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Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/05-01/13**
Date: **10 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 Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo
Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba
Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo
Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu
Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido
Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Others

REGISTRY

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Victims Participation and Reparations Section

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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* ('Case'), having regard to Articles 64(2) and 67(2) of the Rome Statute ('Statute') and Rules 77 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews'.

I. Procedural History

1. On 10 August 2015, the Defence for Mr Arido ('Arido Defence') requested the Chamber to order the Office of the Prosecutor ('Prosecution') to disclose its requests for assistance directed to the Cameroonian authorities ('Arido Request').[1]

2. On the same day, the Defence for Mr Babala ('Babala Defence') requested the Chamber to order the Prosecution to disclose its requests for assistance directed to the authorities of the Democratic Republic of the Congo, the audio recordings of its witness interviews and 'tous les éléments à décharge' in the possession of the Prosecution ('Babala Request').[2]

3. Also on the 10 August 2015, the Defence for Mr Bemba ('Bemba Defence'; together with the Arido Defence and Babala Defence: 'Defence') requested the Chamber to order the Prosecution to disclose, *inter alia*, its requests for assistance directed to the authorities of the Netherlands, Belgium, France, Sweden, Austria, Cameroon, Democratic Republic of Congo, Germany and the Central African Republic and its records on domestic proceedings pertaining

[1] Narcisse Arido's Request for a Disclosure Order Regarding Requests for Assistance to Cameroon, ICC-01/05-01/13-1129-Conf.
[2] Requête en vue d'obtenir la divulgation de certains documents utiles à la préparation de la Défense, ICC-01/05-01/13-1131-Conf.

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to the execution of those requests ('Bemba Request'; together with the Arido Request and Babala Request: 'Requests').[3]

4. On 17 August 2015, the Prosecution filed a consolidated response ('Response') to the above requests.[4]

II. Submissions

A. The Defence

5. The Defence argue that the Requests for Assistance, which were made to states in furtherance of the acquisition of evidential material relied upon by the Prosecution,[5] are material for the Defence to understand the manner in which the evidence against them was collected[6] and challenge its admissibility in terms of legality or reliability[7] (in this vein it is noted that some objects (such as CD-ROMs) have been edited by national authorities[8]). The Defence argue that the Requests for Assistance shed light, *inter alia*, on the timing and legality of the Prosecution's acquisition of material from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, the domestic procedures employed to interview the witnesses and the content of witness statements in which they are referenced.[9]

6. The Bemba Defence argues that even if the domestic authorities technically complied with domestic procedures, there are indications that certain searches or intercepts breached the principle of proportionality or were initiated on the

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[3] Defence Request for Disclosure Concerning Prosecution Requests for Assistance, Correspondence, and Domestic Records, ICC-01/05-01/13-1135-Conf.
[4] Prosecution's Consolidated Response to Defence Requests for Disclosure of Requests for Assistance (RFAs) and Related Material (ICC-01/05-01/13-1129-Conf, ICC-01/05-01/13-1131-Conf, ICC-01/05-01/13-1135-Conf), ICC-01/05-01/13-1156-Conf.
[5] Bemba Request, ICC-01/05-01/13-1135-Conf, para. 2.
[6] Arido Request, ICC-01/05-01/13-1129-Conf, para. 26.
[7] Arido Request, ICC-01/05-01/13-1129-Conf, paras 26-27; Babala Request, ICC-01/05-01/13-1131-Conf, paras 27-30; Bemba Request, ICC-01/05-01/13-1135-Conf, paras 3 and 31-32.
[8] Bemba Request, ICC-01/05-01/13-1135-Conf, para. 42.
[9] Bemba Request, ICC-01/05-01/13-1135-Conf, para. 3.

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basis of incorrect or misleading information.[10] It further argues that several witnesses were interrogated by the Prosecution or national authorities in environments which could be deemed coercive or in breach of the Court's procedural guarantees.[11]

7. The Arido Defence argues that the Requests for Assistance may reveal call data records which are yet to be disclosed and material to the preparation of the defence.[12] Further, the Defence submits that the Prosecution cannot evoke Article 87(3) of the Statute to prevent disclosure to the Defence as that article does not prohibit disclosure by the party requesting cooperation,[13] nor can it evoke Rule 81(1) of the Rules as the correspondence concerned is not purely internal.[14]

8. The Babala Defence further request the audio recordings of witness interviews received by the Prosecution in order to understand their context and verify the reliability of the written statements.[15] Finally the Babala Defence requests access to all exculpatory material in the possession of the Prosecution.[16]

B. The Prosecution

9. The Prosecution opposes the Requests, arguing that Requests for Assistance are not generally subject to disclosure as they are confidential pursuant to Article 87(3) of the Statute[17] and, in principle, deal with investigative steps.[18] The Prosecution further submits that the requested disclosure could have negative consequences on future cooperation with states.[19] It is argued that

[10] Bemba Request, ICC-01/05-01/13-1135-Conf, paras 36- 37.
[11] Bemba Request, ICC-01/05-01/13-1135-Conf, para. 38.
[12] Arido Request, ICC-01/05-01/13-1129-Conf, paras 28 -31.
[13] Bemba Request, ICC-01/05-01/13-1135-Conf, para. 43-46.
[14] Arido Request, ICC-01/05-01/13-1129-Conf, para. 18; ICC-01/05-01/13-1135-Conf, para. 48.
[15] Babala Request, ICC-01/05-01/13-1131-Conf, paras 34-52.
[16] Babala Request, ICC-01/05-01/13-1131-Conf, para. 53.
[17] Response, ICC-01/05-01/13-1156-Conf, paras 13 and 15.
[18] Response, ICC-01/05-01/13-1156-Conf, paras 13 and 16.
[19] Response, ICC-01/05-01/13-1156-Conf, paras 16 and 23.

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whilst confidential documents may be disclosed, either in whole or in part, the Requests are unsubstantiated, in that they fail to establish that the Requests for Assistance and related items are *prima facie* relevant to the preparation of the Defence.[20] The Prosecution avers that the substantive material received from the states as a result of the Requests for Assistance has been disclosed to the Defence to the extent relevant and material.[21] It is further argued that the Defence have not made a *prima facie* showing that there are grounds to believe that the evidence in question has not been collected by the Prosecution in accordance with the law.[22] It is argued that, in fact, the Requests for Assistance do not provide an insight into which procedures were applied by national authorities in executing the requests. Should the Chamber move to disclose the Requests for Assistance, the Prosecution requests that the Chamber inspects those requests and the responses thereto on an *ex parte* basis in order to determine which items warrant disclosure.[23]

10. Whilst the Prosecution further submit that it remains prepared to permit inspection of the requested audio recordings should the Babala Defence articulate a basis for the receipt of such material,[24] it argues that the current request is premature, unfounded and duplicative given that the written transcriptions have been disclosed.[25] In respect of the Babala Request to disclose all exculpatory material in the possession of the Prosecution, it is argued that this request is unfounded and unwarranted.[26]

[20] Response, ICC-01/05-01/13-1156-Conf, paras 16-18.
[21] Response, ICC-01/05-01/13-1156-Conf, paras 13 and 15.
[22] Response, ICC-01/05-01/13-1156-Conf, para. 21.
[23] Response, ICC-01/05-01/13-1156-Conf, para. 25.
[24] Response, ICC-01/05-01/13-1156-Conf, para. 26.
[25] Response, ICC-01/05-01/13-1156-Conf, para. 26.
[26] Response, ICC-01/05-01/13-1156-Conf, para. 32.

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III. Analysis and Conclusion

11. In accordance with the jurisprudence of the Court, there are two stages to an application brought pursuant to Rule 77 of the Rules.[27] First, it must be determined, on a *prima facie* basis,[28] whether the objects in question are 'material to the preparation of the defence'. The term 'material to the preparation of the defence' must be interpreted broadly and is 'understood as referring to all objects that are relevant for the preparation of the defence',[29] including those that are not directly linked to exonerating or incriminating evidence.[30] Second, if the information is material to the preparation of the defence, the Chamber must consider whether any restrictions on disclosure are justified under the Statute and Rules 81 and 82 of the Rules.

12. With respect to the requests for disclosure of the Requests for Assistance, the Single Judge considers that the materiality of such information to the preparation of the defence must be assessed on a case-by-case basis. Article 87(3) of the Statute, which provides that 'the requested State shall keep confidential a request for cooperation and any documents supporting the request', cannot be used as a bar to the production of such material where it is *prima facie* material to the preparation of the defence. In any case, it is noted that Article 87(3) creates an obligation for the state to keep confidential such requests and it is always open for the Court to waive the confidentiality in this regard. Nor do such requests necessarily fall within the ambit of Rule 81(1) of

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[27] Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled 'Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor', 28 August 2013, ICC-02/05-03/09-501 OA4 (*Banda and Jerbo* OA4 Decision, ICC-02/05-03/09-501), para. 35.
[28] *Banda and Jerbo* OA4 Decision, ICC-02/05-03/09-501, para. 42.
[29] *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433 OA11, paras 77-80 (*Lubanga* OA11 Decision, ICC-01/04-01/06-1433); *Banda and Jerbo* OA4 Decision, ICC-02/05-03/09-501, para. 38.
[30] *Lubanga* OA11 Decision, ICC-01/04-01/06-1433, para. 77.

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the Rules which prevents the disclosure of internal documents prepared by a party.

13. 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.[31]

14. In respect of the Babala Request for access to the audio recordings of witness interviews, the Single Judge notes that the Defence have received the written transcriptions of these interviews and finds that there is no reason why disclosure of these recordings is warranted in the absence of any indication that the written statements are inaccurate. The Single Judge thus rejects this request.

15. In respect of the Babala Request for disclosure of all exculpatory material in the possession of the Prosecution, the Single Judge finds that this request is

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[31] Annex to the Decision on Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959-Anx.

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overly broad in scope, given that there is no information to suggest that the Prosecution is not complying with its disclosure obligations. Accordingly, the Single Judge also rejects this request.

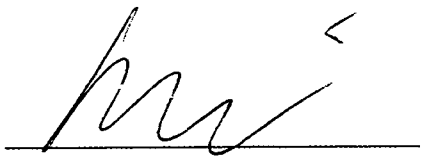
FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Requests in respect of the Requests for Assistance, subject to paragraph 13 above;

ORDERS the Prosecution to disclose the Requests for Assistance, in accordance with paragraph 13 above, by no later than five days after the notification of this decision; and

REJECTS the remainder of the Requests.

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



Judge Bertram Schmitt, Single Judge

Dated 10 September 2015

At The Hague, The Netherlands

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