

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 30 September 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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 and B**

**Public redacted version of "Prosecution Request for the Admission of the
Previously Recorded Testimony of P-0270, pursuant to Rule 68(2)(b)",
15 September 2015, ICC-01/05-01/13-1247-Conf**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber VII (“Chamber”) to admit the previously recorded statement of P-0270 *in lieu* of his *viva voce* testimony in this case, pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”) (“Request”).

2. The previously recorded statement tendered comprises: (i) the transcript of P-0270’s 4 March 2015 interview; and (ii) a note reflecting four minor non-substantive clarifications made by P-0270 during the certification procedure (collectively, “Statement”). It is attached at Annex A.

3. The Statement is *prima facie* relevant and probative of the charges, and does not concern the acts and conduct of the Accused. P-0270 has acknowledged its truthfulness and accuracy in an accompanying declaration meeting the conditions under rule 68(2)(b)(iii) of the Rules.

4. The nature and content of P-0270’s evidence is such that his appearance for cross-examination is unnecessary. Further, granting the Request would not cause any unfair prejudice to the Accused. To the contrary, all Parties will benefit from an expedited presentation of the Prosecution’s case-in-chief. Admitting P-0270’s evidence would, therefore, best serve the interests of justice.

5. There is no impediment to the application of rule 68 in this case, as its 27 November 2013 amendment¹ did not affect any vested or pre-existing right of the Accused.² Nor, does its application operate to their detriment.³

¹ ICC-ASP/12/Res.7.

² See ICC-01/05-01/13-1050, para.3. See also, ICC-01/09-01/11-1938-Red-Corr, paras.22-25.

³ *Ibid.*

II. Confidentiality

6. This filing is classified as “Confidential”, as it refers to information that is not yet available to the public. The Prosecution will file a public redacted version.

III. Procedural Background

7. On 29 July 2015, the Chamber authorised the Registry Legal Counsel, or anyone delegated by him, to witness declarations made pursuant to rule 68(2)(b)(iii) of the Rules.⁴

8. On 2 September 2015, the Prosecution had P-0270 and his two counsel read the transcripts of his 4 March 2015 interview taken pursuant to rule 112 of the Rules.⁵ P-0270 made four minor clarifications to them, consigned in a note, which he acknowledged and signed.⁶

9. On 3 September 2015, P-0270 made a declaration to the Registry that the contents of his interview as clarified are true and correct to the best of his knowledge and belief. On 9 September, the Registry filed this declaration in the record of the case.⁷

IV. Applicable Law

10. Rule 68(2)(b) of the Rules allows the introduction of a witness’s previously recorded testimony that goes to proof of a matter other than the acts and conduct of the accused. The term “previously recorded testimony” includes statements and

⁴ ICC-01/05-01/13-1109, p.5.

⁵ See Annex A.

⁶ See Annex A.

⁷ ICC-01/05-01/13-1224-Conf, paras.1-3.

transcripts of interviews taken pursuant to rules 111 and 112 of the Rules, respectively, together with the associated exhibits.⁸

11. Other international tribunals have construed the expression “acts and conduct” to refer plainly to the “deeds and behaviour of the accused”,⁹ such that they seek to establish the accused’s responsibility under any applicable mode of liability.¹⁰ Importantly, acts and conduct of the accused must be distinguished from acts and conduct of others who commit crimes for which the accused is alleged to be responsible.¹¹ Proof of the latter is admissible under rule 68(2)(b).

12. By its terms, rule 68(2)(b) does not *per se* unfairly prejudice the Defence by permitting the introduction of uncross-examined evidence unrelated to the acts and conduct of an accused. That both parties can avail themselves of this provision further underscores its inherent neutrality.¹² Thus, any claim of prejudice should only be entertained in light of the circumstances of each case.

⁸ See ICC-01/05-01/08-1386, OA5 OA6, paras.79-81, confirming that written witness statements can be introduced as “previously recorded testimony”. See also ICC-01/09-01/11-1938-Red-Corr, paras.30-33, analysing the term “previously recorded testimony” in light of the Rules’ *travaux préparatoires*, the Court’s prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para.136; ICC-01/05-01/08-886, para.6; ICC-01/04-01/06-1603, para.18; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362.

⁹ “The phrase ‘acts and conduct of the accused’ in Rule 92bis is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so”, see *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted under Rule 92 bis, 21 March 2002, para.22 (“*Milošević Decision*”); *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on the Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Witnesses for Sarajevo Municipality), 15 October 2009, para.5 (“*Karadžić Decision*”); *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 bis and Prosecution Motion to Admit GH-139’s Evidence Pursuant to Rule 92 bis, 24 January 2013, para.15 (“*Hadžić Decision*”).

¹⁰ *Karadžić Decision*, para.5; *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, para.10 (“*Galić Decision*”); *Hadžić Decision*, para.15; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis, 22 August 2008, para.17 (“*Lukić Decision*”).

¹¹ *Karadžić Decision*, para.5; *Galić Decision*, para.9; *Hadžić Decision*, para.15; *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Prosecution Rule 92 bis Motion, 4 July 2006, para.6; *Lukić Decision*, para.17; *Milošević Decision*, para.22.

¹² See ICC-01/09-01/11-1938-Red-Corr, para.25.

V. Submissions

A. The proposed evidence is *prima facie* relevant to the charges

13. P-0270's evidence does not pertain to the acts and conduct of any of the Accused. P-0270 carries out [REDACTED] functions at the [REDACTED].¹³ Western Union records show that P-0270 transferred USD [REDACTED] to Main Case Defence Witness [REDACTED],¹⁴ on the first day on his testimony.¹⁵ In the proposed evidence, P-0270 admitted having made this transfer at the request of a [REDACTED].¹⁶

14. At the time, [REDACTED] (a.k.a. "[REDACTED]")¹⁷ was in charge of [REDACTED].¹⁸ Prosecution evidence shows his involvement in the money circuit funding the implementation of the Overall Strategy.¹⁹ P-0270's prior testimony is, therefore, *prima facie* relevant to, and probative of: (i) the alleged pattern of money transfers to witnesses through third parties;²⁰ (ii) the allegation of the corrupt influencing of [REDACTED].

¹³ See e.g. CAR-OTP-0088-0091 at 0094, lns.102-106; at 0095, lns.114-125; at 0096, lns.160-177.

¹⁴ [REDACTED].

¹⁵ [REDACTED]; compare with [REDACTED].

¹⁶ CAR-OTP-0088-0105 at 0114, lns.292-305; at 0115, lns.320-325; at 0117, lns.388-392; at 0119, lns.473-474.

¹⁷ See ICC-01/05-01/13-1100-Conf-AnxA, paras.43-46.

¹⁸ See e.g. CAR-OTP-0074-0452 (Audio), CAR-OTP-0080-0939 at 0941, ln.25 (Translation).

¹⁹ See e.g. CAR-OTP-0082-0334 at 0334; CAR-OTP-0079-1324 (Audio), CAR-OTP-0089-0900 at 0906, lns.144-165 (Translation); CAR-OTP-0074-0897 at 0903, 0907-0910; CAR-OTP-0074-0981 (Audio), CAR-OTP-0077-1386 (Transcript); CAR-OTP-0074-0983 (Audio), CAR-OTP-0077-1372 (Transcript); CAR-OTP-0074-0984 (Audio), CAR-OTP-0077-1375 (Transcript). [REDACTED] used the phone number [REDACTED], see DRC-OTP-0148-0002 at 0011; CAR-OTP-0044-0071 at 0086, 0097.

²⁰ See ICC-01/05-01/13-1100-Conf, paras.47-49.

B. The proposed evidence is sufficiently probative and reliable

15. P-0270's Statement bears sufficient indicia of reliability²¹ and probative value. It was obtained by the Prosecution in the ordinary course of its investigations.²² The witness provided it voluntarily,²³ and acknowledged its truthfulness and accuracy; in the presence of his two counsel;²⁴ and in the language that he fully speaks and understands.²⁵ The Statement is internally consistent, and, as noted, is corroborated by other evidence in the case, such as Western Union records.

16. Moreover, [REDACTED] and Kilolo have acknowledged the transfer in question as relating to [REDACTED] testifying in the Main Case.²⁶ As such, the core of P-0270's evidence – that the transfer occurred, and its linkage to a member of the Overall Strategy – is not materially in dispute.²⁷

17. The four clarifications that P-0270 made to his interview are minor and non-substantive. If anything, they enhance the Statement's probative value. For instance, P-0270 clarified that both his counsel were present during his interview, and that the transcript must be read and understood in this sense.²⁸ He also insisted, to avoid confusion, that [REDACTED] had given him money in cash.²⁹

²¹ Rule 68(2)(b)(i) of the Rules.

²² See ICC-01/09-01/11-1938-Red-Corr, para.66.

²³ CAR-OTP-0088-0072 at 0079, lns.249-250.

²⁴ See CAR-OTP-0088-0072 at 0073, lns.22-27; at 0077, lns.149-162; CAR-OTP-0088-0105 at 0125, lns.665-669; at 0127, lns.741-754; *see also* Annex A.

²⁵ CAR-OTP-0088-0072 at 0078, lns.190-200.

²⁶ CAR-OTP-0085-0707 at 0732, lns.853-861; CAR-OTP-0085-0628 at 0669, lns.1425-1429, 1440-1444; at 0670, ln.1476 – 0671, ln.1506; *see e.g.* ICC-01/05-01/13-674-Conf, paras.269-270.

²⁷ Rule 68(2)(b)(i) of the Rules.

²⁸ See Annex A.

²⁹ See Annex A.

C. Admitting the proposed evidence is in the interests of justice

18. Granting the Request would best serve the interests of justice.³⁰ *First*, rule 68 of the Rules is designed to ensure that the Accused are tried without undue delay.³¹ Here, dispensing with P-0270's live testimony would appropriately expedite the proceedings.

19. *Second*, the Statement is manifestly relevant to the proper adjudication of salient issues in this case.

20. *Third*, as noted, the terms of rule 68(2)(b) in general do not cause any prejudice to the Accused. In this case,³² there is no prejudice, and even if there were, it would be minimal and substantially outweighed by the probative value of the Statement.

VI. Relief Requested

21. For the foregoing reasons, the Prosecution requests the Chamber to admit into evidence P-0270's Statement *in lieu* of his *viva voce* testimony.



Fatou Bensouda, Prosecutor

Dated this 30th Day of September 2015
At The Hague, The Netherlands

³⁰ Rule 68(2)(b)(i) of the Rules.

³¹ ICC-01/09-01/11-1938-Red-Corr, para.60.

³² ICC-01/09-01/11-1938-Red-Corr, para.27.