

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 June 2016

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

Public Redacted Document

Public redacted version of "Prosecution's Response to the Defence Request for Disclosure and Judicial Assistance", 31 July 2015, ICC-01/05-01/13-1116-Conf

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Bemba Defence’s requests for the disclosure of: (i) any information capable of identifying the anonymous informant, [REDACTED] (“First Disclosure Request”); and (ii) any material concerning Prosecution’s contacts [REDACTED] (“Second Disclosure Request”). Both Requests fail to establish the requisite materiality of the items sought.

2. The Prosecution further opposes the lifting of the redactions to the information capable of identifying the anonymous informant in court records and/or other documents (“Third Request”). The Defence fails to show that their continuing application is no longer justified.

3. Similarly, although the relief sought in Bemba’s request for judicial assistance (“Fourth Request”) is within the discretion of Trial Chamber VII (“Chamber”), it is not justified and should be denied. This also applies to the derivative request for the provision of any phone numbers [REDACTED] within the Prosecution’s possession.

II. Confidentiality

4. This filing is classified as Confidential, *Ex Parte*, only available to the Prosecution and Bemba Defence, as it responds to a filing of the same designation.

III. Submissions

5. It is incumbent upon the Defence to make “a sufficient showing of materiality, within the meaning of [rule 77 of the Rules of Procedure and Evidence]” to substantiate any request for disclosure.¹ The First and Second Disclosure Requests

¹ ICC-02/05-03/09-501, para.9.

fail to make such showing.

A. The First Disclosure Request is without merit

6. The First Disclosure Request purports to be an attempt to verify Bemba's theory that the anonymous informant is [REDACTED].² However, Bemba provides no valid forensic purpose of identifying the informant, including, or especially [REDACTED]. The matter is simply irrelevant at this stage of the proceedings, given the independent corroboration of the lead information provided by the anonymous informant, including through documentary evidence, and indeed, the recorded words of the Accused themselves.³

7. Bemba's Request is untenably overbroad and nebulous. The Prosecution cannot reasonably be expected to undertake to identify *any* information which *could* establish the informant's identity or *suggest* any relation to [REDACTED]⁴ - also in light of the rule 77's limitation to physical and tangible evidence.⁵ As Bemba has been informed on several occasions,⁶ the anonymous informant is anonymous to the Prosecution, and, as it stands, his or her connection to [REDACTED] does not exist beyond the unsubstantiated conjecture of the Bemba Defence. Certainly they have not provided the Prosecution with any tangible basis to found such conjecture.

8. This is the second time in these proceedings that the Bemba Defence has sought access to this information,⁷ notwithstanding the ruling of the Single Judge granting it access to the contents of the anonymous informant's correspondence with the

² See e.g., CAR-OTP-0082-0460-R02, CAR-OTP-0082-1961-R01.

³ See e.g., CAR-OTP-0074-0976 (Audio), CAR-OTP-0077-1356 (Transcript); CAR-OTP-0074-0977 (Audio), CAR-OTP-0077-1359 (Transcript).

⁴ ICC-01/05-01/13-1098-Conf-Exp, para.99(i).

⁵ Rule 77 of the Rules.

⁶ ICC-01/05-01/13-1098-Conf-Exp, para.23. See also ICC-01/05-01/13-T-5-Red2-ENG, p.2, lns.11-12.

⁷ See ICC-01/05-01/13-208.

Prosecution.⁸ Notably, the Single Judge characterised the grounds advanced by the Defence in support of that application as “debatable” under rule 77.⁹ The Defence never appealed the ruling, and cannot now seek to circumvent the Rome Statute (“Statute”)’s procedural framework by raising it anew, based on speculative and specious arguments, none of which address the fundamental materiality requirement. In short, nothing has changed—except further corroboration of the Accused’s criminal conduct and confirmation of the information provided by the anonymous informant. It bears noting that the Prosecution does not rely on the lead information, which merely served as a trigger to investigate the Accused’s conduct in advancing its case against the Accused.

9. Bemba’s contention that the anonymous informant “[REDACTED]” for the Defence, as he is “[REDACTED]” of Prosecution’s witnesses¹⁰ is speculative, at best. As such, it falls outside the scope of the Prosecution’s rule 77 disclosure obligations, which requires a showing of *actual* materiality, however minimally this test has been applied. The First Disclosure Request fails to meet even this minimum threshold.

10. Although Bemba states that information provided by the anonymous informant supported the Prosecution’s requests to obtain evidence,¹¹ he does not even allege, let alone identify, any illegality or impropriety tainting the decisions granting these requests. Thus, in addition to failing to demonstrate materiality on this basis, the First Disclosure Request fails to show how the anonymous informant’s identity would have any rational bearing on any such claim.

11. As noted by the Single Judge in this case, “by no means can information provided by an informant, whether anonymous or not (as opposed to a witness statement), be regarded, treated or relied upon as evidence in the context of judicial

⁸ ICC-01/05-01/13-298, p.5.

⁹ *Ibid.*

¹⁰ ICC-01/05-01/13-1098-Conf-Exp, para.38 (emphasis added).

¹¹ ICC-01/05-01/13-1098-Conf-Exp, paras.31-32.

proceedings”.¹² All of the evidence sustaining the confirmation of charges comes from identified, verifiable sources. The identity of the anonymous informant, who merely provided *lead* information, or his or her motives, affects no allegation underlying the charges as confirmed, and is unrelated to the Prosecution’s obligations under article 54(1) of the Statute.

B. The Third Request is not justified

12. The Single Judge has ordered that the information capable of identifying the anonymous informant be redacted, on the grounds that his or her anonymity “must be strictly preserved”, *inter alia*, to protect his or her safety and security.¹³ This information appears in the informant’s correspondence with the Prosecution, as well as in a few attendant filings, decisions, and a transcript of a hearing. The limited existing redactions fall under category A.6., pursuant to the Protocol establishing a redaction regime in this case.¹⁴ These redactions should continue to apply,¹⁵ absent a showing that the security concerns no longer exist. The Third Request fails to make such showing.

13. To the contrary, when imagining the implications of different hypothetical scenarios resulting from a possible lifting of the redactions,¹⁶ Bemba conveniently ignores one important potential result: if his hypothesis that [REDACTED] is the anonymous informant is not confirmed, an individual's security in relation to this case would be unjustifiably compromised.

¹² ICC-01/05-01/13-298, p.5.

¹³ ICC-01/05-01/13-298, p.5-6; the Single Judge has carefully evaluated the basis for all the proposed redactions, including in a dedicated hearing, *see* ICC-01/05-01/13-T-5-Red2-ENG.

¹⁴ *See* ICC-01/05-01/13-959-Anx, paras.28-30.

¹⁵ *See* ICC-01/05-01/13-959-Anx, para.7.

¹⁶ ICC-01/05-01/13-1098-Conf-Exp, paras.44-45.

C. The Second Disclosure Request is without merit

14. Under the statutory framework, the Defence is not entitled to *all* material generated in the course of the Prosecution's investigations. Bemba concedes that [REDACTED].¹⁷ [REDACTED]. The Second Disclosure Request fails to establish the relevance of the nature and frequency of his contacts with the Prosecution.

15. The analogy with the Prosecution's cross-examination strategy in the Main Case is clearly inapposite.¹⁸ That trial witnesses on the stand were asked about the number of their contacts with the calling party does not lend relevance to this information in respect of everyone met, screened or interviewed during the investigations.

16. Bemba's alleged right "[REDACTED]" is illusory.¹⁹ Moreover, [REDACTED]'s "input" is limited to the information contained in his statements, with which the Defence is already clearly familiar. Had [REDACTED]'s provided any further relevant information to the Prosecution during the course of any contacts, then this too would have been disclosed in the ordinary course. But [REDACTED] did not. The allegation of [REDACTED]'s supposed "influence" over the Prosecution's investigations relies on a misrepresentation of a recommendation in [REDACTED].²⁰ First, the report says [REDACTED]²¹ – [REDACTED];²² and, second, the Prosecution has already informed the Defence that no such consultation took place.²³

17. In regard to the June 2014 [REDACTED] interview, the Prosecution has already confirmed to the Bemba Defence that it has discharged its disclosure obligations in respect of information provided by [REDACTED] on, or in connection with, that

¹⁷ ICC-01/05-01/13-1098-Conf-Exp, paras.63, 64.

¹⁸ ICC-01/05-01/13-1098-Conf-Exp, paras.59-61

¹⁹ ICC-01/05-01/13-1098-Conf-Exp, para.64.

²⁰ ICC-01/05-01/13-1098-Conf-Exp, para.62.

²¹ *Ibid.*

²² CAR-OTP-0084-0087 at 0088.

²³ ICC-01/05-01/13-1098-Conf-Exp-AnxE, p.3.

occasion.²⁴ The Second Disclosure Request advances no valid basis for the disclosure of other material. Bemba's insinuations that the Prosecution is withholding relevant evidence are solely founded on speculations, such as that, *inter alia*, "[REDACTED]".²⁵ Nevertheless, the Prosecution observes that it does not possess or control any material within the scope of this part of the Second Disclosure Request that the Defence has not received.

D. The Fourth Request fails to show sufficient justification for the issuance of an order

18. Requests for assistance should adhere to the tripartite principles of (i) specificity, (ii) relevance and (iii) necessity that have been articulated by Chambers of the Court as essential prerequisites for cooperation requests under Part 9 of the Statute.²⁶ The Fourth request fails to sufficiently establish that the request for assistance sought would be either relevant or necessary.

19. The Fourth Request fails to establish the requisite materiality of the information sought, either to the proper determination of the issues being adjudicated, or to the proper preparation of Bemba's defence, as required.²⁷ *First*, although Bemba suggests that he needs the material "[REDACTED]" at the time of the charged events,²⁸ he advances no concrete claim of [REDACTED]'s interference with the testimony or statements of these individuals.

²⁴ ICC-01/05-01/13-1098-Conf-Exp-AnxE, p.2.

²⁵ ICC-01/05-01/13-1098-Conf-Exp, para.68.

²⁶ See, for example. *The Prosecutor v. Banda and Jerbo*, Decision on "Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union", 1 July 2011, ICC-02/05-03/09-170, paras.13-14; *The Prosecutor v. Banda and Jerbo*, Public Redacted Decision on the second defence's application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 December 2011, ICC-02/05-03/09-268-Red, para. 13; *The Prosecutor v. Banda and Jerbo*, Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 September 2013, ICC-02/05-03/09-504-Red, para.4.

²⁷ Rule 116(1)(a) of the Rules. See also ICC-02/05-03/09-170, para.13 (noting the requirement of establishing materiality in respect of requests for cooperation under Part 9 in furtherance of an application pursuant to article 57(3)(b)) of the Statute) and para.14, ICC-02/05-03/09-504-Red, paras.6-7.

²⁸ ICC-01/05-01/13-1098-Conf-Exp, para.73.

20. *Second*, the Fourth Request is predicated upon Bemba's purported "[REDACTED]".²⁹ Bemba offers no legal basis for such "right" in the context of a demand for the rule 77 disclosure.

21. *Finally*, Bemba tries to graft his Request onto the Chamber's relevance determinations regarding the contacts between the Accused and witnesses, or amongst witnesses.³⁰ Given that [REDACTED] did not testify in the Main Case, nor is he charged in this case, there is no analogy to be made.

22. In the absence of a sufficient legal basis for the Chamber to issue an order for judicial assistance, the request for the provision of [REDACTED]'s contact information must fail.

E. Bemba is free to address his concerns directly with [REDACTED]

23. As noted, the Prosecution does not intend to call [REDACTED] as a witness in this case. As such, to date, nothing has prevented Bemba from contacting [REDACTED] directly to confirm his theory and/or other issues described in his filing, particularly to the extent that he ostensibly has considered them genuinely material to the preparation of his defence. In this respect, Bemba's addendum underscores the ease with which he has identified [REDACTED]'s contact information from an open source³¹ – the same contact information which he seeks to obtain from the Prosecution.

²⁹ ICC-01/05-01/13-1098-Conf-Exp, para.92.

³⁰ See *contra* ICC-01/05-01/13-1098-Conf-Exp, paras.93-94.

³¹ ICC-01/05-01/13-1101-Conf; ICC-01/05-01/13-1101-Conf-Exp-AnxA.

IV. Requested Relief

24. For the foregoing reasons, the Prosecution requests the Chamber to reject the First and Second Disclosure Requests and the Third Request. As concerns the Fourth Request, the Prosecution does not consider that it establishes a sufficient basis for the Chamber to seek the States' cooperation.



Fatou Bensouda, Prosecutor

Dated this 13th Day of June 2016
At The Hague, The Netherlands