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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

**Public Redacted Version of “Joint Defence Response to Prosecution’s Request to
Admit Statement through Rule 68 (2)(b)”**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

Defence for Mr. Aimé Kilolo Musamba

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

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Introduction

1. The Defence teams for Mr. Bemba and Me. Kilolo hereby submit their response to the Prosecution request to admit the statement of P-264 through Rule 68(2)(b) of the Rules of Procedure and Evidence.
2. The Defence fully subscribes to the need for expeditious and focussed proceedings, and, in principle, is willing to waive its right to confront witnesses for which there are no issues of dispute or reliability.
3. The Defence is not, however, in a position to make an informed assessment as concerns the consequences of the admission of the statement of P-264 in *lieu* of oral testimony due to the absence of key information, which touches on the availability of the witness to avail herself to testify should the Defence require, and the reliability of new information provided by the witness during the Rule 68 process.
4. The Defence also has not been provided with the formal declaration signed by the witness and the Registry legal officer as part of the Rule 68 process.
5. The Defence therefore requests that the Trial Chamber's determination of the request be suspended, pending the disclosure of this information to the Defence.
6. Alternative, the Defence requests the Trial Chamber to condition the admission of the statement on:
 - i. The exclusion of any new information provided by the witness which go beyond mere corrections or clarifications; and
 - ii. The witness's agreement to remain available to testify before the Court should the Defence need to elicit further information or clarification from the witness during the course of the proceedings.

Submissions

7. Rule 68(2) applies to witnesses (“If the witness”), and as such, there is an underlying presumption that the person in question either expressed his or her willingness to testify as a witness at some point in time, or would be (or would have been) available to be summonsed as a witness if necessary.
8. The notion that the use of written evidence should not be exercised in a manner which is prejudicial to the rights of the accused also presupposes that the admission of such written evidence should be without prejudice to the right of the Defence to confront the witness in court should the need to do so arise during the proceedings.
9. It therefore follows that any decision to admit evidence through Rule 68(2)(b) should take into consideration whether the witness might be available to be cross-examined by the Defence before the Chamber at some point during the proceedings (even if the person’s availability is not in itself dispositive).
10. At this point in time, the Defence has insufficient information to assess whether P-264 could be available to appear before the Chamber at a later stage.
11. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].
[REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED].¹
12. P-264 resides in a non-State party, and as such, her consent is of particular relevance to her availability to testify before the Court.
13. However, since the date of its initial interview with P-264, the Prosecution has not submitted any documentation or information concerning this person’s consent to testify as a Prosecution witness, or to appear before the Chamber if necessary (even by video-link).

¹ CAR-OTP-0085-0541 at 0550, lines 318-338; at 0551 line 359; at 0552 lines 394-395.

14. More importantly, the Defence has not received any information concerning P-264's apparent *volte face*, if there has indeed been one. In this regard, if there is no information in the Prosecution's possession concerning P-264's willingness to testify, then the presumption must be that P-264 has maintained her resistance to testifying as a witness.
15. The Defence notes that when faced with a similar scenario regarding P-263's reluctance to testify as a witness, the Prosecution met with her in order to "assure" her.² Such assurances included a promise that she would not be prosecuted herself and the discussion of different protective measures.
16. Such promises or assurances are disclosable. Of particular import, when P-264 met with the Prosecution to sign the Rue 68 declaration, she added the new information that [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].³
17. The provision of new information (as opposed clarifications) during the Rule 68 process and after the commencement of the trial is itself, highly problematic. If, before this advanced stage of the proceedings, there had been prior contacts between the Prosecution and P-264 which touched on the substance of her testimony, then these should have been disclosed immediately pursuant to Rule 76. It should be noted in this regard that the Prosecution has not denied that there were prior contacts, and that there are materials in the possession of the Prosecution in relation to such contacts.
18. The context and contacts leading up to the provision of new information to the Prosecution is also relevant to its reliability. In particular, if the Prosecution had, at some juncture, attempted to assuage P-264's concerns regarding testifying before the Chamber by suggesting that protective measures could be employed as an alternative, then this would be relevant to the issue as to whether P-264

² CAR-OTP-0090-2124-R01, CAR-OTP-0090-1876-R01.

³ CAR-OTP-0089-1185.

proffered such information in order present evidence of a risk, which would justify such protective measures.

19. In relation to past witnesses who have appeared before this Court, the Prosecution has suggested that the Defence would not be prejudiced through late disclosure or non-disclosure regarding contacts because:⁴

the nature of those contacts is entirely exploitable and explorable, if you can use that term, during the course of cross-examination as it is in any case. And there is nothing that precludes the Defence from doing that.

20. In the current situation, the admission of P-264 through Rule 68 – when combined with the non-disclosure of information concerning the Prosecution's contacts with P-264 – would deprive the Defence of the ability to explore or elicit information on such issues.

21. Finally, the Defence notes that it has yet to receive the attestation of the Registry legal officer, in which P-264 apparently fulfils the criteria of Rule 68(2)(b)(iii). This information is relevant to the reliability of P-264's consent to this process.

Relief sought

22. For the reasons set out above, the Defence requests the Trial Chamber to either:

- i. suspend the Trial Chamber's determination of the request, pending the disclosure of the requested information to the Defence; or
- ii. in the alternative, condition the admission of the statement on

⁴ ICC-01/05-01/13-T-18-CONF-ENG ET, dated 12 Oct 2015 p 22 lines 11-14.

- a. The exclusion of any new information provided by the witness which go beyond mere corrections or clarifications; and
- b. The witness's agreement to remain available to testify before the Court should the Defence need to elicit further information or clarification from the witness arise during the course of the proceedings.



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Dated this 1ST day of July 2016

The Hague, the Netherlands