

**Cour
Pénale
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**International
Criminal
Court**

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Date: 23 March 2016

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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 Annex A and Public Annex B

Public redacted version of “Prosecution’s Motion for an Order of Disclosure or, in the Alternative, Partial Exclusion of D21-0003’s Evidence”, 22 March 2016, ICC-01/05-01/13-1738-Conf

Source: The Office of the Prosecutor

Document 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

Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell

Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Ms Beth Lyons

The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section Others

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber VII (“Chamber”) to order the Kilolo Defence to produce the audio recording(s) and any transcripts of D21-0003’s 2012 meeting with Aimé Kilolo and Kate Gibson at [REDACTED] (“Material”).¹ Kilolo’s elicitation of the substance of that meeting during D21-0003’s examination and re-examination implicates the Defence’s disclosure obligations under rule 78 of the Rules of Procedure and Evidence (“Rules”). The requested disclosure is consonant with the Court’s statutory framework, which confers on the Chamber the authority to compel production of the Material under articles 64(6) and 69(3) and rule 79(4) in the fulfilment of its mandate to determine the truth.

2. In the alternative, the Chamber should exclude the evidence led by the Defence concerning the contents of D21-0003’s meeting with Kilolo and Gibson.

II. Confidentiality

3. This response is filed “Confidentially” because it refers to information contained in confidential documents. The Prosecution will file a “Public Redacted” version.

¹ The Prosecution brings this motion after exhausting *inter-party* efforts to obtain the Material. See Annex A.

III. Submissions

A. The Chamber should order the Material to be produced

i. Rule 78 requires disclosure of the Material

4. The Material comprises tangible objects in the possession or control of the Kilolo Defence, the substance of which were led by the Defence at trial. During its direct examination and re-examination of Witness D21-0003, the Kilolo Defence elicited evidence concerning the substance of a meeting between the Witness and Kilolo and Gibson in April 2012 at [REDACTED].² In particular, the Kilolo Defence led evidence as to “who was present” and “[w]ho was Mr Kilolo with during this meeting”, “what was discussed”, and whether there was “any mention of [the witness’s] son at this stage”.³

5. D21-0003 confirmed that the Material is in the possession and control of the Kilolo Defence. The Witness testified that his interview with Kilolo and Gibson was recorded, and the recordings were in Kilolo’s possession;⁴ a fact also corroborated by the following:

- The Kilolo Defence’s confirmation submissions concede Kilolo’s possession of audio recordings of his and Gibson’s interviews with prospective defence witnesses.⁵

² ICC-01/05-01/13-T-40-CONF-ENG ET, pp. 67, lns. 15-18, 69, lns. 4-6. The witness also confirmed that the meeting was at [REDACTED] in his statements to the Prosecution and the Defence. See CAR-OTP-0085-0628 at 0663, lns. 1218-1220; CAR-D21-0014-0102 at 0110, lns. 237-242.

³ ICC-01/05-01/13-T-40-CONF-ENG ET, pp. 26-27, lns. 6-3; ICC-01/05-01/13-T-41-CONF-ENG ET, p. 60, lns. 8-14.

⁴ ICC-01/05-01/13-T-41-ENG ET, pp. 52-53, lns. 17-3.

⁵ ICC-01/05-01/13-600-Conf-Corr2, para. 222.

- Kilolo disclosed and used similar audio recordings and their transcripts in his examination of Prosecution witnesses, including P-0260 (D-0002),⁶ P-0245 (D-0003),⁷ P-0261 (D-0023),⁸ and P-0198 (D-0015).⁹
- D21-0002 confirmed, in her interview with the Kilolo Defence, that she was responsible for transcribing the audio recordings of Kilolo's and Gibson's interviews with prospective *Bemba* Defence witnesses¹⁰ and that she received and transcribed audio interviews of 25 to 40 such witnesses.¹¹

6. The requirements of rule 78 are met. Having now led the substance of D21-0003's interview with Kilolo and Gibson at trial, the Kilolo Defence has the obligation to disclose the Material forthwith.¹²

ii. *Production of the Material is required under articles 64(6) and 69(3) and rule 79(4) in the circumstances of this case*

7. In the alternative, the Chamber should compel the Material's production in accordance with articles 64(6) and 69(3) and rule 79(4). Article 69(3) grants the Chamber wide authority to request the submission of any evidence that "it considers

⁶ See ICC-01/05-01/13-T-19-CONF-ENG ET, pp. 47-61, lns. 21-2; CAR-D21-0007-0017; CAR-D21-0007-0020; CAR-D21-0007-0025; CAR-D21-0004-0463.

⁷ See ICC-01/05-01/13-T-27-CONF-ENG ET, pp. 6-16, lns. 25-8; CAR-D21-0008-0005.

⁸ See ICC-01/05-01/13-T-14-CONF-ENG ET, pp. 29-37, lns.23-7; ICC-01/05-01/13-T-15-CONF-ENG ET, pp. 4-13, lns. 3-13; CAR-D21-0006-0002; CAR-D21-0006-0003; CAR-D21-0006-0004; CAR-D21-0006-0005.

⁹ See ICC-01/05-01/13-T-30-CONF-ENG ET, pp.60-67, lns.25-14; CAR-D21-0009-0001; CAR-D21-0009-0002; CAR-D21-0009-0003; CAR-D21-0009-0004; CAR-D21-0009-0005; CAR-D21-0009-0006; CAR-D21-0009-0013; CAR-D21-0009-0023; CAR-D21-0009-0028; CAR-D21-0009-0035.

¹⁰ CAR-D21-0014-0086 at 0088, lns. 39-42 ("Et j'étais dans le bureau de la défense de monsieur Bemba. Euh ... souvent il y a les ... les ... les avocats qui étaient dans ... euh ... les audiences et je me retrouvais souvent seule dans le bureau entrain de transcrire les témoignages qui étaient en français et qui je les transcrivais je les mettais sur papier.").

¹¹ CAR-D21-0014-0086 at 0091, lns. 134-141 ("SP: Ok. Thank you very much for that, Hum ... I wanted to get into the specifics of the actual transcribing process that you did for the Bemba team. Hum do you remember approximately how many statements you transcribed, the deposition you transcribed? [...]MR: Hum peut-être entre 25 et 40, je sais pas.").

¹² See ICC-01/04-01/07-2388, para. 50 ("the Defence has to disclose the material only when a decision has been made that it will be used at trial.").

necessary for the determination of the truth.” This broad authority is also articulated in article 64(6)(d), which permits the Chamber to “[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.”

8. Although rule 78 sets out the Defence’s disclosure obligations toward the Prosecution, the Statute, as noted above, authorises the Chamber to go beyond its limits. This broader authority is also articulated in rule 79(4) which expressly states that the Chamber may order the “disclosure of any *other* evidence.”¹³

9. In this instance, the substance of D21-0003’s interview with Kilolo and Gibson in April 2012, and the participants of that interview are all matters in dispute between the Parties.¹⁴ They are relevant to the allegations in this case, as the witness allegedly falsely testified in the Main Case as to the participants of that meeting.¹⁵ Whether the Witness also addressed the circumstances concerning his son during his meeting with Kilolo and Gibson also goes to the veracity of the Witness’ testimony before this Chamber. The audio recording of that interview is the best evidence of its substance and record of its participants. The Chamber should thus exercise its broad discretion under the Statute and Rules and require the Material’s production in accordance with the Chamber’s authority and clear mandate to determine the truth.

¹³ See also Decision on the “Prosecution’s Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4), ICC-01/04-01/07-2388, 14 September 2010, para. 47 (“[p]ursuant to Rule 79(4), the Chamber may order the Defence to disclosure any ‘evidence’ in its possession which requires, according to the Chamber, to be provided to the parties and participants.”); Decision on Disclosure by the Defence, ICC-01/04-01/06-1235-Corr-Anx1, 20 March 2008, para. 30 (referencing rule 79(4) as a provision which “envisage[s] that disclosure by the defence may go beyond the scope of the defences”).

¹⁴ See e.g. ICC-01/05-01/13-T-40-CONF-ENG ET, pp. 26-27, lns. 6-3; ICC-01/05-01/13-T-41-CONF-ENG ET, pp. 48-53, lns.17-3, 60, lns. 8-14.

¹⁵ Compare CAR-OTP-0085-0628 at 0664, lns. 1224-1229 (“*Ils nous ont demandé de prendre un taxi et de ... euh ... de les rejoindre à [REDACTED] [...] moi et mon épouse*”) and CAR-OTP-0085-0673 at 0698, lns. 845-847 (“*Intervieweur 1: Bon, juste, on va re... bon ... donc la recontre, en fait, avec Me KILOLO et la dame blanche était en présence de votre femme? Personne entendue: Oui, en présence de ma femme*”) with ICC-01/05-01/08-T-339-CONF-ENG, p. 36, lns. 8-10 (“*Q. When you met with the Defence were you alone, or were you with someone else? A. I was alone.*”).

B. The Statute and Rules do not preclude production of the Material

i. Article 67 does not preclude production of the Material

10. Requiring production of the Material does not affect Kilolo's article 67 rights. The Chamber's prior decision denying the Prosecution's request that Kilolo produce all prior statements of defence witnesses in the Main Case was predicated on the fact that the Defence had yet to advance a positive case.¹⁶ The request for the production of this material thus implicated Kilolo's right to remain silent.¹⁷ However, by positively advancing evidence on the substance of D21-0003's conversations with Kilolo and Gibson, the Kilolo Defence has elected not to remain silent as concerns the Material. As noted by the Appeals Chamber in the *Lubanga* case, the right to silence is waived "if the accused decides to advance a positive case".¹⁸

11. That waiver functions in the same way as when an accused opts to testify. In the same way that an accused cannot choose to testify and then assert the right to remain silent on cross-examination,¹⁹ Kilolo cannot choose to advance evidence on the substance of his conversations with D21-0003 in 2012 and then assert the right to remain silent when the Prosecution requests that evidence.

12. Further, and importantly, requiring the Material's production does not reverse the burden of proof onto the Defence.²⁰ As noted by Trial Chamber I, "it is the duty of 'any participant in criminal proceedings to offer comprehensive arguments and

¹⁶ ICC-01/05-01/13-907, para. 14.

¹⁷ ICC-01/05-01/13-907, para. 14.

¹⁸ ICC-01/04-01/06-1313, para. 13.

¹⁹ See Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused, ICC-01/04-01/07-3153, 13 September 2011, para. 7 ("once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all relevant questions, even if the answers are incriminating"); *Prosecutor v. Gotovina et al.*, Decision on Joint Defence Motion to Prohibit Use of Defence Documents by the Prosecution, Case No. IT-06-90-T, 5 December 2008, para. 9 ("once an accused has decided to take the stand as a witness, he is under an obligation to answer questions, even if the answers may be self-incriminating.").

²⁰ *Contra* ICC-01/05-01/13-907, para. 14.

substantiated positions pertaining to the claims they make.”²¹ Indeed, as noted by the Appeals Chamber in the *Gaddafi and Al-Senussi* case, “it is not unreasonable to place an ‘evidential’ burden on the Defence sufficiently to substantiate the factual allegations it raises.”²² This duty exists because there is a distinction “between (a) the obligation of the prosecution to prove all the facts necessary to establish guilt; and (b) the obligation on either the prosecution or defence to establish the facts of a particular issue.”²³ The latter, commonly referred to as the evidential burden of proof, requires the Defence to substantiate specific claims through their presentation of evidence. That burden is also consistent with the “best evidence rule”, a general principle of international criminal law, which requires the Parties to submit and the Chamber to “rely on the best evidence available in the circumstances of the case”, depending on the particularities of each document.²⁴ The purpose of the rule is consonant with the Chamber’s truth-seeking function, which is to ensure that the Chamber has before it the superior evidence of an issue of fact where available, as it is here.

13. In this instance, requiring production of the Material does not dispense with the Prosecution’s burden of establishing Kilolo’s guilt beyond reasonable doubt. Rather, it comports with Kilolo’s evidential burden and his obligation to present the “best evidence” of the conversations between D21-0003, Kilolo and Gibson.

²¹ ICC-01/04-01/06-915, para. 62 (citation omitted) (emphasis added).

²² Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, ICC-01/11-01/11-565 OA6, 24 July 2014, para. 167.

²³ May and Wierda, *International Criminal Evidence, Burden and Standard of Proof*, at 4:62; Wait and Williams, *Evidence Commentary and Materials*, Lawbook Co, 6th Ed., p. 56.

²⁴ *Prosecutor v. Halilović*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, Case No. IT-01-48-AR73.2, 19 August 2005, para. 19. *See also Prosecutor v. Perišić*, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, Case No. IT-04-81-T, 29 October 2008, para. 36.

ii. *Rules 73(1) or 81(1) does not preclude production of the Material*

1. *The Material is not covered by the professional privilege between an accused and his or her legal counsel*

14. The privilege pertaining to communications made in the context of the professional relationship between a person and his or her legal counsel, codified in rule 73(1), does not preclude production of the Material. That privilege only extends to communications between an accused person and his or her legal counsel. It does not extend to communications with a third-party, particularly where the third-party is a witness in the case. Here, the Material concerns an interview between Kilolo, Gibson, and a third party; not between Bemba and Kilolo or Gibson.

2. *The Material is not internal work product*

15. Rule 81(1) also does not preclude production of the Material. Rule 81(1) only precludes production of internal work product: “[r]eports, memoranda or other internal documents *prepared by a party, its assistants or representatives*”. By its very terms, as conceded by the Bemba Defence, rule 81(1) “applies exclusively to internal work product, and not external communications with third parties.”²⁵ The Chamber subsequently adopted this position, which “persuaded by the arguments of the Bemba Defence” found that rule 81(1) does not apply to external correspondences.²⁶ Even if the audio-recordings of D21-0003 were covered by the internal work product

²⁵ ICC-01/05-01/13-1589-Red-Corr, para. 9. *See also* Decision on the Defence Application for Additional Disclosure Relating to a Challenge on Admissibility, ICC-01/05-01/08-632, 2 December 2009, para. 34 (“[l]etters sent to, or by, the prosecution fall outside this restriction”); Redacted Decision on the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” of 5 December 2008, ICC-01/04-01/06-1924-Anx2, 2 June 2009, para. 31 (81(1) covers such material as “the legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation”); Decision on the Defence Request for Disclosure of Screening Notes, ICC-01/04-01/06-2585, 13 October 2010, para. 21 (material covered by 81(1) include “the names and locations of protected witnesses and victims, internal assessments on various individuals and work processes”).

²⁶ ICC-01/05-01/13-1632, para. 19.

privilege, the Material cannot remain internal given that the confidential contents were led at trial. In that regard, any confidentiality that may have existed has been waived.

C. Failing the Material's production the Chamber should exclude the evidence

16. The Chamber should exclude evidence elicited by the Kilolo Defence concerning the purported contents of D23-0003's interview with Kilolo and Gibson, failing the Material's production.

17. The Chamber has broad discretion to exclude evidence where a Party withholds the "best evidence" within their possession or control.²⁷ That discretion should be exercised here. *First*, the Kilolo Defence clearly possesses or controls the Material as shown above. D21-0003's testimony establishes this, as does the Kilolo Defence's use of similar audios and transcripts of interviews with other witnesses during the trial. *Second*, the Defence cannot be permitted to benefit from providing a selective view of facts while deliberately withholding the evidence which reliably establishes them. *Third*, absent the Material, the Chamber's critical function in these proceedings to determine the truth will be impeded.

18. All of these factors weigh in favour of excluding the evidence elicited by the Defence concerning D21-0003's meeting with Kilolo and Gibson, failing the Kilolo Defence's production of the best evidence regarding that meeting, its content and its participants (*i.e.* the Material).

²⁷ See *e.g.* *Prosecutor v. Stanišić and Župljanin*, Decision Denying Prosecution Motion for Admission of Statement of ST060 Pursuant to Rule 92 bis, Case No. IT-08-91-T, 25 August 2011, p. 3 (denying the admission of a statement because it "the admission of the Bosnian Statement would not comply with the best evidence rule").

IV. Relief Requested

19. For the foregoing reasons, the motion should be granted, and the Kilolo Defence ordered to produce the Material. Alternatively, the Chamber should exclude the evidence led by the Kilolo Defence concerning D21-0003's meeting with Kilolo and Gibson from the trial record.



Fatou Bensouda, Prosecutor

Dated this 23rd Day of March 2016
At The Hague, The Netherlands