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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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***

Public

**Public Redacted Version of Reply to “Prosecution’s Response to the Bemba
Defence’s Request for Correspondence with the Dutch Authorities (ICC-01/05-
01/13-1525)”**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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Introduction

1. The Defence for Mr. Bemba hereby submits its reply to the Prosecution's response to the 'Prosecution's Response to the Bemba Defence's Request for Correspondence with the Dutch Authorities (ICC-01/05-01/13-1525)' ("the Response").¹

2. The Response is predicated on three flawed assumptions:

- i. Firstly, the Prosecution's contention that the issue of access to the meetings notes and emails (the Requested Documents) was addressed by Mangenda litigation, and is now *res judicata*;
- ii. Secondly, that the receipt of the Requests for Assistance concerning the Dutch proceedings extinguished the right of the Defence to seek and receive further documentation cited in the RFAs, which concern the legality of the collection of the evidence;
- iii. Thirdly, that the Prosecution's duty to disclose material concerning the legality of the collection of evidence is fulfilled in circumstances in which the Defence is informed of the existence of relevant documents, but does not receive the documents themselves.

3. These assumptions do not undermine the materiality of the Requested Documents, nor does they excuse or exempt the Prosecution for its duty to disclose them.

¹ ICC-01/05-01/13-1528-Conf. This request has been filed on confidential basis in order to correspond to the Prosecution's response, but can be reclassified as public redacted (as concerns the telephone number of Me. Kilolo).

Submissions

4. The Prosecution has argued that the Defence Request should be characterised as a request for reconsideration of a previously adjudicated issue.

5. This is patently incorrect. The Defence is not requesting the Trial Chamber to reverse any previous factual or legal findings. To the contrary, the Defence is requesting the Chamber to apply its previous legal determination regarding the scope of the Prosecution's disclosure obligations to specific categories of information, which were not known to the Defence at the time of previous litigation.

6. Although the Requested Documents fall within the scope of the Trial Chamber's later decision on the Mangenda request, the fact that they do so enhances rather than detracts from the Prosecution's duty of disclosure.

7. Indeed, the Prosecution's reliance on the Mangenda litigation only serves to prove that the Prosecution should have disclosed the Requested Documents in August 2015. The Prosecution's continued refusal to do so constitutes material non-compliance with the Trial Chamber's decision.

8. The Prosecution also cannot rely on its inaccurate notice of compliance in order to oppose the current request. Rather than closing the litigation, the Prosecution's subsequent notice of compliance only served to prove that until the Defence received and reviewed the RFAs in detail, the Defence would not have known that the Prosecution had purportedly requested the interception of the [REDACTED] number through informal processes.

9. The Prosecution had been ordered to disclose all material concerning the legality of the interception process. The fact that the Prosecution then disclosed

RFAs would have only served to reinforce the understanding of the Defence that the Prosecution's requests for interception were captured fully by the RFAs themselves.²

10. The Mangenda correspondence relied upon by the Prosecution is dated June 2015; it predates both the Trial Chamber's decision regarding the disclosability of material related to the legality of the interception process, and the receipt of the RFAs from the Dutch authorities.

11. The Mangenda Defence could not have requested the disclosure of specific emails and notes of meetings concerning the interception of the [REDACTED] number because it was not aware of the existence of such documents. The Prosecution's response letter of 18 June 2015³ fails to speak to the disclosability of the Requested Documents, and does not provide any indicia as to the existence and specific relevance of the Requested Documents.

12. In particular, it is clear from Annex attached by the Mangenda team to its formal request for disclosure (ICC-01/05-01/13-1082-Conf-AnxA) that the defence was unaware of the fact that the Prosecution has purportedly requested the interception of the [REDACTED] number through informal communications. This is illustrated by the distinction made in the Annex between 'requests', and 'discussions'.

13. Accordingly, the very fact that the Prosecution excluded the emails and meeting records from its disclosure meant that the Defence was only in a position to ascertain the full extent of the materiality of these documents to the legality of the

² ICC-01/05-01/13-1233-Conf, para. 5. See also paragraph 10, which reinforces the position that the RFAs were the only documents generated by the Prosecution, which were relevant to the Defence request.

³ ICC-01/05-01/13-1528-Conf-AnxA

interception process after the Defence had received and carefully reviewed the RFAs.

14. The subsequent litigation concerning ‘non-compliance’ was also focussed on the Single Judge’s Decision of 10 September 2015, and the Prosecution’s 14 September 2015 Notice of Compliance.⁴ In particular, the litigation centered on the Prosecution’s interpretation of a specific paragraph in the 10 September 2015 decision. The question as to whether the Prosecution had complied in full with the earlier decision concerning the Dutch proceedings was not placed before the Chamber. Indeed, the later litigation concerned RFAs, and thus by definition, did not address the issue as to whether the Prosecution should have disclosed emails and meeting records concerning the Dutch interception process.

15. In any case, apart from being unrealistic in light of the sheer amount of litigation and workload during the September 2015 time period, the question as to whether the Defence could or should have requested the emails and records at an earlier juncture is irrelevant.

16. Disclosure is not a cat and mouse game. The Prosecution has a proactive duty to identify and disclose any material which can be relevant to the preparation of the Defence.⁵ The absence of an explicit Defence request does not excuse or exempt the Prosecution to disclose information falling under Rule 77. This is particularly the case given that the Prosecution has repeatedly been put on notice throughout the Prosecution case that the Defence considers that informal or irregular requests for access to information from national authorities/entities are relevant to the Defence case, and as disclosable under Rule 77.⁶ The Prosecution is also aware that the Defence considers that informal exchanges cited RFAs are

⁴ ICC-01/05-01/13-1308-Conf, paras. 1 and 2.

⁵ ICC-02/05-03/09-501, para. 34.

⁶ ICC-01/05-01/13-T-33-ENG, p. 15.

relevant to both the legality of the collection of evidence, and the manner in which the RFAs were executed.

17. The 10 September 2015 Notice of Compliance therefore did not extinguish the Prosecution's ongoing duty to assess whether the Requested Documents would be relevant to such lines of Defence inquiry.

18. The Prosecution has also failed to cite any valid grounds for withholding the Requested Documents. As confirmed by the Appeals Chamber, "the overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule."⁷ If information falls within the scope of Rule 77, then it must be disclosed absent an explicit legal basis not to do so.

19. In this regard, the Prosecution's argument that disclosure of the Requested Documents would be duplicative to information disclosed in the RFAs is both incorrect and an insufficient basis to withhold disclosure. The RFAs refer to the existence of the Requested Documents, but the contents themselves are only referred to cursorily. In particular, given that the truncated description was provided by the Prosecution (a party to these proceedings) for the purpose of filling a gap in its own diligence, the description could be inaccurate or self-serving. The Defence thus has a clear interest to review the actual emails and records themselves in order to obtain a clear picture of the understanding of both the Prosecution and the Dutch authorities at the time that the emails were sent and the meetings convened, rather than the Prosecution's *posto facto* construction of their content.

20. Full disclosure in these circumstances is therefore consistent with the Appeals Chamber's edit that although "the Chamber may also take into account whether the defence has already received relevant documents from the Prosecutor",

⁷ ICC-01/04-01/07-475, para. 11.

“caution should be exercised in taking such an approach as it must not undermine the paramount right of the defence to disclosure of all information material to the preparation of the defence”(emphasis added).⁸ The *ad hoc* Tribunals have similarly emphasised that in order to be *effective*, it is necessary for the Defence to be disclosed the contents of documents in their original form.⁹

Relief sought

21. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Trial Chamber to order the Prosecution to disclose the Requested Documents forthwith.

Respectfully submitted,



Melinda Taylor
Counsel of Mr. Jean-
Pierre Bemba

Dated this 6th day of January 2016

The Hague, The Netherlands

⁸ ICC-02/05-03/09-50, para. 40.

⁹ Cf *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 41; *Prosecutor v. Brdjanin and Talic*, Decision On "Motion For Relief From Rule 68 Violations By The Prosecutor And For Sanctions To Be Imposed Pursuant To Rule 68bis and Motion For Adjournment While Matters Affecting Justice And A Fair Trial Can Be Resolved, 30 October 2002. paras. 21-31.