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**International
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Court**

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Date: 17 August 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, AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND
NARCISSE ARIDO***

Confidential

**Corrigendum to Urgent Joint Request for Order Compelling the Prosecution to Disclose
Materials from the Case of *Prosecutor v. Bemba***

Source: Defence for Aimé Kilolo Musamba
Defence for Jean-Jacques Kabongo Mangenda
Defence for Fidèle Babala Wandu
Defence for Narcisse Arido

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

The Office of the Prosecutor Ms Fatou Bensouda Mr James Stewart Mr Kweku Vanderpuye	Counsel for Jean-Pierre Bemba Gombo Ms Melinda Taylor Counsel for Aimé Kilolo Musamba Mr Paul Djunga Mudimbi Mr Steven Powles Counsel for Jean-Jacques Kabongo Mangenda Mr Christopher Gosnell Mr Arthur Vercken Counsel for Fidèle Babala Wandu Mr Jean-Pierre Kilenda Kakengi Basila Mr Roland Azama Shalie Rodoma Counsel for Narcisse Arido Mr Charles Achaleke Taku Mr Philippe Larochelle
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Legal Representatives of the Victims	Legal Representatives of the Applicants
Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States’ Representatives	Amicus Curiae

REGISTRY

Registrar Mr Herman von Hebel	Defence Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

I. INTRODUCTION

1. Mr. Aimé Kilolo, Mr. Jean-Jacques Mangenda, Mr. Fidèle Babala Wandu and Mr. Narcisse Arido (“the Defence” or “the Defence teams”)¹ hereby request an order requiring the Prosecution to disclose, pursuant to Regulation 42(2) of the Regulations of the Court (“Regulations”), all confidential *inter partes* material from the case of *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) (“Main Case”). This case (the “Article 70 Case”) is inextricably intertwined with the Main Case, yet only a small percentage of material from the latter has been disclosed. The material that has not yet been disclosed includes: (i) testimony of Prosecution witnesses tending to show that the falsehoods allegedly encouraged by the defendants in the Article 70 Case were not, in fact, falsehoods; (ii) submissions and testimony (including of Prosecution witnesses) that assist in understanding the nature of the issues on which the accused are alleged by the Prosecution in the Article 70 Case to have encouraged false testimony; (iii) decisions, communications and filings (whether of the Trial Chamber III, Prosecution, VWU or Defence) about the modalities by which the Defence and Prosecution were to – and did – contact, reimburse and “hand-over” witnesses to the Registry; and (iv) decisions, communications and filings concerning other relevant modalities of trial in the Main Case. This and other *inter partes* confidential information is material to the Defence’s preparation for trial in the Article 70 Case pursuant to Rule 77 of the Rules.
2. The requested disclosure is also necessary given the asymmetrical state of knowledge, and level of access, amongst the parties to the Article 70 Case. The Prosecution and Mr. Bemba have knowledge of, and access to all confidential *inter partes* information from the Main Case; Mr. Mangenda and Mr. Kilolo have knowledge, but not access; and Mr. Babala and Mr. Arido have neither access nor knowledge. The unequal knowledge and access of the parties is inimical to fair and efficient trial proceedings. No witness protection concerns arise since all defendants in the Article 70 Case will be subject, *mutatis mutandis*, to the same witness protections obligations as those that apply in the Main Case.

¹ This submission is classified as confidential pursuant to Regulation 23*bis* (2) to correspond with submissions of the same classification that are cited herein. The Defence teams, however, have no objection to the present submission being reclassified as public should the Chamber so order.

II. APPLICABLE LAW

3. Article 67(2) of the Statute prescribes that:

the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.

4. Material that is “exculpatory” includes any information that may undermine the credibility of Prosecution evidence; that may show the innocence of the accused; or even that merely mitigates the guilt of the accused. Further, the information in question need only “tend[] to show” that to be the case. The ICTR Appeals Chamber, which has a regrettably substantial experience with the non-disclosure of exculpatory material, has pointed out that this obligation is to be understood “broadly” and that its fulfilment is “essential to a fair trial.”²

5. Rule 77 of the Rules requires that the

Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

6. The ICC Appeals Chamber has held that the Prosecution’s obligation to disclose “material to the preparation of the defence” is to be “interpreted broadly” and must be understood as referring to “all objects that are *relevant* for the preparation of the defence.”³

² *Kalimanzira*, ICTR-05-88-A, Appeals Judgement, 20 October 2010, para.18 (“The Appeals Chamber recalls that the Prosecution’s obligation to disclose exculpatory material is essential to a fair trial.”)

³ *Banda and Jerbo*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, ICC-02/05-03/09-501, 28 August 2013, para. 38 (“Regarding the application of rule 77 in general, the Appeals Chamber recalls that in its *Lubanga OA II* judgment, it held that “the term ‘material to the preparation of the defence’ must be interpreted broadly”. It found that documents that were “not directly linked to exonerating or incriminating evidence” were nevertheless material to the preparation of the accused’s defence in that case. The overarching consideration is whether the objects are “material to the preparation of the defence”, which was found in that judgment to “be understood as referring to all objects that are relevant for the preparation of the defence”).

7. Regulation 42(2) allows the Prosecution to concurrently respect these disclosure obligations while respecting witness protection orders in previous cases. Thus, the Prosecution is permitted by this Regulation to disclose confidential materials in one case to the parties in a second case by informing the parties in the second case of the confidentiality obligation to which they are subject:

- (1) Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.
- (2) When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.

III. SUBMISSIONS

(i) *Large Quantities of Material Responsive to Article 67(2) and Rule 77 Have Not Yet Been Disclosed to the Defence in the Article 70 Case*

8. A central allegation in the Article 70 Case is that the co-accused have “aided and abetted” the crime of “[g]iving false testimony.” An element of this offence is that the testimony provided is false. If the testimony given is not false, then the crime has not been committed and, consequently, could not have been aided and abetted.

9. The Prosecution’s Pre-Trial Brief asserts that the following falsehoods were encouraged:

- that “*nos soldats ne sont pas arrivés là-bas*”;⁴
- that D-54 was an “*observateur au CCOP, ne fussent que quelques jours*”;⁵
- that “there was no complaint and no evidence had been found to support the allegations of any criminal activity” in Bangui during a particular (unidentified) time period;⁶

⁴ *Bemba et al.*, Prosecution Pre-Trial Brief, ICC-01/05-01/13-1110-Conf, 31 July 2015 (“Pre-Trial Brief”) para. 73.

⁵ *Id.* para. 86.

⁶ *Id.* para. 98.

- that Mr Bemba was “unaware of the crimes” in Bangui;⁷
- that amongst certain troops, “*la plupart parlait le Swahili [...] parce que le plus grand nombre était de la brigade de MUSTAPHA, il venait de l’est. (...) un petit group parlait Lingala [...] d’autres encore parlaient français [...] le ngbandi*”;⁸
- an unspecified falsehood about the timing of Francois Bozizé’s rebellion;⁹
- an unspecified falsehood about the number of Bozizé’s troops;¹⁰
- an unspecified falsehood about the composition of Bozizé’s troops;¹¹
- an unspecified falsehood about being able to distinguish “*un Centrafricain et un Congolais quand ils parlent Lingala*”;¹²
- that Bozizé’s troops occupied the northern areas of Bangui until 30 October 2002;¹³
- that Bozizé’s troops, based at Moyenne SIDO, CAR, attacked Bangui on 25 October 2002;¹⁴
- an unspecified falsehood about the “creation and composition of Bozizé’s Main Staff and the various roles of individual officers”;¹⁵ and
- the identity of three officers who had commanded MLC troops in CAR.¹⁶

10. Some or all of these allegations go beyond the falsehoods that were confirmed to be part of the charges in the Pre-Trial Chamber’s decision on the confirmation of charges.¹⁷ Pursuant to the Trial Chamber’s decision of 10 June 2015, the

⁷ *Id.*

⁸ *Id.* para. 99.

⁹ *Id.* para. 110.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* paras. 110, 111.

¹³ *Id.* para. 111.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* paras. 214, 217.

¹⁷ *Bemba et al.*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, 11 November 2014, para. 64 (“This Chamber is obviously not in a position to assess the reliability and truthfulness of the Witnesses’ testimony on issues pertaining to the merits of the Main Case. Nevertheless, there is evidence that the Witnesses falsely testified before TCIII in respect of the following issues: (i) their previous contacts with the Defence; (ii) their meetings with other prospective witnesses; (iii) their acquaintance with some of the Suspects, or other persons associated with them; (iv) the fact that promises had been made to them in exchange for their testimony; (v) the fact that they had received reimbursements or transfers by Mr Bemba or on his behalf, regardless of their purpose; and (vi) other substantive issues related to the charges against Mr Bemba in the Main Case, as such as the witnesses’ membership of certain groups or entities, the structure of these groups or entities, their movements on the ground, and names of officials.”)

“confirmation of charges decision rendered under 61(7)(a) of the Statute sets out the charges, which, as such, also binds the Trial Chamber.”¹⁸ Despite this guidance, the Prosecution Pre-trial Brief continues to rely on the aforementioned alleged falsehoods which, consequently, makes them factually relevant – at least unless and until the Prosecution formally renounces any intention to rely on the aforementioned falsehoods in the Article 70 Case.

11. The extent to which confidential *inter partes* material in the Main Case is relevant to the Article 70 Case has been affirmed by the Prosecution itself. The Prosecution has previously submitted to Trial Chamber III that the Article 70 case has a “direct nexus to the *Bemba* case.”¹⁹ The Prosecution has also referred in that case to a large volume of material pertaining to the credibility of Defence witnesses – the same witnesses whom the Prosecution now asserts were induced to lie, and eight of whom are now relied on as Prosecution witnesses in this case:

The Prosecution disclosed significant information placing the Defence on notice of the credibility challenges to Defence witnesses. Specifically, between July 2012 and mid-November 2013, during the Defence case, the Prosecution disclosed over 2,000 pages of rule 77 material. The Defence cannot seriously contend that the Prosecution deprived it of an opportunity to consider significant information.

During the Defence case and prior to the testimonies of Defence witnesses, the Prosecution also disclosed information pertaining to their credibility, such as screening notes, investigator’s reports, prior statements, witness statements and annexes regarding Defence evidence, allegations of [REDACTED], and prior criminal records.²⁰

12. Other elements of the *inter partes* confidential material in the Main Case are relevant to the Article 70 Case. The modalities and reasons for contacting witnesses, for example, are reasonably believed to be amongst those materials, and are directly relevant for the defences of both Mr. Kilolo and Mr. Mangenda. While some of the

¹⁸ *Bemba et al.*, Decision on the Submission of Auxiliary Documents, ICC-01/05-01/13-992, 10 June 2015, para. 12.

¹⁹ *Bemba*, Prosecution Request for Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding, ICC-01/05-01/08-2951, 30 January 2014, para.8 (emphasis added).

²⁰ *Bemba*, Public Redacted Version of “Prosecution’s Response to ‘Defence request for a stay of proceedings and request for further disclosure’”, 13 July 2015, ICC-01/05-01/08-3265-Conf, ICC-01/05-01/08-3265-Red, 20 July 2015, paras. 9-10 (internal citations omitted).

relevant issues have been addressed in a VWU filing in the Article 70 Case,²¹ the original information remains relevant and disclosable under Rule 77.

13. Mr. Mangenda is alleged to have communicated questions of the Legal Representatives for Victims to Mr. Kilolo, who is alleged to have shared these questions with a witness.²² The Prosecution itself sought disclosure of, and the Chamber granted, the specific questions that are alleged to have been communicated.²³ The typical content of such questions, the modalities by which they were shared with the Defence, and even as simple a question as their level of confidentiality, are all matters of relevance to the Article 70 Case.
14. The Prosecution may be expected to argue that the testimony of its own witnesses is irrelevant to the Article 70 case, as are the documents and submissions that it has not already selected for disclosure. These arguments should be rejected. Prosecution witness testimony is relevant not only to the truthfulness of the propositions that the Prosecution claims constitute false testimony, but may be probative of other issues as well. Further, the category of information sought includes not only Prosecution witness testimony, but also filings concerning the modalities of trial, the timing of the appearance of witnesses, periods of adjournment, and a host of other procedural issues that may be of direct or contextual relevance to the allegations. The Defence's ability to establish this relevance with precision is, of course, precluded by its lack of access to the material; what cannot be denied, however, is there is a "good chance" that this information will be material to the preparation of the Defence.

(ii) The Defence's Access Request to the Main Case Trial Chamber In No Way Diminishes the Prosecution's Disclosure Obligations

15. The Prosecution has disclosed some, but far from all, the documents that are known or believed to fall within Rule 77 and Article 67(2). The absence of any such disclosure should be a cause of concern. As stated in one ICTY case:

²¹ *Bemba et al.*, Victims and Witnesses Unit's Provision of Information Pursuant to Decision ICC-01/05-01/13-182, ICC-01/05-01/13-207-Conf, 19 February 2014.

²² Pre-Trial Brief, para.79.

²³ *Bemba*, Decision on "Prosecution's Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding", ICC-01/05-01/08-3074, 27 May 2014, paras. 3, 23, ordering disclosure of the 'Items', which included *inter alia* two confidential filings of the legal representatives of victims containing lines of questioning for Witness D04-15.

Nor, unfortunately, has the prosecution always complied with its obligations under Rule 68 in a timely manner. In any event, the range of material within the Tribunal to which a party may legitimately seek access may well be wider in the particular case than the class of documents which must be disclosed pursuant to Rule 68. It is certainly not for the prosecution to attempt to categorise them in a way which avoids its obligation, as a Minister of Justice, to assist the defence to present its case where a legitimate forensic purpose has been established.”²⁴

16. The Defence has also filed an access request before Trial Chamber III in the Main Case,²⁵ but this in no way diminishes the Prosecution’s continuous and ongoing disclosure obligations under Article 67(2), Rule 77 and, for that matter, Rule 76(1). As an ICTY Trial Chamber stated while granting an access request pursuant to the counterparts of Regulation 42(3) of the Regulations, “nothing in this decision shall affect the disclosure obligations of the Prosecution under Rules 66 and 68 of the Rules.”²⁶
17. A group of eminent former Prosecutors in the United States, addressing a similar issue of shifting responsibility onto the Defence to obtain information already in the Prosecution’s possession, have explained that this approach “contributes to a harmful notion that the criminal justice system is a game, and that victory rather than justice, is a prosecutor’s goal.”²⁷
18. The Prosecution is attempting to play this game. Instead of effecting disclosure itself pursuant to Regulation 42(2) of the Regulations, the Prosecution has recently told the Defence that it should seek the confidential material directly from the Trial Chamber in the Main Case.²⁸ Even assuming that this suggestion is reasonable, the Prosecution still has an obligation to identify and disclose material pursuant to Article 67(2) of the Statute – which implies that it must be identified as such. Yet almost no such material

²⁴ *Hadžihasanović et al.*, IT-01-47, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001, para. 13.

²⁵ *Bemba et al.*, Urgent Joint Request for Access to Confidential Material, filed in ICC-01/05-01/08 on 10 August 2015.

²⁶ *Mladić*, IT-09-92-T/IT-08-91-A, Decision on Motions on Behalf of Mico Stanišić and Stojan Župljanin for Access to Confidential Materials from the *Mladić* Case, 3 September 2013, p. 7.

²⁷ Brief of Former Federal Prosecutors and Former Senior Justice Department and Government Officials as Amici Curiae, *Georgiou v. United States of America*, on Petition to the Supreme Court of the United States for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, No. 14-1535 (July 2015), p. 6, available at: <https://www.documentcloud.org/documents/2189922-14-1535-georgiou-amicus-brief.html>.

²⁸ Letter of the Prosecution to the Arido Defence, “Ref: OTP/PD/20150727/KV”, 27 July 2015 (“The Prosecution observes that, to date, nothing has prevented the Arido Defence from seeking appropriate access to the entirety of Main Case record...”)(emphasis added).

has been identified and disclosed from the vast annals of the Main Case.²⁹ No transcripts or statements of any Prosecution witness in the Main Case, as far as the Defence can ascertain, has been deemed disclosable. Only a tiny number of filings from the Main Case have been disclosed.³⁰

19. The Defence has collectively made eighteen requests for disclosure, many of which have been accompanied by annexes and tables detailing the particular information sought and how such information was identified. The individual requests, varying by both team and subject matter, have also elaborated on the need and relevance of the information requested to each team's adequate preparation. The Prosecution has categorically rejected every request, basing its blanket rejections on the (i) lack of materiality of the requests; (ii) lack of substantiation of the request; and (iii) absence of a clear and specific basis for the request.
20. The unreasonableness of the Prosecution's approach is exacerbated by the asymmetrical state of knowledge of the parties in this case in respect of the Main Case.³¹ Two parties to the Article 70 Case – the Prosecution and Mr. Bemba – have full knowledge and access to all confidential *inter partes* and *ex parte* Defence material in the Main Case. Two other parties – Mr. Mangenda and Mr. Kilolo – have full knowledge, but not access, to most confidential material in the Main Case, including the identities of all protected Prosecution witnesses. Granting Mr. Mangenda and Mr. Kilolo access to confidential material is, as the Prosecution itself has argued,

²⁹ The Prosecution has requested the Defence in the Article 70 Case be given access to a total of 7 items out of 704 items of documentary evidence admitted in the Main Case (1%) and to the unredacted transcripts of only 17 witnesses out of 77 witnesses who testified (22%). The seven items to which the Defence has been granted access are four filings by the Legal Representatives containing lines of questioning for two witnesses; the Defence list of evidence for trial; a summary of the proposed trial testimony of Defence witnesses; and a confidential Registry filing.

³⁰ *Bemba*, Requête de la Représentante légale de victimes relative à l'interrogatoire du témoin 15, ICC-01/05-01/08-2720-Conf, 27 June 2013; *Bemba*, Requête de la Représentante légale de victimes afin d'être autorisé à l'interroger le témoin D-015, ICC-01/05-01/08-2725-Conf, 4 July 2013; *Bemba*, Requête de la Représentante légale de victimes relative à l'interrogatoire du témoin 54, ICC-01/05-01/08-2817-Conf, 17 September 2013; *Bemba*, Requête de la Représentante légale de victimes afin d'être autorisé à l'interroger le témoin 54, ICC-01/05-01/08-2819-Conf, 20 September 2013; *Bemba*, Annex B to Defence Disclosure of its List of Witnesses and the Factual and Legal Elements of its Case, ICC-01/05-01/08-2243-Conf-AnxB, 13 July 2012; *Bemba*, Annex A to the Submissions of Defence Evidence, ICC-01/05-01/08-2222-Conf-AnxA, 28 May 2012; *Bemba*, Report of the Registrar on the events experienced by staff member of the Victims and Witnesses Unit in [Redacted], ICC-01/05-01/08-2261-Conf-Red, 23 August 2012.

³¹ The Prosecution and Mr. Bemba have both full knowledge and full access to the material in question; Mr. Mangenda and Mr. Kilolo have full knowledge, but not full access, to the material; Mr. Babala and Mr. Arido have neither access nor knowledge of the confidential *inter partes* material.

little more than “an academic exercise”³² – but one that will undoubtedly assist the preparation of their defence.

21. Neither Mr. Arido nor Mr. Babala has knowledge of, or access to, confidential material from the Main Case. Both will accordingly be substantially disadvantaged if the other four parties can identify and rely upon such material, whereas they cannot.
22. This situation is a recipe for an unfair and inefficient trial. It may well encourage or necessitate *ex parte* submissions to which all parties, in fairness, ought to have notice. This will be unfair, as well as obstructing the smooth and efficient conduct of proceedings. The Prosecution approach has done nothing to mitigate this situation.

IV. CONCLUSION AND RELIEF REQUESTED

23. The Defence is not in a position to define with precision the full scope of the Prosecution’s breach of its disclosure obligations. In present circumstances, disclosure violation begets disclosure violation. The Trial Chamber is requested, given the pattern of non-disclosure up to the present and the inherent inter-connectedness of the Main Case and this case, to order disclosure of:

- (a) All confidential transcripts in the Main Case, including of all Prosecution and Chamber witnesses;
- (b) All confidential exhibits in the Main Case;
- (c) All confidential *inter partes* or *ex parte* filings by the Chamber, the Prosecution, Defence, or any organ of the Registry or from any other source whatsoever;
- (d) All confidential *inter partes* communications by the Prosecution, Defence, Trial Chamber, or any organ of the Registry, to any party; and
- (e) All confidential disclosure provided by the Prosecution to the Defence in the Main Case.

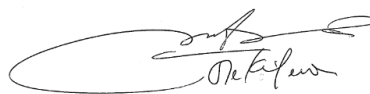
³² *Bemba*, Prosecution Request for Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding, ICC-01/05-01/08-2951, 30 January 2014, para. 12 (“As the Chamber is aware, Jean-Pierre Bemba Gombo and two members of his Defence team in the *Bemba* Case comprise three of the five suspects in the Article 70 Case. They, like the Prosecution, are already fully privy to the requested transcripts of evidence. As to them, the requested access is very nearly an academic exercise. However, the requested variance is concretely necessary to ensure that all the Defence teams in the Article 70 Case have sufficient access to the transcripts of relevant evidence in the Bemba Case in order to prepare adequately for the confirmation hearing and later for trial.”)



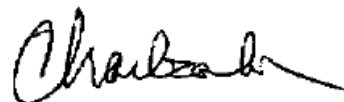
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Dated this 17 August 2015,
At The Hague, The Netherlands