

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 July 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,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE
BABALA WANDU and NARCISSE ARIDO***

Confidential, *ex parte* only Kilolo Defence and Registry

**Decision on the “Defence request for the replacement and substitution of an
approved Defence expert witness” submitted by the Defence for Mr Kilolo**

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Counsel for Jean-Pierre Bemba Gombo

Counsel for Aimé Kilolo Musamba

Ghislain Mabanga

Counsel for Jean-Jacques Mangenda Kabongo

Counsel for Fidèle Babala Wandu

Counsel for Narcisse Arido

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

Herman von Hebel

Detention Section

Victims and Witnesses Unit

Others

I, Judge Cuno Tarfusser, having been designated as Single Judge of Pre-Trial Chamber II of the International Criminal Court;

NOTING the “Requête aux fins d’audition de témoins de la Défense à l’audience de confirmation des charges”, dated 15 April 2014 (“15 April 2014 Request”)¹, whereby the Defence of Mr Kilolo requested, *inter alia*, to be authorised to call a number of witnesses to provide *viva voce* testimony, including an expert witness (“Expert Witness”) who might address “les différents problèmes juridiques soulevés par l’Affaire connexe”;

NOTING the “Decision on ‘Requête aux fins d’audition de témoins de la Défense à l’audience de confirmation des charges’ filed by the Defence of Aime Kilolo Musamba” dated 25 April 2014², whereby the Single Judge rejected the 15 April 2014 Request, stating, *inter alia*, that the “presentation of evidence in documentary form is the preferred modality by which evidence is introduced at the stage of the confirmation of charges proceedings” and that “no discernible prejudice to the suspect's rights results from the fact that the Defence be required to rely on witnesses’ statements only in writing”;

NOTING the “Decision amending the calendar for the confirmation of charges” dated 28 May 2014 (“28 May 2014 Decision”)³;

NOTING the “Defence request for the replacement and substitution of an approved Defence expert witness” dated 4 July 2014 (“Mr Kilolo’s Request”)⁴, whereby the Defence for Aimé Kilolo submits that, as a consequence of the 28 May 2014 Decision, the Expert Witness became unable “to appear before this Court” and, accordingly, requests the Single Judge (i) to “grant [the] request for the replacement and substitution” of the Expert Witness with another expert

¹ ICC-01/05-01/13-339 and confidential ex parte Annex A thereto.

² ICC-01/05-01/13-363.

³ ICC-01/05-01/13-443.

⁴ ICC-01/05-01/13-536-Conf-Exp.

witness and (ii) "to authorise the provision of confidential materials" to the replacing expert witness in order "to allow him to fulfil his duty";

NOTING articles 61 and 70(2) of the Statute and rules 121, 122 and 165(3) of the Rules of Procedure and Evidence;

CONSIDERING that, in light of the decision that the confirmation of charges in these proceedings shall take place in writing, as initially adopted in the context of the suspects' first appearances⁵ and repeatedly reiterated during the course of these proceedings⁶, as well as in light of the 25 April 2014 Decision, it is incomprehensible to the Single Judge how the Defence for Mr Kilolo may argue that the Expert Witness and his appearance for the purposes of *viva voce* testimony have been "approved";

CONSIDERING, more specifically, that the 25 April 2014 Decision (i) explicitly refrained from taking a position as to "whether the Defence shall be authorised [to] present evidence emanating from the identified witnesses (which is in its rights under article 61(6)(c) of the Statute), but solely [addressed the issue as to] whether this evidence shall be elicited through the oral questioning of such witnesses at the confirmation hearing, as opposed to the presentation of written witness statements" and (ii) clarified that "in light of the information provided in the confidential ex parte annex to the Request in respect of each of the prospective witnesses whom Mr Kilolo proposes to call to testify live ... oral testimony of these witnesses at the confirmation of charges hearing - as opposed to the presentation of their written statements - is not necessary for the proper elucidation of the facts for the purpose of the Chamber's final decision under article 61(7) of the Statute";

⁵ ICC-01/05-01/13-T-1-ENG, pages 14-15; ICC-01/05-01/13-T-3-Red-ENG, page 6; ICC-01/05-01/13-T-4-Red2-ENG page 14.

⁶ See for example ICC-01/05-01/13-93; ICC-01/05-01/13-255; ICC-01/05-01/13-443.

CONSIDERING that, since no “approval” of any of the prospective witnesses has ever been given in these proceedings, no issue of their “replacement”, or of authorisation thereof, can arise;

CONSIDERING further that, in light of the written form chosen for the forthcoming proceedings for the confirmation of the charges, no issue of “unavailability” of the prospective witnesses as a consequence of the amendment of the calendar through the 28 May 2014 Decision can arise;

CONSIDERING that, accordingly, Mr Kilolo’s Request is premised on incorrect factual assumptions;

CONSIDERING that this is without prejudice to the Chamber’s determinations as to the admissibility and relevance of any and all witness statements which the parties may decide to include in their list of evidence;

CONSIDERING, as regards the request to authorise the provision of confidential materials, that witnesses are not parties to the proceedings and, accordingly, cannot be given access to confidential materials;

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS Mr Kilolo’s Request.

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



Judge Cuno Tarfusser
Single Judge

Dated this Tuesday, 8 July 2014

The Hague, The Netherlands