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

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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 on 'Requête de la défense de monsieur Aimé Kilolo Musamba aux fins
de divulgation d'informations relatives au témoin de l'Accusation 169' and Related
Additional Requests**

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

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, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (the ‘Bemba et al. case’), having regard to Rule 77 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulations 23, 23 bis, 24 and 29 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on “Requête de la défense de monsieur Aimé Kilolo Musamba aux fins de divulgation d’informations relatives au témoin de l’Accusation 169” and Related Additional Requests’.

I. Background and Submissions

1. On 19 June 2015, the defence for Mr Kilolo (the ‘Kilolo Defence’; with the four other defence teams, the ‘Defence’) requested (the ‘Kilolo Defence Request’) that the Chamber order the Office of the Prosecutor (the ‘Prosecution’) to disclose information concerning payments to witness P-169 (the ‘Information’), a witness for the Prosecution in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (the ‘Main case’).¹ It submits that disclosure of the Information is necessary in order to ensure a fair trial² and would clarify the general practice of witness payments in the Main case, thereby providing essential context.³
2. On 25 June 2015, the defence for Mr Bemba (the ‘Bemba Defence’),⁴ Mr Mangenda (the ‘Mangenda Defence’),⁵ Mr Arido (the ‘Arido Defence’),⁶ Mr

¹ Requête de la défense de monsieur Aimé Kilolo Musamba aux fins de divulgation d’informations relatives au témoin de l’Accusation 169, ICC-01/05-01/13-1023-Conf, with confidential Annex A (ICC-01/05-01/13-1023-Conf-AnxA).

² Kilolo Defence Request, ICC-01/05-01/13-1023-Conf, paras 26-28.

³ Kilolo Defence Request, ICC-01/05-01/13-1023-Conf, paras 20-23.

⁴ Defence Response to Filing 1023-Conf, ICC-01/05-01/13-1033-Conf-Exp. A confidential redacted version was filed on 30 June 2015 (ICC-01/05-01/13-1033-Conf-Red).

⁵ Response to “Requête de la défense de monsieur Aimé Kilolo Musamba aux fins de divulgation d’informations relatives au témoin de l’Accusation (ICC-01/05-01/13-1023Conf)”, ICC-01/05-01/13-1030-Conf.

⁶ Narcisse Arido’s Observations on ‘Requête de la défense de monsieur Aimé Kilolo Musamba aux fins de divulgation d’informations relatives au témoin de l’Accusation 169’ (ICC-01/05-01/13-1023), ICC-01/05-01/13-1032-Conf.

Babala (the 'Babala Defence')⁷ and the Prosecution responded (the 'Bemba Defence Response', 'Mangenda Defence Response', 'Arido Defence Response', 'Babala Defence Response' and 'Prosecution Response', respectively).

3. The Bemba Defence and Mangenda Defence join the Kilolo Defence Request and support submissions made therein. They submit, *inter alia*, that the Information would permit the Defence to develop arguments concerning what factual and legal inferences can be drawn from witness payments, the applicable standards for regulating such conduct and its context.⁸ In addition, the Mangenda Defence stresses that the Prosecution relied on defence witness payments in asserting reasonable suspicion for purposes of surveillance requests.⁹ According to the Bemba Defence, the Information would facilitate its ability to respond to allegations concerning persons associated with the accused.¹⁰ It notes that information concerning P-169 was transmitted to the parties by the attorney appointed to review seized material and intercepted communications (the 'Independent Counsel') and the Prosecution has relied on it.¹¹
4. Both the Arido Defence and Babala Defence note the risk of inequality of arms as the Prosecution and other Defence teams all have more information on the matter at issue.¹² In addition to the relief sought in the Kilolo Defence Request, (i) the Babala Defence seeks to be provided with the Information¹³ and (ii) the Arido Defence requests the unredacted filings, transcripts and other material (the 'Additional Information') related to P-169 and P-178, another Prosecution

⁷ Observations concernant la « Requête de la Défense de monsieur Aimé Kilolo Musamba aux fins de divulgation d'informations relatives au témoin de l'Accusation P-169 » (ICC-01/05-01/13-1023-Conf), ICC-01/05-01/13-1031-Conf.

⁸ Bemba Defence Response, ICC-01/05-01/13-1033-Conf-Red, paras 13 and 49-56; Mangenda Defence Response, ICC-01/05-01/13-1030-Conf, paras 3-5.

⁹ Mangenda Defence Response, ICC-01/05-01/13-1030-Conf, paras 3-4.

¹⁰ Bemba Defence Response, ICC-01/05-01/13-1033-Conf-Red, para. 57.

¹¹ Bemba Defence Response, ICC-01/05-01/13-1033-Conf-Red, para. 58.

¹² Arido Defence Response, ICC-01/05-01/13-1032-Conf, para. 5; Babala Defence Response, ICC-01/05-01/13-1031-Conf, para. 8.

¹³ Babala Defence Response, ICC-01/05-01/13-1031-Conf, para. 9.

witness in the Main case, submitting that it is material to the preparation of the defence (the 'Additional Requests').¹⁴

5. The Prosecution opposes the Kilolo Defence Request and submits that (i) P-169 is not a witness and his credibility is not at issue and (ii) general practices in the Main case are irrelevant to the 'corrupt' witness payments alleged.¹⁵
6. On 7 July 2015, the Prosecution responded to the Mangenda Defence Response, Babala Defence Response and Arido Defence Response, claiming that these responses 'are discrete "requests" to which the Prosecution may appropriately respond' (the 'Second Prosecution Response').¹⁶

II. Preliminary Matters

7. The Chamber considers that nothing in the Mangenda Defence Response, Arido Defence Response, Babala Defence Response, Prosecution Response or Second Prosecution Response warrants 'confidential' classification. Pursuant to Regulation 23 *bis*(3) of the Regulations, the Chamber reclassifies them as 'public'.
8. The Chamber further notes that, in making the Additional Requests, the Arido Defence Response and Babala Defence Response seek relief beyond the scope of the Kilolo Defence Request. The Chamber disapproves of this practice. A response serves a distinct purpose in the filing regime established by the Regulations.¹⁷ The Chamber cautions the parties that it may disregard any request made in a response which exceeds the scope of the original filing. Nevertheless, as they are consequential to the Kilolo Defence Request, the Chamber considers it appropriate to exceptionally consider the Additional

¹⁴ Arido Defence Response, ICC-01/05-01/13-1032-Conf, para. 6.

¹⁵ Prosecution Response, ICC-01/05-01/13-1034-Conf, paras 8-11.

¹⁶ Prosecution's Response to the Mangenda, Babala and Arido Defence Filings on the « Requête de la Défense de Monsieur Aimé Kilolo Musamba aux fins de divulgation d'informations relatives au témoin de l'Accusation 169 » (ICC-01/05-01/13-1030-Conf, ICC-01/05-01/13-1031-Conf, ICC-01/05-01/13-1032-Conf), ICC-01/05-01/13-1067-Conf.

¹⁷ Regulations 23 and 24 of the Regulations. The Chamber notes, in particular, the distinction made in Regulations 23(1)(c) and 24(4) of the Regulations.

Requests. In turn, the Chamber has considered those portions of the Second Prosecution Response addressing the Additional Requests.

9. The Second Prosecution Response also concerns the Mangenda Defence Response. The Chamber is not satisfied that, by 'join[ing]' the Kilolo Defence Request, the Mangenda Defence transformed its response into a request, as asserted by the Prosecution.¹⁸ Indeed, the Mangenda Defence does not seek any relief beyond the scope of the Kilolo Defence Request. Accordingly, that portion of the Second Prosecution Response which addresses the Mangenda Defence Response constitutes a reply. Pursuant to Regulation 24(5) of the Regulations, a reply may only be filed with leave of the Chamber. As no leave was sought and noting Regulation 29 of the Regulations, the Chamber disregards these submissions as improperly filed.

III. Analysis

10. An inquiry pursuant to Rule 77 of the Rules has two stages.¹⁹ First, it must be determined, on a *prima facie* basis,²⁰ whether the objects in question are 'material to the preparation of the defence'. The phrase 'material to the preparation of the defence' must be interpreted broadly and 'understood as referring to all objects that are relevant for the preparation of the defence'.²¹ Second, if the information is material to the preparation of the defence, the Chamber must consider whether any restrictions on disclosure are justified under the Rome Statute and/or Rules. The Chamber emphasises that any decision under Rule 77 of the Rules must take into account the particular circumstances of any given request.

¹⁸ Second Prosecution Response, ICC-01/05-01/13-1034-Conf, para. 1.

¹⁹ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Appeals Chamber, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, ICC-02/05-03/09-501 OA4 ('Banda and Jerbo OA4 Decision'), para. 35.

²⁰ *Banda and Jerbo* OA4 Decision, ICC-02/05-03/09-501, para. 42.

²¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433 OA11, paras 77-80; *Banda and Jerbo* OA4 Decision, ICC-02/05-03/09-501, para. 38.

11. The Prosecution does not intend to call P-169 and P-178 as witnesses. P-169 and P-178 are not mentioned in the decision confirming the charges. They are mentioned on the *Bemba et al.* case record solely in filings related to the Kilolo Defence Request; a disclosure request dismissed by Pre-Trial Chamber II;²² a request to disqualify the Prosecutor; and, according to the Bemba Defence, material transmitted to the parties following Independent Counsel's review.²³ The Defence submits that the Information and Additional Information is material to its preparation, primarily, because it is relevant to the general practice of witness payments in the Main case.
12. The Chamber has previously found that payments to certain witnesses, including but not limited to those mentioned in the decision confirming the charges, 'could be deemed useful in understanding the overall system of money transfer and payment of witnesses' in the Main case.²⁴ Payments relating to both P-169 and P-178 were at issue in the Main case.²⁵ The Chamber is therefore satisfied that information concerning payments relating to P-169 and P-178 is relevant and material to the preparation of the defence.
13. As part of the Additional Requests, the Arido Defence also seeks information unrelated to witness payments, but does not explain how or why such information is material. Noting that the right to disclosure is not unlimited,²⁶ the Chamber accordingly dismisses this unsubstantiated part of the Additional Requests.

²² Pre-Trial Chamber II, Consolidated decision on various filings submitted by the parties in case ICC-01/05-01/13, ICC-01/05-01/13-753, pages 4-5 (The Single Judge dismissed the request for disclosure relating to P-169 and other witnesses, among other filings, 'since they either reiterated issues previously raised and already decided upon in the course of these proceedings, or were found not to be instrumental to the Chamber's determinations under article 61(7) of the Statute'). Both P-178 and P-169 are mentioned in related filings.

²³ Bemba Defence Response, ICC-01/05-01/13-1033-Conf-Red, para. 58. Only P-169 is mentioned in the related filings and material.

²⁴ Decision on Prosecution Request to obtain Records from the VWU, 4 June 2015, ICC-01/05-01/13-983-Conf, para. 5.

²⁵ Bemba Defence Response, ICC-01/05-01/13-1033-Conf-Exp.

²⁶ *Banda and Jerbo* OA4 Decision, ICC-02/05-03/09-501, para. 39.

14. Concerning the submissions of the Arido Defence and Babala Defence alleging unequal access to information about the Main case, the Chamber clarifies that the principle of equality of arms cannot be invoked in relation to information that is immaterial to the preparation of the defence. The Bemba Defence Response also includes submissions relating to equality of arms, but only as to how this principle was applied in the Main case, not the *Bemba et al.* case.²⁷ The Chamber emphasises that it is not the purpose of these proceedings to re-litigate the Main case. Submissions that attempt to do so will not be entertained.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Kilolo Defence Request and **PARTIALLY GRANTS** the Additional Requests concerning information of payments relating to P-169 and P-178;

REJECTS that portion of the Additional Requests for unredacted filings, transcripts and other material unrelated to payments to P-169 and P-178;

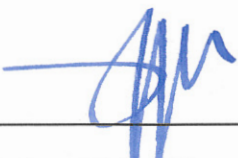
ORDERS the Prosecution to disclose to the Defence, as soon as practicable, any information in its possession concerning payments made to P-169 and P-178;

ORDERS the Registry to reclassify the Mangenda Defence Response, Arido Defence Response, Babala Defence Response, Prosecution Response and Second Prosecution Response as 'public'; and

ORDERS the Kilolo Defence and Bemba Defence to file, within five days of notification of this decision, public redacted versions of the Kilolo Defence Request and Bemba Defence Response, respectively, or indicate to the Chamber that they may be reclassified as 'public' without redactions.

²⁷ Bemba Defence Response, ICC-01/05-01/13-1033-Conf-Red, paras 49-53.

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



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Bertram Schmitt

Dated 17 August 2015

At The Hague, The Netherlands