

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **12 February 2014**

## **PRE TRIAL CHAMBER II**

**Before: Judge Cuno Tarfusser, Single Judge**

## **SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

**Public Redacted document**

**With**

**Confidential, *EX PARTE*, only available to Prosecution and Victims and Witnesses  
Unit only Annexes A and B**

**Public Redacted version of "Third Request for Judicial Order to Obtain Evidence  
for Investigation under Article 70", 7 October 2013, ICC-01/05-60-Conf-Exp**

**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**

Fatou Bensouda

James Stewart

Kweku Vanderpuye

**Counsel for the Defence of Jean-Pierre Bemba**

Nicholas Kaufman

**Counsel for the Defence of Aimé Kilolo Musamba**

Ghislain Mabanga

**Counsel for the Defence of Jean – Jacques Mangenda Kabongo**

Jean Flamme

**Counsel for Fidèle Babala Wandu**

Jean-Pierre Kilenda Kakengi Basila

**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**

**Amicus Curiae**

**REGISTRY**

**Registrar**

Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Patrick Craig

**Detention Section**

**Victims Participation and Reparations Other Section**

## I. Introduction

1. The Office of the Prosecutor ("Prosecution") continues to investigate offences against the administration of justice under Article 70 of the Rome Statute ("Statute") and Rule 165 of the Rules of Procedure and Evidence ("Rules") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.

2. The Prosecution is in possession of KILOLO and MANGENDA call data records ("CDR"), which shows contact between KILOLO and Defence witnesses during overnight adjournments in the witnesses' multi-day video-link testimonies.<sup>1</sup> A counsel's contact with a witness during testimony is generally prohibited by Trial Chamber III.<sup>2</sup> Unless KILOLO had the express *ex parte* authorization of Trial Chamber III, his contact with Defence witnesses strongly suggests witness coaching.

3. In order to fully investigate the extent of KILOLO's contact with Defence witnesses it is necessary to be able to attribute unknown phone numbers contained in the CDR. The Prosecution therefore seeks from the Single Judge of Pre-Trial Chamber II ("Chamber") a judicial order to the Victims and Witness Unit ("VWU") to provide the Prosecution with the phone numbers of Defence witnesses in order to check the numbers against Prosecution-obtained CDR for attributions.

## II. Confidentiality

4. The Prosecution submits this request as confidential, *Ex parte*, only available to the Prosecution and the VWU since it contains sensitive information that, if disclosed, would compromise an on-going investigation.

---

<sup>1</sup> See Annex A

<sup>2</sup> ICC-01/05-01/08-1016, Decision on the Unified Protocol on practices used to prepare and familiarise witnesses for giving testimony at trial, 18 November 2010 and ICC-01/05-01/08-1081-Anx1, Annex 1 - Victims and Witnesses Unit's amended version of the "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" submitted on 22 October 2010, 8 December 2010 at paras. 27-35

### III. Procedural Background

5. On 3 May 2013, the Prosecution filed its “Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70.”<sup>3</sup>

6. On 8 May 2013, upon request of the Prosecution, the Single Judge designated by Pre Trial Chamber II <sup>4</sup> ordered the Registrar to:

- a. verify whether telephone numbers belonging to BABALA were included in the Registry’s records and to provide the Prosecution with all available information pertaining to those numbers;
- b. make available to the Prosecution a complete log of all telephone calls placed or received by the Accused while at the detention centre, as well as available recordings of non-privileged calls placed or received by him.<sup>5</sup>

7. On 3 June 2013, the Registry initiated compliance with the Decision and the Prosecution began to receive telephone logs and recordings, which it continues to receive to date.

8. On 19 July 2013, the Prosecution requested the Chamber to approve its investigation plan of the scheme.<sup>6</sup>

---

<sup>3</sup> ICC-01/05-44-Conf-Exp. Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70, 3 May 2013.

<sup>4</sup> ICC-01/05-45-Conf-Exp, Decision Designating a Single Judge, 6 May 2013.

<sup>5</sup> ICC-01/05-46-Conf-Exp, Decision on the Prosecutor's Request for judicial assistance to obtain evidence for investigation under Article 70, 8 May 2013.

<sup>6</sup> ICC-01/05-51-Conf-Exp, Request for Judicial Order to Obtain Evidence for Investigation under Article 70, 19 July 2013.

9. On 29 July 2013 the Chamber approved the Prosecution's investigation plan and appointed independent counsel, working under the Chamber's supervision.<sup>7</sup>

10. On 13 September 2013, pursuant to a request for international cooperation and assistance, Dutch authorities released to the Prosecution CDR of KILOLO and MANGENDA's mobile phone communications.

#### **IV. Findings from the investigation since 19 July 2013**

##### Findings

11. Since obtaining judicial authorization from this Chamber the Prosecution has requested assistance from Dutch and Belgian authorities to obtain, *inter alia*, the CDR of Messrs KILOLO and MANGENDA. The Dutch authorities have provided the Prosecution with KILOLO's CDR obtained between the periods of 20-24 August 2013 and MANGENDA CDR between the periods of 26 August 2012 and 6 August 2013. The Belgian authorities granted the Prosecution's request related to KILOLO's CDR. They will provide KILOLO's CDR to the Prosecution by the end of October 2013.

12. The Prosecution has conducted an on-going analysis of the CDR provided by the Dutch authorities. The Prosecution compared phone numbers from the CDR to phone numbers attributed to some Defence witnesses in the BEMBA case. Thus far, the Prosecution has found that KILOLO's CDR indicates that from 20-24 August 2013, KILOLO called sworn Defence witnesses located in [REDACTED] and under the control of the VWU.<sup>8</sup> On 20 August 2013, minutes before stepping into Courtroom I, on four occasions from 8:43 AM to 8:57 AM KILOLO contacted Defence witness [REDACTED], CAR-D04-PPPP-0026 ("D-26"). D-26 started his testimony via video-link from [REDACTED], in the afternoon on 20 August 2013.

---

<sup>7</sup> [REDACTED].

<sup>8</sup> See Annex A and B.

KILOLO contacted D-26 later that evening at 11:23 PM and spoke for approximately 23 minutes. D-26 continued his testimony the next day. KILOLO contacted D-26 again on 22 August 2013 and spoke for 25 minutes. D-26 finished his testimony the next day on 23 August 2013.

13. Also on 20-21 August 2013 KILOLO called Defence witness [REDACTED], CAR-D04-PPPP-0023 ("D-23") five times from 10:23 PM to 12:32 AM, talking past midnight for a total of approximately 25 minutes. D-23 had started his testimony via video-link from [REDACTED], on the morning of 20 August 2013. He continued his testimony the following day. In between KILOLO's five calls to D-23, KILOLO called MANGENDA once and then called D-23 back.

14. Absent Trial Chamber III's express authorization, KILOLO's contact with Defence witnesses violates a court order requiring that the parties refrain from such contact while witnesses are under oath and/or under the care and control of the VWU.<sup>9</sup>

#### Significance of the Above Findings

15. The Prosecution suspects that KILOLO's contact with Defence witnesses is connected to payments to Defence witnesses and that these activities form parts of the same criminal transaction to corruptly influence Defence witnesses.

16. The times and durations of KILOLO's contacts with Defence witnesses strongly suggests that KILOLO was coaching witnesses during the evenings regarding testimony the witnesses gave the next day. KILOLO's contact with MANGENDA between calls to D-23 indicates MANGENDA's likely awareness of

---

<sup>9</sup> ICC-01/05-01/08-1016, Decision on the Unified Protocol on practices used to prepare and familiarise witnesses for giving testimony at trial, 18 November 2010 and ICC-01/05-01/08-1081-Anx1, Annex 1 - Victims and Witnesses Unit's amended version of the "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" submitted on 22 October 2010, 8 December 2010 at paras. 27-35.

and involvement in the witnesses coaching. Over the course of multi-day testimonies Defence witnesses have often appeared to change their testimony overnight.<sup>10</sup> Although KILOLO's CDR shows a 23-minute call to D-26 on the evening of 20 August 2013, during his 21 August 2013 testimony, D-26 [REDACTED].<sup>11</sup> The changes in D-26's testimony from 20 to 21 August 2013 additionally suggest that KILOLO was coaching D-26 on the evening of 20 August 2013.<sup>12</sup> On 20 August 2013 D-26 testified that [REDACTED]. The next day however D-26 [REDACTED].

17. Additionally, from 20 – 24 August 2013 KILOLO facilitated four unmonitored conference calls between the Accused, BABALA, and other unknown individuals, possibly Defence witnesses.<sup>13</sup> The conference calls, through KILOLO, are significant to the investigation since it is the only method the Accused can use to avoid the International Criminal Court Detention Centre telephone monitoring system as calls to counsel are not recorded or monitored by the Registry.

18. The Prosecution suspects that KILOLO's contact with D-23 and D-26 during their testimonies is demonstrative of KILOLO and MANGENDA's contact with other Defence witnesses throughout the course of the Defence presentation of evidence. KILOLO's CDR obtained from Dutch authorities is only a small window of four days of witness testimony. The Prosecution submits that it will likely find additional contact with Defence witnesses in CDR in its possession and CDR it expects to receive from The Netherlands and Belgium. However, in order to investigate the existence of this suspected pattern, the Prosecution needs to obtain Defence witness phone numbers to search for matches.

## **V. Proposed Additional Investigation**

---

<sup>10</sup> Compare [REDACTED].

<sup>11</sup> See ICC-01/05-01/08-T-333-Conf-Eng ET, 21 August 2013, pp. 68-69.

<sup>12</sup> See [REDACTED].

<sup>13</sup> See Annex A.

19. The Prosecution seeks the phone numbers of Defence witnesses in the possession of the VWU. The Prosecution was able to match phone numbers found in KILOLO's CDR to Defence witness phone numbers found in evidence in the possession of the Prosecution.<sup>14</sup> However, the Prosecution's list of Defence witness phone numbers is partial and likely out-of-date. There are many unidentified and non-attributed telephone numbers on the CDR and many of the unidentified telephone numbers have country codes from countries where Defence witnesses were located during their video-link testimonies.

20. The VWU is in possession of the most current and accurate Defence witness contact information, including phone numbers. The Prosecution intends to use the VWU-provided Defence witness phone numbers to cross-reference and verify information contained in the CDR in the Prosecution's possession and CDR the Prosecution expects to obtain in the coming days or weeks. The Prosecution expects that it will receive additional KILOLO and MANGENDA CDR requiring extensive analysis. In order to complete this analysis thoroughly and efficiently, consistent with the Prosecutor's duties under Article 54(1) of the Statute, it is crucial to obtain all Defence witness phone numbers from the VWU. These phone numbers will assist the Prosecution to assess the scope of probable unauthorized contact KILOLO has had with Defence witnesses. The Prosecution's request extends to contact information for listed Defence witnesses who were not called to Court, since many of these witnesses appear to have been involved in the bribery scheme and their phone numbers will assist the Prosecution with the complex task of CDR analysis.

21. The Prosecution understands that the VWU provides all witnesses with a Dutch mobile phone during the periods of their testimony in The Hague. Since it is likely that KILOLO's CDR going back to August 2012 will show calls to witnesses

---

<sup>14</sup> See Annex B

who testified in person in The Hague, the Prosecution additionally requests the Chamber to order the VWU to provide the Prosecution with all Dutch mobile number(s) that were provided to Defence witnesses while they were in The Hague for their testimonies. These number(s) will be used to cross-reference unknown phone numbers contained in CDR.

22. At this time the Prosecution does not intend to disclose any Defence witness phone numbers to governments in requests for international cooperation and assistance. Should the Prosecution's current investigation require additional CDR from VWU-provided Defence witness phone numbers the Prosecution will first seek advice from the VWU to assess any potential security risks to Defence witnesses before deciding on a course of action. The Prosecution is mindful of its Article 68 legal duties to take appropriate measures to protect the security of witnesses during investigations of crimes.

23. The legal authority to grant the Prosecution's request is found in Article 54(1) of the Statute, which mandates that "[t]he Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute and, in doing so, investigate incriminating and exonerating circumstances equally." Additional legal authority is found in Article 57(3)(a) of the Statute which empowers the Pre-Trial Chamber to, "[a]t the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation."

24. The Prosecution incorporates the facts contained in paragraphs 9-28 of ICC-01/05-44-Conf-Exp and paragraphs 14-22 of ICC-01/05-51-Conf-Exp for this request.

## **VI. Relief Requested**

25. The Prosecution respectfully requests that the Chamber order the VWU to provide the Prosecution with

- a. all available telephone contact information for all 62 Defence witnesses listed on ICC-01/05-01/08-2243-Conf-AnxA;
- b. all available telephone contact information for VWU mobile phones issued to Defence witnesses during their stays in The Netherlands and;
- c. clarification from VWU whether KILOLO had specific authorization to contact Defence witnesses (CAR-D04-PPPP-0023 and CAR-D04-PPPP-0026) during overnight adjournments in their testimonies.

26. The Prosecution requests a status conference with the Single Judge of Pre-Trial Chamber II to update the Single Judge with the progress of the Prosecution's investigation.

## **VII. Conclusion**

27. These are serious allegations of offences against the administration of justice. The Prosecution is aware of their far-reaching implications. The Prosecution therefore respectfully requests both confidentiality and urgency, and that the Chamber grant the relief requested.



---

Fatou Bensouda, Prosecutor

Dated this 12<sup>th</sup> day of February, 2014

At The Hague, The Netherlands