

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 03 March 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public

Prosecution Response to the Bemba Defence's Request for Disclosure

Source: The Office of the Prosecutor

Document to be notified in accordance with Regulation 31 of the *Regulations of the*

Court to:

The Office of the Prosecutor

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Bemba Defence’s Request for the disclosure of email exchanges between the Prosecution and an anonymous source whose information led to the initiation of the investigation in this case (“Request”).¹ The Request is without merit because it fails to establish that the information sought is material to the preparation of the Defence, and should be dismissed.

II. Submissions

A. The Request fails to establish ‘materiality’ under Rule 77

2. The Defence’s contention that “[t]he Suspect has the right to check the veracity of the very information which led to his being investigated”,² is fundamentally flawed and unsubstantiated. First, Rule 77 of the Rules of Procedure and Evidence (“Rules”) does not provide for an unlimited right to disclosure.³ Second, the Defence provides no legal basis for its assertion, and further conflates the materiality of the impetus to investigate with that of the basis for a suspect’s arrest and charging (*i.e.*, contested issues in the case). These are distinct; the latter, being at the core of Rule 77’s ‘materiality’ requirement.

3. The Defence concedes that a request for disclosure must be “directly relevant to the charges which have been presented by the Prosecutor”, albeit while arguing that

¹ ICC-01/05-01/13-208, Defence request for disclosure, 20 February 2014 (“Request”).

² Request, para. 10.

³ ICC-02/05-03/09-501, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, para. 39 (“Banda Appeals Decision”).

it need not divulge its strategy.⁴ However, the Request advances only speculative submissions to establish this requirement. For example, the Defence argues that the informant could be “motivated by political considerations”,⁵ “connected to prosecution witnesses”,⁶ or blanketly, could “possess exonerating information.”⁷ However, nothing in the Request suggests a concrete basis for these claims.

4. It is incumbent upon the Defence to make “a sufficient showing of materiality, within the meaning of [the Rule].”⁸ The Request fails in this respect.

5. The Defence’s reliance on the “Prosecutor’s representative’s” consideration of its request to obtain a redacted version of email exchanges between the anonymous source and the Prosecution, belies the sufficiency of the arguments advanced in the Request. Such consideration does not: (1) transform the character of the material sought or invest it with any particular value; or (2) suggest that the Prosecution has “agreed that the information could be deemed ‘material’.”⁹

6. To the contrary, the Defence omits the dispositive language in the 19 February 2014 email from the Prosecution to Counsel quoted at paragraph nine of the Request. In fact, that email provides:

“Please be advised that the information provided by the anonymous source is not being relied on or used either directly or indirectly as evidence in the case. As such, I do not see that it is relevant to the proceedings.”

7. In sum, there is no agreement by the parties as to the materiality or relevance of the information sought to any contested issue in this case.

⁴ Request, para. 11.

⁵ Request, para. 10.

⁶ Request, para. 10.

⁷ Request, para. 10.

⁸ Banda Appeals Decision, para. 9.

⁹ Request, para. 12.

B. The Chamber's disposition of previous Article 57(3)(a) requests is irrelevant

8. The Single Judge's consideration of previous unrelated Prosecution applications under Article 57(3)(a) of the Rome Statute ("Statute") has nothing to do with the disposition of the Request. The Defence's suggestion that the Single Judge should allow the disclosure of the material sought as a grant of "equal investigative latitude to the Suspect [to] allow him, similarly, to 'establish the truth'", confuses the issues before the Chamber and fails nevertheless to meet the threshold requirements for disclosure under Rule 77 of Rules.

C. The absence of a specific request for protective measures has no bearing on the determination of the Request

9. The fact that the Prosecution has not yet requested protective measures pursuant to Article 54(3)(f) of the Statute does not affect the determination of the Request. Article 54(3)(f) of the Statute confers on the Prosecution the authority, *inter alia*, to "take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information [and] protection of any person",¹⁰ which the withholding of the requested email exchanges has thus far accomplished.

10. There is no countervailing obligation or order to disclose the requested material. As such, a request for protective measures under Article 54(3)(f) of the Statute is premature. Contrary to the Request, there is no basis upon which to infer that the Prosecution "has no legal standing to object to disclosure"¹¹ on Article 54(3)(f) of the Statute grounds, since any such application would only become necessary if the Request is granted.

¹⁰ Article 54(3)(f) of the Statute.

¹¹ Request, paras. 14-16.

11. Should the Chamber consider it necessary to the determination of the Request, the Prosecution is prepared to provide the Chamber with a copy of the email exchanges sought on an *ex parte* basis.

III. Requested Relief

12. For the foregoing reasons, the Request should be denied. Should the Chamber determine that a disclosure obligation arises, the Prosecution respectfully requests a reasonable opportunity to apply for protective measures, pursuant to Article 54(3)(f) of the Statute, prior to making any disclosures.



Fatou Bensouda, Prosecutor

Dated this 3rd Day of March 2014

At The Hague, The Netherlands