', 28 September 2015, ICC-01/05-01/13-1308-Conf.

¹³ Decision on 'Joint Defence Request for remedies for disclosure violations', 28 September 2015, ICC-01/05-01/13-1308-Conf.

¹⁴ Decision on 'Defence Request for Disclosure and Judicial Assistance', 21 August 2015, ICC-01/05-01/13-1166-Conf; Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses; ICC-01/05-01/13-1172, Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews, 10 September 2015, ICC-01/05-01/13-1234.

employed in collecting the evidence against them'.¹⁵ The Single Judge repeats¹⁶ that this particularly holds true if the Prosecution, as in the present case, relies to a large extent on intercepted data and communications. The fact that the defence is in possession of the resulting RFA and further additional information (sender/recipient of the communications, general subject of the communication) does not, in itself, render the disclosure of the Requested Material duplicative. In the RFA the Prosecution specifically cites to the Requested Material as the reason for why the Dutch authorities might have intercepted the Telephone Number despite the absence of a formal request.

12. The Requested Material is therefore relevant to assessing the procedure by which evidence against the accused was collected. Accordingly, the Single Judge finds that the Requested Material is material for the preparation of the defence and should be disclosed, subject to the application of any redactions in accordance with the redaction protocol.¹⁷

¹⁵ 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.

¹⁶ *See also*, 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.

¹⁷ Annex to the Decision on the Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959-Anx.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request subject to the application of any redactions in accordance with the redaction protocol; and

ORDERS the Bemba Defence and the Prosecution provide public redacted versions of the Request and the Response.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'B. Schmitt', is written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 12 January 2016

At The Hague, The Netherlands