

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 5 November 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding 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 Annex A

Public redacted version of Corrected version of “Prosecution’s Motion to Add P-0242 to its Witness List and Request for the Admission of her Written Statements, pursuant to Rule 68(2)(b)”, 28 September 2015, ICC-01/05-01/13-1288-Conf-Corr

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: (i) authorisation to add Witness P-0242 to its witness list pursuant to articles 64(6)(f) and 69(3) of the Statute, rules 76(2) and 84 of the Rules of Procedure and Evidence and regulation 35(2) of the Regulations of the Court (“RoC”); and (ii) the admission of P-0242’s prior written statements (“Statements”)¹ *in lieu* of her *viva voce* testimony, pursuant to rule 68(2)(b) (“Motion”). At the time the Prosecution interviewed the Witness, it intended to submit her Statements under rule 68(2)(b) and thus needed the relevant certifications required by rules 68(2)(b)(ii) and (iii). However, despite repeated attempts to obtain those certifications, the Prosecution was unable to obtain contact with P-0242 by the time its list of witnesses was due on 30 June 2015. Contact with the Witness was finally re-established on 7 September 2015, and the certifications promptly obtained [REDACTED].² Those certifications were filed by the Registrar on Monday, 21 September 2015.³ On that basis, reasons outside the Prosecution’s control prevented the inclusion of P-0242 on its witness list within the deadline established by Trial Chamber VII (“Chamber”).⁴

2. The Statements are *prima facie* relevant and probative of the charges and do not concern the acts and conduct of the Accused. P-0242 has also acknowledged the truthfulness and accuracy of the Statements in accompanying declarations meeting the conditions of rule 68(2)(b)(iii).⁵ Further, the nature and content of P-0242’s evidence is such that her appearance for cross-examination is unnecessary.

¹ See CAR-OTP-0075-0002 (English); CAR-OTP-0074-0805 (French); CAR-OTP-0075-0009 (English); CAR-OTP-0074-0814 (French).

² See ICC-01/05-01/13-1272-Conf, pp.3-4.

³ See *generally* ICC-01/05-01/13-1272-Conf.

⁴ See ICC-01/05-01/13-960, para.13 (setting a deadline of 30 June 2015 for the filing of a list of witnesses).

⁵ See ICC-01/05-01/13-1272-Conf-Exp-AnxII.

3. P-0242's addition to the Prosecution's list of witnesses and the admission of her Statements will not prejudice the Defence, and is in the interests of justice.⁶ The Statements have been in the Defence's possession for well over a year. They were included on the Prosecution's list of evidence out of an abundance of caution. The Defence has, thus, been on notice of the evidence's relevance and its intended use at trial. Further, because the Statements are tendered under rule 68(2)(b), the Defence will not need additional time to prepare for cross-examination, as there is no reason for the witness to be called to testify in-court. All Parties will also benefit from an expedited presentation of the Prosecution's case-in-chief.

4. The Motion should be granted.

II. Confidentiality

5. The Motion is classified as "Confidential" pursuant to regulation 23*bis*(2) of the RoC [REDACTED].

III. Submissions

A. Reasons outside the Prosecution's control prevented it from adding P-0242 to its witness list by 30 June 2015

6. The Prosecution did not list P-0242 on its witness list by the Chamber's 30 June 2015 deadline for reasons outside of its control. The Prosecution met with P-0242 [REDACTED] during which time she provided the Prosecution with two written statements.⁷ The Prosecution intended to admit the Statements under rule 68(2)(b) by obtaining the certifications required by sub-sections (ii) and (iii) of that rule. Following its initial meeting with the Witness, however, and despite multiple

⁶ See ICC-01/05-01/13-1191, paras.10, 11.

⁷ See CAR-OTP-0075-0002 at 0002; CAR-OTP-0075-0009 at 0009.

attempts, the Prosecution was unable to regain contact with the Witness to secure the necessary certifications, including by the time the Prosecution was required to submit its witness list.

7. In light of P-0242's unavailability, and with no prospect of getting the Witness's Statements certified, the Prosecution was unable, in good faith, to list P-0242 as a witness whose evidence it intended to admit at trial. Nevertheless, out of an abundance of caution, the Prosecution included P-0242's Statements in its list of evidence, to ensure the Defence's timely notice of its intent to rely on the Statements, and to avoid any prejudice to the Defence should the Witness later become available to certify the Statements. The Prosecution was only able to regain contact with the Witness on 7 September 2015, following which it immediately organised a mission to obtain her certifications. Those certifications were promptly obtained [REDACTED] and filed by the Registrar on 21 September 2015.⁸ This Motion is filed immediately following that filing.⁹

B. The Statements are *prima facie* relevant to the charges

8. P-0242's evidence is *prima facie* relevant to, and probative of: (i) the pattern of money transfers to witnesses through third parties; and (ii) the allegation of the corrupt influencing [REDACTED]. [REDACTED].¹⁰ In her Statements, the Witness confirms receiving a wire transfer [REDACTED] *via* Western Union.¹¹ Her evidence does not go to the acts and conduct of any of the Accused.¹² In fact, in her Statement the Witness explicitly provides that she has no recollection of who transferred those

⁸ See ICC-01/05-01/13-1272-Conf; ICC-01/05-01/13-1272-Conf-Exp-AnxII.

⁹ See ICC-01/05-01/13-1272-Conf.

¹⁰ See ICC-01/05-01/13-1110-Conf, paras.170-176.

¹¹ See CAR-OTP-0075-0009 at 0012, paras.11-12.

¹² Rule 68(2)(b). The Prosecution incorporates by references its prior submissions on the meaning of "acts and conduct" for purposes of rule 68(2)(b). See ICC-01/05-01/13-1247-Conf, para.11.

funds, or of Kilolo or Babala.¹³ Her Statements, on their face and when taken by themselves,¹⁴ make “[n]o mention [...] of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else.”¹⁵ The gravamen of P-0242’s evidence is thus her confirmation that she received a money transfer [REDACTED].

9. Other evidence demonstrates that the transfer to P-0242 came from Babala at Kilolo’s request.¹⁶ P-0242’s Statements are corroborated by financial data evidencing that transaction¹⁷ as well as Babala’s admission that he transferred money [REDACTED] at Kilolo’s request.¹⁸ Her inclusion on the Prosecution’s witness list and the admission of her evidence will, thus, enhance the efficiency of the proceedings without causing any undue delay in the trial.

C. The Statements are sufficiently probative and reliable

10. P-0242’s Statements bear sufficient indicia of reliability and probative value to be admitted into evidence.¹⁹ The Statements were obtained by the Prosecution in the ordinary course of its investigation.²⁰ P-0242 provided the Statements voluntarily and acknowledged their truthfulness and accuracy;²¹ in the presence of counsel;²² and in a language that she fully speaks and understands.²³ The Statements are internally and mutually consistent and, as noted above, are corroborated by other evidence in this

¹³ See CAR-OTP-0075-0009 at 0012-0013, paras.11, 19-20.

¹⁴ For instance, in *Galić*, an Appeals Chamber of the ICTY concluded that the written statement of a witness who saw a man killed by a sniper’s shot did not go to the acts and conduct of the accused because the statement “does not indicate the source of the shot and (on its face and taken by itself) it appears to be of no particular importance to proof of the responsibility of the appellant.” *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, para.18.

¹⁵ *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.

¹⁶ See ICC-01/05-01/13-1110-Conf, para.172. See also CAR-OTP-0075-0009 at 0012, paras.11-12.

¹⁷ See CAR-OTP-0073-0274, tab 31 Fidele Babala, row 14; CAR-OTP-0070-0004, tab 31 Fidele Babala, row 19. See also CAR-OTP-0075-0009-R01 at 0011-0012, paras.9-12.

¹⁸ See ICC-01/05-01/13-596-Conf-Corr2, paras.20, 43, 82, 124, 148; ICC-01/05-01/13-671-Conf, para.56.

¹⁹ See article 69(4); rule 68(2)(b)(i).

²⁰ See ICC-01/09-01/11-1938-Red-Corr, para.66.

²¹ See CAR-OTP-0075-0002, p.6; CAR-OTP-0075-0009, p.6.

²² See ICC-01/05-01/13-1272-Conf, p.4.

²³ See CAR-OTP-0075-0002, p.6; CAR-OTP-0075-0009, p.6.

case, such Western Union records. Upon having an opportunity to review the Statements before certifying them, the Witness made no substantive changes – enhancing their reliability and probative value. Finally, the core of P-0242’s evidence – that the transfer occurred – is not materially in dispute given Babala’s admission to having made it.²⁴

D. Adding P-0242 to the witness list and admitting her Statements is in the interests of justice and causes no undue prejudice to the Accused

11. Granting the Motion causes no unfair prejudice to the Accused and would best serve the interests of justice. P-0242’s evidence is on a discrete, limited, but important matter: her receipt of money through a Western Union wire transfer [REDACTED].²⁵ Babala admits the transaction in his confirmation submissions of which the Defence has been on notice for a year.²⁶

12. Further, the Defence has been in possession of P-0242’s Statements since their 14 February 2014 disclosure – well over a year ago. The Prosecution also identified P-0242’s evidence and described how it fits into its overall case in its Document Containing the Charges,²⁷ confirmation submissions,²⁸ and Pre-Trial Brief.²⁹ The Statements were also included on the Prosecution’s list of incriminating evidence for the confirmation proceedings³⁰ and its list of evidence for trial.³¹ Indeed, the Defence itself has referenced the Witness’s Statements in its own submissions,³² demonstrating its familiarity with its content. The Defence is, thus, well-apprised of the Witness’s evidence and its relevance to this case and was put on notice in advance of trial that the Prosecution intended to rely upon that evidence.

²⁴ See ICC-01/05-01/13-596-Conf-Corr2, paras.20, 43, 82, 124, 148; ICC-01/05-01/13-671-Conf, para.56.

²⁵ See generally CAR-OTP-0075-0002; CAR-OTP-0075-0009.

²⁶ See ICC-01/05-01/13-671-Conf, para.56.

²⁷ See ICC-01/05-01/13-526-AnxB1-Red, paras.33, 91.

²⁸ See ICC-01/05-01/13-597-Conf-AnxB, paras.70, 332.

²⁹ See ICC-01/05-01/13-1110-Conf, para.172.

³⁰ See ICC-01/05-01/13-291-Conf-AnxA, pp.53, 54.

³¹ See ICC-01/05-01/13-1048-Conf-AnxB, p.17.

³² See e.g. ICC-01/05-01/13-673-Conf, para.133; ICC-01/05-01/13-1203-Conf-Anx, p.79, row 57.4.

13. Finally, because the Witness need not be called to testify in-court, the Defence will not need to expend any additional time or effort to prepare for cross-examination. Dispensing with her live testimony would also appropriately expedite the proceedings.

IV. Relief Requested

14. The Motion should be granted. The Chamber should permit P-0242's addition to the Prosecution's list of witnesses and her Statements admitted into evidence *in lieu* of her *viva voce* testimony.

15. In the event the Chamber permits the Prosecution to add P-0242 to its witness list, the Prosecution appends a summary of her evidence to supplement the witness summaries provided in its 17 September 2015 notice.³³



Fatou Bensouda, Prosecutor

Dated this 5th Day of November 2015
At The Hague, The Netherlands

³³ See ICC-01/05-01/13-1263-Conf.