



Original: **English**

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

Date: **4 February 2016**

TRIAL CHAMBER VII

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

Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses

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 Mangenda Kabongo

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 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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal 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), 67(1)(c) and (e), 69 and 74 of the Rome Statute ('Statute'), Rule 68 of the Rules of Procedure and Evidence ('Rules') and Regulations 23 *bis* and 43 of the Regulations of the Court, issues the following 'Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses'.

I. Procedural History

1. On 9 December 2015, after receiving provisional witness lists and time estimates from the defence teams, the Single Judge designated by the Chamber ('Single Judge') considered that the provisional estimates:

[A]ppear[ed] to be reasonable, though this is without prejudice to the Chamber concluding at a later point that estimates for certain witnesses need to be revised. This could be the case if, for example, a witness's anticipated testimony is irrelevant or goes solely to factual and/or legal matters which usurp the functions of the Chamber.¹

2. On 21 January 2016, the defence team for Mr Kilolo ('Kilolo Defence') provided its final list of witnesses and anticipated testimony summaries.²
3. On 26 January 2016, the Single Judge directed the Kilolo Defence to file submissions justifying the relevance and propriety of calling: (i) a witness expected to testify as to '*certaines des défis et des réalités pratiques*' of appearing as defence counsel in international proceedings (D21-001) and (ii) witnesses to testify as to Mr Kilolo's character, professionalism and/or ethics (including D21-004, D21-005, D21-006, D21-007 and D21-008 – collectively, 'Character Witnesses').³

¹ Further Directions on the Conduct of the Proceedings in 2016, ICC-01/05-01/13-1518, para. 15.

² Soumissions de la défense de monsieur Aimé Kilolo concernant sa liste de témoins et sa liste de preuves, ICC-01/05-01/13-1562 (with four annexes).

³ Directions Relating to Certain Defence Witnesses and Appearance Order, ICC-01/05-01/13-1578, para. 4. The Kilolo Defence at one point referenced the possibility of a sixth character witness, but has since indicated it is no

4. On 29 January 2016, the Kilolo Defence filed these submissions ('Kilolo Submissions').⁴ The Kilolo Defence requests that it be permitted to call D21-001 and its Character Witnesses.
5. On 2 February 2016,⁵ the Office of the Prosecutor ('Prosecution') responded to the Kilolo Submissions ('Prosecution Response').⁶

II. Analysis

6. Article 67(1)(e) of the Statute guarantees that the accused shall be entitled to 'obtain the attendance and examination of witnesses on his or her behalf'. Although the parties' are entitled to a degree of deference in the selection and presentation of their evidence, their discretion is not unlimited.⁷ The Chamber may intervene in these matters in order to ensure the fair and expeditious conduct of the trial, as foreseen in Articles 64(2) and (9), 67(1)(c) and 69(4) of the Statute.⁸

A. Evidence on challenges and practical realities faced by international defence counsel

7. As for D21-001, the Kilolo Defence submits that in order to properly assess Mr Kilolo's conduct, and to fully appreciate the rationale for certain actions taken by him, it is 'imperative to view that conduct within the context of the normal role and function of a defence counsel in international criminal proceedings. D21-001

longer minded to call him. *See* Defence submission to the Trial Chamber on Identity of Two Outstanding Witnesses and Request for Various Orders, 1 February 2016, ICC-01/05-01/13-1587-Conf-Red, para. 4 (confidential redacted version notified 2 February 2016).

⁴ Kilolo Defence's submissions on relevance and propriety of certain defence witnesses, ICC-01/05-01/13-1585-Conf.

⁵ The response deadline was shortened to this date. ICC-01/05-01/13-1578, para. 4.

⁶ Prosecution's Response to the Kilolo Defence's Submissions on Relevance and Propriety of Certain Defence Witnesses, ICC-01/05-01/13-1591-Conf.

⁷ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of the Chamber's 11 November 2011 Decision regarding the prosecution's witness schedule, 15 November 2011, ICC-01/05-01/08-1904-Red, paras 24-25.

⁸ *See* ICC-01/05-01/08-1904-Red, paras 24-25; Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285, para. 13 (despite the Chamber's approach that relevance considerations will be deferred until the trial judgment, the Chamber 'always retains the discretion to rule on admissibility related issues upfront when appropriate').

will provide just such context and background'.⁹ The Kilolo Defence indicates that D21-001 is expected to testify, *inter alia*, on the use of intermediaries, payments to witnesses during investigations, preparing/interviewing witnesses before their in-court testimony and cultural factors which can impact upon the work and role of defence counsel.¹⁰

8. The Prosecution objects to calling D21-001, submitting that his expected testimony is irrelevant to the specific facts and circumstances of this case.¹¹
9. The Chamber does not consider that it requires general background on the challenges and practical realities of international defence counsel for purposes of its Article 74 decision. In order to determine whether Mr Kilolo committed any offences against the administration of justice, it does not matter how defence counsel behave in the abstract. What matters is Mr Kilolo's own acts and conduct in respect of the alleged criminal offences, and there is no indication that D21-001 has any personal knowledge of any information specific to Mr Kilolo. There is also no indication that D21-001 has any specialised knowledge about the context of this particular case, such as the cultural factors or different professional obligations in the relevant African countries.¹²
10. The Chamber understands the Kilolo Defence as seeking to present D21-001's general views on how international defence counsel work, also before other courts, as a kind of baseline for interpreting the evidence on Mr Kilolo's acts and conduct. Despite the Kilolo Defence submissions to the contrary, using D21-001 for this purpose is indeed comparable to improper expert testimony, usurping the

⁹ Kilolo Submissions, ICC-01/05-01/13-1585-Conf, para. 10.

¹⁰ Kilolo Submissions, ICC-01/05-01/13-1585-Conf, paras 9-16.

¹¹ Prosecution Response, ICC-01/05-01/13-1591-Conf, paras 1, 3-14.

¹² In this regard, the defence team for Mr Babala intends to call an expert on the scope and limits of 'la solidarité africaine' in order for the Chamber to better understand 'les traditions africaines en général, et congolaises en particulier et d'apprécier à sa juste valeur le comportement de M. Babala dans ses rapports avec M. Bemba'. Annex A to the Notification de l'équipe de Défense de M. Fidèle BABALA WANDU du dépôt de sa liste de témoins, des éléments de preuve et de la divulgation des éléments par l'équipe Babala en application de la « *Decision on Defence Presentation of Evidence* » (ICC-01/05-01/13-1450) et de la « *Further Directions on the Conduct of the Proceedings in 2016* » (ICC-01/05-01/13-1518), 21 January 2016, ICC-01/05-01/13-1558-AnxA.

functions of the Chamber to decide the criminality of Mr Kilolo's acts and conduct for itself.

11. Accordingly, the specialised knowledge offered by D21-001 is irrelevant and inappropriate in order for the Chamber to understand the evidence presented. The Kilolo Defence is ordered to strike D21-001 from its list of witnesses.

B. Character Witnesses

12. As for the Character Witnesses, the Kilolo Defence submits that this is a case in which the character, professionalism and ethics of Mr Kilolo have been called into question by the Prosecution and the witnesses they have called. The Kilolo Defence explains that the Character Witnesses are called so as to rebut such challenges and to highlight the exemplary character and professional practices of Mr Kilolo over the course of his professional career'.¹³
13. The Prosecution defers to the Chamber's discretion as to the Character Witnesses. It submits that while such evidence is, in principle, relevant to an accused's propensity to commit an offence, or the mitigation of a potential sentence, a Chamber may reasonably restrict such evidence where cumulative to ensure the fair and efficient conduct of the proceedings.¹⁴
14. The Chamber notes that the Kilolo Defence seeks to present evidence of the accused's good character for purposes of the assessment of his/her guilt or innocence. Contrary to what the Kilolo Defence claims, this case is not about Mr Kilolo's 'character, professionalism and ethics'¹⁵ but whether Mr Kilolo's acts and conduct were criminal with respect to the relevant witnesses in *The Prosecutor v. Jean-Pierre Bemba Gombo* case (ICC-01/05-01/08). Evidence that Mr Kilolo

¹³ Kilolo Submissions, ICC-01/05-01/13-1585-Conf, paras 22-26.

¹⁴ Prosecution Response, ICC-01/05-01/13-1591-Conf, paras 1,15.

¹⁵ Kilolo Submissions, ICC-01/05-01/13-1585-Conf, para. 22.

conducted his work ethically with respect to other witnesses in other contexts does little to contribute to this assessment.

15. In light of the foregoing, the Chamber is not persuaded that the proposed evidence of Mr Kilolo's good character has much – if any – relevance to the Chamber's Article 74 decision.¹⁶ The Chamber will therefore not allow the Kilolo Defence to call five witnesses during trial on ancillary matters like his overall good character. The Chamber will not permit an inefficient presentation of evidence, even if such a presentation would fall within the time allotted to the Kilolo Defence to present its evidence.¹⁷
16. This said, and noting the seriousness of the allegations against Mr Kilolo and that character witnesses constitute more than half of his list of evidence, the Chamber considers it in the interest of fairness to give the Kilolo Defence an opportunity to present this evidence. The Chamber considers that evidence of Mr Kilolo's good character does not constitute the 'acts and conduct of the accused' for purposes of the procedural bar set by Rule 68(2)(b) of the Rules.¹⁸ This is because Rule 68(2)(b)

¹⁶ There does not seem to be a consistent pattern in other international criminal cases as to whether good character evidence is generally admissible when considering the guilt or innocence of the accused. *Compare* ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujan, 31 January 2000, IT-94-1-A-R77, para. 130 ('the Appeals Chamber has also taken into account as relevant to the guilt or innocence of the Respondent the evidence which was given as to his character. Such evidence is relevant because it bears on the questions as to whether the conduct alleged to constitute contempt was deliberate or accidental, and whether it is likely that a person of good character would have acted in the way alleged') *with* ICTY, Trial Chamber, *Prosecutor v. Zoran Kupreskic et al.*, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque* (concluding that 'as a general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the accused's propensity to act in conformity therewith', but allowing for each accused to call one character witness in the interests of fairness and to corroborate that witness with affidavits of other witnesses).

¹⁷ *In this regard, see* ICC-01/05-01/13-1518, para. 17.

¹⁸ Rule 68(2)(b) of the Rules allows for the introduction of prior recorded testimony when 'the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused'. Rule 68 also requires that the prior recorded testimony be accompanied by a declaration witnessed by an authorised person. This authorised person does not necessarily need to have legal training, particularly in circumstances where – as here – the witnesses in question are lawyers. On authority from the Chamber, it is the Registry Legal Counsel that decides who to delegate as an appropriate authorised person. Decision on the Prosecution's Request to Designate a Person Authorised to Witness a Declaration Under Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-01/05-01/13-1109.

of the Rules excludes submission of evidence relating only to the acts and conduct of the accused as alleged in the confirmed charges.¹⁹

17. If the Kilolo Defence presents prior recorded testimony of the Character Witnesses in a manner compliant with Rule 68(2)(b) of the Rules, then, subject to any objections raised by the other parties, the Chamber will recognise the submission of this testimony despite its reservations as to its relevance. Such rulings would be without prejudice to considering submission of any further evidence from the other parties in response to these matters.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Kilolo Defence request to call D21-001 as a witness;

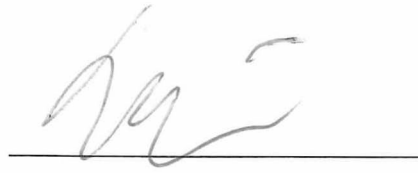
PERMITS the Kilolo Defence to present the testimony of D21-004, D21-005, D21-006, D21-007 and D21-008 in accordance with paragraphs 16-17 above;

ORDERS the Kilolo Defence to file an amended list of witnesses with D21-001 removed forthwith; and

ORDERS the Registry to reclassify the Kilolo Submissions (ICC-01/05-01/13-1585-Conf) and Prosecution Response (ICC-01/05-01/13-1591-Conf) as ‘public’.

¹⁹ ICTY Trial Chambers have also not barred character evidence of an accused as ‘acts and conduct’ for purposes of the ICTY analogue to Rule 68(2)(b), namely Rule 92 *bis* of the ICTY Rules. ICTY, Trial Chamber, *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Decision Partially Granting Stojan Župljanin’s Motion for Admission of Evidence Pursuant to Rule 92 *Bis*, 21 July 2011, IT-08-91-T, paras 25-26; ICTY, Trial Chamber, *The Prosecutor v. Jadranko Prlić et al.*, Decision on Prlić Defence Motion for Admission of Written Statements Pursuant to Rule 92 *Bis*, 25 November 2008, paras 11-12.


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

A handwritten signature in black ink, appearing to be 'BS', written over a horizontal line.

Judge Bertram Schmitt, Presiding Judge

A handwritten signature in black ink, appearing to be 'M. Perrin de Brichambaut', written over a horizontal line.

Judge Marc Perrin de Brichambaut

A handwritten signature in black ink, appearing to be 'Raul C. Pangalangan', written over a horizontal line.

Judge Raul C. Pangalangan

Dated 4 February 2016

At The Hague, The Netherlands