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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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 Annexes A, B, C, D and E

**Public Redacted Version of “Joint Defence Request for remedies for disclosure
violations”**

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Defence teams for Messrs Babala, Bemba and Kilolo are, regrettably, compelled to request the Trial Chamber to:

- i. direct the Prosecution to comply with disclosure decisions;
- ii. notify the Prosecution that it may face sanctions under Article 71 of the Statute should these decisions not be complied with, forthwith; and
- iii. order the Prosecution to file a schedule of items in its custody.

2. The Defence does not request these measures lightly. *Inter partes* efforts to resolve this impasse have, however, proved fruitless, and the Defence has the right to expect that judicial decisions will be complied with, without debate or delay.

3. The deference accorded to the Prosecution as concerns the fulfilment of its disclosure obligations is also subject to two important caveats:

- a. Firstly, this deference does not apply in circumstances in which it is clear that the Prosecution has applied an incorrect or unduly narrow legal standard as concerns the scope of its disclosure obligations;¹ and
- b. Secondly, where it is apparent that the Prosecution has not complied with defined disclosure obligations, it is imperative that the Chamber steps in order to ensure that the rights of the Defence are not compromised.

4. Given that the trial is scheduled to commence on 29 September 2015, the Trial Chamber's immediate and effective intervention is required to ensure that the

¹ *Prosecutor v. Haradinaj*, Decision On Joint Defence Motion For Relief From Rule 68 Violations By The Prosecution And For Sanctions Pursuant To Rule 68bis, 12 October 2011, *para* 59; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions (30 June 2011) at *para*. 39

Prosecution's non-compliance does not further prejudice the right of the Defence teams to prepare their cases in a timely and effective manner.

5. The present filing is submitted on a confidential basis due to its citation of confidential filings and correspondence. A public redacted version will be submitted forthwith.

Procedural History

6. On 14 August 2015, the Trial Chamber issued a decision on the request by the Defence for Mr. Mangenda for an order for cooperation, in which it found that:²

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.

7. The Trial Chamber therefore directed the Prosecution to “the Prosecution to disclose to the Mangenda Defence all material related to the assessment of the legality of the telephone surveillance of Mr Mangenda”.

8. On 10 September 2015, the Single Judge of the Trial Chamber issued his decision on the Defence requests for Prosecution Requests for Assistance (RFAs), Judicial Records, and Audio-Recordings (hereinafter, “the Decision”).³ The Defence requests had encompassed a wide-range of RFAs, which were directed to the collection of evidence in several countries (including Cameroon, Austria, the DRC, France, CAR, Germany, and Belgium).

9. At paragraph 13 of the Decision, the Single Judge found that

² ICC-01/05-01/13-1148-Conf, para. 10.

³ ICC-01/05-01/13-1234-Conf.

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. The Defence have alleged that certain searches or intercepts undertaken by national authorities in executing the Requests for Assistance might have breached the principle of proportionality or were initiated upon incorrect or misleading information, and that some of the evidence collected was edited before disclosure to the Defence. In such instances, it is imperative that the Defence be able to test the reliability of the procedures employed in collecting the evidence against them, and the Requests for Assistance may assist in this process. The Requests are therefore granted in this regard, but redactions may be applied by the Prosecution in accordance with the protocol establishing a redaction regime adopted in this case.

10. The Single Judge therefore granted the request for access to RFAs, within the terms set out in paragraph 13, and ordered the Prosecution to disclose the materials no later than five days of the notification of the decision.

11. On Monday 14 September 2015, the Prosecution submitted a “Notice of Compliance”, in which the Prosecution announced that:⁴

The Prosecution considers that paragraph 13 of the Chamber’s 10 September Decision is constrained to the “intercepted data and communications”. Since the Prosecution obtained intercepted communications solely from The Netherlands, its disclosure obligations in respect of the Requests for Assistance to the Dutch authorities concerning intercepted data and communications have been discharged through its 28 August 2015 disclosure.

12. On 15 September 2015, the Defence for Mr. Arido conveyed to the Prosecution their urgent need for disclosure of the RFAs concerning [REDACTED], and the relevance that such documents would have to their preparation as concerns witnesses D2 and D3.⁵

⁴ ICC-01/05-01/13-1239-Conf.

⁵ Annex A.

13. On the same day, the Defence for Mr. Bemba also wrote to the Prosecution, noting that a plain reading of paragraph 13 dispels such an interpretation, and inviting the Prosecution to withdraw the Notice, failing which the Defence would be compelled to raise the issue of compliance with the Trial Chamber.⁶

14. The Defence for Mr. Bemba further stressed Mr. Bemba's right to a speedy trial. This right can only be respected if all aspects of the proceedings are conducted in an effective and expeditious manner; this self-evidently includes the disclosure process.

15. The Prosecution did not respond to these Defence emails, nor has it withdrawn its Notice, provided further disclosure, or, requested a variation in the deadline for disclosure or leave to appeal the Decision.

Submissions

The Prosecutor has wilfully failed to comply with the Decision

16. At paragraph 13 of the Decision, the Single Judge referred to allegations of improper interference with witnesses, and the right of the Defence "to be able to test the reliability of the procedures employed in collecting evidence against them".

17. The Single Judge also explicitly referred to the parameters of the Defence request as encompassing a range of different types of evidence, in different countries. Whereas the Single Judge ruled that the Defence request for access to

⁶ Annex B.

audio-tapes was not justified, the Single Judge did not in other way exclude particular countries or types of evidential records from his ruling.⁷

18. The Prosecution's assertion that the Decision is limited to the content of telephone conversations in The Netherlands cannot be reconciled with any aspect of the Decision. Even if the ruling was restricted to "intercepted data and communications" (which it is not), it is impossible to restrictively interpret the words "data" and "communications" to exclude Call Data Records, Financial Records, and emails *inter alia*. Indeed, had the Single Judge intended paragraph 13 to be interpreted in this manner, then the decision would have been rendered moot by his prior ruling concerning the request of the Mangenda Defence for access to the Dutch records.

19. The Prosecution does not have the right to define or modify *proprio motu* judicial rulings. If the Prosecution was of the view that the parameters of paragraph 13 of the Decision were in any way ambiguous, it could have filed a timely request for clarification, so that the issue could be addressed and resolved prior to the expiration of the deadline. The Prosecution did not do so.

20. Similarly, if the Prosecution disagreed with the legal foundation of the Single Judge's decision, Prosecution could have filed a request for suspensive effect or variation of the deadline, pending the submission and resolution of a request for leave to appeal.

21. The Prosecution did not, however, resort to any of the appropriate avenues for contesting a judicial decision.

⁷ As a matter of fact 'Intercepted data and communications' were not only obtained solely in the Netherlands, as demonstrated already in Annex A of filing ICC-01/05-01/13-1135. For example, the Prosecution requested several data information to Belgium authorities concerning records of calls and SMS (see CAR-OTP-0083-1415 or CAR-OTP-0083-1350).

22. This situation thus falls squarely within the factual matrix deprecated by the Appeals Chamber in the *Lubanga* case,⁸ and can only be construed as intentional non-compliance with the terms of the Single Judge's ruling.

The rights of the Defence have been prejudiced through this non-compliance

23. The deadline for effecting disclosure elapsed on 16 September 2015. At this juncture, the Defence has not received disclosure of a range of RFAs from Belgium, Cameroon, Austria, France, DRC, [REDACTED], and [REDACTED] *inter alia*.

24. The Defence first requested these RFAs in July 2015; 2 months have elapsed and the Defence has still not received these records.

25. The evidence collected pursuant to these RFAs was directly relevant to the Prosecution's three Bar Table Motions, and the Defence preparation for the first eight witnesses.

26. The Defence has also requested the RFAs as a preliminary step towards identifying which domestic judicial decisions or records might be relevant to arguments concerning the legality of the processes used to collect the evidence on a domestic level.

27. Although the Defence has requested to raise supplementary issues concerning the impact of issues of legality on the admission of evidence in the first

⁸ ICC-01/04-01/06-2582, para. 1, and 46: "The Prosecutor failed to comply with both orders and remained in noncompliance at the time of the Impugned Decision. The Prosecutor does not contend that his non-compliance was caused by any external factor. He was aware of the orders and voluntarily chose to pursue other actions which he considered to be justified rather than to comply with the orders. The Prosecutor's non-compliance was deliberate. The Appeals Chamber finds that such wilful non-compliance constituted a clear refusal to implement the orders of the Chamber. To characterise such wilful noncompliance as anything other than refusal, as the Prosecutor does in his Document in Support of the Appeal, is, at best, disingenuous."

three Bar Table Motions, the Trial Chamber has not confirmed that the Defence will in fact have the right to do so.

28. Belated and piecemeal disclosure also delays and impedes the ability of the Defence to adopt a timely and comprehensive approach to Prosecution evidence. For example, the conclusions in the reports prepared by Mr. Hemmings and Mr. Pluijmers are predicated on the assumption that all items cited in these reports (and used for attribution or analytical purposes) are admissible (which is an issue which could be contingent on information in the RFAs).

29. The RFAs would shed light on the accuracy and reliability of the assumptions upon which the reports are based: for example, why there is a discrepancy of timing in different records allegedly representing the same contact (which concerns the Hemmings report), or whether the Prosecution requested customer information for the determination of phone number attribution (Hemmings related).

30. The possibility that some items, should however, be excluded from their consideration could thus impact on the conclusions or assumptions employed in these reports. The Defence therefore required timely access to the RFAs (and related judicial records) in order to examine and potentially contest the foundations of these reports.

31. It is unfair for the Defence to prepare its cross-examination 'blind'. If the Prosecution is in possession of this information, it should be disclosed prior to the witness's testimony so that the Defence can make informed strategic decision, and seek instructions accordingly.

32. The Prosecution's non-disclosure has thus already prejudiced Defence preparation, and will continue to do so, until remedied. The gravity of the Prosecution's non-compliance is exacerbated by the fact that it has forced the Defence to once again, divert its time and resources to litigating disclosure issues, rather than fully concentrating on the trial, which will start in ten days' time.

The Defence has the right to an effective remedy for this non-compliance

33. As underscored by the Appeals Chamber,⁹

when there is a conflict between the Prosecutor's perception of his duties and the orders of the Trial Chamber, the Trial Chamber's orders must prevail. This is a fundamental criterion for any trial to be fair. The Appeals Chamber fully endorses the statement of the Trial Chamber that "[n]o criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations". Orders of a Trial Chamber are binding orders, to be implemented unless and until they are suspended, reversed or amended by the Appeals Chamber or their legal effects are otherwise modified by an appropriate decision of a relevant Chamber.

34. The Appeals Chamber further emphasised in the same decision that,¹⁰

proper management of the disclosure regime including ongoing monitoring of the necessity of maintaining redactions is a key part of ensuring a fair trial, holding, in logic which even more strongly applies to a Trial Chamber, that Pre-Trial Chambers have a continuing duty to review restrictions on disclosure to ensure they are necessary and sufficiently counterbalanced by other procedures. In the present case, the Prosecutor's refusal to comply with or to be bound by the orders of the Trial Chamber extended to a significant part of the trial and concerned issues of the trial's fundamental fairness. It threatened not only Mr Lubanga Dyilo's right to be tried without undue delay but also the fairness of the proceedings as a whole. If a Trial Chamber loses control of such a significant and fundamental part of proceedings because of the Prosecutor's refusal

⁹ ICC-01/04-01/06-2582, para. 48. The ICTY Appeals Chamber has also emphasised that the Tribunal "will not tolerate anything short of strict compliance with disclosure obligations"; Prosecutor v. Krstic Case No. IT-98-33-A, Judgement, 19 April 2004, para 179.

¹⁰ Para. 58.

to comply with its orders, it would indeed be impossible to ensure a fair trial, and a stay of proceedings would then be justified.

35. The Appeals Chamber nonetheless attached the caveat that the Trial Chamber should first employ other mechanisms at its disposal before resorting to the more drastic remedy of a stay of the proceedings. This includes the issuance of a notice under Article 71 of the Statute that the Prosecution could face sanctions if immediate compliance is not forthcoming.

36. In the current situation, there is a need to ensure full and timely compliance with the terms of the Defence, but also ongoing compliance with the Prosecution's disclosure obligations.

37. The conduct of the Prosecution displaces any presumption that the Prosecution is executing its disclosure obligations in the manner required by the Appeals Chamber's interpretation of Article 67(2) and Rule 77.

38. Throughout the pre-trial phase, there have been significant disputes between the Prosecution and the Defence concerning the legal scope of the Prosecutor's disclosure obligations. Despite averring that information concerning the circumstances under which a witness changes or recants their testimony was relevant to the credibility in the *Ruto* case,¹¹ the Prosecution adopted the opposite tact in this case.¹²

¹¹ ICC-01/09-01/11-1527-Red.

¹² ICC-01/05-01/13-1118. Notably, in filing ICC-01/05-01/13-1237-Conf-Red, at para. 29), the Prosecution averred that there were ground to subpoena D-54 on the basis that "the Prosecution has exhausted all avenues to secure P-201's voluntary attendance. After multiple attempts, the Prosecution first established communication with P-0201 on 3 July 2015. When asked whether he was willing to testify before the Court, P-0201 unequivocally stated that he did not want to testify and had already said what he had to say during his testimony in the Main Case." When the Defence requested the Prosecution to disclose the records of such attempts and the contact of 3 July 2015, the Prosecution responded that "[t]he Defence has no procedural right in this respect, as indicated at paragraph 4 of the motion. The mere notification of a filing does not confer standing on the Defence. Thus, the information sought is neither relevant, nor material to your preparation." See Annex C.

39. Similarly, whereas the Prosecution argued that the Prosecution had the right to receive information concerning *any* expenses paid to the 14 witnesses in this case (including VWU expenses),¹³ the Prosecution refused to disclose the same type of information to the Defence.¹⁴

40. The Prosecution also failed to respond to some requests,¹⁵ or responded after a significant length of time.¹⁶

41. The Prosecution has still not disclosed communications pertaining to demands for financial or other forms of assistance. For example, it appears that the Court has assumed the responsibility for paying the rent, furniture, utilities, and relocation costs for D-2 and D3, but the Defence has not been disclosed the basis as to why this occurred, upon whose initiative, and if requested by the witnesses, the timing of such requests.

42. The fact that the Defence have been compelled to obtain multiple judicial rulings in order to secure access to these materials is also reflective of the fact that

¹³ ICC-01/05-01/13-784-Corr.

¹⁴ ICC-01/05-01/13-1118.

¹⁵ ICC-01/05-01/13-1103, para. 11-13. On 15 September 2015, the Defence for Mr. Bemba sent the Prosecution an urgent query concerning meetings with domestic authorities referred to by Mr. Hemmings in his curriculum vitae. Notwithstanding the fact that Mr. Hemmings is listed as the first witness, the Prosecution has not responded. See Annex D.

¹⁶ See for example, Letter sent on 30 April 2015 from Bemba Defence Team where the Prosecution responded on 20 May 2015; Letter sent on 26 June 2015 from Bemba Defence Team (ICC-01/05-01/13-1098-Conf-Exp-AnxD) where the Prosecution responded on 11 July 2015 (ICC-01/05-01/13-1098-Conf-Exp-AnxE); Letter 10 July 2015 from Bemba Defence Team (ICC-01/05-01/13-1213-Conf-AnxA) where the Prosecution responded on 28 July 2015 (ICC-01/05-01/13-1213-Conf-AnxA). CAR-OTP-0090-2036; CAR-OTP-0090-2037, CAR-OTP-0090-2038; CAR-OTP-0090-2005 are elements which are in [REDACTED], dated 5 August 2015 for which there is no translation in one of the working language of the Court. P-245's statements (CAR-OTP-0085-0857-R01) was taken on 5 November 2014 but was only disclosed on 04 June 2015. P-260's statements (CAR-OTP-0084-0412; CAR-OTP-0084-0442; CAR-OTP-0084-0472; CAR-OTP-0084-0487) were taken on 5 November 2014 but were only disclosed on 04 June 2015. Investigator's report from 16 July 2014 (CAR-OTP-0082-1418-R01) was only disclosed on 27 July 2015. Health issues included in Investigator's report from 02 September 2014 and disclosed to defence on 12 August 2015 ICC-01/05-01/13-665-Conf-Anx-Red.

the Prosecution's conduct does not comport with the standards set out for Rule 77 disclosure in the *Banda* case.¹⁷

43. In particular, rather than conducting a thorough review of the information in its custody and making a *proprio motu* determination as to whether the material could be material for the preparation of the Defence, the Prosecution has required the Defence to first submitted detailed arguments, which it has then dismissed in summary terms.¹⁸

44. Indeed, the Prosecution continued to maintain that Defence requests for access to specific information concerning the legality of the processes for collection of evidence did not fall within the scope of Rule 77 after the Trial Chamber had confirmed that it did.¹⁹

45. There is therefore a need for clear safeguards in order to ensure that the right of the Defence to receive information in the custody of the Prosecution, which could be relevant to its preparation, is not further compromised, delayed or obstructed. The need for safeguards is further required in order to ensure the appearance of fairness and impartiality in a case, which was instigated by the Prosecution against its litigation adversary in ongoing proceedings.

46. The particular measures imposed by the Chamber should aim to advance the case, rather than simply penalise the Prosecution. Accordingly, whereas it might be appropriate to put the Prosecution on notice that it could face sanctions if immediate disclosure is not effected, the imposition of sanctions will not in itself, cure what appears to be a defective approach to the scope and nature of the Prosecution's disclosure obligations in this case.

¹⁷ ICC-02/05-03/09-501.

¹⁸ Annex C

¹⁹ Annex E.

47. It is also not effective to require the Prosecution to certify that it has complied with its disclosure obligations in circumstances in which the Prosecution has repeatedly adopted an overly narrow definition of its disclosure obligations.²⁰

48. The Defence submits that the most effective remedy to ensure the fairness and expeditiousness of the proceedings would be to order the Prosecution to disclose a full schedule of items collected pursuant to its investigation into the suspects and fourteen witnesses in this case (irrespective as to whether the investigation was initiated under the umbrella of the Main Case or the Article 70 case) with the date and nature of the items collected.

49. This schedule should include:

- i. The destination and date of any RFAs;
- ii. The description of any information received from States, organisations or persons, and the date of receipt (i.e. CDRS from Cameroon from 2012-2014, received on X date);
- iii. The dates of all interviews with actual and potential witnesses (with the pseudonym provided if the name has not been disclosed to the Defence); and
- iv. A log of contacts and communications between the Prosecution and Prosecution witnesses (date of contact, name/pseudonym of witness).

50. This schedule would enable the Defence to submit targeted and informed requests for disclosure, which would expedite the ongoing disclosure request. It would also allow the Defence to prioritise its disclosure requests in accordance with the schedule of witnesses, and thus avoid any unnecessary delays in the proceedings, or the requirement of recalling witnesses.

²⁰ Cf. CC-01/09-01/11-1774-Red.

51. This measure is consistent with the practice of the *ad hoc* Tribunals to require the Prosecution to file detailed disclosure reports in cases in which it appears that the Prosecution has adopted an erroneous approach to its disclosure obligations.²¹ Parties have also been required to submit a list of all documents collected by them in their investigations in order to ensure full compliance with disclosure obligations concerning a particular witness.²²

52. The Appeals Chamber of the ICTR/ICTY has also upheld the necessity of requiring the Prosecution to create an electronic index of documents as concerns the Electronic Disclosure Suite (EDS).²³ The EDS system employed at the ICTY/ICTR is analogous to the Prosecution's Rule 77 obligations at the ICC. Whereas the practice of the ICTY/ICTR is to store the general fruits of the Prosecution's investigations on the EDS and require the Defence to sift through it in order to find information that might be relevant to the Defence, the ICC requires the Prosecution to perform this exercise on behalf of the Defence.

53. In both instances, though, the fact that the information is hypothetically available either *via* the EDS or *via* the custody of the Prosecution (at the ICC) is of no utility to the Defence if the Defence is completely unaware of the existence of this information, and has no mechanism to audit the materials. In both scenarios, the Prosecution has for all intents and purposes buried the exculpatory materials, at

²¹ Prosecutor v. Karadzic, No. IT-95-5/18-PT, Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011; Prosecutor v. Kordić & Čerkez, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, para. 15; Prosecutor v. Blaškić, Decision on the Appellant's Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000.

²² Prosecutor v. Popovic, Transcript of 29 October 2008, T27553

²³ Prosecutor v. Nikola Sainovic et al., Case No. IT-05-87-A, Decision on Nikola Sainovic's Second Motion for Admission of Additional Evidence on Appeal, 8 September 2010, para. 21; (Prosecutor v. Radovan Karadzic, IT-95-5/18- PT., Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities, 10 March 2009, para. 20.

least unless it notifies the Defence of the existence of such materials and provides a means by which the Defence can be reasonably expected to find them.²⁴

54. Finally, an order for Prosecution to submit such a schedule is fully consistent with the duty of the Trial Chamber to issue such orders as are necessary to ensure the “disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial”.²⁵

Relief sought

55. For the reasons set out above, the Defence respectfully requests the Trial Chamber to:

- i. direct the Prosecution to comply with disclosure decisions;
- ii. notify the Prosecution that it may face sanctions under Article 71 of the Statute should these decisions not be complied with, forthwith; and
- iii. order the Prosecution to file a schedule of items in its custody.



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²⁴Prosecutor v. Karemera, ‘Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations’, 30 June 2006, para. 13.

²⁵ Article 64(3)(c) of the Statute; ICC-02/04-01/15-251, para. 1.



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Dated this 21th day of June, 2016

The Hague, The Netherlands