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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

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 Redacted Document
with
Confidential Annex A**

**Public redacted version of “Prosecution Request to Include Court Documents into
its List of Evidence”, 10 July 2014, ICC-01/05-01/13-554-Conf**

Source: Office of the Prosecutor

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

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REGISTRY

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Detention Section

Victims Participation and Reparations

Other

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests the Chamber’s leave to rely on court transcripts and filings (“Court Records”)¹ cited in the Document Containing the Charges (“DCC”), but not included in the Prosecution’s List of Evidence (“LoE”).

2. The Prosecution compiled its LoE in the understanding that Court Records can be relied on without their inclusion in the LoE, particularly where specifically listed in the DCC itself in support of material allegations.

3. The Prosecution’s provision of a thoroughly footnoted DCC and LoE in this case fulfills the notice purposes that lie at the heart of Article 61(3) of the Rome Statute (“Statute”) and Rule 121(3) of the Rules of Procedure and Evidence (“Rules”). Together, these filings sufficiently detail not only the charges against the Suspects, but also what the supporting evidence is, and how the Prosecution intends to rely on that evidence to present its submissions during the confirmation process.

II. Procedural history

4. On 30 June 2014, the Prosecution filed its DCC and LoE,² pursuant to Article 61(3) and Rule 121(3).

5. On 5 July 2014, the Prosecution notified the Defence teams that: (1) its LoE did not reference Court records (i.e., decisions, filings and official transcripts) cited in the DCC, as such; and (2) that it intended to rely on such Court records in support of its

¹ See Annex A.

² ICC-01/05-01/13-526 with confidential annexes. Annex B1 containing the DCC was filed in a public redacted version on 3 July 2014. See ICC-01/05-01/13-526-AnxB1-Red.

submissions on the confirmation of charges.³ On 6 July 2014, although asserting that Court records should not be included in a list of evidence, the Bemba Defence objected to the Prosecution's notice on the basis that the substantive use of annexes to court filings for their truth requires inclusion in a list of evidence.⁴

III. Confidentiality

6. This filing is classified as "Confidential" as it refers to the content of an *inter partes* email exchange. The Prosecution submits that the filing and its annex should be reclassified as public if the Bemba Defence, being the party to this email exchange, has no objection.

IV. Submissions

a. The Prosecution has fulfilled its obligations under Article 61(3) and Rule 121(3)

7. The Prosecution informed the Defence of the evidence on which it intended to rely for the purposes of the confirmation of charges proceedings both through the DCC and in a separate document.

8. The DCC is a hyperlinked, fully footnoted document, which provides the Defence and the Chamber with a detailed description of the charges against the Suspects and precise references to the supporting evidence. In addition, the Prosecution's LoE comprises an automatically generated list of all hyperlinked and ERNd evidence cited in the DCC and uploaded to eCourt. It does not include Court Records given their unique nature.

³ Email communication dated 5 July 2014 at 16:57.

⁴ Email communication dated 6 July 2014 at 18:09.

9. The Court's statutory framework requires that a suspect be informed of both the charges and the underlying evidence on which the Prosecution intends to rely for the purposes of the confirmation proceedings. However, it neither imposes any rigid form by which the suspect must be so informed, nor precludes the effectuation of such notice *via* a fully footnoted DCC.

10. Article 61(3) is silent about the manner in which the Suspects should be informed of the underlying evidence. It provides, in relevant part, that: "the person shall [...] [b]e informed of the evidence on which the Prosecutor intends to rely at the hearing". While Rule 121(3) requires the Prosecution to provide "a list of the evidence", it does not prescribe the form such "list" should take.

11. Accordingly, listing the Prosecution's evidence in a separate document or within the DCC itself equally meets the requirements of Rule 121(3).

12. Here, the DCC fully informs the Suspects of the core documents on which the Prosecution relies to support the charges. Further, the Suspects are not only informed of the evidence relied upon abstractly, but of the manner in which it is used in support of the various allegations and submissions in the DCC.

b. The Court Records constitute a unique category of material

13. The Court Records comprise records of proceedings before the Court, the facts of which are not contestable. For instance, transcripts of a given witness's testimony are not contestable as to the dates of the testimony, whether the witness took an oath before testifying, what was asked of the witness and what the witness answered during his/her testimony. These are matters of record before the Court.

14. Reliance on such facts is distinguishable from relying on contestable issues for their truth. For example, a witness's testimony that "a car is blue" may raise a disputed issue as to the actual colour of the car—whereas, whether the witness testified, or whether the witness said that the "car is blue" does not. It is a matter of record.

15. Indeed, the Bemba Defence appears to share the view that Court records should not be included in the LoE, noting: "[REDACTED]".⁵

16. Given the express reference to the Court Records in the DCC, the Bemba Defence's objection is illusory, since the Suspects are thereby sufficiently informed of the evidence on which the Prosecution intends to rely.

c. Should the Chamber determine that the footnoted form of the DCC does not conform to Rule 121(3) the Defence remains fully "informed" under Article 61(3)

17. If the Court considers that the form of the information provided to the Defence through the DCC does not technically meet Rule 121(3), this should not undermine the Prosecution's abundantly clear intention to rely on the cited Court Records.

18. In the circumstances, it would be inequitable to, on the one hand, require the Prosecution's filing of a DCC in a form not prescribed by the Statute or Rules in providing the Defence with greater clarity concerning the evidence supporting the charges; while on the other hand, precluding the Prosecution from relying on that very form for that purpose.

19. The clear objective of the statutory regime is to inform the Suspects of the

⁵ Email communication dated 6 July 2014 at 18:09.

charges and the evidence against them within the prescribed time limit. This is properly and fully met by the provision of a footnoted DCC and LoE detailing the charges, its supporting facts and circumstances, and the evidence on which the Prosecution intends to rely.

d. The Defence was timely given notice of the Prosecution intention to rely on the Court Records

20. As of the filing of the DCC and LoE, the Defence was on notice of the Prosecution intention to rely on the Court Records to support its submissions on the confirmation of charges.

21. The Prosecution filed multiple applications to lift protective measures concerning relevant Court Records in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, particularly concerning the transcript evidence of witnesses, such that it could disclose this material to the Defence and rely on it during the confirmation proceedings. Further, the extensive litigation of these issues and the purpose thereof was express and on notice to the Defence in this case.

22. In its First Request, the Prosecution expressly stated that “[t]he requested variance is necessary to: (1) allow the Prosecution to rely on such evidence for the confirmation proceedings in the Article 70 Case”.⁶ The Prosecution further stressed that “the evidence of Defence witnesses in the *Bemba* Case is highly relevant to material issues arising in the Article 70 Case.”⁷ On 30 January 2014, the Prosecution filed a notification in the instant proceeding informing the Pre-Trial Chamber and the

⁶ ICC-01/05-0101/08-2951-Conf-Exp, Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding, 30 January 2014, para. 3 (“First Request”). A public redacted version was filed on 24 March 2014. See ICC-01/05-01/08-2951-Conf-Red.

⁷ First Request, para. 9.

Defence of the First Request and the reasons for it, namely “to enable the Prosecution to rely on such evidence for the confirmation proceedings”.⁸

23. In its Second Request, the Prosecution similarly stated that: “[...] the existing protective measures should be varied to permit the Prosecution to [...] rely on the material in its document containing the charges in the Article 70 case (“DCC”), during the confirmation proceedings and at trial”.⁹ It described the requested materials as “central to charges in the DCC”.¹⁰ On 23 April 2014, the Prosecution filed a notification in the instant proceeding informing the Pre-Trial Chamber and all Defence teams of the Second Request and its underpinning reasons including the reason “to enable the Prosecution [...] to rely on such evidence in its DCC and during the confirmation proceedings”.¹¹

24. In its Third Request, the Prosecution stated that “[...] it is important that the Prosecution is able to rely on the requested transcripts during the confirmation process and in the Document Containing the Charges (“DCC”) in the Article 70 case, which will be filed on 30 June 2014.”¹² In the same filing, the Prosecution emphasised the importance of the unredacted disclosure of the requested transcripts to the Prosecution case, stating that: “[d]isclosure of the requested transcripts is crucial to proving charges that the Prosecution will include in its DCC, particularly as the information implicating these witnesses is not contained in other evidence in the possession of, or otherwise available to, the Prosecution.”¹³ On 11 June 2014, the

⁸ ICC-01/05-01/13-139-Conf, Prosecution Notification of a Filing in *The Prosecutor v. Jean-Pierre Bemba* Case, 30 January 2014.

⁹ ICC-01/05-01/08-3052-Conf, Prosecution’s Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding, 22 April 2014, para. 3 (“Second Request”). A public redacted version was filed on 3 June 2014: See ICC-01/05-01/08-3052-Red.

¹⁰ Second Request, para. 18.

¹¹ ICC-01/05-01/13-355-Conf, Prosecution Notification of a Filing in *The Prosecutor v. Jean-Pierre Bemba* Case, 23 April 2014.

¹² ICC-01/05-01/08-3086-Conf, Prosecution’s Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding, 10 June 2014, para. 2 (“Third Request”). A public redacted version was filed on 11 June 2014: See ICC-01/05-01/08-3086-Red.

¹³ Third Request, para. 6.

Prosecution filed a notification in the instant proceeding informing the Pre-Trial Chamber and all Defence teams of the Third Request and the underlying reasons for it, including “to enable the Prosecution [...] to rely on such evidence in its Document Containing the Charges and during the confirmation proceedings”.¹⁴

25. Given that the DCC references further expound on how these Court Records support the Prosecution’s case, the nature and sufficiency of the information provided to the Defence satisfy the spirit, if not, letter of Article 61(3) of the Statute and Rule 121(3) of the Rules. Moreover, granting the Prosecution’s request in these circumstances cannot reasonably occasion any unfair prejudice to the Defence.

V. Relief Requested

26. For the foregoing reasons, the Prosecution respectfully requests leave to rely on the Court Records cited in the DCC and identified at Annex A to this filing for the purposes of its submissions on the confirmation of charges.



Fatou Bensouda, Prosecutor

Dated this 27th day of February 2015
At The Hague, The Netherlands

¹⁴ ICC-01/05-01/13-485-Conf, Prosecution Notification of a Filing in *The Prosecutor v. Jean-Pierre Bemba* Case, 11 June 2014