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

Date: **29 March 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
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 Bemba Defence Application for Admission of D20-2's Prior Recorded
Testimony Pursuant to Rule 68(2)(b) of the Rules**

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

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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REGISTRY

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Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court ('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 Articles 64(9)(a), 67, 69 and 74(2) of the Rome Statute ('Statute') and Rules 68(2)(b) and 134(3) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Bemba Defence Application for Admission of D20-2's Prior Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules'.

I. Procedural History

1. On 15 March 2016, the defence for Mr Bemba ('Bemba Defence') applied to introduce the prior recorded testimony of D20-2 pursuant to Rule 68(2)(b) of the Rules ('Application').¹ The relevant declaration and attestation required by Rule 68(2)(b) – as well as the correspondence constituting D20-2's prior recorded testimony – were annexed to a recent Registry submission.²
2. On 22 March 2016,³ the Office of the Prosecutor ('Prosecution') responded to the Application ('Response'), submitting that it be rejected or, in the alternative, to also allow for the introduction of the Prosecution's own 17 March 2016 interview with D20-2.⁴
3. On 23 March 2016, the Bemba Defence sought leave to reply to the Response on certain issues.⁵ The Prosecution responded the same day, submitting that the Chamber should dismiss this request.⁶

¹ Defence Application for Admission of Prior Recorded Testimony of D20-0002 Pursuant to Rule 68(2)(b), ICC-01/05-01/13-1721-Red (with two confidential annexes; redacted version of filing notified on 18 March 2016).

² Registry submission of the declaration made by witness CAR-D20-P-0002 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 3 March 2016, ICC-01/05-01/13-1692-Conf (with two confidential annexes).

³ The response deadline was shortened to this date. Email from Trial Chamber VII Communications to the parties, 16 March 2016 at 10:55.

⁴ Prosecution's Response to Bemba's "Application for Admission of Prior Recorded Testimony of D20-0002 Pursuant to Rule 68(2)(b)", ICC-01/05-01/13-1737-Red (with four annexes; public redacted version notified 23 March 2016 and corrected confidential version notified 24 March 2016).

⁵ Public Redacted Version of Defence Request for Leave to Reply to Prosecution's Response to Bemba's "Application for Admission of Prior Recorded Testimony of D20-0002 Pursuant to Rule 68(2)(b) (ICC-01/05-01/13-1737-Conf), ICC-01/05-01/13-1741-Red (confidential version notified same day).

II. Analysis

4. As a preliminary issue, the Chamber does not consider it necessary to receive the reply proposed by the Bemba Defence in order to reach its decision. The Chamber therefore rejects this request.
5. The Chamber recalls its past decisions interpreting the parameters of Rule 68(2)(b) of the Rules.⁷ The Chamber also recalls that it recently rejected a request from the defence for Mr Mangenda for D23-1 to have his report introduced pursuant to Rule 68(2)(b) on the following grounds:

The Chamber considers that when assessing the requirements in Rule 68(2)(b)(i) of the Rules, they do not militate in favour of receiving D23-1's testimony without examination by all parties. The contents of the Report do relate to issues which are materially in dispute. The Prosecution clearly contests its contents in the Response, and the Mangenda Defence also gives all appearances of considering the issues raised by the Report as particularly important. D23-1 is Mr Mangenda's only proposed witness, and the Mangenda Defence has argued in great detail how the Report is directly relevant to whether financial information central to the Prosecution's investigation was obtained in violation of Article 69(7) of the Statute. The Mangenda Defence makes no submission that this evidence is cumulative, corroborative or relates to background information. Under these circumstances, the Chamber is not persuaded that the interests of justice are best served by dispensing with the Prosecution and other defence teams' opportunity to examine D23-1.⁸

6. The Prosecution raises arguments against the present Application which are very similar to the reasoning above,⁹ and the Chamber considers that nearly identical considerations apply here. D20-2's correspondence is highly disputed,¹⁰ and the Bemba Defence submissions suggest that D20-2's remarks are particularly important for its defence. D20-2 is the only Bemba Defence witness on this point,

⁶ Prosecution's Response to Bemba's "Request for Leave to Reply to Prosecution's Response to Bemba's "Application for Admission of Prior Recorded Testimony of D20-0002 Pursuant to Rule 68(2)(b) (ICC-01/05-01/13-1737-Conf)", ICC-01/05-01/13-1745.

⁷ Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, paras 26-34, 50-51, 95-96 (with annex). *See also* Decision on Request for Formal Submission of D23-1's Expert Report Pursuant to Rule 68(2)(b) or, in the Alternative, Rules 68(3) and 67, 19 February 2016, ICC-01/05-01/13-1641; Public redacted Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence', 12 November 2015, ICC-01/05-01/13-1481-Red; Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules, 29 October 2015, ICC-01/05-01/13-1430.

⁸ ICC-01/05-01/13-1641, para. 7 (citations removed).

⁹ Response, ICC-01/05-01/13-1737-Red, paras 4-12.

¹⁰ Response, ICC-01/05-01/13-1737-Red, paras 4-6.

and it also argues that D20-2's correspondence is directly relevant on matters which challenge the legality of the collection of significant Prosecution evidence.¹¹ The Bemba Defence likewise makes no submission that this evidence is cumulative or corroborative of any other evidence in the record.

7. The one distinguishing point raised is that, while D23-1 was willing to testify before the Chamber (albeit only via video-link),¹² the Bemba Defence indicates that D20-2 'has also stated explicitly that he would not testify as a *vive voce* Defence witness; it would therefore be contrary to the rights of the Defence and the interests of justice not to admit D20-0002's prior recorded testimony via Rule 68(2)'.¹³ The Chamber considers that D20-2's categorical refusal to testify is insufficient to counterbalance the other parties' interests in having an opportunity to question him on any evidence he provides. The Chamber is unpersuaded that it is in the interests of justice to introduce D20-2's correspondence pursuant to Rule 68(2)(b) of the Rules under these circumstances.¹⁴
8. Given the Chamber's assessment on the Rule 68(2)(b)(i) criteria, the relief sought in the Application is rejected.
9. The Chamber emphasises that this ruling has a significant caveat. The Bemba Defence submits that D20-2 provides 'important contextual information concerning the legality of the collection of evidence in The Netherlands, and positive assertions put forward by the Independent Counsel in court filings [...]'.¹⁵ The Bemba Defence also indicates that D20-2 'does not provide any evidence concerning the specific content of seized communications, nor does his testimony

¹¹ ICC-01/05-01/13-1721-Conf, para. 17.

¹² The Chamber originally ordered for D23-1 to testify in-person, but this was later reconsidered and he testified via video-link on 11 March 2016. *See* Transcript of Hearing, 2 March 2016, ICC-01/05-01/13-T-40-CONF-ENG ET, page 83 line 22 to page 84 line 2, *ruling on* Jean Jacques Mangenda's Request for Reconsideration of Decision Concerning Video-Conference Testimony, 29 February 2016, ICC-01/05-01/13-1674 (notified 1 March 2016).

¹³ Application, ICC-01/05-01/13-1721-Red, para. 23 (citation removed).

¹⁴ This is particularly the case in light of the Chamber's considerations in paragraph 12 below.

¹⁵ Application, ICC-01/05-01/13-1721-Red, para. 2(d). *See also* ICC-01/05-01/13-1721-Conf, para. 17.

relate to the specific incidents, set in the charges'.¹⁶ On these submissions, the Chamber understands that the Bemba Defence relies on D20-2 solely to support arguments which would be used in an application to declare evidence inadmissible pursuant to Article 69(7) of the Statute.

10. The Chamber does not anticipate discussing any Article 69(7) considerations in the trial judgment – applications filed on this basis are being ruled upon before then as an exception to the general rule that the Chamber defers admissibility assessments until the judgment.¹⁷ The Chamber has set a deadline of 8 April 2016 for any final Article 69(7) applications to be filed.¹⁸
11. The Chamber considers that supporting materials for procedural motions – like Article 69(7) applications, and the Prosecution's responses to those applications – do not typically need to meet the same admissibility criteria as evidence being considered in the judgment.¹⁹ There are certain decisions in the proceedings where the Statute makes explicit reference to a Chamber's consideration of 'evidence',²⁰ and the trial judgment in particular may be based 'only on evidence submitted and discussed before it at the trial'.²¹ But Rule 134(3) of the Rules does not

¹⁶ Application, ICC-01/05-01/13-1721-Red, para. 7.

¹⁷ Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285, para. 13. *See also* Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr; Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, 30 October 2015, ICC-01/05-01/13-1432; Decision on Request to declare telephone intercepts inadmissible, 24 September 2015, ICC-01/05-01/13-1284; Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, ICC-01/05-01/13-1257.

¹⁸ Transcript of Hearing, 9 March 2016, ICC-01/05-01/13-T-42-CONF-ENG, page 42 line 21 to page 43 line 5.

¹⁹ The Chamber has said this previously in relation to its email rulings on evidence submission. Formally Submitted Items for D23-1, Email from Trial Chamber VII Communications to the parties on 21 March 2016 at 09:00, para. 10 ('Moreover, all parties have discussed D23-1's evidence in the context of Article 69(7) challenges. Any such challenges must be filed by 8 April 2016 and will be resolved prior to the judgment. The Chamber has not been requiring annexes to procedural motions to meet the Rule 68 criteria as a prerequisite to considering them, and the Prosecution's position does not suggest that it intends to rely on any of its 16 items outside the context of Article 69(7) litigation').

²⁰ *Egs* Articles 58(1) (the Pre-Trial Chamber's arrest warrant rulings are made on the basis of the 'evidence or other information submitted by the Prosecutor'); 61(7) ('The Pre-Trial Chamber shall, on the basis of the [confirmation] hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged') and 76(1) of the Statute ('In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence').

²¹ Article 74(2) of the Statute.

reference 'evidence' or limit a Chamber's consideration to 'evidence' when ruling on procedural motions,²² and this Chamber routinely rules on applications without addressing the 'admissibility' of the supporting materials annexed to them. In this way, an Article 69(7) application is not limited to admissible 'evidence' in the same way as a trial judgment.

12. Bearing this in mind, the present decision on the Rule 68(2)(b) criteria does not necessarily mean that the Bemba Defence cannot use D20-2's correspondence. This correspondence cannot be considered as admissible 'evidence',²³ but could be considered as supporting material in an Article 69(7) motion. In much the same way, the Prosecution's 17 March 2016 interview with D20-2 could be considered with a response to any such motion.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Bemba Defence request to reply to the Response; and

REJECTS the relief sought in the Application, subject to paragraph 12 above.

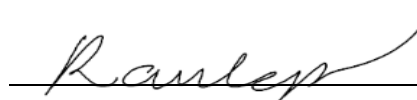
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 29 March 2016

At The Hague, The Netherlands

²² Rule 134 is entitled 'Motions relating to the trial proceedings', and Rule 134(3) provides that: 'After the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial'.

²³ See Rule 64(3) of the Rules.