

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

No.: ICC-01/05-01/13

Date: 26 June 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Bertram Schmitt

**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

Observations of the Defence for Mr Fidèle Babala on the “Prosecution’s Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence” (ICC-01/05-01/13-1011)

Source: Defence for Mr Fidèle Babala Wandu

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

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I. INTRODUCTION

1. On 16 June 2015, the Office of the Prosecutor (“the Prosecution”) filed a request for the Chamber to designate a person authorised to assist in taking witness statements pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“the Rules”).¹
2. As the Prosecution recognises in its own Request, it envisages calling at least five witnesses in accordance with the “prior recorded testimony” procedure,² on the basis of rule 68(2)(b).
3. The Chamber requested that the Registry and the Defence teams submit any observations on the Request by 25 and 26 June, respectively.³ Today the Registry filed its observations⁴ on the above-mentioned Request. That short submission does not express any opinion but proposes that the Registry Legal Counsel (or a person designated by him) be designated as the person authorised to assist in taking statements from witnesses pursuant to rule 68(2)(b) of the Rules.
4. The Defence team for Mr Babala (“the Defence”) would hereby like to point out that rule 68(2)(b) is *ratione temporis* not applicable to the instant case; additionally it will be difficult to meet the admissibility criteria for prior recorded testimony, given the specificities of the case. These submissions are without prejudice to the right of the Defence to file observations on the Prosecution’s Request seeking to obtain the agreement of the Chamber on the filing of prior recorded testimony. The Defence would like to address this question before the Chamber at this stage to prevent the designation of this person and to avoid unnecessary costs.

¹ ICC-01/05-01/13-1011.

² Ibid, para. 3.

³ E-mail sent by Trial Chamber VII Communications at 12.49 on 22 June 2015.

⁴ ICC-01/05-01/13-1036.

II. Inapplicability of rule 68(2)(b) in the instant case

(a) The *ratione temporis* application of rule 68(2)(b)

5. The Prosecution is basing its Request on rule 68(2)(b) of the Rules. This rule was introduced on 27 November 2013 at the twelfth plenary Assembly of States Parties to the Rome Statute and entered into force on the same day.⁵
6. In paragraph 2 of the resolution adopting the new rule 68 – the paragraph which renders the rule operational – it:

Further decides that the following shall replace rule 68 of the Rules of Procedure and Evidence, **emphasizing article 51, paragraph 4, of the Rome Statute according to which amendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted**, with the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused, and to article 68, paragraph 3, of the Rome Statute related to the protection of the victims and witnesses and their participation in the proceedings.⁶
7. What those drafting the new rule intended is clear: the rule must not be applied retroactively to the detriment of a person who is being investigated or prosecuted before the Court.
8. Article 51(4) of the Rome Statute (“the Statute”) provides that no amendment to the Rules may be applied retroactively “to the detriment of the person who is being **investigated or prosecuted** or who has been convicted”.
9. This is an extension of the principle of the non-retroactivity of criminal law as set out in the main universally recognised⁷ international human rights instruments

⁵ Resolution ICC-ASP/12/Res.7.

⁶ Ibid., operative para. 2, references omitted. (Emphasis added).

⁷ Universal Declaration of Human Rights, 10 December 1948, article 11(2); International Covenant on Civil and Political Rights, 16 December 1966, article 15(1).

and the domestic criminal legislation of various countries.⁸ It is also a principle of customary international criminal law, codified in the Rome Statute.⁹ This principle means that no rule that would cause additional harm to the accused can be applied to a situation which took place before the rule entered into force. In other words, criminal law must be preventive rather than punitive. Explicit reference is made to this principle of non-retroactivity in articles 24 and 51(4) of the Rome Statute.

10. Accordingly, with the aim of protecting this intrinsic principle of international criminal law, the drafters of the Statute mentioned it twice, demonstrating its importance.

11. Article 24(2) of the Rome Statute even extends this principle, providing that “[i]n the event of a change in the law applicable to a given case prior to a final judgement, **the law more favourable to the person being investigated, prosecuted** or convicted shall apply.”

12. By dint of the words “law applicable”, the intention behind article 24(2) of the Statute is to incorporate not only the provisions of the Rome Statute but also the Rules. This is made clear, moreover, in article 21(1)(a) of the Statute. In addition, article 24(2) also contains the expression “the law more favourable,” implying that a new rule which is of a less favourable nature than the older one it is substituting must not be applied retroactively.

13. The (new) rule 68(2)(b) is itself less favourable than the old rule 68 of the Rules.

Denying the opposing party the ability to cross-examine the witness is one

⁸ See, for example, the French Criminal Code, article 112-1(3).

⁹ *The Prosecutor v. Šešelj*, Redacted version of the “Decision on the Prosecution’s consolidated motion pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence,” filed confidentially on 7 January 2008, Case No. IT-03-67-T, 21 February 2008, para. 19.

example of the unfavourable nature of this rule. Accordingly, it cannot be applied retroactively.

14. Compliance with the principle of non-retroactivity of a more stringent criminal law gives full meaning to the concepts of legal certainty and the principle of legality of criminal law¹⁰ – a key principle that must be respected by all parties to a trial.
15. Therefore, the Defence for Mr Babala would like to point out to the Chamber that the temporal scope of the new rule 68(2)(b) began only when it entered into force. For that reason, its scope applies only to those cases for which the Prosecutor may have opened an investigation or initiated any other proceedings after 27 November 2013.
16. Bemba et al¹¹ began on the day when the Prosecutor began to investigate the Accused, i.e. before the 3 May 2013, the date on which it filed a request with the Pre-Trial Chamber seeking judicial assistance to gather the evidence required as part of its investigative activities pursuant to article 70 of the Statute.¹²
17. It was, therefore, on 20 November 2013 that Pre-Trial Chamber II issued a warrant of arrest for Mr Babala,¹³ who was arrested in the Democratic Republic of the Congo on 24 November 2013¹⁴ and placed in detention on 25 November 2013.¹⁵ He first appeared before Trial Chamber I on 27 November 2013.¹⁶ All those proceedings took before the second paragraph of rule 68 of the Rules – the paragraph on which the Prosecution is basing its Request – entered the Court’s legal arsenal.

¹⁰ “General principles of international criminal law,” ICRC, Advisory services on international humanitarian law, 03/2014.

¹¹ ICC-01/05-01/13.

¹² ICC-01/05-44-Conf-Exp. Cited in the warrant of arrest, ICC-01/05-01/13-1-Red2.

¹³ ICC-01/05-01/13-1-Red2.

¹⁴ ICC-01/05-01/13-24-Conf.

¹⁵ ICC-01/05-01/13-24-Conf.

¹⁶ ICC-01/05-01/13-T-1-FRA.

18. In a decision of 24 August 2014, Trial Chamber III in *Bemba* twice recalled, in footnotes, that it is obliged to apply the non-amended version of rule 68 when deciding on the admission of evidence, as a result of the non-retroactive scope of the new version.¹⁷
19. It goes without saying that, as the investigative and procedural activities involving Mr Babala took place before this rule, the new rule 68 cannot be applied to the instant case. In addition to this irrefutable argument on legality, in the unlikely case that the Prosecution Request were granted, it would prejudice the rights of the defence because, according to the Defence, it is not applicable in the instant case.

III. Irrelevance of rule 68 in the light of the specificities of the instant case

20. Even if rule 68, in its new and expanded version, were applicable *ratione temporis*, its application is not compatible *in abstracto* with the specificities of this case.
21. The principles governing criminal trials make publicity,¹⁸ orality¹⁹ and adversariality requirements.²⁰ The exceptions to these principles must be specified in law and must not in any case undermine the rights of the defence.

¹⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, public redacted version of the “Decision on the admission into evidence of items deferred in the Chamber’s previous decisions, items related to the testimony of Witness CHM-01 and written statements of witnesses who provided testimony before the Chamber,” of 17 March 2014 (ICC-01/05-01/08-3019-Conf), Trial Chamber III, ICC-01/05-01/08-3019-Red, 26 August 2014, footnotes 88 and 111: “The Chamber notes that Rule 68 was amended by Resolution ICC-ASP/12/Res.7 but that the amended rule cannot be applied retroactively to the detriment of the person who is being investigated or prosecuted. For present purposes, therefore, the Chamber will apply the unamended Rule 68.”

¹⁸ See article 68(2) of the Statute.

¹⁹ See article 69 of the Statute.

²⁰ Updated Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993, as amended on 7 July 2009, article 21(4); *The Prosecutor v. Kupreškić et al*, Decision on Appeal by Dragan Papić against Ruling to proceed by Deposition, 15 July 1999, para. 24; *The Prosecutor v. Nahimana et al.*, Judgment, Case No. ICTR-99-52-A, 28 November 2007, para. 181; European Convention on Human Rights, article 6(3)(d); Judgment *Ruiz-Mateos v. Spain*, application no. 12952/87, para. 63, ECHR, 23 June 1999; Judgment [Lobo Machado v. Portugal](#) [GC], no. 15764/89, para. 31, ECHR, 20 February 1996.

These principles not only provide the defendant with a guarantee, as highlighted by Merle and Vitu, that “[TRANSLATION] the truth will not be obfuscated by blind or partial justice”²¹ but they also grant the judge “[TRANSLATION] moral authority.”²² Admissible limitations are, for example, those included under article 56 of the Statute, which provides that testimony and statements cannot be filed subsequently, and article 68, which takes into account the need to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The Prosecution fails to explain in a convincing manner the factual reasons forcing it to violate these principles.

22. One of the most important criteria for applying rule 68(2)(b) is as follows: “The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused.” (emphasis added).
23. *Prima facie* this provision means that such testimony may not contain evidence that relates to the acts and conduct of the accused. In view of the limited scope and nature of the instant case, and in the light of the evidence filed, we can conclude that the subjects on which potential witnesses have testified relate to the conduct and acts of the Accused.

(b) The right of the defence to examine the witnesses against him or her

24. Article 67(1)(e) of the Statute lays down the right of the accused “to examine, or have examined, the witnesses against him or her” and should be read in parallel with article 67(1)(b), which provides for the right “to have adequate time and facilities for the preparation of the defence”.
25. Prior recorded testimony blocks any possibility for the Defence to cross-examine the witness. In addition, use of this tool inevitably creates problems of time and

²¹ Merle, R. and Vitu, A., *Traité de droit criminel*, T. II, 4th edition, p. 700 no. 611 *et seq.*

²² *Ibidem.*

material availability for the Defence to be able to properly prepare their response. The use of prior recorded testimony in our case, in which testimonies are the beating heart of the proceedings, will lead to less favourable treatment of the Accused than if he had the opportunity to cross-examine the witnesses on all of their statements.

FOR THESE REASONS,

MAY IT PLEASE THE TRIAL CHAMBER TO:

ENTERTAIN the Prosecution Request and DECLARE it without merit and consequently REJECT it in its entirety.

AND JUSTICE SHALL BE DONE.

RESPECTFULLY SUBMITTED.

[signed]

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Mr Fidèle Babala Wandu

Dated this 26 June 2015

At Denderleeuw, East Flanders, Belgium