

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 April 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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

**Decision on Prosecution Request for Production of Evidence in Possession of the
Defence**

Decision 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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Trial Chamber VII (the ‘Chamber’) 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*, having regard to Articles 66(2), and 67(1)(g) and (i) of the Rome Statute (the ‘Statute’) and Regulations 23 *bis*, 24(5) of the Regulations of the Court (the ‘Regulations’) issues the following ‘Decision on Prosecution Request for Production of Evidence in Possession of the Defence’.

I. Procedural history and submissions

1. On 17 February 2015, the Office of the Prosecutor (‘Prosecution’) requested the Chamber to order the defence for Mr Kilolo (‘Kilolo Defence’) to produce all prior statements of defence witnesses in case ICC-01/05-01/08 (‘Main Case’) against Mr Bemba (‘Request’).¹
2. On 9 March 2015, the defence for Mr Bemba (‘Bemba Defence’) filed its response, requesting the Chamber to dismiss the Request (‘Bemba Response’).²
3. On 10 March 2015, the defence for Mr Arido (‘Arido Defence’) filed its response, also opposing the Request (‘Arido Response’).³
4. On 12 March 2015, the Kilolo Defence filed its response (‘Kilolo Response’),⁴ adopting the arguments made in the Bemba Response with a view to also seeking the dismissal of the Request.⁵
5. On 13 March 2015, the Prosecution sought leave to file a consolidated reply to all three responses of the defence teams (‘Request for Leave to Reply’).⁶

¹ Prosecution’s Request for the Production of Evidence, ICC-01/05-01/13-820-Conf, the filing was notified on 18 February 2015. A public redacted version was filed on 20 February 2015.

² Defence Response to Prosecution’s Request for the Production of Evidence (ICC-01/05-01/13-820-Conf), ICC-01/05-01/13-836.

³ Narcisse Arido’s Response to the ‘Prosecution’s Request for the Production of Evidence’ (ICC-01/05-01/13-820-Conf), notified on 13 March 2015, ICC-01/05-01/13-838-Conf.

⁴ Adjonction de la Défence de Monsieur Kilolo à la « Defence response to Prosecution’s Request for the Production of Evidence (ICC-01/05-01/13-836-Conf) », ICC-01/05-01/13-840-Conf.

⁵ Kilolo Response, ICC-01/05-01/13-840-Conf, para. 2.

6. The Prosecution requests that the Kilolo Defence be ordered to produce ‘all prior statements of defence witnesses [in the Main Case] in any form including the full record of interviews comprising audio recordings, transcriptions, interview notes and where available, their translations’ (‘Requested Material’).⁷ In case any part of the Requested Material is covered by the work-product privilege, it requests that the Kilolo Defence be disallowed to apply any redactions thereto, unless expressly authorised by the Chamber.⁸
7. The Prosecution submits that the Requested Material is necessary for the determination of ‘matters placed at issue by [...] [Mr] Kilolo’, as well as ‘for the discharge of the Prosecution’s obligation under article 54(1)(a) of the Statute’.⁹ It contends that the Kilolo Defence argued at the confirmation stage of this case that Mr Kilolo merely reminded the witnesses of the content of their prior statements and did not corruptly influence them, thus placing the content of the Request Material at issue.¹⁰ The Prosecution argues that the Requested Material is evidence, since this can only be tested at trial by comparison of the prior statements of the defence witnesses with their trial testimony and the contents of intercepted telephone communications between defence witnesses and Mr Kilolo.¹¹
8. Finally, the Prosecution maintains that the production of the Requested Material does not violate attorney-client privilege or gives rise to any issue concerning self-incrimination, as the material was purportedly claimed by Mr Kilolo to be exonerating.¹² The Chamber, according to the Prosecution’s submissions, has the power the ‘to order a party to produce all evidence that

⁶ Consolidated Prosecution Request for Leave to Reply to ICC-01/05-01/13-836-Conf, ICC-01/05-01/13-838-Conf and ICC-01/05-01/13-840-Conf, ICC-01/05-01/13-843-Conf.

⁷ Request, ICC-01/05-01/13-820-Red, paras 1 and 15.

⁸ Request, ICC-01/05-01/13-820-Red, para. 15.

⁹ Request, ICC-01/05-01/13-820-Red, para. 2.

¹⁰ Request, ICC-01/05-01/13-820-Red, para. 5.

¹¹ Request, ICC-01/05-01/13-820-Red, paras 4 and 6.

¹² Request, ICC-01/05-01/13-820-Red, paras 11-13.

was not previously disclosed, when it is necessary for the determination of the truth'.¹³

9. The Bemba Defence submits that the Request lacks any factual or legal basis.¹⁴ It argues, *inter alia*, that the Requested Material is privileged material¹⁵ and 'internal work product',¹⁶ and therefore protected from disclosure. Further, it submits that Mr Kilolo does not have the competence to disclose the information without Mr Bemba's consent.¹⁷
10. The Arido Defence argues that the Request is inadmissible, since it should have been addressed to the trial chamber of the Main Case.¹⁸ Further, it contends that the Requested Material does not fall within any category of items which are subject to disclosure¹⁹ and that, should the Request be granted, it would violate Mr Kilolo's rights to a fair trial.²⁰

II. Preliminary Matters

11. As regards the Prosecution's Request for Leave to Reply, the Chamber notes that the Prosecution raises mainly points of law relevant to the Request. Having considered the issues the Prosecution wishes to reply to, the Chamber considers that it has sufficient information before it to render a decision on the Request. Accordingly, it rejects the Request for Leave to Reply.
12. The Chamber further notes that the Arido Response, the Kilolo Response and the Request for Leave to Reply are filed as 'Confidential'. The Chamber considers that the basis for the classification no longer exists and therefore

¹³ Request, ICC-01/05-01/13-820-Red, para. 10.

¹⁴ Bemba Response, ICC-01/05-01/13-836, para. 1.

¹⁵ Bemba Response, ICC-01/05-01/13-836, paras 17-37.

¹⁶ Bemba Response, ICC-01/05-01/13-836, paras 37-40.

¹⁷ Bemba Response, ICC-01/05-01/13-836, paras 5, 72-74.

¹⁸ Arido Response, ICC-01/05-01/13-838-Conf, paras 9-10.

¹⁹ Arido Response, ICC-01/05-01/13-838-Conf, paras 15-18.

²⁰ Arido Response, ICC-01/05-01/13-838-Conf, paras 19-.

reclassifies all three filings as 'Public', pursuant to Regulation 23 *bis*(3) of the Regulations.

III. Analysis

13. The Chamber notes that the Request pertains to the production of evidence in this case. Accordingly, it finds that the Request is admissible and the Chamber to be competent to rule on the Request.

14. The Prosecution argues that the production of the Requested Material is warranted in order to test the viability of the Kilolo Defence's contention that Mr Kilolo did not corruptly influence witnesses.²¹ This allegation of improper witness interference is the very matter to be determined in this case. Therefore, the Prosecution seeks, in essence, that the Chamber orders the accused to produce evidence that could be potentially incriminating in a prosecution against the accused. The Prosecution has not satisfied the Chamber that such an order would not violate the rights of the accused '[n]ot to be compelled to testify or to confess to guilt and to remain silent' (Article 67(1)(g) of the Statute) and his right '[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal' (Article 67(1)(i) of the Statute).

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

REJECTS the Request for Leave to Reply;

DIRECTS the Registry to reclassify the Arido Response (ICC-01/05-01/13-838-Conf), the Kilolo Response (ICC-01/05-01/13-840-Conf) and the Request for Leave to Reply (ICC-01/05-01/13-843-Conf) as 'Public'; and

REJECTS the Request.

²¹ Request, ICC-01/05-01/13-820-Red, para. 5-6.

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



Judge Chile Mbogo-Osuji, Presiding



Judge Olga Herrera Carbuccion



Judge Bertram Schmitt

Dated 15 April 2015

At The Hague, The Netherlands