

**Cour
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**International
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Court**



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Date: **12 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***

Public

**Prosecution's response to application for leave to appeal the "Decision on
Relevance and Propriety of Certain Kilolo Defence Witnesses"**

Source: Office of the Prosecutor

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

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I. Introduction

1. The Prosecution opposes the Kilolo Defence's application for leave to appeal¹ Trial Chamber VII's ("Chamber's") "Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses".² In that decision, the Chamber rejected the Defence's request to call D21-001 as a witness. It also rejected the Defence's request to call five character witnesses *viva voce* but permitted the Defence to submit their evidence pursuant to rule 68(2)(b) of the Rome Statute ("Statute").

2. The proposed Issue, namely "[t]he extent to which Articles 64(2) and 69(2) permit a Trial Chamber to interfere with an accused's right pursuant to Article 67(1)(e) to identify and choose the witnesses he would like to call in his defence at trial",³ does not arise from the Decision and is not an appealable issue. Alternatively, the Issue does not meet the criteria for leave to appeal under article 82(1)(d). The Application should therefore be rejected.

II. Submissions

A) The Issue does not arise from the Decision

3. The Issue does not arise from the Decision and amounts to a mere disagreement with the Chamber's findings. Because the Application relates to two groups of witnesses, namely a witness who the Defence proposed to give evidence about the challenges and practical realities faced by international defence counsel (Witness D21-001), and five character witnesses (Witnesses D21-004, D21-005, D21-006, D21-007 and D21-008), the respective portions of the Decision will be analysed separately for the purposes of responding to the Application.

¹ ICC-01/05-01/13-1614 ("Application").

² ICC-01/05-01/13-1600 ("Decision").

³ Application, para. 8 ("Issue").

4. Contrary to the Defence's contention,⁴ the Trial Chamber's ruling to exclude Witness D21-001's evidence does not give rise to the Issue concerning Mr Kilolo's right pursuant to article 67(1)(e) to identify and choose the witnesses he would like to call in his defence. The Trial Chamber held that the proposed evidence is "irrelevant and inappropriate [...] to understand the evidence presented".⁵ Article 67(1)(e) does not give an accused an unbridled right to submit irrelevant evidence. To the contrary, the Trial Chamber has a duty under articles 64(2) and 69(4) to exclude such evidence to ensure the fair and expeditious conduct of the proceedings.⁶ The Defence merely repeats its arguments as to the alleged relevance of Witness D21-001's proposed evidence to the facts of this case,⁷ but fails to demonstrate how the Decision affects the Defence's right under article 67(1)(e) to obtain the attendance of witnesses. Accordingly, the Defence expresses nothing more than a disagreement with the Trial Chamber's conclusion that the proposed evidence of Witness D21-001 is irrelevant and accordingly should be rejected.⁸

5. Nor does the Issue arise in relation to the five character witnesses. Although the Trial Chamber held that the proposed evidence of these five witnesses is only of marginal relevance to the case,⁹ it nevertheless allowed the Defence to submit the written statements of these witnesses pursuant to rule 68(2)(b).¹⁰ Accordingly, the Defence's argument that the Trial Chamber has negatively affected its right to present the evidence of these five witnesses¹¹ does not correctly reflect the Decision and the Issue as framed by the Defence does therefore not arise from it.

6. As for the Defence challenges to the Chamber's assessment as to the limited significance of the five character witnesses,¹² these arguments fall short of identifying

⁴ Application, paras. 16, 18, 32-38.

⁵ Decision, para. 11.

⁶ Decision, para. 6.

⁷ Application, paras. 32-38.

⁸ Decision, para. 11.

⁹ Decision, paras. 15, 17.

¹⁰ Decision, paras. 16-17.

¹¹ Application, paras. 18-19.

¹² Application, paras. 21-31.

an appealable Issue. Not only do they merely disagree with the Decision, but they are irrelevant to the Application, as the Chamber has allowed the Defence to submit the evidence of the five character witnesses pursuant to rule 68(2)(b).

7. Since the Issue identified by the Defence does not arise from the Decision, the Application should be dismissed on this basis alone.

B) The Issue does not meet the criteria for leave to appeal

8. In addition, the Issue identified by the defence does not meet the criteria for leave to appeal under article 82(1)(d).

9. The exclusion of the irrelevant evidence of Witness D21-001¹³ does not impact on the fair and expeditious conduct of the proceedings, nor does it impact on the outcome of the trial. Moreover, since the Trial Chamber did not prevent the Defence from submitting the evidence of the five character witnesses, there is no question whether the admission of their evidence impacts on the fair and expeditious conduct of the proceedings or the outcome of the trial.

10. Second, because the Chamber has already determined that the evidence in question is of no relevance –or, taken at its highest, of marginal relevance – immediate resolution by the Appeals Chamber of the Issue would not materially advance the proceedings. This is because even if, *arguendo*, the Decision had violated the Accused’s right to obtain the attendance and examination of witnesses, it would be a harmless error, given the insignificance of the proposed evidence to the questions that the Chamber needs to decide in this case.

11. Finally, considering that this case is narrow in scope, and that the presentation of defence evidence is currently forecasted to last for 200 hours,¹⁴ the defence will soon be in a position to analyse what impact, if any, the challenged procedural ruling

¹³ The Prosecution notes that the Issue does not extend to a challenge of the Chamber’s findings with respect to the lack of relevance of the proposed evidence, but merely raises an alleged violation of article 67(1)(e).

¹⁴ ICC-01/05-01/13-1518, para. 16.

has had on the judgment, and raise any ensuing grievances in the context of a final appeal.

III. Conclusion

12. For the reasons above, the Prosecution requests the Trial Chamber to reject the Application.



Fatou Bensouda, Prosecutor

Dated this 12th day of February 2016
At The Hague, The Netherlands