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No.: ICC-01/05-01/13
Date: 12 November 2015

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

Corrected public redacted version of

**Decision on ‘Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the
Rules of Procedure and Evidence’**

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

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

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* ('Case'), having regard to Articles 64(9)(a), 67 and 69(2) and (4) of the Rome Statute ('Statute') and Rules 63(2) and 68(2)(c) of the Rules of Procedure and Evidence ('Rules') issues the following 'Decision on Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence'.

I. INTRODUCTION

1. On 12 October 2015, the Office of the Prosecutor ('Prosecution') filed a request pursuant to Rule 68(2)(c) of the Rules ('Request'), seeking to admit P-263's witness statement of 1 October 2014 ('Statement').¹
2. On 4 November 2015, the defence teams for Mr Bemba ('Bemba Defence') and Mr Kilolo ('Kilolo Defence', together with the Bemba Defence ('Defence')) filed a joint response ('Response') asking the Chamber to reject the Request on the grounds that the Prosecution had failed to meet the requirements of Rule 68(2)(c) of the Rules.²

II. SUBMISSIONS

A. Prosecution

3. The Prosecution submits that Rule 68(2)(c) of the Rules covers any scenario where a witness is unable to attend the Court in person or *via* video-link due

¹ Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence, ICC-01/05-01/13-1363-Conf-Exp (confidential redacted version notified on 12 October 2015).

² Joint Defence Response to the Prosecution's 'Confidential redacted version of "Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence"' (ICC-01/05-01/13-1363-Conf-Exp), ICC-01/05-01/13-1456-Conf.

to infirmity, disease or any other circumstance, when these obstacles cannot be overcome with reasonable diligence.³

4. The Prosecution submits that the Statement is directly relevant to Mr Kilolo's alleged corrupt influencing of P-245 in the case of *The Prosecutor v Jean-Pierre Bemba Gombo*.⁴ It is argued that the Statement is material to the Case and, although not the only evidence of the financial transaction, will show that Mr Kilolo is responsible for transmitting a payment to P-245 through P-263, the latter having made the transfer at Mr Kilolo's request.⁵
5. The Prosecution submits that P-263 is currently [REDACTED] and that, in these circumstances, it is not possible for the Victims and Witnesses Unit ('VWU') to arrange for her *viva voce* testimony, whether in person or via video link.⁶ The Prosecution submits that doing so would likely result in adverse consequences for P-263, such as [REDACTED].⁷ The Prosecution also argues that measures under Article 56 of the Statute could not be implemented for the aforementioned reasons namely, [REDACTED] adverse consequences that P-263 might face [REDACTED].
6. The Prosecution further submits that P-263: (i) has allegedly received threats from purported associates of Mr Kilolo, who called her twice in March 2014 and allegedly threatened to report her to the Cameroonian authorities if she refused to meet with her interlocutor; (ii) is afraid of being confronted by members of the [REDACTED]; and (iii) 'feels uneasy testifying against [Mr] Kilolo given their history'.⁸
7. The Prosecution argues that no witness should face adverse consequences because of their willing cooperation with the Court and that the Chamber should exercise its discretion in the case of P-263 to ensure that no measures

³ Request, ICC-01/05-01/13-1363-Conf-Exp, paras 6-7.

⁴ Request, ICC-01/05-01/13-1363-Conf-Exp, para. 2.

⁵ Request, ICC-01/05-01/13-1363-Conf-Exp, paras 9-11.

⁶ Request, ICC-01/05-01/13-1363-Conf-Exp, paras 13-15.

⁷ Request, ICC-01/05-01/13-1363-Conf-Exp, para. 16.

⁸ Request, ICC-01/05-01/13-1363-Conf-Exp, para. 17.

are undertaken that would place her in a considerably worse situation than she is in at the moment.⁹

8. The Prosecution contends that the Statement is reliable since the witness signed it, acknowledged its truthfulness, accuracy and voluntariness, and approved its use in the proceedings before the Court. The Prosecution further argues that whereas the Statement goes to Mr Kilolo's acts and conduct, it does not unfairly prejudice the accused and should be admitted since: (i) it is of limited scope as it merely sets out that the witness made a money transfer on Mr Kilolo's behalf and does not go to his intent or the ultimate purpose of the transfer; (ii) Mr Kilolo allegedly conceded that P-263 had made the transfer on his behalf when he stated in his confirmation submissions that he had designated '*sa secrétaire ad hoc*' (i.e. P-263) to effect the transfer; and (iii) her Statement is allegedly independently corroborated by other evidence in the Case.¹⁰
9. The Prosecution lastly submits that it has unsuccessfully attempted to secure agreed facts from the Kilolo Defence on Mr Kilolo's instructions to P-263 regarding the money transfer, thus making the admission of her statement under Rule 68(2)(c) of the Rules the only viable and reasonable course of action.¹¹

B. Defence

10. The Defence submit that there are no indications to support the view that P-263 is unavailable to testify within the meaning of Rule 68(2)(c) of the Rules, and that the subjective wish of a witness not to appear before the Court is an untenable ground for invoking the said provision, since such an approach would render the majority of witnesses unavailable and the Defence unable to test their evidence. The Defence submit that the said provision also cannot be

⁹ Request, ICC-01/05-01/13-1363-Conf-Exp, para. 19.

¹⁰ Request, ICC-01/05-01/13-1363-Conf-Exp, paras 23-27.

¹¹ Request, ICC-01/05-01/13-1363-Conf-Exp, para. 29.

invoked when the Court possesses the power to summon witnesses, as it did in the cases of P-198 and P-201.¹²

11. The Defence submit that since the Prosecution has questioned P-263 on multiple occasions and characterised her as a 'material witness', the Defence must also be given an opportunity to put questions to her, elicit information exculpatory or relevant to the Defence case and establish that there was no concealment regarding the circumstances of the money transfer.¹³
12. The Defence argue that while P-263 may exercise her right to decline direct contact with the Defence, she cannot refuse to make herself available to the Court in order to provide information that could be relevant to the Defence.¹⁴ It is argued that any discomfort experienced by P-263 in relation to participating as a witness in the Case is generated by the Prosecution's decision to interview her in the first place, making it unfair for the Prosecution to now highlight the negative consequences of her involvement in the trial.¹⁵
13. The Defence submit that there is no evidence showing that P-263 was threatened by the Defence and that, during the course of its interactions with her, the Defence complied with all applicable rules and ethical standards. It is argued that if the Prosecution was of the view that there was an objective risk to the witness, they had ample time to refer the matter to the VWU, with the view to facilitating the testimony of P-263 without security risks.¹⁶

III. ANALYSIS

14. Rule 68(2)(c) of the Rules provides that if the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony, *inter alia*, where

¹² Response, ICC-01/05-01/13-1456-Conf, paras 7 and 9.

¹³ Response, ICC-01/05-01/13-1456-Conf, para. 10.

¹⁴ Response, ICC-01/05-01/13-1456-Conf, para. 11.

¹⁵ Response, ICC-01/05-01/13-1456-Conf, para. 11.

¹⁶ Response, ICC-01/05-01/13-1456-Conf, paras 14-17.

it 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’. The Rule further provides, that in such a case:

- (i) ‘Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is 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 prior recorded testimony has sufficient indicia of reliability.
- (ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it’.

15. First, the Chamber finds that the Statement is prior recorded testimony within the meaning of Rule 68 of the Rules.¹⁷

16. With respect to the interpretation of the provision, the Chamber notes that the nature of unavailability in Rule 68(2)(c) of the Rules is undefined. In this vein, it is noted that unlike Rule 92 *quater* (A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), which refers to the admission of a prior statement 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’, the drafting history of the amended Rule 68(2)(c) of the Rules makes clear that the intention of the drafters in effecting the amendment in the Rules was to comparatively broaden the ICTY provision to include ‘a situation in which it was not possible to secure or reach a witness, although that witness

¹⁷ See also Decision on Prosecution Rule 68(2) and (3) Requests, 11 November 2015, ICC-01/05-01/13-1478-Conf, paras 28-31 (public redacted version filed on 12 November 2015, ICC-01/05-01/13-1478-Red-Corr). Judge Pangalangan considers that Rule 68(2)(c) of the Rules may be applied consistently with Article 51(4) of the Statute, in accordance with his separate opinion on Decision ICC-01/05-01/13-1478-Conf, to be rendered in due course.

could, with reasonable diligence be traced'.¹⁸ Bearing this in mind, the Chamber considers that the term 'unavailable' in Rule 68(2)(c) of the Rules must be interpreted broadly.

17. Turning to the case at hand, the Chamber notes witness P-263's [REDACTED] situation. [REDACTED] present obstacles to her ability to cooperate with the Court and to the ability of the Court to secure her oral testimony that cannot be overcome with reasonable diligence, thereby rendering her 'unavailable to testify' either in person or via video link within the meaning of Rule 68(2)(c) of the Rules.
18. Furthermore, the Chamber finds that [REDACTED] are such that the reasonably foreseeable consequences of her testifying before the Court, whether in answer to a summons or otherwise, would place her under unnecessary hardship that is disproportionate to the purported significance of her evidence (discussed further at paragraph 22 below). Pursuant to Article 68(1) of the Statute, the Chamber has the duty to protect the safety, physical and psychological well-being, dignity and privacy of witnesses. This encompasses refraining from actions (in this case calling or summoning witness P-263 to testify) that would in all likelihood entail negative consequences for the witness, [REDACTED].
19. Turning to the next limb of the test in Rule 68(2)(c)(i) - the anticipation of measures under Article 56 of the Statute - the Chamber considers that this requirement is to avoid introducing evidence through Rule 68(2)(c)(i) when Article 56 measures would have been a viable alternative at an earlier stage. As regards the question of whether the necessity of measures under article 56 of the Statute could have been anticipated in the present case, the Chamber is satisfied that, whereas measures under Article 56 of the Statute were contemplated by the Prosecution, they could not be implemented on the

¹⁸ 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.

ground of the aforementioned [REDACTED]. As Article 56 measures would have been incapable of ameliorating the situation of P-263, the Chamber considers the requirement in Rule 68(2)(c)(i) of the Rules to be met.

20. The Chamber turns to the following limb of the test in Rule 68(2)(c)(i) – the condition that the prior recorded testimony ‘has sufficient indicia of reliability’. The Chamber considers that the assessment of reliability is preliminary at this stage, but notes that the Statement appears to have been: (i) obtained by the Prosecution in the ordinary course of its investigations; (ii) signed by the witness and the two investigators conducting the interview; (iii) given voluntarily; and (iv) declared to be accurate by the witness at the time of giving it. Noting further that reliability is not an issue contested by the Defence, the Chamber thus finds that the Statement bears a sufficient indicia of reliability in accordance with Rule 68(2)(c)(i) of the Rules.

21. As regards the conditions stipulated in Rule 68(2)(c)(ii) of the Rules, the Chamber accepts that the Statement goes to the proof of acts and conduct of Mr Kilolo. However, the Chamber is mindful of the fact that Rule 68(2)(c)(ii) of the Rules does not prevent the introduction of this type of evidence, providing instead that this element ‘may be a factor against its introduction, or part of it’. The Chamber recalls that in exercising its discretion in allowing the introduction of previously recorded testimony under Rule 68(2)(c) of the Rules, it may take into consideration, *inter alia*, the following factors: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether the evidence is central to the allegations or the case; and (iii) whether the evidence is purportedly corroborative.¹⁹

22. In the instant case, the Chamber concurs with the Prosecution that the statement is limited in its scope, as its introduction seeks solely to corroborate

¹⁹ Appeals Chamber, *The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeal 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 & OA6), para. 78.

the allegation (already proffered through other Prosecution evidence) that P-263 transferred money to P-245 at Mr Kilolo's behest. As such, the narrow scope of this purportedly corroborating evidence limits any prejudicial effect caused to the accused in this respect. Furthermore, the introduction of the Statement is evidently without prejudice to the probative weight, if any, that the Chamber might attach to it later.

23. Considering the above, the Chamber finds that the grounds presented by the Prosecution satisfy the test laid out in Rule 68(2)(c) of the Rules and the Statement may accordingly be recognised as formally submitted.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request, recognising the formal submission of CAR-OTP-0083-1291.

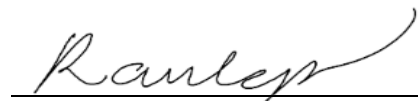
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 12 November 2015

At The Hague, The Netherlands