

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 May 2015

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

**Decision Providing Materials in Two Independent Counsel Reports and Related
Matters**

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

States Representatives

Others

Independent Counsel

REGISTRY

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 Article 64 and 67(1)(b) of the Rome Statute (the ‘Statute’), Rule 73 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 23 *bis* of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision Providing Materials in Two Independent Counsel Reports and Related Matters’.

I. Procedural background

1. On 11 November 2014, Pre-Trial Chamber II confirmed the charges in this case (the ‘Confirmation Decision’).¹ This Trial Chamber was constituted on 30 January 2015² and this case was referred to it on that date.
2. On 9 April 2015, this Chamber maintained a procedure, initially established by the Pre-Trial Chamber at the confirmation stage, for an appointed independent counsel (the ‘Independent Counsel’) to review certain seized materials in this case (the ‘Independent Counsel Decision’).³ The Independent Counsel has been tasked with: (i) being present at the unsealing of seized material; (ii) reviewing it and (iii) promptly submitting a report to the Chamber as to which materials he considers to be relevant and not privileged.⁴ These reports are to be notified *ex parte* to the Chamber and the defence teams that represent the accused who own or are potential privilege holders in this material.⁵ These defence teams are to make any observations on these reports within five days of being notified of them,⁶ at

¹ Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, ICC-01/05-01/13-749.

² Decision constituting Trial Chamber VII and referring to it the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 30 January 2015, ICC-01/05-01/13-805.

³ Decision on ‘Request concerning the review of seized material’ and related matters, 9 April 2015, ICC-01/05-01/13-893-Red (confidential version notified same day).

⁴ Independent Counsel Decision, ICC-01/05-01/13-893-Red, paras 19-23, page 13.

⁵ See Independent Counsel Decision, ICC-01/05-01/13-893-Red, paras 22-24.

⁶ See Independent Counsel Decision, ICC-01/05-01/13-893-Red, paras 23-24.

which point the Chamber will rule on any objections raised and provide materials to the other parties as appropriate.

3. The present decision primarily concerns review of two Independent Counsel reports: one filed on 11 September 2014 (the 'September 2014 Report')⁷ and one filed on 13 March 2015 (the 'March 2015 Report') (collectively, the 'Two Independent Counsel Reports').⁸
4. As regards the September 2014 Report, this report was to analyse two DVDs with email accounts seized by national authorities.⁹ The Independent Counsel was only able to review one of these DVDs, as the contents of the other could not be extracted by the Court because it was corrupted or damaged (the 'Corrupted DVD').¹⁰ Observations on this report were sought from Mr Bemba and Mr Kilolo.¹¹
5. As regards the March 2015 Report, this report analyses certain email accounts, SMS messages and call data records (but not call contents)¹² seized by national authorities. Observations on this report were sought from Mr Bemba,¹³ Mr Kilolo¹⁴ and Mr Arido.¹⁵

⁷ 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-Exp (with three annexes).

⁸ Rapport du Conseil indépendant sur la levée des scellés et l'analyse de pièces saisies par les autorités françaises et les autorités belges (Décisions ICC-01/05-01/13-41 et ICC-01/05-01/13-366 et 446), 13 March 2015, ICC-01/05-01/13-845-Conf (with four annexes; report reclassified as confidential on 9 April 2015).

⁹ See Decision on the "Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel", 25 April 2014, ICC-01/05-01/13-366-Red (confidential version filed same day); Decision on the requests submitted by the Defence for Jean-Pierre Bemba Gombo on the forensic acquisition of DVDs and related filings, 30 May 2014, ICC-01/05-01/13-446.

¹⁰ Registry submissions related to the implementation of Decisions ICC-01/05-01/13-366-Conf and ICC-01/05-01/13-446, 13 June 2014, ICC-01/05-01/13-490-Conf (with three annexes).

¹¹ See Order Related to Prosecution's Request for Reclassification of ICC-01/05-01/13-670-Conf-Exp and its Annexes, 15 April 2015, ICC-01/05-01/13-910-Conf; Decision on various filings related to two DVDs received from national authorities, 24 November 2014, ICC-01/05-01/13-765, page 8.

¹² See Decision on 'Urgent Request for Access to the Content of Seized Communications', 14 April 2015, ICC-01/05-01/13-906.

¹³ Only for Annexes B, C and D of the March 2015 Report. Independent Counsel Decision, ICC-01/05-01/13-893-Red, para. 24, page 14.

¹⁴ Only for Annexes B, C and D of the March 2015 Report. Independent Counsel Decision, ICC-01/05-01/13-893-Red, para. 24, page 14.

6. On 17 April 2015, the Registry sought the Chamber's guidance as to how to proceed regarding the Corrupted DVD (the 'Corrupted DVD Report').¹⁶
7. On 20 April 2015, the defence teams for Mr Bemba (the 'Bemba Defence'),¹⁷ Mr Arido (the 'Arido Defence')¹⁸ and Mr Kilolo (the 'Kilolo Defence')¹⁹ filed their observations on the March 2015 Report (the 'Bemba March 2015 Report Observations', the 'Kilolo Defence Observations' and the 'Arido Defence Observations', respectively).
8. On 21 April 2015, the Bemba Defence filed its observations on the September 2014 report (the 'Bemba September 2014 Report Observations').²⁰ The Kilolo Defence did not submit any observations on this report.
9. On 5 May 2015, the Registry informed the Chamber that further items seized from the accused were unsealed on 20 April 2015, including various electronic items (the 'Unsealed Electronic Items').²¹
10. On 7 May 2015, the Prosecution requested that an inventory accounting for each item seized or transmitted be completed promptly (the 'Inventory Request').²²

¹⁵ Only for Annexes A, A1 and A2 of the March 2015 Report. Independent Counsel Decision, ICC-01/05-01/13-893-Red, para. 24, page 14.

¹⁶ Registry observations on the status of seized material and request for guidance in relation to item of evidence referenced as CAR-ICC-0002-0001 (DVD 1), 17 April 2015, ICC-01/05-01/13-914-Conf (with annex).

¹⁷ Defence Observations on the Annexes of the Report of the Independent Counsel, ICC-01/05-01/13-845-Conf-Exp, 20 April 2015, ICC-01/05-01/13-917-Conf-Exp (with five annexes; a corrigendum of Annex C was notified on 23 April 2015).

¹⁸ Narcisse Arido's Observations on Annexes A, A1 and A2 of the Independent Counsel's Report of 13 March 2015 (ICC-01/05-01/13-845-Conf) in Accordance with Trial Chamber's Decision No. ICC-01/05-01/13-893-Red, 20 April 2015, ICC-01/05-01/13-918-Conf-Exp (with annex).

¹⁹ Observations de la Défense de monsieur Aimé Kilolo relatives au rapport du Conseil indépendant du 13 mars 2015, 20 April 2015, ICC-01/05-01/13-919-Conf-Exp. This filing appears to have been made late, as these observations were not notified until 21 April 2015. These observations will be accepted on this occasion, but the Kilolo Defence is minded that future untimely submissions may be disregarded.

²⁰ Public redacted version of Defence Observations on ICC-01/05-01/13-670-Conf-Exp-AnxB, with Confidential Ex Parte (Bemba Defence only) Annex A, 21 April 2015, ICC-01/05-01/13-920-Red (confidential ex parte filing and annex filed same day).

²¹ Joint report on the implementation of Decision ICC-01/05-01/13-893-Conf and related to the unsealing and transmission of seized material, 5 May 2015, ICC-01/05-01/13-931-Conf (with two annexes; the items specified are 'two mobile phones, one hard drive, several SIM cards, one iPod, several DVDs/CDs and a USB stick').

11. On 11 May 2015, the Arido Defence responded to the Corrupted DVD Report.²³

12. On 13 May 2015, the Registry responded to the Inventory Request and provided a further *procès verbal* on the unsealing of further materials.²⁴

II. Submissions and analysis

A. The Two Independent Counsel Reports

13. Rule 73 of the Rules concerns privileged communications and information, with Rule 73(1) in particular governing ‘communications made in the context of the professional relationship between a person and his or her legal counsel’. Communications which do not ostensibly appear to be made in the context of such a relationship may nevertheless attract privilege depending on their content and the circumstances, context or purpose of their creation.²⁵

14. Rule 73(1) communications are not subject to disclosure unless: (a) the person consents in writing to such disclosure; or (b) the person voluntarily disclosed the content of the communication to a third party and that third party gives evidence of that disclosure.²⁶ However, communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege.²⁷

²² Prosecution’s Request for Further Information in relation to the Seized Material, 7 May 2015, ICC-01/05-01/13-938-Conf.

²³ Narcisse Arido’s Response to “Registry Observations on the Status of Seized Material and Request for Guidance in Relation to item of Evidence Referenced as CAR-ICC-0002-0001 (DVD 1)” (ICC-01/05-01/13-914-Conf), 11 May 2015, ICC-01/05-01/13-941-Conf.

²⁴ Registry observations in response to filing ICC-01/05-01/13-938-Conf and in relation to the actions taken with items ICC-01/05-01/13-RPM-0022-0004 and ICC-01/05-01/13-RPM-0022-0037, 13 May 2015, ICC-01/05-01/13-944-Conf (with two annexes). The submission deadline was shortened to this date. Email from a Legal Officer of the Chamber to the Registry and parties, 11 May 2015 at 13:43.

²⁵ See Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the review of potentially privileged material, 15 June 2011, ICC-01/04-01/10-237, pages 7-8.

²⁶ Rule 73(1)(a)-(b) of the Rules.

²⁷ Decision on the Prosecutor’s “Request for judicial order to obtain evidence for investigation under Article 70”, 3 February 2014, ICC-01/05-52-Red2, paras 3-4 (filed confidential ex parte on 29 July 2013, but reclassification

15. The Chamber considers that the requirement to ensure the fairness of the trial, pursuant to Article 64 of the Statute, does recommend the exercise of discretion in the Chamber to decide the scope of materials covered by the crime/fraud exception. The Chamber will now identify the considerations underlying its overall approach to evaluating the Independent Counsel's selected materials.
16. First, the Chamber notes that the Independent Counsel fulfils his role autonomously and not as an agent or a delegate of the Chamber for purposes of the exercise of its own functions. This is, however, without prejudice to the review power of the Chamber. Accordingly, the Chamber has not relied solely on the Independent Counsel's analysis of the selected materials - the Chamber has conducted its own independent analysis of the relevance and potentially privileged character of the documents in question.
17. Second, when assessing the selected materials' 'relevance', the 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 developments show that previous determinations are no longer justified; then further materials may be provided.
18. Third, whether a given communication satisfies the crime/fraud privilege exception must be evaluated in the context of the charges as a whole. For example, some of the communications selected by the Independent Counsel are quite brief, such as an SMS message from an accused to another person

to 'Confidential' was ordered on 15 May 2014); Decision on the filing in the record of items seized upon the searches of the person and cell of Jean-Pierre Bemba Gombo, 19 May 2014, ICC-01/05-01/13-408, page 5.

simply saying 'ok'.²⁸ Clearly, where such communication falls – either as privileged or as crime/fraud excepted – will depend on a proper appreciation of the broader context of the given communication. A piecemeal approach, whereby each selected communication must show a certain threshold of illegitimacy before the crime/fraud exception applies, is therefore not appropriate.

19. Finally, the Chamber notes that the basic parameters of the Confirmation Decision are that, between the end of 2011 and 14 November 2013 (the 'Relevant Timeframe'), the five accused are alleged to have committed offences against the administration of justice with regard to fourteen witnesses called by the Bemba Defence in case ICC-01/05-01/08 (the 'Fourteen Witnesses').²⁹ These parameters are of particular importance when deciding which materials are relevant.

20. With these considerations in mind, the Chamber's overall approach to reviewing the Two Independent Counsel Reports can, in principle and subject to exceptions where warranted, be described as follows:

- i. Selected communications with the Fourteen Witnesses in or around the Relevant Timeframe are not privileged, either because they are not privileged communications in any event or that they fall under the crime/fraud exception. 'In or around' includes communications made between the end of the Relevant Timeframe and the accuseds' arrests on 23-24 November 2013, as these communications may be used to support or challenge the alleged facts and circumstances in the Relevant Timeframe.

²⁸ E.g. Annex B of the March 2015 Report, ICC-01/05-01/13-845-Conf-Exp-AnxB: Entry 8.

²⁹ Confirmation Decision, ICC-01/05-01/13-749, pages 47-54.

- ii. Selected communications in or around the Relevant Timeframe between the accused are not privileged if they relate to: (i) the Fourteen Witnesses; (ii) money transfers and/or (iii) the whereabouts or conduct of the accused. Nevertheless, these communications would, unless determined otherwise, still be subject to the redactions proposed by the Independent Counsel. Other Rule 73(1) communications relating to defence strategy would retain their privilege.
- iii. Selected communications are irrelevant and, if privileged, not covered by the crime/fraud exception when the accused are speaking to persons not referred to in the Confirmation Decision or Document Containing the Charges (the 'DCC')³⁰ about matters unrelated to the facts and circumstances described in the charges. These persons include, *inter alia*, witnesses other than the Fourteen Witnesses and potential witnesses. For persons named in DCC factual allegations who are not referred to in the Confirmation Decision, the Chamber has assessed relevance by analysing whether the alleged events concerning these persons fall within the parameters of the charges as confirmed.

1. *The September 2014 Report*

21. This report analyses 16 emails found on an account used by Mr Kilolo. Annex A of the September 2014 Report contains the Independent Counsel's analysis of these emails. Annex B contains the emails with redactions proposed in yellow highlight. Annex C is identical to Annex B, except that the proposed redactions are applied. The Bemba Defence's observations indicate that, in its view, none of these emails should be provided to the other parties.³¹

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

³¹ Annex A of the Bemba September 2014 Report, Observations, ICC-01/05-01/13-920-Conf-Exp-AnxA.

22. Four of these emails are communications with the Fourteen Witnesses in or around the Relevant Timeframe.³² A further batch of six emails involves communications between the accused concerning the Fourteen Witnesses, money transfers or their own whereabouts/conduct in or around the Relevant Timeframe.³³ The Chamber considers these emails to be relevant to the case and not privileged. They are to be provided to the other parties accordingly.

23. Entries 10 and 11 of this report are communications between Mr Kilolo and Mr Mangenda about Mr Bemba's instructions regarding how to examine a witness other than the Fourteen Witnesses. The Chamber considers these communications to be privileged and do not fall under the crime/fraud exception.

24. Entries 13-16 are emails where Mr Kilolo is communicating with persons not referred to in the DCC or Confirmation Decision. The contents of these emails bear no relation to the facts and circumstances described in the charges. The Chamber considers that these communications are irrelevant.

25. In view of the Chamber's analysis, the Independent Counsel is directed to file a confidential redacted version of Annex C of the September 2014 Report which, in addition to the redactions already applied, redacts the entirety of the six emails which the Chamber has found to be irrelevant and/or privileged.³⁴

2. *The March 2015 Report*

i. Annexes A, A1 and A2 of the March 2015 Report

³² Annex B of the September 2014 Report, ICC-01/05-01/13-670-Conf-Exp-AnxB: Entries 2, 5, 7-8.

³³ Annex B of the September 2014 Report, ICC-01/05-01/13-670-Conf-Exp-AnxB: Entries 1, 3, 4, 6, 9, 12 (Entry 12 is a relevant email Mr Kilolo sent to himself).

³⁴ Namely, entries 10-11, 13-16.

26. These annexes concern emails from an account used by Mr Arido. Annex A of the March 2015 Report contains the Independent Counsel's assessment of the 35 emails he identified as relevant and non-privileged. Annex A1 contains the selected emails themselves, along with redactions applied by the Independent Counsel. Annex A2 contains the same emails as Annex A1, but without redactions.
27. The Arido Defence submits that there is no justification to provide these annexes to the other parties because the Prosecution is already in possession of the selected emails and has disclosed them to the defence teams.³⁵ The Arido Defence particularly objects to providing Annex A to the Prosecution, arguing that it contains a number of 'prejudicial comments from the Independent Counsel, which could "assist" the Prosecution'.³⁶ Further, the Arido Defence submits that the fact that the Prosecution had already acquired these 35 emails 'raises the question of the method by which the Prosecution obtained these emails' and requests the Chamber to order the Prosecution to provide information as to how it obtained these materials.³⁷
28. As to Annex A1 of the Report, the Chamber considers that the fact that all these materials are already in the parties' possession cuts in favour of - not against - its reclassification. The basis for the 'confidential *ex parte*' classification of this annex appears to no longer exist.³⁸ However, the Chamber notes that the Arido Defence indicates that the Independent Counsel has not redacted certain information which was redacted by the Prosecution.³⁹ Mindful of the fact that the Prosecution already disclosed the material concerned in redacted form, the Chamber is of the view that the

³⁵ Arido Defence Observations, ICC-01/05-01/13-918-Conf-Exp, paras 14, 32(ii). *See also* ICC-01/05-01/13-918-Conf-Exp-AnxA (chart showing ERN and disclosure package numbers for each of the 35 selected emails).

³⁶ Arido Defence Observations, ICC-01/05-01/13-918-Conf-Exp, para. 14.

³⁷ Arido Defence Observations, ICC-01/05-01/13-918-Conf-Exp, para. 16.

³⁸ *See* Regulation 23 *bis*(3) of the Regulations.

³⁹ Arido Defence Observations, ICC-01/05-01/13-918-Conf-Exp, para. 30.

same redactions must apply to the material set out in the Annex A1 of the March 2015 Report. The Independent Counsel, as the author of the document, will be required to prepare a new redacted version of Annex A1. To this end, he is to receive the information as to the additional redactions from the Prosecution.

29. Annex A was never intended to be shared with all parties - it relates solely to the Independent Counsel's process in selecting the materials contained in Annex A1. Annex A2 was likewise never intended to be reclassified, as it contains the unredacted emails which the Independent Counsel proposed to provide to the parties in redacted form.

30. Regarding the request to order an explanation as to how the Prosecution obtained the 35 emails, the Chamber does not consider this to be necessary at this time, for purposes of the present exercise. The Chamber is now seized with the question as to whether or not the material in question is privileged. This request is rejected, without prejudice to any question as to the admissibility of these emails at the appropriate time.

ii. Annexes B, C and D of the March 2015 Report

31. Annex B of the March 2015 Report analyses 48 SMS messages which were on Mr Kilolo's phone. Annex C analyses 197 call data records⁴⁰ on Mr Kilolo's phone. Annex D is a list where the Independent Counsel attributes phone numbers and persons. The Bemba Defence's observations indicate that, in its view, none of these SMS messages or call data records should be provided to the other parties.⁴¹

⁴⁰ There are only 196 numbered call data records in the annex, but there are two Entry 20s.

⁴¹ Annexes A and B of the Bemba March 2015 Report Observations, ICC-01/05-01/13-917-Conf-Exp-AnxA, ICC-01/05-01/13-917-Conf-Exp-AnxB.

32. As to Annex B of the March 2015 Report, eight of these SMS messages are communications with the Fourteen Witnesses in or around the Relevant Timeframe.⁴² Ten messages are communications between the accused concerning the Fourteen Witnesses, money transfers or their own whereabouts/conduct in or around the Relevant Timeframe.⁴³ A further batch of 11 messages involves communications with persons named in allegations made in the DCC which fall within the parameters of the confirmed charges.⁴⁴ The Chamber considers these messages to be relevant to the case and not privileged. They are to be provided to the other parties accordingly.

33. Entry 11 is a SMS message between Mr Kilolo and an unknown person. However, in view of its timing and content, it appears that this SMS is linked to other SMS messages Mr Kilolo exchanged with one of the Fourteen Witnesses during the Relevant Timeframe,⁴⁵ and thus appears to be relevant to the case. The Chamber considers this message to not be privileged and it is to be provided to the other parties accordingly.

34. The remaining entries are SMS messages where Mr Kilolo is making notes for himself or communicating with persons not referred to in the DCC or Confirmation Decision.⁴⁶ The contents of these messages show no connection to the facts and circumstances described in the charges. The Chamber considers that these communications are irrelevant and/or privileged. In view of the Chamber's analysis, the Independent Counsel is directed to file a confidential redacted version of Annex B of the March 2015 Report which redacts the entirety of these 18 messages. Further, the

⁴² Annex B of the March 2015 Report, ICC-01/05-01/13-845-Conf-Exp-AnxB: Entries 7-10, 12-15.

⁴³ Annex B of the March 2015 Report, ICC-01/05-01/13-845-Conf-Exp-AnxB: Entries 16-17, 20-22, 27-30, 39.

⁴⁴ Annex B of the March 2015 Report, ICC-01/05-01/13-845-Conf-Exp-AnxB: Entries 5-6, 36-38, 40-44, 48.

⁴⁵ See Annex B of the March 2015 Report, ICC-01/05-01/13-845-Conf-Exp-AnxB: Entries 12-15.

⁴⁶ Annex B of the March 2015 Report, ICC-01/05-01/13-845-Conf-Exp-AnxB: Entries 1-4, 18-19, 23-26, 31-35, 45-47.

‘Remarques’ column for all entries, including those where the content is provided to the other parties, is to be redacted in full along with any corresponding footnotes.

35. As to Annex C of the March 2015 Report, 110 of these call data records are communications with the Fourteen Witnesses in or around the Relevant Timeframe.⁴⁷ Twenty-three records are communications between the accused concerning the Fourteen Witnesses, money transfers or their own whereabouts/conduct in or around the Relevant Timeframe.⁴⁸ A further batch of 37 records involves communications with persons named in allegations made in the DCC which fall within the parameters of the confirmed charges.⁴⁹ The Chamber considers these messages to be relevant to the case and not privileged. They are to be provided to the other parties accordingly.

36. Entry 13 is a call with a person where the Independent Counsel indicates that the person called is Witness D-6, but the Bemba Defence indicates that it is not in a position to confirm that this is the case. Without prejudice to any later determination as to the correct attribution of this number, the Chamber is satisfied for present purposes that this communication is relevant to the case and not privileged. Consequently, it is to be provided to the other parties.

37. Entry 62 is a call between Mr Kilolo, one of the Fourteen Witnesses and a third person. The Chamber considers this message to be relevant to the

⁴⁷ Annex C of the March 2015 Report, ICC-01/05-01/13-845-Conf-Exp-AnxC: Entries 2, 5-6, 8, 18, 20 (the first instance only), 22-23, 29-30, 32-34, 38-40, 42, 47-56, 63, 67-70, 75, 78-79, 81-84, 86-117, 122-26, 128-30, 132-37, 140-43, 145-53, 155, 158, 162, 172, 178, 186, 189-91, 193-95.

⁴⁸ Annex C of the March 2015 Report, ICC-01/05-01/13-845-Conf-Exp-AnxC: Entries 11, 16, 24, 31, 57-59, 65-66, 76-77, 80, 118-121, 131, 157, 161, 181, 187-88, 192.

⁴⁹ Annex C of the March 2015 Report, ICC-01/05-01/13-845-Conf-Exp-AnxC: Entries 1, 10, 14-15, 20 (the second instance only), 25-26, 41, 64, 73-74, 127, 138-39, 144, 154, 156, 159-60, 163-68, 171, 173-77, 179-80, 182-83, 185, 196.

case and not privileged, but the phone number and identity of the third person must be redacted.

38. The remaining entries are records where Mr Kilolo is communicating with persons not referenced in the DCC or Confirmation Decision.⁵⁰ The contents of these records do not show any connection to the facts and circumstances described in the charges. The Chamber considers that these communications are irrelevant. In view of the Chamber's analysis, the Independent Counsel is directed to file a confidential redacted version of Annex C of the March 2015 Report which redacts the entirety of these 25 call data records and part of Entry 62, as specified in the previous paragraph. Further, the 'Remarques' column for all entries, including those where the content is provided to the other parties, is to be redacted in full along with any corresponding footnotes.

B. Related matters

1. Access to materials

39. The Bemba Defence, Kilolo Defence and Arido Defence make submissions regarding who should receive access to the original materials reviewed by the Independent Counsel.⁵¹

40. The Chamber agrees that, following its review of the materials selected by the Independent Counsel, the complete materials should be made available to the person whose information was seized. Further, given the interest the Bemba Defence has in many of these same materials, the Chamber considers that it should also have complete access to those materials.

⁵⁰ Annex C of the March 2015 Report, ICC-01/05-01/13-845-Conf-Exp-AnxC: Entries 3-4, 7, 9, 12, 17, 19, 21, 27-28, 35-37, 43-46, 60-61, 71-72, 85, 169-70, 184.

⁵¹ Bemba September 2014 Report Observations, ICC-01/05-01/13-920-Red, para. 18; Kilolo Defence Observations, ICC-01/05-01/13-919-Conf-Exp, paras 7, 12; Arido Defence Observations, ICC-01/05-01/13-918-Conf-Exp, paras 31, 32(vi).

41. The Registry is therefore directed to make available the complete materials underlying the Two Independent Counsel Reports to the defence teams in the manner set out in the disposition.

2. *Potentially exculpatory materials and their transmission to non-owners or non-privilege holders*

42. The Bemba Defence observes that, if the Independent Counsel has under-selected exculpatory materials, then certain defence teams may not necessarily be given access to them.⁵² The Bemba Defence proposes a status conference to discuss a procedure whereby privileged materials are disclosed to the other defence teams with limiting instructions on how to use them.⁵³

43. The Chamber does not consider it necessary to hold a status conference on this matter or adopt any such procedure. The defence teams who have not received the materials reviewed by the Independent Counsel may liaise with defence teams who have been provided access to the materials reviewed with a view to providing any such exculpatory information to its beneficiary.⁵⁴

44. The Chamber notes the Kilolo Defence's request for the Registry to destroy all materials reviewed by the Independent Counsel except for those provided to the Prosecution.⁵⁵ In view of the Chamber's ruling that certain materials are to be made available to the accused concerned, the Chamber considers that the Registry may not destroy them at this time.

⁵² Bemba September 2014 Report Observations, ICC-01/05-01/13-920-Red, paras 20-22.

⁵³ Bemba September 2014 Report Observations, ICC-01/05-01/13-920-Red, paras 23-24. *See also* Narcisse Arido's Response to Bemba and Kilolo's Requests for an Ex Parte Defence Only Status Conference to Discuss Privileged Materials (ICC-01/05-01/13-920-Red and ICC-01/05-01/13-939), 12 May 2015, ICC-01/05-01/13-943; Requête de la Défense de M. Aimé Kilolo Musamba demandant à la Chambre de première instance de suspendre temporairement la procédure, 7 May 2015, ICC-01/05-01/13-939 (also requesting a status conference of this kind).

⁵⁴ *See generally* Transcript of Hearing, 24 April 2015, ICC-01/05-01/13-T-8-CONF-ENG, page 4 lines 16-21.

⁵⁵ Kilolo Defence Observations, ICC-01/05-01/13-919-Conf-Exp, para. 11.

3. *The Corrupted DVD and Unsealed Electronic Items*

45. As to the Corrupted DVD, the Registry indicates that it has already attempted to receive a new copy of it without success.⁵⁶ The Registry now proposes to send the Corrupted DVD to the Netherlands Forensic Institute (the 'NFI') for further forensic extraction and retrieval of data.⁵⁷ The Registry also indicates that, if the Chamber so wishes, the Registry can also communicate a new cooperation request to relevant national authorities so that the email provider provides the information of the email accounts concerned.⁵⁸ The Arido Defence agrees that such a request should be sent.⁵⁹

46. The Registry further recommends that the forensic acquisition of all the Unsealed Electronic Items be outsourced to the NFI.⁶⁰

47. The Chamber is persuaded that transmitting the Corrupted DVD and Unsealed Electronic Items to the NFI for its review is an appropriate measure at this juncture. The Registry is to take the necessary steps for the NFI to analyse the Corrupted DVD and Unsealed Electronic Items as a matter of priority and then to provide the consequent analysis/data in the manner set out in the disposition below. Bearing in mind the Chamber's warning that it may impose a deadline for the Prosecution to collect and analyse any further evidentiary material,⁶¹ this measure is without prejudice to whether the Chamber will allow the Prosecution to use information collected from the Corrupted DVD and/or Unsealed Electronic Items as incriminating evidence at trial.

⁵⁶ Corrupted DVD Report, ICC-01/05-01/13-914-Conf, pages 3-4.

⁵⁷ Corrupted DVD Report, ICC-01/05-01/13-914-Conf, para. 14.

⁵⁸ Corrupted DVD Report, ICC-01/05-01/13-914-Conf, para. 15.

⁵⁹ ICC-01/05-01/13-941-Conf, para. 9.

⁶⁰ ICC-01/05-01/13-931-Conf, para. 3.

⁶¹ ICC-01/05-01/13-T-8-CONF-ENG, page 70 lines 5-13.

48. As to sending a new cooperation request, it has not been demonstrated that Chamber intervention is necessary in order for the parties to obtain the information sought in this way. In any event, this measure is of an investigatory nature as it would lead to acquiring new evidence. This responsibility lies primarily with the Prosecution, in conformity with Article 54(1)(a) of the Statute.

4. *The Inventory Request*

49. In the Inventory Request, the Prosecution requests that the Registry or the Independent Counsel be directed to prioritise the examination of the dossier and to provide an inventory of the items listed as having been seized by specified national authorities and of those transmitted to the Court.⁶²

50. In its observations in relation to the Inventory Request, the Registry provides the information sought by the Prosecution.⁶³ Accordingly, the Prosecution's request is dismissed as moot. As regards Annex 2 of the Registry's observations, which contains further information as to the proceedings and actions taken with the seized materials related to Mr Kilolo,⁶⁴ the Registry is to extract the relevant information - a complete list of the items that were seized – and provide it to the parties in a separate document.

5. *Reclassification and redacted versions of filings*

51. Finally, the Chamber considers that the September 2014 Report may be reclassified as 'Confidential'. Further, redacted versions (public redacted if possible, confidential redacted otherwise) can be prepared for the: (i) Bemba March 2015 Report Observations (ICC-01/05-01/13-917-Conf-Exp); (ii) Arido

⁶² Inventory Request, ICC-01/05-01/13-938-Conf, para. 8.

⁶³ ICC-01/05-01/13-944-Conf. *See also* Observations de la Défense de monsieur Aimé Kilolo relatives à la «Prosecution's Request for Further Information in relation to the Seized Material (ICC-01/05-01/13-938-Conf)», 13 May 2015, ICC-01/05-01/13-945-Conf.

⁶⁴ ICC-01/05-01/13-944-Conf-Exp-Anx2.

Defence Observations (ICC-01/05-01/13-918-Conf-Exp) and (iii) Kilolo Defence Observations (ICC-01/05-01/13-919-Conf-Exp).

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

DIRECTS the Independent Counsel, within five days of notification of the present decision, to file a confidential redacted version of Annex C of the September 2014 Report (ICC-01/05-01/13-670-Conf-Exp-AnxC) in accordance with paragraph 25 above;

DIRECTS the Independent Counsel, within ten days of notification of the present decision, to redact Annex A1 of the March 2015 Report (ICC-01/05-01/13-845-Conf-Exp-AnxA1) in accordance with paragraph 28 above;

DIRECTS the Independent Counsel, within five days of notification of the present decision, to file a confidential redacted version of Annex B of the March 2015 Report (ICC-01/05-01/13-845-Conf-Exp-AnxB) in accordance with paragraph 34 above;

DIRECTS the Independent Counsel, within five days of notification of the present decision, to file a confidential redacted version of Annex C of the March 2015 Report (ICC-01/05-01/13-845-Conf-Exp-AnxC) in accordance with paragraph 38 above;

ORDERS the Registry to make available the complete materials reviewed by the Independent Counsel for purposes of: (i) the September 2014 Report to the Kilolo and Bemba Defence; (ii) Annexes A, A1 and A2 of the March 2015 Report to the Arido Defence and (iii) Annexes B, C and D of the March 2015 Report to the Kilolo and Bemba Defence;

ORDERS the Registry to take the necessary steps for the NFI to analyse the Corrupted DVD and Unsealed Electronic Items as a matter of priority and, following this analysis, to provide: (i) the NFI's report on the forensic analysis to the Chamber, Independent Counsel and, with redactions as appropriate, to the parties and (ii) any data extracted by NFI to the Independent Counsel for his review;

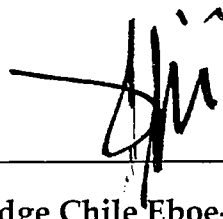
ORDERS the Registry, within fourteen days of notification of the present decision, to provide the relevant extracts of ICC-01/05-01/13-944-Conf-Exp-Anx2 to the parties in accordance with paragraph 50 above;

ORDERS the Registry to reclassify the September 2014 Report (ICC-01/05-01/13-670-Conf-Exp) as 'Confidential' forthwith;

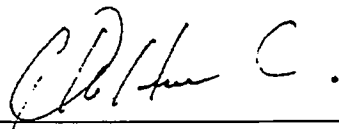
ORDERS the parties to redact the filings identified in paragraph 51 above within seven days of notification of the present decision; and

REJECTS all remaining requests.

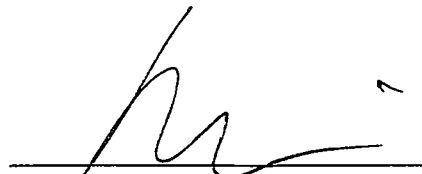
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccia



Judge Bertram Schmitt

Dated 15 May 2015

At The Hague, The Netherlands