



Original: English

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

Date: 10/09/2015

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

**Defence Response to “Prosecution Urgent Motion for Clarification of Paragraph
23 of the “Directions on the conduct of the proceedings””**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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Introduction

1. The Prosecution's request to admit prior transcripts through Article 69(3) (the Request)¹ is an impermissible attempt to conjure up special procedures for its contempt prosecution, which would violate the Rome Statute framework and ICC jurisprudence, and constitute a remarkable inequality of arms.

2. Although the Prosecution hearkens to the special features of an Article 70 trial as the basis for its Request, where such special features warranted a deviation from the norm, the Statute and Rule so provide. They do not, however, allow any exceptions to Rule 68 for the purposes of an Article 70 trial.

3. Although the Prosecutor may wish for that to be so, unless and until the Statute and Rules are amended, the Statute and Rules must be applied in its current version.

4. Neither the legal frame work of the case or its particular factual matrix warrant special treatment, or the creation of new and unforeseen exceptions.

5. It is in the interest of justice for both the witnesses and the Defence to be accorded a fair and effective opportunity to address these allegations, during the course of the trial. Moreover, give that only the Prosecution can initiate and prosecute Article 70 cases, it would be unfair, and contrary to Article 67(1)(e) for the Prosecution to carve out a special niche for prior transcripts in Article 70 cases.

¹ ICC-01/05-01/13-1217.

6. The absence of concrete details also militates against the issuance of a judicial ruling in a factual vacuum.

Submissions

The Statute, Rules and Case law of the ICC require the Prosecution to apply to admit the transcripts via Article 69(2)/Rule 68

7. Testimony under oath is without any doubt, "testimony"; there is no ambiguity in this regard, which would justify recourse to supplementary means of interpretation.

8. Article 69(2) of the Statute governs the admission of the 'testimony' of a witness. Its wording is framed in such a manner as to make:²

in-court personal testimony the rule, giving effect to the principle of orality. The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded.

9. The exception to this rule of orality is also governed exclusively by the same provision:

The first sentence of article 69 (2) also provides for exceptions, namely for measures taken under article 68 of the Statute or under the Rules of Procedure and Evidence "to protect witnesses, victims or an accused". In addition, under the second sentence of article 69 (2), the Chamber may inter alia permit the introduction of "documents or written transcripts". This power is, however, "subject to this Statute"

² ICC-01/05-01/08-1386, para. 76.

and must be exercised "in accordance with the Rules of Procedure and Evidence".³

10. Exceptions to such an important right must be interpreted and applied narrowly.⁴ If, as is suggested by the Prosecution, Article 69 should be interpreted and applied in such a manner as to allow Article 69(3) to bypass the strict wording of Article 69(2), it would become the exception which swallows the rule. This would defeat the purpose of the strict safeguards in Article 69(2) and Rule 68.

11. The existence of explicit exceptions in Article 69(2) also excludes the general application of Article 69(3), and the possibility of Article 69(3) constituting an implied exception. If that had been the intention of the drafters, then Article 69(2) would have referred either to the Statute in general (rather than Article 68), or, the provision would have cited Article 69(3) in addition to Article 68.

12. Mere disagreement with the *lex lata* of the ICC Statute is also not a basis for ignoring or changing it. The Court is governed by the principle of legality, and any changes to its legal framework must be ushered in by the Assembly of State Parties, and not unforeseen judicial *fiat*.

There is no basis for creating special exceptions to the Statutory framework for Article 70 case

13. As *per* Rule 163 of the Rules of Procedure and Evidence, both Article 69(2) and Rule 68 apply to Article 70 cases.

³ ICC-01/05-01/08-1386, Para. 77.

⁴ See *Klass and others* judgment of 6 September 1978, Series A no. 28, p. 21, para. 42. The ICC Appeals Chamber has also underscored that "[i]n deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally. In the view of the Appeals Chamber, this requires a cautious assessment"; ICC-01/05-01/08-1386, para. 78.

14. There is no logical basis for excluding their application.

15. Article 67(1)(e) sets out the right of an accused to examine witnesses. This right applies irrespective as to whether the examination pertains to war crimes charges or Article 70 offences; in both scenarios, the Defence must be accorded an effective opportunity to test the witness's testimony, and to put their case to the witness.

16. There is no substantive difference concerning the Court's examination of the truth as to a witness testifying, "I saw child soldiers", and a witness testifying that "I did not receive money in connection with my testimony". There is also no difference between an 'insider witness' in an Article 5 case, and a person, suspected to be complicit in Article 70 activity.

17. In the second trial – whether it be an Article 5 or an Article 70 trial - the witness's decision as to whether he or she will testify will still impact on the ability of the Prosecution to establish the charges in the second case.

18. Irrespective as to the nature of the charges, the Prosecution will have the same opportunity to question the witness in relation to the *corpus delicti* of the charges, and, in the event of a discrepancy, refer the witness to their prior testimony and if necessary, declare them hostile.

19. More importantly, in the second trial, the Defence has the right pursuant to Article 67(1)(e) to confront the witness in relation to such issues, and to draw out any information that might contextualise the witness's prior testimony, or which might undermine the premise of the Prosecutor's prior questioning.

20. This is particularly important in relation to a case involving multiple defendants, as the witness might have information that could incriminating either for the witness or some accused, but exculpatory *vis-à-vis* others.

21. This right is also of particular importance in cases, in which neither the Defence nor the Witnesses were disclosed the evidential foundation for the questioning in the first case, and were thus at a fundamental disadvantage *vis-à-vis* the Prosecution.⁵

22. In many instances during the Main Case, the questions posed by the Prosecution in relation to the receipt of money were ambiguous. For example, several witnesses were questioned solely in relation to whether they received money to testify or in exchange for favourable testimony;⁶ this would not necessarily be understood by the witnesses as a question concerning logistical expenses or transport. In the absence of a fair opportunity to respond to such allegations, it cannot be presumed that the witnesses intentionally lied under oath.

23. Since the Defence were not disclosed the evidential foundation for such questioning, they were also not on a fair footing as concerns their ability to address these issues in re-examination.

24. If the Prosecution were now permitted to rely on these transcripts without complying with the procedural safeguards in either Article 69(2) or Rule 68, they

⁵ Trial Chamber I has ruled that fairness to the witness dictates that the witness should be afforded a fair opportunity to respond to any allegation impugning the witness's testimony: ICC-01/04-01/06-T-337-Red-ENG, p.47, lines 1-25 and p.48 lines 1-5. See also ICC-01/04-01/06-T- 122-ENG, pp.44-46.

⁶ See for example, D-55 [P-0214]; ICC-01/05-01-T-265-CONF, page 15, lines 7-18; D-64 [P-0243]; ICC-01/05-01/08-T-260, page 6, lines 14-23; D-03 [P-0245]; ICC-01/05-01/08-T-334, page 17, lines 23-25; D-26; ICC-01/05-01/08-T-335, page 19, lines 8-13; D-25; ICC-01/05-01/08-T-337, page 40, lines 3-6; D-29 [P-0285]; ICC-01/05-01/08-T-339-CONF, page 41, lines 18-19; D-15 [P-0198]; ICC-01/05-01/08-T-345-CONF-ENG, page 12, line 4 – page 15, line 6; D-57 [P-0020]; ICC-01/05-01/08-T-258-Conf-Eng, page 2, line 25 to page 3, line 10; D-02 [P-0260]; ICC-01/05-01/08-T-322-CONF, page 27, line 24 – page 28, line 8.

would be rewarded for the violating their disclosure obligations. Indeed, such a decision would enable the Prosecution to conduct an *ex parte* Article 70 case within a case, without any notice or participation rights being accorded to the Defence.

25. Finally, contrary to the position of the Prosecution, the witness's consent is not a pre-condition to the admission of the testimony, nor does it allow the witness to veto the admission of the testimony.

26. Rule 68 includes a range of scenarios to address such possibilities; the fact that the Prosecution might wish to circumvent the need to prove their applicability is not, in itself, grounds for excluding their applicability.

27. It is also premature and speculative to submit applications for judicial relief based on the premise that the witnesses would not consent to the admission of their prior testimony (for example, *per* Rule 68(3)), if the witnesses have not first been provided with a fair opportunity to consider whether to do so.

28. Whilst the Defence does not necessarily accept the applicability of the amendments to Rule 68 to this case, it is apparent, nonetheless, that the Prosecution has employed the amended version of Rule 68 in connection with some witnesses. According to a report filed by the Registry, it is also apparent that some of the witnesses have availed themselves of this opportunity to make 'clarifications' to their initial testimony before affirming its 'truthfulness'.⁷

29. Witnesses have a right to be treated in an equal manner. The applicability of presumptions of fact (i.e. that certain witnesses are likely to withhold their consent) or a different legal regime to different witnesses (particularly without any factual justification for such a distinction) would create an appearance of partiality or

⁷ ICC-01/05-01/13-1224-Conf.

special treatment vis-à-vis those witnesses, who provide favourable evidence for the Prosecution.

30. The creation of a special category as concerns the admission of testimony for the purpose of assisting the Prosecution to prosecute an Article 70 case, would also be contrary to Article 67(1)(e), which sets out the right of the Defence to call witnesses and evidence under the same conditions as the Prosecution.

Relief Sought

31. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Trial Chamber to reject the Request.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Date this 10th day of September 2015

The Hague, The Netherlands