

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 17 August 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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 Document

Prosecution's response to "Kilolo Defence Motion on Scope of Evidence and Allegations"

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**

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

Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell

Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Mr Philippe Larochelle

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**

I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the Kilolo Defence Motion on Scope of Evidence and Allegations ("Motion").¹ The Motion misapprehends the Confirmation Decision, belies a misunderstanding of the charges, their legal elements, the burdens of proof and functions of the Pre-Trial and Trial Chamber at the confirmation and trial stages, respectively, and erroneously implies that factual findings made by Trial Chamber III in respect of witnesses or events bind this Chamber. The Motion should be summarily dismissed.

II. Confidentiality

2. This filing is classified as "Confidential", as it responds to a filing of the same designation. The Prosecution does not oppose its reclassification as "Public".

III. Submissions

3. Kilolo's assertion that Pre-Trial Chamber II has abdicated its power to pronounce on the crux of this case, namely the alleged false testimony of the 14 witnesses,² defies logic and the plain wording of the Confirmation Decision.³ It further erroneously assumes that substantive issues in a criminal case are coextensive with, and limited to, its merits. They are obviously not. Kilolo's resultant request to preclude the Prosecution from adducing evidence in this case on substantive issues in the Main Case fails on this basis alone.

4. In the Confirmation Decision, Pre-Trial Chamber II merely stated that it was not able to evaluate the *objective* accuracy of the witness' testimony as to the merits of the

¹ ICC-01/05-01/13-1138-Conf.

² ICC-01/05-01/13-1138-Conf, paras.3-11, 13.

³ ICC-01/05-01/13-749.

Main Case – namely, the charged crimes and Bemba's guilt – as it "obviously" did not possess the means to do so.⁴ However, this did not foreclose the Pre-Trial Chamber's determination that there are substantial grounds to believe that Defence witnesses falsely testified on substantive matters relevant to the charges against Bemba, including the basis of their knowledge for the matters concerning Bemba's responsibility, such as their military status, or participation in campaigns on the ground.⁵

5. Assuming *arguendo* that the *objective* accuracy of facts asserted in the testimony of witnesses going to the merits of the Main Case is relevant to this case, this does not attenuate the Accused's responsibility here, having allegedly put, or helped put, those words in the witnesses' mouth.⁶

6. The Motion misunderstands the meaning of "false testimony" under the Rome Statute ("Statute").⁷ As the Pre-Trial Chamber stated clearly in the Confirmation Decision, a witness' testimony is false where they withhold a true fact in as much as when they assert a false one.⁸ Thus, for example, a witness who withholds, let alone misrepresents, the true basis of knowledge or lack thereof for the facts they assert – even if those facts are objectively accurate – nevertheless testifies falsely in violation of article 70(1)(a). Likewise, a counsel presents false evidence, where they are aware that the witness' basis of knowledge of the facts testified to as represented to the Court is false, notwithstanding that those facts may be *objectively* accurate.

7. As such, nothing in the Confirmation Decision is internally inconsistent or contradictory on this issue, or precludes this Chamber's assessment of the alleged false testimony of Main Case witnesses on substantive matters in that case.

⁴ ICC-01/05-01/13-749, para.64.

⁵ *Ibid.*

⁶ See *contra* ICC-01/05-01/13-1138-Conf, para.17.

⁷ See article 70(1)(a) of the Statute.

⁸ ICC-01/05-01/13-749, para.28.

8. Moreover, nothing in the Statute would preclude the use of evidence going to the merits of the Main Case to prove the charges here. While the Confirmation Decision may define the scope of charges to be tried,⁹ it does not similarly constrain the *evidence* going to their proof.¹⁰

9. Contrary to the Motion,¹¹ an assessment of the truthfulness of the witnesses' testimonies is not exclusive to Trial Chamber III. Taken to its logical extension, such a suggestion would preclude any prosecution for false testimony except before the Chamber which received it. This is clearly not the case. Further, Trial Chamber III's credibility findings as to Defence witnesses in the Main Case cannot be dispositive of the merits of the article 70 charges for two reasons: (i) the question of whether any given witness lied in giving evidence is not before Trial Chamber III as an ultimate issue: although the falseness of a witness' evidence is relevant to their credibility, the latter need not depend on any such finding, but may turn instead on the witness' accuracy, reliability, trustworthiness, etc; and (ii) even if Trial Chamber III determined that a given witness' evidence was not false, such an assessment would have been made on evidence different from that to be adduced in this case. In neither case, can the findings of Trial Chamber III in any way dispose of or constrain this Chamber's consideration of the merits of *this* case on the basis of the evidence before it.

⁹ See e.g. article 74(2) of the Statute; see also ICC-01/05-01/13-992, para.12.

¹⁰ ICC-01/04-01/06-2205 OA15 OA16, fn.163: "In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged".

¹¹ ICC-01/05-01/13-1138-Conf, paras.9, 16-17.

IV. Relief Requested

10. For the foregoing reasons, the Prosecution requests Trial Chamber VII to dismiss the Motion.



Fatou Bensouda, Prosecutor

Dated this 17th Day of August 2015
At The Hague, The Netherlands