

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 14 February 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Confidential

**Prosecution's consolidated Response to the Kilolo and Babala Defences requests
for leave to appeal decision ICC-01/05-147-Conf-Red**

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

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for the Defence of Jean-Pierre Bemba

Nicholas Kaufman

Counsel for the Defence of Aimé Kilolo Musamba

Ghislain Mabanga

Counsel for the Defence of Jean – Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Others

I. Introduction

1. The Prosecution opposes the applications of Aimé Kilolo Musamba (“Kilolo’s Application”)¹ and Fidèle Babala Wandu (Babala’s Application)² for leave to appeal the Single Judge’s “Decision on the reclassification of documents in the record of the situation and of the case” (“Decision”).³ Both Applications fail, as they do not establish any properly appealable issue arising from the Decision, under Article 82(1)(d) of the Rome Statute (“Statute”). Alternatively, the issues identified do not meet the well-established criteria for leave to appeal.

II. Confidentiality

2. Pursuant to Regulation 23bis(2), the Prosecution files this response confidentially, because Kilolo’s Application is subject to the same classification.

III. Submissions

3. Kilolo advances the following issue in support of his Application:
 - (i) The question of law whether proceedings can be fair, especially a few weeks prior to the confirmation of charges hearing, if the Defence has not been provided with the identity of an investigator, and in this case of Independent Counsel (“Kilolo’s Issue”).⁴
4. Babala advances two issues in support of his Application:
 - (i) Whether the Independent Counsel’s anonymity violates the principle of “*contradiction des débats*” (“Babala’s First Issue”);⁵ and

¹ ICC-01/05-01/13-164-Conf.

² ICC-01/05-01/13-166.

³ ICC-01/05-01/13-147.

⁴ Kilolo’s Application, para.9.

⁵ Babala’s Application, para.11.

(ii) Whether the Independent Counsel's anonymity affects the principle of the presumption of innocence ("Babala's Second Issue").⁶

5. All three Issues are interrelated in suggesting that the Independent Counsel's continued anonymity is inconsistent with the rights of a suspect under the Statute. Accordingly, they are jointly addressed.

(a) The Issues advanced are not appealable as arising from the Decision

6. The Issues advanced are abstract and are without any substantive foundation derived from the Decision. Significantly, the Defence fails to show that the continued anonymity of the Independent Counsel actually and presently affects the rights of the suspects in this case. As such, the Defence fails to raise a properly adjudicable issue.
7. The Appeals Chamber has held that "[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one."⁷ Here, the speculative and abstract nature of the Defences' claims preclude any such resolution on an interlocutory basis.

(b) The Issues do not meet the criteria for leave to appeal

8. The abstract and general legal questions whether non-disclosure of the identity of Independent Counsel impacts on the rights of the suspects under the Statute also fail to meet the criteria for leave to appeal under Article 82(1)(d). In particular, its immediate resolution by the Appeals Chamber would not materially advance the proceedings.

⁶ Babala's Application, para.11.

⁷ ICC-01/04-168 OA3, paras. 9. ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that "[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

9. The Appeals Chamber has already ruled that the identity of any persons at risk on account of the activities of the Court may be exempted from disclosure. It found that “rule 81(2) provides generally for the non-disclosure of ‘information’, without excluding *per se* certain categories of information from non-disclosure.”⁸

The Appeals Chamber further specified that:

“persons other than witnesses, victims and members of their families, may, at this stage of the proceedings, be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules. The aim is to secure protection of individuals at risk. Thus, by necessary implication, rule 81(4) should be read to include the words ‘persons at risk on account of the activities of the Court’ so as to reflect the intention of the States that adopted the Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect people at risk.”⁹

10. The Independent Counsel clearly falls within the scope of these rulings. This is so irrespective of whether or not he is qualified as an investigator, as incorrectly submitted by Kilolo.¹⁰
11. With respect to the proper process to be followed, the Appeals Chamber found that “the correct approach in such circumstances is for the Pre-Trial Chamber to rule on a case-by-case basis, pursuant to rule 81(2), where the balance of interests lies on the facts of a specific application for non-disclosure.”¹¹ Relevant considerations in this context include “the danger that the disclosure of the information may cause; the necessity of the non-disclosure, including whether it is the least intrusive measure necessary to avoid prejudice to the investigations of the Prosecutor; and the fact that any measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹²

⁸ ICC-01/04-01/07-475 OA, para.93.

⁹ ICC-01/04-01/07-475 OA, para.56.

¹⁰ Kilolo’s Application, para.9.

¹¹ ICC-01/04-01/07-476 OA2, para. 52.

¹² ICC-01/04-01/07-476 OA2, para.59; ICC-01/01-01/06-3031, para.10.

12. The Single Judge in his Decision has exactly adopted this approach when weighing all the relevant factors against each other and when coming to the conclusion that in the circumstances of this case, continuing non-disclosure of the identity and any identifying information of Independent Counsel is justified.
13. Considering the identity of the Issues raised by the Kilolo and Babala in the light of the subject matter that has already been decided by the Appeals Chamber, there is no need for a “prompt reference of the [Issues] to the court of appeal” and for its “authoritative determination” in order to help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course.”¹³
14. Similarly, the Issues raised by Kilolo and Babala do not affect the fair conduct of the proceedings and the arguments advanced by the Defence are speculative, which is insufficient to meet the criteria for leave to appeal. The abstract legal questions regarding the impact of non-disclosure of the Independent Counsel’s anonymity on the fairness of the proceedings is misconceived in light of the process established by the Appeals Chamber. The impact of non-disclosure on the rights of a suspect is one factor that a Chamber must take into consideration. It cannot be assessed in the abstract, but must be evaluated in the context of all other relevant factors.
15. Finally, because the Appeals Chamber has already ruled on the Issues advanced by Kilolo and Babala, the outcome of an appeal is foreseeable. Therefore, reference of the Issues to the Appeals Chamber would not expedite the proceedings but it will delay them for no good reason.

¹³ ICC-01/04-168, paras. 14-15, 18.

IV. Conclusion

16. For the reasons set out above, the two Applications should be rejected.



Fatou Bensouda, Prosecutor

Dated this 14th Day of February 2014
At The Hague, The Netherlands