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**International
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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single 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, *EX PARTE*, only available to the Prosecution and VWU Annex A

**Public redacted version of "Prosecution Submission of Evidence Pursuant to Rule
68(2)(c) of the Rules of Procedure and Evidence", 12 October 2015,
ICC-01/5-01/13-1363-Conf-Exp**

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I. Introduction

1. The Prosecution requests Trial Chamber VII (“Chamber”) to admit the 1 October 2014 Witness Statement (“Statement”), of Witness P-0263, [REDACTED], pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”). P-0263’s Statement is admissible because (i) [REDACTED] will be unavailable to testify orally before the Chamber due to obstacles that cannot be overcome with reasonable diligence, (ii) [REDACTED] statement possesses sufficient indicia of reliability, and (iii) even though measures under article 56 were anticipated, they cannot be implemented. Further, even though P-0263’s Statement goes to the acts and conduct of Kilolo, this should not be considered a factor militating against its introduction. *First*, the Statement is of limited scope. *Second*, Kilolo conceded the salient facts in his confirmation submissions — although he has since declined to agree that they are not contested under rule 69. *Third*, P-0263’s Statement is independently corroborated by other evidence. Thus, the admission of the Statement does not unfairly prejudice the Defence.

2. P-0263’s prospective evidence is directly relevant to Kilolo’s corrupt influencing of Prosecution Witness P-0245 (Witness D-3 in the *Bemba* Main Case).¹ Granting this Request will best ensure the availability of [REDACTED] evidence to the Chamber for the purposes of the trial. It will also ensure the efficiency and integrity of the proceedings.

¹ ICC-01/05-01/08.

II. Confidentiality

3. This request is designated as “Confidential, *EX PARTE*, only available to the Prosecution and Victims and Witnesses Unit (“VWU”)” because it contains information not currently known to the Defence. The filing also has a confidential designation because making it public could undermine the relief sought. The confidential redacted version is filed contemporaneously.

III. Submissions

A. The Statement of P-0263 is admissible pursuant to rule 68(2)(c)

i. Rule 68(2)(c)

4. P-0263’s Statement is admissible under rule 68(2)(c), which permits a Chamber to admit the prior statements of witnesses who are not before the Court, provided:

(c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally.

5. ICC jurisprudence establishes that “previously recorded testimony” includes not only prior in-court testimony, but any prior statements a witness has made, provided the requirements of the sub-rule are met.² So construed, rule 68(2)(c) allows

² See *Prosecutor v. Lubanga*, Decision on the Prosecution’s application for the admission of the prior recorded statements of two witnesses, 15 January 2009, ICC-01/04-01/06-1603, paras. 18-19; *Prosecutor v. Katanga and Ngudjolo*, Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts, 27 August 2010, ICC-01/04-01/07-2289-Corr-Red, para. 11; see also *Prosecutor v. Bemba*, Public redacted version of the First decision on the Prosecution and Defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, ICC-01/05-01/08-2012-Red,

a Chamber to admit such evidence if satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the evidence bears sufficient indicia of reliability.³ The fact that such evidence goes to proof of acts and conduct of an accused may be a factor against its admission – but does not preclude it.⁴

6. Rule 68(2)(c) is similar to rule of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) Rules of Procedure and Evidence, but considerably broader in scope. Unlike ICTY rule 92 *quater*, which only allows for the admission of a prior statement where the witness is unable to testify,⁵ rule 68(2)(c) allows for such admission where a witness’ attendance cannot be obtained due to “obstacles that could not be overcome with reasonable diligence”.⁶ The work of the Preparatory Commission makes it clear that the comparatively broader scope of rule 68(2)(c) was intended:

As a whole, the text of the chapeau in rule 68(2)(c) was considered preferable to the text that appears in ICTY rule 92 *quater* [...], as the text in ICTY rule 92 *quater* does not cover a number of situations that may arise. In particular, ICTY

paras. 134-136. See also *Prosecutor v. Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, OA 5 OA 6, paras. 79-81. This was also the intention of the drafters of the Rules: see Study Group on Governance: Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.I, p. 22, para. 13 (“[p]rior recorded testimony ... is understood to include video or audio recorded records, transcripts and written statements. This is the view in the prevailing jurisprudence to date and it was considered unduly restrictive to understand “prior recorded testimony” in a narrower manner. Rule 68 may therefore apply to written statements taken by the parties or (inter)national authorities, provided that the requirements under one or more of the sub-rules are met”).

³ See rule 68(2)(c)(i).

⁴ See rule 68(2)(c)(ii).

⁵ Rule 92 *quater* (A) of the ICTY Rules refers to the evidence of a person who has “subsequently died, or who can no longer with reasonable diligence be traced, or who is *by reason of bodily or mental condition unable to testify orally*” (emphasis added).

⁶ The Preparatory Commission further clarified that the obstacles in question are not obstacles that can never be overcome: “The chapeau to rule 68(2)(c) establishes the scope of the sub-rule. After discussions with the SGG, it was decided to replace the words ‘insurmountable obstacles’ in the original proposal with the phrase ‘obstacles that cannot be overcome with reasonable diligence’.” Study Group on Governance: Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.I, p. 26, para. 29.

rule 92 *quater* would not apply to a situation in which it was not possible to secure or to reach a witness, although that witness could, with reasonable diligence, be traced. An example of this situation would be if a witness was in detention and his or her release could not be secured. In the present amendment, the formulation “who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally” covers the examples that are explicitly raised in rule 92 *quater*, including those relating to physical or mental conditions which render a witness unavailable to testify orally, as well as other potential situations that may arise in the course of the Court’s work as a permanent institution.⁷

7. The rule therefore, covers any scenario where a witness is unable to attend Court in person or *via* video-link, due to infirmity, disease, or any other circumstance, when these obstacles cannot be overcome with reasonable diligence.

8. The determination of the indicia of reliability for admissibility purposes is based on a *prima facie* examination, and not a substantive determination of reliability or credibility based on an assessment of corroborative, or other evidence.⁸ Neither rule 68 nor the *travaux préparatoires* define the factors that the Chamber must consider in determining whether the evidence tendered bears “sufficient indicia of

⁷ Study Group on Governance: Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, p. 26, para. 29.

⁸ See e.g., *Prosecution v. Lubanga*, Decision on the admissibility of four documents, 13 January 2008, ICC-01/04-01/06-1399, para. 27: “[T]he Chamber must assess whether the evidence has, on a *prima facie* basis, probative value. [...]”. See also, *Prosecutor v. Bemba*, Public Redacted Version of the Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute of 6 September 2012, 8 October 2012, ICC-01/05-01/08-2299-Red, para. 9. A Chamber’s decision on admissibility does not in any way prejudice or limit a Chamber’s ultimate weighing of the evidence, including an assessment of its reliability and credibility in the context of all the other evidence heard at trial. The ICTY Appeals Chamber has stressed that “[p]rima facie proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.” See *Prosecutor v. Popović et al.*, IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 22; see also, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, paras. 33-34.

reliability”.⁹ However, ICTY rule 92 *quater* requires a Chamber of the ICTY to satisfy itself of the “reliability” of evidence tendered by those means, “having regard to the circumstances in which it was made and recorded”. Relying on ICTY jurisprudence, the *Lubanga* Chamber generally accepted, that “[...]there are innumerable factors which may be relevant to this evaluation, some of which, as set out above, have been identified by the ICTY [...] include whether the evidence is “voluntary, truthful and trustworthy, as appropriate [...]”.¹⁰ There is no finite list of the possible criteria that may be considered for assessing reliability of a document,¹¹ and such criteria may also include the assessment of authenticity.¹² The Chamber’s assessment of indicia of reliability requires an exercise of discretion based on the circumstances of the case.¹³

ii. *The evidence of Witness P-0263 is material to the case*

9. P-0263 is a citizen of [REDACTED]. In October 2014, the witness gave [REDACTED] Statement to the Prosecution in [REDACTED].¹⁴ The witness stated that [REDACTED] became acquainted with Kilolo [REDACTED].¹⁵ Pursuant to this encounter, Kilolo travelled to [REDACTED] on four separate occasions between

⁹ See Study Group on Governance: Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, pp. 26-27, paras. 27-30.

¹⁰ ICC-01/04-01/06-1399, para. 28. See *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on prosecutor's appeal on admissibility of evidence, 16 February 1999, para. 15. See *Prosecutor v. Popović et al.*, IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, paras.22-23. See also, *Prosecutor v. Prlić, et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 34; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, paras. 33, 266; *Prosecutor v. Kordić*, IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, paras. 24-26; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion to Admit Testimony of Witness KW582 Pursuant to Rule 92 *quater*, 3 February 2014, paras. 13-14.

¹¹ ICC-01/04-01/06-1399, para. 29 (the Chamber stated that it must be careful “[...] not to impose artificial limits on its ability to consider evidence freely [...]”).

¹² *Prosecutor v. Ruto and Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353, para. 15.

¹³ See *Prosecutor v. Prlić et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 27.

¹⁴ CAR-OTP-0083-1291.

¹⁵ CAR-OTP-0083-1291 at 1296, para. 16.

April and November 2013 to meet [REDACTED] in person.¹⁶ [REDACTED].¹⁷ For a period of time, Kilolo [REDACTED].¹⁸ During Kilolo's last visit to [REDACTED] in November 2013, he asked [REDACTED] to transfer a sum of money in Euros using Express Union.¹⁹

10. The evidence of the payment Kilolo requested P-0263 to make is directly relevant to the allegations of corruptly influencing Witness D-3 (P-0245).²⁰ As alleged in the Prosecution Pre-Trial Brief, Kilolo asked D-3 to provide the name of someone not easily identifiable by the Court, to receive a transfer for him.²¹ Kilolo rejected D-3's suggestion to send the money to his fiancée, as her name was already familiar to the Court.²² D-3 thus provided Kilolo with the name of his [REDACTED], [REDACTED], to whom Kilolo sent the money,²³ transmitting the payment through P-0263.²⁴ Kilolo sent D-3 an SMS confirming the money-transfer and providing the details required for its collection.²⁵ D-3, using the transaction details Kilolo sent him, collected the money with [REDACTED]²⁶ and confirmed its receipt to Kilolo.²⁷

¹⁶ CAR-OTP-0083-1291 at 1296-1299.

¹⁷ CAR-OTP-0083-1291 at 1297, paras. 18, 22-23, at 1297, para. 24.

¹⁸ CAR-OTP-0083-1291 at 1297, paras. 19-21, at 1298, para. 27.

¹⁹ CAR-OTP-0083-1291 at 1298, para. 27.

²⁰ ICC-01/05-01/13-1110-Conf, paras. 131-142.

²¹ CAR-OTP-0080-0165 at 0168 lns. 106-113; CAR-OTP-0078-0264-R01 at 0275-0276, lns. 390-397. *See also* ICC-01/05-01/13-1110-Conf, paras. 48, 142.

²² CAR-OTP-0080-0165 at 0168 lns. 106-113; CAR-OTP-0078-0264-R01 at 0275-0276, lns. 390-397; CAR-OTP-0088-0370 at 0377-0378. *See also* ICC-01/05-01/13-1110-Conf, paras. 48, 142.

²³ CAR-OTP-0080-0165 at 0168 lns. 91-113; CAR-OTP-0079-1541 at 1542. *See also* ICC-01/05-01/13-1110-Conf, paras. 48, 142.

²⁴ CAR-OTP-0078-0264-R01 at 0276, lns. 395-397, lns. 417-419; CAR-OTP-0083-1291-R02 at 1298, paras. 27-29; CAR-OTP-0079-1541 at 1542; CAR-OTP-0080-0165 at 0169, lns. 117-133; CAR-OTP-0088-0370 at 0377-0378. *See also* ICC-01/05-01/13-1110-Conf, paras. 48, 142.

²⁵ The SMS Kilolo sent to D-3 on 26 October 2013 contains the following details "[REDACTED]", *see* CAR-OTP-0088-0370 at 0377-0378, which corresponds to the information included in the receipt provided by D-3, *see* CAR-OTP-0079-1541 at 1542. *See also* CAR-OTP-0080-0165 at 0169, lns. 119-123, ICC-01/05-01/13-1110-Conf, para.48. Several minutes prior to sending this SMS to D-3, Kilolo received an SMS with identical content from the number "[REDACTED]". *See* CAR-OTP-0088-0370 at 0377. Western Union records show that Kilolo made transfer to [REDACTED] in [REDACTED], whose number is listed in as "[REDACTED]" (the [REDACTED] country code [REDACTED] is not given). *See* CAR-OTP-0074-0855, tab KILOLO, row 16.

²⁶ CAR-OTP-0080-0165 at 0169, lns. 136-143.

²⁷ CAR-OTP-0080-0165 at 0170, lns. 170-172; *see also* CAR-OTP-0088-0370 at 0378-0379 (where D-3 confirms to Kilolo the receipt of the information about the money transfer).

11. P-0263's Statement will crucially link Kilolo to the money transfer, specifically that [REDACTED] made it at his direct request. Although this is not the only evidence of the transaction itself, it is direct evidence of Kilolo's responsibility for the transfer. It is in the interests of justice that the Chamber has this evidence for its consideration at trial.

iii. P-0263 is unavailable to testify at trial due to obstacles that cannot be overcome with reasonable diligence

a. P-0263's [REDACTED] makes it infeasible for [REDACTED] to testify at trial

12. [REDACTED].

13. [REDACTED].

14. [REDACTED].

15. [REDACTED].

16. [REDACTED].

17. [REDACTED].²⁸ [REDACTED].²⁹ [REDACTED].³⁰[REDACTED].³¹ [REDACTED].

b. The obstacles presented by P-0263's situation cannot be overcome with reasonable diligence

²⁸ CAR-OTP-0083-1291 at 1299, paras. 31-36.

²⁹ CAR-OTP-0083-1291 at 1299, para. 31.

³⁰ CAR-OTP-0083-1291 at 1299, para. 33.

³¹ CAR-OTP-0083-1291 at 1299, para. 36.

18. [REDACTED].

19. [REDACTED]. No witness should face adverse consequences because of their willing cooperation with the Court. Whereas the Chamber has the power to order such measures, it should not exercise its discretion to the detriment of a witness, where a far less onerous alternative is available. The Chamber should exercise its discretion accordingly, particularly given the witness's background, the nature of [REDACTED], and the important, albeit limited scope of [REDACTED] evidence.

20. In the circumstances, the obstacles preventing the witness from testifying are such that they cannot be overcome with "reasonable diligence", as this concept cannot entail undertaking measures that place a witness in a considerably worse situation than that the witness would be in prior to giving evidence.

iv. Measures under article 56 are not appropriate or feasible

21. The requirement under rule 68(2)(c)(i) that the necessity of measures under article 56 could not be anticipated must necessarily include situations where article 56 measures were anticipated, but found to be infeasible or inappropriate to implement. The language "*obstacles that cannot be overcome with reasonable diligence*" confirms this reading of the sub-rule. Were this not the case, the Chamber would be deprived of a tool to have important evidence from an unavailable witness admitted into the record of the case, where such evidence meets the criteria for admission under the sub-rule. P-0263's evidence, as set out above, meets all of the criteria.

22. Article 56 measures cannot be implemented in this case for the same reasons that make it impossible for the witness to testify without being placed in an adverse situation. The implementation of article 56 measures would result in similar consequences for the witness, because it would entail seeking assistance from

[REDACTED]. As noted above, the consequence of this course of action would likely be [REDACTED].

v. P-0263's prior Statement is sufficiently reliable

23. P-0263's Statement bears sufficient indicia of reliability for admission as defined by this Court and the *ad hoc* tribunals. The Statement is authentic and coherent. The witness signed the Statement,³² acknowledged its truthfulness, accuracy and voluntariness, and approved its use in the proceedings before the Court.³³ In addition, the evidence of P-0263 is corroborated by other evidence, as referred to in paragraph 14.

vi. The Statement should be admitted

24. P-0263's Statement goes to Kilolo's acts and conduct only. However, this does not militate against its introduction in this case.

25. *First*, the Statement is of limited scope in relation to Kilolo's acts and conduct. It sets out that the witness made a money transfer on his behalf. It does not go beyond that to assert anything about Kilolo's intent or the ultimate purpose of the transfer. Indeed, the witness does not appear to be acquainted with any of the other actors involved in this money transfer or the bribery scheme more generally.

26. *Second*, Kilolo conceded the fact that he had the transfer made on his behalf in his confirmation submissions, stating that he designated "[REDACTED]" (i.e., P-

³² CAR-OTP-0083-1291 at 1292.

³³ CAR-OTP-0083-1291 at 1301.

0263) to effect the transfer,³⁴ even though Kilolo has since declined to agree that these facts are not contested under rule 69.³⁵

27. *Third*, [REDACTED] Statement is independently corroborated by other evidence, as set out above at paragraph 11.

28. For these same reasons, the admission of the statement does not unfairly prejudice any Accused, who are free to argue what the appropriate weight of the witness's statement should be at the end of trial.

vii. Other measures to secure P-0263's evidence are have been unsuccessful

29. The Prosecution has attempted on three occasions³⁶ to secure agreed facts or stipulations from the Kilolo Defence regarding Kilolo's instructions to P-0263 regarding the money transfer to [REDACTED]. These attempts were unsuccessful, notwithstanding Kilolo's concession that he designated an *ad hoc* secretary to effect the transfer.³⁷

³⁴ ICC-01/05-01/13-674-Conf, para. 372: "[REDACTED]".

³⁵ See below para. 29.

³⁶ On 30 April 2015, the Prosecution sent its second proposal for agreed facts to the Defence teams. See ICC-01/05-01/13-1072-Conf-Corr, para. 7. The proposal contained several stipulations concerning P-0263, including that (i) [REDACTED] was the associate of Kilolo, (ii) that [REDACTED] sent money to [REDACTED] for D-3 between 18-22 November 2013. See ICC-01/05-01/13-1072-Conf-AnxA-Corr, facts 54 and 341. On 30 June 2015, the Kilolo Defence rejected the proposal with respect to these facts. On 23 June 2015, in relation to the maintenance of redactions to the Statement of P-0263, the Prosecution sent an email to the Kilolo Defence proposing that "to the extent that the Defence agrees to stipulate (a) to the substance of [REDACTED] [i.e., P-0263's] statement concerning the transaction at issue, and (b) to the evidence (i.e., SMSs) set out at ICC-01/05-01/13-845-Conf, Annex B-red, pp. 8-10, [REDACTED]'s testimony may be substantially limited, if not altogether unnecessary." On the same day, the Kilolo Defence responded, *inter alia*, «[REDACTED]». On 1 July 2015, the Prosecution sent an email with a draft proposal of a stipulation to the Kilolo Defence with the following content: "If P-0263 were to testify in this case, [REDACTED] would assert: (i) KILOLO provided [REDACTED] the money for the transfer in EURO, and instructed [REDACTED] to send it to an individual in Cameroon; (ii) [REDACTED] used the money transfer agency Express Union, to make the transfer; (iii) [REDACTED] does not know the motive for the payment; (iv) [REDACTED] only ever made one transfer of money at KILOLO's request; and (v) that upon effecting the transfer [REDACTED] reported the details thereof to KILOLO." (footnotes omitted). The proposal was rejected on 2 July 2015, the Kilolo Defence claiming [REDACTED]. On 7 July 2015, the Kilolo Defence confirmed that they were unwilling to accept the stipulation.

³⁷ See above para. 26, fn 34.

30. Given this state of affairs, the only viable and reasonable course of action would be to admit P-0263's Statement under rule 68(2)(c).

IV. Relief Requested

31. Based on the foregoing reasons, the Prosecution requests the Chamber admit the Statement of P-0263 under rule 68(2)(c).



Fatou Bensouda, Prosecutor

Dated this 22nd Day of June 2016
At The Hague, The Netherlands