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**International
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Court**

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Date: 30 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Redacted Document

Public redacted version of “Prosecution Response to Joint Defence Request for remedies for disclosure violations”, 24 September 2015, ICC-01/05-01/13-1295-Conf

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the 17 September 2015 Joint Defence Request for remedies for disclosure violations (“Request”).¹ The Request is yet another in a series of last-minute dilatory Defence filings, based on nothing more than erroneous and inflated claims.

2. Contrary to the Defence’s contentions², the Prosecution has complied with its disclosure obligations and acted in accordance with the orders and decisions of Trial Chamber VII (“Chamber”), including the Decision on the Defence Requests for Prosecution Requests for Assistance (“RFAs”), Domestic Records, and Audio Recordings of Interviews (“Decision”).³ No remedies are warranted for the purported disclosure violations — which are non-existent. The Request should be rejected.

II. Confidentiality

3. This filing is designated as “Confidential” as it responds to a Defence filing of the same designation. A public redacted version of this filing will be filed.

¹ ICC-01/05-01/13-1265-Conf.

² Request, para.22.

³ ICC-01/05-01/13-1234-Conf.

III. Submissions

A. There has been no wilful non-compliance with the Chamber's disclosure decisions

4. There has been no "wilful" decision not to comply with the Decision.⁴ The Prosecution has interpreted the Decision correctly, absent any indication to the contrary, and has complied with its disclosure obligations accordingly.

5. At the outset of paragraph 13 of the Decision, the Chamber referred to the "particular importance" of "Requests for Assistance which were made in furtherance of the collection and interception" of "*intercepted data and communications*".⁵ A plain reading of this text qualifies the "data and communications" as those which were "intercepted". Basic rules of grammar readily establish the term "intercepted" as a modifier of the nouns which follow it. There is no confusion or ambiguity in the plain meaning of the Decision and thus, no need for its clarification. By contrast, the Defence's strained arguments are wholly dependent on taking the individual phrases of the Decision out of this context, in forcing support for the spurious claim that the Prosecution has intentionally chosen a narrow reading of the Decision.⁶

6. The only evidence in this case that has been intercepted in the ordinary meaning of that term were the telephone conversations of the Accused Kilolo and Mangenda, while these conversations were conducted on the Dutch territory ("Dutch intercepts"). The RFAs in relation to this interception were duly disclosed to the Defence upon the ruling of the Chamber. Furthermore, as the Defence is well aware, although the Prosecution requested the interception of telecommunications from the

⁴ Request, para.22.

⁵ ICC-01/05-01/13-1234-Conf, para.13 (emphasis added).

⁶ See Request, paras.16, 18.

Belgian authorities, these authorities declined to do so.⁷ Therefore, the Prosecution received intercepted data and communications only from the Dutch authorities.

7. Financial records, call data records, and email accounts are not “intercepted” data and communications. All of these are records that are kept in the normal course of business for the purpose of billing, statistics, and other purposes by the companies such as Western Union, Yahoo, or KPN. Nobody has “intercepted” these communications at the Prosecution’s behest or otherwise, and their collection occurred long before the Prosecution ever sent RFAs to obtain them.

8. Even if the Chamber “explicitly referred to the parameters of the Defence request as encompassing a range of different types of evidence, in different countries”⁸ — which it did not — the Chamber’s ruling clearly referred to *intercepted* data and communications. The Prosecution applied this ruling to the facts and circumstances of the case, as it must, and thus in view of the fact that the only relevant investigative steps concerning intercepted data and communications pertained to those obtained and provided by the Dutch authorities.

9. As noted, the Prosecution has disclosed the Dutch RFAs. The Decision is silent as to any others, notwithstanding the Defence’s request for them. However, if the Chamber finds that the Decision should be read in the way that the Defence suggests, the Prosecution will - as it has done before – comply with the order, and disclose all the requested RFAs.

B. The Defence have not been prejudiced as a result of the non-disclosure of the RFAs

⁷ Request, para.17, fn.7.

⁸ Request, para.17. No citation is provided for this assertion.

10. The Prosecution has undertaken its disclosure obligations seriously and consistently. It has timely disclosed to the Defence all information material to the Defence's preparation and potentially exculpatory information; all information that the Chamber ordered it to disclose, and information disclosed out of courtesy. As the Defence readily admit, more than 6,200 items have so far been disclosed in this case.⁹

11. The Defence advances the distorted claims of the Prosecution's intentional wrongdoing to again peddle before the Chamber the same unsubstantiated arguments about prejudice and lack of sufficient time to prepare which the Chamber has rejected.¹⁰ The Defence strategy here is transparent and inappropriate.

12. The Defence's "eleventh hour" requests for RFAs regarding materials in their possession for a long time underscores that no prejudice has ensued for the Defence in the absence of the RFAs. In the post-confirmation phase of the proceedings, the Defence requested the RFAs as late as July 2015. This happened more than a year after the Single Judge of Pre-Trial Chamber II rejected the generic Defence request for disclosure of all the RFAs to national authorities on 13 June 2014,¹¹ more than eight months after the confirmation of the charges,¹² and more than five months after the constitution of Trial Chamber VII.¹³ What is more, at the outset, the Prosecution alerted the Chamber and the Parties of its plan to tender large amounts of documents from the bar table during the first status conference in the case on 24 April 2015.¹⁴

⁹ «Requête conjointe de la Défense de M. Kilolo, M. Mangenda, M. Babala and M. Arido demandant le report du début du procès afin d'assurer l'équité du procès et les droits des prévenus», ICC-01/05-01/13-1228-Conf, para.20. The Bemba Defence was not party to that motion.

¹⁰ ICC-01/05-01/13-1254.

¹¹ ICC-01/05-01/13-494-Conf, 13 June 2014.

¹² ICC-01/05-01/13-749, 11 November 2014.

¹³ ICC-01/05-01/13-805, 30 January 2015.

¹⁴ ICC-01/05-01/13-T-8-Conf-ENG ET, 24 April 2015, p.38, lns.6-25, p.39, lns.1-13, see, in particular, lns.8-10. (The Prosecution alerted the Chamber and the Parties to the fact that it would be tendering from the bar table certain "classes" of evidence, including call data records, financial records, intercepted communications with audio files as well as the transcripts and translations, and Detention Unit recordings, which would comprise a "substantial number" of material).

Finally, the Defence waited for almost two months after the trial date was set on 22 May 2015¹⁵ to request the RFAs.

13. Similarly, the Defence also cannot hide behind the alleged need for the Prosecution's RFAs in order to properly respond to the Prosecution's Bar Table Motions ("BTMs"). Nor can the Defence credibly allege prejudice with respect to raising the "issues of legality on the admission of evidence"¹⁶ in the BTMs, having been in possession of most of the BTMs' underlying materials since before the filing of the Document Containing the Charges on 30 June 2014.¹⁷ Unsurprisingly, the Defence did not raise any such requests in that time. Having timely received all relevant material from States in execution of RFAs – which comprised 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, generally including communications between, and instructions, to relevant national authorities –, and in the absence of any real need for the RFAs, the Defence has sat idly by waiting for a strategically opportune moment to request the RFAs again.

14. The Defence have already analysed the BTMs materials in "467 pages",¹⁸ on top of the hundreds of pages of analysis of evidence they produced for confirmation. In light of all this, the Defence contention that the RFAs have been requested as a "preliminary step towards identifying which domestic judicial decisions or records might be relevant to the arguments concerning the legality of the processes used to collect the evidence on a domestic level"¹⁹ is unconvincing. Like other Defence allegations, the claim here that the Defence cannot prepare due to the Prosecution's

¹⁵ ICC-01/05-01/13-960.

¹⁶ Request, para.27.

¹⁷ ICC-01/05-01/13-526-AnxB1-Conf.

¹⁸ ICC-01/05-01/13-1228-Conf, para.52.

¹⁹ Request, para.26.

alleged failure to disclose critical information, previously rejected by the Chamber,²⁰ continues to be devoid of any substance.

15. Neither are the RFAs necessary for the preparation of examination of witnesses [REDACTED] and Pluijmers, which in any case is a Defence novel argument. Even if this Chamber adopted a rule that all items underlying an expert or analytical report have to be admitted into the evidence before a witness presents a report, the RFAs simply do not have the capacity to shed light on the alleged “discrepancy of timing in different records allegedly representing the same contact”,²¹ which is more appropriate as a question to be put to the report’s author. Nor is the question of whether “the Prosecution requested customer information for the determination of phone number attribution”, which baselessly insinuates that the Prosecution withheld relevant information, in any way relevant for assessing the accuracy and reliability of the [REDACTED] report.²² The Defence is free to argue that lack of certain data and information in the report is relevant for the determination of its reliability and accuracy. However, the RFAs cannot provide any additional assistance in that respect, just as they do not provide insight into the procedures of domestic authorities in their execution.

16. The Request’s allegation that the Defence have been forced to “once again” litigate disclosure issues which have already ostensibly prejudiced their preparation²³ does not accord with reality. The truth is, the Defence simply refuse to accept their own tactical mistakes. It is the Defence who have, late in the day, sought to inundate the Prosecution with specious, overly broad and spurious requests, bringing several before the Chamber, most of which have been rejected.²⁴ This Request, like those

²⁰ ICC-01/05-01/13-1254.

²¹ Request, para.29.

²² Request, para.29.

²³ Request, para.32.

²⁴ See, e.g. ICC-01/05-01/13-1225-Conf, para.16 (partially granted); ICC-01/05-01/13-1227; ICC-01/05-01/13-1188; ICC-01/05-01/13-1172, para.20 (partially granted).

before it, is a transparent last-ditch effort to derail the trial in the process. For that reason alone, it should be denied.

C. The requested remedies are unwarranted, unnecessary, and impracticable

17. The Request for the filing of a full schedule of items collected during the Prosecution's investigation in this case ("Schedule") should be rejected as it lacks any legal or factual basis. It is also unnecessary, as it would not advance the case or aid the Defence preparation. In addition, the measure would be impracticable and time-consuming. Similarly, the request for notice to the Prosecution that sanctions under article 71 might apply in the event of non-compliance, is gratuitous and vexatious. No disclosure violation has occurred.

i. The measure is unwarranted

18. There has been no "intentional non-compliance" with the Decision, and thus there is no factual basis to order the filing of a Schedule. Aside from the baseless claim that the Prosecution has intentionally misread the Decision, the Defence have no other basis to assert that material or exonerating information has been withheld. The Request should thus be rejected on this basis.

19. In particular, the Request should be rejected in relation to those parts of the Schedule that propose including the dates of all interviews with actual and potential witnesses, and a log of contacts and communications between the Prosecution and Prosecution witnesses.²⁵ This information is not ordinarily disclosable to the Defence, as it relates to the Prosecution's investigations, and may impact on witness security. Absent a specific showing of materiality, it is insufficient for the Defence to claim that

²⁵ Request, para.49 iii. and iv.

having this information would assist in submitting targeted and informed requests for disclosure. As the Chamber has already ruled, “[T]here is no information suggesting that the Prosecution has under-disclosed the details of its relevant witness contacts.”²⁶ The Defence’s attempt to obtain information already once refused, without advancing anything substantively new, must be rejected.

20. Further, filing a Schedule would amount to an “open file disclosure” model, which this Court’s framework does not accommodate, and which is contrary to the established jurisprudence of the Court regarding rule 77 disclosure.²⁷ The Defence analogy between the Court’s and the *ad hoc* Tribunals’ disclosure systems is false. Contrary to the Defence assertion, the system of disclosure at the Court is not similar to the Electronic Disclosure Suite (“EDS”) used at the *ad hoc* tribunals. Here, the Prosecution is not required to provide for the Defence “the general fruits” of its investigation for its perusal, but to review the items in its possession and disclose them in accordance with the requirements of rules 76 and 77 of the Rules of Procedure and Evidence or article 67(2) of the Rome Statute. Consequently, and in particular as there is no evidence that the Prosecution has violated these provisions, there can be no resort to such an extreme measure.

ii. The requested measure would be ineffective, time-consuming and would lead to a trial delay

21. Taking into account the extensive disclosure the Defence has received in this case and the lack of any substantiated basis for the allegations that material information has been withheld, filing a Schedule is not necessary and would not constitute “the most effective remedy to ensure the fairness and expeditiousness of

²⁶ ICC-01/05-01/13-1172, para.20.

²⁷ See ICC-01/05-01-13-1156-Conf, para.21.

the proceedings".²⁸ *First*, had the Defence wanted to ensure efficiency and expeditiousness of the proceedings, they would have filed their disclosure requests sooner. A Schedule filed at this time would not fulfil that goal. *Second*, at this stage, with the wealth of information at the Defence's disposal, a Schedule would serve no identifiable purpose.

22. To the contrary, the Schedule would potentially delay the trial, without in any way advancing the Defence preparation, as it would likely lead to additional requests for disclosure of materials, irrespective of their lack of utility to the Defence. This process would not be finalised before the start of trial, unless a postponement was granted, and would inevitably continue throughout the first weeks, if not months, of the trial. The Schedule would also not further assist the Defence in prioritising disclosure requests "in accordance with the schedule of witnesses",²⁹ which is already well known to the Defence. However, given this Defence's statement, it is clear that the Schedule would likely further delay the trial, as it would potentially lead to last-minute adjournments whenever the Defence requested that additional information should be disclosed prior to a witness appearance.

23. The compilation and disclosure of a Schedule as proposed by the Defence, as useless as it would be, would require considerable time and resources, and would at this stage jeopardise the Prosecution's preparation for trial, now scheduled to start in less than a week. Effectively, it would require the Prosecution to rearrange information already disclosed to the Defence in the manner proposed, with little or no added value to the Defence. It would also require the Prosecution to assess, with respect to the information regarding witnesses, which of them would require protective measures both in relation to their identity and as to the dates of its contacts with them.

²⁸ Request, para.48.

²⁹ Request, para.50.

24. Requiring the requested Schedule is untenable in this case and should not be countenanced by the Chamber in the circumstances.

IV. Relief Requested

25. For the foregoing reasons, the Chamber should reject the Request.



Fatou Bensouda, Prosecutor

Dated this 30th Day of September 2015
At The Hague, The Netherlands