

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER V

Before: Judge Bertrand Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
THE PROSECUTOR *v.* ALFRED YEKATOM AND PATRICE-EDOUARD
NGAÏSSONA**

Public

**Registry Observations on Matters related to Rule 68(2)(b) Certifications in light of
the Coronavirus Pandemic**

Source: Registry

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

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I. Introduction

1. Pursuant to the email instruction given by Trial Chamber V (“Chamber”) on 24 April 2020 (“Order”),¹ the Registry submits its views on the matter raised in the “Prosecution’s Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence” filed by the Office of the Prosecutor (“Request” and “Prosecution”, respectively).² The Registry has noted the related response to the Request by the defence for Mr Patrice-Edouard Ngaïssona (“Defence”, “Response” and “Mr Ngaïssona”, respectively).³ As per the Chamber’s instruction, the Registry submits its observations in particular in light of the Coronavirus Pandemic (“Pandemic”).
2. Over the past five years, the established practice at the International Criminal Court (“Court”) has been that the relevant Chamber designates the Registry Senior Legal Adviser (“Registry SLA”),⁴ or a person delegated by him, as the person authorised to witness a declaration under rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules” and “Rule 68(2)(b) Certification”, respectively).⁵ As below explained, to the extent possible, the Registry stands ready to continue fulfilling this function. However, in light of the Pandemic and pursuant to rule 68(2)(b)(iii) of the Rules, a person witnessing such a

¹ Email from Trial Chamber V to the Registry, 24 April 2020 at 13.18.

² Prosecution, Request, ICC-01/14-01/18-489, 22 April 2020, para. 7.

³ Defence for Mr Ngaïssona, “Mr Ngaïssona’s Defence Response to the “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-01/14-01/18-489”, ICC-01/14-01/18-497, 29 April 2020, paras. 3 and 9(i).

⁴ The former title of the Registry Senior Legal Adviser, Chief of the Registry Legal Office, was “Registry Legal Counsel”.

⁵ See for example, Trial Chamber VI, *Ntaganda* case, Decision on Prosecution’s request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules ICC-01/04-02/06-729, 16 July 2015, p.5 and paras. 1 and 5 on the fact that there was at this date no established practice; See also in the *Ntaganda* case, Registry’s Submission on the “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-01/04-02/06-666, 22 June 2015, page 3; Trial Chamber VII, *Bemba et Al.* case, “Decision on the 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-01/05-01/13-1109, 29 July 2015, para. 6 and p.5.; See also in the *Bemba et Al.* case, “Registry’s Submission on the ‘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-01/05-01/13-1036, 25 June 2015 (notified 26 June 2015) and “Registry submission on the forms to be used for declarations made pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence”, ICC-01/05-01/13-1050, 14 August 2015; Trial Chamber I, *Gbagbo and Blé Goudé* case, “Decision on the Prosecution’s request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules”, ICC-02/11-01/15-303, 21 October 2015.

declaration “in accordance with the law and procedure of a State” (i.e. a local official) may, in certain circumstances further detailed below, be an alternative solution for the Chamber to consider.

II. Applicable law

3. The following provisions are of particular relevance to the present submissions: article 43 of the Rome Statute (“Statute”) and rule 68(2)(b)(ii) and (iii) of the Rules. In relevant parts, rule 68(2)(b)(ii) states that a prior recorded testimony may only be introduced - and further admitted as evidence in a witness’ absence -, “if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person’s knowledge and belief”; rule 68(2)(b)(iii) states, *inter alia*, that the declaration itself “must be witnessed by a person authorised to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State.”

III. Submissions

A - Persons authorized to witness a rule 68(2)(b) declaration

Registry SLA, or any one delegated by him, as designated by a Chamber

4. For the purpose of Rule 68(2)(b) Certifications as above mentioned, when a Chamber has deemed it appropriate to designate a representative of the Registry, the Registry SLA, or anyone delegated by him, has been considered over the past five years to be best placed.⁶ When making such a designation, Chambers have taken into consideration the nature of the functions envisioned under rule 68(2)(b)(iii) of the Rules. In its Request, the Prosecution also recalled the jurisprudence according to which the Registry SLA, or a

⁶ *Ibid.*

person delegated by him (e.g. a Victim Application Manager), is usually the person designated to witness a declaration under rule 68(2)(b) of the Rules.

5. By way of background, the Registry SLA would always delegate a Registry staff with a legal background and this staff is trained before carrying out the functions pursuant to rule 68(2)(b) of the Rules. These functions may entail, *inter alia*, traveling abroad to meet in person the witnesses who gave to the calling party – be it the Prosecution or the Defence – prior recorded testimonies to be certified. In its yearly budget, the Registry Legal Office takes into account the necessary travels outside the Netherlands required for the provision of advice on and assistance in these certifications. Based on past experiences, standardized forms of accompanying declarations have been developed and are used during certification missions. The calling parties are not present during the certification process. This process may however require the presence of an interpreter or a reading assistant in the event of illiterate witnesses, as the case may be.

A designated Chamber's Legal Officer

6. In its Response, the Defence submits that a Legal Officer from the Chamber would be best placed to witness a declaration under rule 68(2)(b) of the Rules. Whilst this is a possibility under the existing legal framework, it has not been the practice to date at the Court. In addition, regardless of the person designated by the Chamber – be it the Registry SLA or a Chamber's Legal Officer – these persons may face, as further detailed below, similar logistical issues in witnessing a declaration under rule 68(2)(b) of the Rules in the current circumstances of the Pandemic.

A local official authorized to witness a rule 68(2)(b) declaration in accordance with the law and procedure of a State

7. In accordance with rule 68(2)(b)(iii) of the Rules, the person witnessing a rule 68(2)(b) declaration may be a local official authorized to do so in accordance

with the law and procedure of the State. This may be the case, for example, when the calling party has requested the cooperation of a State where a relevant witness is located (i.e. request for assistance in accordance with Part 9 of the Rome Statute). The State in question, through its relevant national authorities, may execute the party's request for cooperation and certify accordingly the witness's prior statement(s). The certifying person may be a local judge or a notary, for example. In that case, the calling party organises the certification process directly with the local official duly authorized under the domestic law and procedure. In this scenario, save for a possible issue of lack of cooperation, the Chamber would not need to designate or authorize anyone.

8. Due to the neutral role of the Registry and the parties' independence with respect to collecting and introducing evidence, the Registry, unless designated by the Chamber, is not involved in this type of certification process.

B – Possible options in light of the Pandemic

9. The Registry notes that in the present case, a list of evidence has not yet been submitted and there has been no specific request at trial stage for the submission or admission of prior-recorded testimonies. Nonetheless, based on its past experience in witnessing rule 68(2)(b) declarations, the Registry submits, for the purpose of the present submissions, the following three possible scenarios for the Chamber's consideration. For each of them, the Registry makes recommendations taking into account any restrictive measures and regulations adopted by governmental authorities in the context of the Pandemic.

Witnesses located in The Netherlands or in nearby countries, if any

10. Depending on the end date of travel restrictions within Europe, and subject to the decision of the Chamber, the Registry SLA or a person designated by him,

could conduct Rule 68(2)(b) Certification missions and meet witnesses concerned in person, as per the usual practice.

11. Notwithstanding travel restrictions, should the Registry SLA be designated by the Chamber in accordance with rule 68(2)(iii) of the Rules, conducting the certification missions remotely may be envisaged. This would be novel at the Court and, at this juncture, the Registry is in a position to make the following preliminary submissions.
12. Conducting Rule 68(2)(b) Certifications remotely would require the calling party to have prior, separate and remote contacts with the witnesses concerned. These contacts are crucial to ensure that the witnesses will be able to confirm to the Registry SLA, on the day of the certification, that they have read in their entirety the contents of the prior recorded testimony on a given date and that the contents of the prior recorded testimony are true and correct to the best of his/her knowledge, subject to the possible modifications.
13. Further, for any designated person to conduct certifications remotely under the conditions set out in rule 68(2)(b)(ii) and (iii) of the Rules, a feasibility assessment may be required before any such certifications can take place, notably to take into account the profile and location of the witness (i.e. language requirements, reading capacity, secure internet connection, access to a computer with camera and related computer skills, etc.). This would allow the Registry to address and resolve to the extent possible any technical and logistical difficulties that both the certifying person and the witnesses may face.
14. If the certification process is done remotely, one of the difficulties for the certifying officer would be to confirm whether the witness appearing online is indeed the one he/she claims to be. The certifying officer would have to look at the person through a camera and check his/her identifying documents

bearing his/her picture. Conducting this comparison exercise remotely may be challenging. Furthermore, due to the physical distance, although not impossible, it would be more difficult for the certifying officer to ensure that the documentation provided to him/her is exactly the same as that the witnesses is referring to.

15. Due to the novelty and complexities of this option, should the Chamber opt for remote Rule 68(2)(b) Certifications, further submissions from the parties and the Registry would be required.
16. In light of the above, with regard to any certification process in a European country other than The Netherlands, if there are prolonged travel restrictions within Europe, a local official authorized in accordance with national law and procedure would likely be the best placed to conduct Rule 68(2)(b) Certifications.

Witnesses located in a State where the Court has a Country Office, if any

17. To the extent that Rule 68(2)(b) Certifications would concern witnesses located in the Central African Republic (“CAR”), there are currently international and internal travel restrictions decided by the Government of the CAR and a ban of movement from Bangui to the Provinces due to the Pandemic. For witnesses based outside Bangui, if any, these restrictions currently affect the conduct of any Rule 68(2)(b) Certifications, regardless of who would conduct such certifications (i.e. Registry SLA, a person delegated by him, a Chamber’s Legal Officer, a local official).
18. That said, in this scenario and for witnesses located in Bangui, should the Registry SLA be designated by the Chamber for the purpose of Rule 68(2)(b) Certifications, a person delegated by him may be trained remotely. The Registry will explore the option of resorting to the staff in the relevant

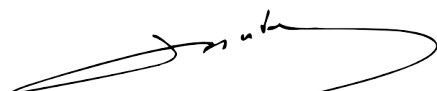
Country Office and determine, on the basis of the requirements (e.g. legal background) to be met and the circumstances to be considered (e.g. number of certifications), whether any of those staff members would be able to conduct any of the required certifications.

19. Further, with regard to the CAR Country Office, regulations are in place to prevent further spreading of the virus at the premises of the Court in Bangui. In this respect, the entry to these premises by any third party is strictly regulated but remains possible under certain circumstances (i.e. social distancing, limited number of persons at a time).

20. Apart from the option described above, another option to consider would be for the calling party to request the assistance of national authorities and to identify locally a person duly authorised to certify a prior recorded testimony. This option would be particularly relevant for witnesses located outside Bangui, should the ban on internal movements within the CAR is prolonged for a significant period of time.

Witnesses located in a State where the Court has no Country Office, if any

21. In this option, in the event of prolonged travel restrictions affecting this State, a local official authorized in accordance with national law and procedure would likely be the best placed to conduct certifications in the conditions set out under rule 68(2)(b) of the Rules.



Marc Dubuisson
Director Division of Judicial Services
on behalf of Peter Lewis, Registrar

Dated this 1st May 2020

At The Hague, the Netherlands