

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

No.: ICC-01/05-01/13  
Date: **9 February 2016**

**TRIAL CHAMBER VII**

**Before: Judge Bertram Schmitt, 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*, available the Registry and Kilolo Defence only**

**Decision on Kilolo Defence Request regarding a Potential Witness**

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**

Mr Paul Djunga Mudimbi

**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**

Potential Witness as identified in  
paragraph 9 below

## **REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Judge Bertram Schmitt**, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('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*, having regard to Articles 64(2) and 67(1)(e) of the Rome Statute and Rule 84 of the Rules of Procedure and Evidence, issues the following 'Decision on Kilolo Defence Request regarding a Potential Witness' ('Decision').

## **I. Procedural History**

1. On 3 November 2015, the Single Judge set certain deadlines on the presentation of evidence by the five defence teams, including the provision of a final list of witnesses, together with the summaries of anticipated testimony by 7 January 2016.<sup>1</sup> That deadline was subsequently postponed to 21 January 2016.<sup>2</sup>
2. On 21 January 2016, the defence team for Mr Kilolo ('Kilolo Defence') submitted its final list of defence witnesses, indicating that it would request the addition of two further witnesses.<sup>3</sup>
3. On 22 January 2016, the Kilolo Defence filed the announced request, explaining that it still seeks to obtain the permission from the competent supervisory body/former employer for both witnesses to testify ('Extension Request').<sup>4</sup> It requested that it not be required to identify these two witnesses pending its attempt to resolve the pending authorisation issues.<sup>5</sup>

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<sup>1</sup> Directions on Defence Presentation of Evidence, ICC-01/05-01/13-1450.

<sup>2</sup> Further Directions on the Conduct of the Proceedings in 2016, 9 December 2015, ICC-01/05-01/13-1518.

<sup>3</sup> Soumissions de la défense de monsieur Aime Kilolo concernant sa liste de témoins et la liste de preuves, ICC-01/05-01/13-1562, para. 10.

<sup>4</sup> Defence request to be authorised not to identify two potential witnesses., notified on 22 January 2016, ICC-01/05-01/13-1563-Conf-Exp, available only to the Kilolo Defence. A confidential-redacted version was filed on 25 January 2016, ICC-01/05-01/13-1563-Conf-Red.

<sup>5</sup> Extension Request, ICC-01/05-01/13-1563-Conf-Red, para.8.

4. On the same day, the Single Judge issued a decision in which it, *inter alia*, granted the Extension Request and ordered the Kilolo Defence to notify the names of two additional witnesses and provide the related summaries of their anticipated testimonies by 1 February 2016.<sup>6</sup>
5. On the 26 January 2016, the Single Judge issued a decision regarding the preparation of the defence phase of the case.<sup>7</sup> Therein, the Single Judge ordered the Kilolo Defence and defence teams for Mr Bemba, Mr Mangenda, Mr Babala and Mr Arido to provide their overall witness order by 12 February 2016 ('12 February Deadline').<sup>8</sup>
6. On 1 February 2016, the Kilolo Defence filed a follow-up to the Extension Request ('Request').<sup>9</sup>
7. On 5 February 2016, upon order by the Chamber,<sup>10</sup> the Registry filed its observations on the request ('Observations').<sup>11</sup>

## II. Submissions

8. The Kilolo Defence informs the Chamber that it no longer intends to call one of the two potential witnesses as a witness, due to the lack of consent by the supervisory body.<sup>12</sup>
9. In respect of the other witness, the Kilolo Defence explains that he is a former employee of the Registry and has worked for the VWU ('Potential Witness').<sup>13</sup>

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<sup>6</sup> Decision Regarding Defence Evidence, ICC-01/05-01/13-1566-Conf.

<sup>7</sup> Directions Relating to Certain Defence Witnesses and Appearance Order, ICC-01/05-01/13-1578.

<sup>8</sup> ICC-01/05-01/13-1578, para. 9.

<sup>9</sup> Defence submission to the Trial Chamber on Identity of Two Outstanding Witnesses and Request for Various Orders, ICC-01/05-01/13-1587-Conf-Exp, available only to the Kilolo Defence and the Registry, with two confidential *ex parte* annexes, available also only to the Kilolo Defence and the Registry. A confidential-redacted version was filed on 2 February 2016.

<sup>10</sup> Email from the Chamber to the Registry on 1 February 2016, at 18:21 and further email from the Chamber to the Registry on 4 February 2016, at 15:14.

<sup>11</sup> Registry's Observations on the "Defence submission to the Trial Chamber on Identity of Two Outstanding Witnesses and Request for Various Orders" (ICC-01/05-01/13-1587-Conf-Exp), ICC-01/05-01/13-Conf-Exp, available only to the Kilolo Defence and Registry, with one confidential *ex parte* annex, available also only to the Kilolo Defence and the Registry.

<sup>12</sup> Request, ICC-01/05-01/13-1587-Conf-Red, para. 4.

After having left the Court, he was instructed by the Registry, as an independent expert, to create a report on the functioning and practices of the Victims and Witnesses Unit ('VWU') ('Report'), which he provided in 2013.<sup>14</sup> The Kilolo Defence requested the Registry to be provided with a copy of the Report. Further, it requested the Registry's consent to talk to the Potential Witness in order to ascertain if he should be called as a defence witness.<sup>15</sup> The Registry declined both requests,<sup>16</sup> and the Kilolo Defence now calls upon the Chamber to order the Registry to comply with them.<sup>17</sup>

10. The Kilolo Defence submits that the Report is material to its preparation in order to explain why Mr Kilolo was in contact with the witnesses in case ICC-01/05-01/08 ('Main Case') and making payments to these witnesses, since it explains the working methods – and shortcomings – of the VWU during the alleged offences ('Relevant Time').<sup>18</sup> For the same reasons, the Kilolo Defence wishes to talk to the Potential Witnesses about these matters.<sup>19</sup> It enumerates several issues regarding the general functioning of the VWU during the period and its role and interaction with defence witnesses during the Relevant Time, which could be addressed by the Potential Witness and the Report.<sup>20</sup>
11. In its observations, the Registry submits that the Potential Witness is bound by confidentiality which, due to the sensitivity of the VWU functions, 'permits of no exceptions'.<sup>21</sup> In respect of the relevance of the Report, the Registry submits that it makes no finding or recommendations on the operating procedure of VWU other than on a conceptual level and that the Potential Witness was

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<sup>13</sup> Request, ICC-01/05-01/13-1587-Conf-Exp, para. 10.

<sup>14</sup> Request, ICC-01/05-01/13-1587-Conf-Exp, paras 5, 10-11.

<sup>15</sup> Request, ICC-01/05-01/13-1587-Conf-Exp, para. 5.

<sup>16</sup> Request, ICC-01/05-01/13-1587-Conf-Exp, para. 6 and ICC-01/05-01/13-1587-Conf-Exp-AnxA.

<sup>17</sup> Request, ICC-01/05-01/13-1587-Conf-Exp, para. 17.

<sup>18</sup> Request, ICC-01/05-01/13-1587-Conf-Exp, paras 7, 9.

<sup>19</sup> Request, ICC-01/05-01/13-1587-Conf-Exp, paras 9, 16.

<sup>20</sup> Request, ICC-01/05-01/13-1587-Conf-Exp, para. 9.

<sup>21</sup> Observations, ICC-01/05-01/13-1602-Conf-Exp, para. 7.

tasked to provide proposals for the organisation of the work of the VWU.<sup>22</sup> Consequently, the Report does not – according to the Registry – contain any case-specific information or discuss any impact of organisational shortcomings which are relevant to the potential issues raised by the Kilolo Defence.<sup>23</sup>

12. With regard to the general issue of the care and assistance provided by the VWU in the Main Case, the Registry asserts that it has observed all applicable protocols and statutory provisions and has applied the same care delivered to all witnesses who testify before the Court.<sup>24</sup>
13. In case the Chamber wants to grant the disclosure of the Report, the Registry submits that it would be unable to apply redactions, since the report in its entirety is relevant to the function of the VWU in relation to the protection of victims and witnesses.<sup>25</sup> Instead, it proposes that the Chamber reviews the Report, as well as the potential testimony of the Potential Witness, to determine the relevance for the case.<sup>26</sup>

### III. Analysis

14. First, the Single Judge notes that any determination in this Decision is solely with respect to the issue at hand and does not in any way prejudice the Chamber's later assessment of relevance or admission into evidence.
15. The Single Judge notes that the Kilolo Defence provided the transcript of a seminar for counsel from October 2013, organised by the Court, during which the Report was presented by the Potential Witness.<sup>27</sup> During his presentation of the report, the Potential Witness described how the Registrar commissioned the report, provides an overview of how he obtained the necessary information for

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<sup>22</sup> Observations, ICC-01/05-01/13-1602-Conf-Exp, paras 8.

<sup>23</sup> Observations, ICC-01/05-01/13-1602-Conf-Exp, para. 10.

<sup>24</sup> Observations, ICC-01/05-01/13-1602-Conf-Exp, para. 13.

<sup>25</sup> Observations, ICC-01/05-01/13-1602-Conf-Exp, para. 15.

<sup>26</sup> Observations, ICC-01/05-01/13-1602-Conf-Exp, para. 16.

<sup>27</sup> ICC-01/05-01/13-1587-Conf-Exp-AnxB.

the Report and of the methods he employed for the composition of the Report. He further presented specific facts and details, as well as an overall summary and conclusion of the Report. In view of this, the Single Judge does not find – as initially submitted by the Registry<sup>28</sup> – that all aspects of the Report are internal work product which is not to be shared outside the Registry, given that the report was presented externally during the seminar.

16. Further, the Single Judge finds that the argumentation put forward by the Registry in support of non-disclosure of the Report is somewhat incongruous. It cannot claim that the Report is irrelevant for the Kilolo Defence since it does not make findings on the operating procedure of the VWU other than on a conceptual level<sup>29</sup> and at the same time assert that it is relevant to the functioning of the VWU in relation to the protection of victims and witnesses and can therefore not be disclosed.<sup>30</sup>
17. In fact, the functioning of the VWU during the Relevant Time is precisely the reason put forward by the Kilolo Defence as to why it needs the Report for the preparation of its defence. Since the alleged offences of this case comprise witness interference and the Kilolo Defence intends to explain certain actions of the accused in view of the role and functioning of the VWU during the Relevant Time, the Single Judge considers the Report to be material to the preparation of the Kilolo Defence in order to pursue this line of defence. Accordingly, the Single Judge orders the Registry to provide the Report to the Kilolo Defence.
18. In respect of the concerns raised by the Registry as to the disclosability of the Report, the Single Judge recalls that the Chamber has repeatedly recognised the

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<sup>28</sup> ICC-01/05-01/13-1587-Conf-Exp-AnxA.

<sup>29</sup> Observations, ICC-01/05-01/13-1602-Conf-Exp, para. 8.

<sup>30</sup> Observations, ICC-01/05-01/13-1602-Conf-Exp, para. 15.

neutrality of the VWU and its statutory obligations.<sup>31</sup> However, this does not mean that the parties are not entitled to obtain information on the VWU's practices and functioning regarding the care and assistance of witnesses during the Relevant Time. The Single Judge further notes that defence counsel and the parties in general are bound by the confidential status of any information and that the circle of persons to whom information about the functioning of the VWU is provided is limited. In order to protect the confidentiality and security of the witnesses under the care of the VWU, redactions may be applied to prevent disclosure of any information specifically related to individual witnesses or case-specific information other than the Main Case, which does not go to the general functioning and working methods of the VWU. However, this general type of information cannot be redacted.

19. For the same reasons the Single Judge hereby instructs the Registry to authorise the Potential Witness to talk with the Kilolo Defence. This consent can be provided under the condition that the Potential Witness is, for all cases other than the Main Case, barred from revealing any specific information related to witnesses under the care of the VWU, case-sensitive information or any information going beyond the mere functioning and working methods of the VWU in the period of time the report is covering.
20. Additionally, and in order to ensure the expeditiousness of the proceedings, the Single Judge also instructs the Registry to authorise the Potential Witness to testify as a defence witness, should he wish to do so. This authorisation can be conditioned in the same manner as set out in the above paragraph.
21. Further, with a view to the 12 February Deadline, the Kilolo Defence is ordered to add the Potential Witness to its list of witnesses as early as possible, should it

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<sup>31</sup> See, Decision on Babala Request to Obtain Contact Details of Witnesses, 28 April 2015, ICC-01/05-01/13-924, para. 6; Decision on the Arido Request to Contact Witnesses, 13 August 2015, ICC-01/05-01/13-1147-Conf, para. 6.

decide to call him, and in any case by no later than 12 February 2016.<sup>32</sup> The Kilolo Defence is to liaise with the other defence teams in the run-up to the 12 February Deadline in order to assure that the overall order of the defence witnesses can be communicated on this date. In the same vein, should the Kilolo Defence decide to call the Potential Witness, the summary of his anticipated testimony is to be filed as early as possible and no later than 12 February 2016. Further, the Kilolo Defence is ordered to file an amended list of evidence containing the Report by this same date, should they decide to call the Potential Witness.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**ORDERS** the Registry to provide the Kilolo Defence with a copy of the Report forthwith, applying redactions, if necessary, in accordance with paragraph 18;

**ORDERS** the Registry to authorise forthwith the Potential Witness to talk to the Kilolo Defence and to testify as a defence witness, should he wish to do so, providing conditions for the authorisation in accordance with paragraph 19, if necessary; and

**ORDERS** the Kilolo Defence, should it decide to call the Potential Witness, to put him on its witness list as soon as possible, but by no later than 12 February 2016 and file a summary of his anticipated testimony and an amended list of evidence in accordance with paragraph 21.

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<sup>32</sup> Should the Kilolo Defence decide after 12 February 2016 that it does not wish to call the Potential Witness, it can still withdraw him. See Decision on Mangenda Request for Extension of Time to file an Expert Report, 20 January 2016, ICC-01/05-01/13-1555, para. 14.

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

A handwritten signature in dark ink, appearing to be 'BS', is written above a horizontal line.

**Judge Bertram Schmitt, Single Judge**

Dated 9 February 2016

At The Hague, The Netherlands