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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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

**Public Redacted Version of “Defence Response to ‘Prosecution Request to Add
Twelve Items of Evidence to its List of Evidence’”**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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Introduction

1. The 'Prosecution Request to Add Twelve Items of Evidence to its List of Evidence'¹ (the Request) should be rejected on the grounds that:
 - a. The Prosecution failed to act with requisite diligence in seeking the admission of these items;
 - b. As conceded by the Prosecution - the additional items require further analysis. Their inclusion would be meaningless without further investigations, which are precluded at this late point;
 - c. The inclusion of these items at this juncture would either compromise the right of the Defence to adequate time and facilities, or delay the commencement of the trial, which would be contrary to Mr. Bemba's right to a speedy trial.

2. This response has been filed on a confidential basis in order to accord with the classification of the Request.

Submissions

- i. *The Prosecution failed to act with requisite diligence in seeking the admission of these items*

3. The Prosecution has requested to add additional items to its list of evidence after the expiration of its deadline for doing so.

4. Given that this constitutes a retrospective request for a variation of a time limit, it is necessary for the Prosecution to demonstrate the existence of circumstances beyond the Prosecutor's control.²

¹ ICC-01/05-01/13-1114-Conf.

5. This element is not fulfilled in circumstances in which the Prosecutor anticipates receiving additional evidence after the deadline, but fails to seek a variation or to foreshadow its intent to do so before its expiration.³ The Prosecution in this case is clearly aware of this requirement, as reflected by its proactive request for a variation of pre-confirmation deadlines.⁴

6. The Request therefore falls at the first hurdle due to the fact that:

- i. The Prosecution was aware of the potential relevance of the eleven call logs prior to the expiration of the deadline, and cannot be accorded a second bite of the cherry due to its omission to include them; and
- ii. The Prosecution was aware of the potential relevance of information emanating from the Belgian search and seizures, but took no steps to vary the deadline or suspend it prior to its expiration.

² Regulation 35(2) of the Regulations of the Court; *Prosecutor v. Katanga and Ngudjolo*, Decision on the Prosecution Motion for leave to disclose and add the investigator's report concerning Witness P-268 to the List of Incriminating Evidence, 27 September 2010, ICC-01/04-01/07-2325-Red, para. 14.

³ *Prosecutor v. Katanga and Ngudjolo*, Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009, 9 October 2009, ICC-01/04-01/07-1515-Corr, para. 33:

33. When a party knows that it will not be able to meet a set time limit, but still has every intention of obtaining the material in order to present it at a later stage, it must, for the reasons outlined above, file a formal application under regulation 35(2) before the deadline. This duty of putting on notice the Chamber and the participants is all the more imperative when the foreseeable volume and complexity of new evidence is as important as it is in the present case. This was not done, even though the Prosecution, by its own admissions, still had the intention of carrying out the expert mission after the deadline. As the Chamber finds that no reasons beyond the Prosecution's control existed that prevented it from filing a formal application under regulation 35(2), it cannot accept the application for an extension of time limit.

See also ICC-01/09-01/11-762, para. 40, where the Prosecution foreshadowed its intent to request the inclusion of the witness on its list should there be a change in circumstances after the expiration of the deadline.

⁴ ICC-01/05-01/13-140-Red, para. 13; ICC-01/05-01/13-234-Red.

7. With respect to the call data logs, the Prosecution's explanation as to why it did not include the logs on its list of evidence lacks credibility and cogency.
8. On the one hand, the Prosecution states that these logs were 'inadvertently excluded',⁵ which implies that the Prosecution was aware of their relevance as of 30 June 2015, but simply failed to list them. On the other hand, the Prosecution also claims that its decision to seek the admission of these logs was triggered by 'new information' which was only made available to it on 24 July 2015.⁶
9. Regarding the first claim, the Prosecution did not file its Request until 30 days after it submitted its list of evidence. A diligent Prosecution could have easily cross-referenced its filed list to its confirmation list, and ascertained within a very short period of time whether there were material omissions. In the absence of any explanation as to why the Prosecution did not audit its list or raise this issue at an earlier point, this explanation fails to provide a sufficient basis for the inclusion of these items.⁷
10. The Prosecution alternative claim - that the Request is justified by the recent disclosure of 'new information' – hinges on the Prosecution's assertion that at the time that it submitted its list of evidence, it was unaware that the number [REDACTED] could be attributed to Mr. Babala and not Mr. Kilolo.⁸
11. This is not correct. The Independent Counsel had in fact linked this number to Mr. Babala in a report, which was transmitted to the Prosecution on 20

⁵ Para. 11.

⁶ Para. 14.

⁷ *Prosecutor v. Katanga and Ngudjolo*, Decision on Prosecution requests ICC-01/04-01/07-1726-Conf-Exp and ICC-01/04-01/07-1738-Conf-Exp made pursuant to regulation 35 of the Regulations 15 February 2010, ICC-01/04-01/07-1869, para. 12.

⁸ Request, para. 14.

May 2015.⁹ The Prosecution therefore had 40 days within which to consider the implications of the Independent Counsel's attribution, and to take any measures necessary to safeguard its procedural rights prior to the expiration of the 30 June 2015 deadline.

12. Of further note, the Prosecution was aware since 2 June 2015 that the Independent Counsel was in possession of a Sim card (which had been seized by the Belgian authorities), and that it was unlikely that its contents would be transmitted to the parties prior to the expiration of the deadline.¹⁰

13. Notwithstanding the clear relevance that the Sim card would have to attribution issues, the Prosecution urged no expedition on this particular aspect, and took no steps to request the Chamber to suspend the 30 June deadline as concerns information emanating from this card.

14. Rather than doing so, it seems that instead, the Prosecution attempted to 'flush out' the Defence position concerning telephone attribution by filing a procedurally defective Bar table motion (which, incidentally, includes a record concerning a telephone call between a number attributed to Fidele Babala, and [REDACTED]).¹¹

15. With respect to the list of expenses, as noted above, the Prosecution failed to act with sufficient diligence to protect its procedural rights as concerns evidence emanating from the Belgium search and seizures.

⁹ ICC-01/05-01/13-845-Conf-AnxC-Red, pp. 8, 21.

¹⁰ ICC-01/05-01/13-981-Conf.

¹¹ ICC-01/05-01/13-1013-Conf-AnxA, p. 29. Category II: Call Data Records, item 12 (CAR-OTP-0071-0503, rows 4435 and 4436).

16. There are therefore no exceptional circumstances, which would warrant the late addition of these items.¹²

ii) The items have no evidential value without further analysis/investigations, which are precluded at this late point

17. The 'list of expenses' and the 'call data logs' have no compelling evidential value, which would justify their late inclusion. In order to adduce evidential submissions, which would meet the standard of proof set out in Article 69 of the Statute, it would be necessary to conduct further forensic analysis, which would open the floodgates to additional litigation, and delays.

18. The 'list of expenses' is an undated sheet of paper, in unidentified handwriting, with various abbreviations and amended/written over figures of unknown denomination.

19. At a minimum, the Prosecution would need to establish forensically whose handwriting it is, and, on the basis of independent analysis, that certain numerical values correspond to that person's particular style of numbers.

20. Contrary to the position of the Prosecution, it is impossible to extrapolate from this document that it lists [REDACTED] as pocket money for witnesses.¹³ It was, moreover, misleading to even claim that it could – the electronic version clearly reflects the fact that this number is not a [REDACTED], if it is indeed one number at all, as opposed to two different written over numbers.

¹² ICC-01/04-01/07-1869, para. 18; ICC-01/04-01/07-2325-Red, para. 19.

¹³ Request, para. 8.

21. Moreover, the more reasonable explanation concerning the purpose of this sum is that the (uncertain) numerical figure refers either to the ‘*déplacement temoins*’, or ‘*Logement et repas*’ and not ‘*poche tem*’, which has a question mark next to it. As such, it falls within the scope of ordinary witness expenses, and has no relevance to Article 70 charges. This is particularly the case given that the list is undated and the expenses do not pertain to specific witnesses - there is thus no apparent link to an incident in the charges.

22. With respect to the call data logs, the Prosecution has acknowledged that it is “currently undertaking further analysis of Bemba’s communications with that number”.¹⁴

23. The trial is scheduled to commence in less than two months. It is therefore a matter of significant concern that the Prosecution is still not certain of its case as concerns the attribution of numbers, which it relied upon for the confirmation of charges.

24. More importantly, the Defence has the right to know what the Prosecution case is, sufficiently in advance of the commencement of the trial so that the Defence can prepare. If the Prosecution is still undertaking further analysis as concerns this number, the Defence will be left completely in the dark as to whether the Prosecution’s position is that it should be attributed to Mr. Babala, or that it should be attributed to Mr. Kilolo (or neither).

25. This uncertainty is aggravated by the fact that the Prosecution has not attempted to modify any of its previous attributions or analysis based on its former position.

26. This degree of uncertainty – this close to trial – is unacceptable.

¹⁴ ICC-01/05-01/13-1114-Conf, para. 14.

27. Contrary to the position of the Prosecutor, the list of contacts also did not 'attribute' the number to Mr. Babala. The Independent Counsel – who is not a forensic analyst – created his own table, on the basis of unknown information and metadata, which places a number next to 'Babala *bis*'. There is no way of ascertaining from this table when these words were linked to the number in the 'carte memoire'.

28. It is also impossible to ascertain the connotation of '*bis*', and how this qualifies 'Babala'. In this regard, the random linkage of words and numbers in the table is further reflected by the fact that the table places the word [REDACTED] and a [REDACTED] number next to the word [REDACTED], even though the Defence never had a [REDACTED] witness called [REDACTED], and Peter Haynes never had a [REDACTED] number.

29. As with the 'list of expenses', it is therefore clear that if the Prosecution wishes to rely on the list of contacts and the call data logs to establish an attribution which runs counter to other evidence (such as the list of privileged contacts), further forensic investigations would be required.

30. Although the Trial Chamber authorised the Prosecution to add the contact list to its list of evidence,¹⁵ the Chamber did not vary the deadline as concerns ancillary documentation, nor did the Prosecution apply to the Chamber for it to do so. It is therefore unfair for the Prosecution to 'piggy back' off the discrete exception authorised by the Chamber in order to incorporate several other documents now, and potentially, several more later.

(iii) *The inclusion of these items at this juncture would either compromise the right of the Defence to adequate time and facilities, or delay the commencement of the trial*

¹⁵ ICC-01/05-01/13-1092, para. 7.

31. The Prosecution never appealed the Trial Chamber's findings that the trial must commence on 29 September 2015, and all incriminating evidence must be disclosed by 30 June 2015, even if material had not been extracted and reviewed by the Independent Counsel by the set disclosure date.¹⁶
32. The Prosecution has also did not request the Trial Chamber to reconsider its finding that the Defence should be accorded three months from the disclosure of all incriminating material, to prepare prior to the commencement of trial.
33. Since the date for the commencement of the trial has not been shifted (and indeed, should not be shifted), the Request should be dismissed due to the fact that the inclusion of these items on the list would be incompatible with the right of the Defence to have a full three months to analyse and investigate the Prosecution case, prior to the trial.
34. The prejudice, which would arise from adopting a contrary stance, must also be assessed in light of the Prosecution's multiple requests for delays, which have steadily eroded the right of the Defence to adequate time and facilities.
35. The Prosecution sought – and was granted – delays as concerns the disclosure of the statements of P-261, its expert report, and its pre-trial brief. It has also been authorised to add the missing transcripts of D-54, and several items from the most recent Independent Counsel's reports.
36. Even if each request was justified in isolation, the cumulative impact has undermined the ability of the Defence to understand the specific contours of the Prosecution case, and further diminished the time available to the

¹⁶ ICC-01/05-01/13-959, para. 50.

Defence to do so. This is particularly the case given that these requests (and resultant disclosures) have taken place during judicial recess.

37. Although these late disclosures have already eroded the bright line of 'three months', there is a point at which it cannot be eroded any further. This point has been reached. The right of the Defence to be informed promptly of the Prosecution case and to have adequate time to prepare should not be compromised as a result of either the Prosecution's negligent failure to include information on its list, or its failure to act to preserve its procedural rights in a timely manner.

Relief Sought

38. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Trial Chamber to dismiss the Request.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 30th day of June, 2016

The Hague, The Netherlands