

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 February 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Confidential Document

**Prosecution's Response to the Kilolo Defence's Submissions on Relevance and
Propriety of Certain Defence Witnesses**

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**

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") objects to calling Witness D21-001 because his expected testimony is irrelevant to the specific facts and circumstances of this case. As to the character witnesses the Kilolo Defence intends to call, the Prosecution defers to Trial Chamber VII's ("Chamber") discretion. While such evidence is, in principle, relevant to an Accused's propensity to commit an offence, or the mitigation of a potential sentence, a Chamber may reasonably restrict such evidence where cumulative, to ensure the fair and efficient conduct of the proceedings.

II. Confidentiality

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

III. Submissions

A. D21-001's evidence is irrelevant to the disposition of any salient issue in this case

3. D21-001 previously sought to intervene in these proceedings as *amicus curiae* under rule 103(1) of the Rules of Procedure and Evidence. The Chamber did not deem his views "desirable for the proper determination of the case", holding that it was in a position to answer the questions raised by the applicant without his assistance.¹ Notwithstanding the change in topics, D21-001's prospective testimony, as summarised by the Kilolo Defence, is no different. It would not assist the Chamber

¹ ICC-01/05-01/13-1212, para. 2.

in its determination of the contested issues because it is irrelevant to the material facts of the case.

4. The proposed testimony is abstract, and divorced from the facts and circumstances of this case. It is not probative of any of the incidents charged, the acts and conduct of the Accused, or any salient issues in the case. Rather, it simply purports to address the potential general difficulties that a defence lawyer *may* face practicing in international criminal proceedings: '*certaines des défis et des réalités pratiques auxquelles un avocat de la défense peut être confronté lors de procédures pénales internationales*'.²

5. The Kilolo Defence's Submission³ fails to provide further information concerning the relevance and propriety of such testimony, despite the Chamber's understandable invitation to the Defence.⁴ Instead, it simply repeats what was already included in the initial Testimony Summaries provided by the Defence⁵ without demonstrating any nexus between the anticipated testimony and any material fact at issue.

6. The Defence's mere assertion that D21-001's testimony will provide the context within which Kilolo's conduct can be assessed,⁶ does not demonstrate how this is applicable in any way to Kilolo's alleged culpable actions. *First*, the Chamber need not resort to an assessment of the conduct of other defence counsel to determine the propriety of Kilolo's alleged criminal conduct in this case. *Second*, the "role of defence

² ICC-01/05-01/13-1562-Conf-AnxB, p. 3 ("Testimony Summaries").

³ ICC-01/05-01/13-1585-Conf ("Kilolo Submission").

⁴ ICC-01/05-01/13-1578, para. 4.

⁵ The Kilolo Submission repeats that D21-001 will explain: (1) the necessity and importance of relying upon intermediaries in the defence investigations and the practical difficulties this can present; (2) the challenges that defence counsel may face during such investigations and the need to meet financial needs of potential defence witnesses; (3) the commonly accepted practices adopted by lawyers during the preparation of defence witnesses for trial; and (4) the impact of the unique cultural challenges of international criminal proceedings on the work and role of defence counsel during such proceedings. See Kilolo Submission, paras 11-15. All of which have already been mentioned in the Testimony Summaries at p. 3.

⁶ Kilolo submission, para. 10.

Counsel”, as Witness D21-001 is slated to testify about, is defined by the Code of Professional Conduct for Counsel,⁷ which is derived from the Statute itself. The question of Kilolo’s conduct as measured against that role necessarily involves the interpretation of the Professional Code, a matter solely within the Chamber’s purview.

7. Further, this witness is not in a position to testify to any *actual* difficulties that Kilolo may have faced within the temporal and geographical scope of this case or that such difficulties had any influence on his acts and conduct. Testimony about the practice of “witness preparation” in other jurisdictions or the forms in such a practice that may be commonly accepted, as suggested by the Kilolo Defence,⁸ is irrelevant because it is undisputed that “witness preparation” (in whatever form) was expressly prohibited in the Main Case.⁹

8. Likewise, it is of no assistance to the Chamber to hear about the importance of intermediaries in investigations in international criminal proceedings in general terms, be it by the Prosecution or by the Defence.¹⁰ The use of intermediaries, its complexities, and limitations is well-known in this Court’s experience. It requires no elaboration, particularly in the abstract. The same holds true for the remaining aspects of this witness’ anticipated testimony, *i.e.* the challenges that a defence counsel may face in investigations,¹¹ meeting the financial needs of potential defence witnesses,¹² and the unique cultural challenges of international criminal

⁷ ICC-ASP/4/Res.1, the Code of Professional Conduct for Counsel, (“Code”) See in particular, (i) articles 6-9 which regulate respectively independence of counsel, professional conduct of counsel, respect for professional secrecy and confidentiality and Counsel-client relationship; (ii) Chapter 2 which regulates the representation by Counsel; (iii) Chapter 3 which regulates the relations with the Court and others including more specifically article 25 which regulates counsel’s duty with respect to evidence and article 29 which regulates counsel’s relations with witnesses and victims; and (iv) chapter 4 which regulates the applicable disciplinary regime.

⁸ Kilolo Submission, para. 14.

⁹ Trial Chamber III in the Main Case ordered that “no proofing or preparation of witnesses for trial by parties shall be allowed”, see ICC-01/05-01/08-1016, para. 34.

¹⁰ Kilolo Submission, para. 12.

¹¹ Kilolo Submission, para. 13.

¹² Kilolo Submission, para. 13.

proceedings.¹³ None of these abstractions is probative of the material facts of the case. Further, it cannot be argued that certain difficulties facing a lawyer in a particular case can serve as a reference for comparison for another lawyer working in another case, let alone, as justification or mitigation of the latter's criminal responsibility. Each case is assessed on its own circumstances, and it is of no value in this case to receive evidence of the circumstances in other cases.

B. D21-001's testimony is not admissible expert evidence

9. The Kilolo Defence has not indicated whether it intends to call D21-001 as a fact or expert witness. Either way, the irrelevance of his testimony to the material facts of the case warrants his exclusion. Nonetheless, it appears that D21-001's testimony will necessarily comprise expert evidence.¹⁴

10. Even if the Chamber is satisfied that D21-001 is an expert, his testimony is of no assistance to the determination of any issue in this case and should not be permitted.

11. An expert witness is defined as "a person who by virtue of some specialised knowledge, skill or training can *assist the Chamber to understand or determine an issue in dispute* [...] due to the qualifications of the expert, he or she can give opinions and draw conclusions, [...] and present them to the Chamber".¹⁵

12. In receiving a witness testimony as an expert, the Chamber must: (i) make a discretionary determination as to whether testimony in the relevant subject area of expertise would be of assistance; (ii) be satisfied that the proposed witness is an

¹³ Kilolo Submission, para. 15.

¹⁴ Kilolo Submission, para. 11 (noting the witness's "extensive experience in international criminal proceedings").

¹⁵ See *Prosecutor v. Tolimir*, Decision on Admission of Expert Report of Ratko Škrbić with Separate Opinion of Judge Mindua and Dissenting Opinion of Judge Nyambe, Case No. IT-05-88/2-T, 22 March 2012, at para. 14, <http://www.icty.org/x/cases/tolimir/tdec/en/120322.pdf>, (emphasis added). See also ICC-01/05-01/08-2273, para. 8 (referring to the "knowledge, experience and training" of a proposed expert on background and context).

expert, given due consideration as to whether the person is included in the Registry's List of Experts set out in regulation 44(1) of the Regulations; and (iii) determine that the anticipated testimony falls within the expertise of the witness and does not usurp the functions of the Chamber as the ultimate arbiter of fact and law.¹⁶

13. In this context, it is worth noting that D21-001 is not included in the Registry's List of Experts,¹⁷ and that the Defence has not disclosed an expert report or statement enabling the Chamber and the Parties to assess the scope of his evidence. Nevertheless, even if the Chamber recognises this witness as an expert notwithstanding the above, his testimony remains of no assistance to the Chamber because: (1) it is abstract and does not bear on the Accused's acts; and (2) to the extent it proposes to interpret the role of defence counsel practicing in international criminal proceedings, this testimony is of no assistance since, before this Court, that role is defined in the Code of Professional Conduct for Counsel.

14. Any interpretation of counsel's role which D21-001 could provide would be fundamentally a question of interpreting the Court's law, and necessarily within the Chamber's sole province. In any case, the Chamber is well positioned to determine the appropriate role of Defence counsel before this Court by resort to the Code, without the need for this witness' expertise.

C. The Prosecution defers to the Chamber's discretion to determine the appropriate number of character witnesses to be called

15. In principle, the Prosecution considers that evidence of an Accused's character can be relevant, particularly as propensity or mitigation evidence. Nevertheless, in certain circumstances a court may restrict such evidence where it is unnecessarily

¹⁶ ICC-01/09-01/11-844, para. 12 (footnotes omitted).

¹⁷ See <https://www.icc-cpi.int/iccdocs/PIDS/other/180815-List-of-Experts-Eng.pdf>.

cumulative. Here, although the reasons provided for calling the six prospective character witnesses¹⁸ remain unclear, the Prosecution defers to the Chamber's discretion in determining whether the proposed number comports with the fair and efficient conduct of the proceedings.

IV. Relief Requested

16. For the foregoing reasons, the Prosecution objects to calling Witness D21-001 because his expected testimony is irrelevant to the material facts of the case, and defers to the discretion of the Chamber to determine the appropriate number of character witnesses to be called.



Fatou Bensouda, Prosecutor

Dated this 2nd Day of February 2016
At The Hague, The Netherlands

¹⁸ The Chamber directed the Kilolo Defence to justify the relevance of the six character witnesses slated to be called, listing them clearly including five witnesses identified and an additional person for whom the Defence was authorised not to reveal his identity, See ICC-01/05-01/13-1578, fn. 9. However, Kilolo's Submission only refers to five character witnesses. See Kilolo Submission, para. 21. Upon further inquiry with the Kilolo Defence, the Prosecution was informed that the Kilolo Defence overlooked the sixth witness in its Submission but in any event it does not plan on calling that witness.