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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

**Narcisse Arido's Response to the Prosecution's Request for a Judicial Notice
(ICC-01/05-01/13-1339)**

Source: Counsel for Narcisse Arido

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for Aimé Kilolo Musamba

Paul Djunga Mudimbi

Steven Powles

Counsel for Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Charles Achaleke Taku

Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and

Other

Reparations Section

I. INTRODUCTION

1. On 5 October 2015, the Prosecution requested the Trial Chamber to take judicial notice of the date, time and contents of 260 transcripts containing evidence related to 27 Defence witnesses in the Main Case (hereinafter ‘proposed materials’).¹

2. The Arido Defence opposes the Prosecution’s Request. First of all, it submits that it would be unfair to take judicial notice of transcripts without the Arido Defence being given access to the totality of the trial record of the Main Case, thereby effectively depriving the Arido Defence from being able to challenge them. Secondly, the Arido Defence submits that Article 69 (6) requires the Prosecution to submit actual facts and that therefore the proposition of 5840 pages of evidence contravenes the very purpose of judicial notice. Finally, it submits that the Prosecution’s proposed materials do not qualify as “facts of common knowledge”.

II. PROCEDURAL HISTORY

3. On 15 September 2015, the Trial Chamber provided guidance to a 7 September 2015 request by the Prosecution. The Trial Chamber found that prior Main Case testimony was in principle admissible through Article 69 (6) of the Statute, it stated:

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 questioned. It is therefore unnecessary to request the admission of materials falling under Article 69(6) of the Statute.

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.²

¹ ICC-01/05-01/13-1339 (‘Prosecution’s Request’).

² ICC-01/05-01/13-1249, paras 5-6.

4. On 5 October 2015, the Prosecution requested that “to take judicial notice of: (i) the existence and authenticity of trial transcripts in the Main Case and their audio-visual equivalents; and (ii) the happenings in the courtroom as shown therein” pursuant to Article 69 (6) of the Statute.³ The transcripts referred to were set out in Annex A to that filing.

5. On 6 October 2015, Pursuant to Regulation 34 of the Regulations of the Court, the Trial Chamber shortened the deadline for responses, if any, for filing ICC-01/05-01/13-1339 to Wednesday, 14 October 2015.⁴ Subsequently, on 12 October 2015, by oral order upon request of the Arido Defence, the Trial Chamber extended the deadline for responses to 16 October 2015.⁵

III. APPLICABLE LAW

6. 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.”

7. According to the Vienna Convention on the Law of Treaties, which applies to the ICC Statute,⁶ “[a] treaty shall be interpreted in good faith in accordance **with the ordinary meaning** to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁷ It also states that “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.”⁸

³ Prosecution’s Request, para. 1.

⁴ Email of 6 October 2015, entitled “shortening of deadline for filing ICC-01/05-01/13-1339”.

⁵ ‘As to the Arido Defence request for an extension of deadline to respond to the Prosecution’s judicial notice application, this is filing 1339, the request is granted. The response deadline for this motion is now the filing deadline on Friday, 16 October 2015. This new deadline applies to all the Defence teams’, ICC-01/05-01/13-T-18-CONF-ENG ET 12-10-2015 1-77 NB T, p. 50, lines 3-5.

⁶ ICC-01/04-168 (Appeals Chamber), para. 33.

⁷ Vienna Convention on the Law of Treaties, Art. 31 (1), available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

⁸ *Ibid.*, Art. 32.

IV. SUBMISSIONS

A. **The Prosecution is attempting to circumvent the procedure and litter the trial record with evidence that is otherwise inadmissible**

8. Judicial notice is not a mechanism that may be employed to circumvent the general rules governing the admissibility of evidence and litter the record with matters which would not be admitted otherwise.⁹ This is precisely what the Prosecution is attempting to do here, by attempting to have the evidence of nearly all the Defence witnesses in the Main Case into the record of the case without it meeting the requirements of Rule 68.

9. The Prosecution's Request is impermissibly broad: while only 14 witnesses from the Main Case form part of the charges against the Accused, the Prosecution is requesting the Trial Chamber to take judicial notice of the evidence of 27 witnesses.¹⁰ Its statement that these other witnesses' transcripts are "equally relevant to this case, especially given that the alleged overall strategy is not limited to the 14 incidents" is simply insufficient.¹¹ Instead, the Prosecution must have specifically linked these witnesses to the charges against the Accused, which it failed to do. The Arido Defence recalls that facts to be taken judicial notice of must still meet the requirement of relevance and probative value.¹²

10. Further, the Arido Defence submits that it would be unfair to have a large part of the trial record from the Main Case becoming part of the record of the present case, in light of the fact that the Arido Defence does not have access to the entirety of the trial record of the Main Case, despite its repeated requests.¹³ This is particularly important since the Prosecution also refused to provide a certification that it had disclosed all material from the Main Case falling under Article 67 (2) or Rule 77.¹⁴ As a result of this lack of access, the Arido Defence is therefore unable to assess the context of the relevant witnesses' evidence or determine whether it has been later contradicted or challenged by other witnesses. Similarly, this lack of access prevents the Arido Defence from submitting facts for judicial notice from the Main Case to the Trial Chamber.

⁹ ICTY, *Prosecutor v. Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for judicial notice, 1 April 2005, para. 17, at http://www.icty.org/x/cases/nikolic_dragan/acdec/en/040401.pdf.

¹⁰ Prosecution's Request, para. 4, footnote 3.

¹¹ Prosecution's Request, para. 6.

¹² See e.g. ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 189, at <http://www.unict.org/sites/unict.org/files/case-documents/ict-97-20/appeals-chamber-judgements/en/050520.pdf>.

¹³ ICC-01/05-01/13-642-Conf; ICC-01/05-01/08-3116-Conf; ICC-01/05-01/08-3134-Conf; ICC-01/05-01/08-3156; ICC-01/05-01/13-1141-Conf-Corr; ICC-01/05-01/08-3291-Conf-Exp; ICC-01/05-01/13-1278; ICC-01/05-01/13-1176.

¹⁴ ICC-01/05-01/13-1176, para. 7.

11. As importantly, most of the witnesses for which the transcripts relate are not going to testify in the present case. As a result, evidence from individuals will be admitted in the present case and be used to support the charges against Mr. Arido and the other Accused without the author of such testimony being present to assert whether his/her testimony was truthful or not. For instance, while Mr. Arido is charged with having corruptly influenced and briefed certain witnesses from the Main Case to provide false evidence, the only evidence regarding the false character of their testimony is provided by individuals other than the witnesses themselves. As a result, the trial record would be unfairly unbalanced in favour of the Prosecution's position. The Arido Defence submits admitting the contents of such witnesses into evidence would de facto make these witnesses in the present case, and therefore violate the Accused's right to examine witnesses against him.¹⁵

12. Finally, the Arido Defence submits that indiscriminate admission into evidence of the near totality of the Defence witnesses' testimonies in the Main Case would invite re-litigation and therefore contravene the Trial Chamber's repeated statements that it would not adjudicate the facts from the Main Case,¹⁶ and impermissibly expand the scope of the present proceedings.

B. Article 69 (6) is not the proper venue as it is limited to facts of common knowledge

13. The language of the statute is unequivocal: Article 69 (6) refers to "facts" of common knowledge. The Arido Defence submits that the materials proposed by the Prosecution constitute neither.

1. The Prosecution does not propose any facts but instead proposes bulk of evidence

14. The Arido Defence submits that Article 69 (6) requires the proposition of actual facts. The Prosecution here attempts to have entire documents made part of the record of the case, which must not be permitted.

15. In the context of judicial notice of adjudicated facts, the *ad hoc* tribunals have held that a proposed fact must be distinct, concrete and identifiable.¹⁷ It has also been the practice at the *ad hoc* tribunals that requests for judicial notice contains list of facts submitted under the applicable

¹⁵ Article 67 (1) (e) of the Statute.

¹⁶ ICC-01/05-01/13-1188, para. 12; ICC-01/05-01/13-T-10-CONF-ENG, at pp. 4-6.

¹⁷ ICTY, *Prosecutor v. Mladić*, Case No. IT-09-92-PT, First decision on Prosecution's Motion for judicial notice of adjudicated facts, 28 February 2012, para. 8, at <http://www.icty.org/x/cases/mladic/tdec/en/120228.pdf>. (internal citations omitted).

rule.¹⁸ The Arido Defence submits that for Article 69 (6) procedure to indeed save time and resources, the same approach should apply to requests for judicial notice. As a result, the Prosecution should be ordered to prepare a list of facts which it submits constitutes facts of common knowledge with the meaning of Article 69 (6) of the Statute, such as “Witness XX testified in the case of *Prosecutor v. Bemba* at the International Criminal Court on XX” or “Witness XX testified that XX.”

16. Admitting into the case record the 5840 pages¹⁹ of witness evidence without pointing out to the specific parts of the documents would defeat the very purpose of Article 69 (6) and instead litter the trial record. This is particularly true since the Prosecution does not rely on the totality of the witnesses’ evidence when arguing that they provided false evidence, but was instead able to point out to specific evidence which it submits was falsely given, such as their military status, or their contacts with the Defence, in its pre-trial brief.²⁰ Only these specific statements should be submitted for the Trial Chamber to take judicial notice thereof.

17. As a result, the Prosecution should be ordered to re-file its request for judicial notice and to propose an actual list of facts, including citations from the relevant court records. The Defence should be given an opportunity to respond. Should it be granted, what will become part of the record of the present case would be the list itself, and not the actual transcripts. This would further permit easier reference to the facts for which the Trial Chamber has taken judicial of.

2. The proposed materials do not constitute “facts of common knowledge”

18. In the absence of any case law at the Court regarding Article 69 (6), the Arido Defence submits that the practice of the *ad hoc* tribunals provides useful guidance as to its applicability and use. The ICTY and the ICTR have defined facts of common knowledge as “common or universally known facts, such as general facts of history, generally known geographical facts and

¹⁸ See e.g. ICTY, *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Appellant’s Motion for Judicial Notice, 11 October 2004, p. 12, Annex A, at: <http://bit.ly/1LxjcOk>; *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 23 June 2003, p. 8, Annex A, at: <http://bit.ly/1Lxjogy>; *Prosecutor v. Marijačić & Rebić*, Case No. IT-95-14-R77.2, Prosecution Motion for Judicial Notice and Admission of Evidence, 21 December 2005, p. 14 Annex A, at: <http://bit.ly/1G9gDSc>.

¹⁹ This is for the French version only.

²⁰ See e.g. ICC-01/05-01/13-1110-Conf, paras 76, 80, 105, 114, 119, 128, 132, 144, 159, 160, 176, 183, 192, 198, 202, 216.

the laws of nature, as well as those facts that are generally known within a tribunal's territorial jurisdiction".²¹

19. Further, such facts are not only widely known but also beyond reasonable dispute,²² that is, "reasonably indisputable".²³ A fact is said to be indisputable if it is either generally known within the territorial jurisdiction of a court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be called into question.²⁴

20. The Prosecution's Request is unprecedented; there has never been transcripts of a witness' testimony been taken judicial notice of in the *ad hoc* tribunals. Documents which were taken judicial notice of included laws,²⁵ the start and end date of an armed conflict,²⁶ the existence of an armed conflict,²⁷ UN Security Council's resolutions,²⁸ peace agreements,²⁹ the different ethnic groups existing in an area,³⁰ wars,³¹ general facts of history, generally known geographical facts

²¹ ICTY, *Prosecutor v. Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for judicial notice, 1 April 2005, para. 10, at http://www.icty.org/x/cases/nikolic_dragan/acdec/en/040401.pdf; ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's interlocutory appeal of decision on judicial notice, 16 June 2005, para. 22, at <http://www.ictcaselaw.org/docs/doc79250.PDF>; *Semanza Appeals Judgement*, para. 194; *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, Decision on the Defence Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94(B) and 54, 3 November 2000, para. 23, at <http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Semanza/decisions/031100.html> ("Semanza 3 November 2000 Decision on Judicial Notice"); ICTY, *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on motion for judicial notice, 25 September 2008, para. 17, at <http://www.icty.org/x/cases/perisic/tdec/en/080925.pdf> ("Perišić 25 September 2008 Decision on Judicial Notice").

²² ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's interlocutory appeal of decision on judicial notice, 16 June 2006, para. 22, at <http://www.ictcaselaw.org/docs/doc79250.PDF>; *Semanza Appeals Judgement*, para. 194; *Semanza 3 November 2000 Decision on Judicial Notice*, para. 23; *Perišić 25 September 2008 Decision on Judicial Notice*, para. 17.

²³ *Semanza 3 November 2000 Decision on Judicial Notice*, para. 24.

²⁴ *Ibid.*

²⁵ *Semanza*: On 6 February 2002, the Chamber partially granted a Defence motion filed on 13 November 2001 and took judicial notice of the following documents: *Décret-Loi No. 10/75: Organisation et fonctionnement de la préfecture [au Rwanda]*, and *Décret-Loi No. 18/75 du 14 août 1978*, to the extent that it amended or otherwise modified *Décret-Loi No. 10/75*, see *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Defence Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94(B) and 54, 6 February 2002, at <http://www.ictcaselaw.org/docs/doc26596.pdf>.

²⁶ ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, para. 281, at <http://www.ictcaselaw.org/docs/doc37512.pdf>. The Chamber took judicial notice of the fact that "[b]etween 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character; ICTR, *Prosecutor v. Niyitigeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, para. 29, at https://www1.umn.edu/humanrts/instree/ICTR/NIYITEGEKA_ICTR-96-14/NIYITEGEKA_ICTR-96-14-T.html.

²⁷ *Ibid.*

²⁸ SCSL, *Prosecutor v. Norman et al.*, SCSL-04-14-T-785, Judgement, Annex E: Judicially Noted Facts, at <http://www.scsldocs.org/documents/view/4914-19310>.

²⁹ *Ibid.*

³⁰ ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's interlocutory appeal of decision on judicial notice, 16 June 2006, paras 30, 31, at <http://www.ictcaselaw.org/docs/doc79250.PDF>.

³¹ *Ibid.*, paras 30, 31.

and the laws of nature.³² The Main Case Trial Chamber has held that examples of facts for which judicial notice could be taken include, for instance, content of domestic legislation³³ or dates.³⁴

21. Finally, the ICTR held that by taking judicial notice of the existence and authenticity of the documents such as UN Security Council's resolutions or legislative texts, "the Chamber does not take judicial notice of the facts recited therein".³⁵ In the *Bizimungu* case, the ICTR Trial Chamber explicitly refused to take judicial notice of documents.³⁶

22. While the existence of the main case, the date and time of testimony of Defence witnesses in the Main Case do not fall squarely within the definition of facts of common knowledge, the Arido Defence would not oppose judicial notice to be taken of these, insofar as they are limited to the testimonies of the 14 witnesses related to the charges, and submitted properly submitted in the form of actual facts.

23. More importantly, their contents - which the Prosecution's alleges that most of which is false, cannot in any way be said to constitute any form of "common knowledge". The ICTR refused to take judicial notice of facts which had been admitted by an accused pleading guilty in another case, since "that an accused admits a fact pursuant to a plea agreement reveals nothing about the nature of the facts as either common knowledge or as indisputable. Similarly, facts that are voluntarily admitted by an accused in the context of a proceeding are not the proper subject of judicial notice because such admissions speak neither to the general currency of the fact nor to its indisputable character."³⁷ The same reasoning applies here.

24. Further, the truthfulness of the contents of the witnesses' testimonies cannot be ascertained. As a result, it cannot be said to fall within the scope of facts for which the Trial Chamber can take judicial notice of.

25. The Arido Defence also notes that the Trial Chamber in the Main Case has yet to render its final judgment. It further notes that the practice of the *ad hoc* tribunals to permit the admission

³² Semanza 3 November 2000 Decision on Judicial Notice, para. 23.

³³ ICC-01/05-01/08-2012-Red, para. 81.

³⁴ *Ibid.*, paras 116, 124.

³⁵ Semanza 3 November 2000 Decision on Judicial Notice, para. 38.

³⁶ ICTR, *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-1, Decision on Prosecution's Motion for judicial notice, 2 December 2013, para. 34, at <http://41.220.139.198/Portals/0/Case%5CEnglish%5CGatete%5Cdecisions%5C021203.pdf>;

³⁷ Semanza 3 November 2000 Decision on Judicial Notice, para. 34.

into evidence of adjudicated facts³⁸ does not exist at the Court and that in any event adjudicated facts must have been deliberated upon and made a decision on by a Chamber of the Tribunal, and which must not be under challenge before the Appeals Chamber or must have been upheld by the Appeals Chamber.³⁹ This is not the case here.

V. CONCLUSION

26. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to reject the Prosecution's Request in its entirety.

27. In the alternative, it requests the Trial Chamber to order the Prosecution to submit a list of proposed facts for which it seeks judicial notice.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 16th Day of October 2015

The Hague, The Netherlands

³⁸ Rule 94 (B) RPE of ICTY and ICTY RPE: (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 of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings. (Amended 10 July 1998, amended 8 Dec 2010). ICTY RPE, at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf; ICTR RPE, at <http://www.unict.org/sites/unict.org/files/legal-library/150513-rpe-en-fr.pdf>.

³⁹ ICTR, *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-1, Decision on Prosecution's Motion for judicial notice, 2 December 2013, para. 34, at <http://41.220.139.198/Portals/0/Case%5CEnglish%5CGatete%5Cdecisions%5C021203.pdf>; ICTY, *Prosecutor v. Mladic*, Case No. IT-09-92-PT, First decision on Prosecution's Motion for judicial notice of adjudicated facts, 28 February 2012, para. 8, at <http://www.icty.org/x/cases/mladic/tdec/en/120228.pdf>.