

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 23 February 2016

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***

Public

**Decision on the 'Prosecution's motion for the lifting of Redactions and the
Release of Information Contained in Independent Counsel Reports'**

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

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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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Judge Bertram Schmitt, Single Judge of Trial Chamber VII ('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* ('Defence'), pursuant to Articles 64(2), 64(3)(c) and 64(6) of the Rome Statute and Rules 81 and 84 of the Rules of Procedure and Evidence, issues the following Decision on the 'Prosecution's Motion for the Lifting of Redactions and the Release of Information contained in independent counsel reports'.

I. Procedural History

1. On 25 April 2014, the Single Judge of Pre-Trial Chamber II, appointed Independent Counsel to: (i) be present at the unsealing and the forensic acquisition of seized material; (ii) review that material, with a view to identifying privileged or irrelevant items; and (iii) promptly report upon the results of this review.¹
2. On 9 April 2015, the Chamber maintained the procedure established by Pre-Trial Chamber II.²
3. On 7 January 2016, the Office of the Prosecutor ('Prosecution') filed its 'Prosecution Motion for the Lifting of Redactions and the Release of Information Contained in Independent Counsel Reports' ('Application').³
4. On 25 January 2016, the defence teams for Mr Babala ('Babala Defence'),⁴ Mr Mangenda ('Mangenda Defence'),⁵ Mr Bemba ('Bemba Defence')⁶ and

¹ Decision on the 'Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel', ICC-01/05-01/13-366-Conf.

² Decision on 'Request concerning the review of seized material' and related matters, ICC-01/05-01/13-893-Conf.

³ ICC-01/05-01/13-1537-Conf.

⁴ Réponse de la Défense de M. Fidèle Babala Wandu à la « Prosecution's Motion for the Lifting of Redactions and the Release Information Contained in Independent Counsel Reports » (ICC-01/05-01/13-1537-Conf), ICC-01/05-01/13-1572-Conf ('Babala Defence Response').

Mr Kilolo ('Kilolo Defence')⁷ submitted their responses ('Babala Defence' Response', Mangenda Defence Response', 'Bemba Defence Response' and 'Kilolo Defence Response', respectively) to the Application.

II. Prosecution's Submissions

5. Annex A to the Application sets out the contested redactions contained in the following seven annexes to four Independent Counsel reports:⁸ ICC-01/05-01/13-670-Conf-AnxC-Red,⁹ ICC-01/05-01/13-845-Conf-AnxA1-Red,¹⁰ ICC-01/05-01/13-845-Conf-AnxB-Red,¹¹ ICC-01/05-01/13-845-Conf-AnxC-Red,¹² ICC-01/05-01/13-982-Conf-Anx4-Red,¹³ ICC-01/05-01/13-1047-Conf-Anx4-Red,¹⁴ and ICC-01/05-01/13-1047-Conf-Anx8-Red.¹⁵
6. It is submitted that the current redactions are overly restrictive and potentially prejudicial to the Prosecution on the grounds that they redact certain information already known to the parties¹⁶ and preclude access to information relevant to Defence witnesses and/or the evidence elicited at trial, thereby

⁵ Jean-Jacques Mangenda's Response to 'Prosecution's Motion for the Lifting of Redactions and the Release of Information Contained in Independent Counsel Reports' (ICC-01/05-01/13-1537-Conf), ICC-01/05-01/13-1574-Conf.

⁶ Defence Response to 'Prosecution's Motion for the Lifting of Redactions and the Release of Information Contained in Independent Counsel Reports', ICC-01/05-01/13-1537-Conf, ICC-01/05-01/13-1575-Conf.

⁷ Defence Response to 'Prosecution's Motion For Lifting Redactions And The Release Of Information Contained In Independent Counsel's Reports' (ICC-01/05-01/13-1537-Conf), ICC-01/05-01/13-1576-Conf.

⁸ Rapport du Conseil indépendant suivant la Décision ICC-01/05-01/13-366-Conf (Analyse d'un premier lot d'emails), 11 September 2014, ICC-01/05-01/13-670-Conf ('September 2014 Report'); Report of Independent Counsel on the unsealing and analysis of material seized by French authorities and Belgian authorities (decisions ICC-01/05-01/13-41 and ICC-01/05-01/13-366 and 446), 13 March 2015, ICC-01/05-01/13-845-Conf-tENG ('March 2015 Report'); Rapport du Conseil indépendant sur l'analyse des pièces saisies par les autorités néerlandaises (ICC-01/05-01/13-893-Conf), 03 June 2015, ICC-01/05-01/13-982-Conf-Exp ('June 2015 Report'); Rapport intermédiaire du Conseil indépendant sur l'analyse des pièces saisies par les autorités belges (ICC-01/05-01/13-893-Conf), 02 July 2015, ICC-01/05-01/13-1047-Conf-Exp ('July 2015 Report').

⁹ Annex C to the September 2014 Report, ICC-01/05-01/13-670-Conf.

¹⁰ Annex A1 to the March 2015 Report, ICC-01/05-01/13-845-Conf.

¹¹ Annexe B to the March 2015 Report, ICC-01/05-01/13-845-Conf.

¹² Annexe C to the March 2015 Report, ICC-01/05-01/13-845-Conf.

¹³ Annex 4 to the June 2015 Report, ICC-01/05-01/13-982-Conf-Exp.

¹⁴ Annex 4 to the July 2015 Report, ICC-01/05-01/13-1047-Conf-Exp.

¹⁵ Annex 8 to the July 2015 Report, ICC-01/05-01/13-1047-Conf-Exp.

¹⁶ Application, ICC-01/05-01/13-1537-Conf, paras 12-13.

affecting the Prosecution's preparation for the Defence case.¹⁷ It is additionally argued that certain redactions may no longer be necessary in light of the totality of the trial evidence, including material deemed 'formally submitted'.¹⁸ Furthermore, the Prosecution requests the Chamber to disclose the list of contacts extracted from a SIM card belonging to Mr Kilolo ('Contact List')¹⁹ and the telephone number associated with that SIM card ('Telephone Number') on the ground that they are relevant to attributing telephone numbers to Mr Kilolo and to potential defence witnesses in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, as well as to the Defence.²⁰

7. The Prosecution furthermore argues that communications between the accused and several individuals who were neither cited in the Confirmation Decision²¹ nor in the Document Containing the Charges,²² including prospective Defence witnesses are relevant to the case as they may corroborate or support other evidence, including by demonstrating a pattern of illicit conduct (those individuals are set out in Annex B to the Application).²³

III. Defence Submissions

8. The Bemba Defence opposes the Application arguing that it is an attempt to: expand the crime-fraud exception to the disclosure of privileged material,²⁴ broaden the incidents in the case to encompass third persons or witnesses not included in the charges,²⁵ conduct further incriminating investigations and expand the scope of the charges.²⁶ It maintains that the Prosecution is seeking

¹⁷ Application, ICC-01/05-01/13-1537-Conf, paras 14-15.

¹⁸ Application, ICC-01/05-01/13-1537-Conf, paras 18 and 12.

¹⁹ ICC-01/05-01/13-845-Conf-Exp-AnxD (Annex D to the March 2015 Report).

²⁰ Application, ICC-01/05-01/13-1537-Conf, paras 19-21.

²¹ Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, ICC-01/05-01/13-749.

²² Document Containing the Charges, 30 June 2014, ICC-01/05-01/13-526-Conf-AnxB1.

²³ Application, ICC-01/05-01/13-1537-Conf, para. 16.

²⁴ Bemba Defence Response, ICC-01/05-01/13-1575-Conf, para. 10.

²⁵ Bemba Defence Response, ICC-01/05-01/13-1575-Conf, para. 11.

²⁶ Bemba Defence Response, ICC-01/05-01/13-1575-Conf, paras 1 and 10.

to re-argue the merits of the Chamber's decisions with regard to these redactions without providing any new facts or arguments.²⁷ It also contends that there is no explanation or justification as to why the Prosecution did not make the request at a less prejudicial juncture.²⁸

9. The Mangenda Defence prays the Chamber to reject the Application except in so far as concerns the redactions in ICC-01/05-01/13-670-Conf-AnxC (items 10 and 11) which it argues are exculpatory.²⁹ In opposing the rest, it states that the test for granting reconsideration has not been met and that lifting the redactions will serve no purpose if the redacted information is already known to the Prosecution.³⁰
10. The Kilolo Defence does not object to lifting redactions to material which is already in the possession of the Prosecution but questions the necessity of doing so.³¹ It argues that: the redactions were already decided upon by the Trial Chamber; no such challenge was made at the appropriate time; such a request is therefore tardy and in any event provides no justification for reconsideration.³² It further argues that linking redacted material to witnesses who are to be called as part of the Defence case does not in and of itself render the material disclosable to the Prosecution.³³ The Chamber is requested to reject the Application in its entirety.³⁴
11. The Babala Defence argues that the Prosecution is attempting to broaden the charges under the guise of lifting redactions.³⁵ It asserts that the arguments of

²⁷ Bemba Defence Response, ICC-01/05-01/13-1575-Conf, paras 8 and 24.

²⁸ Bemba Defence Response, ICC-01/05-01/13-1575-Conf, para. 13.

²⁹ Mangenda Defence Response, ICC-01/05-01/13-1574-Conf, paras 1-2.

³⁰ Mangenda Defence Response, ICC-01/05-01/13-1574-Conf, para. 3.

³¹ Kilolo Defence Response, ICC-01/05-01/13-1576-Conf, para. 4 (i).

³² Kilolo Defence Response, ICC-01/05-01/13-1576-Conf, para. 4 (ii).

³³ Kilolo Defence Response, ICC-01/05-01/13-1576-Conf, para. 4 (iii).

³⁴ Kilolo Defence Response, ICC-01/05-01/13-1576-Conf, para. 6.

³⁵ Babala Defence Response, ICC-01/05-01/13-1572-Conf, para. 12.

the Prosecution are vague and merely speculative,³⁶ demonstrating no factual or legal change in circumstances since the Chamber decided which redactions should apply to the reports of Independent Counsel here concerned.³⁷ It further argues that the Application represents an unjustified and thus disproportionate challenge to the right to a private life of third persons not linked to the case.³⁸

IV. Analysis

12. The Single Judge recalls that the Chamber has in the past³⁹ redacted from the seized material the names and numbers of persons who are neither referred to in the Confirmation Decision, nor in the Document Containing the Charges (including witnesses other than the fourteen witnesses referred to in the charges [‘Fourteen Witnesses’] and potential witnesses) and who are conversing with the accused about matters unrelated to the facts and circumstances described in the charges, on the grounds that such communications were irrelevant to the case and, where privileged, were not covered by the crime/fraud exception.

13. The Chamber held, however, that when assessing the relevance of selected materials:

[T]he Chamber has only considered relevance to the case generally. These determinations are without prejudice to future decisions the Chamber may make on the parameters of the charges, the admission of any items into evidence or its ultimate decision on the merits. Further, the Chamber will keep its relevance assessment under review - should future

³⁶ Babala Defence Response, ICC-01/05-01/13-1572-Conf, para. 28.

³⁷ Babala Defence Response, ICC-01/05-01/13-1572-Conf, para. 1.

³⁸ Babala Defence Response, ICC-01/05-01/13-1572-Conf, para. 27.

³⁹ Decision Providing Materials in Two Independent Counsel Reports and Related Matters, ICC-01/05-01/13-947, 15 May 2015, (‘Decision of 15 May 2015’), para. 20 (iii); Decision on the Independent Counsel Report of 2 July 2015, 20 July 2015, ICC-01/05-01/13-1094-Conf, paras 10 and 14.

developments show that previous determinations are no longer justified; then further materials may be provided.⁴⁰

14. Having considered the submissions of the parties, the Single Judge finds that to the extent to which material has already been disclosed to the Prosecution without redaction in other documentation, there is no need to retain the original redactions in the seized material, except to protect the identities of staff of the Victims and Witnesses Unit and information that was never disclosed to the Prosecution.⁴¹ To this limited extent, the Single Judge authorises the lifting of the redactions in the following entries to Annex 1 to the March 2015 Report (ICC/01/05-01/13-845-Conf-AnxA1-Red): Entries 2, 3, 4, 5, 6, 7, 8, 9, 19, 20, 25, 26, 27, 30 and 31.
15. On a similar basis, the Single Judge authorises lifting the redactions to the dates of birth and nationalities of the two persons concerned at pages 9 and 11 of Annex 4 to the June 2015 Report - ICC-01/05-01/13-982-Conf-Anx4-Red, as the information is already known to the parties.⁴²
16. Furthermore, the Single Judge also authorises lifting the redactions to the telephone number of the three persons concerned at pages 9, 11 and 13 of Annex 4 to the June 2015 Report - ICC-01/05-01/13-982-Conf-Anx4-Red. Those pages pertain to persons belonging to the category of the Fourteen Witnesses and the relevant redactions were put in place to assuage '[a]ny concerns for the witnesses' safety or physical and psychological well-being, as well as their privacy.'⁴³ In the view of the Single Judge, the confidential disclosure of such

⁴⁰ Decision of 15 May 2015, ICC-01/05-01/13-947, para. 17.

⁴¹ See Annex A to the Kilolo Defence Response, ICC-01/05-01/13-1576-Conf-AnxA and Annex A to the Application, ICC-01/05-01/13-1537-Conf-AnxA.

⁴² See Annex A to the Application, ICC-01/05-01/13-1537-Conf-AnxA, page 6.

⁴³ Decision on Independent Counsel Report on Material transmitted by the Dutch Authorities, 30 June 2015, ICC-01/05-01/13-1046-Conf-Exp, para. 22.

information to the parties in the case would not entail any risk to the persons concerned.

17. With respect to the other seized material, the Single Judge sees no reason to depart from the previous approach of the Chamber. The parameters of the alleged offences were clearly set in the Confirmation Decision and widening the provision of information in seized material to the considerable extent suggested by the Prosecution, in circumstances where no new or compelling reasons have been brought therefor, is incompatible with the delineation of the case.⁴⁴ The elicitation of evidence at trial does not sufficiently alter this position and the argument that redacted material concerning persons to be called as Defence witnesses should be produced loses relevance, given that disclosure of the sole redacted entry against which it may be directed has been ordered for other reasons at paragraphs 15 and 16 above.⁴⁵
18. Turning to the Contact List in Annex D to the March 2015 Report (ICC-01/05-01/13-845-Conf-Exp-AnxD), the Single Judge notes that it contains contacts extracted from the SIM card attributed to Mr Kilolo, which Independent Counsel found relevant to the case.⁴⁶ It attributes phone numbers on the sim card to names and other information that the Independent Counsel used in the annexes of the March 2015 Report, and to which the Prosecution has since been granted access. Neither of the two defence teams with access to the Contact List specifically remonstrated against the disclosure of details or contacts thereon.⁴⁷ The Single Judge considers the Contact List to be relevant and not privileged and hereby authorises the disclosure of the Contact List and Telephone Number to the parties, subject to the application of redactions in

⁴⁴ Decision of 15 May 2015, ICC-01/05-01/13-947, para. 19.

⁴⁵ Concerning ICC-01/05-01/13-982-Conf-Anx4-Red, page 13.

⁴⁶ March 2015 Report, ICC-01/05-01/13-845-Conf-tENG, paras 43 and 46.

⁴⁷ Rather, the Kilolo Defence contests the timeliness of this request. Kilolo Defence Response, ICC-01/05-01/13-1576-Conf, para. 5.

accordance with paragraph 12 above, and the retention of information relating to persons to be called to testify as Defence witnesses.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

AUTHORISES the lifting of redactions to Annex 1 to the March 2015 Report (ICC/01/05-01/13-845-Conf-AnxA1-Red) and Annex 4 to the June 2015 Report (ICC-01/05-01/13-982-Conf-Anx4-Red) and the disclosure of the Contact List (ICC-01/05-01/13-845-Conf-Exp-AnxD) and corresponding Telephone Number, as specified in paragraphs 14-16 and 18 above;

ORDERS the Bemba Defence, Kilolo Defence and/or Prosecution, as appropriate, to advise the Registry of any specific redactions to be retained or applied, as appropriate, in Annex 1 to the March 2015 Report (ICC/01/05-01/13-845-Conf-AnxA1-Red) and the Contact List (ICC-01/05-01/13-845-Conf-Exp-AnxD), in accordance with paragraphs 14 and 18 above, within three days of notification of this decision.

ORDERS the Registry to apply all required redactions to: The Contact List (ICC-01/05-01/13-845-Conf-Exp-AnxD); Entries 2, 3, 4, 5, 6, 7, 8, 9, 19, 20, 25, 26, 27, 30 and 31 of Annex 1 to the March 2015 Report (ICC/01/05-01/13-845-Conf-AnxA1-Red); and Pages 9, 11 and 13 of Annex 4 to the June 2015 Report (ICC-01/05-01/13-982-Conf-Anx4-Red) and to transmit them to the parties thereafter.

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



Judge Bertram Schmitt, Single Judge

Dated 23 February 2016

At The Hague, The Netherlands