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

Date: **29 April 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding
Judge Marc Perrin de Brichambaut
Judge Raul C. 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

**Decision on the ‘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’**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Article 69 of the Rome Statute ('Statute') and Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), issues the following Decision on the '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'.

I. Procedural History

1. On 21 January 2016, the defence team for Mr Aimé Kilolo ('Defence') provided its final list of witnesses and anticipated testimony summaries.¹
2. On 26 January 2016, the Single Judge directed the Defence to file submissions justifying the relevance and propriety of calling, *inter alia*, the requested witnesses to testify as to Mr Kilolo's character, professionalism and/or ethics.²
3. On 29 January 2016, the Defence duly filed those submissions reiterating its request to call D21-4, D21-5, D21-6, D21-7 and D21-8 as character witnesses.³
4. On 4 February 2016, the Chamber issued its decision on the relevance and propriety of calling the Defence witnesses ('Relevance and Propriety Decision').⁴
5. On the 7 April 2016, the Defence submitted a request ('Request') to admit the previously recorded testimony of the five character witnesses pursuant to Rule 68(2)(b) of the Rules.⁵

¹ Soumissions de la défense de monsieur Aimé Kilolo concernant sa liste de témoins et sa liste de preuves, ICC-01/05-01/13-1562 (with four annexes).

² Directions Relating to Certain Defence Witnesses and Appearance Order, ICC-01/05-01/13-1578, para. 4.

³ Kilolo Defence's submissions on relevance and propriety of certain defence witnesses, ICC-01/05-01/13-1585-Conf.

⁴ Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, ICC-01/05-01/13-1600, para. 17.

6. On 18 April 2016, the Office of the Prosecutor ('Prosecution') filed its response ('Response') to the Request.⁶

II. Submissions

7. The Defence requests the Chamber to admit into evidence the previously recorded testimony of witnesses D21-4, D21-5, D21-6, D21-7 and D21-8, in lieu of their *viva voce* testimony.⁷ The Defence states that the evidence of each of the witnesses pertains to the character and professional integrity of Mr Kilolo,⁸ that the previous recorded statements are *prima facie* relevant and probative of the charges and do not concern the acts and conduct of the accused.⁹
8. The Defence notes that D21-4, D21-5 and D21-6 have already acknowledged the truthfulness and accuracy of their previous recorded statements in declarations in accordance with Rule 68(2)(b)(ii) of the Rules.¹⁰ Whilst D21-7 and D-21-8's testimony will be certified shortly in accordance with Rule 68(2)(b)(ii) of the Rules, the Chamber is requested to admit their previously recorded statements in anticipation of and on condition of their subsequent certification.¹¹ The Defence submits that the nature and content of the evidence of each witness makes their cross-examination unnecessary.¹² The Defence further notes that the Prosecution has already been given the opportunity to contact each of the five witnesses.¹³
9. The Prosecution does not oppose the Request with respect to witnesses D21-4, D21-5 and D21-6 subject to the condition that the Chamber admits the Prosecution

⁵ Motion on behalf of Mr Aimé Kilolo for the Admission of the Previous Recorded Testimony pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-01/05-01/13-1780-Conf. Public redacted version filed on 7 April 2016, ICC-01/05-01/13-1780.

⁶ 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", ICC-01/05-01/13-1816-Conf. Public redacted version filed on 7 April 2016, ICC-01/05-01/13-1816.

⁷ Request, ICC-01/05-01/13-1780-Conf, paras 1, 3 and 21.

⁸ Request, ICC-01/05-01/13-1780-Conf, para. 16.

⁹ Request, ICC-01/05-01/13-1780-Conf, paras 4,17 and 19.

¹⁰ Request, ICC-01/05-01/13-1780-Conf, paras 4, 8-12.

¹¹ Request, ICC-01/05-01/13-1780-Conf, paras 5 and 13.

¹² Request, ICC-01/05-01/13-1780-Conf, para. 6.

¹³ Request, ICC-01/05-01/13-1780-Conf, para. 6.

questionnaires completed by these witnesses ('Questionnaires').¹⁴ The Prosecution argues that the Questionnaires are admissible under Article 69 of the Statute,¹⁵ noting that they give a fair assessment of the defence statements, assist the Chamber in its determination of the truth, and do not unfairly prejudice the accused.¹⁶

10. The Prosecution opposes the admission of the statements of D21-7 and D21-8, absent a meaningful opportunity to examine those witnesses.¹⁷ The Prosecution notes that both witnesses failed to complete the Questionnaires and claims that admitting their respective statements would therefore deprive the Prosecution of any means of testing the evidence in terms of its reliability or relevance to a decision pursuant to Article 78 of the Statute.¹⁸ The Prosecution maintains that denying the admission of the untested statements is not prejudicial to the Defence as it does not preclude their being tendered pursuant to Rule 68(3) of the Rules.¹⁹

III. Analysis

11. Rule 68(2) of the Rules allows for the introduction of previously recorded testimony of a witness, if the witness who gave the testimony is not present before the Trial Chamber. Rule 68(2)(b) of the Rules allows for such introduction if the testimony goes to proof of a matter other than the acts and conduct of the accused. Several requirements must be met, including that the prior recorded testimony must be 'accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief', pursuant to Rule 68(2)(b)(ii) of the Rules. Such declarations must be witnessed by an authorised person within the meaning of Rule 68(2)(b)(iii) of the Rules.

¹⁴ Response, ICC-01/05-01/13-1816-Conf, paras 1, 4-7.

¹⁵ Response, ICC-01/05-01/13-1816-Conf, para. 1.

¹⁶ Response, ICC-01/05-01/13-1816-Conf, para. 1.

¹⁷ Response, ICC-01/05-01/13-1816-Conf, paras 1, 8-11.

¹⁸ Response, ICC-01/05-01/13-1816-Conf, paras 8-9 and 11.

¹⁹ Response, ICC-01/05-01/13-1816-Conf, para. 10.

12. The Chamber previously found that evidence of Mr Kilolo's good character does not constitute the 'acts and conduct of the accused' for purposes of the procedural bar set by Rule 68(2)(b) of the Rules.²⁰ The Chamber also held that: 'If the Kilolo Defence presents prior recorded testimony of the Character Witnesses in a manner compliant with Rule 68(2)(b) of the Rules, then, subject to any objections raised by the other parties, the Chamber will recognise the submission of this testimony despite its reservations as to its relevance'.²¹
13. Witnesses D21-4, D21-5 and D21-6 have each acknowledged the truthfulness and accuracy of their previously recorded statements in their corresponding declarations²² which were taken by authorised persons.²³ Further it is noted that the Prosecution does not oppose the admission of the statements of D21-4, D21-5 and D21-6 on the condition of the concurrent admission of their respective Questionnaires. Moreover, in its response to the 'Prosecution's Sixth Request for Admission of Evidence from the Bar Table' of 8 April 2016,²⁴ the Defence did not oppose the admission into evidence of those Questionnaires.²⁵ Indeed, the Chamber has recognised the formal submission of these Questionnaires in its 'Decision on Outstanding Evidentiary Applications' of 29 April 2016.
14. Following from the above, the statements of Witnesses D21-4, D21-5 and D21-6 satisfy the criteria set out in Rule 68(2)(b) of the Rules and the Chamber, in accordance with its decision on the timing of assessments of the relevance and probative value of each item of evidence,²⁶ recognises the materials as having been

²⁰ Relevance and Propriety Decision, ICC-01/05-01/13-1600, para. 16.

²¹ Relevance and Propriety Decision, ICC-01/05-01/13-1600, para. 17.

²² Registry submission of the declarations made by witnesses CAR-D21-0005 and CAR-D21-0006 pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence, 4 April 2016, ICC-01/05-01/13-1767-Conf, with two confidential annexes; Registry submission of the declaration made by witness CAR-D21-0004 pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence, 7 April 2016, ICC-01/05-01/13-1782-Conf.

²³ See Decision on the Prosecution's Request to Designate a Person Authorised to Witness a Declaration Under Rule 68(2)(b) of the Rules of Procedure and Evidence, 29 July 2015, ICC-01/05-01/13-1109.

²⁴ Prosecution's Sixth Request for Admission of Evidence from the Bar Table, ICC-01/05-01/13-1819-Conf-AnxA.

²⁵ Annex A to the Kilolo Defence Response to "Prosecution's Sixth Request for Admission of Evidence from the Bar Table", 18 April 2016, ICC-01/05-01/13-1819-Conf-AnxA.

²⁶ Decision on Prosecution Request for Admission of Documentary Evidence (ICC-01/05-01/13-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285, paras 9-13.

formally submitted and shall address issues of relevance in its judgment pursuant to Article 74 of the Statute.

15. Turning to the admission of the prior recorded testimony of witnesses D21-7 and D21-8, the Chamber notes the opposition of the Prosecution to the admission of those statements absent an opportunity to examine the witnesses.²⁷ Rule 68(2)(b)(i) of the Rules provides that: In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question: - relates to issues that are not materially in dispute; - is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; - relates to background information; - is such that the interests of justice are best served by its introduction; and - has sufficient indicia of reliability.
16. In the view of the Chamber, the statements of witnesses D21-7 and D21-8 do not relate to issues which are materially in dispute. The Chamber itself has already noted the limited link between this evidence and the materially disputed part of this case, clearly stating that 'this case is not about Mr Kilolo's 'character, professionalism and ethics' but whether Mr Kilolo's acts and conduct were criminal with respect to the relevant witnesses in *The Prosecutor v. Jean-Pierre Bemba Gombo* case (ICC-01/05-01/08). Evidence that Mr Kilolo conducted his work ethically with respect to other witnesses in other contexts does little to contribute to this assessment'.²⁸
17. Furthermore, given that the Defence has requested the admission of statements from five character witnesses in total, the statements of witnesses D21-7 and D21-8 are not the only evidence pertaining to the character of Mr Kilolo and, moreover, the statements of the two contested character witnesses is similar in nature to the evidence in the statements of the remaining three uncontested character witnesses.

²⁷ Response, ICC-01/05-01/13-1816-Conf, paras 1, 8-11.

²⁸ Relevance and Propriety Decision, ICC-01/05-01/13-1600, para. 14.

18. The Defence had originally requested that D21-7 and D21-8 testify *viva voce* before the Chamber. It was this Chamber, in the Relevance and Propriety Decision, which required resort to Rule 68(2)(b) of the Rules. The interests of justice therefore strongly militate in favour of allowing the Defence to introduce this prior recorded testimony in these circumstances.
19. The Prosecution objections are thus dismissed.
20. The Chamber notes the impending arrival of the declarations pursuant to Rule 68(2)(b)(ii) of the Rules and conditionally admits the prior recorded testimony of witnesses D21-7 and D21-8 upon the presentation of those accompanying declarations.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Defence Request;

RECOGNISES the following as submitted: ICC-01/05-01/13-1767-Conf-AnxI, ICC-01/05-01/13-1767-Conf-AnxII, and ICC-01/05-01/13-1782-Conf-AnxI; and

RECOGNISES the following as submitted only upon receipt of declarations pursuant to Rule 68(2)(b)(ii) of the Rules: ICC-01/05-01/13-1780-Conf-AnxB and ICC-01/05-01/13-1780-Conf-AnxC.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 29 April 2016

At The Hague, The Netherlands