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**International
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Date: 24 January 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's Response to "Defence request for an order requiring the translation
of evidence"**

Source: The Office of the Prosecutor

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I. Introduction

1. The Bemba Defence requests that the Single Judge order the Prosecution to provide translations of all the intercepted communications on which it intends to rely for the purpose of the confirmation proceedings into one of the working languages of the Court (“Request”). The Prosecution opposes the Request, as it lacks merit and is unwarranted in light of the specific circumstances of the case.

II. Procedural background

2. On 20 January 2014, the Bemba Defence filed its Request¹ seeking, *inter alia*, that the Single Judge set a deadline for the Prosecution to provide the Defence and Chamber with translations of all intercepted communications on which it intends to rely at the confirmation proceedings.² The Request further seeks the determination of the Single Judge that the obligation of translation applies to the entirety of every “*.wav” file (audio file) on which the Prosecution intends to rely – even if the Prosecution deems only part of it relevant;³ and that any evidence not translated and provided to the Chamber and the Defence by the stipulated deadline should be precluded for the purposes of the Confirmation proceedings.⁴

3. On 21 January 2014, the Single Judge advanced the time to respond to the Request, ordering the Prosecution and the other Defence teams to file their respective responses by 24 January 2014.⁵

¹ ICC-01/05-01/13-108-Corr, Defence request for an order requiring the translation of evidence, 20 January 2014.

² Request, para. 17.

³ Request, para. 17.

⁴ Request, para.18.

⁵ ICC-01/05-01/13-115, Decision shortening the time limit for responses to the “Defence request for an order requiring the translation of evidence”, 21 January 2014 (emphasis added).

III. Submissions

Regulation 39(1) of the Regulations of the Court does not apply to the disclosure in this case

4. The Request relies on Regulation 39(1) of the Regulations of the Court (RoC) in asserting the Prosecution's obligation to translate into one of the Court's working languages the entirety of each intercepted communication on which the Prosecution intends to rely for the Confirmation proceedings.

5. As developed below, this provision governs 'filings' and their supporting materials. It does not encompass or contemplate evidence channelled through the Registry administratively for the purpose of disclosure. The Defence's reliance on this provision is therefore misplaced.

6. The phrase "*documents and materials filed*" in Regulation 39(1)⁶ expressly limits its application to filings, submissions and their supporting materials. There is no suggestion that this includes evidence. Regulation 22 defines "documents" as including "motion, application, request, response, reply, observation, representation and any other submission in a form capable of delivering a written record to the Court." As such, it limits the term "documents" to define filings in their various forms. Similarly, the term "materials" in the context of this provision should be understood to refer to annexes and appendixes attached to the document filed.

7. Further, the word "filed" which qualifies the phrase "documents and materials" in Regulation 39(1), is used throughout the RoC to refer only to filings in their

⁶ Regulation 39(1) reads: "All *documents and materials* filed with the Registry shall be in English or French, unless otherwise provided in the Statute, Rules, these Regulations or authorised by the Chamber or the Presidency. If the original document or material is not in one of these languages, a participant shall attach a translation thereof." (emphasis added).

various forms (e.g., decisions, orders, replies, applications, responses, etc.) and their supporting materials, such as appendices and annexes.⁷

8. Thus, the language requirements of Regulation 39(1) do not, as such, provide legal support to the Request.

9. Additionally, the role of the Registry is merely administrative in the context of disclosure, which is otherwise an *inter partes* process. The Registry is not the repository of the disclosed material to the same extent it is for filings and other matters comprising written records directed to the Court.⁸ The fact that the mode of *inter partes* disclosure requires the intervention of the Registry essentially because of the nature of eCourt system and other disclosure mechanisms, does not transform the materials disclosed into documents comprising records directed to the Court to which the translation requirements provided in the Court's procedural framework apply.

10. In relation to the Detention Centre communications specifically, which form part of the subject matter of the Request, the Registry made these materials available to the Prosecution through the provision of an access link, pursuant to the Single Judge's instructions. The Prosecution did not initially gain physical possession or control of these materials. If the duty imposed by the RoC mandates that all materials disclosed be in a working language of the Court, this duty would – strictly speaking - have initially fallen upon the Registry in implementing the Single Judge's specific order to make the Detention Centre audio materials available to the Prosecution.

⁷ The term "file or filed" was used more than 60 times in the RoC and without exception, reference is always made to a filing (e.g. response (Reg. 24, 34/b, 59/1), reply (Reg. 34/c, 60), application (Reg. 35, 61/2), notice of appeal (Reg. 57), appeal (Reg. 154), complaint (Reg. 106) or its supporting material (e.g. index (Reg. 36/3), appendix (Reg. 36/3)).

⁸ See Regulation 22.

11. Even if the Chamber were to find Regulation 39(1) applicable to the disclosure of evidence in this case, the determination is discretionary. The Chamber has the express authority to define the necessity and extent of the translation required for disclosure, having regard to the circumstances of the case, the nature of the materials, the attendant burdens and resources, the prejudice to the parties, and, of course, the overall fairness of the proceedings.⁹ In these circumstances, the blanket translation of disclosure sought by the Bemba Defence and particularly, in the related requests for relief, is overbroad and unwarranted.

The Prosecution's obligations of disclosure and translation of the evidence

12. The Prosecution has the obligation to provide to a suspect and the Pre-Trial Chamber a detailed description of the charges and list of evidence on which it intends to rely 30 days prior to the confirmation hearing. The Prosecution intends to rely on limited extracts of the recorded phone conversations, which form the bulk of the material for which the Bemba Defence seeks translation. The Prosecution will provide within the prescribed time limit, appropriate translations or transcriptions of these extracts, including any relevant context.

13. However, the Prosecution has no obligation to translate these materials into a language convenient to Defence counsel. The ability of counsel to understand the phone conversations in this case may justify requests for additional time and/or resources; however, it has no bearing on the Prosecution's obligations, which inure exclusively to the benefit of an accused/suspect before the Court. Translation of materials for the benefit of counsel is not foreseen in the Court's statutory framework - which also presupposes that an accused/suspect is not an idle passenger in his/her

⁹ Regulation 39(1) provides that: "All documents and materials *filed* with the Registry shall be in English or French, unless otherwise provided in the Statute, Rules, these Regulations or authorised by the Chamber or the Presidency. [...]" (emphasis added).

case, but an active participant capable of materially assisting counsel. This is certainly the case here.

14. Article 67(1)(a) and (f), respectively require that an accused be informed of the nature, cause and content of charges which he/she “fully understands and speaks” and to have the assistance of such translations “as are necessary to meet the requirements of fairness.” These guarantees do not extend for the benefit of defence counsel.¹⁰ Rather, the language that the accused (or the suspect) understands and speaks underlies the Prosecution’s obligation to translate evidence, as determined by the Court in the interests of fairness. Linguistic skills of members of the defence teams do not and should not shape the Prosecution’s disclosure or translation obligations.

15. Second, Rule 76 (3) of the Rules of Procedure and Evidence (“Rules”) — the only provision which expressly addresses the Prosecution’s obligation to provide evidentiary materials in a translated language — considers only the language of the accused person and not counsel.¹¹ Further, Rule 76(3) requires only that the Prosecution make the *statements of witnesses* available in the original language and in a language the accused fully understands and speaks.¹²

16. As noted above, Article 67 qualifies an accused’s right to the translation of materials as “necessary to meet the requirements of fairness”.

17. This qualification does not afford a suspect the right to have all procedural documents and evidentiary materials disclosed by the Prosecution translated into a language that he fully understands and speaks, much less translated into the

¹⁰ ICC-01/05-01/08-307, para.17 and ICC-01/04-01/07-522 OA3, para. 59.

¹¹ ICC-01/04-01/06-268, pages 4 and 5 and ICC-01/04-02/07-304, p.4.

¹² Rule 76(3) provides that: “The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.”

language of the Court, as the Request seeks. This limitation is fully consistent with the drafting history of the Statute, the jurisprudence of the Court, and even analogous ECHR case law.¹³

18. Further, a suspect's right to be informed of the charges within the meaning of Article 67(1)(a) is met where the suspect is provided with a detailed description of the charges and list of evidence provided for in Rule 121(3) in a language he/she fully understands and speaks.¹⁴ The provision of the following materials in the suspect's language is also sufficient: (1) the Document Containing the Charges and List of Evidence; (2) the Prosecutor's AWA; and (3) the statements of Prosecution witnesses.¹⁵

19. At a practical level, providing an accused with a translation of every evidential document in a case extends well-beyond that necessary to guarantee his/her rights as set out in Article 67(a) and (f). Furthermore, such a requirement would seriously jeopardize the fairness and expeditiousness of the proceedings due to the substantial

¹³ ICC-01/04-01/06-268, p.6 which cites Case of *Leudicke v. Germany* [EHCR] Applications no. 6210/73; 7132/75 (1978), par. 48; Case of *Kamasinski v. Austria* [ECHR] Application No. 9783/82, Judgement, 19 December 1989, par. 74; and ICC-01/05-01/08-307, paras 12-14, 16 citing Pre-Trial Chamber I. "Decision on the Defence Request Concerning Languages", ICC-01/04-01/07-127, para. 30; the Report of the Working Group on Procedural Matters, A/Conf. 183 C.I/WGPM/L. 2/Add. 6 (11 July 1998) in ICC-01/04-01/07-81, p. 6.; Pre-Trial Chamber I, "Decision on the Requests of the Defence of 3 and 4 July 2006". ICC-01/04-01/06-268; "Decision on the Defence Request concerning time limits", ICC-01/04-01/07-304; "Decision on the Defence for Mathieu Ngudjolo Chui's Request concerning translation of documents", ICC-01/04-01/07-477 and "Decision on the Defence for Mathieu Ngudjolo Chui's request for leave to appeal the Decision concerning the translation of documents", ICC-01/04-01/07-538; ICTY, *The Prosecutor v. Delalic et al*, (Case No. IT-96-21), Trial Chamber Decision on the Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996, paras. 6, 8; and *The Prosecutor v Naletilic and Martinovic*, (Case No. IT-98-34-T), Trial Chamber Decision on Defence's Motion Concerning Translation of All Documents, 18 October 2001, p. 3; H. Friman, "Rights of Persons Suspected or Accused of a Crime", in Roy S. Lee (ed.), "The International Criminal Court: The Making of the Rome Statue". Kluwer Law International, The Hague, The Netherlands, 1999, pp. 252-253.

¹⁴ ICC-01/04-01/06-268, p.6.

¹⁵ ICC-01/05-01/08-307, paras.12-14 and 16.

time necessary for such translation,¹⁶ undermining the right to be tried without undue delay, enshrined in Article 67(1)(c).

The proposed course of action within the circumstances of the instant case

20. To the extent that the determination of the nature and extent of the translation of materials for the benefit of a suspect or accused is within the discretion of the Chamber, so too is the decision whether to link such translation to the effectiveness of disclosure, having regard to the totality of the circumstances.

21. Here, the bulk of the material disclosed (audio recordings) involve conversations of the Suspects in languages (French and Lingala) common to all of them before the Court. As such, each is fully able to comprehend and fully negotiate the audio material both as concerns conversations in which they are allegedly participants, and concerning those in which they are not. Furthermore, each manifestly has the capacity to assist their respective counsel to review, understand, analyse and contextualise this material, even if their counsel is unable to understand the language directly. Thus, the scope of the translation sought in the Request is unnecessary for the fairness of the proceedings. To the contrary, it would serve unnecessarily to bring the proceedings to a virtual standstill in order fully to transcribe and translate the requested materials into a language that the Suspects undeniably already understand and speak.

22. In this context, it is apparent that the Request seeks relief well beyond that required to ensure the overall fairness of the proceedings, as required by Article 67. And that in the particular circumstances, denying the Request would occasion no prejudice whatsoever to the Suspects' procedural right to be informed in detail of the

¹⁶ ICC-01/05-01/08-307, para. 15.

nature and cause of the charges against them and of the specific evidence supporting such charges.

23. To this extent, there is no reason why any translation that the Chamber may require in the reasonable exercise of its discretion be tied to the deadlines applicable to the disclosure regime, so long as the overall fairness of the proceedings is fully respected and maintained. In the circumstances of this case, the Suspects ability to understand, speak and negotiate (with ease) the evidence for which the Request seeks translation is dispositive.

24. Thus, the Prosecution considers the following key factors strongly militate against the Request:

- i. As noted, the audio files for which translation is sought in the Request contain conversations to which the suspects are a party. The Suspects need no assistance to be informed of their own conversations, obviously conducted in their shared language(s).

- ii. The Defence's full access to the audio materials is not substantially disparate to the Prosecution's. This is particularly the case concerning the audio materials accompanying the reports of the Independent Counsel. As concerns the Detention Centre audio recordings, while there is a clear disparity between the parties in terms of access, the Prosecution notes that serious considerations related to the confidentiality of the Article 70 investigations did not permit the broad engagement of the resources and personnel necessary to transcribe and translate all of this material until the Suspects' arrest, at the earliest. Accordingly, it cannot be reasonably argued that the Prosecution was substantially better placed than the Defence in respect of providing the requested translations.

The audio materials accompanying the Independent Counsel's Reports were received by the Prosecution on 21 November 2013.¹⁷ The Defence received access to all these materials on 13 December,¹⁸ shortly after their Initial Appearances before the Court and within three weeks of the Prosecution's access to the same. Furthermore, it is expected that any future reports will be made available simultaneously to the parties. Additionally, as concerns the Detention Centre records provided by the Registry, access to these materials was provided to the Prosecution on a rolling basis since 3 June. However, as noted, the sensitivity of the on-going investigation during this period, through the Suspects' arrests did not allow for the dissemination of this material necessary to embark on a large-scale transcription and translation effort in anticipation of these proceedings. Moreover, the Prosecution did not have physical possession of these recordings until shortly before its first disclosure on 20 December, notwithstanding the earlier 'access' provided.¹⁹

iii. The translation of the entirety of the intercepted conversations, regardless of their relevance, entails an enormous allocation of time and resources which, in the circumstances, is not commensurate or necessary to preserve the fairness of the proceedings. Further, the close and manifest nexus between this case and *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Main Case") requires that the proceedings in the instant case be conducted in a reasonably expeditious manner.²⁰ As such, if granted the Request would defeat this legitimate objective.

¹⁷ ICC-01/05-01/13-6-Conf-Exp, Order on the filing of documents in the record of the case, 21 November 2013.

¹⁸ ICC-01/05-01/13-6-Conf-AnxA-Red and ICC-01/05-01/13-6-Conf-AnxB-Red, Annex A: Order on the filing of documents in the record of the case, 13 December 2013.

¹⁹ ICC-01/05-01/13-61+Conf-Anxs, Prosecution's Communication of Incriminatory Evidence and Rule 77 Material Disclosed to the Defence on 20 December 2013, 20 December 2013.

²⁰ See ICC-01/05-01/13-1-Red2, para. 8 and ICC-01/05-01/13-93, page 6.

25. In light of the above, the Request should be denied to the extent that it seeks to impose on the Prosecution an obligation to translate all the intercepted communications in their entirety.

26. The Prosecution's disclosure of the entirety of telephone conversations for the purpose of completeness, even where only a small segment of the conversation is key, should not create the obligation to translate the whole of the conversation, particularly when the Suspects are fully able to understand the same. The practice is intended to, and will materially, assist the Defence in its preparation.

27. Nothing prevents the Defence teams from, in addition to utilising the Lingala and French speakers in their ranks, seeking the assistance of interpreters that can be assigned or appointed as necessary and appropriate. Notably, without such assistance,²¹ Counsel concedes that he has been able to examine and learn all materials disclosed to date via Ringtail in E-Court.²²

28. The Prosecution's final determination of the evidentiary items on which it intends to rely for the purpose of the confirmation proceedings is regulated by Rule 121(3)(4) and (5). As such, the Prosecution will be best placed to provide the translations of the relevant parts of the audio conversations on which it intends to rely for the confirmation hearing within the time-limits set within that rule, given that it is only then that the Prosecution will be in a position to decide precisely which evidentiary elements should be translated.

²¹ Including the logistical difficulty arising from the denial of legal assistance to the suspect; the unavailability of administrative team present in the Hague; and the inability of the Office of Public Counsel for the Defence to perform the role of "case manager", Request, para. 6.

²² Request, para. 6.

IV. Requested Relief

29. For the above reasons, the Prosecution submits that the Request should be denied to the extent that it seeks the translation of all of the intercepted communications disclosed in their entirety.



Fatou Bensouda, Prosecutor

Dated this 24th Day of January 2014
At The Hague, The Netherlands