

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 12 October 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Document

Prosecution Urgent Motion for Clarification on Decision on Rule 74 Assurances

Source: The Office of the Prosecutor

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

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1. The Office of the Prosecutor (“Prosecution”) requests that the Trial Chamber VII (“Chamber”) provide clarification or guidance on the scope of its ruling concerning the application of rule 74 assurances in this case (“Decision”).¹ In its Decision the Chamber determined, in part, that where issues of self-incrimination arise “the evidence shall be given *in camera*, that is in private or closed session”,² the violation of which “may result in sanctions under Article 71”.³ The Chamber also made clear that it is “primarily the responsibility of the parties” to ensure that questioning “likely to give rise to issues of self-incrimination is conducted in private or closed session.”⁴ Clarification is necessary and appropriate so that the Parties are best equipped to implement that Decision.

2. The Prosecution understands the Chamber’s Decision to necessitate private session testimony only where the *identity* of the witness may be revealed. The Prosecution does not understand the Decision to require private session testimony where it concerns the witness being solicited or induced to give false evidence, having testified falsely in the Main Case, or being subject to corrupt influence by the Accused, so long as other protective measures (use of a pseudonym and voice and facial distortion) are in place to ensure that the witness’s identity is not made public. This understanding is based on several considerations.

3. *First*, the Chamber has consistently emphasised the importance of ensuring that the proceedings are conducted publicly, even when the evidence might incriminate the witness. In its Decision on the Conduct of Proceedings, the Chamber noted that

¹ ICC-01/05-01/13-T-13-CONF-ENG ET, p. 8, l. 16-p. 10, l. 9 (“Rule 74 Decision”).

² Rule 74 Decision, p. 9, l. 19-20. *See also* ICC-01/05-01/13-T-13-CONF-ENG ET, p. 14, l. 7-8 (“Every time you say something that is potentially self-incriminating, we will go into what we call private session”), 14-16 (“if you feel that the answer you give to a question might incriminate you, you can ask the Judges yourself to go into private session.”).

³ Rule 74 Decision, p. 9, l. 22-24.

⁴ Rule 74 Decision, p. 10, l. 3-5. *See also* ICC-01/05-01/13-T-14-CONF-ENG ET, p. 6, l. 17-19 (“So if we want to be, in principle to handle it in future this way, that the parties indicate if we go to private session or if we are in open, then I would accept it as far as possible.”).

“[i]nsofar as possible, witness testimony shall be given in public”.⁵ During the course of Witness P-0261’s testimony, the Chamber stated that “private session should protect the witness”⁶ but also emphasised the importance of the “transparency of the proceedings”.⁷ The Chamber was clear that to effectuate that balance, questions implicating the *identity* of the witness should be elicited in private session, but “we should not make [private session] the rule.”⁸ Consistent with that balance, the Chamber permitted Witness P-0261 to respond to questions and statements, in open session, showing that the witness lied in the Main Case about several matters,⁹ but ensured that “when we come to personal circumstances we have to go into private session”.¹⁰

4. *Second*, restricting private session only to matters that might reveal the witness’s identity is consistent with the Statute and the Rules of Procedure and Evidence. Article 64(7) creates a presumption that “[t]he trial shall be held in public” and that private and closed session is an exception to that presumption to be determined on a case-by-case basis. The Statute and the Rules also create sufficient safeguards to prevent the witness from subjecting himself or herself to potential national prosecutions so long as his or her identity is not disclosed. The Prosecution is not seeking to prosecute these witnesses for their conduct in the Main Case. There is also no risk that national authorities will be asked to prosecute such matters, in accordance with article 70(4)(b) or rule 162(4). Other in-court protective measures granted by the Chamber, namely the use of a pseudonym and facial and voice distortion, ensure that the witness’s identity is not publicly revealed.

⁵ ICC-01/05-01/13-1209, para. 26.

⁶ ICC-01/05-01/13-T-14-CONF-ENG ET, p. 5, l. 23.

⁷ ICC-01/05-01/13-T-14-CONF-ENG ET, p. 5, l. 23-24.

⁸ ICC-01/05-01/13-T-14-CONF-ENG ET, p. 5, l. 24-p. 6, l. 2.

⁹ See e.g. ICC-01/05-01/13-T-15-CONF-ENG ET, p. 85, l. 2-p. 86, l. 4, p. 88, l. 3-25.

¹⁰ ICC-01/05-01/13-T-16-CONF-ENG ET, p. 4, l. 4-5. See also ICC-01/05-01/13-T-16-CONF-ENG ET, p. 6, l. 15-16, 23-24 (private session is necessary where the witness could name people that might reveal his identity).

5. *Third*, a broader interpretation of the Decision may result in this trial being conducted almost entirely in private session. The vast majority of Prosecution witnesses allegedly testified falsely in the Main Case.¹¹ In doing so, they were involved in the charged crimes.¹² Were the Chamber's Decision to be taken at its broadest – requiring evidence to be elicited in private session whenever it could potentially incriminate the witness – this would result in almost the entire Prosecution case to be conducted in private session and, effectively, behind closed doors. For example, the mere admission by a witness in this case that they had testified in the Main Case establishes an element of article 70(1)(a) with which they could be charged. A basic fact such as this would thus need to be elicited in private session. The Prosecution does not consider that either the Statute or the Chamber intends such a result.

6. *Fourth*, restricting private session testimony only to those matters pertaining to the witness's identity ensures that the proceedings are conducted efficiently. As noted by the Chamber, "it will be very difficult to always switch between open and private session because potentially problematic issues will come up at any time".¹³ Providing clarity and restricting private session only to those matters which might reveal the witness's identity will ensure that the Parties are better informed as to when private session is necessary and prevent the problems associated with "constantly going in and out of private and closed session."¹⁴

¹¹ See ICC-01/05-01/13-1263-Conf-AnxA, pp. 3 (P-0245), 4 (P-0260), 5 (P-0261), 7 (P-0198), 8 (P-0201), 14 (P-0243), 15 (P-0020), 16 (P-0214).

¹² ICC-01/05-01/13-T-10-CONF-ENG ET, p. 34, l. 21- p. 35, l. 10 (noting, in part, "[y]ou'll also hear from and consider the statements of witnesses involved in the charged crimes."). See also ICC-01/05-01/13-T-10-CONF-ENG ET, p. 36, l. 18-19 ("the concerted fabrications of at least 14 witnesses complicit in the crimes charged in this case"), p. 39, l. 14-17 ("It was a pattern of conduct in respect of several other witnesses in the Bemba trial, including D-2, D-3, D-6, D-13, D-15, D-23, D-26, D-29, D-54, D-57 and D-64. All of those asked, deliberately misled the Trial Chamber about their prior contact with the Bemba Defence.").

¹³ ICC-01/05-01/13-T-13-CONF-ENG ET, p. 46, l. 23-25.

¹⁴ ICC-01/05-01/13-T-16-CONF-ENG ET, p. 12, l. 24-25.

7. For the foregoing reasons, the Prosecution requests that the Chamber grant the clarification requested. Given the established schedule, the Prosecution seeks this clarification on an urgent basis.



Fatou Bensouda, Prosecutor

Dated this 12th Day of October 2015
At The Hague, The Netherlands