

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 April 2016

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 Prosecution Request to Order the Disclosure of Material in Possession
of the Defence**

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

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*, having regard to Articles 64(6)(d) and 69(3) of the Rome Statute ('Statute') and Rule 78 and 79(4) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence'.

I. Procedural History and Submissions

1. On 22 March 2016, the Office of the Prosecutor ('Prosecution') filed an application requesting that the defence of Mr Kilolo ('Kilolo Defence') be ordered to disclose the recordings ('Requested Material') of an interview in 2012 ('Request'). This interview was between Mr Kilolo, in his functions as defence counsel for Mr Bemba in the case *Prosecutor v. Jean-Pierre Bemba Gombo*, and one of the defence witnesses called by the Kilolo Defence in this case, D21-3. Alternatively, the Prosecution requests that the evidence provided by D21-3 during his testimony before this Chamber on the contents of the 2012 meeting should be excluded ('Alternative Request').¹
2. On 4 April 2016, the defence for Mr Arido submitted its response, opposing the Request and Alternative Request and arguing that it does not know the content of the Requested Material and is therefore unable to determine if a disclosure prejudices the rights of Mr Arido.²

¹ 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, with a confidential annex A and a public annex B. A public-redacted version was filed on 23 March 2016, ICC-01/05-01/13-1738-Red.

² Narcisse Arido's Response to the "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), ICC-01/05-01/13-1765-Conf.

3. On the same day, the defence for Mr Kilolo ('Kilolo Defence') submitted its response, submitting that the Request and Alternative Request should both be rejected ('Response').³
4. The Prosecution submits that during D21-3's testimony he was questioned by the Kilolo Defence about the substance of the 2012 meeting, which – according to the Prosecution – triggers disclosure obligations under Rule 78 of the Rules for the Requested Material.⁴ Further, the Prosecution argues that – in case the Requested Material is not disclosable under Rule 78 of the Rules – the Chamber should order its production under Articles 64(6)(d) and 69(3) of the Statute and Rules 78 of the Rules for the determination of the truth.⁵ It submits that such an order would not be contrary to the rights of the accused, since the Kilolo Defence questioned D21-3 on the content of the Requested Material during D21-3's testimony. Further, it is argued that the disclosure of the Requested Material is justified by the 'best evidence rule'.⁶ Lastly, the Prosecution avers that the Requested Material is neither covered by professional privilege between Mr Bemba and Mr Kilolo, nor does it fall under the restrictions on disclosure as internal working product, according to Rule 81(1) of the Rules.⁷
5. The Kilolo Defence argues that there is no reason to deviate from the previous decision of the Chamber in which it denied the Prosecution's request to order the Kilolo Defence to disclose all prior statements of defence witnesses in any form, including the full record of interviews, comprising audio recordings.⁸ It further submits that the disclosure obligations between the Prosecution and the defence are fundamentally different and that the Requested Material does not

³ 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.), ICC-01/05-01/13-1766-Conf.

⁴ Request, ICC-01/05-01/13-1738-Conf, para. 6.

⁵ Request, ICC-01/05-01/13-1738-Conf, paras 7-9.

⁶ Request, ICC-01/05-01/13-1738-Conf, paras 10-12.

⁷ Request, ICC-01/05-01/13-1738-Conf, paras 14-15.

⁸ Response, ICC-01/05-01/13-1766-Conf, paras 4-7.

fall under Rule 78 of the Rules and is covered by lawyer-client privilege.⁹ Finally, the Kilolo Defence submits that – since there is no legal basis for the Request – the Alternative Request should also be dismissed.¹⁰

II. Analysis

6. The Single Judge notes that the Prosecution bases its Request primarily on the Defence's disclosure obligations under the statutory scheme. The Single Judge reiterates the findings of this and other Chambers that the disclosure obligations of the defence differ significantly from those of the Prosecution.¹¹ Rule 78 of the Rules provides that objects 'which are intended for use by the defence as evidence' have to be disclosed. From the wording of Rule 78 of the Rules, it is clear that only an item which the defence 'intends to use' falls under its disclosure obligations. The scope of the Rule 78 of the Rules is accordingly limited to the defence's choice of evidence.¹² This narrow interpretation of the defence's disclosure obligations is in accordance with the required protection of the rights of the defence. In the words of Trial Chamber I in the *Lubanga case*, '[t]he starting-point for consideration of this issue [of ordering the defence to disclose evidence] is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence'.¹³
7. In light of the above, the Single Judge is not persuaded by the Prosecution's argument that evidence falls under the purview of Rule 78 of the Rules because

⁹ Response, ICC-01/05-01/13-1766-Conf, paras 9-10, 27-28.

¹⁰ Response, ICC-01/05-01/13-1766-Conf, paras 31-32.

¹¹ Directions on Defence Presentation of Evidence, 3 November 2015, ICC-01/05-01/13-1450, para. 2; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", ICC-01/04-01/07-2388, para. 36.

¹² See also, Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on defence disclosure and related issues, 24 February 2012, para. 18, stating that '...Rule 78 obligations apply 'as soon as the defence makes a decision to use an item as evidence,...'.

¹³ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235-Anx1, para. 12.

other evidence going to the same content was led by the defence. Consequently, the fact that the Kilolo Defence presented evidence by questioning D21-3 about the 2012 meeting does not make the interview recording disclosable under Rule 78. Accordingly, the Single Judge finds that the Kilolo Defence has no obligation to disclose the Requested Material under Rule 78 of the Rules.

8. As an alternative, the Prosecution argues that the Chamber should exercise its power under Articles 64(6)(d) and 69(3) of the Statute and Rule 79(4) of the Rules and request the submission of the Requested Material. In determining if such order should be given, the Single Judge will take into account above-mentioned considerations of the protection of the rights of the accused.
9. In the current situation the Single Judge does not deem it appropriate to order the production of the Requested Material. As to the argument by the Prosecution that the Kilolo Defence should be forced to present its 'best evidence', the Single Judge notes that the Chamber has paid deference to the parties and the way they chose to present their evidence. This includes the parties' choice if they wish to submit evidence from the bar table,¹⁴ call a witness to testify before the Chamber or elect to introduce prior recorded testimony.¹⁵ Save for exceptional circumstances, such as when the statutory scheme prevents a party from submitting evidence in a certain manner or for reasons of judicial economy, the Chamber did not intervene on how parties sought to prove their factual propositions.
10. This is consonant with the Chamber's approach to defer its assessments of the relevance, probative value and potential prejudice of each item of evidence until

¹⁴ See, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285 and the follow-up decisions.

¹⁵ See, Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr and the other decisions by the Chamber related to Rule 68 of the Rules requests.

the deliberation of the judgement pursuant to Article 74(2) of the Statute.¹⁶ If a party chooses to submit evidence while not presenting other available and purportedly more probative evidence on the same proposed fact, it will ultimately bear the risk of these choices during the upcoming assessment of the evidence by the Chamber. Further, the Single Judge is not of the view that the 'best evidence rule' is a principle of international criminal law which generally applies in all cases, as asserted by the Prosecution. The jurisprudence relied on in support by the Prosecution clearly shows that it is the choice of the competent chambers to incorporate the principle in their conduct of proceedings and does not indicate the existence of a generally applicable principle. Moreover, the Prosecution itself presented evidence in its bar table motions which would have to be excluded if the principle would be applied. Accordingly, the Single Judge dismisses the Request.

11. In light of the reasoning above, the Alternative Request is also dismissed because there is no disclosure or any other breach justifying the exclusion of part of D21-3's testimony.

¹⁶ See *only*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285, para. 9.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request and the Alternative Request.

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

A handwritten signature in black ink, appearing to read 'BS', is written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 20 April 2016

At The Hague, The Netherlands