

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 8 August 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van den Wyngaert

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

**Confidential
with Confidential Annex**

**Prosecution's Consolidated Response to Babala and Arido Requests in Relation to
Translation of Evidence**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the "*Réquête Urgente de la Défense de M. Fidèle Babala sollicitant de la Chambre Préliminaire II l'injonction au Procureur de ne pas se fonder sur les éléments de preuve divulgués le 30 juillet 2014*" ("Babala Request")¹ and "Arido's Request for an Order Regarding Prosecution's violation of Disclosure Obligations (ICC-01/05-01/13-595)" ("Arido Request")² (together "Requests"). The relief sought – to preclude the Prosecution from relying on 13 documents on its list of evidence ("LoE") for confirmation because translations were not timely disclosed – is unwarranted and disproportionate, given the failure by the Defence to demonstrate actual prejudice.

2. The Prosecution acknowledges that translations of these documents should have been disclosed by 30 June 2014, and accepts full responsibility for this oversight. However, absent a showing of prejudice, the Defence is not entitled to the remedy sought. The Requests should therefore be rejected.

II. Background

3. On 29 July 2014, the Prosecution notified the Defence of its intention to disclose French translations of 13 documents on its list of evidence. On 30 July 2014, the Prosecution disclosed these translations *via* eCourt, despite the objection of the Defence.³ Thereafter, the Requests were filed.

4. The 13 documents at issue are:

- three documents in English,⁴ which the Prosecution does not have an obligation to translate as they were filed in a working language of the

¹ ICC-01/05-01/13-602.

² ICC-01/05-01/13-607-Conf.

³ See ICC-01/05-01/13-617.

⁴ CAR-OTP-0070-0001-0001; CAR-OTP-0074-0859; CAR-OTP-0074-1039.

Court.⁵ There is consequently no basis for objection to these documents.

- 10 documents in either German or Dutch.⁶ These, the Prosecution concedes, should have been disclosed before 30 June in a working language of the Court. The 10 documents consist of:
 - a. four chain-of-custody documents for Western Union financial records in German;⁷ and
 - b. six call data records (“CDRs”) in Dutch.⁸

5. Of the 10 documents, the Prosecution relied on only five in its submissions on the confirmation of charges and its Document Containing the Charges (“DCC”).⁹ These were all CDRs, of which the salient aspects are numerical.¹⁰

6. In view of the Requests, the Prosecution also notifies the Chamber that it undertook a comprehensive audit of its LoE and found an additional 76 items without corresponding translations in a working language of the Court (see Annex A). Of these, 10 are documents that were annexed to Registry filings in the case record and therefore do not require translation.¹¹ The remaining 66 are ICC Detention Centre audio files. None of the 76 items is relied on by the Prosecution in its submissions on the confirmation of charges. Two audio files were cited, a single

⁵ Regulation 39(1) of the Regulations of the Court.

⁶ CAR-OTP-0073-0278; CAR-OTP-0073-0279; CAR-OTP-0074-0826; CAR-OTP-0074-0828; CAR-OTP-0072-0081; CAR-OTP-0072-0082; CAR-OTP-0072-0391; CAR-OTP-0072-0396; CAR-OTP-0077-1024; and CAR-OTP-0077-1207.

⁷ CAR-OTP-0073-0278; CAR-OTP-0073-0279; CAR-OTP-0074-0826; CAR-OTP-0074-0828.

⁸ CAR-OTP-0072-0081; CAR-OTP-0072-0082; CAR-OTP-0072-0391; CAR-OTP-0072-0396; CAR-OTP-0077-1024; CAR-OTP-0077-1207.

⁹ CAR-OTP-0072-0081; CAR-OTP-0072-0082; CAR-OTP-0072-0391; CAR-OTP-0072-0396; and CAR-OTP-0077-1207.

¹⁰ CDRs are essentially columns of numbers, with a single Dutch word at the head of every column to provide the relevant context.

¹¹ These items fall within the exception provided for in Regulation 39(1) of the Regulations of the Court (“All documents and materials filed with the Registry shall be in English or French, unless otherwise . . . authorised by the Chamber) (emphasis added).

instance in each case, in the DCC: one erroneously,¹² and the other as corroborative of other evidence.¹³

7. Thus, of the 1,424 items on the Prosecution's LoE, only six untranslated items were relied on by the Prosecution in its submissions in support of the confirmation proceedings – five CDRs and one ICC Detention Centre audio which, in any case, is corroborated by other evidence.

III. Confidentiality

8. This filing is classified as "Confidential" as it responds to a filing of the same designation and refers to confidential information.

IV. Submissions

9. The Defence has the burden of substantiating the Requests, including demonstrating actual prejudice incurred and the propriety of the relief sought. The Requests fail in both respects.

A. The Requests fail to show any prejudice

10. Any claim of prejudice is flawed as a matter of logic. Either the Defence knew of the untranslated documents and chose not to object to them, thereby waiving their right to a remedy; or they had no actual knowledge of their existence, in which case they are not in a position to claim any prejudice since they obviously did not use the documents (translated or not) in preparation of their submissions. Further, the Defence do not even attempt to show how the disclosure of translations adding

¹² CAR-OTP-0074-0134, a French/Lingala audio recording, was cited, in error, in footnote 160 of the DCC to corroborate other, translated, evidence which fully supports the allegation.

¹³ CAR-OTP-0079-1290, a French/Lingala audio recording, was cited in footnote 350 of the DCC to corroborate other, translated, evidence which fully supports the allegation.

nothing new to material already disclosed has caused them actual prejudice.¹⁴
Absent this, there is no basis for the relief sought.

11. In line with a previous decision, the Chamber may also consider the following when assessing whether any prejudice arises:¹⁵

- i. the original items were all disclosed well in advance of the commencement of the confirmation proceedings.¹⁶ Disclosure was made for some as early as December 2013. The latest disclosure was 28 May 2014;¹⁷
- ii. the language of the items on the LoE is readily discernible; a cursory examination of their descriptions and titles reveals their underlying languages. Thus, the Defence had constructive, if not actual, knowledge of the existence of untranslated documents on the LoE from 30 June 2014;
- iii. the Defence did not object to the oversight until the Prosecution communicated its intention to disclose translations on 29 July 2014; and,
- iv. translations of five of the six items were disclosed on 30 July 2014. Translation of the audio file is outstanding.

12. Finally, the Chamber may also consider the items' content and the context of their use to support the charges, to ensure that no actual prejudice could have been caused:

¹⁴ See, e.g., *Prosecutor v. Radovan Karadzic*, Decision on Accused's eighty-seven disclosure violation motion, IT-95-5/18-T, 10 March 2014, paras. 13-15 (notwithstanding a finding of a disclosure violation, the Trial Chamber was not satisfied that the documents, including material falling under Rule 68 of the ICTY Rules of Procedure and Evidence (i.e., the equivalent of Article 67(2) of the Statute), were of such significance that the Accused had been prejudiced by their late disclosure).

¹⁵ See ICC-01/04-01/06-676.

¹⁶ See ICC-01/05-01/13-595-Conf-AnxC. CAR-OTP-0072-0081 and CAR-OTP-0072-0082 were disclosed on 20 December 2013; CAR-OTP-0072-0391 and CAR-OTP-0072-0396 were disclosed on 31 January 2014; CAR-OTP-0077-1024 and CAR-OTP-0077-1207 were disclosed on 14 March 2014; CAR-OTP-0073-0278, CAR-OTP-0073-0279, CAR-OTP-0074-0826 and CAR-OTP-0074-0828 were disclosed on 28 May 2014.

¹⁷ See ICC-01/05-01/13-595-Conf-AnxC, in which the dates of disclosure of the original documents are listed.

*The six CDRs are predominantly numeric and readily understandable:*¹⁸

13. CDRs list incoming and outgoing phone calls of specific phone numbers, their times and durations. The contents of conversations do not appear. The operative information in these records is numerical data, which the Defence cannot credibly claim they do not understand. The translated material merely comprises the information found in the headers, which denote the basic information found in any CDR data, namely, 'incoming', 'outgoing', 'date', 'time', 'duration', etc. The CDRs are readily comprehended by reference to the numbers alone and, indeed, the Requests do not allege that the Defence has had any difficulty in understanding them.

14. The Prosecution has disclosed similar CDRs with headers in the working languages of the Court,¹⁹ together with a French legend explaining the symbols used in these types of CDRs.²⁰ This material could easily have been consulted by the Defence to understand the untranslated headers of the six CDRs in question.

*The four chain-of-custody documents concern records on which the Defence rely:*²¹

15. These documents do not prove salient issues in the case, but rather support the reliability of the Western Union financial records. As such, the chain-of-custody documents have no bearing on the suspects' right to be promptly informed of the nature, cause and content of the charges under Article 67(1)(a).²² Neither are they indispensable to the proof of either authenticity or reliability of the Western Union financial records at confirmation.²³

¹⁸ CAR-OTP-0072-0081; CAR-OTP-0072-0082; CAR-OTP-0072-0391; CAR-OTP-0072-0396; CAR-OTP-0077-1024; CAR-OTP-0077-1207. The translations of these documents were disclosed on 30 July 2014. See ICC-01/05-01/13-595-Conf-AnxA.

¹⁹ See, e.g., CAR-OTP-0072-0403; CAR-OTP-0072-0078; CAR-OTP-0073-0875; CAR-OTP-0073-0876; CAR-OTP-0073-0881; CAR-OTP-0073-0883; CAR-OTP-0072-0425; CAR-OTP-0072-0428; CAR-OTP-0077-1030.

²⁰ See CAR-OTP-0072-0398, CAR-OTP-0072-0411, disclosed on 31 January 2014 (ICC-01/05-01/13-144-Conf-AnxB).

²¹ CAR-OTP-0073-0278; CAR-OTP-0073-0279; CAR-OTP-0074-0826; and CAR-OTP-0074-0828.

²² Both this Chamber – ICC-01/05-01/13-177, paras. 6, 9; ICC-01/05-01/08-307, para. 12 – and the Appeals Chamber – ICC-02/11-01/11-489 OA5, 22 August 2013, para. 12 – have found that the purpose of translations is to inform the suspects of the nature, cause and content of the charge.

²³ See ICC-01/04-01/10-465-Red, para. 59; ICC-01/04-01/06-803-tEN, para. 97 ("unless a party provides information which can reasonably cast doubt on the authenticity of certain items presented by the opposing party,

16. Notably, the submissions filed by both Defence on the confirmation of charges rely on the Western Union financial records to which the untranslated chain-of-custody documents relate.²⁴ Therefore, the Requests cannot demonstrate prejudice with respect to documents that support the reliability of material that the Defence use in their submissions.²⁵ To the contrary, the exclusion of this evidence would weaken the Defence submissions.

B. Excluding the items is unwarranted and disproportionate

17. The Statute does not prescribe the exclusion of evidence as a remedy for disclosure violations. While the Chamber has the discretion to do so, the exclusion of evidence, even at the confirmation stage, is the most severe evidentiary sanction. It should not be considered as a course of first resort. For example, Article 69(7) reserves this remedy only for evidence procured in violation of the Statute or of internationally recognised human rights.²⁶ Even in such circumstances, the Statute does not countenance automatic exclusion; instead, it requires a Chamber to strike a balance between competing interests.²⁷

18. By design, the threshold for exclusion of evidence is high and aimed at addressing cases where serious breaches have occurred casting doubt on the reliability of the evidence presented, or which are antithetical to, or would damage the integrity of, the proceedings.²⁸ This is not such a situation.

such items must be considered authentic in the context of the confirmation hearing"); see also para. 98 (a Defence request was found to be unsubstantiated when it included no more than a general objection to the admissibility of all Prosecution evidence for which no information pertaining to the chain of custody and transmission had been provided, without addressing specific items or providing the reasons for its objection).

²⁴ ICC-01/05-01/13-596-Conf, pp. 57-65, 157; ICC-01/05-01/13-598-Conf, para. 123 and underlying footnotes.

²⁵ See, e.g., *Prosecutor v. Radovan Karadzic*, Decision on Accused's eighty-seven disclosure violation motion, IT-95-5/18-T, 10 March 2014.

²⁶ See Article 69(7): "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings".

²⁷ See ICC-01/04-01/06-803-tEN, para. 84.

²⁸ See ICC-01/04-01/06-803-tEN, para. 87.

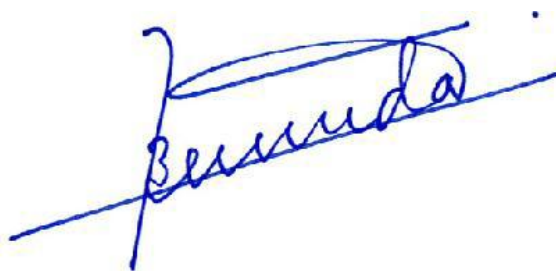
19. Despite the severity of the sanction sought, the Requests do not demonstrate its proportionality to the conduct in question. The Requests, therefore, lack substantiation and should be rejected.

20. Even if the Requests demonstrated prejudice — which they do not — exclusion is not an appropriate sanction for a disclosure violation in these circumstances. More appropriate remedies are available to the Chamber, including the issuance of additional time to digest the material (which comprises 15 pages). The Chamber's recent extension of time²⁹ may itself be sufficient for this purpose.

V. Conclusion

21. An assessment of the fairness of the proceedings, the severity of the relief sought, the absence of any claim of prejudice, the availability of other documents that may further assist the Defence's understanding of the untranslated documents, and the availability of additional time for the preparation of the Defence, demonstrate that the relief sought is unwarranted.

22. The Prosecution respectfully requests the Chamber to deny the Requests.



Fatou Bensouda, Prosecutor

Dated this 8th Day of August 2014
At The Hague, The Netherlands

²⁹ ICC-01/05-01/13-610.