

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 April 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 Second Mangenda Request for Cooperation

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

Kingdom of The Netherlands

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 Articles 57(3)(b), 61(11), 64(6)(a), 86, 87, 93(1)(i), 96 and 97 of the Rome Statute ('Statute'), and Rules 116, 176 and 177 of the Rules of Procedure and Evidence ('Rules') issues the following 'Decision on Second Mangenda Defence Request for Cooperation'.

I. Procedural History and Submissions

1. On 14 July 2015, the defence for Mr Mangenda ('Mangenda Defence') filed an application to issue a request for cooperation to the government of the Kingdom of The Netherlands ('The Netherlands').¹ Therein, it requested that the Chamber request cooperation of the competent authorities of The Netherlands ('Dutch Authorities') in respect to a number of documents related to the Dutch surveillance of the telephones attributed to Mr Mangenda.²
2. On 14 August 2015, the Chamber issued a decision on the request ('14 August 2015 Decision'),³ finding that the Mangenda Defence had not exhausted all *inter partes* consultations with the Office of the Prosecutor ('Prosecution') and ordering the Prosecution to disclose all material related to the assessment of the legality of the telephone surveillance of Mr Mangenda.⁴

¹ Request for Order for Disclosure of Information, ICC-01/05-01/13-1082-Conf, with two confidential annexes. A corrected version was filed on the same day and notified on 15 July 2015, ICC-01/05-01/13-1082-Conf-Corr.

² ICC-01/05-41/13-1082-Conf-Corr, paras 4, 10 and annex A, ICC-01/05-41/13-1082-Conf-AnxA.

³ Decision on the Mangenda Request for Cooperation, ICC-01/05-01/13-1148-Conf.

⁴ 14 August 2015 Decision, ICC-01/05-01/13-1148-Conf, para. 12.

3. On 9 March 2016, the Chamber set the deadline of 8 April 2016 for, *inter alia*, all requests related to the submission or exclusion of evidence to be filed ('8 April Deadline').⁵
4. On 17 March 2016, the Mangenda Defence filed another request for cooperation with the Dutch Authorities ('Request').⁶ Therein, it seeks the Chamber to request the Dutch Authorities to disclose five documents related to the surveillance of telephone numbers attributed to Mr Mangenda ('Five Documents')⁷ and any documents 'attached to those documents' or which are 'integrally connected to those documents such as, for example any request that resulted in the issuance thereof' (together, 'Requested Material').⁸
5. On 24 March 2016, the Prosecution filed its response, deferring to the Chamber's discretion in the resolution of this matter ('Response').⁹ It confirmed that it is not in possession of the Requested Material.¹⁰
6. On the same day, the defence for Mr Bemba filed its response, supporting the Request.¹¹
7. The Mangenda Defence explains that it liaised with the Prosecution, which had disclosed material in accordance with the 14 August 2015 Decision and had informed the Mangenda Defence that it was not in possession of any further material falling under the 14 August 2015 Decision, including four out of the

⁵ Hearing on 9 March 2016, ICC-01/05-01/13-T-42-Conf-ENG, page 42, line 21 to page 43, line 12.

⁶ Second Request for Disclosure of Information from Dutch Authorities, ICC-01/105-01/13-1727-Conf, with 10 confidential annexes A to J.

⁷ ICC-01/105-01/13-1727-Conf-AnxA.

⁸ Request, ICC-01/105-01/13-1727-Conf, para. 25.

⁹ Prosecution's Response to Mangenda's Second Request for Disclosure of Information from Dutch Authorities, ICC-01/05-01/13-1747-Conf.

¹⁰ Response, ICC-01/05-01/13-1747-Conf, para. 4.

¹¹ Bemba Defence Response to the "Second Request for Disclosure of Information from Dutch Authorities, ICC-01/05-01/13-1749-Conf.

Five Documents.¹² It submits that the Requested Material is material for the preparation of its defence since it concerns the legality of evidence put forward against the accused.¹³ The Mangenda Defence also avers that it has exhausted all alternative avenues to obtain the Requested Material and that the cooperation request is sufficiently specific and narrow.¹⁴

II. Analysis

8. The Single Judge recalls that pursuant to Rule 116(1) of the Rules the Chamber may seek cooperation of a State under Article 57(3)(b) of the Statute where it is satisfied that (i) this ‘would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence’; and (ii) sufficient information to comply with Article 96(2) of the Statute has been provided in the Request. The Single Judge also heeds the prior jurisprudence of the Court that, in order to seek cooperation under Article 57(3)(b) and Part 9 of the Statute, the request must meet the requirements of specificity, relevance and necessity.¹⁵
9. The Single Judge notes that the Mangenda Defence lists the Five Documents with additional identifying information and clearly circumscribes the other related documents it wishes to receive. Further, the Single Judge notes that the Mangenda Defence seeks the Requested Material in order to assess the legality

¹² Request, ICC-01/105-01/13-1727-Conf, para. 6, referring to ‘Prosecution’s Notice of Compliance with “Decision on Mangenda Defence Request for Cooperation” ICC-01/05-01/13-1148-Conf, 10 September 2015, ICC-01/05-01/13-1233-Conf.

¹³ Request, ICC-01/105-01/13-1727-Conf, para. 19.

¹⁴ Request, ICC-01/105-01/13-1727-Conf, paras 19-20, 24.

¹⁵ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)”, 25 April 2008, ICC-01/04-01/07-444; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV, Decision on “Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union”, 1 July 2011, ICC-02/05-03/09-170, para. 13-14; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV, Public redacted Decision on the second defence’s application pursuant to Article 57(3)(b) and 64(6)(a) of the Statutes, 21 December 2011, ICC-02/05-03/09-268-Red, para. 13; Decision on ‘Defence Request for Disclosure and Judicial’ 21 August 2015, ICC-01/05-01/13-1166-Conf, para. 14.

of evidence presented against the accused. In the view of the Single Judge, and as held in numerous previous decisions,¹⁶ this kind of information is material to the preparation of the defence of Mr Mangenda. Moreover, sufficient information has been provided to comply with Article 96(2) of the Statute. Accordingly, the Single Judge finds that the Request meets the requirements of Rule 116(1) of the Rules in relation to specificity and relevance for cooperation requests.

10. The Single Judge further notes that the Mangenda Defence endeavoured to obtain four out of the Five Documents from the Dutch lawyer who represented Mr Mangenda during national procedures.¹⁷ It also attempted, unsuccessfully, to acquire four out of the Five Documents, directly and via the intermediary of the Dutch lawyer of Mr Mangenda, from the Dutch Authorities.¹⁸ According to the Mangenda Defence, the Dutch Authorities informed it that any material would only be disclosed upon request by the Court.¹⁹ From this, the Single Judge understands that the Mangenda Defence cannot obtain the material without intervention by the Chamber. Therefore, the Single Judge finds that the cooperation request is necessary and, accordingly, grants the Request.
11. Should the Dutch Authorities identify problems which may impede or prevent the execution of the cooperation request consultations with the Chamber are to take place ‘without delay to resolve the matter’, as foreseen in Article 97 of the Statute.

¹⁶ See, 14 August 2015 Decision, ICC-01/05-1/13-1148-Conf, paras 9-10; 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; Decision on the Bemba Defence Request for Disclosure of Communication with the Dutch Authorities, 12 January 2016, ICC-01/05-01/13-1542-Red, para. 11.

¹⁷ Request, ICC-01/05-01/13-1727-Conf, para. 12.

¹⁸ Request, ICC-01/05-01/13-1727-Conf, paras 4 and 12-13.

¹⁹ Request, ICC-01/05-01/13-1727-Conf, para. 14.

12. In order to facilitate the cooperation Request, the Single Judge considers that it is also helpful that the Request and its annex A, specifying the Five Documents, are transmitted to the Dutch Authorities and instructs the Registry accordingly.
13. These considerations above are not materially affected by the Prosecution's contention²⁰ that the Mangenda Defence acted without proper diligence in seeking cooperation in a timely manner. However, the Single Judges notes that the Mangenda Defence did not undertake any steps in acquiring the Requested Material for a period of approximately four months after having received confirmation that the Prosecution was not in its possession.²¹
14. This unexplained delay appears entirely unjustified and, despite the fact that the Requested Material may be material to defence preparation, the lapse of time in filing this Request casts doubt on the expected importance of these documents to the Mangenda Defence. The Single Judge therefore, despite granting the Request, emphasises that any extension of the 8 April Deadline is not justified at this point in time. The Mangenda Defence is therefore expected to submit all motions concerning the addition or exclusion of evidence by this date. Should the Mangenda Defence, as a result of the cooperation request, obtain any relevant material the Chamber will consider any submissions at that point in time.

²⁰ Response, ICC-01/05-01/13-1747-Conf, paras 6-11.

²¹ In its disclosure complying with the 14 August 2015 Decision on 10 September 2015 (ICC-01/05-01/13-1233-Conf) the Prosecution noted that it did not possess any order, decision or record of the Dutch Courts concerning the legality of the intercepts. The Mangenda Defence contacted the lawyer representing Mr Mangenda in national proceedings only in January 2016.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY


GRANTS the Request;

DIRECTS the parties to prepare public-redacted versions of their respective filings or request reclassification thereof;

REQUESTS the assistance of the Dutch Authorities in disclosing the Requested Material to the Mangenda Defence; and

DIRECTS the Registry to transmit this decision, the Request and annex A of the Request to The Netherlands and prepare, in consultation with the Mangenda Defence, the necessary cooperation request to the Dutch Authorities in accordance with Articles 87(1) and (2), 93(1)(i), 96 and 99(1) of the Statute in order to facilitate the disclosure of the Requested Material.

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



Judge Bertram Schmitt, Single Judge

Dated 5 April 2016

At The Hague, The Netherlands