

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/05-01/13**  
Date: **17 February 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**

**Decision on Bemba Defence Request for Disclosure and Lifting of Redactions  
Related to Collection of Telecommunication Evidence**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

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**Counsel for Fidèle Babala Wandu**

Mr Jean-Pierre Kilenda Kakengi Basila

**Counsel for Narcisse Arido**

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**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**

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**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 Rules 77 and 81(1) of the Rules of Procedure and Evidence ('Rules') and Regulation 24(5) of the Regulations of the Court, issues the following 'Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence'.

## **I. Procedural History**

1. On 12 January 2016, the Single Judge granted a request ('12 January 2016 Decision') from the defence team for Mr Bemba ('Bemba Defence') concerning all communication with the Dutch authorities concerning the monitoring of one of the Dutch numbers of Mr Kilolo and any other related records. The Prosecution was ordered to disclose these documents with redactions applied in accordance with the Chamber's redaction protocol.<sup>1</sup>
2. On 22 January 2016, the Office of the Prosecutor ('Prosecution') disclosed 11 email correspondences and attachments ('Emails') in compliance with the 12 January 2016 Decision.<sup>2</sup>
3. On 2 February 2016, the Bemba Defence filed a submission ('Request') requesting the Chamber to order the Prosecution to: (i) disclose all material and records concerning the legality of the collection of telecommunication evidence

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<sup>1</sup> 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, *referring to* Annex to the Decision on Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959-Anx.

<sup>2</sup> Prosecution's Communication of Incriminatory Evidence and Rule 77 Material Disclosed to the Defence on 22 January 2016, ICC-01/05-01/13-1569.

by the Dutch authorities, which is in its possession; and (ii) lift the Rule 81(1) redactions to the content of the Emails.<sup>3</sup>

4. On 8 February 2016,<sup>4</sup> the defence teams for Mr Babala<sup>5</sup> and Mr Mangenda<sup>6</sup> filed responses submitting that the relief sought in the Request should be granted.
5. That same day, the Prosecution responded, submitting that the relief sought should be rejected ('Prosecution Response').<sup>7</sup>
6. On 9 February 2016, the Bemba Defence sought leave to reply to five issues raised in the Prosecution Response.<sup>8</sup>
7. On 10 February 2016, the Prosecution filed a submission opposing the leave to reply request.<sup>9</sup>

## II. Analysis

8. As a preliminary issue, the Single Judge does not consider it necessary to receive the reply proposed by the Bemba Defence in order to reach his decision. The Single Judge therefore rejects this request.
9. The Single Judge recalls the applicable law on disclosure<sup>10</sup> and disputed redactions<sup>11</sup> as set out in previous decisions of the Single Judge and Chamber.

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<sup>3</sup> Corrigendum of the "Public Redacted Version of Defence Request for Further Orders of Disclosure", ICC-01/05-01/13-1589-Red-Corr (with three confidential annexes; corrigendum notified 3 February 2016).

<sup>4</sup> The deadline for any responses from the other parties was set for this date. The Prosecution was further directed to provide the unredacted versions of the Emails whose Rule 81(1) redactions are disputed. Email from a Legal Officer of the Chamber to the parties, 3 February 2016 at 09:21.

<sup>5</sup> Réponse de l'équipe de défense de M. Fidèle Babala Wandu à la « Defence Request for Further Orders of Disclosure » (ICC-01/05-01/13-1589-Red), ICC-01/05-01/13-1603.

<sup>6</sup> Response to Bemba Request for Further Orders of Disclosure (ICC-01/05-01/13-1589-Conf), ICC-01/05-01/13-1608-Conf (with 12 confidential annexes, corrigendum to Annex E filed on 9 February 2016).

<sup>7</sup> Prosecution Response to "Corrigendum of the 'Defence Request for further Orders of Disclosure'", ICC-01/05-01/13-1607-Red (with *ex parte* annex; public redacted version of filing notified on 12 February 2016).

<sup>8</sup> Public Redacted 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-Red.

<sup>9</sup> Prosecution Response to Defence Request ICC-01/05-01/13-1611-Conf, ICC-01/05-01/13-1616-Conf.

<sup>10</sup> Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses; ICC-01/05-01/13-1172, para. 17; Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records

## A. Disclosure Request

10. The Bemba Defence explains that the contents of the Emails and other disclosed materials suggest that records related to the interception of Mr Kilolo's Dutch number remain undisclosed.<sup>12</sup> The Bemba Defence argues that non-disclosure of these items is in contravention of previous disclosure decisions taken by the Single Judge.<sup>13</sup>
11. The Prosecution argues that: (i) it has complied with the 12 January 2016 Decision;<sup>14</sup> (ii) granting the Request would impermissibly expand the scope of required disclosure<sup>15</sup> and (iii) granting the Request could adversely affect future cooperation with The Netherlands.<sup>16</sup> The Prosecution submits that the Request is 'impermissibly overbroad, exceeds the scope of the applicable appellate standard for disclosure, and creates new and untenable obligations for the Prosecution, as well as the Chamber'.<sup>17</sup>
12. The Single Judge understands that the parties' disagreement primarily concerns whether the Prosecution must disclose materials concerning the legality of the collection of evidence **beyond** the interception process.<sup>18</sup> The defence teams insist that the Prosecution must provide such materials, whereas the Prosecution understands the previous disclosure decisions as requiring it to only disclose information on the legality of intercepting telecommunications. This distinction affects whether information on the collection of materials other than intercepted communications, such as call data records, are disclosable.

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and Audio Recordings of Interviews, 10 September 2015, ICC-01/05-01/13-1234-Conf; Decision on 'Defence Request for Disclosure and Judicial Assistance', 21 August 2015, ICC-01/05-01/13-1166-Conf.

<sup>11</sup> Decision on Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959, paras 10-11 (with annex).

<sup>12</sup> Request, ICC-01/05-01/13-1589-Red-Corr, paras 11-15, 26.

<sup>13</sup> Request, ICC-01/05-01/13-1589-Red-Corr, paras 17, 19.

<sup>14</sup> Prosecution Response, ICC-01/05-01/13-1607-Red, paras 7-10.

<sup>15</sup> Prosecution Response, ICC-01/05-01/13-1607-Red, paras 11-21.

<sup>16</sup> Prosecution Response, ICC-01/05-01/13-1607-Red, para. 22.

<sup>17</sup> Prosecution Response, ICC-01/05-01/13-1607-Red, para. 1.

<sup>18</sup> *Compare* Request, ICC-01/05-01/13-1589-Red-Corr, para. 11 *with* Prosecution Response, ICC-01/05-01/13-1607-Red, para. 11; Annex B of the Request, ICC-01/05-01/13-1589-Conf-AnxB, page 2.

13. The Single Judge and Chamber have rendered several pronouncements confirming the defence teams' broader understanding of the Prosecution's disclosure obligations on this point. Most notably, the Chamber held the following:

The Chamber considers that material which enables the defence to assess the legality of evidence which the Prosecution intends to rely upon at trial is relevant to the preparation of the defence. It therefore falls under the Prosecution's disclosure obligations as set out in Rule 77 of the Rules. It is not necessary for the defence to demonstrate the illegality of the proposed evidence, since this is precisely the reason why the material is sought.<sup>19</sup>

14. Similar considerations were made in ruling that the Prosecution was required to disclose its requests for assistance. When the Prosecution was ordered to provide these requests,<sup>20</sup> it then argued that this ruling only applied to intercepted communications.<sup>21</sup> Subsequently, the Single Judge rejected this argument and emphasised that 'all requests for assistance be disclosed to the Defence, regardless of whether domestic authorities executed the requests for assistance or whether the requests for assistance pertained to intercepted communications or other measures'.<sup>22</sup>
15. The 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**'.<sup>23</sup> As a result, the Single Judge grants the Bemba Defence request. All

<sup>19</sup> Decision on Mangenda Defence Request for Cooperation, 14 August 2015, ICC-01/05-01/13-1148-Conf, para. 11.

<sup>20</sup> 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-Conf, para. 13 ('In the circumstances of this case, dealing as it does with allegations of improper interference of defence witnesses and placing significant reliance upon intercepted data and communications, the Requests for Assistance which were made in furtherance of the collection and interception of those records are of particular importance and are intrinsically linked to the admissibility of the evidence relied upon by the Prosecution in this case').

<sup>21</sup> Public redacted version of "Prosecution Response to Joint Defence Request for remedies for disclosure violations", 24 September 2015, ICC-01/05-01/13-1295-Conf, 30 September 2015, ICC-01/05-01/13-1295-Red.

<sup>22</sup> Decision on 'Joint Defence Request for remedies for disclosure violations', 28 September 2015, ICC-01/05-01/13-1308-Conf, para. 13.

<sup>23</sup> 12 January 2016 Decision, ICC-01/05-01/13-1542-Red, para. 4, page 7 (emphasis added).

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.<sup>24</sup> It is emphasised 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.

16. Contrary to the Prosecution's submission, the Single Judge does not consider that observations from the Dutch Authorities are required before the Prosecution discloses its correspondence with them. This said, the Prosecution may apply redactions in accordance with the redaction protocol, and if the Prosecution is of the view that discrete information not covered by standard redactions may adversely affect cooperation with The Netherlands then it may request non-standard redactions accordingly.

#### **B. Lifting of Rule 81(1) Redactions to the Emails**

17. The Bemba Defence argues that the Prosecution's reliance on Rule 81(1) of the Rules for redacting the emails is misconceived, submitting that this provision does not apply to communications between the Prosecution and external entities, such as national authorities. The Bemba Defence also submits that the Prosecution is not permitted to implement redactions *proprio motu* on the basis that it deems discrete components of a document to be irrelevant.<sup>25</sup>

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<sup>24</sup> Prosecution Response, ICC-01/05-01/13-1607-Red, para. 21.

<sup>25</sup> Request, ICC-01/05-01/13-1589-Red-Corr, paras 32-38.

18. The Prosecution responds that the information in the disclosed emails is ‘neither pertinent, nor related to the interception of Kilolo’s Dutch number in any way’.<sup>26</sup>
19. The Single Judge is persuaded by the arguments of the Bemba Defence. Rule 81(1) of the Rules provides that ‘[r]eports, memoranda or other internal documents’ are not subject to disclosure. The Prosecution’s external correspondence does not qualify under this provision.<sup>27</sup>
20. Further, though the redacted information does indeed appear to be of only marginal relevance, the Single Judge does not consider that this is sufficient, without more, to justify its non-disclosure. As held by the Appeals Chamber, once it is established that a document is material to the preparation of the defence, pursuant to Rule 77 of the Rules, the disclosure obligation ‘extends to the entire document and not only to the “relevant” portions of information contained within such a document’.<sup>28</sup>
21. The Single Judge grants the Request in this respect, and orders the Prosecution to re-disclose the Emails with all Rule 81(1) redactions lifted.

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<sup>26</sup> Prosecution Response, ICC-01/05-01/13-1607-Red, para. 10.

<sup>27</sup> If the Prosecution is of the view that its external correspondence may prejudice further or ongoing investigations, such information may be redacted pursuant to Rule 81(2) of the Rules. The Prosecution makes no such submission in relation to the Emails.

<sup>28</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's request for non-disclosure in relation to document “OTP/DRC/COD-190/JCCD-pt”, 27 May 2013, ICC-01/04-01/06-3031, A5 A6, para. 12. *See also* Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Response to Prosecution Application Regarding the Disclosure of the Identities of Certain Individuals Who Will not Appear as Trial Witnesses, 28 August 2013, ICC-01/09-01/11-886, para. 8.



**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**REJECTS** the request for leave to reply to the Prosecution Response; and

**GRANTS** the relief sought in the Request, subject to paragraph 16 above.

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

A handwritten signature in black ink, appearing to be 'BS', written over a horizontal line.

**Judge Bertram Schmitt, Single Judge**

Dated 17 February 2016

At The Hague, The Netherlands