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

Date: 15/03/2016

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, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO***

Confidential with Confidential Annexes A and B

**Defence Application for Admission of Prior Recorded Testimony of D20-0002
Pursuant to Rule 68(2)(b)**

Source: Counsel for Jean-Pierre Bemba Gombo

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 respectfully requests to submit the prior recorded testimony of D20-0002, pursuant to rule 68(2)(b) of the Rules of the Procedure and Evidence.
2. The information provided by D20-0002 to the Defence:
 - a. qualifies as prior recorded testimony;
 - b. goes to proof of a matter other than the acts and conduct of the accused;
 - c. has sufficient indicia of reliability; and
 - d. provides important contextual information concerning the legality of the collection of evidence in The Netherlands, and positive assertions put forward by the Independent Counsel in court filings, and as such, the interests of justice would be served by its introduction.
3. The present Request has been filed on a confidential basis, due to the fact that it refers to confidential correspondence, and the position of D20-0002. A public redacted version will be filed forthwith.

Submissions

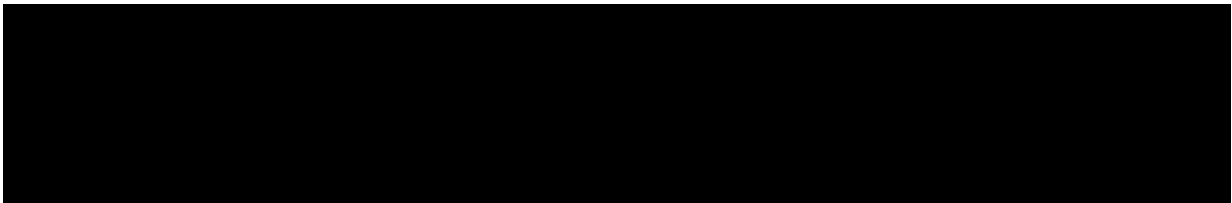
The information provided by D20-0002 qualifies as prior recorded testimony,

4. D20-0002 provided the information in his two letters in response to questions from the Defence, and for the purpose of admission into evidence in this case. Thus, although the format does not approximate a typical witness statement, the

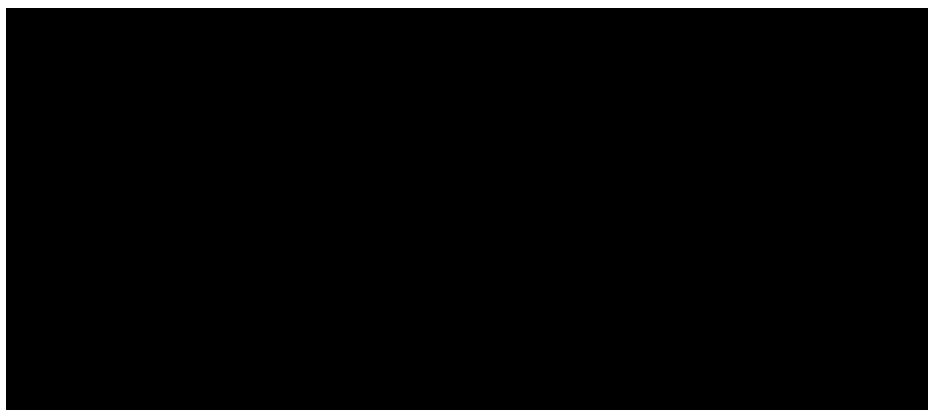
content qualifies as prior recorded testimony for the purposes of Rule 68 of the Rules of Procedure and Evidence.¹

The information goes to proof of a matter other than the acts and conduct of the accused

5. The scope of the prior testimony provided by D20-0002 concerns 



6. As summarised by the Single Judge,²



7. D20-0002 does not provide any evidence concerning the specific content of seized communications, nor does his testimony relate to the specific incidents, set in the charges.

The information provided by D20-0002 has sufficient indicia of reliability

¹ “Generally speaking, statements provided to representatives of the Office of the Prosecutor, which at the time the witness knew might be used in proceedings before the Court, will be considered testimony”; ICC-01/04-01/07-2362, para. 13. See also ICC-01/09-01/11-1353, paras. 85 and 86. Trial Chamber I also found that Rule 68 does not necessarily prescribe a unique or specific format of prior recorded testimony, the Rule could apply to examples of “documented evidence”: ICC-01/04-01/06-1603, para. 18.

² ICC-01/05-01/13-1657-Conf, para. 8.

8. D20-0002 signed the letters of 2 February and 11 February 2016, and provided the information set out therein with full awareness and consent as concerns the possibility that the contents could be used as evidence in this case.

9. During the Rule 68 procedure itself, D20-0002 confirmed - in the presence of the Registry certifying officer - that the contents of his letters to the Defence were true and correct to the best of his knowledge and belief.³

10. The additional correspondence from the Defence, and the [REDACTED] [REDACTED] are referred to in the responses provided by D20-0002,⁴ and are, in that sense, "inseparable" from the content of these responses.⁵

³ ICC-01/05-01/13-1692-Conf-Anx1, p. 2.

⁴ See for example, the response to question 3, CAR-D20-0006-1320 (ICC-01/05-01/13-1692-Conf-AnxII, p. 6).

⁵ ICC-01/04-01/07-2289-Corr-Red, para. 17. See also *Prosecutor v. Karadzic*, Decision On Prosecution's Third Motion For Admission Of Statements And Transcripts Of Evidence In Lieu Of Viva Voce Testimony Pursuant To Rule 92 Bis (Witnesses For Sarajevo Municipality), 15 October 2009, para.11: "In addition to the admission of a witness's written evidence, documents accompanying the written statements or transcripts which "form an inseparable and indispensable part of the testimony" can also be admitted pursuant to Rule 92 bis. Not every document referred to in a witness's written statement and/or transcript from a prior proceeding automatically forms an "inseparable and indispensable part" of the witness's testimony. Rather, a document falls into this category if the witness discusses the document in his or her written statement or transcript, and if that written statement or transcript would become incomprehensible or have lesser probative value without the admission of the document".

⁶ CAR-D20-0006-1312 (ICC-01/05-01/13-1692-Conf-AnxII, p.10).

⁷ See ICC-01/05-01/13-410-Conf-Anx, p. 6; ICC-01/05-01/13-6-Conf-AnxA-Red, pp. 3-4.



13. As concerns the correspondence emanating from the Defence, due to an administrative error, D20-0002 was provided with a copy of the letter with an incorrect date. The contents of the letter were finalised, and all Defence teams authorised the inclusion of their signatures on 2 February. This is the version which was printed, and included in the Rule 68 certification process.⁸

14. However, the date of the letter which was sent to D20-0002 was changed from 2 February to 3 February in order to reflect the actual date on which it was transmitted to D20-0002. Both versions of the letter are attached to this motion;⁹ apart from the different date, the contents of the 2 February and 3 February letters are identical. The letter of 3 February 2016 was also disclosed to the parties on 26 February 2016.¹⁰

15. Since the letter was included for the purpose of providing context to the responses provided by D20-0002, this technical error does not impact on the reliability of these responses.

16. D20-0002's declaration also complies with the formal requirements of Rule 68(2)(b).

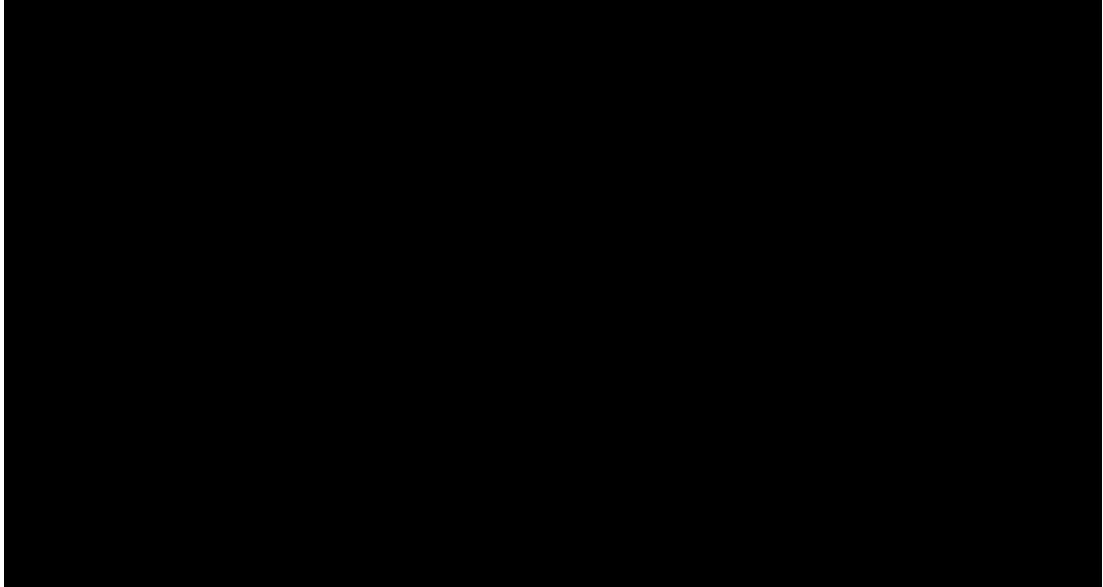
⁸ CAR-D20-0006-1500 (ICC-01/05-01/13-1692-Conf-AnxII, p. 20).

⁹ Confidential Annex A.

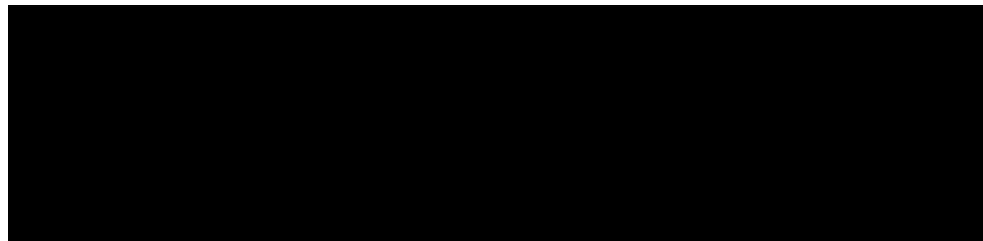
¹⁰ The 3 February 2016 letter was disclosed as CAR-D20-0006-1512. The email, which evidences the chain of custody of the 3 February 2016 letter is CAR-D20-0006-1515.

The interests of justice would be best served by the introduction of this prior testimony through Rule 68(2)(b)

17. The content of D20-0002's prior recorded testimony is of direct relevance to:



18. In terms of the latter aspect, the Independent Counsel asserted in his Third Report to the Single Judge that,¹³



19. The Prosecution applied to admit the contents of the Independent Counsel's filings (which includes the above extract) into evidence through the bar table.¹⁴ The Independent Counsel did not testify, and refused to be interviewed by the Defence.

¹¹ ICC-01/05-01/13-T-10-CONF-ENG ET, pg 24, lns 21-25; ICC-01/05-01/13-T-10-CONF-ENG ET, pg 26, lns 11-19; ICC-01/05-01/13-1013-Conf, Paras 12-13, 25 and 28.

¹² ICC-01/05-01/13-T-10-CONF-ENG ET, pg 24, lns 21-25; ICC-01/05-01/13-T-10-CONF-ENG ET, pg 26, lns 11-19; ICC-01/05-01/13-1013-Conf, Paras 12-13, 25 and 28.

¹³ ICC-01/05-01/13-421-Conf, para. 7.

20. The admission of the specific information provided by D20-0002 is therefore the only means available to the Defence to contest the veracity and reliability of the information provided by the Independent Counsel concerning the procedures utilised to review intercepted communications.

22. In particular, during both his preliminary meeting with the Defence, and in his subsequent responses, D20-0002 underscored that he is obliged to respect certain ongoing confidentiality obligations, [REDACTED]

23. D20-0002 has also stated explicitly that he would not testify as a *vive voce* Defence witness;¹⁷ it would therefore be contrary to the rights of the Defence and the interests of justice *not* to admit D20-0002's prior recorded testimony *via* Rule 68(2).

24. The admission of his testimony through Rule 68(2) would also not occasion any prejudice to the respective defendants in this case, as the Defence teams for Me.

¹⁴ In its Fifth Bar Table Motion, the Prosecution applied to admit the cover filing to the Third Independent Counsel Report (which has the following ERN: CAR-OTP-0080-1124): ICC-01/05-01/13-1498-Conf.

¹⁶ See CAR-D20-0006-1351 concerning the ambit of this privilege.

¹⁷ CAR-D20-0006-1351.

Kilolo, Mr. Mangenda and Mr. Bemba all participated in the formulation of the questions which were directed to D20-0002.

25. The Prosecution was afforded a “real, as opposed to a symbolic or theoretical opportunity”¹⁸ to meet D20-0002, and put any relevant questions concerning his Rule 68 prior recorded testimony to him.¹⁹ At the time that the Prosecution met D20-0002, it was aware of the intention of the Defence to admit the prior recorded testimony through Rule 68(2)(b), as opposed to eliciting D20-0002’s testimony *vive voce*. The Prosecution was therefore on notice, at the time that it questioned D20-0002, that it might not be afforded an opportunity to cross-examine D20-0002 in court.

Relief sought

26. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Trial Chamber to admit the prior recorded testimony of D20-0002 through Rule 68(2)(b) of the Rules of Procedure and Evidence.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 15th day of March 2016

The Hague, The Netherlands

¹⁸ ICC-01/04-01/06-2727-Red, para. 53.

¹⁹ See CAR-D20-0006-1351 and Annex B.