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No.: ICC-01/05-01/13
Date: 19 February 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 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**

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

The Office of the Prosecutor

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Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

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Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

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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

Registrar

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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 and 69 of the Rome Statute ('Statute') and Rules 67 and 68 of the Rules of Procedure and Evidence ('Rules'), issues the following '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'.

I. Procedural History

1. On 11 February 2016, the Single Judge of the Chamber ('Single Judge') rejected a motion of the Office of the Prosecutor ('Prosecution') to exclude the testimony of witness D23-1, an expert witness proposed by the defence team for Mr Mangenda ('Mangenda Defence').¹ The Mangenda Defence explained that D23-1 is to provide testimony about the legality and propriety of the manner in which Western Union financial records were obtained from the Republic of Austria. The Single Judge did not consider that 'D23-1's testimony and/or report to be so clearly irrelevant as to preclude the Mangenda Defence from presenting this evidence [...]'.²
2. That same day, the Mangenda Defence filed a submission ('Request') requesting to admit D23-1's report ('Report')³ pursuant to Rule 68(2)(b) of the Rules, subject to and conditional upon the attestation prescribed in Rule 68(2)(b)(ii)-(iii) of the Rules. In the alternative, the Mangenda Defence requests that the Report is submitted pursuant to Rule 68(3) of the Rules, in conjunction with a request that he be permitted to testify by video-link pursuant to Rule 67 of the Rules.⁴

¹ Decision on Prosecution's Motion to Exclude the Testimony of Witness D23-1 and the Submission of his Report, ICC-01/05-01/13-1622.

² ICC-01/05-01/13-1622, para. 12.

³ CAR-D23-0006-0001.

⁴ Public Redacted Version of the Request for Admission of Expert Report Pursuant to Rule 68(2)(b) or, In the Alternative, Pursuant to Rule 68(3) in Conjunction With Video-Link Testimony Authorized Pursuant to Rule 67, ICC-01/05-01/13-1621-Red (with confidential annex).

3. On 15 February 2016,⁵ the Prosecution responded to the Request ('Response'), requesting that the Chamber reject the relief sought and require D23-1 to personally appear at the seat of the Court to present his evidence.⁶ The Prosecution also filed a notice that it challenges the relevance of the Report in its entirety.⁷

II. Analysis

4. The Chamber recalls its past decisions interpreting the parameters of Rule 68(2)(b) and (3) of the Rules.⁸ When objections are made that prior recorded testimony in the form of an expert report does not satisfy the Rule 68 criteria, the Chamber must evaluate whether these criteria are met.

A. Recognising submission of the Report under Rule 68(2)(b) of the Rules

5. The Mangenda Defence argues that D23-1's report does not address the acts and conduct of any accused. The Mangenda Defence also submits that the discretionary factors set out in Rule 68(2)(b) of the Rules also favour admission of the report. The Mangenda Defence provides authority from the ICTY to support the notion that it should be possible to conditionally accept Rule 68(2)(b) evidence pending fulfilment of the attestation requirements prescribed by the rule.⁹

⁵ By way of email, the response deadline for the Request was shortened to 16:00 on 18 February 2016. Email from a Legal Officer of the Chamber to the parties, 11 February 2016 at 18:51.

⁶ Prosecution Response to Defence Request for Admission of Expert Report pursuant to Rule 68(2)(b) or, in the Alternative, pursuant to Rule 68(3) in Conjunction with Video-Link Testimony Authorised Pursuant to Rule 67 (ICC-01/05-01/13-1621-Red), ICC-01/05-01/13-1627.

⁷ Prosecution's Notice of Intention to Challenge Expert Witnesses, pursuant to the Directions on the Conduct of the Proceedings (ICC-01/05-01/13-1209), 15 February 2016, ICC-01/05-01/13-1628.

⁸ 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* 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.

⁹ Request, ICC-01/05-01/13-1621-Red, paras 8-10.

6. The Prosecution responds that the mandatory factors set out in Rule 68(2)(b)(i) of the Rules preclude the admission of the proffered evidence.¹⁰
7. The Chamber considers that when assessing the requirements in Rule 68(2)(b)(i) of the Rules,¹¹ 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.¹² 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. Given the Chamber's assessment on the Rule 68(2)(b)(i) criteria, this part of the Request is rejected.

¹⁰ Response, ICC-01/05-01/13-1627, paras 2-7.

¹¹ With emphasis added, this sub-rule provides: In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber **shall** consider, *inter alia*, whether the prior recorded testimony in question: - relates to issues that are not materially in dispute; - is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; - relates to background information; - is such that the interests of justice are best served by its introduction; and - has sufficient indicia of reliability.

¹² Response to Prosecution Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report (ICC-01/05-01/13-1605), 10 February 2016, ICC-01/05-01/13-1618, paras 19-25.

B. D23-1 testifying in accordance with Rules 68(3) and 67 of the Rules

9. For its alternative relief sought, the Mangenda Defence submits that D23-1 'has expressed his preference to give testimony by video-link' and that this preference is reasonable given that the Court gives little to no remuneration to experts for their travel and testimony in The Hague. The Mangenda Defence argues that, in light of D23-1's other commitments, video-link will expedite the proceedings and would be in the interests of justice.¹³
10. The Prosecution responds that, although it has no objection to the proffer of D23-1's evidence pursuant to Rule 68(3) of the Rules, the Request fails to justify his appearance via video-link.¹⁴
11. The Chamber notes that the Mangenda Defence's Rule 68(3) request is unopposed, and the Chamber will recognise the formal submission of this report on condition that the formal requirements of this rule are met during D23-1's examination.
12. However, and noting the Prosecution's objection on this point, the Chamber is not persuaded that, in the present circumstances, it is appropriate to hear D23-1's testimony via video-link. The Mangenda Defence presents no justification for video-link beyond D23-1's personal preference and the alleged limited remuneration expert witnesses receive from the Court. D23-1 is an expert witness based in Western Europe, and the Mangenda Defence presents no concrete evidence that there would be any hardship, financial or otherwise, for him to testify in The Hague. The Chamber does not consider it justified to spend the time and resources to send a team from the Court to set up a video-link solely to accommodate such a witness's personal convenience. This part of the Request is also rejected.

¹³ Request, ICC-01/05-01/13-1621-Red, paras 11-12.

¹⁴ Response, ICC-01/05-01/13-1627, paras 8-14.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the relief sought in the Request, subject to paragraph 11 above; and

DIRECTS the Mangenda Defence to immediately make all necessary arrangements, in consultation with the Registry as appropriate, for D23-1 to testify *viva voce* at the seat of the Court.

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 19 February 2016

At The Hague, The Netherlands