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

**Confidential Document
With
Confidential Annex A**

**Prosecution's Response to the Bemba Defence's Observations on «*Rapport
intermédiaire du Conseil indépendant sur l'analyse des pièces saisies par les
autorités belges (ICC-01/05-01/13-1047-Conf-Exp)*»**

Source: The Office of the Prosecutor

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the Bemba Defence's Observations on the «*Rapport intermédiaire du Conseil indépendant sur l'analyse des pièces saisies par les autorités belges*» ("Observations").¹

2. Bemba's request that Trial Chamber VII ("Chamber") precludes the Prosecution's use of any incriminating evidence identified by the Independent Counsel within the materials seized by the Belgian authorities is unjustified.

3. The requested preclusion should be denied, *firstly*, as counter to the statutory framework which, *inter alia*, guarantees the Prosecution a fair trial, and offends the independent and fundamental obligation of the Chambers of this Court, along with the Prosecution, to establish the truth.² *Secondly*, as the Prosecution has not received the material and thus, is in no position to determine whether and to what extent it may seek to add it to its list of exhibits — if at all — the requested preclusion is premature.

II. Confidentiality

4. This filing and its annex are classified as "Confidential", as they refer to a filing of the same designation. The Prosecution does not object to their reclassification as "Public".

III. Submissions

5. At the outset, paragraphs 6 and 17 to 47 of the Observations are redacted as against the Prosecution. The Response is thus qualified accordingly. Nevertheless, the reasons advanced in support of Bemba's request to preclude the Prosecution's

¹ ICC-01/05-01/13-1069-Conf-Red.

² See, article 54(1) of the Rome Statute ("Statute").

use of incriminating evidence identified among the seized materials transmitted to the Court by the Belgian authorities is manifestly ill founded.

A. The 22 May Decision does not preclude the Prosecution's use of incriminating evidence from the seized materials

6. The 22 May 2015 Decision on the Modalities of Disclosure³ does not preclude the Prosecution's use of relevant incriminating evidence identified by the Independent Counsel. The Chamber's statement that "at some point the Prosecution must proceed to trial with the evidence in its possession" is a mere truism. It does not mean that the trial can or should proceed in abrogation or disregard of the Statute and the Chamber's "core judicial duty to establish the truth",⁴ which the Prosecution independently shares pursuant to article 54(1) of the Statute.

7. The Prosecution, like an accused, has the right to a fair process before this Court.⁵ The right to a fair trial guaranteed under article 64(2) of the Statute obliges the Court to ensure that *neither* party is put at a disadvantage when presenting its case.⁶ Excluding the Prosecution's use of incriminating evidence where it "lack[s] fault" in its delayed identification and/or production, contravenes the most basic notions of trial fairness. This is even more so, where the delay is due in part to the implementation of a Court controlled procedure designed to ensure the fairness of the proceedings—*i.e.*, withholding materials "because they are being reviewed by an

³ ICC-01/05-01/13-959, para.50 ("22 May Decision").

⁴ See ICC-01/04-02/12-271-AnxA, para.5, Joint Dissenting Opinion of Judges Ekaterina Trendafilova and Cuno Tarfusser; see also article 64(2) of the Statute (concerning the right to a fair trial).

⁵ See ICC-02/04-112, para.27 (noting in the context of fair trial rights, "fairness also extends to other parties in proceedings such as the Prosecution"); see also ICC-01/04-02/12-271-AnxA, para.6, Joint Dissenting Opinion of Judges Ekaterina Trendafilova and Cuno Tarfusser ("As correctly contended by the Prosecutor, the "right to a fair trial [which] is guaranteed under [a]rticle 64(2) [of the Statute] [...] obliges the Court to ensure that neither party is put at a disadvantage when presenting its case").

⁶ See *e.g.*, *Prosecutor v. Duško Tadić*, Appeal Judgement, IT-94-1-A, 15 July 1999, paras.43, 44, 48 and 52 ("Tadić Appeal Judgement") (acknowledging that "the right to a fair trial ... covers the principle of equality of arms" and "means that the Prosecution and the Defence must be equal before the Trial Chamber"); see also *Prosecutor v. Callixte Kalimanzira*, Appeal Judgement, ICTR-05-88-A, 20 October 2010, para.34; *Prosecutor v. Ferdinand Nahimana et al.* Appeal Judgement, ICTR-99-52-A, 28 November 2007, para.173 ("*Nahimana et al.* Appeal Judgement"); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Appeal Judgement, ICTR-95-1-A, 1 June 2001, para.69 (quoting, *Tadić* Appeal Judgement, para.48); *Prosecutor v. Tharcisse Renzaho*, Appeal Judgement, ICTR-97-31-A, 1 April 2011, para.191 (citing *Nahimana et al.* Appeal Judgement, paras.173, 181).

independent counsel to see if they are privileged.”⁷ Thus, in accord with the Court’s statutory framework regarding the principle of a fair trial, “both the Prosecutor, acting in public interest, and the defence are entitled pursuant to article 69(3) of the Statute to submit evidence relevant to the case and to examine the existing evidence at trial.”⁸ This obviously includes incriminating evidence.

B. The Prosecution’s non-appeal of the 22 May Decision does not waive any right to rely on incriminating evidence in the seized material

8. Bemba’s assertion that the Prosecution did not appeal the 22 May Decision plainly misunderstands the 22 May Decision. Moreover, it ignores the applicable test for interlocutory appeals under article 82(1)(d) of the Statute, and significantly, fails to appreciate that the 22 May Decision does not give rise to a legally appealable issue on this basis.⁹

9. It is true that in noting “that the Prosecution sought and obtained confirmation of charges on the basis that the Prosecution had evidence to establish substantial grounds to believe that the accused committed the crimes charged”,¹⁰ the 22 May 2015 Decision does not account for either, the higher burden of proof applied at the trial phase, or the effect of the Prosecution’s delayed access to the seized materials on its trial readiness.

10. The 22 May Decision further omits reference to the Prosecution’s specific and repeated pre-trial submissions to the effect that “the inaccessibility of most of the seized materials to the Prosecution and its late and limited access to the remainder will, at [the pre-trial] stage, leave the Prosecution not ‘trial ready’ at the

⁷ ICC-01/05-01/13-959, para.50.

⁸ ICC-01/04-02/12-271-AnxA, para.6, Joint Dissenting Opinion of Judges Ekaterina Trendafilova and Cuno Tarfusser.

⁹ ICC-01/04-168 OA3, para.9; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7. *See also* ICC-01/04-01/06-1433 OA11 (Partly Dissenting Opinion of Judge Song), para.4, (specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made”).

¹⁰ ICC-01/05-01/13-959, para.50.

commencement of the confirmation proceedings as scheduled.”¹¹ And, the 22 May 2015 Decision acknowledges that this inaccessibility has persisted, for what is now well-over a year, and notwithstanding the Court’s possession of the material since March 2015.

11. Nevertheless, although the Chamber invoked its “obligation to ensure an expeditious trial which occurs without *undue* delay”,¹² the 22 May Decision in no way expressly or implicitly precludes the Prosecution’s *possible use* of incriminating evidence among the seized materials emerging at a later stage. Further, as the 22 May Decision has not yet resulted in the exclusion of any such evidence, it does not give rise to an appealable issue. Thus, the Prosecution could not have appealed the 22 May Decision.

12. The Chamber’s extension of the Prosecution’s deadline for its list of evidence in respect of a limited number of items recently made available, further underscores the Chamber’s appropriate and well-reasoned determination that the use of relevant evidence as it becomes available, will not be barred in the proceedings.¹³

C. The Prosecution need not have requested an extension of time to use material withheld from it by the Court at the expiration of the disclosure deadline

13. Bemba’s suggestion that the Prosecution should have requested an extension of the disclosure deadline under regulation 35 of the Regulations of the Court, given the

¹¹ ICC-01/05-01/13-234-Red, paras.48-54 (noting, a year prior to the rendition of the seized materials from the Belgian authorities to the Court its “[inability] to proceed to confirmation in a ‘trial ready’ posture” absent a consequential extension”); *see also*, ICC-01/05-01/13-140-Red, paras.2, 15 (in respect of the Prosecution’s delayed access to other seized material); ICC-01/05-01/13-T-2-Red-ENG, p.7, ln.22-p.8, ln.6 (noting as early as 4 December 2013, “[the Prosecution does] not yet have information about the amount of the information, particularly digital or electronic records, hard drives, and so on, that were seized by the Belgian or the Dutch authorities, and that may be quite a substantial amount of material. As my colleague indicates, it depends on the size of the hard drive, it depends on how much of it actually is relevant to the case, and it also depends on how much of it is privileged. But that, I think, is an important piece of information that we will need in order to give the Court a better idea or a more precise idea of what the evidence is that we intend to rely on”).

¹² ICC-01/05-01/13-959, para.50 (emphasis added).

¹³ ICC-01/05-01/13-1046-Red.

Independent Counsel's 2 June 2015 filing, is without merit.¹⁴ Simply, the Prosecution need not have requested an extension of time to include material on its list of evidence which might emerge from the vetting of the seized material by the Independent Counsel after expiry of the deadline, to be able to use it at trial. *First*, the Chamber was fully aware that the Prosecution was not in possession of such material when the disclosure deadline was set. *Second*, the 22 May Decision did not specifically address this material. As such, there was no basis for an application for an extension of time.

D. More appropriate procedural remedies are available to Bemba than the preclusion of evidence

14. Bemba's contention that the Prosecution's inclusion of further materials at this stage compounds the prejudice to the Defence in terms of its ability to dedicate at least three months to investigations and Defence preparation,¹⁵ is (a) unsubstantiated, and (b) premature. *First*, the Bemba Defence already has access to the material in question and is therefore in a position to prepare for its potential use. No prejudice arises. Further, Bemba's characterisation of the material as duplicative¹⁶ is both telling and self-contradictory. *Second*, since the Prosecution may, upon receipt and review of the material, determine that it does not seek to use it or parts thereof, the requested relief is premature and Bemba's claimed prejudice is speculative at this point.

15. As noted, the substance of the material apparently discussed in the Observations is redacted against the Prosecution, which reserves its right to supplement this Response if, and when, the underlying submissions or evidence is revealed.

¹⁴ ICC-01/05-01/13-1069-Conf-Red, paras.11, 12.

¹⁵ ICC-01/05-01/13-1069-Conf-Red, paras.14, 15.

¹⁶ ICC-01/05-01/13-1069-Conf-Red, para.16.

16. To the extent that the Bemba Defence may need additional time to prepare, should the Prosecution seek to add the materials to its exhibit list, more narrowly tailored remedies are available. These include, *inter alia*, a limited application to adjust the order of witnesses, or perhaps modifying the length of cross-examination.

17. In any event, nothing in the Observations establishes a sufficient basis for the exceptional and drastic remedy of precluding evidence in this case.

IV. Requested Relief

18. For the foregoing reasons, and to the extent that Bemba seeks that the Chamber precludes the Prosecution's use of any incriminating evidence identified by the Independent Counsel within the materials seized by the Belgian authorities, the Chamber should dismiss the Observations.



Fatou Bensouda, Prosecutor

Dated this 14th Day of July 2015
At The Hague, The Netherlands