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**International
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Court**

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Date: **3 February 2016**

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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

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with
Public Annex A

Prosecution's Motion to Exclude the Testimony of Witness D22-0004
and the Submission of his Report

Source: The Office of the Prosecutor

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

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I. Introduction

1. Babala Defence Witness D22-0004's testimony and report should be excluded. The proffer of this witness' evidence violates basic tenants concerning expert testimony: (1) the witness' anticipated testimony impermissibly infringes Trial Chamber VII's ("Chamber")'s role as the trier of fact in presenting evidence concerning Babala's *mens rea* in the guise of expert opinion; and (2) the report and proffered testimony is *prima facie* irrelevant.

2. Given the *prima facie* inappropriateness and irrelevance of the witness' evidence, the Chamber should exercise its gatekeeping functions at this stage by excluding the witness' testimony and rejecting the formal submission of his report, pursuant to articles 64(6)(f), 64(9)(a), 69(3), 69(4) of the Rome Statute, rules 63(2) and 64 of the Rules of Procedure and Evidence, and regulation 44(5) of the Regulations of the Court.¹

II. Submissions

A. Witness D22-0004's Proposed Testimony Impermissibly Infringes the Chamber's Role as the Trier of Fact

3. Witness D22-0004's anticipated testimony impermissibly infringes the Chamber's province to draw factual conclusions on Babala's acts and conduct. An expert's function is to "enlighten the Judges on specific issues of a technical nature,

¹ To the extent the Chamber permits the witness's testimony and in accordance with Decision 1209, the Prosecution also reserves the right to orally challenge Witness D22-0004's qualifications or the overall relevance of his anticipated testimony prior to any ruling on whether the witness may testify as an expert in this case. *See also* ICC-01/05-01/13-T-13-Red-ENG, pp. 5-6, lns. 22-17 (the Chamber's oral ruling on the conduct of proceedings with respect to expert witness P-0361).

requiring special knowledge in a specific field”.² However, expert evidence may not “usurp[] the function of the Trial Chamber by offering opinions that are determinative of the guilt or innocence of the Accused or by adverting to the acts, conduct and mental state of the Accused.”³ Only the Chamber, as the finder of fact, is competent to make judicial determinations on the ultimate issues in the case.⁴

4. The proffered expert testimony violates this basic and fundamental premise. The Defence seeks to elicit evidence from Witness D22-0004 on an ultimate issue of fact: Babala’s *mens rea*. As noted in the Defence’s summary of anticipated testimony for Witness D22-0004,⁵ Witness D22-0004 will give evidence on how the notion of “*solidarité africaine*” explains Babala’s behaviour towards Bemba: “*d’apprécier à sa juste valeur le comportement de M. Babala dans ses rapports avec M. Bemba.*”⁶ Through the

² *Prosecutor v. Karemera et al.*, Decision on Prosecution Motion for Reconsideration of the Decision on Prospective Experts Guichaoua, Nowrojee and Des Forges, or for Certification, Case No. ICTR-98-44-T, 16 November 2007 (“*Karemera* 16 November 2007 Decision”), para. 14 (citing *Prosecutor v. Norman et al.*, Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures, Case No. SCSL-04-14-T, 21 June 2005, p. 4; *Prosecutor v. Akayesu*, Decision by a Defence Motion for the Appearance of an Accused as an Expert Witness, Case No. ICTR-96-04-T, 9 March 1998, p. 2). See also *Prosecutor v. Semanza*, Judgement, Case No. ICTR-97-20-A, 20 May 2005 (“*Semanza* 20 May 2005 Judgement”), para. 303; *Prosecutor v. Popović et al.*, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, Case No. IT-05-88-AR73.2, 30 January 2008, para. 27; *Co-Prosecutors v. Chea and Samphan*, Decision on Assignment of Experts, Case No. 002/19-09-2007/ECCC/TC, 5 July 2012 (“*Chea and Samphan* 5 July 2012 Decision”), para. 16; *Prosecutor v. Taylor*, Decision on Defence Application to Exclude the Evidence of Proposed Prosecution Expert Witness Corinne Dufka or, in the Alternative, to Limit its Scope and on Urgent Prosecution Request for Decision, Case No. SCSL-03-1-T, 19 June 2008, para. 7.

³ *Karemera* 16 November 2007 Decision, para. 21 (citing *Prosecutor v. Karemera et al.*, Decision on Joseph Nziirorera’s Motion to Limit the Scope of the Testimony of Expert Witnesses Alison Des Forges and Andre Guichaoua, 21 August 2007, para. 3; *Prosecutor v. Karermera et al.*, Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee – Rules 89 and 94bis of the Rules of Procedure and Evidence, 25 October 2007; *Prosecutor v. Hadžihasanović and Kubura*, Decision on Report of Prosecution Expert Klaus Reinhardt, Case No. IT-01-47-T, 11 February 2004, p. 4). See also *Prosecutor v. Nahimana et al.*, Judgement, Case No. ICTR-99-52-A, 28 November 2007 (“*Nahimana* 28 November 2007 Judgement”), para. 509; *Prosecutor v. Perišić*, Decision on Expert Reports by Richard Butler, Case No. IT-04-81-T, 4 March 2009 (“*Perišić* 4 March 2009 Decision”), para. 10; *Prosecutor v. Stanišić and Simatović*, Decision on Prosecution’s Submission of the Expert Report of Nena Tromp and Christian Nielsen pursuant to Rule 94 bis, Case No. IT-03-69-PT, 18 March 2008, para. 12; *Chea and Samphan* 5 July 2012 Decision, para. 16.

⁴ See *Prosecutor v. Bizimungu et al.*, Decision on Casimir Bizimungu’s Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 89(C)), Case No. ICTR-99-50-T, 2 September 2005, para. 13; *Prosecutor v. Kordić and Čerkez*, Oral Decision, Case No. IT-95-14/2-T, 28 January 2000 (“*Kordić and Čerkez* 28 January 2000 Decision”), T.13307-13308; *Prosecutor v. Sesay et al.*, Decision on Admissibility of Certain Parts of Expert Report of Johan Hederstedt, Case No. SCSL-04-15-T, 29 July 2008 (“*Sesay* 29 July 2008 Decision”), paras. 21-23; *Chea and Samphan* 5 July 2012 Decision, para. 16.

⁵ ICC-01/05-01/13-1558-AnxA.

⁶ ICC-01/05-01/13-1558-AnxA.

witness, the Defence also seeks to demonstrate why Babala's conduct was one of "healthy", not "criminal" solidarity: *"la Défense expliquera que la solidarité affichée par M. Babala est plutôt une saine solidarité. Elle n'est pas une solidarité criminogène."*⁷ Finally, the witness will explain Babala's behaviour within the socio-cultural context from which he originates: *"Ce qui lui permettra de juger M. Babala en tenant notamment compte du contexte socioculturel dans lequel il évolue."*⁸ In these regards, the proposed testimony impermissibly encroaches the right, power, and duty of the Chamber to rule itself on what inferences to draw about Babala's *mens rea* from the evidence presented.⁹

5. Guided by the same considerations, the *ad hoc* Tribunals have similarly rejected attempts to introduce expert evidence intruding into the Trial Chamber's role as a trier of fact. In *Karemera*, a Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") rejected the presentation of expert testimony by Bernard Lugan, a French historian specialising in Africa, who sought to give evidence on such matters including the planning of genocide in Rwanda, the legitimacy of civil defence, and the Accused's conduct.¹⁰ In rejecting the presentation of that evidence, the Trial Chamber ruled that "on each of these points there are factual considerations over which [the Trial Chamber] exercises the widest margin".¹¹ The same Trial Chamber rejected the presentation of expert evidence by Dr. Alison Des Forges, a Human Rights Watch expert on Rwanda and a historian with broad knowledge of Rwandan polity. Like the Defence seeks to do here, the Prosecution at the ICTR sought to admit Dr. Des Forges' evidence "to enable judicial evaluation of the testimony of factual witnesses that were admitted on the record" within the relevant historical

⁷ ICC-01/05-01/13-1558-AnxA.

⁸ ICC-01/05-01/13-1558-AnxA.

⁹ See *Kordić and Čerkez* 28 January 2000 Decision, T.13305-13306.

¹⁰ *Prosecutor v. Karemera et al.*, Order Relating to Defence Witness Bernard Lugan, Case No. ICTR-98-44-T, 5 May 2008 ("*Karemera* 5 May 2008 Decision"), para. 5.

¹¹ *Karemera* 5 May 2008 Decision, para. 7.

framework.¹² In rejecting that application, the ICTR Trial Chamber concluded that “[a]dmitting the evidence of Des Forges, as suggested by the Prosecution, would [] amount to usurping the functions of the Chamber in determining the guilt or not of the Accused.”¹³

6. For similar reasons, an International Criminal Tribunal for the former Yugoslavia Trial Chamber in the *Kordić and Čerkez* case rejected the prospective expert testimony of Dr. Charles Schrader, a military historian.¹⁴ The witness sought to explain the military significance of the facts following his study of the testimony and documents. The Chamber reasoned that such “issues [] are very much matters which the Trial Chamber has to decide” and that the report “simply [] set[s] out the Defence case”, which is “a matter not for an expert, but for the lawyers in the case.”¹⁵

7. Witness D22-0004’s anticipated testimony is equally an attempt to argue the Defence case in the guise of expert testimony. To the extent the Defence seeks to present evidence to explain or justify Babala’s conduct, it may present fact witnesses familiar with the transactions and conduct at issue, such as Babala himself or, for example, the recipients of his alleged payments. Babala also had the opportunity to cross-examine witnesses called by the Prosecution who admitted receiving money from Babala on this issue, specifically whether they considered the transfers were a reflection of “*solidarité africaine*”. However, Babala, did not do so.

8. It is not for an expert to speculate on Babala’s intent and motive. Such testimony falls outside the realm of expertise and into that of conjecture. In substitution of that evidence, the Babala Defence proffers Witness D22-0004’s opinion on a determinative element of Babala’s guilt or innocence *i.e.*, his *mens rea*.

¹² *Karemera* 16 November 2007 Decision, paras. 6, 20.

¹³ *Karemera* 16 November 2007 Decision, para. 20.

¹⁴ *Prosecutor v. Kordić and Čerkez*, Oral Decision, Case No. IT-95-14/2-T, 9 June 2000 (“*Kordić and Čerkez* 9 June 2000 Decision”), T.20825.

¹⁵ *Kordić and Čerkez* 9 June 2000 Decision, T.20825-20826.

However, as noted, only the Chamber is competent to make a determination on the ultimate issues in the case.

B. Witness D22-0004's Proposed Testimony and Report is *Prima Facie* Irrelevant

9. The proposed testimony of Witness D22-0004 and his report are *prima facie* irrelevant to this case. Contrary to Babala's assertions, this case is not about the broader social and cultural practices in the Democratic Republic of the Congo, Central African Republic, or Africa, generally. This case is about the specific conduct of the Accused, in light of their individual backgrounds, in relation to the witnesses from the Main Case alleged to have been subjected to corrupt influence.

10. Nothing in Witness D22-0004's report assists the Chamber to understand the evidence presented or to determine a fact at issue.¹⁶ For instance, the witness provides no opinion as to the reliability of the evidence presented by the Prosecution demonstrating Babala's guilt, including: (1) records from Western Union which show Babala transferring money to witnesses in the Main Case, or relatives thereof; (2) intercepted calls between Babala and Bemba, during which the two use coded language to disguise their illicit conduct; (3) intercepted calls between Babala and Kilolo, during which the two discussed ways to cover-up their illicit conduct after determining that there was a leak; or (4) the testimonial evidence of witnesses who admitted to receiving the alleged corrupt payments from Babala.

11. In addition, nothing in Witness D22-0004's report goes to any fact at issue. Instead of presenting evidence through fact witnesses justifying, denying, or refuting the factual allegations asserted by the Prosecution, Babala effectively concedes the

¹⁶ See *Semanza* 20 May 2005 Judgement, para. 303; *Prosecutor v. Tolimir*, Decision on Admission of Expert Report of Ratko Škrbić with Separate Opinion of Judge Mindua and Dissenting Opinion of Judge Nyambe, Case No. IT-05-88/2-T, 22 March 2012, para. 14; *Chea and Samphan* 5 July 2012 Decision, para. 16; *Sesay* 29 July 2008 Decision, para. 19.

conduct alleged by the Prosecution. The basic thrust of the Witness D22-0004's report is that all Africans, irrespective of their individual background and knowledge are, by virtue of culture, incapable of appreciating the criminality of their conduct from a Western point of view – even where the same conduct is expressly criminalised in their own countries. Even if valid, the proffered evidence does not engage in any analysis relevant to this case, such as whether this Accused, given his background, knowledge, experience in and understanding of the law, relationship with the other Accused, political and socio-economic standing, leadership role, international experience, experience with the Court, and other such individual factors, is capable of appreciating the criminality of his conduct at issue in this case.

12. Witness D22-0004's evidence is particularly irrelevant because Babala does not intend to call any witness who might relate the witness' prospective evidence to the specific circumstance of this case. Babala seeks to explain his conduct by advancing a cultural defence. However, he provides no further evidence demonstrating that he acted pursuant to those cultural norms when participating in the unlawful scheme charged in this case. In effect, Babala relies on Witness D22-0004 to characterise his acts and conduct. This however, exceeds the permissible role of an expert. Experts may only express their opinions "within the confines of their expertise on the facts established in evidence if the opinion is relevant to the case."¹⁷ As noted by the ICTR Appeals Chamber, "the role of expert witnesses is to assist the Trial Chamber in its assessment of the evidence before it, and not to testify on disputed facts as would ordinary witnesses."¹⁸

¹⁷ *Perišić* 4 March 2009 Decision, para. 10.

¹⁸ *Nahimana* 28 November 2007 Judgement, para. 509. *See also Chea and Samphan* 5 July 2012 Decision, para. 16.

C. The Witness' Testimony and his Report Should be Excluded

13. The exclusion of Witness D22-0004 testimony and report is warranted. The Chamber has the authority, upon application from a party, to preclude such testimony as part of its gatekeeping role. That role is vested in the Chamber's general authority under article 64(9)(a) to rule on the admissibility or relevance of the evidence and the requirement under article 69(3) that the Parties may only submit evidence *relevant* to the case. In this instance, Witness D22-0004's testimony and his report are *prima facie* irrelevant and circumvent the Chamber's role as the trier of fact. It thus fails to meet the basic threshold required for admission.

14. The exclusion of that evidence at this stage is also consonant with the Chamber's duty under article 64(2) to ensure that the proceeding is fair and expeditious. While Babala has the right to call witnesses on his behalf, he has no absolute right to call irrelevant expert evidence or to usurp the Chamber's authority as the trier of fact. Here, this should result in the exclusion of Witness D22-0004's evidence *in limine*.

III. Relief Requested

15. For the foregoing reasons, the Motion should be granted. Witness D22-0004's report and proposed expert testimony should be excluded.



Fatou Bensouda, Prosecutor

Dated this 3rd Day of February 2016
At The Hague, The Netherlands