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No.: ICC-01/05-01/13
Date: 27 August 2015

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 Defence Requests for Disclosure of Materials from the Record of the
Case of *The Prosecutor v. Jean-Pierre Bemba Gombo* 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

Trial Chamber III

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, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ('Bemba et al. case'), having regard to Article 64(10) of the Rome Statute ('Statute'), Rule 137 of the Rules of Procedure and Evidence ('Rules') and Regulations 23 bis, 24(5) and 42 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence Requests for Disclosure of Materials from the Record of the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo* and Related Matters'.

I. Procedural History

1. On 10 August 2015, the defence for Mr Kilolo ('Kilolo Defence'), Mr Mangenda, Mr Babala and Mr Arido ('Arido Defence'; collectively, 'Defence') requested ('Joint Defence Request') disclosure of confidential material from the record of the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ('Main Case').¹ The same day, the Kilolo Defence² and Arido Defence³ also filed requests relating to material and issues in the Main Case ('Kilolo Defence Request' and 'Arido Defence Request', respectively; with the Joint Defence Request, 'Requests').
2. On 17 August 2015,⁴ the Office of the Prosecutor ('Prosecution') responded to the Kilolo Defence Request ('Prosecution Response to Kilolo Defence Request').⁵

¹ Urgent Joint Request for Order Compelling the Prosecution to Disclose Materials from the Case of *Prosecutor v. Bemba*, ICC-01/05-01/13-1133-Conf. A corrected version was filed on 17 August 2015 (ICC-01/05-01/13-1133-Conf-Corr).

² Kilolo Defence Motion on Scope of Evidence and Allegations, ICC-01/05-01/13-1138-Conf.

³ Narcisse Arido's Request for an Order on Disclosure Violation (Article 67 (2) of the Statute), ICC-01/05-01/13-1141-Conf, with five confidential annexes. A corrected version was filed on 17 August 2015 (ICC-01/05-01/13-1141-Conf-Corr).

⁴ The Chamber ordered that any response to the Kilolo Defence Request be filed by 19 August 2015. See Email communication from Trial Chamber Legal Officer to Parties on 12 August 2015 at 18:51.

⁵ Prosecution's response to "Kilolo Defence Motion on Scope of Evidence and Allegations", ICC-01/05-01/13-1157-Conf.

3. On 19 August 2015,⁶ the Prosecution responded to the Joint Defence Request ('Prosecution Response to Joint Defence Request')⁷ and the defence for Mr Bemba ('Bemba Defence') responded to the Kilolo Defence Request ('Bemba Defence Response to Kilolo Defence Request').⁸
4. On 24 August 2015,⁹ the Prosecution responded to the Arido Defence Request ('Prosecution Response to Arido Defence Request').¹⁰
5. On 26 August 2015, the Kilolo Defence requested leave to reply to the Prosecution Response to Kilolo Defence Request, submitting that the Prosecution raised in response a new interpretation of Article 70(1) of the Statute ('Kilolo Defence Request for Leave to Reply').¹¹

II. Submissions

6. Submitting that it is exculpatory or material to defence preparations and necessary for equality of arms, the Defence seeks, in the Joint Defence Request, disclosure of the following confidential materials from the Main Case record: (i) all confidential transcripts; (ii) all confidential exhibits; (iii) all confidential *inter partes* or *ex parte* filings; (iv) all confidential *inter partes* communications by the parties, Registry or Chamber to any party; and (v) all confidential disclosure provided by the Prosecution to the Defence.¹² The Prosecution responds, *inter alia*, that the Joint Defence Request is unwarranted because a request for access to the same materials is pending before Trial Chamber III, the competent chamber

⁶ The Chamber ordered that any response to the Joint Defence Request be filed by 19 August 2015. See Email communication from Trial Chamber Legal Officer to Parties on 12 August 2015 at 18:51.

⁷ Prosecution's Response to "Urgent Joint Request for Order Compelling the Prosecution to Disclose Materials from the Case of *Prosecutor v. Bemba*," ICC-01/05-01/13-1133-Conf-Corr, ICC-01/05-01/13-1162-Conf.

⁸ Defence Response to the Kilolo Defence Motion on Scope of Evidence and Allegations (ICC-01/05-01/13-1138-Conf), ICC-01/05-01/13-1161-Conf.

⁹ The Chamber ordered that any response to the Arido Defence Request be filed by 24 August 2015. See Email communication from Trial Chamber Legal Officer to Parties on 12 August 2015 at 18:51.

¹⁰ Prosecution's Response to the Arido Defence Request for Disclosure Orders, ICC-01/05-01/13-1176-Conf.

¹¹ Urgent Application for Leave to Reply to 'Prosecution's response to "Kilolo Defence Motion on Scope of Evidence and Allegations" (ICC-01/05-01/13-1157-Conf)', ICC-01/05-01/13-1186-Conf.

¹² Joint Defence Request, ICC-01/05-01/13-1133-Conf-Corr.

to rule on any request for access to the Main Case record.¹³

7. In the Kilolo Defence Request, the Kilolo Defence requests that the Chamber either (i) indicate that it will not assess the reliability and truthfulness of testimony on issues pertaining to the merits of the Main Case, and prohibit the Prosecution from adducing evidence on such issues; or, in the alternative, (ii) provide the parties access to all material in the Main Case impacting on the truth of the relevant witnesses' testimony, and/or postpone the commencement of the trial until after a determination of such issues.¹⁴ The Kilolo Defence submits that there is a contradiction in the decision confirming the charges ('Confirmation Decision') which requires clarification: despite Pre-Trial Chamber II's assertion that it was not in a position to assess the truthfulness of testimony on issues pertaining to the merits of the Main Case, certain issues mentioned in the Confirmation Decision as the subject of false testimony are related to the charges in the Main Case.¹⁵ The Kilolo Defence asserts that clarification would define (i) the scope of evidence the Prosecution may present and (ii) the parameters of the findings on false testimony that the Chamber may make.¹⁶
8. The Bemba Defence responds in support of the primary relief sought in the Kilolo Defence Request, stressing that, based on the pre-trial brief, it appears that the Prosecution is attempting to, improperly and unfairly, re-litigate issues in the *Bemba et al.* case that concern Mr Bemba's alleged responsibility in the Main Case.¹⁷ The Prosecution opposes the Kilolo Defence Request, submitting, *inter alia*, that the Kilolo Defence misunderstands the charges.¹⁸

¹³ Prosecution Response to Joint Defence Request, ICC-01/05-01/13-1162-Conf.

¹⁴ Kilolo Defence Request, ICC-01/05-01/13-1138-Conf.

¹⁵ Kilolo Defence Request, ICC-01/05-01/13-1138-Conf, paras 3-11.

¹⁶ Kilolo Defence Request, ICC-01/05-01/13-1138-Conf, paras 12-17.

¹⁷ Bemba Defence Response to Kilolo Defence Request, ICC-01/05-01/13-1161-Conf.

¹⁸ Prosecution Response to Kilolo Defence Request, ICC-01/05-01/13-1157-Conf.

9. In the Arido Defence Request, the Arido Defence requests that the Chamber (i) find that the Prosecution violated its disclosure obligations; (ii) order the Prosecution to disclose certain material from the Main Case record; (iii) order the Prosecution to review the Main Case record to identify further information falling under Article 67(2) of the Statute; (iv) order the Prosecution to certify that it has disclosed all exculpatory evidence; and (v) order a temporary stay of proceedings until the Prosecution abides by these orders and the Defence has a meaningful opportunity to review newly disclosed material.¹⁹ The Prosecution opposes the Arido Defence Request, submitting that (i) it is unsubstantiated, (ii) the Prosecution has discharged its disclosure obligations, and (iii) the Arido Defence should apply to Trial Chamber III for access to the Main Case record.²⁰

III. Analysis

10. As a preliminary matter, the Single Judge considers that nothing in the Joint Defence Request (ICC-01/05-01/13-1133-Conf-Corr), Prosecution Response to Joint Defence Request (ICC-01/05-01/13-1162-Conf), Prosecution Response to Kilolo Defence Request (ICC-01/05-01/13-1157-Conf), Bemba Defence Response to Kilolo Defence Request (ICC-01/05-01/13-1161-Conf) or Kilolo Defence Request for Leave to Reply (ICC-01/05-01/13-1186-Conf) warrants confidential classification. Pursuant to Regulation 23 *bis*(3) of the Regulations, the Single Judge therefore reclassifies these filings as 'public'.
11. Further, in order to reach his decision, the Single Judge does not consider it necessary to receive the additional submissions proposed in the Kilolo Defence Request for Leave to Reply. He therefore rejects this request.
12. Turning to the merits, the Single Judge recalls that the Chamber has already cautioned the parties that the purpose of these proceedings is not to re-litigate

¹⁹ Arido Defence Request, ICC-01/05-01/13-1141-Conf-Corr.

²⁰ Prosecution Response to Arido Defence Request, ICC-01/05-01/13-1176-Conf.

the Main Case.²¹ Submissions which attempt to do so, or evidence presented solely for this purpose, will not be entertained. On this basis, the Single Judge dismisses the Kilolo Defence Request.

13. The remainder of the Requests relates to disclosure of materials from the Main Case record. The Prosecution submits that it has already discharged its disclosure obligations relating to the Main Case record. A Defence request seeking access to the same information subject of the Requests is pending before Trial Chamber III.²² Trial Chamber III, not this Chamber, has primary authority to decide whether to provide access to material in the Main Case record.²³ Further, those portions of the Requests alleging – and requesting remedies for – disclosure violations are directly related to access to material (speculated to be) in the Main Case record and are therefore premature.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Kilolo Defence Request for Leave to Reply;

DISMISSES the Requests;

INSTRUCTS the Registry to reclassify the Joint Defence Request (ICC-01/05-01/13-1133-Conf-Corr), Prosecution Response to Joint Defence Request (ICC-01/05-01/13-1162-Conf), Prosecution Response to Kilolo Defence Request (ICC-01/05-01/13-1157-Conf), Bemba Defence Response to Kilolo Defence Request (ICC-01/05-01/13-1161-Conf) and Kilolo Defence Request for Leave to Reply (ICC-01/05-01/13-1186-Conf) as ‘public’; and

²¹ See Decision on ‘Requete de la defense de monsieur Aime Kilolo Musamba aux fins de divulgation d’informations relatives au temoin de l’Accusation 169’ and Related Additional Requests, 17 August 2015, ICC-01/05-01/13-1154, para. 14.

²² Urgent Joint Request for Access to Confidential Material, 10 August 2015, ICC-01/05-01/08-3282-Conf-Exp-AnxA. The Registry transmitted this filing to Trial Chamber III on 12 August 2015 (ICC-01/05-01/08-3282-Conf-Exp).

²³ See, *inter alia*, Article 64(10) of the Statute; Rule 137 of the Rules; Regulations 23 *bis* and 42 of the Regulations.

ORDERS the Kilolo Defence, Arido Defence and Prosecution to, within five days of notification of this decision, file public redacted versions of the Kilolo Defence Request (ICC-01/05-01/13-1138-Conf), Arido Defence Request (ICC-01/05-01/13-1141-Conf-Corr) and Prosecution Response to Arido Defence Request (ICC-01/05-01/13-1176-Conf), respectively.

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

A handwritten signature in black ink, consisting of a stylized 'B' followed by a series of loops and a horizontal line at the end, positioned above a solid horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 27 August 2015

At The Hague, The Netherlands