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No: ICC-01/05-01/13
Date: 25 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, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO***

Public

**Kilolo Defence Response to “Prosecution’s Response to the Materials the Defence
Intends to Use During their Opening Statements” (ICC-01/05-01/13-1654).**

Source: Defence for Mr. 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. On 24 February 2016 the Prosecution submitted its' "Prosecution's Response to the Materials the Defence Intends to Use During their Opening Statements" ["the Motion"].
2. The Defence was granted until 25 February 2016 to file any Response.¹

II. Observations on Prosecution's submissions

3. The Prosecution argue that 'the scope of opening statements is limited to the summarisation of, or commentary on, the evidence that the given Party intends to adduce during its case-in-chief and what it will prove. It is not evidence in itself, nor is it for the purpose of argument'.²
4. The Prosecution is simply wrong to assert that Defence openings can be limited in this way. Moreover, the Prosecution has failed to provide the Trial Chamber with the complete references of some of the authorities cited at footnote 4 of its Motion.
5. The Prosecution seeks to rely on the ICTY decision of *Prosecutor v Kunarac et al* 'Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony'.³ The Prosecution refer only to the following:

"The Trial Chamber does emphasise that there is no justification for the defence submission that the material in the opening statement cannot be limited. The opening statements which the parties are permitted by Rule 94 to make are intended only to

¹ See Trial Chamber VII's e-mail of 25 February 2016 at 3:14 PM.

² ICC-01/05-01/13-1654, para. 1.

³ *Prosecutor v. Kunarac et al.*, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, Case Nos. IT-96-23 & 23/1, 3 July 2000, para. 10.

assist the Trial Chamber in understanding the evidence *which is to be placed before it*'. (Emphasis added)."

6. What the Prosecution omits is the remainder of what the Trial Chamber said which is as follows:

Such assistance can only be provided if the material in the opening statement is limited to the *issues raised by the charges against the accused* and *any issues which the accused may legitimately raise in their defence*. Should the defence seek to introduce in their opening statement material which has no relevance to those issues, the Trial Chamber will exercise its powers to exclude it at that time.⁴

7. In citing the short section from *Kunarac*, the Prosecution failed to highlight that in that case the Defence sought to refer to videotapes that it was not intending to tender into evidence. Hence the reference in the Decision to 'evidence which is to be placed before it' (and emphasized by the Prosecution) was with reference to material that the Defence in that case were not intending to present as evidence at trial. Such material would plainly be irrelevant.
8. Moreover, the *Kunarac* decision appears to highlight that the Defence opening statements may also properly cover: (i) issues raised by the charges against the accused, and (ii) issues which the accused may legitimately raise in their defence. In addressing the evidence to be called by reference to the charges against the Accused (and possible defences), the Defence will inevitably need to place it within the context of a commentary on the Prosecution's case.

⁴ At para. 10 (emphasis added).

9. The Prosecution also seeks to rely on the *ADC-ICTY Manual on International Criminal Defence: ADC-ICTY Developed Practices* (2011).⁵ The Prosecution refer only to the following:

“The primary purpose of the Defence opening statement [...] is to provide an overview of the Defence evidence: the witnesses *who will be* called and the nature of the information *they are expected to present*.” Also noting that opening statements are “not meant to be argumentative” (emphasis added).

10. First, it is noted that the *ADC-ICTY Manual*, which is plainly only advisory, refers to the *primary* purpose of the Defence opening statement. Thus, opening statements can and do refer to other issues.

11. Second, the Prosecution has not fully quoted from the *ADC-ICTY Manual*. The omitted quotation from the Manual is as follows:

In this context, Defence counsel can use the opening statement – which is not meant to be argumentative – as a means of in effect *arguing that the Prosecution did not and cannot meet its burden of proof at trial*.⁶

12. It follows that a Defence opening can legitimately comment upon and the Prosecution’s evidence and assert whether or not it meets the burden of proof at trial, i.e. whether there is evidence that supports of the charges against the accused. This is all the more so if the Defence is presenting limited or no evidence.

III. Defence Submissions

⁵ ADC-ICTY, *Manual on International Criminal Defence: ADC-ICTY Developed Practices*, 2011, para. 42.

⁶ At para. 42 (emphasis added).

13. There is no rule at the ICC as to what may be included/excluded from the Defence opening statement. Neither has the Trial Chamber in any Protocol or Decision set out what may or may not be included in a Defence opening statement.

14. It is respectfully submitted that, as ever, the guiding principle must be relevance. At this stage it is plainly relevant for the Defence opening statement to include the following:

- (i) Comments upon the charges against the accused;
- (ii) The defence position in relation to those charges;
- (iii) Whether the Prosecution has adduced sufficient evidence in support of those charges; and
- (iv) Evidence that may be presented by the Defence as part of its' case.

15. In all the circumstances, it is quite improper for the Prosecution to seek limitation of Defence opening statements to a "summarisation or commentary on the evidence that the given Party intends to adduce".

IV. Relief requested

16. To the extent that the Prosecution has sought any specific relief, it should be denied.

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 25 February 2016,
The Hague, The Netherlands.