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

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THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

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 with Confidential Annexes A, B and C

**Public Redacted Version of "Defence Request for Leave to Reply to the
Prosecution Consolidated Response Dated 27 July 2017", 31 July 2017, ICC-01/05-
01/13-2188-Conf**

Source: Art. 70 Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Helen Brady

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Mylène Dimitri

Counsel for the Defence of Mr Aimé Kilolo Musamba

Michael G. Karnavas

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Peter Robinson

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for the Defence of Mr Narcisse Arido

Charles Achaleke Taku

Beth Lyons

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Counsel Support Section

Herman von Hebel

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to Regulations 24(5) and 34(c) of the Regulations of the Court,¹ the Defence for Mr. Jean-Pierre Bemba respectfully requests the leave of the Honourable Appeals Chamber to file a reply in relation to two discrete issues arising from the Prosecution Consolidated Response dated 27 July 2017 (the Response).²
2. In the Response, the Prosecution asserted that none of the issues set out in the Bemba Regulation 60 request concerned new issues arising from the Prosecution Response to the Bemba Appeal Brief (the Appeal Response).
3. This is demonstrably incorrect. Without repeating the arguments set out in the Regulation 60 application, at least two key issues concerned information that had never been disclosed by the Prosecution previously. The Defence only received information that was germane to this point after it filed its Regulation 60 application, which is why it was unable to provide full particulars in its initial request.
4. If leave is granted, the Defence can file the reply within one working day.
5. The current request has been filed on a confidential basis due to the fact that it includes references to confidential phone numbers. A public redacted version will be filed forthwith.

¹ In the *Gaddafi & Senussi* case, the Appeals Chamber confirmed that whereas Regulation 24 could not be invoked for the purpose of seeking leave to reply in relation to substantive appeal briefs, it was otherwise applicable to ancillary applications filed before the Appeals Chamber: ICC-01/11-01/11-387

² 'Prosecution's Consolidated Response to the Appellants' Requests for Leave to Reply to "Prosecution's Consolidated Response to the Appellants' Document in Support of Appeal"

Submissions

The fact that the Prosecution never disclosed CDRs that it received on 13 September 2013 is a new issue arising from the Response

6. In the Response, the Prosecution has sought to trivialise, and obfuscate the key issue as to whether the Prosecution took steps to conceal the fact that it received confidential and privileged information directly from the Dutch authorities, before the Single Judge ruled that it was entitled to do so.

7. In response to Defence arguments concerning the absence of any disclosed record concerning the Prosecution's receipt of key CDRs at this juncture, the Prosecution averred that all relevant information, including the chain of custody of CDRs, was disclosed to the Defence in 2013.³ The Prosecution also claims to have assisted the Defence to identify relevant information, and further noted that it was planning on responding to a further Bemba Defence query, although it did not explain what the content of its response would be.⁴ The impression which the Prosecution evidently sought to convey by these submissions was that any 'issue' has been resolved, and all relevant information provided to the Defence in a timely manner.

8. Nothing could be further from the actual state of play.

9. The Prosecution initially made the incorrect claim that the 13 September 2013 chain of custody had been provided to the Defence as part of the 2013 disclosure to the previous Defence team.⁵ Although this claim was not compatible with the information in Ringtail and E-Court, out of an abundance of caution, the Defence then reviewed each such disclosure batch

³ ICC-01/05-01/13-2187-Conf, para. 19.

⁴ ICC-01/05-01/13-2187-Conf, para. 19.

⁵ Annex A.

and confirmed that not to be the case. Due to time constraints, the Defence focused its initial efforts on verifying the [Redacted] number CDR;_ it is thus incorrect (and a gross reversal of the disclosure burden of the Prosecution and its duty as an independent Minister of Justice), to claim that because the Defence only referred to specific examples concerning the [Redacted] number CDRs, no other CDRs are impacted.

10. Then, in an email which was sent to the Defence at 1.30pm (two hours before the Response was filed),⁶ the Prosecution conceded that the reason why none of the disclosed [Redacted] CDRs list a chain of custody earlier than 10 October 2013 is that the CDRs, which the Prosecution received directly from the Dutch authorities on 13 September 2013, **were never disclosed to the Defence.**

11. The Prosecution claimed that the information contained in this CDR was duplicated in CAR-OTP-0072-0082, but the initial chain of custody information (of key relevance to issues of legality) was not included in this later CDR. Since CAR-OTP-0072-0082 was compiled by the police and not telecom service providers, it includes a significant amount of additional confidential information, including the identity and address of persons called by the [Redacted] number. The fact that the Prosecution received this information directly, whilst the Main case was ongoing, would have been of key relevance to a range of arguments concerning investigative conflicts of interest.

⁶ Annex A.

12. The Defence is also not in a position to ascertain whether other content is duplicated since the Prosecution continues to refuse to disclose either this missing record, or others received on the same date,⁷ or other dates.⁸

13. The need for precision is of key importance as concerns the [Redacted] number due to the fact that the CDRs were received in an unprotected, modifiable format,⁹ which heightens the need for comparison. As remarked by the Defence in its response to the relevant application to tender the [Redacted] CDRs through the bar (rather than through a witness involved in the collection process), the versions provided in 2014 contained significant gaps in information concerning chain of custody, and errors of accuracy (for example, the records appeared to have captured the wrong [Redacted] number in several instances).¹⁰ Information falling within the date range of some excel CDRs for this number is also missing.¹¹

14. Of further importance, the Dutch police ‘formatted’ the call data records of the [Redacted] number that had been directly compiled by the police, before the Prosecution then disclosed a copy of them to the Defence in 2014.¹² Put simply, there is no duplication between the missing record and the CDR which was eventually disclosed to the Defence because one was ‘formatted’

⁷ See Annexes A and B. The Prosecution has refused to confirm the names and date ranges for the CDRs that it received directly from the Dutch authorities on 13 September 2013. If leave to reply is granted, and if the Prosecution continues to prevaricate on this issue, the Defence will seek leave to admit a Dutch decision setting out this information.

⁸ See Annex B. The Defence intends to seise the Appeals Chamber with a request for an order for disclosure, so that if the Appeals Chamber granted the Defence leave to the Appeal Response, all relevant issues can be addressed at the same time.

⁹ ICC-01/05-01/13-1074-Conf, para. 75; ICC-01/05-01/13-1074-Conf-AnxC, p18, row 16.

¹⁰ ICC-01/05-01/13-1074-Conf-AnxC, p18, row 16

¹¹ For example, for CAR-OTP-0083-1478, which was generated by KPN for the Prosecution on 9 August 2014) the summary information indicates that the date range of compilation was 15 August 2013 to 12 October 2013, while the actual data is limited to 13 September -1 October 2013 only: ICC-01/05-01/13-1074-Conf-AnxC, p. 22, row 19.

¹² CAR-OTP-0090-0724 at 0747 (p.134), footnote 17 to Annex B.3 of the [Redacted] Report states that “CAR-OTP-0072-0082 was formatted by the Netherlands National Police Corps (Korps Nationale Politie) prior to being provided to the OTP.”

by the Dutch police for the purposes of disclosure to the Defence, and the one which was provided directly to the Prosecution in September 2013 was not.

15. The particular legal consequences stemming from this non-disclosure could not have been addressed in the initial Defence Appeal, or the Defence Regulation 60 application, because at the time that these submissions were filed, the Defence had not received confirmation that the Prosecution had not disclosed these records.

16. Nor had the Defence received any confirmation at that point that the Prosecution had not disclosed all the versions of records received from national authorities or third parties, notwithstanding the key relevance of such records to issues of authenticity, legality, and investigative conflicts of interest. The inability of the Defence to raise these issues was also squarely due to the failure of the Prosecution to disclose information that was of key relevance.

17. The fact that the Prosecution only conceded this fact on appeal is also particularly grave, given that the Trial Chamber affirmed on multiple occasions that correspondence between the Prosecution and the Dutch authorities concerning the collection of records fell within the Prosecutor's disclosure obligations,¹³ and further affirmed that information concerning the call data records of the [Redacted] number was encompassed by this disclosure obligation.¹⁴ If all such contextual information was disclosable, it beggars belief that the Prosecutor could simply fail to recognise that the records themselves were not.

¹³ ICC-01/05-01/13-1148-Conf; ICC-01/05-01/13-1542; ICC-01/05-01/13-1632.

¹⁴ ICC-01/05-01/13-1542; ICC-01/05-01/13-1632.

18. This backdrop is of clear relevance to the question as to whether it would be in the interests of justice to allow the Defence to reply to the Prosecution's arguments on this point in the Appeal Response.

The Prosecution submissions concerning whether the evidence relied upon to substantiate the reasonable suspicion threshold arises from its Response

19. In response to the Defence request to address the issue as to whether the specific evidence alluded to in the Prosecution Response had been placed before the Single Judge, or was capable of satisfying the "reasonable suspicion" standard for access to the detention unit recordings, the Prosecution claimed that the Defence had already advanced these arguments in its Appeal Brief.¹⁵

20. This claim glosses over, and conceals the fact that prior to its Appeal Response, the Prosecution had never disclosed that some of the sources of information for its May 2013 applications could be characterised as 'resource persons'. In correspondence post-dating its Response, the Prosecution relied on information which was filed in the Main case, but never the Article 70 case, in order to address Defence queries concerning the identity and role of such persons, and further indicated which allegations were attributable to these 'resources persons'.¹⁶

21. The provision of this new information raised specific issues as to whether the summaries of evidence provided by such persons¹⁷ were capable of satisfying

¹⁵ Response, para. 18.

¹⁶ Annex C.

¹⁷ In light of firstly, the Prosecution characterisation of its evidential sources as 'resource persons', and secondly, the fact that it was evident from the Prosecution's recent correspondence that much greater detail concerning the resource persons' role and allegations was put before Trial Chamber III

the reasonable suspicion standard in connection with the particular allegations advanced by the Prosecutor.

Relief sought

22. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Appeals Chamber to grant the Defence leave to reply to the "Prosecution's Consolidated Response to the Appellants' Requests for Leave to Reply to "Prosecution's Consolidated Response to the Appellants' Document in Support of Appeal"", in relation to the two issues identified above.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba



Mylène Dimitri
Associate Counsel of Mr. Jean-Pierre Bemba

than the Single Judge, the Defence reviewed public transcripts of the Main Case concerning similar allegations put to Defence witnesses during cross-examination. As a result, the Defence discovered indicia that the Prosecution interviewed a specific person for the purpose of obtaining information concerning the credibility of Defence witnesses, put these suspicions to Trial Chamber III in *ex parte* filings and hearings, and then invoked Article 54(3)(e) in order to withhold the person's identity and statements from the Defence. This, in turn, prevented both the Main Case and Article 70 Defence from raising obvious issues concerning the credibility of any information provided by this person. Although the Defence requested the disclosure of specific information concerning this person in order to facilitate its ability to formulate issues in its Regulation 60 request, the Prosecution merely responded by requesting further information from the Defence. The Defence since provided further information as to the relevance of the requested information, but the Prosecution has yet to respond: Annex C. In the event that disclosure is not forthcoming, the Defence will also seise the Appeals Chamber with an order for disclosure so that all relevant issues can be addressed within the framework of the Regulation 60 reply.

Dated this 7th day of August 2017

The Hague, The Netherlands