

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 15 February 2016

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 Document

**Prosecution Response to Defence Request for Admission of Expert Report
pursuant to Rule 68(2)(b) or, in the Alternative, pursuant to Rule 68(3) in
Conjunction with Video-Link Testimony Authorised Pursuant to Rule 67 (ICC-
01/05-01/13-1621-Red)**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell

Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Ms Beth Lyons

The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
---	---

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Others

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Mangenda Defence’s request to introduce the expert evidence of Professor Otto Lagodny, pursuant to rule 68(2) of the Rules of Procedure and Evidence (“Rules”), or alternatively under rule 68(3) *via* video-link (“Request”).¹ The Request is ill-founded, and fails properly to substantiate either the principal or alternative reliefs sought. Trial Chamber VII (“Chamber”) should dismiss the Request.

II. Submissions

A. Professor Lagodny’s Report is not Admissible Under Rule 68(2)(b)

2. That Professor Lagodny’s report or evidence does not discuss the Accused’s acts and conduct is not dispositive of its admissibility under rule 68. Contrary to the Request,² the Chamber’s consideration of the factors set out in rule 68(2)(b)(i) to determine whether to allow the introduction of a witness’ prior recorded testimony when they are not present before the Court is not “discretionary”. And here, their required assessment³ precludes the admission of the proffered evidence.

i. Professor Lagodny’s report relates to issues that are materially in dispute

3. The Request’s assertion that the report is corroborated by clear provisions of Austrian law and “cannot reasonably be the object of dispute”⁴ is misleading and incorrect. On the contrary, the report comprises issues that are manifestly and

¹ ICC-01/05-01/13-1621-Red (“Request”).

² Request, para. 9.

³ See Rule 68(2)(b)(i) (“the Chamber shall consider, *inter alia*” several factors) (emphasis added).

⁴ Request, para. 9.

materially in dispute, particularly as they ostensibly bear on the admissibility of evidence on which the Prosecution relies.

4. Although the text of national codes cited in Professor Lagodny's report is not in dispute, the Prosecution does not concede the correctness, accuracy, or reliability of his interpretations as to their *meaning* or *application*, or his conclusions as concerns the circumstances of this case. For instance, his report does not reflect consideration of salient evidence, such as the testimony of Witness P-0267 who was directly involved in the compiling and transmitting of financial information at issue.⁵ These matters warrant examination.

ii. The evidence is neither cumulative nor corroborative and does relate to background information

5. The Mangenda Defence puts forward Professor Lagodny's report to challenge the propriety of the Prosecution's use of financial information acquired in Austria "in support of the request for telephone surveillance, as well as the nature of the Prosecution's conduct as a whole in obtaining authorization for that surveillance."⁶ As such, the Mangenda Defence cannot credibly argue that the legality of the Prosecution's conduct is not materially in dispute,⁷ particularly as regards the disposition of evidence submitted in this case. For the same reason, the proffered evidence is also not background information. Finally, as Professor Lagodny is the only witness suggesting a violation of Austrian law with regard to the Prosecution's acquisition of financial records, his evidence is obviously not cumulative or corroborative.⁸

⁵ See generally CAR-D23-0006-0001.

⁶ See Request, para. 9.

⁷ See Rule 68(2)(b)(i).

⁸ See Rule 68(2)(b)(i).

iii. *The interests of justice require Professor Lagodny's viva voce testimony*

6. The Mangenda Defence's reference to International Criminal Tribunal for the former Yugoslavia ("ICTY") procedures⁹ in support of the admissibility of Professor Lagodny's report under rule 68(2) is inapposite. The Request ignores the ICTY's specific treatment of expert evidence in this context. In particular, rule 94bis(C) of the ICTY Rules conditions a Chamber's ability to dispense with the appearance of an expert in person, only where "the opposing party accepts the statement and/or report of the expert witness".¹⁰ That is plainly not the case here.

7. This Court's Statute and Rules have no analogue to ICTY/International Criminal Tribunal for Rwanda ("ICTR") rule 94bis. However, the underlying principles of trial fairness nevertheless obtain. The interests of justice require that a Party be afforded a fair opportunity to test a purported expert's qualifications, expertise, independence, or impartiality before the Court, as well as the reliability of the proffered report, or part thereof.¹¹ This is further heightened where, as here, the expert report concerns a materially contested issue.

B. The Request Fails to Show the Necessity of the Witness' Video-link Appearance

8. Although the Prosecution has no objection to the proffer of Professor Lagodny's evidence pursuant to rule 68(3), the Request fails to justify his appearance *via* video-link.

⁹ See Request, para. 10; *see also* Rule 92bis of the ICTY Rules of Procedure and Evidence ("ICTY Rules").

¹⁰ See Rule 94bis (C); *see also* Rule 94bis (C) of the ICTR Rules of Procedure and Evidence.

¹¹ See *e.g.* ICC-01/04-02/06-1159, para. 16 (noting that "any issues surrounding the sources used, or the referencing, structure or methodology of the report, are matters that can be addressed during cross-examination and taken into account in evaluating the weight of the report, should it be admitted"). *See also* ICC-01/09-01/11-844, para. 20 (noting, "the qualification of a witness as an expert witness in a particular case is a judicial determination to be made in the context of the case, following the examination-in-chief and the cross-examination of the witness as to his specific expertise").

9. *First*, the Request is mainly grounded on the witness' "*preference* to give testimony by video-link."¹² However, while the Request refers to the Registry's remuneration policy regarding experts' travel and testimony in The Hague generally, it does not explain the circumstances attendant to this particular witness. The Request's conveying of the witness' preference alone without explaining it fails to substantiate the relief sought.

10. *Second*, while the Mangenda Defence complains of "bureaucratic obstacles needlessly obstructing the retention of high quality experts, who often have significant other demands on their time",¹³ the Request does not appear to reflect that the Mangenda Defence has previously and timely sought the Chamber's intervention to resolve these issues to the extent they may affect this witness.¹⁴ Based on the annex attached to the Request, it also appears that the obstacles faced by the Defence are principally due to the Witness' own "unwillingness" to obtain a document required to be listed on the Registry's List of Experts and the Defence's belated communication of this fact to the Registry.¹⁵ These failings cannot reasonably justify the requested video-link appearance. The Request does not demonstrate that its difficulties in obtaining the Witness' personal presence before the Chamber amount to much more than a nuisance.

11. In any case, permitting Professor Lagodny's appearance to occur *via* video-link at this stage would be premature. The Request does not show that the problems faced in securing his personal appearance before the Chamber are unmanageable. Further, two weeks remain until the start of the Defence case and, beyond this, there is no

¹² Request, para. 11 (emphasis added).

¹³ Request, para. 11.

¹⁴ The Prosecution notes that certain parts of the Request are redacted.

¹⁵ ICC-01/05-01/13-1624-Conf-AnxA, p. 2.

reason why the Witness' evidence cannot be postponed¹⁶ to ensure his personal appearance. Deferring the Witness' evidence would not affect the expeditious conduct of the proceedings, as another witness could be called in his place. Additionally, this would afford the Mangenda Defence sufficient time to acquire the document required by the Registry for the witness to be listed as an expert.

12. The Request's only qualification of Professor Lagodny's availability — the apparent "significant other demands" on his time — is his "other commitments."¹⁷ The Mangenda Defence does not identify their nature or extent to substantiate the necessity of the witness' video-link appearance. Such justification would seem appropriate given the importance of these proceedings.¹⁸ However, the Request provides nothing concerning the Witness' "other commitments"¹⁹ — whatever they might be — to justify the Chamber receiving his expert evidence without requiring his presence in The Hague.

13. *Third*, it is unclear why the Mangenda Defence refers to ICTY jurisprudence allowing a witness' video-link appearance where travel to The Hague would not be expeditious,²⁰ to support the Request. In any case, it is unavailing, since ICTY jurisprudence requires that to consider testimony *via* video-link in the interest of justice, as a threshold matter: (i) the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal; (2) the witness's testimony must be sufficiently important to make it unfair to the requesting party to proceed without it; and (iii) the

¹⁶ The witness is currently listed as the fourth *viva voce* witness on the Defence's order of witnesses. See ICC-01/05-01/13-1624-Conf-AnxA.

¹⁷ Request, para. 12.

¹⁸ See ICC-01/05-01/13-T-15-Conf, pp. 32-34, lns. 12-2 (requiring specificity as to "other commitments" or "so-called commitments" that are "compelling" to the Court in respect of an expert witness' appearance). The Prosecution notes that the circumstances are distinguishable in the matter cited are distinguishable from the Request, but underscores that the Chamber should be provided detailed information in determining whether the commitments advanced justify the relief sought.

¹⁹ Request, para. 12.

²⁰ Request, para. 12 (citations omitted).

opposing party must not be prejudiced in the exercise of its right to confront the witness.²¹

14. Per the Court's jurisprudence, which affords the Chamber broad discretion, the Request presents only conclusory assertions regarding the Witness's limited availability and regarding the expedition of the proceedings if video-link testimony is granted. The former is altogether unsubstantiated. The latter is undercut by the Witness' relative proximity to the seat of the Court.²²

III. Relief Requested

15. For the reasons above, the Chamber should dismiss the Request, and require Professor Lagodny to personally appear before the Court at its seat to provide his expert evidence.



Fatou Bensouda, Prosecutor

Dated this 15th Day of February 2016
At The Hague, The Netherlands

²¹ See e.g. *Prosecutor v. Karadžić*, Decision on Accused's Motion for Video Link Testimony for Witness Mile Dmičić, Case No. IT-95-5/18-T, 27 August 2013, paras. 5-6.

²² The Prosecution notes that Witness P-0267 testified live before the Chamber, having been flown here from the same country in which Professor Lagodny resides.