



Original: English

No: ICC-01/05-01/13

Date: 24 June 2016

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, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU
AND NARCISSE ARIDO***

**Public redacted version of “Request Addressed to the Single Judge Requesting the
Pre-Trial Chamber to Order the Cooperation of German Authorities with the
Defence Team of Aimé Kilolo through the Provision of Legal Assistance” (ICC-
01/05-01/13-517-Conf-Exp)**

Source: Defence for Aimé Kilolo Musamba

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Kabongo Mangenda

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Section
Other**

I. INTRODUCTION

1. *Purpose:* This Request for Assistance (“Request” or “RFA”) from the German authorities is submitted by the Defence of Mr Aimé Kilolo Musamba (“Defence” and “Mr Kilolo” respectively) to the Single Judge pursuant to Articles 56, 57, 87 and 93 of the Rome Statute (“Statute”), respectfully requesting the Single Judge order the German authorities to cooperate with the Kilolo Defence team through the provision of legal assistance vis-à-vis obtaining documents critical to the defence of Mr Aimé Kilolo Musamba in the upcoming confirmation of charges in case ICC-01/05-01/13.
2. *Confidentiality:* This Request is classified as “Confidential” as it references privileged Defence communications and discloses identifying and personal information relating to a Defence witness in ICC-01/05-01/08. Furthermore, this Request contains and discusses confidential Defence strategies not to be divulged to the Office of the Prosecutor (“Prosecutor” or “Prosecution”) or other Suspects and their respective defence teams at this time, and is thus filed *ex parte*, reserved solely for the Registry and Kilolo Defence, as per Regulation 23bis of the Regulations of the Court.
3. *Structure:* This Request will briefly expose the factual basis for submitting the Request (II), before addressing the relevance and legal reasoning supporting the Request (III).

II. FACTUAL BASIS FOR THE REQUEST

4. [REDACTED] is a Defence witness in *Prosecutor v. Jean-*
[REDACTED] the “Main Case”), of whom Mr Kilolo is
alleged by the Office of the Prosecutor (“OTP” or “Prosecutor”) of corruptly

influencing on the basis of monies transferred by Mr Kilolo to [REDACTED] during Mr Kilolo's tenure as Lead Counsel on the Main Case.

5. [REDACTED] in his capacity as a Defence witness, travelled [REDACTED] [REDACTED] on several occasions for the purpose of furnishing testimony in the Main Case. One such occasion took place on [REDACTED] [REDACTED]. On that date, [REDACTED] to the International Criminal Court in The Hague in connection with the Main Case.
6. The airline ticket for [REDACTED]'s travel to the Court was purchased by Mr Kilolo on behalf of Mr Bemba and in connection with Mr Bemba's defence in the Main Case. Indeed, as is established Court practice, witnesses travelling to the Court in connection with furnishing testimony are reimbursed any costs borne in connection with their testimonies. This includes, *inter alia*, costs related to the purchase of airline tickets, transport to and from the relevant airports, lodging, and meals.
7. Typically, the Registry is charged with the reimbursement of witnesses. However, this is only the case where the defence of the Suspect or Accused is being funded by the Court's legal aid programme by which the Court bears the expense of the Suspect's or Accused's defence. The Main Case is exceptional in this regard, as Mr Bemba does *not* enjoy the benefits of legal aid. Indeed, the Main Case remains the only case at the Court that is privately funded by the Accused himself, and is not financially associated with the Registry, including with regard to the reimbursement of witnesses.
8. As such, Mr Kilolo, as Lead Counsel in the Main Case, was charged with either providing witnesses the funds requisite to their travels to The Hague and/or with the reimbursement of such witnesses for expenses borne.
9. Such was the case with [REDACTED], for whom Mr Kilolo purchased an airline ticket with [REDACTED] for 5 June 2012, originating in [REDACTED] and landing in Amsterdam, Netherlands. The flight both departed from and returned [REDACTED] on 5 June 2012.

10. However, [REDACTED] was forced to change such flight reservation, rebooking his return flight for 6 June 2012 as opposed to 5 June 2012. For this rebooking, [REDACTED] paid a sum of sixty Euros (60 €), the standard rebooking fee charged by [REDACTED] for flights originating and taking place within [REDACTED]. [REDACTED] paid this sum himself, from his own private funds. Mr Kilolo later reimbursed to [REDACTED] this sum of sixty Euros via a Western Union transfer.
11. This Western Union transfer was later used by the Prosecution as a basis for alleging Mr Kilolo's corruption of [REDACTED], a Defence witness. Specifically, the OTP alleged that the sums transferred by Mr Kilolo to [REDACTED] were bribery payments in furtherance of a witness corruption scheme.
12. In order to prove that Mr Kilolo's transfer of funds to [REDACTED] was a legitimate act of reimbursement and *not* bribery payments in furtherance of witness corruption, Mr Kilolo must acquire a receipt of the rebooking fee paid by [REDACTED] for 60 €.
13. To this end, the Kilolo Defence team has on numerous occasions since March 2014 communicated to [REDACTED] its need for and request of a formal receipt for the rebooking in [REDACTED]'s name.¹ On 21 June 2014, the Kilolo Defence received an email communication from the [REDACTED] in Munich, Germany, confirming the rebooking of [REDACTED] his payment of 60 €, and providing informally, via email, the receipt thereof and the information concerning the rebooked flights. Confirmation by various [REDACTED] personnel on multiple separate occasions has confirmed not only the rebooking itself and the fees paid, but also the existence of a formal receipt in this regard.
14. However, in order to ensure conformity with and respect of passengers' data privacy information, [REDACTED] is unable to communicate and furnish to the Kilolo Defence team any formal receipts in that regard absent a formal request by the relevant German authorities or by this Court.² Indeed, the Senior Manager

¹ See Confidential Annex 1.

² See Confidential Annexes 2 and 3.

of [REDACTED] has indicated that they require "[REDACTED]
[REDACTED]
[REDACTED]"³ which must include an official case-file-number and the legal basis on which such documentation is sought.⁴ Upon receipt of such official document, [REDACTED] may grant the Kilolo Defence's request and furnish the relevant documentation.

III. LEGAL REASONING SUPPORTING THE REQUEST

15. The information sought by the Kilolo Defence from [REDACTED] is critical to the proper defence of Mr Kilolo and to the fair resolution of this on-going matter. Indeed, without such information, the Defence is unable to provide a full and adequate defence for Mr Kilolo.
16. The rights guaranteed under the Rome Statute and the other legal texts of the Official Journal include *inter alia* those minimum protections afforded to the accused as per the proper administration of justice, such as the right to a fair trial and public hearing.⁵ Fair trial guarantees are to be assured and ensured throughout the entire judicial process, and cannot be forsaken at any point in the proceedings.
17. The right to a fair trial is fundamental, unquestionable and inviolable, and is vital to the protection of basic constitutional and human rights. It is a right guaranteed under international criminal law both explicitly and through reference to international human rights law. This principle – embedded in all legal systems – is memorialized in every major international and regional human rights instrument⁶, including the International Covenant on Civil and Political Rights⁷,

³ Confidential Annex 3.

⁴ Confidential Annexes 3 and 4.

⁵ Rome Statute, Art. 67(1).

⁶ Universal Declaration of Human Rights, GA Res. 217A(III), UN Doc. A/810 (1948), Art. 10; African Charter of Human and Peoples' Rights, (1986) 1520 UNTS 217, Art. 7.

the European Convention on Human Rights⁸ and the American Convention of Human Rights⁹. That the right to a fair trial is a cornerstone of international human rights instruments is particularly instructive in the context of the Rome Statute, which requires that the application of the law under the Statute be subject to and interpreted in line with internationally recognised human rights,¹⁰ a practice respected and perpetuated by this Court.

18. Similarly, the Rome Statute protects the right to a fair trial vis-à-vis numerous statutory provisions which allow, for example, the Pre-Trial Chamber to take such actions as are necessary to preserve evidence or order state cooperation in the preparation of a Suspect's defence. Indeed, Article 57(3) states in pertinent part that the Pre-Trial Chamber may, "[u]pon the request of a person who has been arrested or has appeared pursuant to summons under article 58, **issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence.**"¹¹ Article 56 articulates the protective measures that may be undertaken by the Pre-Trial Chamber to ensure the efficiency and integrity of the proceedings and to protect the rights of the defence¹², including, among others, such "*action as may be necessary to collect or preserve evidence*".¹³

19. Rule 116(1) of the Rules of Procedure and Evidence is further instructive in this regard, making clear that "[t]he Pre-Trial Chamber **shall** issue an order or seek cooperation under article 57(3)(b) where it is satisfied (a) [t]hat ***such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person's defence.***"¹⁴

⁷ International Covenant on Civil and Political Rights (1966), Art. 14(1).

⁸ European Convention on Human Rights, Art. 6(1).

⁹ American Convention of Human Rights, Art. 8(1).

¹⁰ ICC-01/04-01/06-772, para. 36.

¹¹ Rome Statute, Art. 57(3) (emphasis added).

¹² Rome Statute, Art. 56(1)(b).

¹³ Rome Statute, Art. 56(2)(f).

¹⁴ International Criminal Court, Rules of Procedure and Evidence, Rule 116(1).

20. Furthermore, States Parties are obliged to cooperate fully with the Court.¹⁵

Indeed, Article 87(1)(a) specifically authorizes the Court to make cooperation requests to States Parties while Article 93 directs States Parties to comply with Court requests as regards assisting in investigations or prosecutions¹⁶, through, *inter alia*, the taking and production of evidence¹⁷, the service of judicial documents¹⁸, and the provision of records and documents¹⁹. Moreover, though relating to the trial procedure and not the pre-trial proceedings, Article 64(6)(b) is also informative as regards the Court's power to compel State cooperation in that it grants to the Trial Chamber the power to require "*the production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute.*"²⁰ This is buttressed by Court practice, by which Chambers may direct States Parties to cooperate with the Court²¹ upon a showing of *specificity, relevance, and necessity*.²²

21. As such, it is clear that the Pre-Trial Chamber is provided with the requisite legal framework to request and order a State Party – in this case, Germany – to cooperation with the Court and to assist the Defence in its efforts to obtain exculpatory evidence critical to Mr Kilolo's defence. Indeed, the Defence notes that the prompt and immediate cooperation of the German authorities is critical to Mr Kilolo's defence as regards the charges of witness corruption, and more macroscopically, to the right to a fair trial at large.

22. As elucidated above, the documents requested by the Defence from [REDACTED] Airlines - whose existence has already been informally confirmed by [REDACTED] personnel – are vital to Mr Kilolo's defence and should be furnished to the Defence vis-à-vis State cooperation. Indeed, this Request conforms to the

¹⁵ Rome Statute, Art. 86.

¹⁶ Rome Statute, Art. 93.

¹⁷ Rome Statute, Art. 93(1)(b).

¹⁸ Rome Statute, Art. 93(1)(d).

¹⁹ Rome Statute, Art. 93(1)(i).

²⁰ Rome Statute, Art. 64(6)(b).

²¹ ICC-02/05-03/09-268-Red.

²² ICC-02/05-03/09-170, para. 13 ; ICC-02/05-03/09-169, para. 17; ICC-02/11-01/11-333-Conf-Exp, para. 11.

requirements of State cooperation in that the information sought is specific, relevant and necessary.

23. In the first place, only a very limited and narrow range of information is sought by the Defence, and the documents requested have been specifically indicated as to content and purpose, thus allowing a precise determination of the specific information sought. Furthermore, the cooperation of the German authorities is demonstrably relevant to the case, in that the information sought in this Request – information that cannot be obtained without the cooperation of German authorities – is intrinsically related to Defence's strategy and serves to undercut one of the main allegations levied by the Prosecution against Mr Kilolo. Finally, the documents requested are certainly necessary in that they serve as concrete proof that Mr Kilolo did *not* tender monies for the purposes for witness corruption, but instead, for the purposes of legitimate reimbursement.
24. The Defence notes also that its efficiency and ability to structure a proper defence is somewhat crippled by the inequality of arms it suffers in the present proceedings. Indeed, though the right to equality of arms is one of the main pillars of fair trial proceedings, the Defence, not being an organ of the Court *per se* is barred from utilising certain procedures and obtaining documentation relevant to its strategy, which procedures the Prosecution may freely employ. Rather, the Defence is obliged to seek the assistance of the Court in obtaining such documentation. For example, the Defence, in seeking State cooperation, does not have the competence afforded to the Prosecutor as per Rule 176(2) to directly request assistance from States. This uneven access to evidence and documentation results in an unfair procedural inequality between the Defence and Prosecution²³, which in this case, has impeded the Defence's timely access to critical information.
25. As indicated above, the receipt by [REDACTED] is vital to Mr Kilolo's defence as it cuts at the very heart of the OTP's allegations as concerns [REDACTED]

²³ ECtHR, *H. v Belgium*, App. No. 8950/80, November 1987, para. 53.

██████████. The monies transferred by Mr Kilolo to ██████████ form the very basis of the witness corruption charges by the OTP against Mr Kilolo. Given that Mr Kilolo can – through this receipt – prove the provision of funds to ██████████ for legitimate reasons *not* relating to witness corruption – i.e., reimbursements for expenses borne by ██████████ in connection with his travels to The Hague in order to provide testimony for the defence of Jean-Pierre Bemba Gombo – this receipt proves essential, if not decisive, to Mr Kilolo's defence.

26. In this regard, the assistance of the German authorities, without which ██████████ is unable to act and the Kilolo Defence is stagnated, proves paramount. As such, the Defence urgently and fervently requests the Pre-Trial Chamber to order the cooperation of the German authorities with the Kilolo Defence in this matter so as to render more equal the legal playing field and to uphold the fair administration of justice. Specifically, the Defence requests the Single Judge to ask the German authorities to cooperate by (i) respecting the nature of this present Request, (ii) ordering ██████████ to cooperate with the requests by the Kilolo Defence as explicated in Annex 1, and (iii) by issuing a request by and in the name of the German authorities for the same information requested by the Kilolo Defence in this present Request and in Annex 1.

27. The Defence further emphasizes that this Request is of the utmost urgency and requires immediate attention as the Defence must disclose the document sought – i.e., the rebooking receipt – to the Prosecution by 15 July 2014. In order to disclose such document, however, the document must first be subject to disclosure processes such as stamping and verification of the chain of custody. To that end, the Defence must receive such receipt no later than 10 July 2014.

IV. RELIEF SOUGHT

1. The Defence for Mr Kilolo respectfully requests that the Pre-Trial Chamber II:

- Issue a Request for Assistance to the German authorities to cooperate with the Kilolo defence team by requesting that the German authorities order [REDACTED] to provide to the Kilolo Defence team the requisite documents to the payment of a sum of 60 euros for the rebooking of [REDACTED] to Amsterdam, Netherlands, on 5 June 2012, as well as any other ancillary documents including, inter alia, original airline tickets and receipts, rebooked tickets and receipts, official [REDACTED] as to the standard cost of rebooking within Europe, all information to be furnished to the Kilolo Defence no later than 10 July, 2014 ; or
- Alternatively, to issue a Request for Assistance to the German Authorities requesting that the German authorities urgently present to [REDACTED] a formal request for the aforementioned documents to be furnished by [REDACTED] to the German authorities no later than 4 July 2014, which documentation shall be furnished to the Court by the German authorities no later than 8 July 2014, and subsequently to the Kilolo Defence no later than 10 July 2014.

Maître Paul Djunga Mudimbi

Lead Counsel for Aimé Kilolo Musamba



Done this 24th June 2016 in Paris