

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 20 February 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Redacted Document

**Public redacted version of "Prosecution's Request for the Production of Evidence",
17 February 2015, ICC-01/05-01/13-820-Conf**

Source: The Office of the Prosecutor

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests the Trial Chamber, pursuant to articles 64(3)(c), 64(6)(b), 64(6)(d) and 69(3) of the Rome Statute (“Statute”) and rules 79(4) and 84 of the Rules of Procedure and Evidence (“Rules”), to order the Kilolo Defence to produce all prior statements of defence witnesses in case ICC-01/05-01/08 (“Main Case”) in any form, including the full record of interviews comprising audio recordings, transcriptions, interview notes and where available, their translations.¹

2. This material is not protected by any privilege and constitutes evidence in the Article 70 case. It is necessary for the determination of matters placed at issue by the Accused, Aimé Kilolo Musamba, and for the discharge of the Prosecution’s obligations under article 54(1)(a) of the Statute. The Trial Chamber has the power to order its production.

II. Confidentiality

3. This Request is classified as “Confidential”, as it refers to filings and material of the same designation. The Prosecution will file a public redacted version of the Request as soon as possible.

III. Submissions

A. The requested material is evidentiary and probative of matters placed at issue by Kilolo

4. The requested material is actual and probative evidence of whether there has been improper interference with the testimony of witnesses in the Main Case, which lies at the core of this case. The substantive inconsistency between a witness’s prior

¹ The charged defence witnesses in the Main Case are: D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64.

statements and/or interviews and their subsequent trial testimony, although not dispositive, may comprise strong evidence of witness tampering.

5. Kilolo has affirmatively placed at issue the substance of the requested material. During the confirmation phase, Kilolo argued that the conduct underlying the charges of corruptly influencing witnesses and soliciting their false testimony was instead his merely reminding them of the content of their prior statements.² He thus contends that while his conduct may have been [REDACTED],³ it amounted [REDACTED] of witnesses' memories, thus challenging the *actus reus* and *mens rea* of the offences alleged.

6. The viability of this contention, however, can only be fairly tested at trial upon comparison of the witnesses' prior statements and/or interviews with: (a) their subsequent trial testimony; and (b) the content of the intercepted telephone communications between defence witnesses and Kilolo.⁴

B. The requested material is in Kilolo's possession or control, and otherwise unavailable to the Prosecution or the Chamber

7. [REDACTED] the existing evidence establish that witness interviews were audio-recorded⁵ and/or written down in the form of notes.⁶ The Kilolo Defence affirmed that "[REDACTED]" of witnesses D-3 and D-2.⁷ It is reasonable to believe that such material exists in respect of all interviews of defence witnesses and is in Kilolo's possession or control.

8. Although the Kilolo Defence disclosed some witness statements in the form of

² [REDACTED].

³ [REDACTED].

⁴ CAR-OTP-0079-0148; CAR-OTP-0079-0154; CAR-OTP-0077-1389; CAR-OTP-0077-1407; CAR-OTP-0082-0866; CAR-OTP-0082-0877; CAR-OTP-0082-1087; CAR-OTP-0082-1109; CAR-OTP-0082-0659.

⁵ CAR-OTP-0080-0238 at 0241, lns.64-70, at 0242, lns.105-106; [REDACTED].

⁶ CAR-OTP-0080-0494 at 0514, lns.723-724; CAR-OTP-0080-0100 at 0112, lns.414-415; [REDACTED]; CAR-OTP-0080-0100 at 0111, lns.380-405; D-55, ICC-01/05-01/08-T-265-CONF-ENG ET, 30 October 2012, p.14, lns.18-22.

⁷ [REDACTED].

unsigned neatly-drafted series of questions and answers,⁸ these are patently inadequate to fairly test Kilolo's claims. They are neither in their original form, complete, nor do they cover all the defence witnesses. Further, summaries of witnesses' statements disclosed in the Main Case containing their personal details and the general topics of their prospective testimony⁹ were shown to be incorrect on several occasions during trial.¹⁰ As such, they cannot reasonably serve as duplicative equivalents of the prior statements themselves.

9. During confirmation, the Bemba Defence submitted that [REDACTED].¹¹ Similarly, the Kilolo Defence's disclosure of transcriptions of D-23's interview in both French and English¹² suggests the existence of the underlying audio recordings, their original transcriptions and Kilolo's possession of or control over them. As noted, the Prosecution seeks to obtain these audio recordings and derivative material, such as transcriptions, interview notes and where available, their translations. In light of the Kilolo Defence's position and the Prosecution's article 54(1) obligations, the granting of the Request serves both parties' interests, and is in the interests of justice.

C. No legal impediment prevents the Chamber from ordering the production of the requested evidence

10. The Statute and Rules contain a wide range of provisions, particularly articles 64(3)(c), 64(6)(b), 64(6)(d), 69(3) and rules 79(4) and 84, that allow the Trial Chamber

⁸ D-23 (CAR-D21-0004-0640; CAR-D21-0004-0601); D-26 (CAR-D21-0004-0546); D-2 (CAR-D21-0004-0463); D-3 (CAR-D21-0004-0450); D-15 (CAR-D21-0004-0709-R01).

⁹ CAR-D04-0003-0168; CAR-D04-0003-0188; CAR-D04-0003-0200; CAR-D04-0003-0176; CAR-D04-0003-0196; CAR-D04-0003-0198; CAR-D04-0003-0229; CAR-D04-0003-0220; CAR-D04-0003-0190; CAR-D04-0003-0170; CAR-D04-0003-0239; CAR-D04-0003-0259; CAR-D04-0003-0261; CAR-D04-0003-0315; CAR-D04-0004-0008; CAR-D04-0004-0011; CAR-D04-0004-0045; CAR-D04-0004-0047; CAR-D04-0004-0049; CAR-D04-0004-0057; CAR-D04-0004-0060; CAR-D04-0004-0063; CAR-D04-0004-0067; CAR-D04-0004-0079.

¹⁰ See e.g., D-23, ICC-01/05-01/08-T-333-CONF-ENG ET, p.34, lns.4-22 ([REDACTED]); see also D-23, ICC-01/05-01/08-T-333-CONF-ENG ET, p.50, ln.9 – p.51, ln.10 ([REDACTED]). See also the Defence's summary of D-6's prospective testimony in which he is described as [REDACTED] CAR-D04-0003-0180, while D-6 testified "[REDACTED]", D-6, ICC-01/05-01/08-T-329-CONF-ENG, p.19, lns.6-8. [REDACTED] D-6, ICC-01/05-01/08-T-328-CONF-ENG, p.37, lns.1-18.

¹¹ [REDACTED].

¹² CAR-D21-0004-0601; CAR-D21-0004-0640.

to order a party to produce all evidence that was not previously disclosed, when it is necessary for the determination of the truth.

11. A production order would not violate any right or privilege of Kilolo. First, as previously found by this Court, the Trial Chamber's statutory power to order disclosure of evidence from the Defence is not *per se* inconsistent with an accused's privilege against self-incrimination.¹³

12. Second, Kilolo possesses or controls material evidence in the case¹⁴ which, per his own informed assessment, is exonerating — he contends that this evidence demonstrates the absence of any improper interference with defence witnesses on his part, since the witnesses purportedly maintained the same version of facts at trial as they previously represented to the Main Case Defence team.¹⁵ Taking the Kilolo Defence at face value, the production of the requested material does not give rise to any issue concerning self-incrimination.

13. Third, no protection is afforded to Kilolo under the Statute and Rules via the attorney-client privilege, which protects only those communications made in the context of the professional relationship between a person and his or her legal counsel.¹⁶ Such privilege is thus confined to a client's confidences shared with his or her lawyer in the relevant legal context and the legal advice provided to the client by counsel.¹⁷

14. As noted, the prior statements/interviews of witnesses also exist, *inter alia*, in the form of the notes of the interviewer or persons assisting them.¹⁸ As such, these notes are evidentiary and properly within the scope of a production order. However,

¹³ ICC-01/04-01/06-1235-Corr-Anx1, paras.27, 28, 30.

¹⁴ See paras.7, 9 above.

¹⁵ See para.5 above.

¹⁶ Rule 73(1) of the Rules.

¹⁷ Piragoff, D., "Evidence", in Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc., 2001), p.359.

¹⁸ See para.7 above.

should their evidentiary content be commingled with information covered by the work-product privilege, the Prosecution considers that if their production is ordered by the Chamber in this particular context, any redactions sought to be made should only be applied upon the Chamber's authorisation, which may be sought *ex parte*.

IV. Requested Relief

15. For the foregoing reasons, the Prosecution respectfully requests the Trial Chamber to: (a) order the Kilolo Defence 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; and (b) should any part of the evidence ordered to be produced contain work-product, order that no redaction may be made thereto, except upon the Chamber's authorisation.



Fatou Bensouda, Prosecutor

Dated this 20th Day of February 2015
At The Hague, The Netherlands