

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/05-01/13**  
Date: **17 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 Document**  
**with**  
**Public Annex A**

**Prosecution's Motion to Exclude the Evidence of Witnesses D20-0002 and D21-0009, or, in the alternative, to Restrict the Scope of Witness D20-0002's Evidence**

**Source:** The 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. Trial Chamber VII (“Chamber”) should exclude the evidence of Bemba Witness D20-0002<sup>1</sup> and Kilolo Witness D21-0009. Although both are identified as fact witnesses, they proffer expert evidence. In the alternative, the Chamber should restrict Witness D20-0002’s evidence to those matters that he personally perceived, and preclude his opinion on the legality of such matters under domestic or international law.

2. Given the *prima facie* inadmissibility and/or irrelevance of the Witnesses’ evidence, the Chamber should exercise its gatekeeping functions at this stage by excluding Witness D20-0002’s and D21-0009’s evidence, or by restricting the scope of Witness D20-0002’s evidence, pursuant to articles 64(6)(f), 64(9)(a), 69(3), 69(4) of the Rome Statute (“Statute”), rules 63(2) and 64 of the Rules of Procedure and Evidence (“Rules”), and regulation 44(5) of the Regulations of the Court.

## II. Submissions

### A. Witnesses D20-0002’s and D21-0009’s Proffered Evidence is Not Appropriate Fact Witness Evidence

3. The Bemba and Kilolo Defences should not be permitted to elicit expert evidence through Witnesses D20-0002 and D21-0009, as they are offered as fact witnesses. It is a general principle of international criminal procedure that fact

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<sup>1</sup> The proffered evidence of Witness D20-0002 is part of a series of attempts by the Defence to challenge the admissibility of the intercepted communications, despite this Chamber’s previous conclusion that it “cannot conclude that the Prosecution obtained the Telephone Intercepts in a manner amounting to a violation of the Statute or an infringement to Mr Mangenda’s right to privacy.” ICC-01/05-01/13-1284, para. 32. In doing so, the Defence seeks to taken advantage of the Chamber’s position on admissibility by continually testing “new” piecemeal challenges to evidence already formally submitted. This has resulted in repeated litigation on the same issue, which has resulted in extending litigation in a manner that is inefficient and potentially prejudicial to the Prosecution.

witnesses may only express opinions insofar as they emanate from personal experience and that their testimony is limited to what they personally saw, heard, or experienced.<sup>2</sup> Only an expert, due to their specialised knowledge, skill, or training, is afforded the latitude to offer opinions within their expertise not based upon first-hand knowledge or experience.<sup>3</sup> This holds true even if a fact witness has the qualifications of an expert. In such circumstances, as here, “[w]here a Party chooses to call such an individual as a factual, rather than an expert, witness it implicitly makes a choice to limit the witness’ testimony to matters which he personally saw, heard, or experienced.”<sup>4</sup> Both the Kilolo and Bemba Defences have conceded this principle, jointly adopting the position that “where the parties have elected to call a person as a witness of fact, the Trial Chamber has a corresponding duty to exclude irrelevant details, matters of personal opinion, or expertise beyond the remit of a fact witness.”<sup>5</sup>

4. The Bemba and Kilolo defences have designated D20-0002 and D21-0009 as fact witnesses, not as experts.<sup>6</sup> While this is clearly a strategic decision they are entitled to make, they are equally bound by the consequence. By virtue of their election, the Witnesses’ evidence cannot exceed the permissible bounds of their designation.

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<sup>2</sup> *Co-Prosecutors v. Chea and Samphan*, Decision on Assignment of Experts, Case No. 002/19-09-2007/ECCC/TC, 5 July 2012 (“*Chea and Samphan* 5 July 2012 Decision”), para. 16; *Prosecutor v. Karemera et al.*, Decision on “Requete de la Defense de M. Ndirumpatse en Retrait de la Deposition du Temoin GFJ et des Pieces Afferentes”, Case No. ICTR-98-44-T, 6 August 2008 (“*Karemera* 6 August 2008 Decision”), para. 4; *Prosecutor v. Ndindiliyimana et al.*, Decision on the Prosecutor’s Motion Opposing the Testimony of Witness DE4-30 as a Factual Witness, Case No. ICTR-00-56-T, 16 May 2007 (“*Ndindiliyimana* 16 May 2007 Decision”), para. 9.

<sup>3</sup> *Prosecutor v. Popović et al.*, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, Case No. IT-05-88-AR73.2, 30 January 2008, para. 8.

<sup>4</sup> *Ndindiliyimana* 16 May 2007 Decision, para. 9. See also *Karemera* 6 August 2008 Decision, para. 4.

<sup>5</sup> ICC-01/05-01/13-1271-Red, para. 21 (citing *Ndindiliyimana* 16 May 2007 Decision, para. 9; *Karemera* 6 August 2008 Decision, para. 4; *Prosecutor v. Milutinović et al.*, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coö’s Expert Report, Case No. IT-05-87-T, 30 August 2006, para. 11).

<sup>6</sup> ICC-01/05-01/13-1560-Conf-AnxB (noting that D20-0002 is not being offered as an expert); ICC-01/05-01/13-1625-Conf (making no election that D21-0009 is being offered as an expert).

Thus, their evidence must be confined to what they “personally saw, heard, or experienced”.<sup>7</sup>

5. Nevertheless, the Bemba and Kilolo defences suggest that both Witnesses will give evidence about matters which include expert evidence. For instance, in addition to matters he personally perceived, D20-0002 is slated to testify about Dutch law, specifically the “standard procedures in The Netherlands for the search and seizure of potentially privileged materials, and the role of a Dean therein” and the “standard procedures in The Netherlands for the interception of potentially privileged telephone conversations, and the role of a Dean therein”.<sup>8</sup> Although it appears that the Witness may have some personal knowledge about the procedures used to review the intercepted communications,<sup>9</sup> his proffered evidence extends beyond what he personally perceived and into the general expertise on what Dutch law requires.

6. The entirety of D21-0009’s evidence appears to concern matters requiring expertise. The Witness is not being called to testify about his personally perceived fact concerning Victims and Witnesses Unit (“VWU”)’s conduct in the Main Case. Instead, the Witness is being called to provide general evidence about the functioning of the VWU (*“informations sur le fonctionnement de l’UVT de la CPI”*), including the general practice concerning the preparing of and payments of witness expenses (*“la pratique générale de l’unité en ce qui concerne la préparation des témoins et les paiements liés à leurs dépenses”*).<sup>10</sup> Indeed, the Kilolo Defence highlights the fact that the Witness was previously a consultant for the ICC Registry due to *“son expertise”*.<sup>11</sup>

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<sup>7</sup> *CoChea and Samphan* 5 July 2012 Decision, para. 16; *Karemera* 6 August 2008 Decision, para. 4; *Ndindiliyimana* 16 May 2007 Decision, para. 9.

<sup>8</sup> ICC-01/05-01/13-1560-Conf-AnxB.

<sup>9</sup> See CAR-D20-0006-1345 at 1345; CAR-D20-0006-1347 at 1347.

<sup>10</sup> ICC-01/05-01/13-1625-Conf-AnxB.

<sup>11</sup> ICC-01/05-01/13-1625-Conf-AnxB.

7. In addition to being procedurally improper, allowing the Kilolo and Bemba Defences to introduce expert evidence through fact witnesses would unfairly prejudice the Parties and circumvent the Court's regulations. To date, the Court has only received evidence on national law through expert, not fact, witnesses.<sup>12</sup> Allowing these Witnesses to testify about Dutch legal procedures and VWU policies would create procedural unfairness to the Parties and promote inconsistency in how evidence of domestic laws, policies and procedures are introduced. Doing so would also circumvent the Registry's well established process of screening experts.<sup>13</sup> Finally, permitting the Witnesses' evidence would deprive the Prosecution the opportunity to challenge the Witnesses' qualifications as experts, and regarding the sourcing, referencing, structure or methodology used in their reports,<sup>14</sup> or as concerns their statements.

**B. In the Alternative, the Chamber Should Restrict the Scope of Witness D20-0002's Evidence**

8. Should this Chamber deny the exclusion of Witness D20-0002's evidence outright, it should restrict the scope of the Witness' evidence only to his personal perceptions regarding relevant matters. The Bemba Defence has indicated that the Witness was "present during the arrest of Aimé Kilolo, the search and seizure in Kilolo's office, and was involved in the review of seized materials."<sup>15</sup> To ensure that the Witness does not inappropriately provide expert evidence, his opinions on the legality of those events under domestic or international law should be precluded.

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<sup>12</sup> ICC-01/05-01/13-1592; ICC-01/05-01/13-1263-Conf-AnxA, p. 6;

<sup>13</sup> See Regulation 56 of the Regulations of the Registry. For instance, neither Witness is listed on the Registry's List of Experts.

<sup>14</sup> See *e.g.* ICC-01/04-02/06-1159, para. 16; ICC-01/09-01/11-844, para. 20.

<sup>15</sup> ICC-01/05-01/13-1560-Conf-AnxB, p. 2.

### C. The Chamber Should Grant the Prosecution's Relief *In Limine*

9. The Chamber should exercise its gatekeeping functions at this stage and grant the Prosecution's Motion *in limine*. This Chamber has consistently recognised that "although the parties are entitled to a degree of deference in the selection and presentation of their evidence, their discretion is not unlimited"<sup>16</sup> and that "[t]he Chamber may intervene in these matters [to] ensure the fair and expeditious conduct of the trial."<sup>17</sup> The Chamber's intervention is warranted here given that the Bemba and Kilolo Defence intend to present expert evidence that is both *prima facie* irrelevant and inappropriate as fact testimony.

### III. Relief Requested

10. For the foregoing reasons, the Chamber should grant the Motion. The evidence of Witnesses D20-0002 and D21-0009 should be excluded. In the alternative, the scope of Witness D20-0002's evidence should be limited in a manner consistent with paragraph 8 above.




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**Fatou Bensouda, Prosecutor**

Dated this 17<sup>th</sup> Day of February 2016  
At The Hague, The Netherlands

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<sup>16</sup> ICC-01/05-01/13-1622, para. 9 (*citing* ICC-01/0501/13-1600, para. 6).

<sup>17</sup> ICC-01/05-01/13-1622, para. 9 (*citing* ICC-01/0501/13-1600, para. 6).