

**Cour
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**International
Criminal
Court**



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No.: **ICC-01/05-01/13**

Date: **9 September 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, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO**

Public

URGENT

**Narcisse Arido's Response to Prosecution's Urgent Motion for Clarification of
Paragraph 23 of the "Direction on the Conduct of the Proceedings"
(ICC-01/05-01/13-1217)**

Source: Counsel for Narcisse Arido

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

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I. INTRODUCTION

1. On 2 September 2015, the Single Judge issued “directions on the conduct of the proceedings”.¹ Among other things, he stated that “[i]f the witness who gave the prior recorded testimony is expected to testify before the Chamber, any Rule 68(3) application shall be filed within 21 days of the date the witness is scheduled to appear, with any objections thereto filed no later than 10 days after notification. Such application(s) shall be filed together with copies of the prior recorded testimony.”²

2. On 7 September 2015, the Prosecution filed a request for clarification of the meaning of the above-mentioned paragraph,³ arguing that Rule 68 (3) of the RPE does not apply to the allegedly false testimony of the former Main Case defence witnesses called to testify.⁴ It requests the Trial Chamber to clarify the applicability of Rule 68 (3) or to provide guidance.⁵

3. On the same day, pursuant to Regulation 34 of the RoC, the Trial Chamber shortened the deadline for the filing of responses to the Prosecution’s Request to Thursday 10 September 2015.⁶

4. The Arido Defence hereby submits its response, and opposes the Prosecution’s Request.

II. APPLICABLE LAW

5. Rule 68 of the RPE, which governs the admission of prior recorded testimony, permits the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met.

6. Paragraph (3) of Rule 68 provides that 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

¹ ICC-01/05-01/13-1209.

² *Ibid.*, para. 23.

³ ICC-01/05-01/13-1217 (hereinafter ‘Prosecution’s Request’).

⁴ *Ibid.*, para. 2.

⁵ *Ibid.*, para. 5.

⁶ Email from the Trial Chamber to the parties entitled “shortening of response time for filing ICC-01/05-01/13-1217”, 7 September 2015.

recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

III. SUBMISSIONS

7. The Prosecution argues that Rule 68 (3) of the RPE does not apply to the allegedly false testimony of the former Main Case defence witnesses called to testify, based on the fact that Rule 68 (3) conditions the admissibility of the previously recorded testimony on the consent of the witness concerned, which would amount to giving the witness “the power to veto the proof of such crime”.⁷ It also held that the prior testimony, as it constitutes the “substantial and fundamental fact necessary to establish” the commission of the crime, falls outside the ambit of Rule 68 (3).⁸ As a result, the Prosecution argues that the prior recorded testimony of former Main Case defence witnesses is governed by Article 69 (3) of the Rome Statute.⁹ In short, the Prosecution argues that Rule 68 (3) does not apply in the case of Article 70 (1) (a) offences.

8. As a preliminary note, the Arido Defence observes that the Prosecution’s position is premised on the assumption that the testimonies provided by Defence witnesses in the Main Case are false. The Arido Defence notes that this forms part of the facts which the Prosecution must establish beyond any reasonable doubt and that therefore the Prosecution cannot rely on this allegation to support its request.

A. The Prosecution’s Request is premature

9. Firstly, the Arido Defence notes that the Prosecution does not provide information as to whether it approached its witnesses in order to seek their consent pursuant to Rule 68 (3). It also notes that some of the Prosecution’s witnesses have admitted to having lied under oath before the Court. For these witnesses, it appears likely that they would therefore not object to their testimony being tendered into evidence. The Arido Defence assumes that the Prosecution’s concern relates to those witnesses who have not given it their consent to be a Prosecution’s witness. The Arido Defence submits that the Prosecution should - after having exhausted all steps to obtain their consent - file a request for them to be compelled to testify. Only then should the question of the admission of their prior testimony be discussed. As a result, the Prosecution’s Request is premature.

⁷ ICC-01/05-01/13-1217, para. 2.

⁸ *Ibid.*, para. 3.

⁹ *Ibid.*, para. 4.

B. The Prosecution’s “understanding” goes against the wording of the Statute and the Rules

10. Secondly, the Arido Defence submits that the Prosecution’s “understanding” of Rule 68 (3) goes against the unequivocal wording of the Statute and the Rules, and that it fails to provide a justification for such a significant departure. Indeed, Article 70 (2) of the Statute provides that “[t]he principles and procedures governing the Court’s exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence.” The RPE explicitly list the provisions of the Statute and the Rules which shall not apply to Article 70 offences.¹⁰ Those do not include Rule 68. The Arido Defence recalls that the Prosecution took a strict approach in this regard, when opposing the Arido Defence’s arguments that the modes of liability provided for in the Statute did not apply to Article 70 offences.¹¹

C. The Prosecution fails to substantiate its Request

11. Thirdly, the Prosecution also fails to provide any justification for its suggested interpretation of Rule 68 (3). Indeed, the Prosecution does not provide references to case law, practice or preparatory work of the drafters of the Statute and the Rules to support its position. Instead, it just submits its own (convenient) interpretation of the application of Rule 68 (3) to prior testimony of witnesses who allegedly provided false evidence. To the contrary, the Arido Defence recalls that the Statute and the Rules state clearly that the offence listed in Article 70 (1) (a) does not constitute an exception to the applicability of Rule 68. Further, it notes that the Statute and the Rules must be interpreted in accordance with international human rights law,¹² and that any doubt must benefit the Accused.¹³

12. The Arido Defence submits that it is the “form” of the evidence sought to be tendered which counts, not its “intended” use. While Article 69 concerns documentary evidence, Rule 68 concerns testimonial evidence. Article 69 (2) of the Statute makes clear that the testimony of a

¹⁰ Rule 163 (1) of the Rules of Procedure and Evidence provides that “[u]nless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* to the Court’s investigation, prosecution and punishment of offences defined in article 70.” Sub-paragraphs 2 and 3 of Rule 163 exclude the application of Part 2 (other than Article 21) and Part 10 (other than Articles 103, 107, 109 and 111) of the Statute shall not apply to Article 70 proceedings. Finally, Rule 165 (2) of the RPE provides that Articles 53 and 59 – and any rules thereunder – shall not apply to Article 70 offences.

¹¹ ICC-01/05-01/13-646-Conf, para. 10: “Rule 163 unequivocally and unambiguously provides that the Statute and Rules apply “*mutatis mutandis*” to Article 70 offences, listing those provisions specifically excluded from application. As Part III of the Statute is not among these, all of the modes of liability under Article 25(3) necessarily apply.” (internal citations omitted).

¹² Principle of *in dubio pro reo*. See also Article 21 of the Statute.

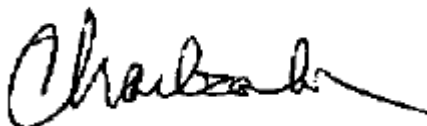
¹³ See Article 22 (2) of the Statute.

witness at trial shall be given in person,¹⁴ and that Rule 68 and Article 69 (2) are the only exceptions to the *viva voce* principle.¹⁵ In any event, the admission of witness material must not be prejudicial to or inconsistent with the rights of the Accused.¹⁶ Rule 68 is the *lex specialis*, and Article 69 simply cannot be used as a replacement for the admission of prior recorded testimony.

13. There is no controversy that prior recorded testimony before the Court falls under the scope of Rule 68.¹⁷ The Court has consistently held that testimonial evidence of individuals - be they witnesses or not - should be tendered through Rule 68.¹⁸ The Prosecution's attempt to bypass the requirements of Rule 68 in order to tender the prior recorded testimony of its witnesses under Article 69 should not be permitted.

IV. CONCLUSION

14. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to reject the Prosecution's Request and to hold that Rule 68 applies to all testimonial evidence which the Prosecution seeks to have admitted into evidence in the present proceedings.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 9th Day of September 2015

The Hague, The Netherlands

¹⁴ See also ICC-01/05-01/08-1386 OA5, para. 76.

¹⁵ See also *ibid.*, para. 77; ICC-01/09-01/11-1353, para. 25.

¹⁶ Article 69 (2) of the Statute.

¹⁷ ICC-01/05-01/08-1386 OA5, paras 77-81; ICC-01/09-01/11-1353, paras 85-88.

¹⁸ See e.g. ICC-01/04-01/07-2635, paras 43-51; see also ICC-01/09-01/11-1353, para. 83, rejecting the statement signed by an employee of a market research company with regard to the availability of copies of recordings of KASS FM Broadcasts, and paras 85, 86, 88, rejecting statements made in the context of judicial proceedings and testimonies; ICC-01/09-01/11-1353, paras 85-88: "this material is testimonial in nature and [...] a bar table motion should not be used in [a] manner which would be duplicative of the Rule 68 of the Rules [of] Procedure".