

**Cour
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Internationale**

**International
Criminal
Court**



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

Date: 28 September 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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

Decision on 'Joint Defence Request for remedies for disclosure violations'

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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REGISTRY

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively), of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Article 64(2), (3)(c), 67(2) and 71 of the Rome Statute ('Statute') and Rule 77 of the Rules of Procedure and Evidence, issues the following 'Decision on "Joint Defence Request for remedies for disclosure violations"'.

I. Procedural History

1. On 10 September 2015, the Single Judge issued the 'Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and audio Recordings of Interviews' ('10 September 2015 Decision') in which he ordered the Prosecution to disclose, within five days of notification of the decision, to the defence teams the requests for assistance directed to a number of national authorities.¹
2. On 14 September 2015, the Prosecution submitted a notice of compliance² and informed the Chamber that it considered the Single Judge's order in the 10 September 2015 Decision to pertain only to the 'intercepted data and communications' obtained by The Netherlands. The Prosecution informed the Chamber and the parties that it had fulfilled its disclosure obligations in respect of the requests for assistance to the Dutch authorities.³

¹ 10 September 2015 Decision, ICC-01/05-01/13-1234-Conf.

² Prosecution Notice of Compliance with 'Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews' ICC-01/05-01/13-1234-Conf, ICC-01/05-01/13-1239-Conf.

³ Prosecution Notice of Compliance with 'Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews' ICC-01/05-01/13-1234-Conf, ICC-01/05-01/13-1239-Conf, para. 2.

3. On 17 September 2015, the defence of Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba and Fidèle Babala Wandu (collectively, 'Defence') submitted the 'Joint Defence Request for remedies for disclosure violations' ('Request').⁴
4. On 24 September 2015, the Prosecution submitted the 'Prosecution Response to Joint Defence Request for remedies for disclosure violations' ('Response').⁵

II. Submissions

A. The Defence

5. The Defence informs the Chamber of its failed *inter partes* efforts to obtain the documents concerned from the Prosecution within the time limit established by the Single Judge in the 10 September 2015 Decision. As a result, it requests that the Chamber (i) direct the Prosecution to comply with disclosure decisions; (ii) notify the Prosecution that it may face sanctions under Article 71 of the Statute should these decisions not be complied with forthwith; and (iii) order the Prosecution to file a schedule of items in its custody.⁶
6. The Defence avers that the 10 September 2015 Decision by its plain wording does not limit the disclosure to material relating to 'intercepted data and communications' and that the Prosecution has no right to modify *proprio motu* judicial rulings.⁷ It also contends that the evidence collected pursuant to the requests for assistance concerned was relevant, *inter alia*, to its preparation for the first eight witnesses.⁸ The Defence also explains that it requested such documentation 'as a preliminary step towards identifying which domestic judicial decisions or records might be relevant to arguments concerning the

⁴ ICC-01/05-01/13-1265-Conf with five confidential annexes A to E.

⁵ ICC-01/05-01/13-1295-Conf.

⁶ Request, ICC-01/05-01/13-1265-Conf, paras 1 and 55.

⁷ Request, ICC-01/05-01/13-1265-Conf, paras 18-19.

⁸ Request, ICC-01/05-01/13-1265-Conf, para. 25.

legality of the processes used to collect the evidence on a domestic level'.⁹ It further clarifies that the timely disclosure of the requests for assistance and related judicial records would 'shed light' on the accuracy and reliability of the assumptions made in the (expert) reports of two prosecution witnesses.¹⁰

7. The Defence alleges that it has a right to an effective remedy for the Prosecution's non-compliance with a judicial decision, such as issuance of a notice under Article 71 of the Statute.¹¹ The Defence maintains that such measure is necessary to ensure 'that the right of the Defence to receive information in the custody of the Prosecution, which could be relevant to its preparation, is not further compromised, delayed or obstructed'.¹²
8. In addition, the Defence requests that the Chamber also order the Prosecution to 'disclose a full schedule of items collected pursuant to its investigation into the suspects and fourteen witnesses in this case (irrespective as to whether the investigation was initiated under the umbrella of the [case of the *Prosecutor v Jean-Pierre Bemba Gombo*] or the Article 70 case) with the date and nature of the items collected'.¹³ In the view of the Defence, this schedule would enable it to submit 'targeted and informed requests for disclosure', as it is 'completely unaware' of the evidence in the Prosecution's custody.¹⁴

⁹ Request, ICC-01/05-01/13-1265-Conf, para. 26.

¹⁰ Request, ICC-01/05-01/13-1265-Conf, paras 28-32.

¹¹ Request, ICC-01/05-01/13-1265-Conf, para. 35.

¹² Request, ICC-01/05-01/13-1265-Conf, paras 45-46.

¹³ Request, ICC-01/05-01/13-1265-Conf, para. 48. Further proposals as to the detailed information are set out in paragraph 49 of the Request, including (i) the destination and date of any requests for assistance; (ii) the description of any information received from States, organisations or persons, and the date of receipt (i.e. call data records from Cameroon from 2012-2014, received on X date); (iii) the dates of all interviews with actual and potential witnesses (with the pseudonym provided if the name has not been disclosed to the Defence); and (iv) a log of contacts and communications between the Prosecution and prosecution witnesses (date of contact, name/pseudonym of witness).

¹⁴ Request, ICC-01/05-01/13-1265-Conf, paras 50-54.

B. The Prosecution's Response

9. The Prosecution opposes the Request and purports that it correctly interpreted the 10 September 2015 Decision.¹⁵ In its view, the 10 September 2015 Decision concerned only 'intercepted' communications, mainly between Mr Aimé Kilolo Musamba and Mr Mangenda conducted on Dutch territory, in relation to which the relevant requests for assistance have been duly disclosed.¹⁶ The Prosecution maintains that 'financial records, call data records and email accounts' are not intercepted data and communications and were collected prior to sending any requests for assistance.¹⁷ In case the Chamber ruled that all requests for assistance should be disclosed, the Prosecution contends that it would comply with such order.¹⁸
10. The Prosecution also alleges that the Defence did not suffer any prejudice due to the non-disclosure of requests for assistance as the material from States in execution of such requests has been in the Defence's possession 'for a long time'.¹⁹ It also purports that the Defence did not raise this matter earlier in the proceedings.²⁰ Moreover, the Prosecution repudiates the Defence argument that the requests for assistance are necessary to examine two (expert) reports of prosecution witnesses.²¹
11. Finally, the Prosecution opposes that it submit a schedule of items as it lacks any legal and factual basis and is 'impracticable and time-consuming'.²² By the same

¹⁵ Response, ICC-01/05-01/13-1295-Conf, paras 4-5.

¹⁶ Response, ICC-01/05-01/13-1295-Conf, paras 6 and 8-9.

¹⁷ Response, ICC-01/05-01/13-1295-Conf, para. 7.

¹⁸ Response, ICC-01/05-01/13-1295-Conf, para. 9.

¹⁹ Response, ICC-01/05-01/13-1295-Conf, paras 12-13.

²⁰ Response, ICC-01/05-01/13-1295-Conf, paras 12-13 and 21.

²¹ Response, ICC-01/05-01/13-1295-Conf, para. 15.

²² Response, ICC-01/05-01/13-1295-Conf, paras 17-24.

token, the Prosecution considers the request to issue a notice under Article 71 of the Statute to be 'gratuitous and vexatious' as no disclosure violation occurred.²³

III. Analysis

12. The Single Judge recalls that the 10 September 2015 Decision was taken upon requests of some of the defence teams in this case seeking, amongst other things, disclosure of requests for assistance addressed to the authorities of Cameroon,²⁴ the Democratic Republic the Congo;²⁵ the Netherlands, Belgium, France, Sweden, Austria, Germany, and the Central African Republic.²⁶ This particular request was granted and the Prosecution was ordered to disclose the requests for assistance. Paragraph 13 of the 10 September 2015 Decision, over which there is disagreement between the parties, is critical in the present instance and deserves being reported in full:

In the circumstances of this case, dealing as it does with allegations of improper interference of defence witnesses and placing significant reliance upon intercepted data and communications, the Requests for Assistance which were made in furtherance of the collection and interception of those records are of particular importance and are intrinsically linked to the admissibility of the evidence relied upon by the Prosecution in this case. The Defence have alleged that certain searches or intercepts undertaken by national authorities in executing the Requests for Assistance might have breached the principle of proportionality or were initiated upon incorrect or misleading information, and that some of the evidence collected was edited before disclosure to the Defence. In such instances, *it is imperative that the Defence be able to test the reliability of the procedures employed in collecting the evidence against them, and the Requests for Assistance may assist in this process. The Requests are therefore granted in this regard*, but redactions may be applied by the Prosecution in accordance with the protocol establishing a redaction regime adopted in this case (emphasis added).

²³ Response, ICC-01/05-01/13-1295-Conf, para. 17.

²⁴ Narcisse Arido's Request for a Disclosure Order Regarding Requests for Assistance to Cameroon, 10 August 2015, ICC-01/05-01/13-1129-Conf, including confidential annexes 1-5; see also Defence Request for Disclosure Concerning Prosecution Requests for Assistance, Correspondence, and Domestic Records, ICC-01/05-01/13-1135-Conf, including confidential annexes A to G.

²⁵ Requête en vue d'obtenir la divulgation de certains documents utiles à la préparation de la Défense, ICC-01/0501/13-1131-Conf; see also Defence Request for Disclosure Concerning Prosecution Requests for Assistance, Correspondence, and Domestic Records, ICC-01/05-01/13-1135-Conf, including confidential annexes A to G.

²⁶ Defence Request for Disclosure Concerning Prosecution Requests for Assistance, Correspondence, and Domestic Records, ICC-01/05-01/13-1135-Conf, including confidential annexes A to G.

13. As is clear from the above, the Single Judge ordered that all requests for assistance be disclosed to the Defence, regardless of whether domestic authorities executed the requests for assistance or whether the requests for assistance pertained to intercepted communications or other measures. Furthermore, the Single Judge did not further specify the requests for assistance to be disclosed in the operative part of the 10 September 2015 Decision. Reading the decision in context, it is clear that all requests for assistance were to be disclosed to the Defence, as sought by the defence teams at the time. The Prosecution is to discharge its disclosure obligations without any delay so that the trial proceedings are not further disrupted.
14. As regards the Defence request to issue a notice under Article 71(1) of the Statute, the Single Judge finds that the non-disclosure of the material concerned is based on a misreading of the 10 September 2015 Decision and not on a deliberate refusal to comply with the Chamber's directions. Given the Prosecution's concession to disclose the requests for assistance upon the Chamber's clarification, the Single Judge is of the view that the present order suffices to remedy any potential prejudice suffered by the Defence.
15. In relation to the Defence request to be provided with a schedule of all items in the Prosecution's possession, the Single Judge holds that such remedy is not warranted in the present circumstances.²⁷ The Single Judge recalls that a vast amount of evidentiary material has already been disclosed to the Defence. Absent any concrete references for the disclosure of evidentiary material, the Single Judge does not find it appropriate, at this advanced stage of the proceedings, to order the Prosecution to prepare and submit a detailed schedule of all items in its possession. Obviously, the preparation and examination of

²⁷ A similar request was rejected previously, *see* Decision on Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959, paras 44-46.

such document would inevitably divert the parties' attention of the trial hearings which are due to start on Tuesday, 29 September 2015.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

PARTIALLY GRANTS the Request and **ORDERS** the Prosecution to disclose, without any delay, all the requests for assistance which underlie the 10 September 2015 Decision; and

REJECTS the remainder of the Request.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to be 'BS', written over a horizontal line.

**Judge Bertram Schmitt,
Single Judge**

Dated 28 September 2015

At The Hague, The Netherlands