

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 29 August 2014

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng

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***

Public Redacted Version, with Confidential *EX PARTE* Annexes A and B

Public redacted version of “Prosecution Response to the Kilolo Defence’s Addendum to its Request for the disqualification of the Prosecutor, the Deputy Prosecutor and the other members of the Office of the Prosecutor from the case against Kilolo”, ICC-01/05-01/13-481-Conf-Exp, 10 June 2014

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

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I. Introduction

1. The Prosecution opposes the Kilolo Defence's 1 June 2014 "*Addendum à la Requête aux fins de récusation de l'Accusation dans le cadre de l'enquête et des poursuites visant M. Aimé Kilolo Musamba* (ICC-01/05-01/13-233-Conf)" ("Statement").¹ Although titled an "addendum" the Statement in fact constitutes a reply. It should be dismissed summarily as a violation of Regulation 24(5) of the Regulations of the Court ("RoC").

2. Alternatively, the Statement fails to advance the Kilolo Defence's 28 February 2014 Request² because: (i) falsehoods in the Statement undermine [REDACTED] ("D-18")'s credibility; (ii) the Statement is unpersuasive and immaterial to the issue of the Prosecutor's independence; (iii) the Statement is of no probative value when read in the context of other evidence in the Article 70 case; (iv) [REDACTED] Kilolo's Lead Counsel, who may have a conflict of interest; and (v) even if the Statement is credited – which it should not be – the alleged misconduct of [REDACTED] in the *Bemba* case does not justify the removal of the Prosecutor, her Deputy, or her Office from the prosecution of the Article 70 case.

II. Confidentiality

3. This document is filed as "Confidential" in response to a filing of the same designation.³

¹ ICC-01/05-01/13-449-Conf; ICC-01/05-01/13-449-Red; ICC-01/05-01/13-449-Conf-Exp-Anx1-Red.

² ICC-01/05-01/13-233-Conf.

³ Regulation 23*bis*(2) of the RoC.

III. Submissions

A. The Statement violates Regulation 24(5) of the RoC

4. Although titled an “addendum”, the Statement is in fact a reply to the Prosecution’s 4 April 2014 Response⁴ to the Request. It should be dismissed *in limine* for violating Regulation 24(5) of the RoC.

5. First, the Statement’s cover filing makes substantive submissions, including re-iterating the urgency of the Request⁵ and describing the impact of the Statement on the Appeals Chamber’s determination.⁶ This is unsuitable for an addendum, which may be used to supplement a filing with *additional* material,⁷ but not to provide further arguments on the same issue.

6. Second, the Statement, dated 27 April 2014,⁸ seems to have been taken deliberately to rebut the Prosecution’s 4 April Response, which contends that the Defence’s claim “lacks support”.⁹ Because the Statement was obtained *in response to* the Prosecution’s submission and then filed without the Chamber’s leave, it violates Regulation 24(5) of the RoC and should be dismissed.

⁴ ICC-01/05-01/13-314-Conf.

⁵ ICC-01/05-01/13-449-Red, para. 3.

⁶ ICC-01/05-01/13-449-Red, para. 6.

⁷ See Bryan A. Garner (ed.), *Black’s Law Dictionary* (8th ed, 2004, Thomson West), p. 41; see also Regulation 36(2)(a) of the RoC, which illustrates the intended, non-substantive, nature of an addendum: “verbatim quotations of the Statute, Rules or these Regulations”.

⁸ ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, p. 2.

⁹ ICC-01/05-01/13-314-Conf, para. 36.

B. In the alternative, the Statement is false, incredible and immaterial to the issues

i. *D-18 lies in the Statement about his contact with Kilolo*

7. Despite repeatedly affirming his respect for the Court and for the truth,¹⁰ D-18 lies in the Statement about his contact with the Kilolo, and relative to the testimony he provided in the *Bemba* case.

8. Specifically, D-18 states that before testifying in The Hague, “[REDACTED]”.¹¹ This is false. D-18 had approximately 61 telephone contacts with Kilolo between 16 October 2012 and 5 June 2013,¹² when D-18 started his testimony in the *Bemba* case.¹³ 15 of these calls lasted over 100 seconds.¹⁴ The total contact time was over one-and-a-half hours.¹⁵ Further, there were three calls between D-18 and Kilolo *during* his testimony, lasting 37, 23, and 34 seconds.¹⁶

9. Further, D-18 asserts that he and Kilolo met “[REDACTED]” before he started his testimony in the *Bemba* case.¹⁷ However, when in his testimony before the Court under oath, D-18 claimed that he met with Kilolo only “[REDACTED]”.¹⁸ These

¹⁰ ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, p. 16.

¹¹ ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, p. 8 (emphasis added); see also p. 15 (“j’étais . . . ni en contact avec son avocat”).

¹² See Annex A, rows 1-61. D-18’s telephone numbers are [REDACTED] and [REDACTED]. These attributions are derived from information D-18 provided to the Victims and Witnesses Unit (see CAR-OTP-0072-0116 at 0116; CAR-OTP-0077-0942 at 0942), and his Western Union records (see CAR-OTP-0073-0275, tab [REDACTED], column Y; CAR-OTP-0070-0006, tab [REDACTED], column AA). Kilolo’s numbers are [REDACTED] and [REDACTED]. These attributions are derived from the Independent Counsel’s identification of Kilolo’s voice during calls from that phone number (see, e.g., ICC-01/05-64-Conf-Anx, p. 5; ICC-01/05-66-Conf-Anx-Corr, p. 16). The information contained in Annex A is extracted from three Excel spread sheets containing call data records (see CAR-OTP-0072-0082; CAR-OTP-0072-0081; CAR-OTP-0072-0391).

¹³ D-18 testified from 5-11 June 2013. See ICC-01/05-01/08-T-317-Red-ENG, 5 June 2013; ICC-01/05-01/08-T-318-CONF-ENG, 6 June 2013; ICC-01/05-01/08-T-319-CONF-ENG, 10 June 2013; ICC-01/05-01/08-T-319bis-CONF-ENG, 10 June 2013; ICC-01/05-01/08-T-320-CONF-ENG, 11 June 2013; ICC-01/05-01/08-T-320bis-CONF-ENG, 11 June 2013.

¹⁴ Annex A, rows 5, 6, 10, 22, 27, 29, 31, 32, 33, 38, 48, 51, 52, 54, 60.

¹⁵ Annex A, column D.

¹⁶ Annex A, rows 62-64.

¹⁷ ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, p. 8. D-18 uses the phrase “[REDACTED]”, but then clarifies that when they saw each other it was “[REDACTED]” – i.e., a meeting.

¹⁸ ICC-01/05-01/08-T-320-CONF-ENG, p. 16, ln. 23-p. 17, ln. 13.

versions cannot sit together, and expose that D-18 lied under oath to Trial Chamber III, or is lying in the Statement. In either case, D-18's evidence is not accurate or credible.

10. Significantly, the Kilolo Defence has had access to the call data records in Annex A, which readily impeach D-18's credibility.¹⁹ There is no justification for the Defence's failure to verify the accuracy of the Statement it now advances – particularly given the serious and personal nature of the allegations – arguably in violation of the Code of Professional Conduct for counsel.²⁰

ii. The Statement is unpersuasive and immaterial to the issues

11. In addition to its falsity, the Statement is without any objective or verifiable support. Thus, the Chamber should find that it is without a sufficient basis to found the Defence's complaint.

12. First, parts of the Statement constitute D-18's opinion, which is not supported by evidence.²¹ Second, D-18's motivations are highly questionable and his statement suggests that he is motivated by money.²² In one peculiar exchange, [REDACTED] about whether he had been offered any money or promises in exchange for giving the Statement, D-18 fails to answer the question.²³

13. Third, parts of the Statement are irrelevant to the Article 70 case and to the Defence's allegations of prosecutorial partiality. The Statement focuses on events in the *Bemba* case,²⁴ and does little more than self-servingly support D-18's June 2013 testimony – apart from the inconsistencies about his contact with Kilolo. Similarly,

¹⁹ The three Excel spread sheets containing call data records (CAR-OTP-0072-0082; CAR-OTP-0072-0081; CAR-OTP-0072-0391), of which Annex A is an extract, were disclosed to the Defence on 20 December 2013 and 31 January 2014.

²⁰ Resolution ICC-ASP/4/Res.1, see articles 7(1), 24(1), (2), (3), (4), and 27(1).

²¹ ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, p. 15.

²² See, e.g., ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, p. 12.

²³ ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, pp. 19-20.

²⁴ ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, pp. 16-17 (“[REDACTED]”).

[REDACTED] conduct in the context of the investigation in the *Bemba* case has nothing to do with the Article 70 case and the charges against Kilolo.

iii. The Statement is further undermined when read in the context of other evidence in the Article 70 case

14. As discussed above, D-18's motivation to give the Statement is suspect. When asked to describe why the meeting took place between the Defence and D-18, his response is that he called Mr Mabanga for no other reason than to "[REDACTED]".²⁵ Nothing in the Statement establishes any plausible basis for this call, which is conveniently timed for the Defence, given the pending allegations.

15. Given the nature of the charges against Kilolo in the Article 70 case, there is no reason to believe that D-18 might not have been otherwise contacted to get in touch with Counsel. D-18's continued false representations about his contact with Kilolo suggest not only that this is a reasonable possibility, but also probable in the circumstances. Further, the possibility of improper influence on D-18 is consistent with Kilolo's previous activity, as evidenced by the third report of an independent counsel appointed by Pre-Trial Chamber II to assess recordings of telephone communications placed or received by him and Mangenda ("Report").²⁶

16. The Report shows Kilolo, as Lead Counsel for Bemba, conspiring with his case manager, Mangenda, and his client, Bemba, to capitalise on complaints made by 22 Prosecution witnesses in the *Bemba* case in November 2013, using unlawful means.²⁷

17. In the Report, on 8 and 10 November Kilolo and Mangenda conspired to use the financial concerns of these witnesses for Bemba's benefit. Specifically, Kilolo and Mangenda spoke about corruptly influencing these witnesses, including the need for a mission to go and see them, the number of witnesses to be approached, how to

²⁵ ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, p. 3.

²⁶ ICC-01/05-01/13-421-Conf; ICC-01/05-01/13-421-Conf-Anx.

²⁷ Annex B, pp. 122-129. [REDACTED].

bribe them, and the need to have them commit false statements to writing. Their intention was to provoke a mistrial²⁸ and to “[REDACTED]”.²⁹ These excerpts are attached at Annex B.

iv. [REDACTED] Kilolo’s Counsel, who may have a conflict of interest.

18. [REDACTED] Counsel for Kilolo, for whom there may be a conflict of interest compounded by the falseness of the Statement.

19. Notwithstanding [REDACTED],³⁰ [REDACTED],³¹ [REDACTED].³² [REDACTED]³³ [REDACTED].

20. [REDACTED], Counsel may be conflicted between [REDACTED].³⁴

v. Even if D-18 is believed, [REDACTED] alleged misconduct in the Bemba case does not justify the removal of the Prosecutor, her Deputy, or her Office from the prosecution of the Article 70 case

21. The Prosecution re-iterates its rejection of D-18’s allegations.³⁵ But even if the Statement is credited to any extent – which it should not be, as the allegations, in the Prosecution’s view, are fabrications – [REDACTED] alleged misconduct in the *Bemba* case does not justify the removal of the Prosecutor, her Deputy, or her Office from the prosecution of the Article 70 case.³⁶

²⁸ Annex B, pp. 126-127; see also pp. 122-129.

²⁹ Annex B, p. 129.

³⁰ ICC-01/05-01/13-307-Conf-Exp.

³¹ ICC-01/05-01/13-307-Conf-Exp, para. 7.

³² ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, pp. 4 (“[REDACTED]”), 5 (“[REDACTED]”).

³³ ICC-01/05-01/13-449-Conf-Exp-Anx1-Red, p. 3.

³⁴ [REDACTED].

³⁵ See also ICC-01/05-01/13-314-Conf, para. 33.

³⁶ See ICC-01/05-01/13-233-Red, paras 29-32.

22. First, contrary to the Request, [REDACTED] is not involved in investigating D-18. Thus, the Defence's claim of a conflict of interest pursuant to Article 31 of the Code of Conduct for the Office of the Prosecutor fails.³⁷

23. Second, it cannot be that unproven accusations against Prosecution staff members are sufficient to require them to withdraw from investigations or prosecutions. Were this the case, the Prosecution's ability to perform its duties would be stymied by any manifestly frivolous claim.

24. Third, contrary to the Request,³⁸ the Prosecutor's decision not to open an investigation into this incident does not reflect her bias, but her assessment of the evidence justifying the opening of an investigation.

IV. Requested Relief

25. The Prosecution requests the Chamber to dismiss the Request and its accompanying Statement.



Fatou Bensouda, Prosecutor

Dated this 29th Day of August 2014
At The Hague, The Netherlands

³⁷ See ICC-01/05-01/13-233-Red, para. 31.

³⁸ ICC-01/05-01/13-233-Red, para. 31.