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No: **ICC-01/05-01/13**
Date: **24 September 2015**

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

Objection to the Use of Certain Materials During the Prosecution's Opening Statements

Source: Defence for Jean-Jacques Kabongo Mangenda

Document 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-Jacques Kabongo Mangenda

Mr Christopher Gosnell
Mr Arthur Vercken

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku
Mr Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Jean-Jacques Mangenda objects, in accordance with paragraph 7 of the Single Judge's "Directions on the conduct of the proceedings,"¹ to the use of Tabs 14, 17, 19, 23, 28, 31-33, 39-41, 44-49, 53, 63 and 65² during the Prosecution's opening statement in this trial.

II. SUBMISSIONS

2. Opening and closing statements serve different purposes. The purpose of the latter is to discuss the evidence presented during trial in-depth, whereas the former is a "preview" of the evidence that will be adduced:

The courts and commentators are virtually unanimous that opening statements may only be used to inform the jury of "what the evidence will show." Counsel may not argue the case during opening and is restricted to offering a preview of the anticipated testimony, exhibits, and other evidence. This limitation results in a highly stylized set of rules for the presentation of opening statements, and it informs almost everything else that there is to be said on the subject.³

3. One of the rules that flow from this distinction is that an opening statement should avoid reference to material whose admissibility is seriously challenged. Mere notice of an objection, according to *Archbold*, is sufficient to preclude such references in the

¹ *Bemba et al.*, Directions on the conduct of the proceedings, ICC-01/05-01/13-1209, 2 September 2015.

² *Bemba et al.*, Prosecution's Notice of the Materials it intends to use in the Course of its Opening Statement, ICC-01/05-01/13-1275, 21 September 2015.

³ Lubet, S. (2013), *Modern Trial Advocacy: Analysis and Practice*, 4th ed, National Institute for Trial Advocacy, ch. 12.1.2. See Canada, Ontario Court of Appeal, *Brochu v. Pond*, 62 O.R. (3d) 722, para. 12 ("[t]he object of an opening is to give the court a general notion of what will be given in evidence [...] In his opening, counsel states what he submits are the issues and the questions between the parties which have to be determined, what are the facts of the case, the substance of the evidence he has to adduce and its effect on proving his case, and he will refer to the relevant correspondence between the parties and other documents. He will remark upon any point of law involved in the case, *but the opening is not the occasion for detailed argument on legal questions* or an extensive examination of the authorities. In opening, counsel may refer to those facts of which the court takes judicial notice. *Neither in the opening nor at any stage of the trial may counsel assert his personal opinion on the facts or the law, or mention facts which require proof but which it is not intended to prove, or which are irrelevant to the issue to be tried.*")

United Kingdom;⁴ a pending motion *in limine* concerning admissibility generally precludes such references in the United States.⁵

4. This is a corollary of the adversarial model itself, which uses standards of admissibility to ensure that evidence heard by the trier of fact meets a certain standard of reliability and has been obtained lawfully. Indeed, this is one of the hallmarks of the adversarial model: without a “dossier” prepared under judicial supervision, the standards of admissibility must play a greater role in ensuring trial fairness. Allowing a party to refer to any contentious or disputed information during an opening statement would undermine the purpose of those rules of admissibility. Conversely, no prejudice is suffered to the presenting party, who will be free to make full reference to such materials in its closing, if they are admitted.
5. While these rules, as with many common law rules, have been developed in the context of avoiding a mistrial before a jury, the “relevant principles are nevertheless of general application.”⁶ As one ICTY Presiding Judge commented concerning a Prosecution attempt to read a portion of a book imputed to the accused during an opening statement:

JUDGE MOLOTO: Let me just make a general comment. I find the opening to verge on testifying and introducing exhibits which are not marked as exhibits yet but which are documents that make an impression in the mind of the Chamber. And to the extent that at this point there is now a dispute about the authenticity and the provenance, the relevance of the book that you are about to refer to, the Chamber feels constrained to apply the rules of admissibility before it allows you to continue talking about that. You’ve got to authenticate it. You’ve got to bring in a witness to say he’s the author of the book. All the requirements for admissibility. Because we -- the Chamber cannot accept that we hear what you are going to say only to throw the book out later. The book might be out, but the mind – it’s still in the mind. And the purpose for admissibility is to make sure that the mind of the Chamber is not coloured by what might turn out to be inadmissible.⁷

⁴ Richardson, J. (ed) (2015), *Archbold Criminal Pleading Evidence and Practice*, 63rd ed, Sweet & Maxwell, Chapter 4, Part X, s. 4-343 (“Where objection is to be taken by counsel for the defence to the admissibility of a piece of evidence, he should inform counsel for the prosecution beforehand, and the latter should refrain from mentioning that piece of evidence to the jury in his opening speech.”)

⁵ Lubet, S. (2013), *Modern Trial Advocacy: Analysis and Practice*, 4th ed, National Institute for Trial Advocacy, ch. 12.4.1.2 (“Many judges also make it a practice to reserve ruling on motions *in limine* while instructing counsel not to allude to the subject evidence during opening statements.”)

⁶ Canada, Canada Human Rights Tribunal, *Mowat v. Canada (Armed Forces)*, 51 C.H.R.R. D/262, para. 35.

⁷ *Haradinaj et al.*, IT-04-84bis-T, 18 August 2011, T. 224-225.

6. Judge Moloto went on to explain that the possibility that the judges' impressions might be "coloured" by such material depends to some degree on its nature and its volume:

I accept that the Chamber is composed of professional Judges who are able to disabuse their minds of things that are irrelevant. However, it is also constituted of human beings, and you will realise that in the guidelines that have been given, the whole question of MFI-ing documents is being forbidden precisely for that reason. If you are going to get one document you may be able to disabuse our minds of its contents. If we are going to get 150, it becomes pretty difficult, humanly impossible to do so, and therefore this Chamber intends to keep to a very bare minimum any documents that come in which may later have to be thrown out.⁸

7. The Prosecution, in deference to this guidance by the Trial Chamber, refrained from reading from the disputed document, and instead offered a summary of its content.⁹ This caused no prejudice to the Prosecution's ability to provide a "preview" of its case.
8. This same approach commends itself here. *Verbatim* references to the documents are unnecessary for the Prosecution to provide an overview of its case. Conversely, the material in question has been challenged on two separate grounds: (i) that it is inherently inadmissible and has not been properly authenticated; and (ii) that it should be excluded pursuant to Article 69(7) of the Statute. The latter request has today been denied by the Trial Chamber.¹⁰ The Defence indicates, subject to a fuller opportunity to review that decision, that it may seek leave to appeal. In any event, the objections to the admissibility of the material, in addition to any potential appeal in respect of exclusion, remain to be adjudicated.
9. The appropriate course, until final adjudication of the pending objections to admissibility, is to limit the Prosecution to giving an overview of the evidence it

⁸ *Id.* T. 226.

⁹ *Id.* T. 233 ("MR. ROGERS: Your Honours, can I deal with it like this. During the course of the trial the Prosecution will produce to you a document in which the Prosecution says the accused Ramush Haradinaj indicated that he was the – one of the first persons in the Dukagjin group along with Lahi Brahimaj, his uncle. And that together he and Lahi and his other relatives, they established the 1st Dukagjini group of the KLA. He also speaks, we say, of his return to Kosovo from Albania and in – the Prosecution suggests that when he first returned he went to Jabllanice where he spent days checking equipment and that he accepted individuals into the organisation of the KLA, and those people included Lahi Brahimaj, Shkelzen Haradinaj, and Luan Haradinaj.")

¹⁰ *Bemba et al.*, Decision on Request to declare telephone intercepts inadmissible, ICC-01/05-01/13-1284, 24 September 2015.

intends to adduce, but without going so far as playing the audio-recordings or reading the excerpts. This preserves the Prosecution's ability to provide a "preview" of the evidence it intends to present, without the opening statement itself becoming a mechanism by which evidence is introduced and presented.

III. CONCLUSION AND RELIEF REQUESTED

10. The Prosecution should not be permitted to play or read the items mentioned in paragraph one of this submission. The Prosecution should be permitted, however, to summarise the content of the material as necessary to provide a "preview" of its case.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 24 September 2015,
At The Hague, The Netherlands