

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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 Document

**Public redacted version of "Prosecution Response to the Kilolo Defence's
Observations on the 17 March 2015 Report of the Registry Related to Seized
Material", 2 April 2015, ICC-01/05-01/13-888-Conf**

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 Office of the Prosecutor (“Prosecution”) opposes the Accused Aimé Kilolo Musamba (“Kilolo”)’s request for Trial Chamber VII (“Chamber”) to adopt a new procedure for the review of seized material recently provided by the Belgian authorities (“Transferred Material”) (“Request”).¹

2. *First*, although the Chamber is entitled to establish any modality for the review of evidence which it deems necessary, the existing procedure set down by the Pre-Trial Chamber for reviewing potentially privileged material, including the Transferred Material, fully respects the rights of the Parties² and should be maintained.

3. *Second*, the Request advances no cogent reason to replace the existing Independent Counsel, merely relying – without substantiation – on a claim previously addressed before the Court and denied.³

II. Confidentiality

4. This filing is classified as “Confidential”, as it responds to a filing of the same designation. The Prosecution does not object to its reclassification as public, should the Defence’s filing be so reclassified.

¹ ICC-01/05-01/13-866-Conf.

² See, e.g., ICC-01/05-01/13-41-Red; ICC-01/05-01/13-362-Red.

³ ICC-01/05-01/13-362-Conf.

III. Submissions

A. The Chamber should adopt the existing procedure for the review of potentially privileged material in the exercise of its discretion

5. The Chamber should adopt the procedure established by the Pre-Trial Chamber for the review of potentially privileged material.⁴ Although a Trial Chamber is not bound by the protocols and practices set down by a Pre-Trial Chamber, the established procedure for the review of potentially privileged material in this case has already proven suitable and effective. This should inform the Chamber's exercise of discretion when determining the contours of the procedure to be applied going forward. Given the nature of the case and the stage of the proceedings, the existing procedure should prevail.

6. As previously noted,⁵ the purpose of the Independent Counsel's appointment is to protect the Parties' interests and the integrity of the proceedings.⁶ The Chamber's endorsement of the continuation of the Independent Counsel's mandate is consistent with this purpose and thus, absent a compelling reason, should be forthcoming. Releasing the Transferred Material to the Independent Counsel to review for potential privilege will avoid the unnecessary delay that a substantial change in the review process will inevitably bring, and ensure the fair and expeditious conduct of the proceedings.⁷

7. Further, the Request fails to articulate a viable alternative. Notably, while referring to the pending request submitted by the Accused Jean-Pierre Bemba Gombo

⁴ ICC-01/05-01/13-41-Red.

⁵ See, ICC-01/05-01/13-842-Conf.

⁶ ICC-01/05-01/13-41-Red.

⁷ See, ICC-01/05-01/13-366-Red, p.8.

(“Bemba”) regarding the Independent Counsel’s role,⁸ there is no suggestion that Kilolo supports the alternative review process proposed by the Bemba Defence. Given (i) the absence of a viable alternative; (ii) the different proposals raised by Bemba and Kilolo; and (iii) the unlikelihood of consensus between Defence teams due to the fundamental incompatibility of their positions, the Chamber should adopt the existing procedure in the interest of procedural economy.

8. Kilolo’s request for the appointment of a new independent counsel concedes the propriety of such a mandate to review the Transferred Material. However, in proposing the current Independent Counsel’s replacement, the Request fails to take account of the substantial delay associated with appointing a new independent counsel. For example, the time it would take for new counsel to become familiar with the relevant issues in the case; his/her ability to make relevance or indeed, privilege determinations, given the nature of the allegations involved in the case; and his/her ability to make such determinations in the context of material previously vetted. The Request also fails to establish any cognisable legal justification for the proposed change. As elaborated below, the Request’s assertion that a conflict of interest arises from the Prosecution’s alleged familiarity with the Independent Counsel is baseless.

B. Continuing the present Independent Counsel’s mandate does not infringe Kilolo’s right to a fair trial

9. The Request erroneously contends that the continuation of the current Independent Counsel undermines the fairness of the proceedings because of his alleged friendship with a member of the Prosecution, based solely on their prior professional association.⁹

⁸ See, ICC-01/05-01/13-822. *See contra*, ICC-01/05-01/13-842-Conf.

⁹ ICC-01/05-01/13-866-Conf, paras.16-17.

10. This claim simply regurgitates a position advanced in multiple filings by the Bemba Defence.¹⁰ Indeed, as the Prosecution already noted, the previous professional relationship in question dates back sixteen years and precedes [REDACTED] employment with the Prosecution.¹¹ This issue was fully adjudicated and dismissed during the pre-trial phase.

11. In determining that Bemba's contention was irrelevant in view of the established system for the Independent Counsel's review for privileged material,¹² the Single Judge held:

that the mere existence of a past working relationship between [the Independent Counsel] and [REDACTED] in 1999 (which is the only fact relied upon by the Defence in support of its Request) does not cast reasonable doubts upon [the Independent Counsel's] ability to properly carry out the tasks assigned to him, in that it does not suggest any lack of independence on the part of [the Independent Counsel].¹³

12. In the same decision, the Single Judge expounded the procedural implications of the Independent Counsel's mandate, noting that:

given (i) the limited tasks assigned to [the Independent Counsel], (ii) the fact that the Defence may challenge the results of [the Independent Counsel]'s review of the concerned material and (iii) that the ultimate determination thereupon is left with the Single Judge and the Chamber as part of their judicial functions, the request for [his] disqualification as Independent Counsel due to his alleged lack of impartiality in the

¹⁰ ICC-01/05-01/13-317; ICC-01/05-01/13-353-Conf. *See also*, ICC-01/05-01/13-209.

¹¹ ICC-01/05-01/13-352-Conf, paras.5-10.

¹² ICC-01/05-01/13-362-Conf, p.6.

¹³ ICC-01/05-01/13-362-Conf, p.6.

performance of his mandate could be already rejected without further consideration.¹⁴

13. The Request advances nothing new, and fails to substantiate any conflict of interest, the claimed unethical behaviour, or any resultant infringement of Kilolo's right to a fair trial. Kilolo's cursory contentions are unsupported and manifestly insufficient to justify the discontinuation of the Independent Counsel's mandate in this case.

IV. Relief Requested

14. Based on the foregoing, the Prosecution requests that the Chamber (1) deny the Request and (2) direct the Registry to release the Transferred Material to the Independent Counsel for review without delay.



Fatou Bensouda, Prosecutor

Dated this 21st Day of June 2016
At The Hague, The Netherlands

¹⁴ ICC-01/05-01/13-362-Conf, p.5.