

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 29 October 2015

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 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**

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

Mr Nigel Verrill

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 67(1)(b) of the Statute, Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules') and Regulations 23 *bis* and 35(2) of the Regulations of the Court ('Regulations'), issues the following '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'.

I. Procedural history and relief sought

1. On 22 May 2015, the Chamber, in its 'Order setting the commencement date for trial', ordered the Office of the Prosecutor ('Prosecution'), *inter alia*, to provide its list of witnesses by no later than 30 June 2015.¹
2. On 30 June 2015, the Prosecution provided its list of witnesses.²
3. On 24 September 2015, the Office of the Prosecutor ('Prosecution') requested that the Chamber permit P-242 to be added to its witness list and to admit P-242's prior recorded testimony pursuant to Rule 68(2)(b) ('P-242 Request').³
4. On 5 October 2015, the defence team for Mr Babala ('Babala Defence') responded to the P-242 Request. The Babala Defence: (i) '*s'en remet à la sagesse de la Chambre*' on whether to add P-242 to the witness list; (ii) requested that the request to admit P-242's prior recorded testimony be rejected on grounds that Rule 68(2)(b) of the

¹ ICC-01/05-01/13-960.

² Annex A: Prosecution's List of Witnesses and Evidence, ICC-01/05-01/13-1048-Conf-Exp-AnxA (confidential redacted version notified same day).

³ Corrected version of "Prosecution's Motion to Add P-0242 to its Witness List and Request for the Admission of her Written Statements, pursuant to Rule 68(2)(b)", ICC-01/05-01/13-1288-Conf, ICC-01/05-01/13-1288-Conf-Corr (with annex; corrigendum and corresponding annex notified 28 September 2015). *See also* Annex II to the Registry submission of the declarations made by witnesses CAR-OTP-P-0020, CAR-OTP-P-0242 and CAR-OTP-P-0243 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 18 September 2015, ICC-01/05-01/13-1272-Conf-AnxII; CAR-OTP-0075-0002-R01 (English); CAR-OTP-0074-0805-R01 (French); CAR-OTP-0075-0009-R01 (English); CAR-OTP-0074-0813-R01 (French).

Rules does not apply in these proceedings and (iii) requested that, independently of Rule 68(2)(b)'s applicability, to order P-242's appearance as a witness.⁴

5. On 14 October 2015, the defence teams for Mr Bemba and Mr Kilolo ('Bemba and Kilolo Defence') responded to the P-242 Request. The Bemba and Kilolo Defence submit that the request to add P-242 to the witness list should be rejected and to defer on whether to introduce P-242's testimony pursuant to Rule 68(2)(b) of the Rules until this initial question has been ruled upon.⁵

II. Analysis

1. P-242's prior recorded testimony and Rule 68(2)(b) of the Rules

6. The Prosecution submits that P-242's testimony relates to a 'discrete, limited, but important matter', namely that P-242 received money through a Western Union transfer for a defence witness in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.⁶ The Prosecution argues that P-242's statement does not go to the acts and conduct of the accused because P-242 has no recollection of who transferred the relevant funds, or of Mr Kilolo or Mr Babala.⁷ However, the Prosecution makes clear that it intends to use other evidence to prove that it was Mr Babala who made the money transfer to P-242 upon Mr Kilolo's request.⁸
7. When prior recorded testimony is duly included on the Prosecution's list of evidence, the Chamber does not consider that the Prosecution must also include these persons on its list of witnesses prior to seeking relief under Rule 68(2) of the Rules. However, it is best practice to do so when the Prosecution does not know if its Rule 68(2) request will be granted when submitting its list of witnesses. For this

⁴ Réponse de la Défense de monsieur Fidèle Babala Wandu à «Prosecution's Motion to add P-0242 to its Witness List and Request for the Admission of her Written Statements, pursuant to Rule 68(2) (b)» (ICC-01/05-01/13-1288-Conf), ICC-01/05-01/13-1335-Conf.

⁵ Joint Defence Response to Prosecution Request to add P-0242 to its witness list (ICC-01/05-01/13-1288-Conf), ICC-01/05-01/13-1374-Conf.

⁶ P-242 Request, ICC-01/05-01/13-1288-Conf-Corr, para. 11.

⁷ P-242 Request, ICC-01/05-01/13-1288-Conf-Corr, para. 8.

⁸ P-242 Request, ICC-01/05-01/13-1288-Conf-Corr, para. 9.

reason, the Chamber will first assess whether P-242's prior recorded testimony may be formally submitted under Rule 68(2)(b) of the Rules prior to considering whether to add P-242 to the Prosecution's witness list.

8. When evaluating whether the prerequisites of Rule 68(2)(b) of the Rules are satisfied, the Chamber considers that it is not dispositive that P-242 does not know who made the relevant money transfer. The issue is rather how the Prosecution attributes the acts and conduct contained in P-242's prior recorded testimony. Rule 68(2)(b) evidence can only go 'to proof of a matter other than the acts and conduct of the accused'. In the present instance, the Prosecution clearly intends to use P-242's prior recorded testimony primarily to prove that Mr Babala made this money transfer to P-242. P-242's prior recorded testimony is therefore being submitted to prove the acts and conduct of Mr Babala.
9. Irrespective of the question of the applicability of the amended Rule 68,⁹ the Prosecution is prohibited from using Rule 68(2)(b) of the Rules for the purpose put forward in the P-242 Request. Accordingly, this part of the P-242 Request is rejected.

2. Whether P-242 may be added to the Prosecution's witness list

10. As to whether P-242 may be added to the witness list at this stage, the Prosecution submits that P-242 was not added to the witness list by the 30 June 2015 deadline¹⁰ because it was unable to contact P-242 to get Rule 68(2)(b) declarations by said

⁹ Prior to Rule 68's amendment in 2013, the text of Rule 68(2)(b) was not contained in Rule 68 of the Rules. Arguments raised on the applicability of Rule 68(2)(b) in this case will be addressed at a later time. *See Réponse de la défense de M. Fidèle Babala Wandu à la « Prosecution Request for the Admission of the Previously Recorder Testimony of P-0270, pursuant to rule 68(2)(b) »* (ICC-01/05-01/13-1247-Conf), en vue du respect des articles 24(1) et 51(4) du Statut, 24 September 2015, ICC-01/05-01/13-1287-Conf (with annex).

¹⁰ Order setting the commencement date for trial, 22 May 2015, ICC-01/05-01/13-960, para. 13.

deadline.¹¹ The Prosecution indicates that contact was only re-established in September 2015, when the Rule 68 declarations were promptly obtained.¹²

11. The Prosecution submits that there will be no prejudice caused by adding P-242 to the Prosecution's witness list since P-242's statements have been in possession of the defence teams for over a year and that these statements were duly included in the Prosecution's list of evidence.¹³
12. The Babala Defence has no objection to adding P-242 to the Prosecution's witness list, and in fact requests an order for P-242 to appear before the Chamber.¹⁴
13. The Bemba and Kilolo Defence argue that the Prosecution has failed to adduce any concrete or persuasive explanation as concerns its failure to add P-242 to its list of witnesses or otherwise request a delay in adding this witness.¹⁵ The Bemba and Kilolo Defence submit that it would be prejudicial to add new witnesses after the commencement of trial and that '[e]ven if the impact on court sitting time might be minimal, the impact on Defence preparation is not'.¹⁶
14. The Prosecution makes reference to Regulation 35(2) of the Regulations in the P-242 Request.¹⁷ This regulation requires that, after the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application for reasons outside his or her control. If this regulation is not complied with, the Chamber may issue any order that is deemed necessary in the interests of justice.¹⁸

¹¹ P-242 Request, ICC-01/05-01/13-1288-Conf-Corr, para. 1.

¹² P-242 Request, ICC-01/05-01/13-1288-Conf-Corr, para. 1.

¹³ P-242 Request, ICC-01/05-01/13-1288-Conf-Corr, para. 3.

¹⁴ ICC-01/05-01/13-1335-Conf, page 8.

¹⁵ ICC-01/05-01/13-1374-Conf, paras 2-4.

¹⁶ ICC-01/05-01/13-1374-Conf, paras 5, 7, 27-31.

¹⁷ P-242 Request, ICC-01/05-01/13-1288-Conf-Corr, para. 1.

¹⁸ Other chambers have previously acknowledged that, despite a failure to comply with Regulation 35(2), witnesses may still be added after expiry of the relevant deadline. Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013, ICC-01/09-02/11-832, paras 10-11; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,

15. To the extent that Regulation 35 is relevant in the present context, the Chamber considers that, despite the Prosecution's inability to contact P-242 in time, it nevertheless could have still requested an extension of time for adding the person to the list of witnesses. The Prosecution did not demonstrate that it was unable to file such a request by 30 June 2015.
16. The Chamber nevertheless considers that it is in the interests of justice to allow P-242 to be added to the Prosecution's witness list. The defence teams should already be familiar with P-242's anticipated testimony, given that they have had this witness's statement for over a year and the Prosecution included it on its list of evidence by the 30 June 2015 deadline. P-242's anticipated testimony is on a short and discrete issue, which means the preparation required for such a witness is less than for other witnesses who have testified in this case.
17. The Chamber is not persuaded by the Bemba and Kilolo Defence claims of prejudice, which are all abstract arguments about prejudice caused by adding witnesses during trial. No concrete argument has been advanced as to why it would be prejudicial to add P-242 to the witness list. Given that the ultimate recipient of the alleged money transfer has always been on the Prosecution's witness list, the Chamber fails to see how much additional preparation the defence teams require beyond what they have already done. It is also notable that the Babala Defence – whose client has a clear interest in P-242's anticipated testimony – actually requests the Chamber to order P-242 to appear.
18. The Chamber will not order P-242 to appear, but will permit the Prosecution to call this witness, so long as this witness testifies *viva voce* towards the end of the Prosecution's presentation of evidence. This part of the P-242 Request is granted.

Decision on the Prosecution's Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537), 3 November 2009, ICC-01/04-01/07-1590, paras 12, 15-16, 19.

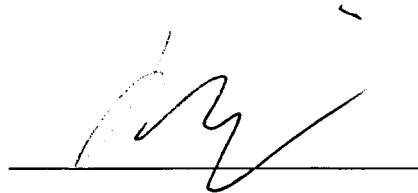
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the request to introduce P-242's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules;

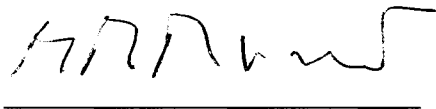
GRANTS the request to add P-242 to the Prosecution's witness list, so long as this witness testifies towards the end of the Prosecution's presentation of evidence; and

ORDERS that the parties, consulting with each other as necessary to protect security-related information about P-242, request reclassification or file public redacted versions of their submissions (ICC-01/05-01/13-1288-Conf-Corr, ICC-01/05-01/13-1335-Conf and ICC-01/05-01/13-1374-Conf) within 10 days of notification of the present decision.

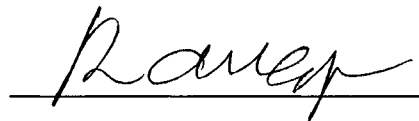
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 29 October 2015

At The Hague, The Netherlands