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No: ICC-01/05-01/13
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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, AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND
NARCISSE ARIDO

Public Redacted Version with Confidential Annex A

**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
Authorized Pursuant to Rule 67**

Source: Defence for Jean-Jacques Kabongo Mangenda

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-Jacques Kabongo Mangenda

Mr Christopher Gosnell
Mr Arthur Vercken

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku
Ms Beth Lyons

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Jean-Jacques Mangenda requests the admission, pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence and subject to the fulfilment of the formal attestation requirements of Rule 68(2)(b)(ii) and (iii), of the expert report prepared by Professor Dr. Otto Lagodny.¹ The report does not go to proof of the acts or conduct of the accused. The matters discussed, given their specific focus on and corroboration by provisions of Austrian law, cannot be the subject of reasonable dispute. The admission of the report pursuant to Rule 68(2)(b) would, accordingly, be in the interests of judicial economy and justice.
2. In the alternative, Professor Lagodny's report is tendered for admission pursuant to Rule 68(3) in conjunction with video-link testimony as provided in Rule 67.

II. APPLICABLE LAW

3. Rule 68(2)(b) permits in relevant part the introduction of "previously recorded testimony" of a person "not present before the Trial Chamber" where it "goes to proof of a matter other than the acts and conduct of the accused." In addition to this threshold requirement, five considerations are set out in Rule 68(2)(b)(i) to guide a Trial Chamber's discretion² whether to admit such statements:

whether the prior recorded testimony in question:

- relates to issues that are not materially in dispute;
- is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
- relates to background information;
- is such that the interests of justice are best served by its introduction; and
- has sufficient indicia of reliability.

¹ All future references to "Rule", unless otherwise indicated, refer to the Rules of Procedure and Evidence. This is a public redacted version of a previous filing by the Defence for Mr. Mangenda. Though some reference is made to confidential submissions, no sensitive or confidential information is disclosed.

² *Bemba et al.*, Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-Red-Corr, 11 November 2015 ("Article 70 Rule 68 Decision"), para. 50 ("[t]he Chamber recalls that allowing the introduction of previously recorded testimonies lies within the discretionary powers of the Chamber.")

Jurisprudence interpreting these provisions has extrapolated further considerations as including “whether the evidence is central to the allegations or the case” and “whether the evidence is corroborative.”³

4. “Prior recorded testimony” encompasses not only transcripts of prior testimony, but also “written statements” signed by an actual or potential witness.⁴ Any such statements are subject to the formal declaration requirements of Rule 68(2)(b)(ii) and (iii). Expert testimony or reports, whose admissibility is not subject to any separate rule, are admissible pursuant to Rule 68.⁵
5. Rule 68(3) permits the admission of a prior recorded statement in conjunction with the appearance of a witness before the Trial Chamber:

If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

6. Testimony by video-link pursuant to Rule 67 constitutes “live testimony”⁶ before the Trial Chamber:

In accordance with article 69, paragraph 2, a Chamber may allow a witness to give *viva voce* (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies.

³ *Id.* para. 50.

⁴ *Id.* paras. 29-34. *Lubanga*, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, ICC-01/04-01/06-1603, 15 January 2009 (“*Lubanga* Decision”), para. 18 (“in the judgment of the Chamber the latter provision is directed at the ‘testimony of a witness’ in a broad sense, given that the various forms of testimony that are specifically included in the rule are audio- or video- records, transcripts **or other documented evidence** of ‘such’ testimony (namely, the testimony of a witness) [...] the Chamber is persuaded that the ambit of Rule 68 permits the introduction of written statements, in addition to video- or audio-taped records or transcripts, of a witness's testimony because these are all clear examples of the ‘documented evidence’ of a witness's testimony”); *See also Karadžić*, IT-95-5/18-PT, Decision on 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 (“*Karadžić* 15 October 2009 Decision”), paras. 4-11 (setting out the parameters of 92 *bis* evidence to include written witness statements, transcripts from prior proceedings and documents which “form an inseparable and indispensable part of the testimony”).

⁵ *Ntaganda*, Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931, ICC-01/04-02/06-845, 21 September 2015.

⁶ *Lubanga* Decision, para. 19 (distinguishing between live testimony and written statements).

7. Rule 134bis refers to “[p]resence through the use of video-technology.” This Trial Chamber has permitted statements to be tendered pursuant to Rule 68(3) in conjunction with video-link testimony.⁷ The words “present before the Trial Chamber” in Rule 68(3) are therefore satisfied by way of video-conference.

III. SUBMISSIONS

(i) *Professor Lagodny’s Report is Suitable for Admission Under Rule 68(2)(b)*

8. Professor Lagodny’s report does not address or discuss the acts and conduct of any of the accused, let alone their acts and conduct as charged in the Document Containing the Charges. The report therefore meets objective threshold of admission.
9. The discretionary factors set out in Rule 68(2)(b) also favour admission of the report. The report is directly corroborated by clear provisions of Austrian law and cannot reasonably be the object of dispute. The report addresses the legal context in which the Prosecution investigators obtained financial records from Western Union without a judicial warrant. As far as Mr. Mangenda is concerned, the financial information obtained was in no way incriminating. None of the payments received by Mr. Mangenda, as the Prosecution now concedes (but contrary to its submissions to Judge Tarfusser) indicate any impropriety.⁸ The lawfulness of the Prosecution investigators’ conduct in obtaining the financial information in Austria is nevertheless relevant to whether it was proper for those records to have been used at all 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.
10. A ruling is sought on the admissibility of the statement under Rule 68(2)(b) subject to, and conditional upon, fulfilment of the attestation requirements prescribed by Rules 68(2)(b)(ii) and (iii). Savings of both cost and time for the Registry strongly supports this approach. This is the procedure frequently followed at the ICTY.⁹

⁷ Article 70 Rule 68 Decision, para. 86 (permitting prior recorded statement of P-272, who testified via video-link, to be tendered pursuant to Rule 68(3)).

⁸ *Bemba et al.*, Prosecution’s Response to the Mangenda Defence Motion to Declare Inadmissible Telephone Intercepts of Mr Mangenda, ICC-01/05-01/13-1180-Conf, 24 August 2015, para. 9 (“REDACTED”).

⁹ *Mladić*, IT-09-92-T, Decision on Defence Motion to Admit the Evidence of Dragan Malinović pursuant to Rule 92bis, 10 September 2015, para. 4 (“[u]nattested witness statements have previously been conditionally admitted

(ii) *In the Alternative, the Report Is Tendered Pursuant to Rule 68(3) and Video-Link Testimony is Requested Pursuant to Rule 67*

11. Professor Lagodny has expressed his preference to give testimony by video-link. The request is reasonable given that the Registry accords little or no remuneration to experts for their travel and testimony in The Hague, and the exhaustion of the funds made available by the Registry for the preparation of Professor Lagodny's report. The Registry has even insisted, despite the absence of any statutory or articulated basis for doing so, that [REDACTED].¹⁰ These bureaucratic obstacles needlessly obstruct the retention of high quality experts, who often have significant other demands on their time.
12. These considerations are sufficient, given the specific circumstances of the report, to justify granting testimony by video-link. As a practical matter, in light of Professor Lagodny's other commitments, video-link testimony will expedite proceedings.¹¹ Conversely, the witness's testimony, given its content, does not require any significant evaluation of demeanour; is limited in scope; and is already set out in a written report. In all these circumstances, hearing the witness's testimony by video-link, if deemed necessary by the Trial Chamber, is in the interests of justice.

IV. CONCLUSION AND RELIEF REQUESTED

13. Jean-Jacques Mangenda requests, pursuant to Rule 68(2)(b), the admission of the report prepared by his expert witness, Prof. Dr. Otto Lagodny, subject to and

by this Chamber pending their formal attestation. In line with this practice, provided all other admissibility requirements are met, the Chamber will conditionally admit the unattested statement pending the filing of the required attestation and declaration"); *Mladić*, IT-09-92-T, Decision on Defence Motion to Admit the Evidence of Božo Davidović pursuant to Rule 92bis, 17 September 2015, para. 3; *Mladić*, IT-09-92-T, Decision on Defence Motion to Admit the Evidence of Radoslav Daničić pursuant to Rule 92bis, 21 October 2015, para. 4; *Karadžić* 15 October 2009 Decision, para. 9 ("[i]n order to expedite proceedings, it is permissible for a party to propose written statements for provisional admission pending their certification under Rule 92 bis(B)"); *Haradinaj et al.*, IT-04-84-T, Decision Denying Subpoena Ad Testificandum for Witness 15 and Instead Conditionally Admitting the Witness's Statements Pursuant to Rule 92 bis, 2 November 2007, p. 4 ("CONDITIONALLY ADMITS, without cross-examination, the three statements of Witness 15: admission will not be final until the attestation required by Rule 92 bis (B) is filed").

¹⁰ Confidential Annex A.

¹¹ *Gotovina et al.*, IT-06-90-T, Reasons for decision granting prosecution's motion to cross examine four proposed rule 92bis witnesses and reasons for decision to hear the evidence of those witnesses via video-conference link, 3 November 2009, paras. 11-12 (granting video-link where travel by witnesses to The Hague would not be expeditious). See also *Ruto and Sang*, Public Redacted Version of Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony', ICC-01/09-01/11-1938-Anx-Red, 19 August 2015.

conditional upon the attestation prescribed by Rule 68(2)(b)(ii) and (iii). In the alternative, Professor Lagodny's report is submitted pursuant to Rule 68(3), in conjunction with a request that he be permitted to testify by video-link pursuant to Rule 67.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 11 February 2016,
At The Hague, The Netherlands