

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/05-01/13
Date: 29 January 2016

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

**Kilolo Defence's submissions on relevance and propriety of certain defence
witnesses**

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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Introduction

1. On 21 January 2016 the Defence for Mr Aimé Kilolo Musamba (hereinafter referred as "Defence" or "Kilolo Defence") submitted its final list of witnesses with summaries of their anticipated testimony.¹ The Kilolo Defence submitted a list of eight witnesses.²

2. On 26 January 2016 the Single Judge issued 'Directions Relating to Certain Defence Witnesses and Appearance Order'.³ It was indicated that Trial Chamber VII (hereinafter referred as "Chamber" or "Trial Chamber") wished to receive further information about certain witnesses that the Kilolo Defence intends to call.⁴

3. Specifically, the Chamber requested submissions justifying the relevance and propriety of calling:

- (i) A witness to testify to the challenges and practical realities of appearing as defence counsel in international criminal proceedings; and
- (ii) Six witnesses to testify as to Mr Kilolo's character, professionalism and/or ethics.

4. The Defence hereby responds to the Chamber's request.

Preliminary Remarks

5. The Defence fully respects the Chamber's request for further information at this stage and appreciates the need to ensure that all witnesses are both justified and relevant to the issues under consideration by the Trial Chamber.

¹ ICC-01/05-01/13-1562; ICC-01/05-01/13-1562-AnxA; ICC-01/05-01/13-1562-AnxC.

² ICC-01/05-01/13-1562-AnxA.

³ ICC-01/05-01/13-1578.

⁴ ICC-01/05-01/13-1578, paras. 3-4.

6. Moreover, even though Article 67(1)(e) of the Statute guarantees that the accused shall be entitled to 'obtain the attendance and examination of witnesses on his ... behalf', the Defence understands that this is subject to the Chamber's guidance and control.⁵

7. For the reasons set out below, the Kilolo Defence respectfully submits that D21-001 and the other character witnesses are both relevant and of vital importance to the Defence of Mr Kilolo and should thus be permitted to testify in the present case.

A. The relevance and importance of Witness D21-001's testimony

8. Before addressing the relevance and necessity of calling D21-001 the Defence for Mr Kilolo respectfully reassures the Chamber of the following two matters:

(i) D21-001 will not be giving testimony about legal matters which usurp the functions of the Chamber; and

(ii) Notwithstanding his previous application to submit Amicus Curiae observations in this case,⁶ D21-001 will not be giving testimony about 'lawyer-client privilege'.

9. Mr Kilolo is charged with 42 counts pursuant to Article 70 of the Statute. The Prosecution alleges *inter alia* that Mr Kilolo: (i) Bribed witnesses; (ii) Made non-monetary promises to witnesses; (iii) Coached witnesses; (iv) Circumvented the Detention Centre's monitoring system; (v) Used third parties to transfer money to witnesses; and (vi) Contacted witnesses after the VWU cut-off date and during their

⁵ See Article 69(4) of the Statute which provides: 'The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence'. See also: *Vidal v Belgium* ECHR judgment of 25 March 1992, Series A no. 235-B, pp. 32-33 at para. 33.

⁶ 'Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103 of the Rules of Procedure and Evidence' 31 August 2015.

testimony. This conduct is all said to have occurred pursuant to Mr Kilolo's role as defence counsel.

10. It is submitted that, in order to properly assess Mr Kilolo's conduct, and to fully appreciate the rationale for certain actions taken by him, it is imperative to view that conduct within the context of the normal role and function of a defence counsel in international criminal proceedings. D21-001 will provide just such context and background.

11. Specifically, D21-001 will explain the unique role and challenges that counsels in international criminal proceedings are faced with, during both the course of investigations and proceedings in court. His extensive experience in international criminal proceedings (in particular his role with regards to supervising disciplinary matters) means that he is well placed to provide testimony that explains and sets out many of the practical realities facing defence counsel.

12. It is apparent that, in this case, certain witnesses were presented to Mr Kilolo after having been identified and introduced to him by intermediaries. D21-001 will explain the necessity and importance of relying upon such intermediaries during the course of defence investigations and the practical difficulties this can present.

13. Mr Kilolo is alleged to have made improper payments to witnesses during the course of defence investigations. D21-001 will explain the challenges that defence counsel may face during the course of such investigations and the need to meet the financial needs of potential defence witnesses.

14. Mr Kilolo is alleged to have improperly prepared witnesses for testimony. D21-001 will give details about the commonly accepted practices adopted by lawyers during the preparation of defence witnesses for trial.

15. Finally, international criminal proceedings, by their very nature, present unique cultural challenges to those participating within them. D21-001 will explain how such

cultural factors can impact on the work and role of defence counsel during such proceedings. This, in turn, may provide a useful background against which Mr Kilolo's conduct can be viewed.

16. Whilst acknowledging that it is the Trial Chamber that is the final arbiter of whether a witness may be called or not, the jurisprudence of the ICC establishes that a 'Chamber will not interfere with a party's decisions regarding its selection and presentation of evidence unless there is a compelling reason to do so'.⁷

17. In this regard, it has been held that there must be a 'measure of deference' to 'parties to shape their presentation of evidence in a manner that best fits their overall theory of the case'.⁸ Thus, while a Chamber *may* intervene, 'it will do so sparingly'.⁹

18. The same principles have been upheld by other International Tribunals, for instance, the ICTY has held that, in principle, 'it is for each party to decide which witnesses to call to prove its case'.¹⁰ Moreover, as recognised by the ICTR Appeals Chamber 'there are few tasks more relevant to the preparation of the defence case than selecting witnesses'.¹¹

19. In light of the above, the Chamber is respectfully requested to permit the Defence to call D21-001 for the purposes identified above.

B. The relevance and importance of character witnesses' testimonies

⁷ *Prosecutor v Bemba* Decision Regarding the Prosecution's Witness Schedule, 11 November 2011, ICC-01/05-01/08-1904-Red, para. 25 [Emphasis added].

⁸ *Ibid.*

⁹ *Ibid* [Emphasis added].

¹⁰ *Prosecutor v Halilovic*, IT-01-48-T, 'Decision on Prosecution's Motion to Vary its Rule 65 ter Witness List, 7 February 2005, p. 6, and cited in a number of subsequent decisions.

¹¹ *Prosecutor v Bagosora et al.* ICTR-98-41-AR73, 'Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence', 25 September 2006 at para. 9.

20. The Chamber has requested explanation as to the relevance and propriety of calling 'six witnesses to testify as to Mr Kilolo's character, professionalism and/or ethics'.

21. In fact, the Defence seeks only to call five such witnesses: (i) D21-004, (ii) D21-005, (iii) D21-006, (iv) D21-007, and (v) D21-008.

22. This is a case in which the character, professionalism and ethics of Mr Kilolo have been called into question by the Prosecution and witnesses they have called. The five witnesses identified by the Defence are called so as to rebut such assertions and to highlight the exemplary character and professional practices of Mr Kilolo over the course of his professional career.

23. It is important in a case of this nature for the character of the accused to be fully and properly appreciated. Each witness has their own and distinct experience of Mr Kilolo and will give evidence accordingly.

24. Moreover, in the Defence filing of 21 January 2016 it was estimated that four of the five witnesses would testify for 1 hour each, while one, D21-005 would testify for 2 hours.¹²

25. Former ICTY Judge, Sir Richard May (in a book with M. Wierda), has previously stated:

'the choice of which (rather than how many) witness to call should remain with the parties and not with the judges It may therefore be preferable for the Trial Chamber to limit the time available to the parties rather than the number of witnesses; the parties can then use this time as they see fit'.¹³

¹² ICC-01/05-01/13-1562- Conf- AnxA.

¹³ R. May and M Wierda, *International Criminal Evidence*, (Ardsey, NY: Transnational, 2002) 342.

26. Accordingly, the Kilolo Defence is of the opinion that both D21-001 and the five character witness are of vital importance for the effective defence of its client's interests and respectfully ask the Trial Chamber to permit them to testify in the present proceedings.

RELIEF SOUGHT

27. The Defence for Mr Kilolo respectfully requests that, for the reasons set out above:

- (i) It be permitted to call D21-001 for the purposes identified; and
- (ii) It be permitted to call all five character witnesses.

RESPECTFULLY SUBMITTED.



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



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

Dated this 29 January 2016,
At The Hague, The Netherlands