

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 9 November 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul C. 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 Request for Judicial Notice

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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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

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

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court (the '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(6) of the Rome Statute, issues the following 'Decision on Prosecution Request for Judicial Notice'.

I. Procedural history and relief sought

1. On 5 October 2015, the Office of the Prosecutor ('Prosecution') filed a submission ('Request') requesting the Chamber to take judicial notice of: (i) the existence and authenticity of trial transcripts in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ('Main Case') and their audio-visual equivalents; and (ii) the happenings in the courtroom as shown therein (collectively, the 'Proposed Facts').¹ The Prosecution identifies 260 materials which form the basis of the Request, all of which are either Main Case trial transcripts or associated audio-visual recordings of Main Case testimony.²
2. On 16 October 2015,³ the defence teams for Mr Mangenda ('Mangenda Defence'),⁴ Mr Kilolo ('Kilolo Defence')⁵ and Mr Arido ('Arido Defence')⁶ responded to the Request. The Mangenda Defence requests the Chamber to reject the Request in full. The Kilolo Defence requests that the request be partially dismissed, arguing that judicial notice should be limited to only the trial transcripts of the 14 Main Case witnesses at issue in this case. The Arido Defence requests the Chamber to

¹ Prosecution Request for a Judicial Notice, Pursuant to Article 69(6) of the Rome Statute, ICC-01/05-01/13-1339 (with two annexes).

² Annex A of the Request, ICC-01/05-01/13-1339-AnxA.

³ The response deadline was ultimately shortened to this date. See Transcript of Hearing, 12 October 2015, ICC-01/05-01/13-T-18-Red-ENG, page 50 lines 2-5; Email from a Legal Officer of the Chamber to the parties, 6 October 2015 at 09:35.

⁴ Response to Prosecution Request for a Judicial Notice (ICC-01/05-01/13-1339), ICC-01/05-01/13-1391.

⁵ Kilolo Defence Response to 'Prosecution Request for a Judicial Notice, Pursuant to Article 69(6) of the Rome Statute (ICC-01/05-01/13-1339)', ICC-01/05-01/13-1392.

⁶ Narcisse Arido's Response to the Prosecution's Request for a Judicial Notice (ICC-01/05-01/13-1339), ICC-01/05-01/13-1393.

reject the request in full and, alternatively, to order the Prosecution to submit a list of proposed facts for which it seeks judicial notice.

II. Analysis

3. The Chamber recalls its decision of 15 September 2015 ('15 September 2015 Decision'),⁷ in which it set out the following on judicial notice:

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.⁸

4. The relief sought by the Prosecution falls squarely within the parameters set by the Chamber in the 15 September 2015 Decision. The Request is limited to ICC court records, namely trial transcripts of court hearings or the corresponding audio-visual recordings of these same hearings produced by the Registry and provided to the parties.⁹ The Chamber does not interpret the Prosecution's request for judicial notice of the 'existence and authenticity' of these records, and the in-court 'happenings' reflected therein, to be meaningfully different from the Chamber indicating that judicial notice can be taken of the 'dates and contents' of these records. The Prosecution does not seek judicial notice of the truth or falsity of any particular fact in any witness's Main Case testimony – if it were, this would

⁷ Decision on Prosecution Motion for Clarification of Rule 68(3) Direction in Conduct of Proceedings Decision, ICC-01/05-01/13-1249.

⁸ 15 September 2015 Decision, ICC-01/05-01/13-1249, paras 5-6 (citations removed).

⁹ These audio-visual recordings were provided pursuant to an order by Trial Chamber III. Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Prosecution's Third Request for Access to Evidence for a Related Article 70 Proceeding", 23 January 2015, ICC-01/05-01/08-3238.

not be a judicial notice request, but rather one falling under other provisions like Rule 68 of the Rules.

5. The Chamber considers, contrary to the Mangenda and Arido Defence submissions,¹⁰ that the Prosecution has sufficiently set out what facts it seeks to have judicially noticed in the Request and Annex A of the Request. The Proposed Facts are the contents of ICC court records, which are most precisely described by referencing the document registration number or unique identification number of the court records in question. This is exactly what the Prosecution has done in Annex A of the Request.
6. The Chamber is not persuaded by the Kilolo Defence argument that judicial notice can only be taken of the 14 Main Case witnesses named in the charges of this case. As stated in the 15 September 2015 decision, it is unnecessary to request the admission – or, consequently, to consider the admissibility criteria - of facts which can be judicially noticed. In consequence, the Chamber may take judicial notice of facts of common knowledge without first assessing the relevance of these facts to the case at hand, though it always has the discretion to decline to take judicial notice of clearly irrelevant facts.¹¹ Consistent with the Chamber's approach to evaluating evidence generally,¹² the Chamber will decide in its judgment how much it will rely on judicially noticed facts in its assessment of the evidence.
7. The Chamber fails to see how this approach would, as argued by the Mangenda Defence, 'flood the case with thousands of pages of testimonial evidence' or give the Prosecution 'undue license to ambush the Defence with unexpected

¹⁰ ICC-01/05-01/13-1393, paras 14-17.

¹¹ In this regard, it is noted that Article 69(6) of the Statute indicate that the Court 'may' take judicial notice of facts of common knowledge, while other Tribunals indicate that the Chamber 'shall' take judicial notice of them. Rule 160(A) of the STL Rules; Rule 94(A) of the ICTY, ICTR and SCSL Rules. As such, certain aspects of the way these Tribunals assess facts of common knowledge – such as by requiring relevance of facts of common knowledge before the Chamber exercises its obligation to take judicial notice - do not equally apply when interpreting Article 69(6) of the Statute. Other aspects of the judicial notice schemes at these Tribunals, such as taking notice of adjudicated facts, are not at issue in the present Request.

¹² Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285.

propositions that will never have been tested before by this Trial Chamber'.¹³ The limited nature of the Prosecution's relief sought must be emphasised. The Prosecution is not, for example, requesting the Chamber to take judicial notice of the fact that 'Witness D-2 understood what the oath means', but merely that 'Witness D-2 said during the hearing of 12 June 2013 that he understood what the oath means'. The first fact is of a kind falling outside the scope of the Request. But the second fact, plainly evident from the ICC's official court records,¹⁴ is of the kind covered by the Request. The Chamber does not consider that any undue prejudice is caused to taking judicial notice of facts of this second kind – as stated in the 15 September 2015 Decision, the accuracy of such facts cannot reasonably be questioned.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the relief sought in the Request; and

TAKES judicial notice of the dates and contents of the materials contained in Annex A of the Request.

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



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 9 November 2015

At The Hague, The Netherlands

¹³ ICC-01/05-01/13-1391, para. 11.

¹⁴ See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript of Hearing, 12 June 2013, ICC-01/05-01/08-T-321-Red-ENG, page 3 lines 17-20.