

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 27 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

With

Confidential, *EX PARTE*, Annex only available to the Prosecution

**Public redacted version of “Prosecution’s Response to the Kilolo Defence’s
« *Requête aux fins de divulgation des demandes d’assistance adressées à la France
par le Bureau du Procureur les 9 novembre 2013 et 22 novembre 2013* » (ICC-01/05-
01/13-375-Conf)”, 26 May 2014, ICC-01/05-01/13-427-Conf**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

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

I. Introduction

1. The Prosecution hereby responds to the Kilolo Defence's request to disclose two requests for assistance ("RFAs") directed to the French authorities in the course of the investigation of this case ("Request").¹ The Request lacks a proper legal or factual basis for disclosure and fails to establish *prima facie* that the information sought is material to the preparation of the Defence. The Prosecution is nevertheless prepared to defer to the Pre-Trial Chamber should it, upon examination of the RFAs, request that the Prosecution disclose them in the interests of expediency and transparency, or should it find that disclosure is otherwise "appropriate"².

II. Confidentiality

2. This filing is classified as "Confidential" as it responds to a filing of the same designation. The Annex is classified as "Confidential, *Ex Parte*" as it contains material to which the Defence is as yet not entitled.

III. Submissions

A. The Request lacks a proper legal or factual basis

3. In principle, the Prosecution does not ordinarily disclose RFAs to States Parties or any other communications between the Prosecution and third parties on investigative matters. These are confidential documents dealing with particular investigative steps, and are not intended as evidence themselves. As Article 87(3) of the Rome Statute mandates, even the requested State must keep a request for cooperation and any documents supporting the request *confidential*.

¹ ICC-01/05-01/13-375-Conf.

² ICC-01/05-01/13-298, p. 5.

4. The Defence Request fails because it does not explain how the requested information is material to the preparation of the Defence³ pursuant to Rule 77 of the Rules of Procedure and Evidence (“Rules”). In the absence of such an explanation, the Request amounts to no more than a fishing expedition.

5. The Appeals Chamber has held that “the right to disclosure is not unlimited” and the application of Rule 77 depends on specific circumstances of the case.”⁴ The burden is on the Defence to establish *prima facie* the basis on which the information sought is material to its preparation.⁵ The Defence Request to obtain Prosecution RFA’s to France concerning Kilolo’s email accounts fails to establish any such basis.

6. The Defence invokes «[REDACTED]», claiming that the information contained in the requests will allow it to assess «[REDACTED]»⁶ However, this argument is insufficient.

7. The Request does not elaborate on any supposed deficiency in the procedure applied by the French authorities to acquire and/or transmit the email accounts to the Prosecution, or how this might affect the admissibility of their contents. The Request does not articulate how the information contained in the RFAs might assist in determining the sufficiency of the national procedures, in that it fails to allege any link between those procedures and the expected contents of the RFAs.

8. Given that on 12 May 2014, the Prosecution disclosed to the Defence *inter alia* the *Procès-Verbaux* relating to its acquisition of the email accounts, the Defence’s failure to identify any specific basis in these documents calling the domestic

³ ICC-02/05-03/09-501 OA4, para. 1.

⁴ ICC-02/05-03/09-501 OA4, para. 39.

⁵ ICC-02/05-03/09-501 OA4, paras. 2, 42.

⁶ ICC-01/05-01/13-375-Conf, para. 3.

procedures into question underscores the absence of any substantiated basis for the Request.⁷ It also obviates any need to disclose the RFAs.

B. Prosecution's deferral to the Pre-Trial Chamber

9. The Prosecution has attached as a Confidential *Ex Parte* Annex, copies of the requested RFAs for the Pre-Trial Chamber's examination.

10. Notwithstanding the absence of any substantiated legal basis for the Request, the Prosecution is prepared to defer to the Pre-Trial Chamber, should it request the Prosecution's disclosure of the RFAs in the interest of transparency and the efficiency of the proceedings, or otherwise finds the disclosure appropriate.

IV. Requested Relief

11. For the foregoing reasons, the Defence Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 27th Day of February 2015

At The Hague, The Netherlands

⁷ Pre-confirmation Rule 77 package 9.