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**International
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Date: **04 April 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, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO**

Public Redacted Version

**Kilolo Defence Response to 'Prosecution's Motion for an Order of
Disclosure or, in the Alternative, Partial Exclusion of D21-0003's Evidence'
(ICC-01/05-01/13-1738-Conf).**

Source: Defence for Mr. Aimé Kilolo Musamba

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 Powles

Counsel for Jean-Jacques Kabongo Mangenda

Mr Christopher Gosnell

Mr Arthur Vercken

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Ms. Beth Lyons

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 22 March 2016, the Prosecution filed 'Prosecution's Motion for an Order of Disclosure or, in the Alternative, Partial Exclusion of D21-0003's Evidence' ["the Motion"].¹
2. The Prosecution's Motion seeks an order that the Kilolo Defence produce audio recordings and any transcripts of D21-0003's meeting with Aimé Kilolo and Kate Gibson [REDACTED]. In the alternative the Prosecution's Motion seeks exclusion of D21-0003's evidence regarding his meeting with Mr Kilolo and Ms Gibson.
3. For the reasons set out below, the Prosecution's Motion should be dismissed in its entirety.

II. PROSECUTION'S MOTION SEEKS TO GO BEHIND PREVIOUS TRIAL CHAMBER DECISIONS.

4. The Prosecution has previously sought an order from the Trial Chamber that the Kilolo Defence be ordered 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'.²
5. The Prosecution asserted then that the material did not violate attorney-client privilege or give rise to issues concerning self-incrimination.³

¹ ICC-01/05-01/13-1738-Conf.

² ICC-01/05-01/13-820-Red, paras. 1 and 15.

³ *Ibid* paras. 11-13.

6. The Prosecution's arguments were, quite rightly, roundly rejected by the Trial Chamber which, on 15 April 2015, held:

The Prosecution argues that the production of the Requested Material is warranted in order to test the viability of the Kilolo Defence's contention that Mr Kilolo did not corruptly influence witnesses. This allegation of improper witness interference is the very matter to be determined in this case. Therefore, the Prosecution seeks, in essence, that the Chamber orders the accused to produce evidence that could be potentially incriminating in a prosecution against the accused. The Prosecution has not satisfied the Chamber that such an order would not violate the rights of the accused '[n]ot to be compelled to testify or to confess to guilt and remain silent' (Article 67(1)(g) of the Statute) and his right '[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal' (Article 67(1)(i) of the Statute).⁴

7. The Prosecution has presented no valid reason as to why this decision should now be reversed and overturned.
8. Moreover, on 3 November 2015 the Single Judge of the Trial Chamber issued 'Directions on Defence Presentation of Evidence'.⁵ The Single Judge summarized and set out the following important principles:

- (i) The onus is on the Prosecution to prove the guilt of the accused, pursuant to Article 66(2) of the Statute.

⁴ ICC-01/05-01/13-907 15-04-2015 para. 14 (emphasis added).

⁵ ICC-01/05-01/13-1450.

Conversely, the accused have the right to remain silent and need not present any evidence, as foreseen in Article 67(1)(g) of the Statute. If the Defence does elect to present evidence, the Chamber may set deadlines and request information on their presentation [...].

- (ii) The disclosure obligations of the Defence and Prosecution differ significantly, because of the particular role the two parties have at trial. This said the Defence must permit the Prosecution to inspect any books, documents, photographs and other tangible objects in their possession or control, which are intended for use by the Defence as evidence for purposes at trial. In this regard, the Single Judge has taken note of the Defence disclosure already effectuated up until now.
[...].⁶

9. It is respectfully submitted that the Single Judge was absolutely right to highlight the very different disclosure obligations of the Defence and Prosecution at trial, in particular that the Defence obligation *vis-à-vis* ‘books, documents, photographs and other tangible objects in their possession or control’ is limited to those ‘which are intended for use by the Defence *as evidence* ... at trial’.

10. The Defence for Mr Kilolo did not, and nor does it, intend to use the audio recordings of D21-0003’s 2012 meeting with Mr Kilolo and Ms Gibson as

⁶ *Ibid* para. 2.

evidence at trial. There is therefore no proper basis for the request contained in the Prosecution's Motion.

III. PROSECUTION'S REQUEST IS NOT IN ACCORDANCE WITH ESTABLISHED ICC JURISPRUDENCE.

11. In support of the request, the Prosecution's Motion refers to certain ICC jurisprudence. On closer analysis it appears that such jurisprudence tends to undermine rather than support the Prosecution's position.
12. The Prosecution Motion prays in aid the "Appeals Chamber" decision in the *Lubanga* case as support for the contention that 'the right to silence is waived "if the accused decides to advance a positive case"'.⁷
13. First, the Prosecution incorrectly refers to the decision as one of the 'Appeals Chamber' when in fact it is of the Trial Chamber. Second, the Decision is a '*Decision on the defence request for leave to appeal the "Decision on disclosure by the defence"*'.⁸
14. The Defence in *Lubanga* was seeking to challenge the Trial Chamber's order that they disclose details of any alibi, the general terms of the Defence, any applications regarding the admissibility of evidence, details of defence witnesses, and 'evidence intended for use by the defence'.⁸ Thus, the Decision does not even begin to support the Prosecution's current contention that the Defence is obliged to disclose material that it has not or does not intend to use.
15. It is in this context that the Trial Chamber in *Lubanga* observed that:

⁷ Motion para. 10 referring to ICC-01/04-01/06-1313, para. 13.

⁸ ICC-01/04-01/06-1313, para. 2 (e).

The fundamental misunderstanding revealed in this application [by the Lubanga Defence] is that the order does not have any relevance to the accused's right to silence. Instead, its ambit is limited to disclosure of information only if the accused decides to advance a positive case (thereby waiving his right to silence).⁹

16. This is what the Prosecution now relies upon in support of their request. It is plain, however, that the Trial Chamber's observations in *Lubanga* were limited only to the material that was ordered for disclosure in that case. It does not in any way support the Prosecution's current contention that the Defence is obliged to disclose material that it has not and does not intend to use at trial.

17. The underlying basis and parameters of the *Lubanga* Trial Chamber's decision is encapsulated in their observation that:

This order is a further example of a case-management tool that is necessary to avoid delays and adjournments which are likely to be occasioned by the unanticipated introduction of documents or other evidence (other than oral testimony) during questioning. Once the defence has made a decision that particular material of this kind is to be used, in order for the Court, the court officer, the prosecution and the participants to prepare adequately, short advance notification has been ordered.¹⁰

⁹ ICC-01/04-01/06-1313, para. 13.

¹⁰ ICC-01/04-01/06-1313, para. 29.

18. The Prosecution is therefore in error to suggest that the *Lubanga* decision they cite supports the application they now make.

19. The Prosecution also asserts that: 'Having now led the substance of D21-003's interview with Kilolo and Gibson at trial, the Kilolo defence has the obligation to disclose the Material forthwith'.¹¹

20. In support of this contention the Prosecution cites, at footnote 12, the Trial Chamber decision in *Katanga and Ngudjolo* in which it is said that 'the Defence has to disclose the material only when a decision has been made that it will be used at trial'.¹²

21. A close examination of the *Katanga and Ngudjolo* decision reveals that it in no way supports the Prosecution's position. The Decision is entitled '*Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)"*'. The Prosecution's request in that case was limited only to disclosure of material pursuant to Rule 78, a document containing the defences of the accused in general terms, and evidence that the Defence 'intends to rely on for trial'.¹³

22. The Trial Chamber in *Katanga and Ngudjolo* observed, as has the Trial Chamber in this case, that:

[T]hat the Statute's framework does not provide for a reciprocal disclosure regime. The disclosure obligations of the Prosecution and Defence differ significantly, because of the particular roles that these two parties have at trial. While the Prosecution bears

¹¹ Motion para. 6.

¹² ICC-01/04-01/07-2388 para. 50.

¹³ ICC-01/04-01/07-2388 para. 2.

the burden of proof and has to investigate both incriminating and exonerating circumstances pursuant to Article 54(1)(a) of the Statute, the role of the Defence is largely reactive to the Prosecution's presentation of evidence. ... Different and more limited disclosure obligations are imposed on the Defence by Rules 78 and 79 of the Rules.¹⁴

23. Rule 79 relates to the disclosure of alibi evidence or any ground for excluding criminal responsibility. It is not relevant here. The Chamber observed that while Rule 78 shares some similarities with Rule 77, 'the disclosure obligations of the Prosecution under Rule 77 are more extensive'.¹⁵

24. It is abundantly clear from the Trial Chamber's decision that the Defence obligation to disclose material related only to that material that the Defence *actually* presented or intended to present at trial. The Chamber stated:

49. No obligation has been imposed on the Defence for disclosure of material it intends to use as evidence before the start of the hearings on the merits. Requesting the Defence to disclose material three weeks prior to that, as sought by the Prosecution, would have imposed on the Defence a premature and unrealistic obligation. The Defence could not be expected, at that stage of the proceedings, to know whether and what kind of evidence it intended to present at trial. [...].

¹⁴ ICC-01/04-01/07-2388 para. 36.

¹⁵ ICC-01/04-01/07-2388 para. 48.

50. The Chamber is of the view that the Defence has to disclose material only when a decision has been made that it will be used at trial. [...] The Chamber therefore encourages the Defence to permit the Prosecution to inspect documents or other tangible objects falling under Rule 78, as soon as it makes a decision to use them at trial.¹⁶

25. So much is made clear by Rule 78 itself, which provides that ‘The defence shall permit the Prosecutor to inspect [material] which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial’.

26. It is therefore clear that the Trial Chamber quotation relied upon by the Prosecution is limited only to material that is actually used and presented by the Defence at trial. That has plainly not happened in this case.

IV. OTHER ERRORS IN THE PROSECUTION MOTION

27. The Prosecution’s Motion displays a worrying lack of appreciation of the scope of legal professional privilege. The Prosecution states 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’.¹⁷

28. It is self-evident that investigations carried out by a lawyer on behalf of his client are privileged and it is disturbing that the Prosecution thinks otherwise.

¹⁶ ICC-01/04-01/07-2388 paras. 49 and 50.

¹⁷ Motion para. 14.

29. The Prosecution Motion also relies on the Appeals Chamber Decision in *Gaddafi and Al-Sennusi* in support of a claim that there is some sort of ‘evidential’ burden on the Defence.¹⁸ Specifically, the Prosecution refers to paragraph 167 of the Appeals Chamber Judgment on the appeal against ‘Admissibility’.

30. It is important to note that the reference to there being an ‘evidential’ burden on the accused in the *Al-Senussi* case arises in an entirely different context to the one at hand in this case. The Appeals Chamber was in that case considering the burden on the accused within the context of a challenge to admissibility. It is axiomatic that an accused seeking to challenge admissibility should produce evidence in support of a submission. It plainly does not follow that an accused must produce evidence in support of a statement made by a defence witness at trial.

V. PROSECUTION’S ALTERNATIVE REQUEST

31. In the event that the Defence does not disclose the material requested, the Prosecution ask that D21-0003’s evidence regarding the contents of his meeting with Mr. Kilolo and Ms Gibson be excluded.¹⁹

32. Given that there is no justifiable legal basis for the Prosecution’s disclosure request, it is respectfully submitted that it would be wrong in all the

¹⁸ Motion para. 12.

¹⁹ Motion paras. 2 and 18.

circumstances to exclude any of D21-0003's evidence on the basis that evidence to which the Prosecution is not entitled has not been disclosed.

VI. RELIEF REQUESTED

33. The Defence respectfully asks the Trial Chamber to dismiss the Prosecution's Motion.

RESPECTFULLY SUBMITTED.



Maître Paul Djunga Mudimbi
Lead Counsel of Mr. Aimé Kilolo Musamba



Mr. Steven Powles
Associate Counsel of Mr. Aimé Kilolo Musamba

Dated this 4 April 2016,
At The Hague, The Netherlands.