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

Date: 26/06/2015

**TRIAL CHAMBER VII**

**Before: Judge Chile Eboe-Osuji, Presiding Judge  
Judge Olga Herrera Carbuccion  
Judge Bertram Schmitt**

**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*

**Defence Response to Prosecution's Request to Designate a Person Authorised to  
Witness a Declaration under Rule 68 (2) (b) of the Rules of Procedure and  
Evidence (ICC-01/05-01/13-1011)**

**Source: Defence for Mr. Jean-Pierre Bemba Gombo**

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

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Section Other**

## Submissions

1. On 22 May 2015, the Trial Chamber ordered the Prosecution to disclose all evidence upon which it intends to rely at trial by 30 June 2015.<sup>1</sup>
2. On the 16 June 2015 - almost one month after the Trial Chamber established the disclosure deadline, and 14 days before it was due to expire - the Prosecution filed a motion requesting the Chamber to designate a person to witness Rule 68(2)(b) declarations (the Request).<sup>2</sup>
3. No information or justification was provided in relation to why the Prosecution submitted the Request at a juncture, in which it would be impossible to implement the Request prior to the expiration of the disclosure deadline.
4. The Prosecution has also not provided any information concerning the circumstances or content of the proposed Rule 68 statements.
5. For example, no explanation or elaboration has been provided as to the Prosecution's understanding of the definition of "prior recorded testimony", or the "acts and conduct of the accused".
6. There is also no information, which would allow the Defence to assess the degree of prejudice which could stem from the Prosecution's reliance on Rule 68.
7. There are potential issues as to whether Rule 68(2)(b) can or should be employed in relation to persons, who could be qualified as suspects in an Article 70 case, and if it is employed, which safeguards need to be implemented in order to protect the person's right to silence and privilege against self-incrimination.

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<sup>1</sup> ICC-01/05-01/13-959.

<sup>2</sup> ICC-01/05-01/13-1011.

8. Depending on the profile of the witness and the nature of the prior recorded testimony, the manner in which the Rule 68(2)(b) instructions are explained to the witness could also have the inadvertent effect of deterring the witness from correcting or resiling from aspects of the prior recorded testimony, which might be incorrect.<sup>3</sup>

9. These issues cannot, however, be identified or resolved in the absence of any information concerning the identity of the witnesses or the nature of their prior recorded testimony.

10. No protective reasons were cited for withholding this crucial information from the Defence.

11. The Prosecution has therefore frustrated the ability of the Defence to advance any informed or meaningful submissions concerning the applicability and propriety of the use of Rule 68(2) in this situation.

12. The Defence for Mr. Jean-Pierre Bemba Gombo therefore takes no position on the Request, subject to:

- i. The understanding of the Defence that all evidence upon which the Prosecution wishes to rely must be disclosed by 30 June 2015; and
- ii. The right of the Defence to contest the applicability of Rule 68 and the admissibility of any statements or declarations derived from the procedures set out in this Rule.

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<sup>3</sup> Unlike the equivalent procedure at the ICTY (where witnesses routinely updated or amended their statements during the Rule 92*bis* process), Rule 68(2)(b)(ii) of the ICC Rules of Procedure and Evidence stipulates that the declaration cannot contain any new information. Rule 68(2)(b)(iii) further specifies that the person can be prosecuted under Article 70 if the contents of the prior recorded statement are not true. Accordingly, whereas the Rule 92*bis* procedure facilitated the ability of witnesses to update and correct their statements, Rule 68(2)(b) has the opposite effect.



Melinda Taylor  
Counsel of Mr. Jean-Pierre Bemba

Date this 26<sup>th</sup> day of June 2015

The Hague, The Netherlands