

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 21 April 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 Redacted Document

**Public redacted version of "Prosecution Response to Motion on behalf of Mr Aimé Kilolo for the Admission of the Previously Recorded Testimony pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence",
18 April 2016, ICC-01/05-01/13-1816-Conf**

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. The Office of the Prosecutor (“Prosecution”) does not oppose the Kilolo Defence’s request to admit the statements of Witnesses D21-0004, D21-0005, and D21-0006 (collectively, “Defence Statements”),¹ provided that Trial Chamber VII (“Chamber”) also admits the completed questionnaires furnished by these Witnesses to the Prosecution (collectively, “Witness Questionnaires”).² The Witness Questionnaires are admissible under article 69 of the Rome Statute, as they go to the fair assessment of the Defence Statements, assist the Chamber in its determination of the truth, and do not unfairly prejudice the Accused. Further, the interests of justice and fundamental fairness compel the admission of the Witness Questionnaires, since admitting the Defence Statements under rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”) would otherwise preclude the Prosecution’s examination of the Witnesses on matters going to the weight and reliability of the Defence Statements.

2. The Prosecution opposes the admission of the statements of D21-0007 and D21-0008 (“Untested Statements”), absent a meaningful opportunity to examine the Witnesses.

II. Confidentiality

3. This filing is classified as “*Confidential*” as it responds to a filing of the same designation. A “Public Redacted” version will be filed shortly.

¹ See ICC-01/05-01/13-1780-Conf (“Request”).

² See D21-0004’s and D21-0006’s responses to the Prosecution’s questionnaires and D21-0005’s declaration in response to the Prosecution’s questionnaire which the Witnesses provided at the Prosecution’s request, pursuant to the Chamber’s Contact Protocol, ICC-01/05-01/13-1093-Anx.

III. Submissions

A. The Witness Questionnaires are essential to the fair assessment of the Defence Statements and should be admitted

4. The Prosecution incorporates by reference the arguments advanced in its Sixth Bar Table Motion³ elaborating on the legal bases for the admission of the Witness Questionnaires.

5. The Witness Questionnaires are essential to the Chamber's fair evaluation of the accuracy and reliability of the Defence Statements, as well as to a reasoned determination of the weight to ascribe to them. For instance, while D21-0004's statement provides evidence of Kilolo's purported character, including that he is «[REDACTED]»,⁴ his response to the Prosecution's questionnaire reveals the tenuous factual basis for these assertions. In it, D21-0004's makes clear that his knowledge of Kilolo is based on his limited relationship with him [REDACTED].⁵

6. D21-0004's and D21-0006's responses to the Prosecution's questionnaire also reveal their potential bias. For instance, in response to a question about whether the Witness' opinion of Kilolo would be affected were Kilolo convicted of the charged crimes – *i.e.*, conduct which D21-0004 and D21-0006 acknowledge violates the professional and ethical obligations of lawyers [REDACTED]⁶ – D21-0004 confirmed that he would not change his opinion.⁷ D21-0006 refused to answer the question altogether.⁸

³ ICC-01/05-01/13-1784-Conf, paras. 25-30 ("Sixth Bar Table Motion").

⁴ ICC-01/05-01/13-1780-Conf-AnxA, pp. 3, 4.

⁵ In response to a question about his relationship with the accused, D21-0004 stated: [REDCATED].

⁶ For D21-0006, *see*: CAR-OTP-0093-0449 at 0452. For D21-0004, *see*: CAR-OTP-0094-0003, at 0005-0006.

⁷ CAR-OTP-0094-0003 at 0011.

⁸ CAR-OTP-0093-0449 at 0457.

7. D21-0005's lack of knowledge of the charges against the Accused⁹ is relevant to the weight to be ascribed to his Defence statement. It shows that his opinion of Kilolo's character is drawn without knowledge of all relevant factors, and that he has limited knowledge of Kilolo's actions.¹⁰ Moreover, D21-0005's failure to answer important questions in his responses to the Prosecution's questionnaire, such as (i) whether a lawyer in his jurisdiction who presents false testimony before a court, bribes or illicitly coaches witnesses and/or provides non-monetary promises to witnesses to influence their testimony or evidence breaches his legal, professional, and ethical obligations, and (ii) whether any of the accused has been involved in disciplinary proceedings,¹¹ bears directly on his credibility, [REDACTED].¹²

B. The Untested Statements should not be admitted absent an opportunity for the Prosecution to examine the Witnesses

8. The Prosecution opposes the admission of the Untested Statements, absent a reasonable opportunity to examine Witnesses D21-0007 and D21-0008. *First*, as both Witnesses' failed to respond to the Prosecution's questionnaire,¹³ admitting their respective Defence Statements would deprive the Prosecution of any means of testing their evidence. Although this alone does not defeat a rule 68(2) application, the Witness Questionnaires adduced have uniformly demonstrated that the Chamber cannot simply presume the accuracy or reliability of the Defence Statements so as to obviate any need for the Witnesses' examination.

⁹ CAR-OTP-0093-0469, at 0470.

¹⁰ D21-0005 stated in his Defence Statement that: «[REDACTED]». ICC-01/05-01/13-1767-Conf-AnxII, p. 5.

¹¹ In his response to the Prosecution's questionnaire, D21-0005 stated that: «[REDACTED]». See CAR-OTP-0093-0469, at 0469. He never explained how answering the questions cited above would violate his obligations.

¹² ICC-01/05-01/13-1767-Conf-AnxII, p.5.

¹³ While noting that the Contact Protocol (ICC-01/05-01/13-1093-Anx) places no obligation on witnesses to cooperate with opposing party, this fact should be considered in this instance when assessing the interests of justice pursuant to rule 68(2)(b)(i) of the Rules. The Witnesses' failure to cooperate with the Prosecution renders their evidence virtually immune to examination. Thus, their admission would unfairly prejudice the Prosecution and would not serve the interests of justice.

9. As noted, the Witness Questionnaires have revealed evidence bearing on the Witnesses' bias, credibility, or basis of knowledge concerning their Defence Statements – all going to their weight and reliability. As such, there is no reason for the Chamber to believe that D21-0007 and D21-0008 would have responded differently to the Prosecution's questionnaire.

10. *Second*, denying the admission of the Untested Statements is not prejudicial to the Defence, as it does not preclude their tendering pursuant to rule 68(3) of the Rules – thus providing both Parties a fair opportunity to examine the Witnesses' evidence. Even if the Chamber were to reject the Untested Statements, the Kilolo Defence still has recourse to the statements of three other character witnesses, whose admission the Prosecution does not oppose as long as their Witness Questionnaires are concomitantly admitted.

11. *Third*, admitting the Untested Statements is prejudicial to the Prosecution. Even given their limited relevance to the article 74 decision,¹⁴ their relevance to the proceedings also concerns an article 78 determination. Defence evidence bearing on the determination of a possible sentence is a salient aspect of trial which the Prosecution should have a fair opportunity to challenge. Admitting the Untested Statements absent that opportunity would be inconsistent with, if not, contrary to the interests of justice.

¹⁴ ICC-01/05-01/13-1600, para. 15.

IV. Requested Relief

12. For the foregoing reasons, the Prosecution does not oppose the Kilolo Defence's request to admit the Defence Statements of D21-0004, D21-0005, and D21-0006, provided that the Chamber admits their Witness Questionnaires. Additionally, the Prosecution opposes the admission of D21-0007's and D21-0008's statements, absent a meaningful opportunity to examine the Witnesses.



Fatou Bensouda, Prosecutor

Dated this 21st day of April, 2016
At The Hague, The Netherlands