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TRIAL CHAMBER VII

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
Judge Olga Herrera Carbuccia
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

Prosecution's Consolidated Response to Defence Requests for Disclosure of Requests for Assistance (RFAs) and Related Material (ICC-01/05-01/13-1129-Conf, ICC-01/05-01/13-1131-Conf, ICC-01/05-01/13-1135-Conf)

Source: **The Office of the Prosecutor**

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the disclosure motions of Arido, Bemba, and Babala[1] (collectively, the "Defence"), which seek, *inter alia*, that Trial Chamber VII ("Chamber") compel the Prosecution to disclose certain Requests for Assistance ("RFAs") to States and related material ("Defence RFA Request").

2. The Defence fails to establish that the requested items are disclosable under rule 77 of the Rules of Procedure and Evidence ("Rules"). The Chamber should thus reject the Defence RFA Request.

3. The Prosecution's RFAs and related diplomatic communications with States are, by their nature, not subject to disclosure without a legitimate forensic purpose. The Defence already has the material produced and submitted by the States in response to the relevant RFAs, including the underlying evidence. The Defence fails to establish the *prima facie* materiality of any additional documents sought. Rule 77 does not provide for an unlimited right to disclosure. The Court's statutory framework does not afford the Defence the right to conduct fishing expeditions, particularly in respect of potentially highly sensitive and confidential diplomatic correspondence.

4. The Chamber should also reject the Babala Defence's generalised request for the audio recordings of Prosecution witness interviews ("Audio Recordings Request"). The Prosecution has no general obligation to disclose the underlying audio recordings of witness interviews where *verbatim* written transcripts of such interviews have been disclosed. Absent an indication of any issue incapable of assessment by resort to the transcript, the Prosecution considers the transcripts of witness interviews duplicative of the audio recordings thereof.

[1] ICC-01/05-01/13-1129-Conf, ICC-01/05-01/13-1131-Conf, and ICC-01/05-01/13-1135-Conf.

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Here, the Babala Defence fails to establish that any specific audio recordings are *prima facie* material to the preparation of his defence.

II. Confidentiality

5. This Response is classified as "Confidential" as it responds to filings of the same designation. The Prosecution does not object to its reclassification as "Public".

III. Background

6. Given the limited time allowed,[2] the Prosecution's response is consolidated, notwithstanding differences in the individual Defence requests for RFAs and related material, as set out below.

7. Arido requests all RFAs sent by the Prosecution to the Cameroonian authorities and related information.[3] Babala Defence requests this material as concerns the Democratic Republic of the Congo ("DRC").[4] Bemba seeks RFAs addressed to the national authorities of nine countries,[5] as well as "records of domestic proceedings in relation to the execution of the RFAs."[6]

IV. Submissions

A. Applicable Law

8. The Prosecution's disclosure obligation under rule 77 of the Rules is "broad but

[2] The three Defence motions requesting an order to compel disclosure of RFAs were filed on 10 August 2015. On 12 August 2015, the Trial Chamber shortened the deadline for responses to these motions from 31 August 2015 to 17 August 2015. *See* Email from Trial Chamber Legal Officer, 12 August 2015 at 18:50.
[3] ICC-01/05-01/13-1129-Conf, paras.1, 33.
[4] ICC-01/05-01/13-1131-Conf, p.17.
[5] ICC-01/05-01/13-1135-Conf, para.17.
[6] ICC-01/05-01/13-1135-Conf, para.19.

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not unlimited"[7] and depends on the "specific circumstances of the case."[8] In order to justify a request for disclosure, the Defence must establish the *prima facie* materiality of the requested items to its preparations.[9]

9. An item is "material" to the preparation of the defence "if it would undermine the prosecution case or support a line of argument of the defence or significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case."[10]

10. To make a *prima facie* showing of materiality, the Defence must provide a particularised explanation of the materiality of the requested items; generalised pleadings do not suffice.[11] The requested items must also be identified with sufficient specificity.[12] The ICTY, in relation to its similar procedural rule 66(B),[13] has held that this rule does not entitle the Defence to embark on a speculative "fishing expedition" to obtain material.[14]

11. By its reference to "full disclosure", the Arido Defence takes the law out of

[7] ICC-01/05-01/08-3100, para.11; *see also* ICC-02/05-03/09-501, para.39; ICC-01/09-01/11-1465, para.12(v).
[8] ICC-02/05-03/09-501, para.39; ICC-01/09-01/11-1465, para.12(v).
[9] *See* ICC-02/05-03/09-501, para.42 ; ICC-01/05-01/08-3100, paras.11, 29; ICC-01/09-01/11-1465, para.12; *see also* ICTY, *Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012 ("Karadzic 8 February 2012 Decision"), para. 8; ICTY, *Prosecutor v. Boskoski and Tarkulovski*, Case No. IT-04-82-T, Decision on Boskoski Urgent Defence Motion for an Order to Disclose Material Pursuant to Rule 66(B), 31 January 2008, para.7.
[10] ICC-01/05-01/08-3100, para.11.
[11] ICC-01/05-01/08-3100, para.29 (finding that the Defence had not adequately demonstrated the *prima facie* materiality of items sought under rule 77 where the Defence made only "general pleadings" in support of its request).
[12] ICC-01/05-01/13-1148-Conf, para.11 (rejecting a Defence request for "any documents relevant to the production of any records from any source" as "too vague to substantiate materiality in the sense of Rule 77 of the Rules"); *see also* STL, STL-11-01/PT-PTJ, Public Redacted Version of "Decision on the Sabra Defence's Fifth Request of the Fourth Motion for Disclosure" Dated 21 December 2012, 28 May 2013, paras.9-10 (citing ICTY and ICTR caselaw).
[13] The Appeals Chamber considers the jurisprudence of the ICTY and ICTR in relation to rule 66(B) of their Rules of Procedure and Evidence useful when interpreting rule 77 of the Rules. *See* ICC-02/05-03/09-501, para.42, fn.103.
[14] *See, e.g.*, Karadzic 8 February 2012 Decision, para. 8; *Prosecutor v. Brdanin and Talic*, Decision on Motion by Momir Talic for Disclosure of Evidence, 27 June 2000, para.7; ICTR, *Karemera et al v. the Prosecutor*, ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, para.13.

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context. The cited Appeals Chamber jurisprudence refers to the principle that, subject to the exceptions in the Rules, disclosable documents should be disclosed fully and unredacted; it does not purport to alter the legal standard established in rule 77 itself.[15]

B. The Defence has not demonstrated that the RFAs and related information are disclosable under rule 77

12. The Defence RFA Request should be rejected as the Defence has not demonstrated that the requested information is disclosable under rule 77.

i. Confidential correspondence such as RFAs are not generally subject to disclosure under rule 77

13. The material requested by the Defence—RFAs and internal domestic records pertaining to their execution—are confidential correspondence which, by nature, are not generally subject to disclosure. These are, in principle, confidential documents dealing with particular investigative steps, and are not intended as evidence themselves. RFAs are ordinarily generic and simply request information which, in this case, has been disclosed to the Defence to the extent relevant and material in the Prosecution's assessment.

14. Importantly, the Single Judge of Pre-Trial Chamber II determined, in this case, that "requests for cooperation are *per se* irrelevant for the purposes of determining the admissibility of evidence which might be retrieved as a result of their implementation and are not intended as evidence themselves."[16] As such, a demand for disclosure on such grounds will not, without more, meet the *prima facie* materiality threshold of rule 77.

[15] *Contra* ICC-01/05-01/13-1129-Conf, para.16. *See* ICC-01/04-01/06-3031 A5 A6, para.10; ICC-01/04-01/07-475 OA, para.70. *See also infra*, para.21.
[16] ICC-01/05-01/13-453-Conf, p.4 ; ICC-01/05-01/13-494-Conf, p.4.

15. To be clear, the Prosecution has registered and disclosed any and all relevant material received from States in execution of RFAs; not only the resulting evidence (e.g., the *procès verbal* of the witness interview, the call data records, the financial transactions, etc.), but also accompanying documentation, which generally includes communications between and instructions to relevant national authorities. However, as noted, the Prosecution's disclosure of RFAs is not automatic – nor should it be. The same goes for the diplomatic *communiqués* or *note verbales* from the Embassies or State authorities transmitting the responsive material and documentation. These materials, which carry a presumption of confidentiality, are, in principle, mere cover letters to the underlying (substantive) material, referencing the original RFA.

16. As article 87(3) of the Rome Statute mandates, even the Requested State must keep a request for cooperation and any documents supporting the request *confidential*. If divulged, the disclosure could seriously undermine the investigative step in question. Further, States and other partners cooperating with the Prosecution are likely to cease or reduce assistance if the confidentiality of their communications with the Prosecution cannot be guaranteed. The Prosecution recognises that even confidential documents may contain information that becomes disclosable, either in whole or in part, as the matters at issue in the case evolve. But a general, unsubstantiated request for disclosure of a class of confidential documents is insufficient to justify the request. [17]

[17] *See* ICC-01/04-01/05-103, pp.2-3 (rejecting the Defence's request for access to the entire file of the DRC situation, noting the Prosecution's submission that the request constituted a "fishing expedition" and did not identify the legitimate forensic purpose for the request). It is also well-established in the jurisprudence of the *ad hoc* tribunals that a request for disclosure of confidential information must identify the precise legitimate forensic purpose that would justify disclosure.

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ii. The Defence RFA Request is overly generalised and fails to establish that the RFAs and related items are *prima facie* material to the preparation of the Defence.

17. The Defence RFA Request is based on generalised assertions and typified by speculation. It makes no concrete showing of *prima facie* materiality. For example, the Arido Defence argues that the requested RFAs are material "because they *may* impact upon the legality of the disclosed material" and "*may* reveal the existence of yet undisclosed call data records."[18] Similarly, a principal argument of the Bemba Defence is its claimed entitlement to "*explore* issues such as reliability and legality of evidence … and receive any information in the possession of the Prosecution which *could* assist it to advance arguments on such matters."[19] Likewise, the Babala Defence asserts that the RFAs and related documentation are necessary for its preparation because they "*sont nécessaires pour attester de la fiabilité de ces éléments et de la légalité de la procédure de leur interception*."[20]

18. Such generalised assertions do not suffice to establish the *prima facie* materiality of this class of information. Trial Chamber III in the *Bemba* case recently rejected a Defence request for RFAs based on similarly broad assertions.[21] In that case, the Defence sought "information concerning requests for assistance directed to the DRC, which pertain to the Defence case",[22] arguing that it "must be put in a position [in] which it can verify and contest the reliability of the source of any information used to attack the credibility of the Defence case" and that the "existence and scope of any assistance from the DRC authorities is thus directly

[18] ICC-01/05-01/13-1129-Conf, para.28 (emphasis added).
[19] ICC-01/05-01/13-1135-Conf, para.32 (emphasis added).
[20] ICC-01/05-01/13-1131-Conf, para.24.
[21] ICC-01/05-01/08-3100, para.29.
[22] ICC-01/05-01/08-3100, paras.14, 29.

Pursuant to Trial Chamber VII's instruction dated 3 June 2016, this document is reclassified "Public"

relevant to the preparation of the Defence."[23] In its Decision, Trial Chamber III found that the Defence request failed adequately to demonstrate the *prima facie* materiality of the RFAs sought, noting that the Defence had made only "general pleadings related to information concerning RFAs."[24]

19. The Defence's own authority further supports the conclusion that general assertions about the relevance of RFAs do not suffice to establish *prima facie* materiality. For example, in the *Ayyash et al.* case from the Special Tribunal for Lebanon,[25] the Trial Chamber initially found inadequate the type of generalised pleading at issue here, declining to mandate disclosure where the Defence only sought to "verify" whether the underlying data had been obtained "according to legal requirements".[26] While the Trial Chamber subsequently ordered disclosure of the disputed RFAs, this was only after the Defence explicitly asserted its intention to mount a challenge to the legality of certain evidence.[27] Notably, the Trial Chamber did not require disclosure merely to aid the Defence's *assessment* of a legality challenge; rather, the information became disclosable only at the point when the Defence expressed its actual intention to mount a challenge to the admissibility of the evidence.

20. Furthermore, the *Lubanga* appeal decision cited in support of the Defence RFA Request[28] is inapposite. In that case, the Appeals Chamber considered an RFA to be disclosable under rule 77 because it was the basis and context for a State Party's written response, which related to "a key issue in dispute in the pending

[23] ICC-01/05-01/08-3100, para.14.
[24] ICC-01/05-01/08-3100, para.29.
[25] This decision was cited by the Arido and Bemba Defence in support of their requests for RFAs and related material. *See* ICC-01/05-01/13-1129-Conf, para.23; ICC-01/05-01/13-1135-Conf, para.35. The Babala Defence also cited to an earlier decision from this case. *See* ICC-01/05-01/13-1131-Conf, para.13.
[26] STL, *Prosecutor v. Ayyash et al.*, Decision Reconsidering 'Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance', 7 November 2014", 6 March 2015 ("*Ayyash* Decision"), para.16.
[27] *Ayyash* Decision, paras.16, 18.
[28] *See, e.g.*, ICC-01/05-01/13-1129-Conf, para.16; ICC-01/05-01/13-1135-Conf, para.30(a); ICC-01/05-01/13-1131-Conf, para.22.

Pursuant to Trial Chamber VII's instruction dated 3 June 2016, this document is reclassified "Public"

appeal" (the age of witnesses D-0040 and D-0041).[29] Not only did this determination turn upon the particular facts of the case;[30] the issue to which the RFA related was already "live" in the litigation between the Parties, as in *Ayyash*. Correspondingly, the Appeals Chamber's subsequent observations on the importance of "full disclosure" arose in the context of its determination that the particular RFA was already disclosable, and its disagreement with the redactions proposed.[31] This did not amount to a general statement that RFAs are disclosable, but was only a reassertion of existing law that redactions to a disclosable document must be objectively justifiable. The Appeals Chamber did not alter the existing law on rule 77, nor did it purport to do so.

iii. The Defence desire to verify whether the underlying information has been obtained according to legal requirements does not provide a basis for disclosure of the RFAs

21. The Defence should not be allowed to access the RFAs and related material on the basis of the mere assertion that they have a right to verify whether the data was obtained according to legal requirements. The Defence should be required (i) to make at least a *prima facie* showing that there are grounds to believe that the evidence in question has not been collected by the Prosecution according to applicable legal requirements, including by identifying the legal requirements that it considers to be applicable; and (ii) to demonstrate that the documents sought are material to determining the issue of whether the evidence in question was collected according to legal requirements. Any lesser requirement transforms rule 77 into a vehicle for open file model of disclosure, which the Court's procedural framework does not accommodate.

[29] ICC-01/04-01/06-3017 A5 A6, para.11. *See also* ICC-01/05-01/13-1129-Conf, para.16.
[30] *See* ICC-01/04-01/06-3017 A5 A6, para.11. Since the Appeals Chamber did not give detailed reasoning for its conclusion, it must be understood to have turned upon the particular facts.
[31] *See* ICC-01/04-01/06-3031 A5 A6, paras.8-12.

Pursuant to Trial Chamber VII's instruction dated 3 June 2016, this document is reclassified "Public"

22. The Defence fails to demonstrate that the sought RFAs are even relevant to the issue of either the Prosecution or the State's compliance with legal requirements for the collection of evidence. They are not. The requested RFAs provide no insight into what procedures national authorities apply when executing the requests. And it is the relevant responses to the RFAs—which, as noted above, have been disclosed—which demonstrate the collection of evidence.

23. The Bemba Defence's request is particularly problematic as it essentially seeks inspection of the Prosecution's *entire collection* of RFA-related material, including non-substantive correspondence relating to practical arrangements. If adopted by the Chamber, this over-broad approach would have far-reaching implications for the Court's interactions with State authorities and the framework of cooperation, including the presumption of confidentiality, which underpins the Statute.

24. The Defence RFA Request fails to satisfy the existing consistent case law and the Court's practice regarding the requirement of materiality in respect of disclosure, which is intended to safeguard against overly broad speculative fishing expeditions. It thus fails on this basis.

25. Should the Chamber determine however, that the Defence RFA Request is debatable under the Rules, the Prosecution proposes that, in advance of any order for the disclosure of such material, the Chamber inspect the relevant RFAs and attendant correspondence for each State, together with the responses thereto, on an *ex parte* basis, which will afford the Chamber the opportunity to make concrete determinations as to whether the items under consideration warrant disclosure.[32]

[32] A similar procedure for the review of confidential material was approved by the Appeals Chamber in ICC-01/04-01/06-1486, para.48.

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C. The Audio Recordings Request is premature and unsubstantiated

26. The Trial Chamber should reject the Babala Defence's premature and unfounded Audio Recordings Request.

27. The Prosecution is under no general obligation to disclose the audio recordings of its witness interviews. As Trial Chamber V recognised in the *Ruto and Sang* case, in the context of witness interviews, "in principle, underlying audio recordings need not be disclosed where transcripts of those recordings have been disclosed".[33]

28. The Prosecution considers audio recordings of witness interviews to be duplicative of their written transcriptions and does not routinely disclose both. Disclosure of written transcripts is preferred for at least two reasons. *First*, in accordance with the Court's common practice, the written transcripts are the authoritative version of oral statements referred to in filings, submissions and during in-court proceedings. *Second*, the application of redactions to audio recordings is a burdensome, cumbersome, and time-consuming process, particularly in the early stages of proceedings when redactions are most numerous.

29. The Prosecution does sometimes disclose audio recordings of witness interviews in certain circumstances, *e.g.*, where the transcripts of those interviews have not been completed by a disclosure deadline. However, here, the Prosecution has not disclosed the audio recordings of most of its witness interviews since the transcripts of those interviews had already been prepared and disclosed to the Defence.[34]

[33]ICC-01/09-01/11-T-137, p.16, ln.20 – p.17, ln.3; *see also* ICC-01/04-01/13-378, para.22.
[34] The Prosecution did disclose the audio recordings of the witness interviews of D-57 and D-64; the written transcripts of those interviews were not ready by the applicable disclosure deadline.

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30. Nevertheless, as indicated in its 14 July 2015 response[35] to the Babala Defence's 8 July 2015 letter requesting disclosure of the audio recordings of Prosecution witness interviews,[36] the Prosecution remains prepared to permit inspection of these audio recordings pursuant to rule 77, "should the Defence have an articulable basis for the review of any specific audio recording as material to its preparation."[37] The Babala Defence has made no attempt to provide any particularised request for specific audio recordings, and instead brought a motion before the Chamber, despite the Chamber's direction to "only come to the Chamber as a matter of last resort."[38] The Chamber may reject the Audio Recordings Request as premature on that basis alone.

31. Alternatively, the Chamber should reject the Request as unsubstantiated since the Babala Defence's general arguments fail to establish the *prima facie* materiality of any specific audio recording. The Babala Defence's claims about purported issues in the transcription of intercepted calls[39]—a different body of material—do not establish the existence of issues concerning the transcription of witness interviews or otherwise demonstrate the *prima facie* materiality of the requested audio recordings.

V. No Judicial Order Mandating Disclosure of "*Tous les Éléments à Décharge*" Is Required

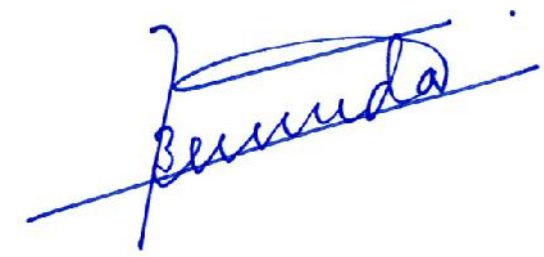
32. The Babala Defence's request for an order that the Prosecution disclose "*tous les éléments à décharge*"[40] in the Prosecution's possession—or to certify that it has done so—is unfounded and unwarranted. The Prosecution has carried out its

[35] OTP Letter to Babala Defence, OTP/PD/150714/KV, 14 July 2015, attached as Annex B ("Annex B").
[36] Babala Defence Letter to OTP, 019/D.20150708/FBW/KKB, 8 July 2015, attached as Annex A ("Annex A").
[37] Annex B, p.1.
[38] ICC-01/05-01/13-T-8-CONF-ENG, p.4.
[39] *See* ICC-01/05-01/13-1131-Conf, paras.49-50.
[40] ICC-01/05-01/13-1131-Conf, para.53.

disclosure obligations in good faith under the applicable legal framework. The Babala Defence's speculative submissions do not establish otherwise. The Trial Chamber has already rejected similar Defence requests as unnecessary[41] and should reject this one on the same basis.

VI. Relief Requested

33. For the reasons above, the Prosecution requests that the Chamber deny the Defence RFA Request, the Audio Recordings Request and the Babala Defence's request for an order mandating disclosure of "*tous les éléments à décharge*" in the Prosecution's possession.



Fatou Bensouda, Prosecutor

Dated this 17th day of August 2015
At The Hague, The Netherlands

[41] *See* ICC-01/05-01/13-959, paras.44-46.