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

Date: **25 May 2015**

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**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 redacted version of**

**Decision on requests related to the draft memorandum of understanding  
concerning cooperation between MINUSCA and the International Criminal Court**

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**

Mr Xavier-Jean Keïta

**States Representatives**

**Others**

**REGISTRY**

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**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 (the ‘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 2, 38, 43, 64(2) and 67 of the Rome Statute (the ‘Statute’), Rules 13 and 20 of the Rules of Procedure and Evidence (the ‘Rules’), Regulations 77(4)(c) and 107 of the Regulations of the Court (the ‘Regulations’) and Regulation 119 of the Regulations of the Registry, issues the following ‘Decision on requests related to the draft memorandum of understanding concerning cooperation between MINUSCA and the International Criminal Court’ (the ‘Decision’).

## **I. Background and submissions**

1. On 13 April 2015, the defence for Mr Jean-Pierre Bemba Gombo (the ‘Bemba Defence’) requested that the Chamber add the draft ‘Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) and the International Criminal Court’ (the ‘Memorandum of Understanding’) to the agenda for the first status conference (the ‘Bemba Defence Observations’).<sup>1</sup> The Bemba Defence submits that the current version of the Memorandum of Understanding impacts on (i) its ability to conduct effective and secure investigations in the same manner as the Office of the Prosecutor (the ‘Prosecution’) and (ii) the Prosecution’s ability to fulfil its disclosure obligations.<sup>2</sup> It submits that, as the Registry and Prosecution have agreed to the current text, there is no

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<sup>1</sup> Observations of the Defence for Mr. Jean-Pierre Bemba Gombo on the Agenda of the First Status Conference, ICC-01/05-01/13-896-Conf (a public redacted version was notified the same day: ICC-01/05-01/13-896-Red). The Memorandum of Understanding was attached as confidential Annex A.

<sup>2</sup> Bemba Defence Observations, ICC-01/05-01/13-896-Conf, paras 18-28.

prospect that it will change and it is therefore not premature to raise this issue now.<sup>3</sup>

2. That same day, the defence for Mr Aimé Kilolo Musamba joined the Bemba Defence Observations.<sup>4</sup>
3. On 23 April 2015, the Chamber directed the parties and Registry to file observations on the Memorandum of Understanding by 5 May 2015.<sup>5</sup>
4. On 5 May 2015, the defence for Mr Fidèle Babala Wandu (the 'Babala Defence'),<sup>6</sup> Mr Jean-Jacques Mangenda Kabongo (the 'Mangenda Defence')<sup>7</sup> and Mr Narcisse Arido (the 'Arido Defence'; together with all defence teams, the 'Defence')<sup>8</sup> joined the Bemba Defence Observations (all Defence observations collectively, the 'Defence Observations').
5. The Babala Defence requests (i) that the Chamber order the Registry to ensure respect for the principle of equality of arms and the rights of the defence; (ii) that the Registry transmit to the parties any agreement with States or United Nations missions in States where the charged crimes were allegedly committed; and (iii) that the Prosecution explain how it will fulfil its statutory obligations in light of the Memorandum of Understanding.<sup>9</sup>

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<sup>3</sup> Bemba Defence Observations, ICC-01/05-01/13-896-Conf, para. 29.

<sup>4</sup> Observations de la Défense de monsieur Aimé Kilolo en vue de la première conférence de mise en état, ICC-01/05-01/13-904-Conf, para. 50 (a public redacted version was filed on 14 April 2015: ICC-01/05-01/13-904-Red).

<sup>5</sup> Email communication from Legal Officer of the Trial Chamber to the parties and Registry on 23 April 2015 at 9:35.

<sup>6</sup> Observations de la Défense de M. Fidèle Babala Wandu sur le Memorandum d'entente entre les Nations Unies et la Cour pénale internationale concernant la coopération entre la MINUSCA et la Cour, ICC-01/05-01/13-928-Conf ('Babala Defence Observations').

<sup>7</sup> Mangenda Observations on the proposed Memorandum of Understanding between the ICC and MINUSCA, ICC-01/05-01/13-930-Conf ('Mangenda Defence Observations').

<sup>8</sup> Narcisse Arido's Observations on the Memorandum of Understanding between the ICC and the MINUSCA (ICC-01/05-01/13-896-Conf-AnxA), ICC-01/05-01/13-934-Conf (notified on 6 May 2015) ('Arido Defence Observations').

<sup>9</sup> Babala Defence Observations, ICC-01/05-01/13-928-Conf.

6. The Mangenda Defence requests that the Chamber issue any order it deems necessary and appropriate to ensure that the Defence is not provided any less assistance than that afforded to the Prosecution.<sup>10</sup>
7. The Arido Defence notes that many of the ‘permissions and facilities’ extended to the Prosecution have also been extended to the Defence through proposed changes which appear to have been accepted in the draft Memorandum of Understanding and submits that the possibility for further submissions upon final agreement be left open.<sup>11</sup>
8. Also on 5 May 2015, the Prosecution<sup>12</sup> and Registry<sup>13</sup> filed observations on the Memorandum of Understanding (the ‘Prosecution Observations’ and the ‘Registry Observations’, respectively).
9. The Prosecution submits that (i) the draft Memorandum of Understanding, which remains under negotiation, does not cause any prejudice to the Defence; and (ii) Defence concerns should be directed, at this stage, to the Registry, which is responsible for representing and protecting Defence interests in negotiating Court-wide cooperation agreements.<sup>14</sup>
10. The Registry observes that (i) mindful of its responsibilities relating to [REDACTED]; (ii) negotiation of an agreement is not a judicial process; (iii) it is in the interests of the Defence and the Court that finalisation of the Memorandum of Understanding not be further delayed; and (iv) the Defence cannot assume that it will suffer prejudice as the Registry will abide by its obligations under Rule 20 of the Rules.<sup>15</sup> The Registry requests

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<sup>10</sup> Mangenda Defence Observations, ICC-01/05-01/13-930-Conf, para 3.

<sup>11</sup> Arido Defence Observations, ICC-01/05-01/13-934-Conf.

<sup>12</sup> Prosecution’s Observations Regarding the Defence Submissions on the Draft Memorandum of Understanding Between the ICC and MINUSCA, ICC-01/05-01/13-929-Conf.

<sup>13</sup> Observations of the Registry on the Memorandum of Understanding with MINUSCA, ICC-01/05-01/13-932-Conf.

<sup>14</sup> Prosecution Observations, ICC-01/05-01/13-929-Conf.

<sup>15</sup> Registry Observations, ICC-01/05-01/13-932-Conf.

that the Chamber reject the requests that the Memorandum of Understanding be submitted to judicial determination and invites the Defence to address its concerns to the Registry ‘which will see whether these can be addressed in the course of the negotiation’.<sup>16</sup>

11. On 6 May 2015, the OPCD requested leave to respond to the Registry Observations in order to provide ‘full information’ concerning the disclosure of the draft Memorandum of Understanding and thereby ‘allay any concerns of confidentiality breaches’ (the ‘OPCD Request’).<sup>17</sup>

## II. Analysis

12. As a preliminary matter, the Chamber notes that the OPCD seeks leave to respond to issues raised in the Registry Observations relating to the Registrar’s consultation process. For purposes of this Decision, the Chamber finds it unnecessary to review that aspect of the matter. The Chamber therefore considers that the additional submissions proposed in the OPCD Request are unnecessary and rejects the OPCD Request.
13. Turning to the merits, the Chamber notes that agreements with the United Nations (or any other international organisation) are concluded under the authority of the President of the Court.<sup>18</sup> The Registrar may be delegated by the Presidency to negotiate such agreements.<sup>19</sup> In the exercise of this and all other functions, the Registrar is obliged to, *inter alia*, provide that assistance which is necessary for the efficient and effective conduct of the Defence.<sup>20</sup>

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<sup>16</sup> Registry Observations, ICC-01/05-01/13-932-Conf, para. 10.

<sup>17</sup> Request For Leave to Respond to the “Observations of the Registry on the Memorandum of Understanding with MINUSCA”, ICC-01/05-01/13-935-Conf.

<sup>18</sup> Article 2 of the Statute (with respect to the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004, ICC-ASP/3/Res.1); Regulation 107(1) of the Regulations.

<sup>19</sup> Articles 38(3)(a) and 43(2) of the Statute; Regulation 107 of the Regulations.

<sup>20</sup> Rule 20 of the Rules; *see also* Regulation 119 of the Regulations of the Registry.

[REDACTED].<sup>21</sup> That said, it is clear from the statutory framework that Chambers should not, as a general principle, intervene in the negotiation and conclusion of such agreements. Accordingly, the Chamber will only intervene in such matters to ensure the fairness of the proceedings (including the rights of the Defence), pursuant to Articles 64(2) and 67 of the Statute, and once all other available remedies have been exhausted.<sup>22</sup>

14. The Chamber notes that the Registry, [REDACTED].<sup>23</sup> [REDACTED].<sup>24</sup> Consequently, as negotiations appear to be ongoing and other remedies remain available, the Chamber finds the requests made in the Defence Observations for judicial intervention in the negotiation and conclusion of the Memorandum of Understanding to be premature.

**FOR THE FOREGOING REASONS THE CHAMBER HEREBY**

**REJECTS** the OPCD Request; and

**REJECTS** the requests made in the Defence Observations.

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<sup>21</sup> Assembly of States Parties, Report of the Bureau on cooperation, ICC-ASP/13/29, 21 November 2014, para. 7(a); *see also* Prosecution Observations, ICC-01/05-01/13-929-Conf, para. 10; Registry Observations, ICC-01/05-01/13-932-Conf, para. 4.

<sup>22</sup> *In this regard, see* ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Appeals Chamber, Decision on the Registry Submission Pursuant to Rule 33(B) Following the President's Decision of 17 December 2008, 9 April 2009, para. 20 ('[w]hile mindful of the Trial Chamber's fundamental duty to ensure the fairness of the proceedings before the Tribunal, the Appeals Chamber recalls that in a case of review of an administrative decision, a Trial Chamber may step in under its inherent power to ensure that proceedings are fair once all available remedies have been exhausted').

<sup>23</sup> ICC-01/05-01/13-896-Conf-AnxA.

<sup>24</sup> Registry Observations, ICC-01/05-01/13-932-Conf, para. 10.

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



**Judge Chile Eboe-Osuji**  
(Presiding)



**Judge Olga Herrera Carbuccion**



**Judge Bertram Schmitt**

Dated 25 May 2015

At The Hague, The Netherlands