

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/05-01/13

Date: 31 August 2015

TRIAL CHAMBER VII

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

Confidential

Confidential Annex A

**Kilolo Defence Response to 'Prosecution's Second Request for the Admission of
Evidence from the Bar Table' (ICC-01/05-01/13-1113-Conf).**

Source: Defence for Aimé Kilolo Musamba

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
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I. INTRODUCTION

1. On 31 July 2015 the Prosecution filed 'Prosecution's Second Request for the Admission of Evidence from the Bar Table' ['the Bar Table motion'].
2. In short, the Prosecution seeks the admission of 579 items of evidence. The material derives from ICC Detention Centre recordings from Mr Bemba's non-privileged phone line. Mr. Kilolo is not a party to any of those calls.
3. We do not propose to repeat the submissions made in response to the Prosecution's First Request for the Admission of Evidence from the Bar Table to the propriety of the Prosecution's attempt to adduce evidence from the Bar Table.
4. We simply adopt, *mutatis mutandis*, the relevant submissions made in reply in our 'Réponse de la Défense de M. Aimé Kilolo à la 'Prosecution's First Request for the Admission of Evidence from the Bar Table'.¹
5. Moreover, we respectfully refer the Trial Chamber to confidential Annex A in which specific objections are taken in relation to individual items of evidence that the Prosecution seeks to admit.
6. In short, the objections can be summarized as follows:
 - (i) There is doubt as to the provenance of many of the items, they do not contain stamps indicating authenticity, and the identity of callers/numbers used is unclear. Moreover, it is unclear, in some cases, how the conversation was compiled by the Registry.

¹ ICC-01/05-01/13-1075-Conf. We also adopt the relevant submissions made on behalf of other Defendants to the propriety of admitting evidence at trial from the Bar Table rather than seeking to adduce the evidence concerned through a relevant witness: See ICC-01/05-01/13-1073-Conf, ICC-01/05-01/13-1074-Conf, ICC-01/05-01/13-1076-Conf, ICC-01/05-01/13-1077-Conf, .

- (ii) Many of the recordings are of poor quality. They are difficult to understand in that there are gaps/silences, time lags between the speakers and sometimes inaccuracies in the transcripts.
 - (iii) Some of the calls relate to a period outside of the scope of the charges and/or are not related to the 14 witnesses in question.
 - (iv) Some of the calls invade the privacy/privilege of Mr. Bemba and contain discussion on strategy vis-à-vis the Main Case.
7. The additional issue to which we wish to advance submissions in this Response is in relation to the admissibility of hearsay evidence from a co-accused against an accused who was not a party to the hearsay conversation.
8. The evidence that the Prosecution seeks to admit may well be evidence against the parties to the conversation (subject to any arguments advanced on their behalf). But, unless the maker of the statement gives evidence at trial, the out of court statements of that person should not be admissible against any other accused.
9. The Defence position can be summarized as follows:
- (i) In the event that the participants to the telephone conversations that the Prosecution seek to rely upon do not give evidence, Mr. Kilolo will not be able examine them regarding any statements they make about him in those calls.
 - (ii) As a result he will be denied his right pursuant to Article 67(1)(e) of the Statute to examine statements relied upon against him.

- (iii) While the statements made in the telephone conversations may be admissible against the participants to the call, they should not, at this stage, be admissible against Mr. Kilolo.
- (iv) The position should be re-evaluated in the event of any participant to the call deciding to give evidence in their defence.

II. RELEVANT LAW

10. Article 67(1) of the ICC Statute provides, *inter alia*:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

...

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other admissible evidence under this Statute;

...

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence.

...

11. In *Prosecutor v. Katanga and Ngudjolo*² it was held by the Trial Chamber that prior statements made by the accused Ngudjolo would not be admissible against the accused Katanga as, unless the former testified, the latter would not have an opportunity to cross-examine him or challenge the contents of his statements. The Trial Chamber held as follows:

To the extent that these statements implicate only the person making the statement, no issue under article 67(1)(e) and Rule 68 arises. However, Mr. Ngudjolo's statement contains accusations against Mr. Katanga, thus creating an overwhelming legal obstacle against its admission, as Mr. Ngudjolo cannot be compelled to submit to examination by, or on behalf of, Mr. Katanga. The Chamber cannot, therefore, allow DRC-OTP-0039-0058 into evidence as proof of any fact involving Mr. Katanga. However, this does not exclude the possibility of admitting the statement for other purposes.³

12. Article 6(3)(d) of the European Convention of Human Rights is in similar terms to Article 67(1) of the Statute, it provides *inter alia*:

1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
2. ...
3. Everyone charged with a criminal offence has the following minimum rights:
...
(d) to examine or have examined witnesses against him

² *Prosecutor v. Katanga and Ngudjolo*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, 17 December 2010.

³ *Ibid* at para.53.

13. In *Luca v Italy*⁴, the European Court of Human Rights held that:

39. [E]vidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, paragraphs 1 and 3(d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage (see *Ludi v. Switzerland* ... and *Van Mechelen and others*).

...

41. [T]he fact that depositions were, as here, made by a co-accused rather than by a witness is of no relevance. In that connection, the Court reiterates that the terms "witness" has an "autonomous" meaning in the Convention system (see *Vidal v Belgium* ...). Thus, where a deposition may serve to a material degree as the basis for conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6(1) and (3)(d) of the Convention apply (see, *mutatis mutandis*, *Ferrantelli and Santangelo v. Italy* ...).

...

43. In the instant case, the Court notes that the domestic courts convicted the applicant solely on the basis of statements made by [the co-accused] before the trial and that neither the applicant nor his lawyer was given an opportunity at any stage of the proceedings to question him.

⁴ European Court of Human Rights, Application No. 33354/96. Judgment, 27 February 2001.

44. In those circumstances, the Court is not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based.

14. In *Luca v. Italy*, where the applicant was convicted solely on evidence of a co-accused who did not give evidence at trial, the European Court found that he had been denied a fair trial and a violation of Article 6(1) and (3)(d) of the Convention.

III. SUBMISSIONS

15. Unlike ordinary witnesses, neither Mr. Bemba nor Mr. Babala can be compelled to give evidence at trial: Article 67(1)(g) of the Statute.

16. It is apparent from the Bar Table Motion that the Prosecution intends to rely upon the content of conversations to which Mr. Kilolo was not a party as evidence against him.⁵

17. If any of those speaking on the recorded telephone calls that the Prosecution seeks to rely upon gives evidence, Mr. Kilolo will obviously have an opportunity to examine them regarding the meaning of their conversation about him in accordance with Article 67(1)(e) of the Statute.

18. If, however, the participants to the telephone calls choose to exercise their right not to give evidence, Mr. Kilolo will be denied an opportunity to examine them in accordance with his rights under the Statute.

⁵ See ICC-01/05-01/13-1113-Conf, paras. 11, 13 and 22.

19. Unless and until the participants to the telephone conversations give evidence, there is, as in *Katanga and Ngudjolo*, 'an overwhelming legal obstacle' against the admission of the conversations against Mr. Kilolo.

20. It is accepted though, subject to any other additional arguments advanced on their behalf, that the statements made in the conversations may well be admissible against the participant to the call.

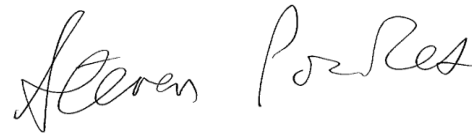
IV. RELIEF SOUGHT

- (i) For the reasons set out in 'Response de la Défense de M. Aimé Kilolo a la 'Prosecution's First Request for the Admission of Evidence from the Bar Table' and in the confidential Annex A, that the Bar Table Motion be dismissed in its entirety.
- (ii) In the alternative, if the Trial Chamber is minded to grant the Prosecution Request, the admitted detail of the telephone conversations should, at this stage, be admissible only against the participants to the conversations.

Paul Djunga Mudimbi
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Steven Powles
Co-counsel for Mr. Aimé Kilolo Musamba



Dated this 31 August 2015,
At The Hague, The Netherlands.