

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/05-01/13  
Date: 15 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**

**Decision on Prosecution Motion for Clarification of Rule 68(3) Direction in Conduct  
of Proceedings Decision**

**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-Pierre Bemba Gombo**

Ms Melinda Taylor

**Counsel for Aimé Kilolo Musamba**

Mr Paul Djunga Mudimbi

**Counsel for Jean-Jacques Mangenda**

**Kabongo**

Mr Christopher Gosnell

**Counsel for Fidèle Babala Wandu**

Mr Jean-Pierre Kilenda Kakengi Basila

**Counsel for Narcisse Arido**

Mr Charles Achaleke Taku

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

|                                                 |                                                         |
|-------------------------------------------------|---------------------------------------------------------|
| <b>The Office of Public Counsel for Victims</b> | <b>The Office of Public Counsel for the<br/>Defence</b> |
|-------------------------------------------------|---------------------------------------------------------|

**States Representatives**

*Amicus Curiae*

**REGISTRY**

---

**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber VII** ('Chamber') of the International Criminal Court ('Court' or 'ICC'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Article 69 of the Rome Statute ('Statute') and Rule 68 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution Motion for Clarification of Rule 68(3) Direction in Conduct of Proceedings Decision'.

1. On 2 September 2015, the Presiding Judge issued directions on the conduct of the proceedings. As regards prior recorded testimony under Rule 68(3) of the Rules,<sup>1</sup> the direction given ('Direction') was 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 [...]'.<sup>2</sup>
2. On 7 September 2015, the Office of the Prosecutor ('Prosecution') requested the Chamber to clarify or provide guidance on the application of the Direction to the allegedly false testimony of defence witnesses in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ('Main Case') testifying in this case. Arguing that the admission of this kind of testimony is governed by Article 69(3) of the Statute, the Prosecution submits that the Direction does not apply because of Rule 68(3)'s 'conditioning of the admissibility of the previously recorded testimony on the consent of the witness concerned. A witness complicit in a crime involving the

---

<sup>1</sup> Rule 68(3) of the Rules provides that: '[i]f 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'.

<sup>2</sup> Directions on the conduct of the proceedings, ICC-01/05-01/13-1209, para. 23.

giving of false testimony cannot reasonably have the power to veto the proof of such crime'.<sup>3</sup>

3. On 10 September 2015,<sup>4</sup> the defence teams for Mr Bemba ('Bemba Defence') and Mr Kilolo ('Kilolo Defence') responded to the Prosecution's request.<sup>5</sup> The Bemba Defence submits that the Prosecution's reliance on Article 69(3) of the Statute in this context is impermissible, and that the Court's statutory scheme and jurisprudence require the Prosecution to admit these transcripts via Article 69(2) of the Statute and Rule 68 of the Rules.<sup>6</sup> The Kilolo Defence argues that the Prosecution's request is premature and that requesting clarification on Rule 68(3) of the Rules before any witness objects to the introduction of their prior recorded testimony is effectively asking 'for those objections to be dismissed in advance of considering them'.<sup>7</sup>
4. In principle, the Chamber does not clarify legal issues in the absence of requests for specific relief. However the Chamber considers that some limited guidance is warranted in this situation given the novelty of introducing the materials at issue, the timelines set out in the Direction and the imminent commencement of the trial.
5. Article 69(6) of the Statute provides that '[t]he Court shall not require proof of facts of common knowledge but may take judicial notice of them'. The Chamber considers 'facts of common knowledge' to include facts which are capable of ready determination by resort to sources whose accuracy cannot reasonably be

---

<sup>3</sup> Prosecution Urgent Motion for Clarification of Paragraph 23 of the "Directions on the conduct of the proceedings", ICC-01/05-01/13-1217, para. 2.

<sup>4</sup> The response deadline was shortened to this date. Email from Legal Officer of the Trial Chamber to the parties, 7 September 2015 at 15:25.

<sup>5</sup> Defence Response to "Prosecution Urgent Motion for Clarification of Paragraph 23 of the "Directions on the conduct of the proceedings"", ICC-01/05-01/13-1230; Kilolo Defence Response to "'Prosecution's Urgent Motion for Clarification of Paragraph 23 of the "Directions on the Conduct of the Proceedings"", ICC-01/05-01/13-1236.

<sup>6</sup> ICC-01/05-01/13-1230, paras 7-30.

<sup>7</sup> ICC-01/05-01/13-1236, paras 7-8, 16. *See also* ICC-01/05-01/13-1230, para. 6.

questioned.<sup>8</sup> It is therefore unnecessary to request the admission of materials falling under Article 69(6) of the Statute.<sup>9</sup>

6. The Chamber understands the 'allegedly false testimony' referenced by the Prosecution to be the transcripts relating to the testimony of Main Case defence witnesses who the Prosecution intends to call in this case. These transcripts are part of ICC court records, the dates and contents of which are capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. As such, the Chamber could take judicial notice of this Main Case testimony without requiring recourse to Rule 68(3) of the Rules or Article 69(3) of the Statute. The Chamber emphasises that such a ruling would be limited to taking judicial notice of the dates and contents of the relevant witnesses' Main Case testimony, and not the truth or falsity of the testimony itself.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**PROVIDES** guidance on the Direction as set out above.

---

<sup>8</sup> See ICTR, Trial Chamber, *The Prosecutor v. Théoneste Bagosora et al.*, Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 11 April 2003, ICTR-98-41-T, para. 44 ('[i]n addition, "matters of common knowledge" captures those facts which are readily verifiable by reference to a reliable and authoritative source'); ICTR, Appeals Chamber, *The Prosecutor v. Edouard Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, ICTR-98-44-AR73(C), para. 29 ('[t]he question [for judicial notice of facts of common knowledge] is whether the proposition can reasonably be disputed'); ICTY, Appeals Chamber, *The Prosecutor v. Slobodan Milošević*, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, IT-02-54-AR73.5, para. 8. See also ICTR, Appeals Chamber, *Laurent Semanza v. The Prosecutor*, Judgement, 20 May 2005, ICTR-97-20-A, para. 194.

<sup>9</sup> Trial Chamber III, *The Prosecution v. Jean-Pierre Bemba Gombo*, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, ICC-01/05-01/08-2012-Red , para. 81 (concerning the content of publicly available legislation).

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to be 'BS', written over a horizontal line.

**Judge Bertram Schmitt, Presiding Judge**

A handwritten signature in black ink, appearing to be 'MPdB', written over a horizontal line.

**Judge Marc Perrin de Brichambaut**

A handwritten signature in black ink, appearing to be 'Raul', written over a horizontal line.

**Judge Raul Pangalangan**

Dated 15 September 2015

At The Hague, The Netherlands