

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **21 June 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 Providing Information in the Independent Counsel Report on the
Remaining Seized Material**

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

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('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 to Articles 64 and 67(1) of the Rome Statute, Rules 73 of the Rules of Procedure and Evidence and Regulation 23 *bis*(3) of the Regulations of the Court, issues the following 'Decision on Providing Information in the Independent Counsel Report on the Remaining Seized Material'.

I. Procedural History

1. On 4 May 2016, provided the independent counsel, initially appointed by Pre-Trial Chamber II¹ and confirmed by this Chamber,² ('Independent Counsel') a report on the remaining material which was seized and transmitted to him for inspection ('Report').³
2. The Independent Counsel informs the Chamber that the Report covers all material provided to him by the Registry which has not been reviewed until now.⁴ He states that he reviewed the material consistently with the Chamber's instructions,⁵ identifying relevant and non-privileged information.⁶ In this process, the Independent Counsel identified four batches of material which

¹ Decision on Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70", 29 July 2013, ICC-01/05-52-Conf (public redacted version on 3 February 2014), Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings, 13 December 2013, ICC-01/05-01/13-41-Conf-Exp (public redacted version on 4 February 2014) and Decision on the "Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel", 25 April 2014, ICC-01/05-01/13-366-Conf (public redacted version on the same day).

² Decision on 'Request concerning the review of seized material' and related matters, 9 April 2015, ICC-01/05-01/13-893-Conf (public redacted version notified same day), 'Independent Counsel Decision'.

³ Rapport du Conseil indépendant relatif aux matériels ICC-01/05-01/13-RPM-0022-0037 ; ICC-01/05-01/13-RPM-0022-0004 ; ICC-01/05-01/13-RPM-0022-0062 ; ICC-01/05-01/13-RPM-0023-0011 ; ICC-01/05-01/13-RPM-0023-0022 ; ICC-01/05-01/13-RPM-0023-0033 et ICC-01/05-01/13-RPM-0023-0044, ICC-01/05-01/13-1868-Conf, with confidential *ex parte* Annexes 1 and 2 available only to the Kilolo and Bemba Defence; confidential *ex parte* Annexes 3 and 4, available only to the Arido, Kilolo and Bemba Defence; Annexes 5 and 6, confidential *ex parte*, available only to the Mangenda, Kilolo and Bemba Defence and confidential *ex parte* Annexes 7 and 8, available only to the Kilolo and Bemba Defence.

⁴ Report, ICC-01/05-01/13-1868-Conf, para. 14.

⁵ Independent Counsel Decision, ICC-01/05-01/13-893-Red, paras 16-17.

⁶ Report, ICC-01/05-01/13-1868-Conf, para. 16.

contain pertinent, non-privileged information ('Disclosable Material'). In accordance with the procedure set out by the Chamber,⁷ the Independent Counsel proposed redactions to the identified information.⁸

3. On 10 May 2016, the defence for Mr Mangenda ('Mangenda Defence') filed its response ('Mangenda Response') to the Report.⁹
4. On 11 May 2016, the defence for Mr Bemba ('Bemba Defence') and Mr Kilolo ('Kilolo Defence') provided their responses to the Report ('Bemba Response'¹⁰ and 'Kilolo Response',¹¹ respectively).

II. Submissions and Analysis

5. The Single Judge incorporates by reference a previous decision in which the Chamber outlined its approach when assessing material identified by Independent Counsel as relevant and non-privileged, including its understanding of Rule 73 of the Rules and the crime or fraud privilege exception.¹² Relevance in this context is to the case generally, and not in relation to the admissibility of any particular item as evidence.¹³ He recalls that the Chamber has in the past¹⁴ 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 ['Fourteen Witnesses'] referred to in the charges and potential

⁷ Independent Counsel Decision, ICC-01/05-01/13-893-Red, paras 17, 22-25.

⁸ Annexes 2, 4, 6 and 8 of the Report, ICC-01/05-01/13-1868-Conf-Exp-Anx2, ICC-01/05-01/13-1868-Conf-Exp-Anx4, ICC-01/05-01/13-1868-Conf-Exp-Anx6 and ICC-01/05-01/13-1868-Conf-Exp-Anx8.

⁹ ICC-01/05-01/13-1887-Conf-Exp, confidential *ex parte* available only to the Independent Counsel, and the Bemba, Kilolo and Mangenda Defence.

¹⁰ Observations on the Report of the Independent Counsel dated 4 May 2016 (ICC-01/05-01/13-1868-Conf), ICC-01/05-01/13-1888-Conf-Exp, available only to the Bemba Defence with four public annexes, A to D. A public redacted version was filed on the same day.

¹¹ Observations de la Défense de Monsieur Aimé Kilolo Musamba sur le Rapport du Conseil Indépendant du 4 mai 2016 (ICC-01/05-01/13-1868-Conf et ICC-01/05-01/13-1868-Conf-Exp-Anx1-8), ICC-01/05-01/13-1889-Conf-Exp, available only to the Kilolo and Bemba Defence.

¹² Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 15 May 2015, ICC-01/05-01/13-947 ('Decision of 15 May 2015'), paras 13-19.

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

¹⁴ 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.

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. The Single Judge further notes that none of the defence teams invoked legal privilege in respect of the Disclosable Material.

6. In respect of Annex 2 of the Report, containing two emails, the Kilolo Defence submits that the selected information is not relevant since key information pertaining to the emails, like the time they were sent, is missing.¹⁵ In the email (sent from one of the accused) the name of another accused is mentioned and reference to payments and reception of sums of money is made. The Single Judge is of the view that these emails – in combination with other information available to the parties – might still be relevant. Accordingly, the Chamber finds that Annex 2 can be disclosed to the parties, with the redactions as proposed by the Independent Counsel.
7. With regard to Annex 4, containing several emails, the Bemba Defence argues that the scope of the proposed redactions are too extensive and frustrate a proper assessment.¹⁶ The Kilolo Defence submits that all the emails, including the ones containing the redactions, have already been disclosed to the parties in their unredacted form.¹⁷
8. The Single Judge agrees with the defence teams that information which has already been revealed to the parties does not need to stay redacted. The Disclosable Material should be as little redacted as possible in order to permit the parties to fully assess them. The Single Judge also notes, that the content has been previously disclosed to the parties. However, for reasons of completeness and

¹⁵ Kilolo Response, ICC-01/05-01/13-1889-Conf-Exp, paras 4-5.

¹⁶ Bemba Response, ICC-01/05-01/13-1888-Conf-Exp, para. 3.

¹⁷ Kilolo Response, ICC-01/05-01/13-1889-Conf-Exp, paras 6-7. *See*, CAR-OTP-0075-0752 and CAR-OTP-0075-0763.

since they have been identified by the Independent Counsel, the Single Judge is of the view that the material may be provided again. Accordingly, the Single Judge finds that Annex 3 and 4 are to be reclassified as ‘confidential’.

9. In respect of Annex 6, containing 12 emails, the Mangenda and Bemba Defence submit that the proposed redactions preclude access to important contextual and exculpatory information.¹⁸ The Kilolo Defence submits that some of the emails have already been disclosed in their unredacted form.¹⁹ With regard to three other emails, the Kilolo Defence points out that the redacted email addresses have been disclosed previously in other documents.²⁰ More generally, the Kilolo Defence submits that the proposed redactions are – save for one witness – not necessary.²¹
10. The Single Judge agrees that the two emails²² containing redactions which have been previously disclosed in their unredacted form²³ can be provided without any redactions. Further, the email addresses redacted in emails 8, 11 and 12 of Annex 6 are also already available to the parties.²⁴ Accordingly, these email addresses and the corresponding names in the body of the text of emails 8, 11 and 12 of Annex 6 can be revealed.
11. As to the redaction of the name in email 2, the Single Judge notes that the indicated expert is known to the Prosecution and has provided testimony in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* publicly.²⁵ Accordingly, the Single Judge finds that this redaction is not warranted.

¹⁸ Mangenda Response, ICC-01/05-01/13-1887-Conf-Exp, paras 1-2; Bemba Response, ICC-01/05-01/13-1888-Conf-Exp, para. 3.

¹⁹ Kilolo Response, ICC-01/05-01/13-1889-Conf-Exp, para. 9.

²⁰ Kilolo Response, ICC-01/05-01/13-1889-Conf-Exp, para. 10.

²¹ Kilolo Response, ICC-01/05-01/13-1889-Conf-Exp, para. 11.

²² Emails 5 and 10 of ICC-01/05-01/13-1868-Conf-Exp-Anx6.

²³ CAR-OTP-0088-0504, at 0509. In respect to email number 10 of Annex 6, the Kilolo Defence submits that the document has been provided to the parties in accordance with decision ICC-01/05-01/13-983-Conf.

²⁴ See, for instance, CAR-OTP-0088-0504, at 0514; CAR-D21-0003-0050 and CAR-D21-0003-0187.

²⁵ See, ICC-01/05-01/08-T-236-Red, p. 2, lines 20-22.

12. As to the redactions in email 6 of Annex 6, the Chamber notes that the persons mentioned in the first four points in the email are part of the 14 Witnesses. The person mentioned under number 5 in the email has been mentioned by two witnesses in their testimony and is linked to the facts and circumstances described in the charges. Accordingly, the information relating to the first five people mentioned in the email can be provided unredacted. Consequently, only the name and information pertaining to the person mentioned under number 6 remains redacted. The same considerations apply to emails 7 and 8 of Annex 6. The same 6 persons are mentioned and, accordingly, the Single Judge finds that only the redactions to the name and information to the person mentioned under point 6 need to be redacted.
13. In summary, in respect of Annex 6, (i) only the redactions to the name and information pertaining to the person mentioned under number 6 in emails 6, 7 and 8; (ii) the redaction contained under point 1 in email 11 and (iii) the redaction in the end of the email 12 are to be retained.
14. Annex 8 contains a list of names and work phone numbers. The Kilolo and Bemba Defence pointed out that part of the numbers are in a format which does not accurately reflect the telephone number.²⁶ Further, the Kilolo Defence submits that 4 of the redacted telephone numbers have already been disclosed to the parties.²⁷
15. The Single Judge notes that the numbers in lines 5 and 7 to 11 pertain to a person who has been mentioned in the Pre-Trial Brief of the Office of the Prosecutor and is linked to the facts and circumstances described in the charges. Accordingly, the numbers in lines 5 and 7 to 11 are not to be redacted. As to the argument of the defence teams that the depiction of ten of the numbers are done in a format

²⁶ Bemba Response, ICC-01/05-01/13-1888-Conf-Exp, paras 4-8 ; Kilolo Response, ICC-01/05-01/13-1889-Conf-Exp, paras 12-13.

²⁷ Kilolo Response, ICC-01/05-01/13-1889-Conf-Exp, para. 14.

that makes information unreliable, the Single Judge notes that this is an argument pertaining to the reliability of the information, not the disclosability. As to the person mentioned in line 20, the Single Judge notes that he was mentioned by several witnesses during their testimony and is linked to the facts and circumstances described in the charges. Therefore, his number is not to be redacted. In conclusions, only the redactions in line 6, 12, 17 and 18 are to be maintained.

16. Finally, the Bemba Defence requests to be provided with copies of the raw data.²⁸ The Single Judge notes that a similar request has been granted previously²⁹ and hereby finds that the materials emanating from Mr Kilolo and Mr Mangenda should be made available to the person whose information was seized, as well as to the Bemba Defence. In respect of the material seized from Mr Arido, the Chamber is of the view that only Mr Arido has a legitimate interest in reviewing these materials.
17. However, despite the provision of additional information to the parties and the right for some of the parties to inspect the underlying raw data, the Single Judge stresses, again, that the evidence in the case is closed and that any consideration of additional evidence will be limited to truly exceptional circumstances. The fact that the parties have received the information after the expiration of the deadline is, in and of itself, not a sufficient reason.
18. Further, the Single Judge notes, that the Independent Counsel indicated that the Report contained all outstanding material.³⁰ Accordingly, the Single Judge considers, after implementation of this decision, the mandate of the Independent Counsel to be terminated.

²⁸ Bemba Response, ICC-01/05-01/13-1888-Conf-Exp, para. 9.

²⁹ Decision Providing Materials in Two Independent Counsel Reports and Related Matters, ICC-01/05-01/13-947, para. 40

³⁰ Report, ICC-01/05-01/13-1868-Conf, para. 14.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DIRECTS the Independent Counsel, within five days of notification of the present decision, to file a confidential redacted version of Annex 2 of his Report (ICC-01/05-01/13-1868-Conf-Exp-Anx2) with the redactions as proposed, to file a confidential redacted version of Annex 6 of his Report (ICC-01/05-01/13-1868-Conf-Exp-Anx6) in accordance with paragraph 13 above and to file a confidential redacted version of Annex 8 of his Report (ICC-01/05-01/13-1868-Conf-Exp-Anx8) in accordance with paragraph 15 above;

DIRECTS the Registry to reclassify ICC-01/05-01/13-1868-Conf-Exp-Anx3 and ICC-01/05-01/13-1868-Conf-Exp-Anx4 as 'confidential';

ORDERS the Registry to make the material reviewed by the Independent Counsel which was seized from Mr Arido available to him and the materials reviewed by the Independent Counsel which were seized from Mr Kilolo and Mr Mangenda available to the respective owner of the material and the Bemba Defence; and

DECLARES that he considers the mandate of the Independent Counsel to be terminated.

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



Judge Bertram Schmitt, Single Judge

Dated 21 June 2016

At The Hague, The Netherlands