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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 Redacted Version with Confidential Annexes A-L

**Response to Bemba Request for Further Orders of Disclosure
(ICC-01/05-01/13-1589-Conf)**

Source: Defence for Jean-Jacques Kabongo Mangenda

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

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I. INTRODUCTION

1. Jean-Jacques Mangenda supports Jean-Pierre Bemba Gombo's request for further orders for disclosure.¹ The Prosecution, instead of abiding by the well-established principle that Rule 77 "is to be interpreted broadly",² has taken a narrow view of its disclosure obligations. This narrow view is reflected in the Prosecution's frequent resistance to reasonable and appropriate requests for disclosure, and its tardy disclosure of information. Mr. Bemba's current request is affirmed by the Trial Chamber's own previous ruling 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."³
2. The requested order is necessary to ensure that the Prosecution is disclosing all documents falling within Rule 77 of the Rules of Procedure of Evidence. The more that the Prosecution applies complex or narrow criteria of disclosure, or inserts qualifications as to the scope of its disclosure obligations, the greater the danger that material subject to disclosure is not being disclosed. The danger is compounded by the possibility that there are two separate Prosecution trial teams necessarily involved in the disclosure process. The disclosure order as requested by the Bemba Defence is, accordingly, appropriate in these circumstances. Further, no Rule 81(1) redactions or non-disclosures should be permitted in respect of any communication with any entity other than the Office of the Prosecutor itself.

II. PROCEDURAL HISTORY

3. The Prosecution was required to disclose all incriminating material by 30 June 2015, and to file any request for non-standard redactions to materials in its possession no later than 9 June 2015.⁴

¹ *Bemba et al.*, Defence Request for Further Orders of Disclosure, ICC-01/05-01/13-1589-Conf, 2 February 2016, para. 4. This submission is a public redacted version prepared pursuant to the Chamber's direction in its *Decision Closing the Submission of Evidence and Further Directions*, ICC-01/05-01/13-1859, 29 April 2016.

² *Bemba et al.*, Decision on the Mangenda Defence Request for Cooperation, ICC-01/05-01/13-1148-Conf, 14 August 2015 ("Decision on Cooperation"), para. 8 (citing *Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433, 11 July 2008, paras. 77-78).

³ *Id.* para. 10.

⁴ *Bemba et al.*, Decision on Modalities of Disclosure, ICC-01/05-01/13-959, 22 May 2015, para. 51 ("[t]he Chamber sets a disclosure deadline of 30 June 2015 for the Prosecution. This is the date by which the

4. On 14 August 2015, the Trial Chamber ordered the Prosecution to disclose “all material related to the assessment of the legality of the telephone surveillance of Mr. Mangenda in accordance with paragraphs 10 and 11 above.”⁵ The Trial Chamber also enunciated a broader principle that the Prosecution’s “disclosure obligations extend to any material in the possession of the Prosecution which would assist the Mangenda Defence in determining the legality of the audio-recordings.”⁶
5. On 10 September 2015, the Prosecution filed a notice of purported compliance with the decision:

The Prosecution considers that, by its terms, the Chamber’s 14 August Decision is constrained to the particular subject matter of the Request, namely the intercepted material and does not extend — out of context — to “any and all” evidence collected in this case. The Prosecution further understands that the 14 August Decision, per rule 77 of the Rules of Procedure and Evidence (“Rules”), is necessarily confined to documents material to the preparation of a defence and thus, *at least capable of being asserted within the Court’s procedural framework*.

The materiality of Mangenda’s request must thus be assessed in light of article 69(8), which provides:

“When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law.”⁷

6. The words “capable of being asserting within the Court’s procedural framework” seem to be an oblique reference to admissibility: in other words, the Prosecution only considers itself bound to disclose materials that it deems potentially admissible. Thus, the Prosecution’s view is that it shall itself judge the potential admissibility of material as an additional prerequisite of disclosure.
7. On the very same day, the Single Judge ordered the Prosecution, in the face of its refusal of Defence requests, to disclose its Requests for Assistance to States.⁸ The

Prosecution itself indicated it could finish its disclosure review of the materials in its possession. By this date, the Prosecution must disclose all evidence upon which it intends to rely at trial.”)

⁵ Decision on Cooperation, p. 6.

⁶ *Id.* para. 11.

⁷ *Bemba et al.*, Prosecution’s Notice of Compliance with “Decision on Mangenda Defence Request for Cooperation” ICC-01/05-01/13-1148-Conf, ICC-01/05-01/13-1233-Conf, 10 September 2015, paras. 6, 7 (internal citations omitted) (italics added).

⁸ *Bemba et al.*, Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews, ICC-01/05-01/13-1234, 10 September 2015.

Single Judge held that 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.*”⁹

8. Late disclosure has also occurred consistently in respect of the Prosecution’s contacts with witnesses:

- a “contact log” describing contacts with P-261 was disclosed only on the day of his testimony;¹⁰
- a “contact log” with P-260, despite repeated requests,¹¹ was disclosed two days before the commencement of the witness’s testimony;¹²
- a “contact log”¹³ with substantive redactions¹⁴ was disclosed five days before the commencement of P-245’s testimony as a “courtesy”;¹⁵
- a “contact log” was disclosed on the day prior to the commencement of P-214’s testimony, along with documents concerning witness expenses (which had apparently not been considered disclosable until that moment);¹⁶ and

⁹ *Id.* para. 13.

¹⁰ Annex A, Email from [REDACTED], Subject: RE: 4 October 2015, 9:19 pm (“[REDACTED].”)

¹¹ Annex B, Letter from Arido Defence to [REDACTED], Re: Request for disclosure #1, 5 May 2015; letter from [REDACTED] to [REDACTED], Re: Request for Clarification of the Prosecution’s Understanding of the Scope of Its Disclosure Obligations, 11 September 2015; email from [REDACTED] to the Prosecution, Request for disclosure of contacts between the OTP and P-245 and P-260, 6 October 2015, 6:32 pm.

¹² Annex C, Email from Prosecution to Arido Defence, Subject: FW: DRAFT D-2 interactions with the Cameroonian police, 10 October 2015, 1:02 pm.

¹³ Annex D, Email from [REDACTED] to Defence teams, D-3 contact log, 14 October 2015, 6:42 pm.

¹⁴ Annex E Email from [REDACTED] to [REDACTED], Request for further disclosure regarding OTP contacts with P-245, and his substantive responses, 17 October 2015, 1:53 pm.

¹⁵ Annex F, Email from [REDACTED] to [REDACTED], Subject: RE: Request for further disclosure regarding OTP contacts with P-245, and his substantive responses, 17 October 2015, 8:28 pm (“[REDACTED].”)

¹⁶ Annex G, Email from [REDACTED] to Defence Teams, Subject: 151102 – Prosecution Disclosure related to P-0214, 2 November 2015, 6:08 pm.

- emails to and from P-267 were disclosed during his testimony; further emails have been disclosed subsequent to the completion of his testimony.¹⁷

9. No explanation has been provided for these late disclosures. One possible explanation, however, is the Prosecution's own equivocal statements about its understanding of the scope of its disclosure obligations. For example, the Prosecution has at times adopted the view that disclosure of such contacts was done as a mere "courtesy"¹⁸ or that disclosure would be forthcoming only upon the Prosecution's own unilateral assessment of whether there has been a showing of a "specific forensic basis."¹⁹
10. The Defence has yet to receive a single hand-written note taken by any Prosecution investigator of anything of substance that he or she has been told by any Prosecution witness appearing in this case, nor have any notes been disclosed in relation to any contacts by Prosecution investigators with Austrian or Dutch authorities. The Defence has repeatedly had to follow-up on incomplete disclosures of emails after noting that the disclosed emails cross-referenced other emails that had not been disclosed.²⁰
11. On 15 December 2015, after repeated fruitless requests to the Prosecution, the Bemba Defence Team filed a request for the Prosecution to disclose certain communications with the Dutch authorities.²¹ The Chamber granted the request and ordered the Prosecution to disclose the materials subject to the application of any redactions in accordance with the redaction protocol.²²
12. On 8 January 2016, Mr. Mangenda sent a request to the Prosecution for further disclosure on materials arising from the testimony of Herbert Smetana.²³ On 21 January 2016, the Prosecution responded that a few items would be disclosed shortly,

¹⁷ Annex H, Email from [REDACTED] to the Defence Teams, Subject: Information related to P-0267, 2 November 2015, 1:10 pm; email from [REDACTED] to the Defence Teams, Subject: 151103 – Prosecution disclosure in relation to P-0267, 3 November 2015, 2:08 pm; email from [REDACTED] to Defence Teams, Subject: 151103- Prosecution disclosure in relation to P-0267, 3 November 2015, 8:52 pm.

¹⁸ See Annex F.

¹⁹ *Id.*

²⁰ Annex I, Letter from Mangenda Defence to the Prosecution, Re: Request for Further Disclosure Arising from Testimony of Herbert Smetana, 8 January 2016.

²¹ *Bemba et al.*, Defence Request for Correspondences with the Dutch Authorities, ICC-01/05-01/13-1525-Conf, 15 December 2015.

²² *Bemba et al.*, Decision on the Bemba Defence Request for Disclosure of Communication with the Dutch Authorities, ICC-01/05-01/13-1542-Conf, 12 January 2016.

²³ See Annex I.

but that the reminder of the request was deemed “too vague” and lacked materiality.²⁴ The Defence provided further information about the nature of the request,²⁵ to which no response has been received as to whether the Prosecution disagrees or believes that it has no information responsive to the request.

III. SUBMISSIONS

(i) *The Prosecution’s Asserted “Admissibility” Test Requires Correction*

13. The Prosecution’s “notice” of 10 September 2015 purports to assert that its disclosure obligations are subject to its own assessment as to whether the information is potentially admissible. This approach has no foundation in the text of Rule 77; is directly contrary to ICTY case law;²⁶ and contravenes this Trial Chamber’s guidance that admissibility issues should not curtail the scope of information disclosed and heard by the Trial Chamber.²⁷ The consequence of such an approach is the very antithesis of the “broad” approach to disclosure that is incumbent upon the Prosecution in regulating its own disclosure. The order as requested by the Bemba Defence is necessary to ensure that the Prosecution is not applying any inappropriate criteria that curtails disclosure.

(ii) *The Prosecution Must Disclose All Information Without Requiring the Defence to Guess at the Specific Documents or Sub-Categories of Documents that May Exist*

²⁴ Annex J, Email from [REDACTED] to Mangenda Defence, Subject: 160121 – PD’s Response to the Letter from the Mangenda Defence on 08 January 2016, 21 January 2016, 1:08 pm (“[REDACTED]”)

²⁵ Annex K, Email from [REDACTED] to the Prosecution, RE: 160121 – PD’s Response to the Letter from Mangenda Defence on 08 January 2016, 21 January, 1:56 pm.

²⁶ *Krnojelac*, IT-97-25-PT, Record of Rulings Made in Status Conference, 14 September 1999, para. 1 (“[t]he expression ‘evidence’ is intended to include any material which may put the accused on notice that material exists which may assist him in his defence, and it is not limited to material which itself admissible in evidence”); *Krnojelac*, IT-97-25-PT, Decision on Motion by Prosecution to modify Order for Compliance with Rule 68, 1 November 1999, para. 11 (“[t]he expression ‘evidence’ is intended to include any material which may put the accused on notice that material exists which may assist him in his defence, and it is not limited to material which itself admissible in evidence”); *Kordić and Čerkez*, IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant’s Briefs, 11 May 2001, para. 9 (“[t]he reference to ‘evidence’ is not restricted to material in a form that would be admissible in evidence, but includes all information in any form which falls within the quoted description”); *Krstić*, IT-98-33-A, Judgement, 19 April 2004, para. 178 (“material to be disclosed under Rule 68 is not restricted to material which is in a form which would be admissible in evidence”); *Brđjanin and Talić*, IT-99-36-T, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 June 2000, para. 8 (“[t]he word “evidence” in Rule 68 must be interpreted very widely. It is not restricted to material which is in a form that would be admissible in evidence”).

²⁷ See e.g. *Bemba et al.*, Decision on the Mangenda Defence Request for Extension of Time Limit for Disclosure of Potential Expert Report, ICC-01/05-01/13-1555, 20 January 2016, para. 11 (“the Single Judge holds that any argument on the admissibility of evidence is premature.”)

14. Rule 77 requires the Prosecution to disclose all information material to the preparation with or without a specific request from the Defence. The Trial Chamber has already repeatedly held that the category requested by the Bemba Defence is sufficiently specific. Indeed, it is hard to see how the Defence is supposed to further define the sub-categories of information that are within the sole possession, knowledge and control of the Prosecution.
15. The scope of the order requested is therefore appropriate in the circumstances, particularly in light of the Prosecution's record of resisting disclosure²⁸ and late disclosure.²⁹

(iii) The Prosecution Has Failed To Comply With The Redaction Protocol

16. Rule 81(1) allows redactions for "Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure." No information communicated outside of the Office of the Prosecutor – be it a State or any organ of the Registry – may be redacted pursuant to Rule 81(1).

IV. CONCLUSION AND RELIEF REQUESTED

17. The relief sought by Mr. Bemba should be granted in its entirety with any additional and further orders as the Trial Chamber may deem appropriate in the circumstances.

²⁸ See Annex F.

²⁹ See Annex L.



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Respectfully submitted this 15 July 2016,
At The Hague, The Netherlands