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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 Sentencing Witnesses and Setting an Article 76(2) Hearing

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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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), 74(2) and 76 of the Rome Statute ('Statute') and Rules 68 and 143 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing'.

I. Procedural history

1. On 20 October 2016, the Single Judge of the Chamber set a calendar for sentencing ('Sentencing Calendar').¹ The first deadline required the parties to provide the identities of any witnesses they seek to call for sentencing, along with estimated examination lengths and anticipated testimony summaries, by 4 November 2016. In setting this deadline, the Single Judge emphasised that 'the Chamber may intervene in the selection and presentation of their evidence in order to ensure the fair and expeditious conduct of the trial'.² The parties were also informed that the date of a sentencing hearing would be confirmed following receipt of these 4 November submissions, with the Presiding Judge indicating a provisional inclination to set this hearing during the week of 12 December 2016.³
2. On 4 November 2016, the Office of the Prosecutor ('Prosecution')⁴ and the defence teams for Mr Bemba ('Bemba Defence'),⁵ Mr Kilolo ('Kilolo Defence'),⁶

¹ Sentencing Calendar, ICC-01/05-01/13-1990.

² ICC-01/05-01/13-1990, para. 2(i).

³ ICC-01/05-01/13-1990, para. 2(i) footnote 3.

⁴ Prosecution's Notification of Witness Summaries for Sentencing Proceeding, ICC-01/05-01/13-2009 (with confidential annex) ('Prosecution Submission').

⁵ Response to Directions Concerning the Sentencing Calendar, ICC-01/05-01/13-2002 (with confidential annex) ('Bemba Defence Submission').

⁶ Communication de la Liste des Témoins de la Défense de Monsieur Aimé Kilolo Musamba pour la Fixation de la Peine, ICC-01/05-01/13-2010 (with two confidential annexes) ('Kilolo Defence Submission').

Mr Mangenda ('Mangenda Defence'),⁷ Mr Babala ('Babala Defence')⁸ and Mr Arido ('Arido Defence')⁹ duly filed their submissions.

3. On 9 November 2016, at the request of the Chamber,¹⁰ the Victims and Witnesses Unit ('VWU') filed a report on whether essential arrangements for the proposed witnesses could be completed by 12 December 2016.¹¹ On the information available to it, the VWU indicated that it is able to facilitate the appearance of all the proposed witnesses by 12 December.

II. Sentencing witnesses

4. Noting that the Mangenda Defence and Arido Defence indicate that they do not intend to call any witnesses,¹² the Chamber will turn its attention to the witnesses identified by the remaining four parties.
5. As a threshold point, the Chamber notes that some parties present their witnesses with reference to Rule 68(2)(b) or (3) of the Rules.¹³
6. The Chamber does not consider it necessary for the parties to meet the procedural pre-requisites of Rule 68 in order to submit post-conviction witness statements in writing for sentencing.¹⁴ For purposes of a trial judgment, the

⁷ Notice of Witnesses For Sentencing, ICC-01/05-01/13-2005 ('Mangenda Defence Submission').

⁸ Soumission de la Défense de M. Fidèle BABALA WANDU de sa liste des témoins, ICC-01/05-01/13-2003 (with confidential annex) ('Babala Defence Submission').

⁹ Narcisse Arido's Notice of Witnesses For Sentencing, ICC-01/05-01/13-2008 ('Arido Defence Submission').

¹⁰ Email from Trial Chamber VII Communications to the Registry and parties, 7 November 2016 at 12:47.

¹¹ Victims and Witnesses Unit's report on the appearance of witnesses for the sentencing hearing, ICC-01/05-01/13-2018-Conf.

¹² Mangenda Defence Submission, ICC-01/05-01/13-2005, para. 1; Arido Defence Submission, ICC-01/05-01/13-2008, para. 2.

¹³ Annex A of the Prosecution Submission, ICC-01/05-01/13-2009-Conf-AnxA, page 2; Bemba Defence Submission, ICC-01/05-01/13-2002, para. 2. Rule 68(2)(b) permits the introduction of prior recorded testimony from witnesses not present before the Chamber. Such testimony must go to proof of a matter other than the acts and conduct of the accused and meet further procedural requirements specified in the rule. Rule 68(3) permits the introduction of prior recorded testimony from witnesses who do appear before the Chamber, provided that he/she does not object to the submission of this testimony and the parties and Chamber have an opportunity to examine the witness.

¹⁴ This Chamber has already considered that the procedural pre-requisites of Rule 68 do not need to be met in all contexts where prior recorded testimony is relied upon. *See* Decision on Bemba Defence Application for Admission of D20-2's Prior Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules, 29 March 2016, ICC-01/05-01/13-

Chamber's decision shall be based on its 'evaluation of the evidence and the entire proceedings'.¹⁵ However, the Chamber is further limited by the Statute to base its judgment 'only on evidence submitted and discussed before it at the trial'.¹⁶ In contrast, Article 76(1) of the Statute provides that the Chamber shall consider the appropriate sentence to be imposed and 'shall take into account the evidence presented *and submissions made* during the trial that are relevant to the sentence' (emphasis added).

7. The Statute therefore foresees that the Chamber may take into account non-evidentiary submissions for sentencing purposes,¹⁷ meaning that Rule 68 procedural pre-requisites are not a procedural bar for sentencing in the same way they are at trial. It is noted in this regard that other chambers of this Court introduced written witness statements or expert reports at sentencing without exploring whether the Rule 68 prerequisites were met.¹⁸ The statutory schemas

1753, paras 8, 11-12 (prior recorded testimony failing to meet the Rule 68(2)(b) criteria can nevertheless be relied upon as supporting material for procedural motions).

¹⁵ Article 74(2) of the Statute.

¹⁶ Article 74(2) of the Statute.

¹⁷ One example of such information would be the views and concerns of victims, which are not considered as evidence during trial but could be considered for sentencing purposes. *For example, see* Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, ICC-01/05-01/08-3399, para. 7 and footnotes 94, 96, 119, 127, 128, 157, 163 (relying on the views and concerns of two victims who spoke at the sentencing hearing); Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138 (notified 23 February 2012), paras 19-20.

¹⁸ Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Transcript of Hearing, 22 August 2016, ICC-01/12-01/15-T-4-Red-ENG, page 3 line 20 to page 4 line 15; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, 4 May 2016, ICC-01/05-01/08-3384, para. 15; Trial Chamber II, *The Prosecutor v. Germain Katanga*, Order on the Prosecution and Defence requests for admission of documentary evidence into the record of the sentencing proceedings and on the Legal Representative's request for reclassification of a Registry report, 10 April 2014, ICC-01/04-01/07-3463-Conf-tENG, para. 8 ('With respect, in particular, to the written statements of the four witnesses which the Defence wishes to file into record, the Chamber considers that these evidentiary items satisfy the relevancy requirement stipulated in article 76(2) of the Statute and sees no obstacle to their being admitted into the record, considering that: (1) the Defence has expressly requested this; (2) the Prosecution, subject to the condition specified in paragraph 4 above, is not opposing it; (3) they will be examined and, where appropriate, considered by the Chamber strictly for the purposes of the sentencing proceedings and in particular where it is necessary to consider the existence of mitigating circumstances; and (4) they relate to issues which are not challenged by any of the parties.').

of other international tribunals likewise require chambers to consider ‘any relevant information’, not just evidence, in the determination of a sentence.¹⁹

A. Character witnesses

8. The Kilolo Defence seeks to call four character witnesses whose statements were already introduced during the trial.²⁰ The Kilolo Defence further seeks to call Mr Kilolo’s neighbour and brother to testify as to certain aspects of Mr Kilolo’s personal life and character.²¹ The Babala Defence seeks to call two witnesses: (i) one who will testify on Mr Babala’s personal and spiritual life and (ii) a Congolese MP who will testify to Mr Babala’s role in the community, his political engagements, and his work in defending democracy and the rule of law in his country.²² All eight of these witnesses were proposed to testify *viva voce*.

9. The Chamber does not consider that it is necessary to receive this character witness testimony live in order to properly evaluate it in its sentencing decision. There is no indication that the matters sought to be established by these witnesses are materially in dispute, and the Chamber does not consider any undue prejudice is caused by receiving this information without the witnesses being questioned by the other parties. Further, to the extent that the Kilolo Defence already introduced the written statements of four of these character

¹⁹ ICTY, Rules of Procedure and Evidence, Rule 100(A); ICTR, Rules of Procedure and Evidence, Rule 85(A)(vi); MICT, Rules of Procedure and Evidence, Rule 102(A)(vi); SCSL, Rules of Procedure and Evidence, Rule 100(A); RSCSL, Rules of Procedure and Evidence, Rule 100(A); STL, Rules of Procedure and Evidence, Rule 171(A). *See also* ICTY, Appeals Chamber, *Zejnir Delalić et al.*, Judgement, 20 February 2001, IT-96-21-A, para. 787 (‘there is a relevant distinction in the role of a fact-finder at trial and a sentencing judge, who is not restrained by the same rules. Rather, it is essential that the sentencing judge is in “possession of the fullest information possible concerning the defendant’s life and characteristics”’).

²⁰ Annex B of the Kilolo Defence Submission, ICC-01/05-01/13-2010-Conf-AnxB, pages 2-5 (D21-4, D21-5, D21-6 and D21-8). *See also* Decision on the ‘Motion on behalf of Mr Aimé Kilolo for the Admission of the Previously Recorded Testimony pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence’, 29 April 2016, ICC-01/05-01/13-1857; Registry submission of the declarations made by witnesses CAR-D21-0007 and CAR-D21-0008 pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence, 15 June 2016, ICC-01/05-01/13-1933-Conf.

²¹ Annex B of the Kilolo Defence Submission, ICC-01/05-01/13-2010-Conf-AnxB, pages 6-8.

²² Annex of the Babala Defence Submission, ICC-01/05-01/13-2003-Conf-Anx. This annex identifies three witnesses, but the Babala Defence subsequently indicated that it was withdrawing D22-7. Email from the Babala Defence to the Chamber and parties, 9 November 2016 at 11:03.

witnesses during trial, a *viva voce* presentation of these and additional character witnesses in relation to Mr Kilolo is cumulative.

10. The Chamber considers that hearing the live testimony of these witnesses would constitute an inefficient sentencing presentation which might be disproportionate to the anticipated value of this evidence. In order to ensure the fair and expeditious conduct of the trial, the Chamber determines that the Kilolo and Babala Defence may only present their character witnesses through written witness statements.

B. Psychologist and psychiatrist

11. The Bemba Defence indicates that it intends to submit a psychological expert evaluation of Mr Bemba in relation to the impact of his detention conditions on his state of mind and interaction with third parties.²³ The Kilolo Defence intends to call a psychiatrist *viva voce* to testify as to Mr Kilolo's '*profil de personnalité*' and the psychological impact Mr Kilolo's detention had on his professional and family life.²⁴

12. The Chamber considers that the Bemba Defence request to submit their expert evaluation in writing is reasonable. The Chamber considers that no undue prejudice is caused by receiving this information without the witness being questioned by the other parties.

13. As for the Kilolo Defence expert, the Chamber considers that this witness's statement may only be introduced in writing. Issues like the psychological impact Mr Kilolo's detention had on him do not appear to be materially in dispute, and the Chamber considers that no undue prejudice is caused by receiving this information without the witness being questioned by the other parties. Hearing the live testimony of such an expert would constitute an

²³ Bemba Defence Submission, ICC-01/05-01/13-2002, para. 2; ICC-01/05-01/13-2002-Conf-AnxA.

²⁴ Annex B of the Kilolo Defence Submission, ICC-01/05-01/13-2010-Conf-AnxB, page 9.

inefficient sentencing presentation which might be disproportionate to the anticipated value of this evidence. The Chamber does not consider that it is necessary to receive such expert testimony live in order to properly evaluate it in its sentencing decision.

C. Prosecution witness

14. The Prosecution proposes to call one witness to provide evidence allegedly going to Mr Arido's attempt to obstruct justice in this case ('Prosecution Witness').²⁵ The Prosecution identifies the mode of testimony as 'Rule 68(2)(b) or 68(3)'.²⁶ If the Prosecution Witness appears, the Prosecution proposes a two hour direct examination and the following protective measures: (i) image and voice distortion; (ii) use of a pseudonym and (iii) private/closed session to protect identity.²⁷
15. The VWU confirms that the Prosecution Witness was known to it before the 4 November deadline submissions and would only require a visa to travel to the seat of the Court.²⁸
16. Although the Prosecution offers to submit its witness's statement only in writing, the Chamber considers that procedural fairness demands that the Prosecution Witness also appear to be examined by the other parties. If the Prosecution does not wish to expose this witness to such an examination, then it must withdraw him. The anticipated testimony summary raises serious allegations, and the Arido Defence in particular should be afforded an opportunity to challenge them.
17. The Registry is directed to arrange for a Rule 74 counsel for the Prosecution Witness following the same procedures utilised during trial. As for the

²⁵ Prosecution Submission, ICC-01/05-01/13-2009, paras 2-4.

²⁶ Annex A of the Prosecution Submission, ICC-01/05-01/13-2009-Conf-AnxA, page 2.

²⁷ Annex A of the Prosecution Submission, ICC-01/05-01/13-2009-Conf-AnxA, page 2.

²⁸ ICC-01/05-01/13-2018-Conf, para. 9.

Prosecution's requested protective measures, any responses to these requested measures must be filed by 28 November 2016.

18. If and when the Prosecution Witness appears, the Chamber emphasises that he may only be examined on the matters allegedly proving that Mr Arido attempted to obstruct justice in this case. This is not a further opportunity to litigate the merits of the present case, as the Chamber has already decided upon the merits of this case in its judgment.

III. Sentencing hearing

19. Given that the Chamber considers it necessary and appropriate to hear only one of the 11 witnesses proposed, it sees no reason why the sentencing hearing cannot be set for 12-14 December 2016, as previously foreshadowed in the Sentencing Calendar.

20. The general structure of the hearing will be as follows:

- (i) Examination of Prosecution Witness: two hours for the Prosecution's examination, followed by four hours of defence team examination to divide as the five teams see fit;²⁹
- (ii) Oral sentencing submissions by the Prosecution: three hours total, noting that the Prosecution must make arguments applicable to all five convicted persons and
- (iii) Oral sentencing submissions by the defence teams: 1.5 hours for each defence team.

²⁹ This 1:2 ratio follows the estimates for all other Prosecution witnesses. Directions on the conduct of the proceedings, 2 September 2015, ICC-01/05-01/13-1209, paras 13-14.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the parties to submit any written witness statements, in accordance with paragraphs 10 and 12-13 above, by 23 November 2016;³⁰

DECIDES that the Prosecution Witness must testify before the Chamber in order for his evidence to be considered;

DIRECTS the defence teams to respond to the Prosecution's requested protective measures for its witness in accordance with paragraph 17 above; and

SETS a sentencing hearing for 12-14 December 2016, in accordance with paragraphs 19-20 above.

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



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 11 November 2016

At The Hague, The Netherlands

³⁰ See Sentencing Calendar, ICC-01/05-01/13-1990, para. 2(ii).