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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

**Joint Defence Observations on Modalities of Disclosure in Accordance with the Trial
Chamber's Order Regarding the Agenda of the First Status Conference
(ICC-01/05-01/13-824)**

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I. INTRODUCTION

1. The Defence teams of Mr. Bemba, Mr. Kilolo, Mr. Mangenda, Mr. Babala, and Mr. Arido (hereinafter “the Defence”) hereby submit their joint observations on the modalities of disclosure, in accordance with the Trial Chamber order seeking submissions in advance of the first status conference dated 23 February 2015.¹

2. The Defence disagrees with the Prosecution’s submission that the modalities of disclosure set out by the Pre-Trial Chamber remain in place.² A number of small yet significant changes should be made in the disclosure regime. First, disclosure should be strictly *inter partes*. Second, the Defence requests that the Prosecution be required to provide additional information in the disclosure packages, including an element based chart. Third, the Prosecution should be ordered to provide information to the Trial Chamber and the Defence regarding the methods used to identify items subjects to disclosure under Article 67 (2) and Rule 77. Fourth, translations into one of the working languages of the Court should be provided for all materials disclosed pursuant to Articles 67 (2) and Rule 77. Fifth, specific categories of information should be defined as falling within the scope of Article 67 (2) of the Statute and, therefore, subject to disclosure by the Prosecution. Sixth, the Prosecution should be required to certify, as of a date certain, that all materials in its possessions subject to disclosure pursuant to Article 67 (2) have been disclosed. Seventh, all disclosure of incriminating materials should be completed as soon as practicable and no later than four months prior to the start of the trial. Finally, a monthly disclosure report should be filed by the Prosecution to keep the Trial Chamber and the Defence apprised of outstanding disclosures.

¹ ICC-01/05-01/13-824.

² ICC-01/05-01/13-859-Conf, para. 14.

II. DISCLOSURE SHOULD TAKE PLACE *INTER-PARTES*

3. All disclosure should take place *inter partes* only, without being transmitted to the Trial Chamber. This has been the practice in most of the cases before the Court.³ Only evidence admitted at trial can be considered by a Trial Chamber when making determinations of fact,⁴ from which it follows that only materials tendered as evidence via e-court should be presented to the Trial Chamber. As a result, the Defence submits that only items that the Prosecution will include in its list of evidence should be made available to the Trial Chamber and the Registry. These should be made available via e-court at the time set by the Trial Chamber for such filing.

4. Further, the Defence requests the Trial Chamber to order that all items currently on e-court be removed, and that only the items contained in the Parties' lists of evidence and those intended for use in the Courtroom during cross-examination be transmitted to the Trial Chamber.

III. CONTENTS OF THE DISCLOSURES PACKAGES

A. Indication of the categories of material disclosed

5. Presently, when disclosing INCRIM evidence, the Prosecution notes that "although an item intended to be relied upon by the Prosecution is marked as incriminating, it may contain potentially exculpatory or Rule 77 information".

6. The Defence submits that the Prosecution should be required to indicate precisely which INCRIM or Rule 77 material also contains potentially exculpatory materials. Simply indicating that they "may" contain exculpatory material is not sufficient to meet the Prosecution's disclosure obligations under Rule 67 (2) of the Statute, particularly in light of the amount of documents disclosed.

³ Lubanga: ICC-01/04-01/06-102; Katanga and Ngudjolo : ICC-01/04-01/07-T12-ENG ET WT, pp. 17-18 ; Ble Goudé: ICC-02/11-02/11-57, paras 6-7; Gbagbo: ICC-02/11-01/11-30; Ruto & Sang: ICC-01/09-01/11-T-15-ENG, T. 43, l. 11-13; Kenyatta: ICC-01/09-02/11-T-18-ENG, T. 59, l. 22-23 & ICC-01/09-02/11-465, para. 9.

⁴ Misappreciating the facts, disregarding relevant facts or taking into account facts extraneous to the *sub judice* issues constitute an error of fact, see ICC-01/05-01/13-559, para. 19; ICC-01/05-01/08-631-Red (OA 2), para. 61; ICC-01/04-01/10-T-5-FRA, p. 2; ICC-01/04-01/10-283, para. 16; ICC-01/09-01/11-307, para. 56.

7. As a result, the Defence requests the Trial Chamber to order the Prosecution to review the totality of its INCRIM and Rule 77 disclosures made so far, and to provide the Defence with a list of the items which also contain Article 67 (2) information.

8. Further, the Defence submits that for future disclosure, the basis of disclosure (INCRIM, Rule 77, Article 67(2)) must be identified for each document.

B. Provision of an element based chart

9. The Prosecution should provide, with each INCRIM disclosure, an “element based chart”, which categorises the elements disclosed in relation to each constitutive element of each offence and the modes of liability. The chart should include the Doc ID of the documents, as well as references to the specific paragraph(s) of the updated DCC. In addition, it should indicate the specific paragraph(s) of the document related to the specific element of the offence.

10. A large amount of documents have been disclosed, and the relevance to the charges of a large number of the documents disclosed is often unclear.⁵ Providing such chart will assist the Defence in understanding the relevance of the INCRIM documents disclosed.

11. This was the practice put into place in the *Gbagbo*,⁶ *Kenyatta*,⁷ *Ruto & Sang*,⁸ and *Blé Goudé* cases.⁹ The Defence submits that the element based charts in these cases be used as a model for the present case. In light of the fact that some of the Defence teams intend to request the Trial Chamber to provide guidance on the definition of the offences, the substantive content of the chart will have to be determined by the Chamber.

12. In light of the limited scope of the charges and the stage of the trial, it is submitted that the preparation of the chart would not create an undue burden on the Prosecution. Therefore, the Defence requests the Trial Chamber order the Prosecution to provide such a chart for all

⁵ See e.g. CAR-OTP-0014-0061; CAR-OTP-0082-0090; CAR-OTP-0082-2120; CAR-OTP-0082-2417.

⁶ ICC-02/11-01/11-30-AnxIII.

⁷ ICC-01/09-02/11-48-Anx2.

⁸ ICC-01/09-01/11-44-Anx2.

⁹ ICC-02/11-02/11-130.

disclosures so far, as well as one to be included for all new INCRIM disclosures.

C. Formatting issues

13. Any video or audio recording should be disclosed together with a transcription and a translation of the transcript, if the latter is in a language other than French or English.

14. The same numbering (ERN/Doc ID) should be kept for the documents disclosed at the pre-trial Stage. This would aid the efficiency of the process by not requiring the Prosecution to re-disclose the same material with a different identification number.

IV. OBSERVATIONS REGARDING ARTICLE 67 (2) AND RULE 77 DISCLOSURES

A. Provision of information regarding the method used to identify PEXO and Rule 77

15. Of the 3739 documents disclosed as of 6 February 2015, only 45 were PEXO – that is 1.2 % of the totality of the disclosures. In addition, no material from the Main Case has been disclosed as PEXO, such as the documents used by the Prosecution to discredit the Defence witnesses from the Main Case, which are now Prosecution’s witnesses. Similarly, it is unclear to the Defence why certain materials have been disclosed under Rule 77.

16. As a result, the Defence requests the Trial Chamber to order that the Prosecution provide the Defence with information regarding the method used to identify materials falling under the ambit of Article 67 (2) and Rule 77, and to provide the Defence with the search terms used to identify such materials. This would permit the Defence and the Trial Chamber to ensure that the Prosecution is fully discharging its obligations pursuant, in particular, to Rule 67(2).

17. This practice was accepted by the Prosecution in the *Ruto & Sang* case regarding Article 67 (2) materials.¹⁰

¹⁰ ICC-01/09-01/11-T-15-ENG, p. 13, l. 1-3.

18. The Trial Chamber is urged to adopt the definition of the Prosecution's obligations regarding the identification of Article 67 (2) and Rule 77 materials set out in the *Katanga* case. In that case, the Chamber unequivocally stated that the Prosecution had an "obligation to define its search criteria in a manner that will ensure full compliance with its disclosure obligations" under Article 67 (2) and Rule 77,¹¹ and that the Prosecution needed to "redefine the search criteria used" as the proceedings continued.¹² It further held that such search criteria shall be broad, given the broad language used in Article 67 (2) and Rule 77, and that a restrictive interpretation could lead to a violation of the Prosecution's disclosure obligations.¹³

19. In particular, in the context of Rule 77 disclosures, the provision of such information is necessary to ensure that the Prosecution has approached the Rule 77 requirement of "material to the preparation of the Defence" as including "all objects that are relevant for the preparation of the Defence".¹⁴

B. Article 67 (2) and Rule 77 materials should be provided in one of the working languages of the Court

20. The Defence submits that all Rule 77 and PEXO materials should be translated by the Prosecution in one of the working languages of the Court, namely French or English.

21. Indeed, unless the Defence team is provided with translations for these materials, it would be unable to assess how and why the information is material to the preparation of the Defence (in the case of Rule 77 disclosure), or how the disclosed document relates to the innocence of the accused, mitigates his guilt or affects the credibility of Prosecution's evidence (in the case of PEXO disclosure). In other words, the right to receive such information as provided by Rule 77 and Article 67 (2) would simply become illusory, as it could not be analysed or used.

¹¹ ICC-01/04-01/07-621, para. 23.

¹² ICC-01/04-01/07-621, para. 26.

¹³ ICC-01/04-01/07-621, para. 28.

¹⁴ ICC-01/04-01/06-1433 (OA11), paras 2, 77.

22. In particular, the Arido Defence notes that Mr. Arido does not speak or understand Lingala, unlike all the other Accused. Further, in cases where the client speaks the language in which the disclosure is provided, translation should be provided into one of the working languages of the Court. Indeed, a client cannot be expected to provide an objective assessment of the relevance of the evidence; this is the role of his Defence team.

23. In the alternative, the Defence requests the Trial Chamber to order that sufficient resources be accorded to the Defence for translation of disclosure, including intercepts, which are in a language other than the working languages of the court.

V. ITEMS SUBJECT TO DISCLOSURE UNDER ARTICLE 67 (2) OF THE STATUTE ('PEXO')

A. Applicable principles

24. The Prosecution has a duty to actively search for potentially exculpatory evidence, rather than merely disclosing exonerating evidence when they come across it, in light of Article 54 (1) of the Statute and its corresponding obligation to investigate both incriminating and exonerating evidence equally. In addition, potentially exculpatory materials must be disclosed as soon as practicable.¹⁵ The Defence understands this as meaning that the Prosecution must disclose PEXO as soon as it is in its possession.

25. In addition, the Prosecution must diligently, and on an ongoing basis, review the information in its possession to ensure full disclosure, which includes evaluating potential and known defences to ensure full disclosure under Article 67(2)¹⁶ and reviewing all newly-received information to ensure full disclosure.¹⁷

¹⁵ Art. 67 (4); *see also* ICC-01/04-01/06-102, para. 125.

¹⁶ ICC-01/04-02/06-T-13-ENG , p. 28, l. 18-24

¹⁷ ICC-01/04-02/06-T-13-ENG , p. 28, l. 17-24; *See e.g. Ntaganda*: OTP stated that it was reviewing its search terms “to take into account new defence positions for which [they] were apprised during the confirmation hearing [...] review of [their] past searches, also in line with the Defence strategy that [they] became aware of during the confirmation hearing [...] a very thorough review of documents that [they] call unsearchable, which [...] means that [...] their content or metadata are not captured by [their] specific search term searches”, ICC-01/04-01/06-1019, para. 28.

B. Material falling under Article 67 (2) of the Statute

26. Information tending to discredit Prosecution, intermediaries or staff should be considered as falling under the scope of Article 67 (2) since it relates to the credibility of witnesses. This includes any and all benefits conferred on witnesses, financial or otherwise.

27. The Prosecution has an ongoing obligation to identify, and if necessary seek the lifting of any confidentiality or protective orders of, Article 67(2) material as and when it may arise in the context of the Main Case. This may include judicial orders. The Defence also understands that if any exculpatory matter relating to his case is revealed in the Main case, the responsibility belongs to the Prosecution to keep the Defence apprised of any such matters in a timely fashion. In the event that such information is covered by protective measures, the Prosecution shall be obliged to request the Trial Chamber in the Main Case lift protective measures to enable disclosure in the Article 70 case.

28. It is also the understanding of the Defence that the Prosecution's obligations under Article 67 (2) of the Statute include the disclosure of any confidential filings or decisions from the Main Case which qualifies as PEXO in the present case.

C. Certification of disclosure

29. The Defence requests that the Prosecution certify as of a date certain that its disclosure obligations under Article 67(2) have been diligently completed, which includes diligently and actively searching its own databases. That date should be no later than three months before the start of the trial.¹⁸

¹⁸ In *Kordić & Čerkez*, the Appeals Chamber noted that, while the defence is entitled to have a clear assurance from the prosecution of their obligation under Rule 68, such an assurance is regularly sought, and given without difficulty, during Status Conferences held pursuant to Rule 65bis. "Such an assurance need not be in the form of a certificate as sought by [Counsel for] Čerkez, but it should be in writing." As such, the Appeals Chamber ordered the Prosecution submit a written assurance that it has been and is still searching through the material which it has received, and that, so far, no material which may reasonably be considered to fall within the scope of Rule 68 has been identified. *See* ICTY, *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, paras 15, 23, available at: http://www.icty.org/x/cases/kordic_cerkez/acdec/en/10511EX315605.htm; In *Blaškić*, the Appellant sought a signed certificate that the Prosecution has complied with the First and Second Requests and is furthermore aware of its

30. The report should include a written statement from the Prosecution that they have searched any and all relevant records, and that all PEXO have been disclosed to the Defence at the time of the filing. This is necessary to ensure that the Prosecution diligently exercised its obligations pursuant to Article 67 (2) of the Statute.

31. This is without prejudice to the Prosecution's obligation to disclosure PEXO materials on an on-going basis.

VI. DISCLOSURE SCHEDULE

A. Disclosure of INCRIM materials

32. Items subject to disclosure which are already in the possession of the Prosecution and which have not been disclosed at the Confirmation of Charges stage, other than those for which the Prosecution seeks delayed disclosure or redactions, must be disclosed immediately.¹⁹

continuing obligations under Rules 66 and 68. "[The Appellant] suggests that certification is required so that the Appellant and the Appeals Chamber can be assured that the Prosecution has discharged its obligations before the appeal process may proceed. He also asks that the Prosecution be required to review the material, produce it to the Appellant, and provide certification within 14 days of the issuance of an order by the Appeals Chamber on the Motions." The request was denied, and the Chamber noted that this type of order would be rarely made as the Prosecution is expected to act in good faith. *See* ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14, Decision on the Appellant's Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, paras 43, 45, available at: <http://www.icty.org/x/cases/blaskic/acdec/en/00926PN313780.htm#31>; The *Krnojelac* decision was cited in the *Blaskic* Decision, where Judge David Hunt ordered compliance with Rule 68 in that particular case by requiring the Prosecution to file an affidavit to that effect. The affidavit was to acknowledge both that a full search has been conducted throughout the materials in the possession of the prosecution or otherwise within its knowledge for the existence of such evidence, and that he or she is aware of the continuing nature of the obligation pursuant to Rule 68. *See* ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, 1 November 1999, para. 11, available at: <http://www.icty.org/x/cases/kjnojelac/tdec/en/91101DE212633.htm>; As a remedy for a Rule 68 violation, in the Orić case the Chamber ordered the Prosecution to provide the Trial Chamber with a declaration stating what searches had been made, where the searches had been made, and the results of such searches. *See* ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68, 27 October 2005, p. 5, available at: <http://www.icty.org/x/cases/oric/tdec/en/051027.pdf>; Finally, in *Haradinaj*, the Chamber made a similar finding, requiring that the Prosecution to file a report with the Tribunal "confirming that it has comprehensively searched for Rule 68 material in its possession, in relation to all its witnesses in this trial, specifying what searches have been made, where they have been made, and the results of such searches." In this case, the Prosecution had seven days after the decision to file the report. *See* ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68bis, 12 October 2011, para. 66, available at: <http://www.icty.org/x/cases/haradinaj/tdec/en/111012.pdf>.

¹⁹ ICC-01/04-02/06-382-Corr, para. 9, point d.

33. The disclosure of large volumes of material close to the scheduled commencement of trial would be prejudicial to Defence preparations.²⁰ Disclosure should therefore be done on an on-going basis. The Prosecution should not be permitted, as has occurred during the Pre-trial phase, to delay disclosure of any disclosable material.²¹

34. Without prejudice to the above, the disclosure of all incriminatory material should be done on an on-going basis, within one month of coming into the possession of the Prosecution. Should the Prosecution request protective measures, those should also be requested within one month of the Prosecution taking possession of the said material. All redactions must be lifted and all materials disclosed four months prior to the commencement of the trial.²²

B. Monthly progress report

35. The Prosecution has indicated that a large number of items are yet to be disclosed and that another unknown amount of material is still being reviewed by the Independent Counsel.²³ The Prosecution recognised that it was difficult for it to provide a “realistic time-line for the completion of disclosure”.²⁴

36. As a result, the Defence requests that the Trial Chamber put in place a system of regular reporting on disclosure to be made by the Prosecution and the Independent Counsel. It suggests that the Prosecution be ordered to file a monthly disclosure report indicating the number of materials which are currently being reviewed for disclosure, the amount of material undergoing translation, as well as the items it is waiting to collect. The Independent Counsel should be ordered to provide similar monthly reports indicating the amount of material reviewed, and the materials which remain to be reviewed. Such reports should be made available to all the parties.²⁵

²⁰ ICC-01/09-01/11-642, para. 13.

²¹ See ICC-01/05-01/13-443, p. 5, and ICC-01/05-01/13-510-Conf-Anx, entries 5 through 20, 23-36.

²² See e.g. Ntaganda case: 3 months (ICC-01/04-02/06-382-Corr, para. 9, point d); Kenyatta: 3 months (ICC-01/09-02/11-451, para. 12); Gbagbo: 5 months (ICC-02/11-01/11-723, para. 10); Ruto & Sang: 3 months (ICC-01/09-01/11-440, para. 7, 14.)

²³ ICC-01/05-01/13-859-Conf, paras 10-13.

²⁴ ICC-01/05-01/13-859-Conf, para. 12.

²⁵ See e.g. Katanga case, monthly reports on disclosure under Rule 77 and PEXO, see ICC-01/04-01/07-T-13-ENG, p. 7, l. 14-15.

VII. CONCLUSION

37. In light of the above, the Defence hereby requests the Trial Chamber to order that:

- a. Only items contained in the Prosecution's lists of evidence be transmitted to the Chamber, at the time of the filing of such lists;
- b. All items currently on e-court which are not included in the parties' lists of evidence at the confirmation of charges stage should be removed;
- c. The Prosecution indicate precisely when a document disclosed as incriminating also falls under the scope of Article 67 (2) or Rule 77;
- d. The Prosecution review all previously disclosed documents and indicate precisely when a document which is disclosed as incriminating also falls under the scope of Article 67 (2) or Rule 77;
- e. The Prosecution provide an element based chart with each future incriminating disclosure, as well as an element based chart for all previously disclosed incriminating materials;
- f. Any video or audio recording be disclosed together with a transcription and a translation of the transcript, if the latter is in a language other than French or English;
- g. The same numbering (ERN/Doc ID) is kept for the documents which were already disclosed at the pre-trial Stage. This would aid the efficiency of the process by not requiring the Prosecution to re-disclose the same material with a different identification number;
- h. The Prosecution to provide information regarding the method and search terms used to identify Article 67 (2) and Rule 77 material, to the Defence and the Trial Chamber;
- i. The Prosecution to provide a translation into French or English of all the Rule 77 and PEXO materials which are in another language;
- j. That the materials listed in paragraphs 26-28 of the present filing be considered as falling under the scope of Article 67 (2) and therefore subject to disclosure;
- k. The Prosecution to file a written certification that it has searched any and all relevant records and that all PEXO have been disclosed to the Defence, three months before the start of the trial;
- l. All incriminating material must be disclosed by the Prosecution on an on-going basis, and at the latest four months prior to the start of the trial;

- m. The Prosecution to provide a monthly report on the status of disclosure.

Respectfully submitted,



Melinda Taylor, Counsel for Jean-Pierre Bemba Gombo



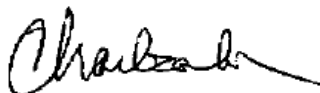
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Dated this 13th Day of April 2015

In The Hague, The Netherlands