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No.: ICC-01/05-01/13
Date: 14 February 2018

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

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

**Public Redacted Version of “Prosecution’s Request to
Admit Prior Recorded Testimonies and to
Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b)”, 25
August 2017, ICC-01/05-01/13-2205-Conf**

Source: 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 Prosecution maintains that Arido's Application for Additional Evidence¹ seeking the admission of D-6's [REDACTED]² should be dismissed. First, by due diligence, Arido could have presented such evidence at trial.³ Second, even if Arido had presented D-6's [REDACTED] at trial, it could and would not have led the Chamber to enter a different verdict.⁴ In particular, whether D-6 had a military background is immaterial to Arido's conviction for corruptly influencing D-6.⁵

2. However, should the Appeals Chamber decide to admit D-6's [REDACTED] to determine whether the Trial Chamber erred in concluding that Arido believed that D-6 (like D-2, D-3 and D-4) did not have a military background, the Prosecution sought the admission in rebuttal of three documents:⁶

- [REDACTED], which makes no mention of D-6 in any capacity;⁷
- ICC statement of witness P-785, [REDACTED];⁸
- ICC statement of witness P-805, [REDACTED].⁹

3. To streamline these appeal proceedings, the Prosecution seeks to introduce the prior recorded testimony of P-785 and P-805 under rule 68(2)(b).

¹ "Narcisse Arido's Application for the Submission of Additional Evidence Before the Appeals Chamber Pursuant to Regulation 62 of the Regulations of the Court", ICC-01/05-01/13-2116-Conf (A), paras 1, 2, 22. A public redacted version was registered on 22 May 2017 ("[Arido Application for Additional Evidence](#)").

² CAR-OTP-0094-1580-R01 ("[REDACTED]" or "[REDACTED]").

³ "Prosecution's Consolidated Response to the Appellants' Documents in Support of Appeal", ICC-01/05-01/13-2170-Conf ("Prosecution Consolidated Response"), paras. 734-736.

⁴ Prosecution Consolidated Response, paras. 737-740. See further [Lubanga AJ](#), para. 1.

⁵ "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13, 19 October 2016 ("[Judgment](#)"), paras. 48, 704, 733, 872. See Prosecution Consolidated Response, paras. 740, 696-698.

⁶ Prosecution Consolidated Response, para. 741.

⁷ CAR-OTP-0093-0071, at 0072.

⁸ CAR-OTP-0093-0092-R01, at 0097-0098, paras. 22, 24.

⁹ CAR-OTP-0093-0064-R01, at 0068, para. 19.

4. The prior recorded testimony of P-785 and P-805 meet rule 68(2)(b)'s requirements subject to the necessary declaration under rule 68(2)(b)(ii) and (iii). Accordingly, the Prosecution respectfully requests the Appeals Chamber to designate a person (*e.g.* a Registry staff member) authorised to witness a declaration under rule 68(2)(b)(ii) and (iii).

II. CONFIDENTIALITY

5. This filing is classified as "Confidential", as it refers to information that could reveal the witnesses' identities to the public. The Prosecution will file a public redacted version.

III. PROCEDURAL BACKGROUND

6. On 14 March 2017, Arido filed his Application for Additional Evidence requesting the Appeals Chamber to admit D-6's [REDACTED].¹⁰

7. On 18 May 2017, the Appeals Chamber (i) indicated that it would rule on the admissibility of additional evidence jointly with the other issues raised in Arido's appeal; and (ii) directed the Prosecution to set out arguments in response to the Application for Additional Evidence and to adduce any rebuttal evidence in its consolidated response to the documents in support of the appeal.¹¹

8. On 10 July 2017, the Prosecution filed its Consolidated Response, in which it argued that Arido's Application for Additional Evidence should be dismissed.¹² The Prosecution further requested that three items be admitted in rebuttal—including P-

¹⁰ CAR-OTP-0094-1580-R01.

¹¹ "Directions and Decision regarding Mr Arido's applications for additional evidence filed pursuant to regulation 62 of the Regulations of the Court", ICC-01/05-01/13-2160, 18 May 2017.

¹² Prosecution's Consolidated Response, paras. 733-743.

785's and P-805's statements—in the event the Appeals Chamber was to grant Arido's Application for Additional Evidence.¹³

9. On 18 August 2017, the Appeals Chamber decided that, should the Prosecution wish to rely on P-785's and P-805's testimony, it should file by 25 August 2017, a request to either introduce their prior recorded testimony pursuant to rule 68 or to call them orally.¹⁴

IV. SUBMISSIONS

A) THE PROSECUTION SEEKS TO INTRODUCE THE PRIOR RECORDED TESTIMONY OF P-785 AND P-805 UNDER RULE 68(2)(B)

10. Rule 68(2)(b) provides for the introduction of a witness's prior recorded testimony¹⁵ that goes to proof of a matter other than the acts and conduct of the accused. In assessing whether to admit the testimony under rule 68(2)(b) a Chamber shall consider, *inter alia*, whether the evidence is relevant, cumulative and sufficiently reliable and whether its admission is in the interests of justice.

11. To streamline these appeal proceedings, the Prosecution seeks to introduce the prior recorded testimonies of P-785¹⁶ and P-805¹⁷ under rule 68(2)(b). The testimonies go to proof of matters other than Arido's acts and conduct; they are

¹³ Prosecution's Consolidated Response, paras. 741-742.

¹⁴ "Decision on Mr Arido's request to respond to evidence adduced by the Prosecutor", ICC-01/05-01/13-2198-Conf, 18 August, 2017, para. 12.

¹⁵ "[P]rior recorded testimony" is not limited to in-court testimony and includes statements taken, like in this case, pursuant to rule 111 of the Rules. See ICC-01/04-01/06-1603, paras. 18-19; ICC-01/04-01/07-2635, para. 44: "Clearly, statements made out of court can equally qualify as testimony. This is apparent from the wording of article 56(1)(a), which refers to a 'unique opportunity to take testimony', and of article 93(1)(b), which expressly mentions the taking of evidence, 'including testimony under oath' in the context of assistance provided by States Parties 'in relation to investigations or prosecutions'. Moreover, a narrow interpretation of the word 'testimony' in article 67(1)(a) would entirely undermine the very right protected by this article and deprive rule 68 of any meaning." The *travaux préparatoires* also confirms that "prior recorded testimony" was understood to include prior transcripts and written witness statements, taken by the Parties or authorities, see ICC-ASP/12/37/Add.1, Annex II, A, Study Group on Governance Cluster I: Expediting the Criminal Process Working Group on Lessons Learnt Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), para. 13.

¹⁶ CAR-OTP-0093-0092-R01.

¹⁷ CAR-OTP-0093-0064-R01.

relevant to the matter raised by Arido (*i.e.*, whether D-6 was a military driver); they are cumulative in nature; and they contain sufficient indicia of reliability. Overall, the interests of justice are best served by their introduction.

12. Although the prior recorded testimonies of P-785 and P-805 meet all relevant criteria under rule 68(2)(b), they are not yet accompanied by declarations under rule 68(2)(b)(ii) and (iii). The Prosecution will seek their admission, once the witnesses have made the necessary declarations.

i) The prior recorded testimonies are relevant, cumulative in nature and do not pertain to Arido's acts and conduct

13. P-785's and P-805's statements do not pertain to Arido's acts and conduct. They are, however, *relevant* to Arido's claim that D-6 did not serve in the military. These testimonies thus directly rebut D-6's claim in [REDACTED] that he worked as driver of [REDACTED].¹⁸

- P-785 is [REDACTED]. [REDACTED].¹⁹

- P-805 is [REDACTED]. [REDACTED]. [REDACTED].²⁰

14. P-785's and P-805's evidence is *cumulative* in nature—another factor favouring the adoption of rule 68(2)(b).²¹ Both in-court witness testimony and documentary evidence at trial showed that that D-6 was not in the military, including:

¹⁸ [Arido Application for Additional Evidence](#), para. 16.

¹⁹ CAR-OTP-0093-0092-R01, at 0097-0098, paras. 22, 24.

²⁰ CAR-OTP-0093-0064-R01, at 0068, para. 19.

²¹ See rule 68(2)(b)(i).

- D-3's testimony that he heard D-6 stating that he had no military background;²²
- Arido's article 55(2) statement in which he stated that he knew that D-6 had not been a military person;²³
- Official documentation [REDACTED].²⁴

15. Further, the CAR [REDACTED],²⁵ which the Prosecution has also sought to have admitted as rebuttal evidence to Arido's proposed additional evidence,²⁶ further confirms the cumulative nature of P-785's and P-805's evidence that D-6 was not a military driver. The [REDACTED] makes no mention of D-6 in any capacity.²⁷

16. Finally, D-6's military status is *in dispute*.²⁸ However, the issue is *not determinative* of Arido's conviction.²⁹ Overall, the factors under rule 68(2)(b)(i) militate in favour of admission.

ii) The prior recorded testimonies have sufficient indicia of reliability and probative value

17. P-785's and P-805's prior recorded testimonies bear *prima facie* indicia of reliability and probative value because they are truthful, authentic, consistent, and they were provided voluntarily. For admission of evidence under rule 68 it is only necessary to establish *prima facie*—not definitive—proof of reliability based on sufficient indicia.³⁰

²² [Judgment](#), para. 338.

²³ [Judgment](#), para. 671.

²⁴ See [REDACTED], (CAR-OTP-0093-0152, at 0155) [REDACTED] (CAR-OTP-0093-0197).

²⁵ CAR-D24-0005-0056, at 0077.

²⁶ Prosecution's Consolidated Response, para. 741.

²⁷ CAR-OTP-0093-0071, at 0072.

²⁸ See rule 68(2)(b)(i).

²⁹ [Judgment](#), paras. 48, 704, 733, 872. See Prosecution Consolidated Response, paras. 740, 696-698.

³⁰ See rule 68(2)(b)(i). See also ICC-01/09-01/11-1353, para.15. See also ICC-02/11-01/15-744 para. 104 ("The Appeals Chamber considers that, in their assessment of indicia of reliability under rule 68 (2) (b) (i) of the

18. First, the signed statements—taken by the Office of the Prosecutor under rule 111—are accompanied by a signed declaration that the statements were given voluntarily and that their content is true and accurate to the best of P-785’s and P-805’s knowledge and belief.³¹

19. Second, the proposed testimonies are internally consistent as well as externally consistent with in-court trial testimony and other evidence at trial showing that D-6 was not member of the military.³²

20. Finally, there is no indication of a motive for either P-785 or P-805 to fabricate or distort their accounts.

21. In this case, admitting P-785’s and P-805’s prior recorded testimony under rule 68(2)(b) advances the interests of justice and contributes to a fair and expeditious conduct of these appeal proceedings.

**B) THE PROSECUTION REQUEST TO DESIGNATE A PERSON AUTHORISED TO WITNESS
A DECLARATION UNDER RULE 68**

22. The Prosecution submits that, if the Appeals Chamber were to grant Arido’s Application for Additional Evidence, P-785’s and P805’s prior recorded testimony should be admitted in response under 68(2)(b). Both statements meet rule 68(2)(b)’s requirements in principle but presently lack the necessary declaration under rule 68(2)(b)(ii) and (iii). The Prosecution interviewed P-785 and P-805 but did not seek

Rules, Trial Chambers are not obliged to consider factors beyond formal requirements. This is because an assessment of ‘indicia of reliability’ under rule 68 (2) (b) (i) of the Rules can be more cursory in nature so that, even if some factors, such as the witness’s competence to testify about the facts, the internal consistency of the statement and potential inconsistencies with other evidence in the record, are not taken into account during this assessment, they may still be considered when assessing the probative value of the evidence. The Appeals Chamber underlines, however, that, in looking at ‘indicia of reliability’ for the purposes of rule 68 (2) b) (i) of the Rules, Trial Chambers are not precluded from looking beyond formal requirements if they consider it to be appropriate in a particular case.”)

³¹ CAR-OTP-0093-0092-R01, at 0093-0100; CAR-OTP-0093-0064, at 0093-0070.

³² See above paras. 14-15.

to obtain their affidavits in order to avoid unnecessary costs, given that D-6's [REDACTED] was not admitted at trial.

23. Under rule 68(2)(b)(ii), the prior recorded testimony needs to be "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."³³ 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. The person witnessing the declaration must verify in writing the date and place of the declaration, and that the person making the declaration:

- is the person identified in the prior recorded testimony;
- assures that he or she is making the declaration voluntarily and without undue influence;
- states that the contents of the prior recorded testimony are, to the best of that person's knowledge and belief, true and correct; and
- was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony."³⁴

24. Although rule 68(2)(b)(ii) alternatively permits declarations to be witnessed by persons authorised to do so under national laws and procedures, the Prosecution considers that the Appeals Chamber's designation is advisable because (1) not all States provide for procedural mechanisms allowing an authorised official to administer the required warning to prospective declarants (concerning the

³³ Rule 68(2)(b)(ii).

³⁴ Rule 68(2)(b)(ii).

consequences of falsely attesting to the truth of their prior statement/testimony);³⁵ and (2) the authorisation of a member of the Registry avoids this problem, promotes efficiency and ensures the consistency of practice within the case.³⁶

25. The Prosecution respectfully requests the Appeal Chamber to designate a person authorised to witness declarations made under rule 68(2)(b)(ii) and (iii). The Prosecution is prepared to liaise directly with such person or unit to provide all necessary information, and logistical or practical arrangements concerning the relevant witnesses.

³⁵ Rule 68(2)(b)(iii) provides that the individual who has given the prior recorded statement needs to be informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony. In essence, the certification process converts the prior recorded statement into testimony. In doing so, it makes such “testimony” subject to article 70 proceedings.

³⁶ See 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, 29 July 2014, ICC-01/05-01/13-1109.

V. RELIEF SOUGHT

26. Based on the foregoing, should the Appeals Chamber decide to grant Arido's Application for Additional Evidence, the Prosecution respectfully requests the Appeals Chamber to:

- Designate a person authorised to witness declarations made under rule 68(2)(b)(ii) and (iii); and
- Admit the prior recorded testimony of P-785³⁷ and P-805³⁸ once the witnesses have made the necessary declarations under rule 68(2)(b)(ii) and (iii).



Fatou Bensouda, Prosecutor

Dated this 14th day of February 2018³⁹
At The Hague, The Netherlands

³⁷ CAR-OTP-0093-0092-R01.

³⁸ CAR-OTP-0093-0064-R01.

³⁹ This submission complies with regulation 36, as amended on 6 December 2016: [Al Senussi Admissibility AD](#), para. 32.