

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 19/08/2015

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

Confidential

**Defence Response to the Kilolo Defence Motion on Scope of Evidence and
Allegations (ICC-01/05-01/13-1138-Conf)**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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 Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for the Defence of Mr Aimé Kilolo Musamba

Paul Djunga

Steven Powles

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken De Vreuschmen

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Azama Shalie Rodoma

Counsel for the Defence of Mr Narcisse Arido

Charles Achaleke Taku

Philippe Larochele

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

Introduction

1. On 10 August 2015, the Defence for Me. Kilolo filed the 'Kilolo Defence Motion on Scope of Evidence and Allegations' (the Motion),¹ in which the Defence for Me. Kilolo requested as its primary relief ('Requested Relief'):

- i. That the Trial Chamber indicates whether it, like the Pre-Trial Chamber, is not in a position to assess the reliability and truthfulness of Witnesses' on issues pertaining to the merits of the Main Case;
- ii. If so, prohibit the Prosecution from adducing evidence that goes to such issues.

2. The Defence for Mr. Jean-Pierre Bemba fully supports the Requested Relief.

3. As observed by the Defence for Me. Kilolo, it would appear from the Prosecution's Pre-Trial Brief that the Prosecution is attempting to litigate issues before the Article 70 Chamber, which concern Mr. Bemba's alleged responsibility in the Main case.

4. This falls outside the scope of the confirmed charges, and prejudices the rights of Mr. Bemba.

5. The ICC Prosecution had both the power and the discretion to either:

- i. Put their case to Defence witnesses in the Main Case concerning allegations that witnesses lied on substantive issues pertaining to their testimony, or request that the witnesses be recalled in order to enable the Prosecution to do so;
- ii. Defer the initiation of the Article 70 (and its application for arrest warrants) until after the completion of the Main Case;

¹ ICC-01/05-01/13-1138-Conf.

iii. Request that the Article 70 charges be joined to those of the Main Case; or

iv. Request the referral of the Article 70 case to a national authority to prosecute.

6. The Prosecution chose to pursue none of these options.

7. It is therefore unfair and inappropriate for the Prosecution to utilise the Article 70 case as a vehicle for re-litigating issues, which are central to the charges in the Main Case.

Level of Classification

8. This response has been filed on a confidential basis in order to accord with the classification of the Motion, and the Prosecution's Pre-Trial Brief. The Defence nonetheless has no objection to the reclassification of this response as public.

Submissions

9. As highlighted by the Defence for Me. Kilolo,² the Pre-Trial Chamber found that it "was not in a position to assess the reliability and truthfulness of the Witness' testimony on issues pertaining to the merits of the Main Case".³

10. This "position" has not changed in the interim, and will not change.

11. Trial Chamber III is currently seized with the responsibility for adjudicating the fact and circumstances of the charges in Case No. ICC-01/05-01/08.

² Motion, para. 3.

³ ICC-01/05-01/13-749, para. 64.

12. Although there is no explicit rule of *lis pendens* or *res judicata* at the ICC, Article 20(1) of the Statute expressly prohibits two separate Chambers from adjudicating the same conduct against the same defendant.

13. Rule 165(4) also envisages that the Trial Chamber may – where appropriate – direct that Article 70 charges be joined to a ‘Main Case’. This suggests that the drafters were alert to the fact that joinder might be necessary if the Article 70 allegations are tied to issues, which are pending before a Trial Chamber. Conversely, where joinder has not occurred, parallel litigation should be avoided.⁴

14. This is consistent with the (limited) practice of International Tribunals, according to which prosecutions concerning false testimony or evidence were initiated after the completion of the related case, and after a prior judicial finding that the testimony or evidence in question lacked veracity.⁵

15. This Trial Chamber has, moreover, emphasised that,

it is not the purpose of these proceedings to re-litigate the Main case.
Submissions that attempt to do so will not be entertained.⁶

16. In line with this direction, clear parameters concerning the scope of the charges in this case are required to avoid re-litigation of key factual issues from the Main Case, in a forum which offers less procedural protections for the Defence.

17. The risk that such re-litigation could occur stems from the specific nature of the Prosecution’s allegations in this case.

⁴ ICC-01/05-01/08-3029, fn. 51.

⁵ See for example, the findings of the ICTR Appeals Chamber in *Prosecutor v. Kamuhanda*, Appeals Judgment, 19 September 2005, paras. 219-221, which preceded the indictment issued against Witness GAA on 11 July 2007 (see *Prosecutor v. GAA*, Sentencing Judgment, 4 December 2007, para. 1). In the Milan Lukic, the ‘false evidence’ was disclosed to the Prosecutor but was never tendered at trial, the witness and Defence team member involved acknowledged that the evidence was false, and the indictments in the contempt case were issued several months after the trial judgment was issued on 20 July 2009: See *Prosecutor v. Jelena Rasic*, IT-98-32/1-R77.2, ‘Written Reasons for the Sentencing Judgment’, 6 March 2012; Indictment against Zuhdija Tabakovic, Case no: IT-98-32/1-R77.1 , 22 December 2009.

⁶ ICC-01/05-01/13-1154, para. 14.

15. The charges against Mr. Bemba and others include allegations pertaining to Articles 70(1)(a), (b) and (c).

16. Even if actual falsity is not required for Article 70(1)(c), it is an essential criterion as concerns Articles 70(1)(a) and (b). Whereas Article 70(1)(c) captures conduct directed towards corrupting evidence or the testimony of a witness, Articles 70(1)(a) and (b) require the Prosecution to establish that false evidence or testimony was intentionally presented to the Court.⁷

17. The Prosecution has advanced the position that “[t]estimony is false where it affirms a false fact, or negates, withholds or partially accounts for a true fact”.⁸ The Prosecution has further asserted that the ‘falseness of evidence’ under Article 70(1)(b) must be defined in the same manner.⁹

18. Both provisions therefore require the Chamber to ascertain whether the substance of the testimony or evidence is factually true.

19. If the substance of the testimony or evidence were to intrude into the facts and circumstances underpinning the allegations in Case No. ICC-01/05-01/08, Trial Chamber VII would be called upon to adjudicate the truthfulness or falsity of factual issues, which are either pending before Trial Chamber III, or the Appeals Chamber (in the future), or are *res judicata*.

20. In its Pre-Trial Brief, the Prosecution has attempted to draw several critical Main Case issues into the ambit of Articles 70(1)(a) and (b). This includes, but is not limited to, allegations that witnesses presented false evidence in relation to:

i. The commanders of MLC troops in the CAR;¹⁰

ii. The dates and arrival of MLC troops in the CAR;¹¹

⁷ Cf with ICC-01/05-01/13-1157-Conf, para. 5, in which the Prosecution appears to conflate Article 70(1)(c) conduct with false testimony under Article 70(1)(a).

⁸ ICC-01/05-01/13-1110-Conf, para. 220.

⁹ ICC-01/05-01/13-1110-Conf, para. 222.

¹⁰ ICC-01/05-01/13-1110-Conf, para. 69.

- iii. The dates and composition of the Centre de Commandement des Opérations (CCOP) in CAR;¹²
- iv. Mr. Bemba's command and control over MLC troops;¹³
- v. The names of CAR military leaders, who exercised command and control over MLC troops;¹⁴
- vi. The presence of the MLC at certain locations,¹⁵ and the dates of troop movements;¹⁶
- vii. The identity of the perpetrators of crimes;¹⁷
- viii. Mr. Bemba's knowledge of crimes committed in CAR;¹⁸
and
- ix. The movement of Bozize rebels;¹⁹

21. These issues are still 'live' issues in the Main Case.

22. Although the Defence for Mr. Bemba did not rely on the fourteen witnesses in its Final Trial Brief or Closing Submissions, it did not resile from or modify its position concerning the above issues, which are corroborated by other evidence (including Prosecution evidence).

23. Any litigation as to the veracity of these issues in the Article 70 case would therefore require the parties to both access, and consider the credibility of related evidence.

¹¹ ICC-01/05-01/13-1110-Conf, para. 69, para. 84

¹² ICC-01/05-01/13-1110-Conf, para. 69,

¹³ ICC-01/05-01/13-1110-Conf, para. 69.

¹⁴ ICC-01/05-01/13-1110-Conf, para. 71

¹⁵ ICC-01/05-01/13-1110-Conf, para. 73, 84

¹⁶ ICC-01/05-01/13-1110-Conf, para. 95

¹⁷ ICC-01/05-01/13-1110-Conf, para. 95

¹⁸ ICC-01/05-01/13-1110-Conf, para. 98, 105

¹⁹ ICC-01/05-01/13-1110-Conf, para. 111.

24. It would also require Trial Chamber VII to render a judicial determination on facts and circumstances, which are part of the charges in the Main Case.

25. The Decision confirming the charges in the Main Case was predicated on:

- i. The movements of the rebels;²⁰
- ii. The arrival of MLC troops in CAR,²¹ and their present at certain locations such as Mongoumba;²²
- iii. Composition of troops;²³
- iv. The identity of the perpetrators,²⁴ and crimes committed by the rebels;²⁵
- v. Mr. Bemba's alleged knowledge of crimes in the CAR; and²⁶
- vi. Mr. Bemba's command and control of MLC troops.²⁷

26. There is therefore a concurrence between facts, which the Prosecution alleges to be untrue in the Article 70 case, and the facts and circumstances, which are yet to be adjudicated in the Main Case.

27. Apart from the issue as to the Trial Chamber VII's competence to adjudicate the veracity of facts, which are before Trial Chamber III, it would also be disproportionately prejudicial to the rights of Mr. Bemba to pursue such a course of action.

28. The Prosecutor was in possession of the information, which was the genesis of its Article 70 investigations, before all of the related Defence witnesses testified in

²⁰ ICC-01/05-01/08-424, para. 98.

²¹ ICC-01/05-01/08-424, para. 101, 254

²² ICC-01/05-01/08-424, para. 99.

²³ ICC-01/05-01/08-424, para. 212.

²⁴ ICC-01/05-01/08-424, para. 106.

²⁵ ICC-01/05-01/08-424, para. 102.

²⁶ ICC-01/05-01/08-424, para. 399.

²⁷ ICC-01/05-01/08-424, paras. 451-457 (inter alia).

the Main Case.²⁸ The Prosecution thus had the means to either test the veracity of the witnesses' evidence at the time that the witnesses testified, or to request a suspension of the proceedings in order to collect further evidence, if required, before the witnesses testified.

29. In contrast, the Prosecution failed to disclose this evidence to the Defence before the witnesses in question testified, and as such, the Defence had no means to address these issues with its witnesses timeously.²⁹ Indeed, key evidence concerning the factual basis for the Prosecution's Article 70 allegations was not disclosed until after the closure of the Main Case.³⁰

30. Although the Prosecution requested to introduce some elements from the Article 70 case into the Main case, these elements were limited to allegations concerning financial transfers to witnesses, or contacts with witnesses.³¹

31. In dismissing the request, Trial Chamber III found that the Prosecution had failed to apply for the admission of evidence in a diligent manner; although the Prosecution was in possession of the evidence before the expiration of the deadline for the admission of evidence in the Main Case, the Prosecution never applied to admit the evidence, or to vary the deadline for the admission of evidence.³²

32. Of critical importance, Trial Chamber III further ruled that it would not be

[i]n the interests of justice for matters which may be central to the charges before the Pre-Trial Chamber to be litigated in parallel before the Trial Chamber [...]³³

33. The Prosecution also never requested that the fourteen witnesses be recalled in order to enable the parties to address substantive aspects of their testimony, in

²⁸ For example, the 'anonymous informant' wrote to the Prosecution prior to the commencement of the Defence case, and the Prosecution interviewed P7 on 12 October 2002, which was prior to the commencement of any of the testimony, which is the subject of the Article 70 case.

²⁹ ICC-01/05-01/08-3257-Red, paras. 19-27.

³⁰ See ICC-01/05-01/08-3264-Red2.

³¹ The Prosecution applied to admit "one audio recording, one report and one financial chart": ICC-01/05-01/08-2910, para 8. See also ICC-01/05-01/08-2948-Red, para. 9.

³² ICC-01/05-01/08-3029, para. 20.

³³ ICC-01/05-01/08-3029, para. 26.

light of the evidence collected in the Article 70 case. The Prosecution also expressly declined to request a rebuttal phase in the Main Case, after the Article 70 allegations became public.³⁴

34. The ability of the Defence to address these issues now with its witnesses is, moreover, impeded by the fact that many of Defence witnesses have become Prosecution witnesses, and have been given assurances that they will not be prosecuted if they testify for the Prosecution.

35. In any case, the fact that these witnesses have been designated as suspects in the Article 70 case impacts objectively on the witnesses' willingness and ability to engage with the Defence in an open and unfettered manner in relation to key testimonial issues pertaining to the Main Case.

36. Given this context, the Article 70 case should not be used as a vehicle for litigating key Main Case issues, which could and should have been addressed within the framework of the Main Case in a fully adversarial manner.

Relief Sought

37. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Trial Chamber to grant the primary relief requested in the 'Kilolo Defence Motion on Scope of Evidence and Allegations'.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 19th day of August 2015
The Hague, The Netherlands

³⁴ ICC-01/05-01/08-2948-Red, para. 11.