

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **9 June 2014**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

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***

Confidential

**Prosecution's Consolidated Response to the Kilolo and Bemba Defence Request's
for Disclosure of Requests for State Cooperation made by the Office of the
Prosecutor**

Source: The Office of the Prosecutor

Document to be notified in accordance with Regulation 31 of the Regulations of the Court to:

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I. Introduction

1. The Prosecution opposes the Kilolo Defence's request to disclose Prosecution requests for assistance ("RFAs") addressed to the Belgian authorities in the course of the investigation of this case and the responses they have provided thereto ("Kilolo Request"),¹ and the Bemba Defence's request to disclose all Prosecution RFAs generating evidence the Prosecution will use during the confirmation proceedings ("Bemba Request").²

2. Both the Kilolo Request and the Bemba Request ("Defence Requests") lack a proper legal or factual basis for disclosure and fail to establish that the information sought is material to the preparation of the Defence. The Defence Requests should therefore be dismissed.

II. Confidentiality

3. This filing is classified as "Confidential" as it refers to confidential filings.

III. Submissions

The Defence Requests lack a valid legal or factual basis

4. As previously noted, the Prosecution does not ordinarily disclose RFAs made to States Parties.³ These documents are confidential and the Statute makes clear that even the State Party who receives an RFA is required to keep it and any supporting documents confidential.⁴

¹ ICC-01/05-01/13-430-Conf.

² ICC-01/05-01/13-470-Conf.

³ ICC-01/05-01/13-427-Conf, para. 3.

⁴ Article 87(3) of the Rome Statute ("Statute").

5. Further, the Appeals Chamber has held that “the right to disclosure is not unlimited” and the application of Rule 77 of the Rules of Procedure and Evidence (“Rules”) “will depend upon the specific circumstances of the case.”⁵

6. The Defence Requests fail to explain how the requested documents are material to the preparation of the Defence pursuant to Rule 77 of the Rules.

i. The Kilolo Request fails to meet the criteria under Rule 77

7. The Kilolo Request seeks disclosure to “*determine* [the requested document’s] relevance and importance to the present proceedings.”⁶ Thus, instead of arguing how the requested documents are, or even might be, material to its preparation, the Kilolo Request asserts that inspection is necessary to determine *whether or not* the requested documents are material to the Defence. Such an approach turns the Statute’s procedural paradigm in respect of disclosure on its head. Moreover, the speculative nature of the Request is expressly acknowledged by the Kilolo Defence.⁷

8. The Kilolo Request incorrectly contends that the right to a fair trial entitles a suspect to express their views on, and thereby inspect, “every document in the file”.⁸ As noted above, the Court’s jurisprudence is clear and contradicts this contention, which disregards the provisions of the Statute and the Rules governing disclosure.

9. The sole authority cited by the Kilolo Defence to support its claim to unfettered access to material and the alleged right to “comment” upon all documents is a European Court of Human Rights case involving access to the reasoned judgment of a tribunal.⁹ It is inapposite and therefore irrelevant for the purposes of the Kilolo Request.

⁵ ICC-02/05-03/09-501 OA4, para. 39.

⁶ Kilolo Request, para. 11 (emphasis added).

⁷ Kilolo Request, para. 12.

⁸ Kilolo Request, para. 10 (emphasis omitted).

⁹ Kilolo Request, paras. 10-11.

10. The Kilolo Request provides no authority for the claimed entitlement to inspect the requested documents to assess whether the RFA was “in line” with the Single Judge’s 29 July 2013 decision.¹⁰ To the contrary, the Kilolo Request misreads the decision, which specifically authorises the Prosecution to seize the Belgian authorities with a particular matter – rather than constrains the Prosecution’s contacts with those authorities.¹¹

11. Having failed to establish any valid legal or factual basis for its Request, there are consequently no grounds upon which the Kilolo Defence can allege prejudice arising from the lack of opportunity to inspect the requested documents.¹²

12. Notwithstanding the Kilolo Request’s lack of merit and as counsel for the Kilolo Defence has already been informed in a communication with the Prosecution, no wiretap of Kilolo’s telephone communications has been conducted by the Belgian authorities for this case.¹³

ii The Bemba Request fails to meet the criteria under Rule 77

13. The Bemba Request misinterprets the Single Judge’s 3 June 2014 decision, in suggesting that the Single Judge considered RFAs not subject to disclosure where they “did not result in evidence on which the Prosecutor would rely at confirmation.”¹⁴ To the contrary, the Single Judge determined that RFAs are not, in principle, subject to disclosure in that they “are not intended as evidence *themselves*”.¹⁵

¹⁰ Kilolo Request, para. 12.

¹¹ ICC-01/05-52-Red2.

¹² *Contra* Kilolo Request, para. 11.

¹³ *Contra* Kilolo Request, para. 12.

¹⁴ Bemba Request, para. 1.

¹⁵ ICC-01/05-01/13-453-Conf, p. 4 (emphasis added).

14. The Bemba Request contends that the disclosure of all RFAs which have produced evidence on which the Prosecutor will rely is necessary for the purpose of “determining the admissibility of evidence at trial”.¹⁶ This contradicts the 3 June decision, on which the Bemba Request relies as “precedent”,¹⁷ wherein the Single Judge held that RFAs are not pertinent “for the purposes of determining the admissibility of evidence which might be retrieved as a result of their implementation”.¹⁸

15. Further, the Bemba Request’s speculative assertion that disclosure is necessary to potentially determine whether the nature and scope of assistance sought in all RFAs exceed the parameters of the investigation in this case¹⁹ is without foundation and amounts to a fishing exercise, at best.

IV. Requested Relief

16. For the foregoing reasons, the Prosecution requests the Single Judge to dismiss the Defence Requests.



Fatou Bensouda, Prosecutor

Dated this 9th Day of June 2014
At The Hague, The Netherlands

¹⁶ Bemba Request, para. 3.

¹⁷ Bemba Request, para.4.

¹⁸ ICC-01/05-01/13-453-Conf, p. 4.

¹⁹ Bemba Request, para. 3.