

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 May 2015

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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

Public Document

Prosecution's Response to Joint Defence Observations on Modalities of Disclosure

Source: The Office of the Prosecutor

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

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I. Introduction

1. Pursuant to the instructions of the Trial Chamber VII (“Chamber”),¹ the Office of the Prosecutor (“Prosecution”) provides its response to the joint Defence observations on the modalities of disclosure (“Defence Observations”).² With the exception of limiting the Chamber’s access to disclosed evidence, the Defence Observations advance no compelling reason to depart from the existing disclosure system and should be dismissed.

2. Since its adoption on 4 December 2013,³ the disclosure between the Parties has been effective, transparent and timely. Given the advanced stage of the proceedings — when disclosure is almost complete — a substantial departure from the existing system serves no purpose. Not only is the proposed do-over of disclosures effected since the beginning of the case unwarranted, but it will inevitably undermine the expeditious conduct of the proceedings.

II. Submissions

3. The Prosecution addresses each request made in the Defence Observations in turn below:

A. Observations regarding the transmission of the totality of evidence disclosed to the Trial Chamber

4. The Prosecution agrees that article 74 clearly requires that a Chamber base its decision “only on evidence submitted and discussed before it at the trial.”⁴ But, this

¹ ICC-01/05-01/13-T-8-CONF-ENG ET, p.23, ln.13 to p.24, ln.24.

² ICC-01/05-01/13-894 (“Defence Observations”).

³ ICC-01/05-01/13-T-2-CONF-ENG ET, p.32, lns.9-13.

⁴ Article 74(2).

does not mean that a Chamber's mere access to evidence that is not admitted will *per se* influence its final determination of the merits of a case, as the Defence suggests.⁵

5. *First*, this case is before professional judges well disposed to determine the appropriate evidence on which to base their final determination. *Second*, Trial Chambers routinely have access to material which does not form part of the evidentiary trial record: for example, when dealing with material which it determines to be inadmissible.

6. Accordingly, the Defence's request for the removal of evidence already uploaded into the E-court is unwarranted.

7. Looking forward however, and recognising the Chamber's express continuation of the Pre-Trial Chamber's disclosure protocol,⁶ the Prosecution considers that it may nevertheless be preferable for the Chamber to limit its access to *inter partes* disclosure for trial purposes only to material intended to be relied upon by the Parties. The Prosecution has previously taken this position, which preserves the Parties' ability to control their evidence in order to best present their case, and avoids confusion and uncertainty as to what material ultimately comprises the evidentiary record relied on by the Chamber. The Prosecution understands that Trial Chamber V has taken a restricted approach to the Chamber's access to disclosed materials in the *Ruto and Sang* case.

8. The Chamber's access to information in E-court can be practically limited through the parties' control over the release of documents through the Registry. The Prosecution thus can continue to provide directly to the Defence electronic copies of

⁵ Defence Observations, para.3. In support of this submission, the Defence further notes in footnote 4, that "[m]isappreciating the facts, disregarding relevant facts or taking into account facts extraneous to the *sub judice* issues constitute an error of fact".

⁶ See 9 February 2015 email on behalf of Trial Chamber VII to the parties (informing of the Chamber's continuation of the notification process set out by Pre-Trial Chamber II on 4 December 2013).

all evidence disclosed and subsequently file with the Chamber a disclosure report to ensure that the Chamber is kept apprised, even if access to the material in E-Court is otherwise limited.

B. Observations regarding the provision of additional information in disclosure packages

i. Indicating different disclosure categories within each item of evidence

9. The Defence fails to substantiate its request that the Prosecution (1) “indicate precisely which INCRIM or Rule 77 material also contains potentially exculpatory materials”;⁷ and (2) “review the totality of its INCRIM and Rule 77 disclosures [and] provide the Defence with a list of the items which also contain Article 67(2) information.”⁸

10. Neither the Statute nor the Rules require any such undertaking. Rather, the Prosecution discharges its obligation under article 67(2) by providing the Defence with the required information as soon as practicable. How the Prosecution characterises (*i.e.*, labels) a document containing article 67(2) material is a completely separate issue. Again the object of article 67(2) is to timely place such material in the Defence’s hands. The Prosecution’s characterisation of the evidentiary value of the documents disclosed neither constrains, nor supplants the Defence’s independent obligation to review them. Thus, the Single Judge has noted,

“[w]hilst the Prosecutor is under a strict obligation to provide the Defence with the entirety of the materials it considers relevant, thereby making the Defence fully aware of the nature, cause and content of the charges, the Defence cannot abdicate its duty and responsibility to examine such

⁷ Defence Observations, para.6.

⁸ Defence Observations, para.7.

materials, which examination is necessary for it to be in a position to decide whether to challenge the evidence or its reading by the Prosecutor, as well as to identify portions which it deems relevant for the purposes of the Chamber's determinations under article 61(7) of the Statute.”⁹

11. The Prosecution characterises every item it discloses *bona fide* according to its prevailing evidential value. As such, every disclosure package contains a clear proviso informing the Defence of the possibility that the disclosed material may include information falling under a different evidentiary category, including PEXO.

12. It is up to the Defence to make its own assessment of any disclosure in order to diligently defend an accused. What is key under the Statute is that the evidence is timely made available, not the Prosecution’s determination of its evidential value which, in any case, cannot direct the Defence’s independent evaluation thereof. There is no added benefit in requiring the Prosecution to provide a re-assessment of material already in the Defence’s hands. The Defence, not the Prosecution, is best positioned to determine what is, or is not, article 67(2) information in such material.

ii. Providing an element-based chart

13. The Defence’s request that the Prosecution prospectively and retroactively provide an element-based chart (EBC) linking INCRIM disclosure materials to the elements of charged offences and modes of liability,¹⁰ is unfounded and unjustified in the circumstances.

⁹ ICC-01/05-01/13-177, para.10, (emphasis added).

¹⁰ Defence Observations, paras.9-12.

14. Like an in-depth analysis chart (IDAC), an EBC is a creature of judicial practice. It is not envisaged or supported as such by the statutory instruments.¹¹ Its intended purpose is to inform accused of the nature, cause and content of the charges against them. Whilst the need for these extra-statutory tools in complex article 5 cases involving proof of myriad contextual elements is debatable, they serve no purpose in this case. As previously noted,¹² the scope of this case is limited and straightforward. The Accused are already thoroughly familiar with the core evidence, *i.e.*, the telephone conversations to which most were parties. Additionally, the Defence has benefited from the written confirmation proceedings and other documents and instruments explaining the Prosecution's case and the supporting evidence in detail.

15. The Bemba Defence's request for an EBC is a mere continuation of its failed efforts to require the provision of an IDAC. In the latter context, it argued that the instrument "has become an accepted tool at the International Criminal Court"¹³, "will address the clear inequality of arms"¹⁴, and "will prevent the Prosecutor from drowning the Defence and the Court in a sea of potentially irrelevant information".¹⁵ However, as the Single Judge recognised,

"[w]hilst it is true that this instrument has now been in use for some time before Pre-Trial Chamber II, several cases before Pre-Trial Chamber I have been conducted without recourse to it. Its use in the context of trial proceedings seems likewise limited and far from uncontroversial, and at least one defence team is on the record having said that the chart had 'proved less useful'".¹⁶

The confirmation of the charges against the Accused does nothing to change these findings. Accordingly, there are no new circumstances justifying the production of

¹¹ ICC-01/05-01/13-134, para.5.

¹² ICC-01/05-01/13-125, paras.10, 14-17.

¹³ ICC-01/05-01/13-84, para.1. See also ICC-01/05-01/13-134, para.1.

¹⁴ ICC-01/05-01/13-84, para.5. See also ICC-01/05-01/13-134, para.1.

¹⁵ ICC-01/05-01/13-84, para.5. See also ICC-01/05-01/13-134, para.1.

¹⁶ ICC-01/05-01/13-134, para.4, (footnotes omitted).

the requested chart.

iii. Formatting issues:

a. Timing of disclosure of transcripts and/or translations

16. The Prosecution understands the Defence request to pertain to only ‘a formatting issue’,¹⁷ which therefore only concerns the *timing* of the disclosure of transcriptions and/or the translations, not their *scope*.¹⁸

17. With respect to timing, it is more efficient for the Prosecution to provide the Defence with the audio or video material at the earliest. Any necessary transcriptions and/or translations follow on a rolling basis as they become available. It would be counterproductive for the Prosecution to delay providing the underlying material, pending the completion of transcripts and translations. In providing the audio or video material first, the Defence is at least put in a position potentially to advance its analysis and preparations.

18. Additionally, there is no danger that the audio or video material will become dissociated from the relevant transcripts or translations if disclosed secondarily. To the contrary, the Prosecution ensures that when disclosing such transcriptions and/or translations, it includes the metadata necessary to automatically link them to the corresponding recordings initially disclosed.

¹⁷ Defence Observations, para.13.

¹⁸ It bears noting that the *scope* of translation of intercepted communications has been the subject of a specific decision from the Single Judge (ICC-01/05-01/13-177), which the Prosecution assumes that the Defence is not trying to re-litigate in this instance.

- b. *Maintaining the same numbering when re-disclosing evidence for the purpose of the trial.*

19. No further regulation is required for this issue.¹⁹ First, the Prosecution does not intend to re-disclose the totality of the evidence it initially disclosed for the purpose of the confirmation hearing. Second, to the extent that limited items are required to be re-disclosed *e.g.* to provide a less redacted version for instance, the E-court Protocol adopted in this case sufficiently regulates the matter.²⁰

C. Observations regarding article 67(2) and rule 77 disclosures

- i. *Provision of information regarding the method used to identify PEXO and Rule 77 material*²¹

20. This practice is not required by the Court's statutory instruments and unnecessary in the circumstances. The Prosecution has adopted a broad approach to its assessment of material in its possession to ensure that all evidence under article 67(2) and rule 77 is duly disclosed. Furthermore, the Defence has presented nothing suggesting that the Prosecution has failed in its disclosure obligations in any respect. This request is therefore both unwarranted and unnecessary.

- ii. *Translation of article 67(2) and Rule 77 materials in one of the working languages of the Court.*²²

21. The Defence request should be denied because it seeks to impose on the Prosecution an additional obligation unsupported by the Court's legal instruments.

¹⁹ Defence Observations, para.14.

²⁰ ICC-01/05-01/13-35-Anx, paras. 21-30.

²¹ Defence Observations, paras.15-19.

²² Defence Observations, paras.20-23.

Article 67 (1)(a), rule 76(3) and regulation 39(1) of the Regulations of the Court, which define the scope of the Prosecution's translation obligation, do not require the Prosecution to translate PEXO and rule 77 materials. In deciding a similar request, the Single Judge noted that translation into a working language of the Court is limited to the evidence on which the Prosecution intend to rely.²³

22. This does not prevent the Defence from seeking the assistance of the interpretation service of the Court. As noted by the Registry during the last status conference, the Court Interpretation and Translation Section is ready to assist the Defence when need arises.²⁴

23. Guided by the Chamber's directions,²⁵ the Prosecution will enter into a dialogue with the Defence and the Registry with a view to resolving the issue of translations within the available resources and in accordance with its legal obligations under the statute.

D. Disclosure of article 67(2) material

i. Certain information should be considered as article 67(2) material²⁶

24. The Prosecution disagrees with the Defence's general contention that "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

²³ The Single Judge noted that : "whilst the statutory instruments do not make it mandatory for the Prosecutor to provide translation of disclosed evidence into one of the working languages of the Court, the need for translation into a working language of the Court does indeed arise in respect of any portion of evidentiary item which is relevant to the nature, cause and content of the charges and upon which the Prosecutor intends to rely for the purposes of the confirmation hearing and will therefore include in her list of evidence." See ICC-01/05-01/13-177, para.9.

²⁴ ICC-01/05-01/13-T-8-CONF-ENG ET, p.80, lns.6-14.

²⁵ ICC-01/05-01/13-T-8-CONF-ENG ET, p.32, lns.9-16.

²⁶ Defence Observations, paras.6-28

of witnesses”.²⁷ Information which may discredit a staff member for example, need not have any bearing on the credibility of Prosecution witnesses. Moreover, such request is unnecessary because the Prosecution as a matter of practice discloses to the Defence information that ‘may affect the credibility of prosecution evidence’ under article 67(2) regardless of whether it also incidentally affects the credibility of others.

25. The Defence’s request that the Prosecution review the database of the Main Case for disclosure purposes is unnecessary. The Prosecution has already conducted such a review and disclosed the relevant material.

ii. Certification of disclosure

26. The Defence request that, not later than three months before the start of the trial, the Prosecution certify that it has completed disclosure under article 67(2),²⁸ is neither supported by the law nor necessary. The Prosecution is already under a standing obligation to disclose such material as soon as practicable which, absent any substantiation to the contrary, is sufficient.

E. Disclosure schedule

i. Disclosure of INCRIM materials

27. The case record refutes the contention that the Prosecution has delayed disclosure of incriminatory material during the pre-trial phase,²⁹ on which the Defence request for on-going disclosure is premised. Since 20 December 2013 until the filing of the Defence Observations, the Prosecution has systematically disclosed INCRIM material to the Defence in 22 different disclosure packages, including four,

²⁷ Defence Observations, para.26.

²⁸ Defence Observations, paras.29-31.

²⁹ Defence observations, paras.32-34.

after the constitution of the Trial Chamber.³⁰

28. The Defence's reference to a few items as an example of the Prosecution's delayed disclosure is misplaced.³¹ Of the 30 items identified by the Defence, 29 pertain to two witnesses for whom a redaction application was pending before the Single Judge. These items were disclosed three days³² after the Single Judge's decision on the proposed redactions.³³ This information is clear in the public filing cited by the Defence.³⁴ The remaining item is a Court document which was accessible to the Defence since its filing on 28 May 2014.³⁵

ii. Monthly progress report

29. The Defence's request that the Prosecution provide a monthly report on the progress of its disclosure³⁶ is unwarranted. First, the Prosecution has nearly completed disclosure of the relevant material in its case collection. Second, although continually evaluated, the outstanding material to be considered for possible disclosure is largely limited to material to be vetted by the Independent Counsel and reported by the Registry, pursuant to the Chamber's instructions.³⁷ Moreover, the Prosecution suggests that such material be disclosed to the Parties directly by the Registry at the Chamber's direction. Accordingly, there is no need for the requested monthly report.

³⁰ These packages were disclosed on 20 December 2013 (package 1), 16 January 2014 (package 2), 31 January 2014 (package 3), 14 February 2014 (package 4), 28 February 2014 (package 5), 10 March 2014 (package 6), 18 March 2014 (package 7), 11 April 2014 (package 8), 17 April 2014 (package 9), 12 May 2014 (package 10), 21 May 2014 (package 11), 28 May 2014 (package 12 and 13), 9 June 2014 (package 14), 20 June 2014 (package 15), 27 June 2014 (package 16), 30 June 2014 (package 17 and 18), 6 February 2015 (package 19), 25 February 2015 (package 20), 20 March 2015 (package 21), and 1 April 2015 (package 22). Additionally Package 23 was disclosed on 30 April 2015 after the Defence Observations.

³¹ Defence Observations, fn.21.

³² These three days were clearly used to implement the authorized redactions and process the items for disclosure.

³³ ICC-01/05-01/13-503.

³⁴ ICC-01/05-01/13-510 which specifically indicates the nature of the items disclosed and cites to the Single Judge decision on the Prosecution application for redaction ICC-01/05-01/13-503.

³⁵ ICC-01/05-01/13-438-Conf.

³⁶ Defence Observations, paras.35-36.

³⁷ ICC-01/05-01/13-893-Red.

III. Conclusion

30. For the reasons above, the requests contained in the Defence Observations should be denied, with the exception of limiting the Chamber's access to disclosed evidence.



Fatou Bensouda, Prosecutor

Dated this 5th Day of May 2015

At The Hague, The Netherlands