

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 March 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

Public Redacted Document

with

Confidential Annexes A to C and Public Annex D

Public redacted version of "Prosecution's Response to Bemba's 'Application for Admission of Prior Recorded Testimony of D20-0002 Pursuant to Rule 68(2)(b)'", 22 March 2016, ICC-01/05-01/13-1737-Conf

Source: The Office of the Prosecutor

Document 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

Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell

Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Ms Beth Lyons

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

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Bemba Defence’s request to introduce [REDACTED]’ evidence, pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”) (“Motion”). Consideration of all rule 68(2)(b)(i) factors, many of which are omitted in the Motion, weigh in favour of [REDACTED]’ *viva voce* testimony. In particular, the tendered evidence, which comprises [REDACTED]’ responses to a questionnaire provided by the Bemba Defence, and English translations of two letters authored by [REDACTED], lacks relevant context, is potentially misleading, and in some respects incorrect. [REDACTED] confirmed these facts in his 17 March 2016 interview with the Prosecution.¹ In these circumstances, the interests of justice warrant his *viva voce* testimony.

2. In the alternative, should the Chamber grant the Motion, the Prosecution requests that the transcript of its 17 March 2016 interview with [REDACTED] be admitted under article 69(4) or conditionally, under rule 68(2)(b) pending the filing of the relevant declarations. Admission of [REDACTED]’ statement to the Prosecution is particularly important as it contains a number of corrections to the proffered evidence.

II. Confidentiality

3. This response is filed as “Confidential” because it responds to a filing of the same designation. The Prosecution will file a “Public Redacted” version and has no objection to it being reclassified as “Public”.

¹ The transcript of that interview is attached at confidential annex A. The transcript was completed today, 22 March 2016, and will be registered and formally disclosed to the Defence together with an audio recording of the interview.

III. Submissions

A. The Proffered Evidence is not Admissible Under Rule 68(2)(b)

4. The Chamber's consideration of all the factors set out in rule 68(2)(b)(i),² most of which the Motion fails to address, weighs against the admission of the proffered evidence. The proffered evidence relates to issues that are materially in dispute and are neither cumulative nor corroborative or background information. Further, and contrary to Bemba's assertions, the interests of justice weigh heavily in favour of the witness' *viva voce* testimony to prevent a selective and misleading presentation of [REDACTED]' evidence.

i. [REDACTED]' evidence relates to issues that are materially in dispute

5. The Bemba Defence concedes that [REDACTED]' evidence deals with issues materially in dispute between the Parties. The purpose of [REDACTED]' evidence is to "examine and challenge" the process by which evidence advanced by the Prosecution, including the intercepted communications, were collected in The Netherlands,³ presumably to support a claim for their exclusion under article 69(7). The Prosecution has consistently contested any allegation that materials transmitted by Dutch authorities were obtained unlawfully.⁴

6. The accuracy, reliability, and relevance of [REDACTED]' evidence are also materially in dispute and require examination. For example, during his interview with the Prosecution, [REDACTED] confirmed that some of the propositions in the proffered materials were factually inaccurate. He explained that he did not receive or

² ICC-01/05-01/13-1641, para. 4 ("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."). See also fn. 11.

³ ICC-01/05-01/13-1647-Conf, para. 10.

⁴ See e.g. ICC-01/05-01/13-1180-Conf.

review all of the documents the Bemba Defence claims were provided to him in the tendered questionnaire, including, for example, the 28 April 2014 decision of the Hague District Court.⁵ [REDACTED] also provided further details in relation to some of his answers to the Bemba Defence, without which his responses would be misleading. For example, [REDACTED] confirmed that:

- His responses to Bemba's questionnaire solely concern the application of Dutch law on criminal proceedings carried out in The Netherlands and that he has "no experience" in dealing with the provision of such evidence by Dutch authorities to international organizations or other countries.⁶
- The seizure of materials from Kilolo and Mangenda were done in accordance with Dutch law.⁷
- He has no direct knowledge as to the propriety of the intercept and vetting process because he took no direct part in it.⁸
- Under Dutch law an investigative judge has discretion whether or not to give lawyers or the Dean of The Hague Bar an opportunity to review intercepted communications, and [REDACTED] was not legally binding on the investigative judge.⁹
- Under Dutch law the judge may transfer the intercepted communications to the public prosecutor without giving the lawyers an opportunity to review the wiretaps where such review would jeopardize the investigation.¹⁰

⁵ CAR-OTP-0094-0359 at 0362, 0366, lns. 106-114, 247-274 (*contra* CAR-D20-0006-1316 at 1316-1317).

⁶ CAR-OTP-0094-0359 at 0360, lns. 26-36.

⁷ CAR-OTP-0094-0359 at 0364, lns. 161-172 (*relating to* CAR-D20-0006-1316 at 1320-1321).

⁸ CAR-OTP-0094-0359 at 0362-0364, lns. 112-159, 175-178 (*relating to* CAR-D20-0006-1316 at 1320-1322).

⁹ CAR-OTP-0094-0359 at 0364-0366, lns. 189-194, 220-232 (*relating to* CAR-D20-0006-1316 at 1318-1319).

¹⁰ CAR-OTP-0094-0359 at 0374-0375, lns. 558-576 (*relating to* CAR-D20-0006-1316 at 1318).

- The Accused could have challenged the legality of the intercepts under Dutch law before Dutch courts, but the Accused did not file an appeal challenging the transmission of the intercepted communication to the ICC, rendering the legality of the transmissions final according to Dutch law.¹¹
- Under Dutch law, the attorney-client privilege does not extend to communications between an attorney and his client involving the commission of a crime.¹²

7. [REDACTED]' also confirmed that Bemba's English translations of his two letters were incorrect in at least two salient respects: (1) the word "will" in the sentence "[REDACTED]" ¹³ is incorrect; the retention of authority is only a possibility¹⁴; and (2) the statement "[REDACTED]" ¹⁵ is, in [REDACTED]' words, "isn't a good translation" and mischaracterises the point he makes in the letter.¹⁶

8. For these reasons, the proffered evidence is *prima facie* unreliable and the witness should be called to testify to ensure that the above issues are properly reflected in the trial record.

ii. [REDACTED]' evidence is neither cumulative nor corroborative and does not relate to background information

9. The Bemba Defence makes no submission that [REDACTED]' evidence is cumulative, corroborative, or relates to background information. Indeed, the Defence underscores that [REDACTED]' evidence is not background evidence as it is ostensibly "the only means available to the Defence to contest the veracity and

¹¹ CAR-OTP-0094-0359 at 0368-0371, lns. 320-421.

¹² CAR-OTP-0094-0359 at 0373, 0384, lns. 520-542, 902-920.

¹³ CAR-D20-0006-1347 at 1347.

¹⁴ CAR-OTP-0094-0359 at 0385, lns. 948-954.

¹⁵ CAR-D20-0006-1347 at 1348.

¹⁶ CAR-OTP-0094-0359 at 0385-0386, lns. 955-974.

reliability of the information provided by the Independent Counsel concerning the procedures utilised to review intercepted communications.”¹⁷ For the same reasons, [REDACTED]’ evidence is not cumulative or corroborative within the meaning of rule 68(2)(b)(i).

iii. The interests of justice require [REDACTED]’ viva voce testimony

10. The Bemba Defence’s reliance on [REDACTED]’ refusal to be called as a witness for the Defence¹⁸ is flawed. [REDACTED] has clarified that he did not refuse to testify in-person, but declined to testify as a Defence witness given his obligation as [REDACTED] to be “neutral and impartial”.¹⁹ Thus, there is no apparent obstacle to his appearance before the Chamber, if necessary, as a Chamber witness, pursuant to articles 64(6)(b) and 69(3).

11. On the other hand, preventing the Prosecution from examining [REDACTED] would unduly prejudice the Prosecution and undermine the Chamber’s mandate to determine the truth. Bemba’s contrary arguments are unpersuasive. *First*, as reflected above, in his interview with the Prosecution, [REDACTED] provided information undermining the accuracy and reliability of the proffered evidence. *Second*, contrary to Bemba’s assertion,²⁰ the Prosecution’s interview of [REDACTED] is not a substitute for cross-examination, for the obvious reason that the former is not part of the evidentiary record unless admitted by the Chamber. *Finally*, until now the Prosecution could not object to the admission of [REDACTED]’ evidence under rule 68(2)(b) since no such application was filed until late last week.²¹ The issue only became ripe for response once a motion was filed and its reasons articulated. In that respect, Bemba’s assertion that the Prosecution was “on notice, at the time it

¹⁷ ICC-01/05-01/13-1721-Conf, para. 20. *See also* ICC-01/05-01/13-1647-Conf, para. 10.

¹⁸ ICC-01/05-01/13-1721-Conf, paras. 21-23.

¹⁹ CAR-D20-0006-1351 at 1351.

²⁰ ICC-01/05-01/13-1721-Conf, para. 25.

²¹ ICC-01/05-01/13-1721-Conf, para. 25.

questioned D20-0002, that it might not be afforded an opportunity to cross-examine D20-0002 in court” is not only misleading, but attempts to shift the burden of Bemba’s delay in filing his Motion – to the extent time constraints now preclude the witness’ *viva voce* testimony.

12. Underlying Bemba’s argument are incorrect representations – deliberate or not – concerning the nature and timing of the Prosecution’s contact with [REDACTED]. *First*, the Bemba Defence never directly notified the Prosecution of [REDACTED]’ consent to be contacted under the Contact Protocol.²² The Prosecution sought that consent from the Bemba Defence on 31 December 2015 and again on 22 January 2016.²³ While [REDACTED]’ informed the Bemba Defence of his consent on 11 February 2016²⁴ the Bemba Defence never directly informed the Prosecution of this fact. The Prosecution was only constructively informed of [REDACTED]’ consent when the Bemba Defence attached a letter containing that consent to a filing requesting designation of a certification officer under 68(2)(b)(ii) on 15 February 2016, also disclosed the same day.²⁵ *Second*, at the time the Motion was filed, the Prosecution had not interviewed [REDACTED], which was known to the Bemba Defence²⁶ when stating otherwise in the Motion.²⁷

B. In the alternative, the Chamber should admit [REDACTED]’ interview with the Prosecution under article 69(4) or conditionally under rule 68(2)(b)

13. Alternatively, should the Chamber be minded to grant the Motion, the Prosecution requests that the Chamber also admit [REDACTED]’ 17 March 2016 statement to the Prosecution. Admission of that statement would ensure that the

²² ICC-01/05-01/13-1093-Anx, paras. 35-37.

²³ See Confidential Annex B.

²⁴ CAR-D20-0006-1351 at 1351.

²⁵ ICC-01/05-01/13-1626-Conf-AnxA.

²⁶ See Confidential Annex C.

²⁷ ICC-01/05-01/13-1721-Conf, para. 25 (stating in past tense “[a]t the time the Prosecution met D20-0002”).

Chamber has a full and accurate view of [REDACTED]' evidence and not the selective presentation provided by the Bemba Defence, thereby assisting it in its determination of the truth. It would also ensure that [REDACTED]' corrections to the proffered evidence are reflected in the record of this case. Finally, it would mitigate any potential prejudice to the Prosecution caused by being denied an opportunity to examine the witness.

14. As [REDACTED] is not a Prosecution's witness, the admission of [REDACTED]' statement to the Prosecution is not necessarily limited by rule 68.²⁸ Rather, [REDACTED]' statement to the Prosecution may be properly governed by the general admissibility requirements set out in article 69. As the evidence is clearly relevant and probative to the issues, including the reliability of the proffered evidence, [REDACTED]' statement to the Prosecution is suitable for admission under article 69(4).

15. Even were the Chamber to find that [REDACTED]' evidence is more appropriate for admission under rule 68 because the Prosecution tenders the statement for the truth of its contents and not just to challenge the reliability of the proffered evidence,²⁹ it has the authority to conditionally admit [REDACTED]' statement to the Prosecution pending the filing of declarations under rule 68(2)(b)(iii). Such conditional admission is consistent with the practice of the International Criminal Tribunal for the former Yugoslavia ("ICTY") under its equivalent rule 92*bis* of the ICTY Rules of Procedure and Evidence.³⁰

²⁸ See *Prosecutor v. Mladić*, Oral Ruling, 2 April 2015, T.34116-34117, 34139-34140 (permitting the admission of a witness' prior statement on cross-examination under the general rules of admission and without requiring a declaration under rule 92*ter* of the ICTY Rules of Procedure and Evidence).

²⁹ See ICC-01/05-01/13-1478-Red-Corr, para. 34 (citations omitted).

³⁰ See e.g. *Prosecutor v. Mladić*, Decision on Defence Motion to Admit the Evidence of Radoslav Daničić Pursuant to Rule 92 *bis*, Case No. IT-09-92-T, 21 October 2015, para. 8; *Prosecutor v. Limaj et al.*, Decision on Prosecution's Third Motion for Provisional Admission of Written Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, Case No. IT-03-66-T, 9 March 2005, Disposition; *Prosecutor v. Karadžić*, Decision on Accused's Motion for Admission of Supplemental Rule 92 *bis* Statement (Witness KDZ612), Case No. IT-95-5/18-T, 23 March 2012, para. 8.

IV. Relief Requested

16. For the reasons above, the Motion should be denied and [REDACTED] required to testify *viva voce*. In the alternative, [REDACTED] statement to the Prosecution, attached as Confidential Annex A, should be admitted under article 69(4), or conditionally, under rule 68(2)(b) pending the filing of the rule 68(2)(b)(iii) declarations.



Fatou Bensouda, Prosecutor

Dated this 23rd Day of March 2016
At The Hague, The Netherlands