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

Date: 30/06/2016

**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’s Request to obtain  
Records from the Victims and Witnesses Unit ICC-01/05-01/13-937-Conf”**

**Source:** Defence for Mr. Jean-Pierre Bemba Gombo

**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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**REGISTRY**

**Registrar**

Herman von Hebel

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section Other**

## I. INTRODUCTION

1. The Prosecution has requested the Trial Chamber to order the VWU to disclose:<sup>1</sup>

records and dates of money provided, either directly or indirectly, by the Registry to the *Bemba* Defence in relation to the testimonies of 21 defence witnesses, and (ii) receipts, invoices and documents submitted by the *Bemba* Defence to VWU relating to the use of this money (together, “the Records”).

2. The Request is submitted pursuant to Articles 54(1)(a), and 57(3)(a) of the Statute,<sup>2</sup> which concern the Prosecution’s investigative powers, and the related power of the Chamber to issue such orders as may be required for an investigation.

3. The Prosecution’s powers under Article 54(1) are, however, circumscribed by the following provisions:

- a. Its duty to fully respect the rights of the defendants (which includes the right to confidentiality, the right to silence, and the privilege against self-incrimination (Article 54(1)(c)); and
- b. The requirements that its investigative powers must be:
  - i. directed to evidence that is relevant to the Court’s assessment in the proceeding in question (Article 54(1)(a)); and
  - ii. employed in an effective manner (Article 54(1)(b)).

4. The Request falls foul of these cumulative requirements, and should be dismissed in its entirety.

5. The Records concern confidential Defence information, and the Prosecution has failed to either establish a legal basis for obtaining the information or a legitimate forensic purpose for its acquisition.

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<sup>1</sup> Prosecution’s Request to obtain Records from the Victims and Witnesses Unit ICC-01/05-01/13-937-Conf, para. 4, (hereinafter, “the Request”).

<sup>2</sup> ICC-01/05-01/13-937-Conf, para. 1.

6. The Request concerns several witnesses who fall outside the confirmed charges in this case. The lack of direct relevance to the Prosecution case is reflected by the fact that Prosecution's justification can be distilled to the single point that the Defence *might* use these documents as Defence evidence, or raise arguments based on them at some unknown point in the future.

7. It is thus – once more – an attempt by the Prosecution to invoke its investigative powers in order to circumvent the Court's disclosure regime, as well as the defendant's right to silence and related privilege against self-incrimination.

8. Notwithstanding the fact that the requested 'Records' derive from the Defence of Mr. Bemba, the Prosecution has not directed the Request to the Defence. Instead, the Prosecution has sought to exploit the reliance of the Defence on 'neutral' service providers within the Registry in order to obtain access to information that it would not be able to obtain directly from the Defence.

9. This is inappropriate and contravenes the principle of equality of arms.

10. The Prosecution has also failed to provide any explanation or justification for its dilatory submission of this request. The submission of piecemeal and tardy investigative requests is contrary to Mr. Bemba's right to a speedy trial, and should not be condoned.

## II. CONFIDENTIALITY LEVEL

11. This Response has been filed on a confidential basis in order to accord with the classification of the Request. The Defence has no objection to this being reclassified as public.

### III. SUBMISSIONS

12. The Request concerns information, which is protected by Defence confidentiality, and which is not otherwise disclosable at this juncture of the case.

13. In particular, such documents may contain information regarding the locations of interviews, modalities of investigations, and identity of witnesses and related third persons.<sup>3</sup>

14. For this reason, information concerning witness payments are subject to a presumption of confidentiality,<sup>4</sup> and are not subject to disclosure unless the requesting party has *first* demonstrated a specific basis for disclosure (*i.e* that the documents concern the payment of expenses that go beyond ordinary payments, and are relevant to the credibility of a witness, who is appearing in the case in question).

15. The mere existence of Article 54(1)(a) does not constitute a basis for disclosure: it is a tool for investigations, not a tool for expanding the disclosure obligations of the Defence, or for conducting a fishing expedition in relation to information that would otherwise be protected by confidentiality.

16. The fact that the Pre-Trial Chamber granted a similar request at the investigation stage is also not a basis to grant this Request, at this stage of the proceedings.

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<sup>3</sup> See for example, ICC-01/05-01/13-957-Conf, para. 3.

<sup>4</sup> “[t]he management of expenditure that the Registry undertook under Rules 81 to 86 of the Regulations of the Registry come under its internal procedures and are not shared with participants to the proceedings”: ICC-01/04-01/07-T-215-Red-ENG-ET, p.7, lines 19-21.

17. When the Prosecution submitted its request to the Single Judge, it was in the midst of conducting its investigation into Article 70 allegations, and the charges had not been filed. The earlier request also concerned information which was "limited, targeted and necessary" for investigations,<sup>5</sup> and was directed to information that was acquired independently by the VWU (as opposed to information derived from the Defence).<sup>6</sup>

18. This case is not, however, in the investigation stage. The charges have been confirmed, and should control the proper ambit of any continued investigations.

19. The scope of the confirmed charges also frames the power of the Trial Chamber to issue orders pertaining to the Prosecution's investigations in this case. This is reflected in the Appeals Chamber's finding that it "agrees with the Prosecutor's contention that the parameters set forth in the charges define the issues to be determined at trial and limit the Trial Chamber's authority to the determination of those issues."<sup>7</sup>

20. The Request nonetheless includes several Main Case witnesses, who are not part of the group of fourteen witnesses, who were implicated in the charged incidents, and who were not referred to in the Decision Confirming the Charges.<sup>8</sup>

21. It is also not 'necessary' for Prosecution to obtain information concerning these Main Case witnesses for the sole purpose of pre-empting a putative Defence.<sup>9</sup>

22. At this stage of the proceedings, the defendants have not yet entered a plea, prosecution disclosure has not been completed, and the strategies of the respective Defence teams are likely to be in a formative stage. The Defence is not bound by its

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<sup>5</sup> ICC-01/05-01/13-182, p.3.

<sup>6</sup> ICC-01/05-01/13-172-Conf, para. 5.

<sup>7</sup> ICC-01/04-01/06-1432, para. 63.

<sup>8</sup> ICC-01/05-01/13-749.

<sup>9</sup> ICC-01/05-01/13-937-Conf, paras. 9-10.

submissions at the confirmation hearing and may adopt a different tactic at trial. It is therefore not certain that issues concerning these persons will form part of the trial process.

23. For this reason, the case law of the ICC has held consistently that the Prosecution has no right to receive the disclosure of information that *might* be relied upon by the Defence, but which does not comprise part of a concrete list of evidence, which the Defence *will* rely upon.<sup>10</sup>

24. The right to silence thus continues to apply until the Defence has evinced a concrete intention to advance a specific case, or rely on specific evidence.

25. For this reason, the Trial Chamber rejected a similar Prosecution request in this case on the grounds that:

The Prosecution has not satisfied the Chamber that such an order would not violate the rights of the accused '[n]ot to be compelled to testify or to confess to guilt and to remain silent' (Article 67(l)(g) of the Statute) and his right '[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal' (Article 67(l)(i) of the Statute).<sup>11</sup>

26. Moreover, in contrast to the 2014 request which was granted by the Pre-Trial Chamber, the Records were derived from the Defence, and constitute Defence property, which is subject to Defence confidentiality. The mere fact that the Records are in possession of the VWU and not the Defence does not displace this conclusion or create such an independent basis for disclosure.

27. The Records were provided to VWU as part of VWU's duty to provide neutral assistance to the Defence and Defence witnesses; the VWU did not acquire them in an independent manner.

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<sup>10</sup> See case law set out at paras. 44-48 of ICC-01/05-01/13-836.

<sup>11</sup> ICC-01/05-01/13-907, para. 14.

28. Unlike the Prosecution, which has its own administrative and budgetary services, the Defence is dependent on the Registry to facilitate its work. This dependency should not, however, operate to the detriment of the confidentiality or independence of the Defence. For this reason, Rule 20(1)(a) specifies that the Registrar shall facilitate the protection of Defence confidentiality as defined in Article 67(1)(b), and Rule 20(2) requires the Registrar to meet the administrative requirements of the Defence in a manner which ensures “the professional independence of Defence Counsel”.

29. Regulation 130 of the Regulations of the Registry reiterates the Registrar’s obligation to respect the confidentiality and professional independence of counsel, and further clarifies that all information concerning the provision of legal assistance shall be treated with “the utmost confidentiality. [Registry staff] shall not communicate such information to any person, except to the Registrar or to the legal aid commissioners”.

30. Any information received by Registry sections as part of their mandate to assist and support the Defence must therefore remain subject to Defence confidentiality.

31. Contrary to the Prosecution’s submissions at paragraph 11, it is also not correct that the Trial Chamber ‘granted’ a Prosecution request to order the VWU to disclose this type of information in the Main Case.

32. The cited decision (ICC-01/05-01/08-2421) concerned a request from the Trial Chamber for the VWU to submit observations in relation to a similar Prosecution request. As noted by the Trial Chamber, the VWU did not confine its submissions to ‘observations’, the VWU, but, on a unilateral basis:<sup>12</sup>

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<sup>12</sup> ICC-01/05-01/08-2606-Conf, para. 3.



[REDACTED] [REDACTED], [REDACTED] [REDACTED]  
 [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
 [REDACTED] [REDACTED] [REDACTED], [REDACTED]  
 [REDACTED] [REDACTED] [REDACTED], [REDACTED]  
 [REDACTED] [REDACTED] [REDACTED]. [REDACTED]  
 [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
 [REDACTED] [REDACTED].

33. The VWU's error cannot be equated to a judicial precedent.

34. Finally, the Prosecution has failed to provide any explanation or justification for the belated submission of the Request.

35. Irrespective as to the issue of whether the Prosecution has an unfettered right to conduct post-confirmation investigations in order to obtain incriminating evidence,<sup>13</sup> the Prosecution has a duty to conduct its investigations in a diligent manner, which respects the right of the defendants to a speedy trial.

36. The present submission of the Request fails to comport to these requirements.

37. In 2012, the Prosecution anticipated the possible relevance of documents concerning the expenses of Defence witnesses in the Main Case. Nonetheless, although the documents it received pursuant to its 2012 Request only dated until November 2012, the Prosecution took no steps to address this gap until 22 December 2014.<sup>14</sup>

38. This was over two years since it submitted its first request, over a year after the accused were first arrested, and almost four months after the Kilolo Defence apparently placed the matter at issue.<sup>15</sup>

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<sup>13</sup> ICC-01/04-01/10-51, para. 44; ICC-01/09-02/11-728, paras. 119-120.

<sup>14</sup> ICC-01/05-01/13-784-Corr.

<sup>15</sup> ICC-01/05-01/13-937-Conf, para. 12. The documents in question were filed on 26 August 2014.

39. Moreover, although Judge Tarfusser indicated that such a request should be directed to the Trial Chamber,<sup>16</sup> a further four months elapsed before the Prosecution filed the current Request.

40. Whilst some investigative delays might be justifiable, in the present case, the delay in submitting the Request, and the further delays that are likely to be engendered if the Request is granted, are completely disproportionate to the nature of an Article 70 case and the penalties that could likely be incurred in connection with such a case.

41. Granting the Request would therefore fall foul of the Trial Chamber's duty to ensure that the trial is fair and expeditious, and conducted with full respect for the rights of Mr. Bemba.

#### IV. RELIEF

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



Melinda Taylor  
Counsel of Mr. Jean-Pierre Bemba

Dated this 30<sup>th</sup> day of June 2016

The Hague, The Netherlands

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<sup>16</sup> ICC-01/05-01/13-799.