

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 14/10/2015

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*

Confidential

**Joint Defence Response to Prosecution Request to add P-0242 to its witness list
(ICC-01/05-01/13-1288-Conf)**

Source: Counsel for Jean-Pierre Bemba Gombo
Counsel for Aimé Kilolo Musamba

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Defence for Mr. Jean-Pierre Bemba and Me. Aimé Kilolo (hereinafter “the Defence”) request the Trial Chamber to reject the Prosecution request to add P-242 to its list of witnesses (the Request).¹
2. The Prosecution has failed to adduce any concrete or persuasive explanation as concerns its failure to include P-242 on its list prior to the expiration of the deadline, or its failure to request that the deadline be suspended as concerns P-242.
3. The Prosecution has admitted that it intended to call P-242 as a witness prior to the expiration of the deadline. Neither the issue of contact nor the issue of certification precluded the Prosecution from including other persons in its list, or from submitting such certification after the deadline. The Prosecution has failed to provide any explanation as to this anomaly.
4. There are also no exceptional circumstances which would warrant the inclusion of P-242 at this juncture. This is not new, or previously unavailable evidence, and the issues set out in P-242's statement are at best, duplicative of peripheral issues.
5. It would also be prejudicial to add new witnesses after the commencement of the trial. Even if the statements were disclosed prior to the commencement of the trial, the Prosecution did not otherwise foreshadow its intention to call P-242 as a witness. Given the current trial schedule, the Defence does not have the means to investigate any issues arising from P-242, whilst ensuring the effective representation of the accused in relation to the coming witnesses.

¹ ICC-01/05-01/13-1288-Conf.

6. In the event that the Trial Chamber grants the Prosecution's application to add P-242 to its list, then the Defence requests to submit discrete additional observations regarding the applicability of Rule 68(2) to this statement.

7. The manner in which the Prosecution intends to introduce P-242's testimony should not influence the threshold question as to whether she should be added to the list at this point of the proceedings. Even if the impact on court sitting time might be minimal, the impact on Defence preparation is not.

8. Moreover, the temporal applicability of the amended version of Rule 68 to cases, which were initiated prior to the adoption of such amendments, is currently before the Appeals Chamber in the *Ruto & Sang* case.² This appellate ruling will have obvious implications for this case, and the Request. Concretely, if the Appeals Chamber rules that the amendments to Rule 68 cannot be applied on a retrospective basis, it would be necessary for P-242 to testify live.

9. There is therefore good cause to separate the Trial Chamber's determination of these two issues.

10. This response is being filed on a confidential basis in line with the classification of the Request. The Defence has no objection to it being reclassified as public.

Submissions

11. In order to incorporate additional witnesses on its list after the expiration of the deadline, the Prosecution must establish:

² ICC-01/09-01/11-1953-Red-Corr, para. 20.

- i. That it was unable to request an extension of the deadline for adding this witness to the list for reasons beyond its control;³ or
- ii. That the testimony of this witness is sufficiently compelling to warrant its inclusion, and its inclusion would not be prejudicial to the rights of the accused, and a fair and impartial trial.⁴

12. The Request fails to do so.

The Prosecution has failed to establish that, for reasons beyond its control, it was unable either to include P-242 on its list, or to request a suspension of the deadline to do so, prior to the expiration of the deadline

13. On 22 May 2015, the Trial Chamber ordered the Prosecution to submit its list of witnesses by 30 June 2015.⁵ This deadline expired prior to the filing of the Request.

14. Regulation 35(2) of the Regulations of the Court requires the Prosecution to establish that it was unable to either include P-242 on its list, or seek a variation of the deadline to do so, prior to 30 June 2015.

15. The Prosecution has not established that this was the case.

16. According to the Request, after the Prosecution interviewed P-242 in January 2014, the Prosecution formulated an intention to introduce her statement through Rule 68.⁶

³ ICC-01/05-01/13-1191, para. 9.

⁴ ICC-01/05-01/13-1191, para. 10 ; Prosecutor v. Katanga and Ngudjolo, Transcript of 27 September 2011, p. 5, lines 17-25, ICC-01/04-01/07-T-314-ENG

⁵ ICC-01/05-01/13-960, para. 13.

⁶ Request, para. 6.

17. The content and relevance of the testimony of P-242 were thus known at the time of the expiration of the deadline for the submission of the Prosecution list of witnesses.⁷ There were no impediments as concerns the Prosecution's ability to file a Regulation 35(2) request to postpone or vary the 30 June 2015 deadline as concerns the potential inclusion of P-242 on its list.⁸

18. The Prosecution had, moreover, 19 months to organise a Rule 68(2) certification for P-242, prior to the submission of its witness list on 30 June 2015. If there were any impediments to the Prosecution's ability to obtain certification for P-242, the Prosecution had ample time to raise such matters with the Chamber, with a view to resolving them in a timely manner.

19. In this connection, the Trial Chamber established a deadline of 31 July 2015 for the parties to file motions, which required resolution prior to the commencement of the trial.⁹ The Prosecution did not file any submissions or request any relief at this juncture as concerns its ability to establish contact with P-242 for the purpose of obtaining certification.

20. The issue of Rule 68 certification also has no bearing as concerns the Prosecution's ability to include P-242 on its list of witnesses. The Prosecution included P-0020, P-0214, P-0243, and P-0264 on its list, and expressed its intention to employ some variant of Rule 68 with these witnesses notwithstanding the fact that no certifications had been obtained for these witnesses by 30 June 2015.¹⁰

⁷ Cf ICC-01/05-01/13-1191, para. 11.

⁸ *Prosecutor v. Katanga and Ngudjolo*, 'Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28,29 and 31 March 2009', 9 October 2009, ICC-01/04-01/07-1515-Corr, para. 33: "When a party knows that it will not be able to meet a set time limit, but still has every intention of obtaining the material in order to present it at a later stage, it must, for the reasons outlined above, file a formal application under regulation 35(2) before the deadline."

⁹ Para. 14.

¹⁰ ICC-01/05-01/13-1048-Conf-AnxA-Red.

21. On 29 July 2015, the Trial Chamber also confirmed that Rule 68 certifications did not need to be filed prior to the 30 June 2015 deadline.¹¹ The Prosecution was therefore on notice since at least 29 July 2015 that it could apply to add P-242 to its list prior to the receipt of a Rule 68 declaration.

22. Of further relevance, on 7 September 2015 (the date the Prosecution established contact with P-242), the Prosecution informed the Trial Chamber that it wished for all of its witnesses to testify live in The Hague, unless indicated in Annex A. Although Annex A once again delineated the witnesses for whom the Prosecution intended to file Rule 68 applications,¹² the Prosecution did not presage any intention to call evidence from P-242 *via* Rule 68, or *via* any other mode of testimony.

23. If 'contact' was the cause for P-242's omission from the list, the Prosecution has failed to adduce any explanation as to why – after having established contact with P-242 on the 7 September 2015 – it then waited a further 14 days to file the Request.

24. In any case, the Prosecution's claim that it was unable to contact P-242 during the preceding period does not provide any justification for the omission of P-242 from its list of evidence. The Prosecution designated other persons as Prosecution witnesses notwithstanding the absence of consent (P-198, P-201), or contact (P-201).

25. The explanations provided by the Prosecution defy logic and reason, and are in any case, incompatible with the Prosecution's strict duty of diligence.

¹¹ ICC-01/05-01/13-1109.

¹² ICC-01/05-01/13-1219-Conf-AnxA.

There are no exceptional or compelling circumstances, which would justify the inclusion of this witness in the list

26. The Prosecution has acknowledged that the evidence of P-242 is not dispositive of any core issues in the case.¹³ As such, there are no compelling or exceptional reasons to add P-242 to the list of witnesses at this late juncture.

The inclusion of P-242 on the list would prejudice the rights of the Defence

27. Irrespective as to whether the testimony if P-242 is elicited *vive voce* or *via* Rule 68)(2), the Defence has the right to investigate her credibility and the veracity of her evidence. Given that the trial has already commenced (and is sitting full consecutive days), the Defence has very limited means to do so.

28. It would also not be feasible for the Defence to defer its investigations to a later stage. If admitted, the potential testimony of P-242 would impact on the Defence strategy concerning P-0020. The Defence has the right to investigate the Prosecution case, and formulate a comprehensive strategy prior to the commencement of the trial. The Defence cannot do that if it is ambushed with unanticipated developments, which could alter the evidential landscape of the trial.

29. As regards the Prosecution's claim that the Defence will not be prejudiced by this amendment due to the fact that P-242's statement was included on the list, the inclusion of a statement in the list cannot be equated to notice that P-242 could be called as a witness. The mechanisms governing the introduction of witness testimony under the Statute are finite. 'Testimony' is either introduced *vive voce* or *via* Rule 68. Both scenarios mandate the inclusion of the witness on the Prosecution's list of witnesses.

¹³ Request, para. 8.

30. In the absence of any indication that P-242 would be called *vive voce*, or that her statement would be introduced *via* Rule 68, the Defence had a legitimate expectation that it could not be introduced at trial.

31. It also bears noting that the Prosecution had stated the inclusion of statements from other persons on the list did not in any way assimilate such persons to witnesses. In particular, in response to a Defence request for disclosure and judicial assistance as concerns P-7 (whose statements were also included on the Prosecution list of evidence), the Prosecution underscored that P-7 could not be treated as a trial witness.¹⁴ By the same token, the inclusion of P-242's statements on the list of evidence did not assimilate her to the status of a trial witness.

Relief sought

32. For the reasons set out above, the Defence teams for Mr. Bemba and Me. Kilolo request the Trial Chamber to:

- i. reject the request to add P-242 to the list of Prosecution witnesses; and
- ii. defer the question as to the introduction of P-242's testimony *via* Rule 68(2)(b)(ii) and (iii) until after the Trial Chamber has ruled on the initial question as to whether P-242 can be added to the list of Prosecution witnesses.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

¹⁴ ICC-01/05-01/13-1116-Conf-Exp

A handwritten signature in black ink, consisting of a series of slanted, parallel strokes followed by a short horizontal line.

Paul Djunga
Lead Counsel of Mr. Aimé Kilolo

Dated this 14th day of October, 2015

The Hague, The Netherlands