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No: ICC-01/05-01/13
Date: 2 September 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**

Public redacted document

Public redacted version of “Kilolo Defence Motion on Scope of Evidence and Allegations”, 10 August 2015, ICC-01/05-01/13-1138-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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I. Introduction

1. This motion is filed confidentially¹ pursuant to the Trial Chamber's order that 'all motions that, in view of the parties, require resolution prior to the commencement of trial [...] be filed by 31 July 2015'.²
2. The Trial Chamber is respectfully asked to:
 - (i) Indicate whether it, like the Pre-Trial Chamber, is 'obviously not in a position to assess the reliability and truthfulness of Witnesses' on issues pertaining to the merits of the Main Case';³ and, if so,
 - (ii) Prohibit the Prosecution from adducing evidence at this trial that goes to such issues.

II. Submissions

3. In the 'Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute'⁴ the Pre-Trial Chamber stated that:

'This Chamber is obviously not in a position to assess the reliability and truthfulness of the Witness' testimony on issues pertaining to the merits of the Main Case.'⁵

4. The rationale for this decision is self-evident as to do otherwise would involve the Pre-Trial Chamber trespassing into matters solely for determination by the Trial Chamber in the Main Case⁶.

¹ This is because it refers to matters in the Prosecution's Pre-Trial Brief which was filed confidentially.

² ICC-01/05-01/13-960. Extended to 10th of August 2015.

³ ICC-01/05-01/13-749, at para. 64.

⁴ ICC-01/05-01/13-749.

⁵ ICC-01/05-01/13-749, at para. 64.

⁶ The Prosecutor v. Mr. Jean-Pierre Bemba Gombo, ICC-01/05 -01/08.

5. The Pre-Trial Chamber was ‘obviously’ not in a position to determine such issues because they are matters that are *sub judice* before the Trial Chamber III in the Main Case (“TCIII”).
6. For this reason, the Pre-Trial Chamber limited its findings on the existence of evidence that witnesses falsely testified before TCIII to the following issues:
 - (i) Their previous contacts with the Defence;
 - (ii) Their meetings with other prospective witnesses;
 - (iii) Their acquaintance with some of the Suspects, or other persons associated with them;
 - (iv) The fact that promises had been made to them in exchange for their testimony;
 - (v) The fact that they had received reimbursements or transfers by Mr Bemba or on his behalf, regardless of their purpose; and

Other substantive issues related to the charges against Mr. Bemba in the Main Case such as the witnesses’ membership of certain groups or entities, the structure of these groups or entities, their movements on the ground, and names of officials.⁷

7. There is an obvious conflict between the Pre-Trial Chamber’s indication that it would (a) not rule on the reliability of ‘issues pertaining to the merits of the Main Case’ and (b) the indication that there was evidence that witnesses

⁷ ICC-01/05-01/13-749, at para. 64.

falsely testified before TCIII on 'other *substantive* issues related to the charges against Mr Bemba in the Main Case'.

8. The latter being issues that plainly 'pertain to the merits of the Main Case'. Witnesses' membership of certain groups, the structure of those groups, their movements and the names of officials are all matters to be determined by the Trial Chamber in the Main Case.
9. The Trial Chamber, like the Pre-Trial Chamber, will only be able to determine that someone has given *false* evidence on these issues after first deciding the *truth* or otherwise of the underlying issues. Those are matters within the domain the Trial Chamber in the Main Case.
10. In its 'Decision on the Submission of Auxiliary Documents'⁸ the Trial Chamber held, by majority, that:

'[A]t the confirmation stage the Pre-Trial Chamber has the sole authority to define the parameters of the case for the purpose of ensuing trial proceedings; the confirmation of charges decision rendered under Article 61(7)(a) of the Statute sets out the charges, which, as such, also binds the Trial Chamber.'⁹

11. Given the importance of the Confirmation of Charges decision to determining the parameters of the ensuing trial proceedings it is necessary, at this stage, to clarify the apparent contradiction in the Pre-Trial Chamber's decision.

⁸ ICC-01/05-01/13-992.

⁹ ICC-01/05-01/13-992, at para. 12.

12. This will:

First help establish the scope of evidence that the Prosecution may call; and

Second give the parties advance indication as to parameters of the factual findings on false testimony that the Trial Chamber is prepared to make.

13. In short, is the Trial Chamber, like the Pre-Trial Chamber, of the view that it is 'obviously not in a position to assess the reliability and truthfulness of the Witnesses' testimony on issues pertaining to the merits of the Main Case'?

14. If there is to be no determination of the 'truthfulness of the Witnesses' testimony on issues pertaining to the merits of the Main Case', then it is clear that there are a number of matters in the Prosecution's 'Pre-Trial Brief' that go well beyond the scope of issues to be properly determined in this trial.

15. If the Trial Chamber, like the Pre-Trial Chamber, does not intend to assess the reliability and truthfulness of the witnesses' testimony on issues pertaining to the Main Case, the following are some of the issues contained within the 'Pre-Trial Brief'¹⁰ which are matters properly within the domain of the Main Case and which it would be wrong to rule upon in this case:

(i) [REDACTED] (D-15): Alleged to have given false testimony about the [REDACTED].¹¹

(ii) [REDACTED] (D-54): Is said to have falsely testified that [REDACTED],¹² that [REDACTED],¹³ and [REDACTED].¹⁴

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

- (iii) [REDACTED] (D-26): Alleged to have been [REDACTED]¹⁵ and to have testified falsely on, for example, [REDACTED].¹⁶
- (iv) [REDACTED] (D-23): Alleged to have falsely testified that [REDACTED]¹⁷ [REDACTED].¹⁸
- (v) [REDACTED] (D-3): It is alleged that he falsely testified about the [REDACTED].¹⁹
- (vi) [REDACTED] (D-2): It is alleged that he falsely testified that [REDACTED].²⁰
- (vii) [REDACTED] (D-6): Alleged to have been [REDACTED].²¹ It would seem to follow from this that the Prosecution asserts that the evidence he gave in the Main Case was in fact false.
- (viii) [REDACTED] (D-55): Is alleged to have falsely testified that [REDACTED].²²

16. The truth or otherwise of these matters is plainly for determination by the Trial Chamber in the Main Case.

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ [REDACTED]

¹⁷ [REDACTED]

¹⁸ [REDACTED]

¹⁹ [REDACTED]

²⁰ [REDACTED]

²¹ [REDACTED]

²² [REDACTED]

17. Moreover, any determination of whether any defendant in these proceedings believed that the evidence of the respective witnesses above was true necessarily requires a determination of whether, at least to some extent, the actual evidence of the witness was true. Again, that is plainly a matter for determination by the Trial Chamber in the Main Case.

III. Relief Sought

18. The following relief is respectfully requested:

- (i) That 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.

19. In the alternative, if the Prosecution is to be permitted to adduce evidence that goes to such issues, it is respectfully requested that:

- (i) The Parties in this case be permitted full access to all material in the *Bemba* Main Case that could establish whether what each witness stated might be true; and/or
- (ii) That the Trial Chamber considers postponing the commencement of the trial in this case until *after* a determination of such issues by the Trial Chamber in the Main Case.

Maître Paul Djunga Mudimbi
Lead Counsel for Mr. Aimé Kilolo Musamba



Mr. Steven Powles
Associate Counsel for Mr. Aimé Kilolo Musamba



Dated this 2 September 2015,
At The Hague, The Netherlands.