



Original: English

No: **ICC-01/05-01/13**
Date: **16 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, AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND
NARCISSE ARIDO

Public

Response to Prosecution Request for a Judicial Notice (ICC-01/05-01/13-1339)

Source: Defence for Jean-Jacques Kabongo Mangenda

Document 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-Jacques Kabongo Mangenda

Mr Christopher Gosnell
Mr Arthur Vercken

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku
Mr Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Mr. Jean Jacques Mangenda opposes the Prosecution's requests for: (i) judicial notice of the "existence and authenticity" of the records of entire Defence case in the *Bemba* proceedings; and (ii) admission of those records as "part of the record in this case."¹
2. Article 69(6) of the Rome Statute, unlike the broader provisions at the ICTY and ICTR, provides only for judicial notice of "facts" of common knowledge. The materials of which the Prosecution seeks notice are not "facts", but a huge mass of testimonial evidence from another case. The Prosecution has made no effort to identify the distinct, concrete and identifiable facts relevant and necessary to this case. Even worse, the Prosecution seeks to have this vast quantity of material admitted as "part of the record of this case" – i.e., as evidence in this case. Doing so would be inefficient and seriously damage trial fairness by depriving the Defence of a reasonable opportunity to know and test the information upon which the Prosecution seeks to rely before this Trial Chamber.

II. APPLICABLE LAW

3. Article 69(6) of the Statute provides that "the Court shall not require proof of facts of common knowledge but may take judicial notice of them." The Prosecution has cited no case-law in support of its application, nor has the Defence been able to find any decisions applying this provision. The application and interpretation of this provision, accordingly, appears to be a matter of first impression before this Court.
4. The ICTY and ICTR Rules contained provisions on judicial notice at the time of the adoption of the Statute. Those provisions are substantially broader than those adopted in the Statute:

Rule 94 Judicial Notice

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating

¹ *Bemba et al.*, Prosecution Request for a Judicial Notice, Pursuant to Article 69(6) of the Rome Statute, ICC-01/05-01/13-1339, 5 October 2015 ("Request"), para. 1.

to matters at issue in the current proceedings.

5. On 8 December 2010, the ICTY judges in plenary revised Rule 94(B) to read as follows:

At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or ***of the authenticity of*** documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.²

6. The implication of this change at the ICTY is that only the “authenticity” of a document, not its content, may be judicially noted.
7. There is extensive case-law at the ICTY and ICTR on the conditions for taking judicial notice of facts. The Prosecution Request cites one ICTR case from fifteen years ago, and offers no additional information as to how that case-law has developed in the intervening years.
8. The standard test for taking judicial notice of facts, which has emerged on the basis of numerous decisions, was recently set out in the *Karadžić* case:

In exercising its discretion under Rule 94(B), the Trial Chamber must assess: (1) whether each adjudicated fact satisfies the various requirements enumerated in the Tribunal’s case law for judicial notice, and (2) whether a fact, despite having satisfied the aforementioned requirements, should be excluded on the basis that its judicial notice would not be in the interests of justice. The test for determining whether to consider taking judicial notice of an adjudicated fact pursuant to Rule 94(B) has been established as follows:

- (a) The fact must be relevant to the current proceedings;
- (b) The fact must be distinct, concrete, and identifiable;
- (c) The fact, as formulated by the moving party, must not differ in any substantial way from the formulation of the original judgement;
- (d) The fact must not be unclear or misleading in the context in which it is placed in the moving party’s motion. In addition, the fact must be denied judicial notice “if it will become unclear or misleading because one or more of the purported facts will be denied judicial notice”;
- (e) The fact must be identified with adequate precision by the moving party;

² ICTY Rules of Procedure and Evidence, IT/32/Rev. 45, 8 December 2010 (italics and emphasis added), available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf.

- (f) The fact must not contain characterisations or findings of an essentially legal nature;
- (g) The fact must not be based on an agreement between the parties to the original proceedings;
- (h) The fact must not relate to the acts, conduct, or mental state of the accused; and
- (i) The fact must clearly not be subject to pending appeal or review.³

III. SUBMISSIONS

9. Article 69(6), unlike its ICTY and ICTR counterparts, does not provide for taking judicial notice of documents. Judicial notice may only be taken of “facts”. The Prosecution has defined no “facts” of which it seeks the Trial Chamber to take judicial notice. The Request should be rejected on this ground alone.

10. Even assuming that the Trial Chamber could interpret Article 69(6) as conferring discretion to take judicial notice of documents, and even assuming that transcripts of prior testimony of a witness could be interpreted as a “document”, those transcripts may not be accepted as evidence of the truth of their content. Rule 68(2) and 68(3) reflect the *lex specialis* for admission of “prior recorded testimony”. The Prosecution nevertheless asks that those transcripts be made “part of the record in this case”,⁴ only subject to the caveat that they be admitted “without prejudging their truthfulness.”⁵ This formulation is vague, but seems to imply that the factual propositions therein can be taken into account for the truth-value, albeit not “prejudged” (whatever that might mean). Such an approach would circumvent Rule 68(2) and 68(3) and should be rejected.

11. The Prosecution request is also so over-broad that it would damage the integrity and efficiency of the proceedings. The Request would flood the record of this case with thousands of pages of testimonial evidence. Most of those pages will have no relevance whatsoever to this case. Conversely, the Prosecution reserves the right to use this avalanche of information for any purpose it wants. Such an approach, aside from being unprecedented, would give the Prosecution undue licence to ambush the Defence with unexpected propositions that will have never have been tested before

³ Karadžić, Decision on Accused’s Motion for Judicial Notice of Adjudicated Facts Related to Count One, 21 January 2014, para. 6 (citations omitted), available at <http://www.icty.org/x/cases/karadzic/tdec/en/140121.pdf>.

⁴ Request, para. 1.

⁵ Request, para. 7.

this Trial Chamber. The fairness and efficiency of these proceedings would be damaged by this approach.

IV. CONCLUSION AND RELIEF REQUESTED

12. The Request has no proper foundation in law, and has been made without even a minimum effort to identify requisite facts or portions of documents for judicial notice. The Request should be rejected.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 16 October 2015,
At The Hague, The Netherlands