

1 International Criminal Court
2 Trial Chamber VII - Courtroom 1
3 Situation: Central African Republic
4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,
5 Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse
6 Arido - ICC-01/05-01/13
7 Presiding Judge Bertram Schmitt, Judge Marc Perrin de Brichambaut and Judge Raul
8 Pangalangan
9 Trial Hearing
10 Monday, 12 October 2015
11 (The hearing starts in open session at 9.33 a.m.)
12 THE COURT USHER: All rise.
13 The International Criminal Court is now in session.
14 PRESIDING JUDGE SCHMITT: Good morning, everybody.
15 Could the court officer please call the case.
16 THE COURT OFFICER: Thank you, Mr President.
17 The situation in the Central African Republic, in the case of The Prosecutor versus
18 Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo,
19 Fidèle Babala Wandu and Narcisse Arido, case reference ICC-01/05-01/13.
20 We are in open session.
21 PRESIDING JUDGE SCHMITT: Thank you.
22 Now I ask for the appearances of the parties.
23 We start with the Prosecution.
24 MR VANDERPUYE: Good morning, Mr President, your Honours, everyone. The
25 Prosecution is represented today by Olivia Struyven, seated to my left; Sylvie Vidinha,

1 seated behind her; and behind me, Ekaterina Kopylova; I'm Kweku Vanderpuye.

2 Good morning, your Honours.

3 PRESIDING JUDGE SCHMITT: Thank you.

4 Now the Defence please.

5 MR GOSNELL: Good morning, Mr President, your Honours. Christopher Gosnell

6 on behalf of Mr Mangenda, to my left; accompanied by Nikki Sethi, legal assistant;

7 and co-counsel Maître Arthur Vercken.

8 MR DJUNGA: (Interpretation) Good morning, Mr President. Maître Paul Djunga;

9 Mr Steven Powles; Madam Rosalie Mbengue. We are representing Mr Maître Kilolo.

10 MR TAKU: Good morning, Mr President. Good morning, your Honours. My

11 learned colleague and brother, Phillipe Larochelle appears for Mr Arido; and with us

12 today is our case manager, Mr Michael Rowse.

13 MR KILENDA: (Interpretation) Good morning, Mr President. Good morning,

14 your Honours. Maître Azama Shalie Rodoma; and Maître Kilenda, respectively

15 co-counsel and lead counsel, for Fidèle Babala Wandu, to my right; and also

16 Adriana-Maria Manolescu, case manager, for the defence of Mr Babala.

17 MS TAYLOR: Good morning, Mr President, your Honours. Melinda Taylor

18 appearing on behalf of Mr Jean-Pierre Bemba, who is on my right; and today I'm with

19 Ms Natacha Lebaindre. Thank you.

20 PRESIDING JUDGE SCHMITT: Thank you very much.

21 And now we have another person that we don't know yet. I assume that this is

22 Ms Doucerain. And could you kindly introduce yourself, please.

23 MS DOUCERAIN: (Interpretation) Yes, good morning, Mr President, your

24 Honours. Karine Doucerain, duty counsel for Witness 260.

25 PRESIDING JUDGE SCHMITT: Thank you very much.

1 Before turning to the testimony of the next witness, the Chamber wishes to issue a
2 few directions and the Chamber has not forgotten that the Arido Defence wants
3 to address some housekeeping matters. We can do that after we have issued these
4 directions.

5 First direction: Oral decision on accompanying transcriptions for audiovisual
6 experts played in Court.

7 We have discussed about this last week.

8 First, the Chamber will clarify how it wishes for the interpreters and court reporters
9 will use the transcriptions provided by the parties when they play audiovisual
10 materials. We all recall that from last week.

11 When the parties give transcripts of a audiovisual material which they intend to use,
12 the court reporters are to copy the transcription verbatim into the record. The
13 interpreters would then read out or translate this transcription accordingly.

14 The interpreters can note for the record before any recordings are played that they are
15 reading a part-prepared transcription. This will make it clear for the record that they
16 are not translating the played recording in realtime.

17 Should the parties disagree with the accuracy of the transcription, they may request
18 corrections to the transcript as needed in accordance with decision 1209.

19 This concludes the first oral decision.

20 The second oral decision is on the motion requesting directions for refreshing
21 recollection and for impeachment of a party's own witness.

22 Second, the Chamber will now turn its attention to Defence motion 1357 which is
23 called, I repeat this, motion requesting directions for refreshing recollection and for
24 impeachment of a party's own witness.

25 The Defence requests the Chamber to require a calling party seeking to refresh a

1 witness's recollection with a prior statement, first, to establish the nature of the
2 witness's failure to remember and, second, to ask the witness whether he believes that
3 his memory would be refreshed by resort to the information sought to be put before
4 the witness.

5 The Defence also requests a guideline in respect of impeachment. Reference to prior
6 statements by the calling party will be permitted only where, first, the calling party
7 has sought, expressed permission from the Trial Chamber to do so and, second,
8 permission is granted on the basis that the witness is demonstrably hostile.

9 The Defence makes specific reference in its motion to the way P-261's prior statements
10 were used by the Prosecution in its recent examination of him. I would first like to
11 hear from the Prosecution as to how they respond to the Defence request, and it
12 would be helpful if you could clarify if you wanted to impeach Witness P-261.

13 Please, Mr Prosecutor.

14 MR VANDERPUYE: Thank you, very much Mr President. I was a little worried
15 that you'd already made a decision.

16 PRESIDING JUDGE SCHMITT: (Overlapping speakers) The basic -- the line that
17 we had was decision -- the oral decision will be rendered afterwards of course.

18 MR VANDERPUYE: Yes. Thank you very much for the opportunity to address the
19 Chamber.

20 I have read the Defence filing and there are some problems I think with it in terms of
21 what the remedy is that the Defence seek in this case.

22 First is the question of the use of the statement. The motion is predicated
23 fundamentally on the assumption that the statement was used in a manner -- that the
24 statement was used as a prior inconsistent statement, or a prior out-of-court
25 declaration with this witness.

1 So I want to clarify, first of all, that the entire purpose of laying the foundation for the
2 use of that statement through eliciting from the witness in his present testimony that
3 the statement that he previously made was true was to incorporate that statement and
4 its contents and the truth of those contents into his present testimony, which -- which
5 is an issue that is noticeably absent from the Defence filing in the case. And it is
6 absent from the Defence filing in the case because it precludes the arguments that the
7 Defence are making.

8 The use of a witness's statement that is adopted as his present testimony in a case is
9 neither leading nor necessarily impeachment by reference to it. It's as though I were
10 to say, "You just testified two minutes ago X, and now you're saying Y, which is it?"

11 Those two statements on the present record before the Chamber stand in equipoise
12 against any other evidence that is adduced from the witness on the specific issue.

13 So I think there's a fundamental misunderstanding or misgiving concerning the use of
14 the statement to begin with.

15 In terms of the use of statements, out-of-court statements for the purposes of either
16 impeaching a witness or refreshing their recollection, absent the witness adopting the
17 statement in court under oath before the Chamber, that's another matter altogether
18 and that I can address as well.

19 In terms of the application of the Defence concerning the manner in which a witness's
20 recollection is refreshed, it seems to me that the Chamber is neither bound by any
21 particular rubric, any particular rituals that are derivative of the common law system.
22 We're all experienced counsel her. You are professional Judges and you are perfectly
23 capable of weighing and assessing the evidence that's adduced through a witness
24 through a manner of refreshing recollection that is not necessarily a textbook method
25 that is derived from a common law system, because we are a hybrid system and we

1 are from different systems, and the Chamber is readily able to make that assessment.
2 So I don't think there's any need to adopt any specific rubric or specific procedural
3 mechanisms where it is obvious that the witness's recollection is being refreshed, as
4 was the case with 261.

5 In many instances you may recall, because I don't think there are specific instances
6 cited in the Defence motion, but you will recall in many instances where the witness
7 said he could not remember the specific words that he used or the specific question
8 that was put to him in his prior statement. And, effectively, when the statement was
9 shown to him the witness -- the witness actually confirmed the statement: That's
10 what I meant, that's what I said, that's what I interpret what I said to mean presently.
11 That's not impeachment. That's a clarification of a present testimony before the
12 Chamber.

13 And in terms of -- in terms of the impeachment -- let me just add one other thing:
14 With respect to the notion of incorporating a witness's prior statement as their present
15 evidence before the Chamber, that's something that's well-recognized, both
16 internationally and domestically in many common law jurisdictions. It is something
17 that is enshrined in the principle that underlies Rule 92ter in the ICTY's Rule of
18 Procedure and Evidence, where the witness is available for cross-examination, the
19 witness attests to their prior statement, the truth and accuracy of that testimony -- of
20 that statement, that becomes part of their evidence before the Court, which is
21 essentially what happened with respect to 261.

22 And in terms of the regulation of impeachment, it seems to me that if a party intends
23 to impeach their witness, certainly it is within the discretion of the Chamber to
24 regulate how that occurs, whether there's any particular litany that is required or any
25 particular -- slow down. I've got it.

1 Whether there's any particular litany that may be required, whether there is any
2 formalistic means by which the party should proceed lies entirely within the
3 discretion of the Chamber. I think that the Chamber had made with respect to 261
4 and will make with respect to the following witnesses appropriate determinations as
5 to whether and when such a procedure should apply. I know that there is
6 jurisprudence in this Court, but I don't think it's binding on this Chamber in any
7 event, but there is some jurisprudence as to the use of statements or the process that
8 applies to the impeachment of a witness.

9 I would underscore that that is an ad hoc determination that the Chamber may make
10 with due regard to the circumstances. And I would also add that it's quite clear even
11 in international jurisprudence that the Defence cites the Popovic appeals decision on
12 this matter, and it's quite clear from that appeals decision that that is a matter that
13 rests entirely within the discretion of the Chamber, notwithstanding that the decision
14 held that there should be some procedure that applies. What the nature is of that
15 procedure, the steps that are required is left to the discretion of the Chamber.

16 The other thing that that decision also importantly points out though is that there
17 has to be and the Chamber should consider that there is flexibility in this respect.

18 Whether the witness is adverse, whether the witness is hostile in the circumstances,
19 whether or not the statement is being used simply to refresh recollection or simply to
20 clarify an inconsistency in two positions that lie together on the present record are all
21 determinations the Chamber has to make. It is entirely appropriate for a Chamber to
22 allow a witness's evidence to be clarified, their recollection to be refreshed without
23 making a determination necessarily that the witness is either hostile, adverse so as to
24 require or necessitate their impeachment.

25 Just so the record is clear, that's at the Popovic appeal decision. It's a decision on

1 appeals against the decision on impeachment of a party's own witness,
2 1 February 2008. The reference is IT-05-88-AR-73.3, paragraph 28.
3 That's our position in a nutshell. With respect to this Witness P-261, to the extent
4 that the Defence are either challenging the decisions made by the Chamber during the
5 course of that witness's evidence, I would oppose the application as essentially
6 relitigating a decision that have already been made by the Chamber.
7 Alternatively, I think that the record is quite clear as to the propriety of the
8 examination and the use of the statement as a present reflection of his testimony
9 before the Chamber and, therefore, none of these issues apply.
10 That's it in a nutshell. I'm sorry to have taken as long as I have, Mr President.
11 PRESIDING JUDGE SCHMITT: No, I think this is an important issue. As you all
12 are well aware of, we have been not very specific in the conduct of proceedings
13 directions, and that was for a reason. And it's perfectly clear that we all in this
14 courtroom have to accustom ourselves a little bit to an approach that is not
15 completely common law of course and of course also not completely civil law, but is a
16 hybrid approach.
17 (Trial Chamber confers)
18 PRESIDING JUDGE SCHMITT: Yes, and the Chamber will retire for a little
19 deliberation. It will not take long, perhaps ten minutes, and then -- yes.
20 MR LAROCHELLE: Can I briefly reply to the Prosecutor? If I can be granted --
21 PRESIDING JUDGE SCHMITT: Briefly, yes.
22 MR LAROCHELLE: Very briefly. So we hear from the Prosecutor that there is
23 actually no foundation for the use of the statement. I thought, I was wondering, now
24 we have a clear position, which is the use of the statement is to refresh the memory of
25 the witness about what he told the Prosecutor. This is different from reminding the

1 witness about what happened and the event itself.

2 The Prosecutor is just trying to iron out and to basically remind the witness about the
3 version he would like you to have. But can I just remind you of what few facts about
4 these witnesses?

5 First, they are paid by the Prosecutor to testify here. They are receiving benefits first
6 from the Prosecutor, then from the VWU. They have refused systematically to be
7 interviewed by us. This, we will probably save days of hearing time if we would
8 have been given the opportunity to interview these witnesses who are now working
9 from the Prosecutor. They are self-confessed liars. We have a right to confront
10 their evidence. And the purpose for which the Prosecutor proposes to use the past
11 statement of the witness have no ground, no basis. We are losing time. The
12 witness should just testify. Maybe we won't even confront the witnesses with those
13 mere inconsistencies or mere contradictions. Our role is here to maybe bring the
14 witness into a different light. So those are my few comments about the Prosecutor's
15 response.

16 PRESIDING JUDGE SCHMITT: Thank you.

17 Also first, Mr Gosnell, Mrs Taylor rose first, so she has of course first the floor.

18 MS TAYLOR: I'll be very brief. Thank you very much, Mr President.

19 We've heard today about common law precepts, and we've heard about Rule 92ter.

20 But what we haven't heard is the ICC Rules of Procedure and Evidence, in particular,
21 Rule 68. What it seems the Prosecutor is doing is laying a foundation to admit the
22 statement for the truth of its contents.

23 We have a provision. We have an appeals judgment decision in the Bemba case
24 which governs the use of statements such as this. And they are clear criteria, there is
25 clear guidelines, exceptional circumstances. The Judges must take into consideration

1 the impact upon the rights of the accused and whether it goes to acts and conduct.

2 The Appeals Chamber was also very cautious about the wholesale introduction of

3 such statements. So of course it's concerning to hear about statements being

4 admitted when there's no grounds to do so because the witness testified in accordance

5 with the principle of orality, which was guaranteed by the Appeals Chamber. Thank

6 you.

7 PRESIDING JUDGE SCHMITT: Mr Gosnell, I assume that it is in line with what

8 Mrs Taylor said, of course you have also the floor.

9 MR GOSNELL: Thank you, Mr President. I appreciate your forbearance. And

10 rest assured, I am going to say something new and not just repeat what has been said.

11 And it has to do with -- and I appreciate your Honours' acknowledgment of the

12 fundamental importance of this issue. And one of the questions that was raised was,

13 by my learned friend opposite was isn't this just the same as the witness being asked

14 to comment on what had just been said by the witness a few minutes previously?

15 And, Mr President, that's actually not true at all. And this does go to the heart of the

16 difference between an inquisitorial system and an adversarial system. In an

17 inquisitorial system, if you are going to refer to a prior statement, usually that prior

18 statement will have been taken under some form of judicial control or supervision.

19 It has a certain degree, therefore, of reliability and transparency as a result of that

20 supervision and those rules.

21 What is being referred to here are lengthy transcripts of interviews conducted

22 essentially by the police. They are not conducted with the same level of

23 transparency or control or guidance that would be required by an instructing Judge.

24 And that means that you are introducing material that is very different from a prior

25 statement by the witness on the stand; not to say that it can't be referred to under any

1 circumstances, but that your Honours will get the best impression of the witness's
2 actual recollection in respect of events -- and that's a very key point that my colleague
3 made -- if you hear it from the witness directly, and if there are failings in their
4 memory, then you will understand how it's been refreshed.

5 And just to say one more thing, Mr President, I do appreciate your patience, this
6 Chamber has already laid down a procedure for how Rule 68(3) is to be used, and it
7 has been resorted to already by the Prosecution in this case. If they wish to do that
8 in terms of adoption, because that was the point being made by my learned friend,
9 they could have resorted to it and they didn't at least in respect of this witness.

10 And just to clarify, Mr President, there has been no request for reconsideration. That
11 was not the purpose of the motion. So that matter can be taken off the table. Thank
12 you.

13 PRESIDING JUDGE SCHMITT: Of course you, Mr Powles, also get the floor and for
14 one or two sentences also Mr Larochelle. You can see by that and afterwards you
15 can perhaps respond also very shortly, you see indeed it's correct what you're saying,
16 Mr Gosnell, that the Chamber deems this question as so important that we should
17 address this here in the courtroom and discuss it as we wished it to do so in general in
18 a lively debate, to put it this way, and I appreciate that very much.

19 So Mr Powles is the next.

20 MR POWLES: I'm very grateful, Mr President. I saw Mr Vanderpuye on his feet.
21 I wonder if he'd rather I went first so he can respond to all the Defence submissions
22 before he addresses the Court?

23 Very briefly then, Mr President, your Honours, in addition to all the points that
24 already been made and the written motion by the Defence and those by my learned
25 colleagues this morning, what we would seek to do on behalf of Mr Kilolo is

1 respectfully remind the Chamber of an unusual feature of this case and the use of
2 prior of statements and interviews by the Prosecution in this case; and that is that
3 each interview which each of the these Prosecution witnesses I think I'm not mistaken
4 by saying in relation to every of these witnesses was prefaced and predicated by a
5 statement of limited use, which is an unusual feature of this case.

6 And your Honours will remember the contents of each of those statements of limited
7 use which each of these Prosecution witnesses have entered into and signed by the
8 Prosecution. Essentially each is cautioned that if they deviate from the interview
9 that they have given to the Prosecution, that they themselves are now and thereafter
10 at risk of prosecution.

11 My learned friend reminds you respectfully that you are professional judges, and we
12 would respectfully adopt and agree with that; and that no doubt your Honours will
13 treat with caution a situation where a Prosecution witness is prompted to or pushed
14 to adhere to or maintain a previous statement that they have given an interview to the
15 Prosecution in light of and with the statement of limited use in the background of
16 their testimony.

17 Moreover, as my learned friend Mr Gosnell reminded you and drew attention to,
18 there was no Defence representative or even independent officer of the Court present
19 when these interviews were given to the Prosecution. Yes, it's right that some of
20 these witnesses had representation, but there was no representation of those against
21 whom those statements and interviews would be used and certainly no independent
22 officer of the Court present when those interviews were being taken.

23 So we would caution and invited the Chamber to give limited weight and value to
24 those independent -- to those interviews given to the Prosecution by these witnesses
25 prior to their testimony in Court.

1 PRESIDING JUDGE SCHMITT: Thank you.

2 Please very short, Mr Larochelle, because you had the floor before.

3 MR LAROCHELLE: I don't even to talk about that. I simply want to know
4 whether you would like me to address the housekeeping matters that I want to raise
5 now before you retire so you can also ponder on these or if you want to wait before?
6 I was simply offering to do that now. It's up to you, your Honour.

7 PRESIDING JUDGE SCHMITT: I don't hope that the housekeeping matters will
8 force us to retire again to deliberation. I don't know. But I think it would be the
9 best to now hear from the Prosecutor what he wants to answer to your colleagues,
10 because this is the issue that we are at the moment discussing.

11 MR VANDERPUYE: I will just say at the outset that I'm somewhat concerned about
12 the additional arguments that the Defence have raised in addition to their filing that
13 was submitted.

14 But I'll start first with Mr Powles, because this is the second time that I think he has
15 mischaracterized the nature of the statement of limited use.

16 The document he has in front of him, he's read the conditions under which those
17 statements were taken. The conditions under which those statements were taken,
18 which I attempted to elicit from the Witness 261 before the Court was objected to by
19 most of the Defence. I can't remember who. And so the foundation and the
20 contents of that material the Defence sought to prevent the Chamber from knowing
21 about, notwithstanding the Prosecution's attempt to put it squarely before the
22 Chamber so the Chamber could evaluate the nature, the circumstances and all of the
23 issues surrounding the statement made by the witness to the Office of the Prosecutor.
24 That agreement does not say and does not suggest that the witness will be prosecuted
25 if they don't stick to what they told the Prosecution. Its plain reading is simply that

1 if the witness deviates from what they've told the Prosecution is the truth, that that
2 statement can be used to rebut what they claim when they testify at trial. That's
3 what it says. There's no dispute about it.

4 Mr Powles has that thing right in front of him. He can read it into the record so that
5 we're on all -- we're on all fours all of us about what the nature of that agreement is.

6 So that argument, I would submit, does not hold any water, and it's the second time
7 he's made this representation. The first time was in front of the witness himself.

8 As to Mr Gosnell's arguments concerning challenging the witness's evidence as he
9 delivers it, one of the fundamental problems with his argument and I think the same
10 for Ms Taylor's argument is it presupposes that this statement is coming into evidence
11 without the Defence having an opportunity to examine the witness, right. It violates
12 the principle of orality because the Defence is not in a position to examine the witness
13 about the circumstances of the statement when the witness is on the witness stand.

14 Anything they want to know about how the statement was taken, who was there,
15 what happened, what was said, A, they have in front of them and they have the
16 witness to answer the question. So it doesn't violate the principle of orality by any
17 stretch of the imagination.

18 In respect of Ms Taylor's argument concerning Article 68, I would also -- I'm sorry, in
19 terms of Ms Taylor's arguments, I would also point out that this Court has Rule 68,
20 Rule 68(3). Rule 68(3) is not an exception to the principle of orality. Why?

21 Because the witness is on the witness stand and the witness can address every issue
22 that is raised in a prior statement. It is entirely consistent with the principle of
23 orality.

24 And the Defence can't rely on the fact that they simply don't want to get into the
25 circumstances in order to cross-examine a witness and then claim that the witness's

1 prior statement violates the principle of orality. That is -- it is entirely dependent
2 upon the opportunity to examine the witness which they are presented with
3 unequivocally.

4 Now, I'm sure that I'm -- I'm sure that I'm forgetting an argument or two, but I would
5 say also that the reason why I raised the question of 92ter was to establish that the
6 notion of a witness incorporating a prior statement as their statement in court is one
7 that's well established, it's well recognized, not just in -- not just internationally, but
8 domestically. There's several domestic cases, which I'm sure my colleagues are fully
9 aware of that when a witness says to a Chamber under oath that what I said
10 previously is true in its -- in whatever respect, that that is a binding testimony of the
11 witness presently before the Chamber.

12 And during the course of 261's examination, the Defence basically went
13 round-robin objections on the laying of the foundation for that proposition fully
14 aware that once the witness adopts that, adopts their prior testimony, incorporates
15 their prior testimony, that all of the issues arising concerning the refreshing of the
16 recollection, concerning impeachment by a prior inconsistent statement evaporate.

17 There is no argument about impeachment by a prior inconsistent statement when the
18 statement isn't prior. It is their present testimony.

19 And so I think the Chamber should take that into consideration.

20 In terms of Mr Larochelle's argument, I can hardly remember exactly what he said,
21 but I would say with respect to what he was arguing that it conflates the issue before
22 the Chamber.

23 There's absolutely no reason why a witness cannot testify to their prior statement
24 before the Chamber and the contents of the prior statement before the Chamber.

25 There's no rule against hearsay here. The witness is simply attesting to something

1 that they said at another time, which is entirely admissible in these circumstances.

2 And it should not be the case that simply when the witness has made a prior
3 statement, the Prosecution should overlook that prior statement in order to lead
4 evidence before the Chamber when it is entitled to and the witness can attest to the
5 reliability of that statement. And in this case that's exactly what happened and the
6 witness adopted it. It's not a question of impeachment. It's not a question of
7 refreshing the recollection.

8 And I think that the Defence have -- if you look at the filing, that's the elephant in the
9 room. The prequalification of that prior statement as the witness's present evidence
10 before this Chamber under oath is what is missing from every single one of their
11 arguments and the filing itself because it's dispositive of the issue. It actually
12 renders their -- all of their arguments fundamentally moot. That's why you don't see
13 it, that's why they're not arguing it today.

14 MR TAKU: May it please, your Honours. Just one word. I think --

15 PRESIDING JUDGE SCHMITT: Yes.

16 MR TAKU: -- what the Prosecutor has just described we call that internal
17 inconsistency. It cannot just be about adopting a prior -- a statement as his evidence
18 in this case. It becomes an internal inconsistency. He has to make a distinction
19 between contradictions and internal inconsistencies. And these internal
20 inconsistencies render the witness even more unreliable.

21 PRESIDING JUDGE SCHMITT: Thank you very much. That should be enough as
22 a foundation for the deliberation.

23 As I said, we retire for deliberations. I would say 15 minutes at the least we will -- it
24 will take us.

25 THE COURT USHER: All rise.

1 (Recess taken at 10.05 a.m.)

2 (Upon resuming in open session at 10.37 a.m.)

3 THE COURT USHER: All rise.

4 PRESIDING JUDGE SCHMITT: The Chamber will now render its ruling on this
5 request.

6 The Chamber recalls at the outset its oral direction at the commencement of the trial
7 that, and I quote, "The Chamber has not set strict regulations on questioning so that
8 appropriate limitations can be set on a case-by-case basis." Quote end.

9 Issuing general guidelines clash with this previous direction so the Chamber will only
10 respond to the Defence's request in a limited manner.

11 From the outset the Defence's proposal for refreshing recollection appears to be
12 reasonable. The Chamber would appreciate it if the examining party would first try
13 to elicit the information sought by asking direct questions before seeking to refresh
14 the witness's recollection.

15 However, the Chamber deems it not necessary to ask the witness before such try to
16 recollect his memory if he or she believes his or her memory would be refreshed.

17 The Chamber would also emphasise that when prior statements refresh a witness's
18 recollection, the evidence given is the witness's subsequent testimony and not the
19 contents of the prior statements.

20 The Chamber recalls should the Prosecution intend to use the prior recorded
21 statements to prove the content of this prior statement, that the Prosecution must give
22 21 days' notice before introducing statements under Rule 68(3). The rule itself also
23 requires that the witness indicates that he or she does not object to the submission of
24 the prior recorded testimony.

25 It is therefore unnecessary to formally submit the witness's prior statements when

1 they were used solely to refresh the recollection.

2 As regards a general guideline for impeaching witnesses, the Chamber does not
3 consider that any such guideline is necessary or appropriate. The Chamber will not
4 abandon or undermine its authority to control the calling party's questioning of its
5 witness. Any improper use of witnesses' prior statements will not be tolerated and
6 non-calling parties are always entitled to object to the way a prior statement is put to
7 a witness.

8 The Chamber recalls that many such objections were raised and ruled upon during
9 P-261's testimony. This concludes the Chamber's ruling on Defence motion 1357.

10 As a final matter -- we have a third oral decision that is on submitting evidence by
11 email and P-261's materials. As a final matter and as stated by the Chamber last
12 week the parties may formally submit items by email. This has the advantage of not
13 having to reread all the ERNs of all the items in Court. Whenever this is done the
14 tendering party is to request during the hearing to file the list of items by email.

15 In accordance with Rule 64 of the Rules the other parties will be given an opportunity
16 to raise any issues with respect to any of the items used during the tendering party's
17 examination. These items will then be recognized as formally submitted and the
18 tendering party may send its email in copy to the other parties and court officer with
19 a full list of ERNs.

20 Once the Registry has marked these items as formally submitted in the eCourt
21 metadata, it is then to submit a formal filing containing the list of items which it has
22 marked as formally submitted for a particular witness.

23 As regards the documents requested for formal submission related to P-261, the
24 Chamber notes the Prosecution's email of 8 October 2015 containing 20 items. In
25 view of the Chamber's direction today on refreshing recollection, the Chamber

1 reiterates that it will not consider these prior recorded statements to prove the content
2 of these statements if the Prosecution has not made use of Rule 68(3) and the
3 procedure established by the Chamber in the conducts of proceedings direction.

4 Now we turn to the upcoming testimony of Witness 260 and we will discuss the issue
5 of protective measures and Rule 74 assurances.

6 Or should we address first the housekeeping matters? I hope they are not too
7 serious, but perhaps we should do that before. We should hear what you want to
8 say, Mr Larochelle.

9 MR LAROCHELLE: I will be very brief. The first housekeeping matter is the issue
10 of obtaining the benefits given to that witness and we wrote emails about that, but we
11 would like to know -- for us it is important to assess their credibility and for the Trial
12 Chamber as well to know the full extent of the benefits of course without
13 compromising their security. I think there's easily a way where -- we don't want
14 their address, we're not interested, but we would like to know how long they're
15 supposed to get rent and food and family allocations. I think we should be able to
16 get that.

17 The question of -- the issue of the fact that they testify for promises or what
18 consideration, we think we should get that, so we would request an order from the
19 Trial Chamber to the Registry, I guess, to obtain in a form that would not jeopardise
20 protection measures this information. That's the first.

21 PRESIDING JUDGE SCHMITT: Perhaps we address this first and ask the
22 Prosecution if they want to say something to that.

23 MR VANDERPUYE: I wouldn't have a problem with the Defence addressing the
24 matter to the VWU or to the Registry as concerns any benefits that they allege were
25 conferred on this witness or witnesses that may be coming. We would note,

1 however, that this is information that the Defence has been in possession of for a very
2 long time now and it seems to me that the timeliness of the request is in issue
3 considering the speed with which this case is going, considering the length of the
4 Prosecution's direct case. So we don't know that it's -- that it's timely, but certainly
5 I would -- I would suggest to the Chamber that proceeding not be delayed as a result
6 of this because this in my view is a seriously belated request for this information.
7 Mr Larochelle has been aware of this for a very long time, as has Mr Taku and the rest
8 of the Defence in this case.

9 PRESIDING JUDGE SCHMITT: No, no, Mr Larochelle, I don't need further
10 submissions on that. I think we know what is on the table and we will defer a
11 decision. We will not -- we will proceed today as we want and of course we will
12 keep in mind what has been said by both the Defence and by the Prosecution.
13 The second housekeeping matter, Mr Larochelle?

14 MR LAROCHELLE: The second housekeeping matter, another very short one, we
15 were given until Wednesday to file a response for the judicial notice motion of the
16 Prosecutor. We have very busy days these days. If we could have until Friday
17 afternoon, that would be much appreciated. This is something you can decide over
18 lunch and inform us after that.

19 PRESIDING JUDGE SCHMITT: Exactly we will do that. We will decide that after
20 lunch. Okay.

21 MR LAROCHELLE: And the last one is, this is the last one, and I'm very grateful for
22 the time.

23 PRESIDING JUDGE SCHMITT: I appreciate that, that it is the last one.

24 MR LAROCHELLE: The last one is concerning disclosure that we received Friday
25 afternoon, and this is a list of contacts between the Office of the Prosecutor and the

1 witness who is about to take the stand. We had been requested that -- requesting
2 this information for a long time. It's in our list of document. We can -- we can
3 bring it up if that would clarify matters. It's tab 32 of our documents at -- the
4 reference is CAR-OTP --

5 PRESIDING JUDGE SCHMITT: I think this is premature. Don't you think so?

6 MR LAROCHELLE: Well, I wanted to show it to you, but I can address it orally.
7 Basically we have a list now of 43 pages which detail the contacts the witness had
8 with the Prosecution and in those summarized contact we see that it refers to more
9 reports from the Prosecutor's investigators about these meetings which we still don't
10 have and this is -- I want to alert your Honours because this is the second time that
11 we receive last-minute disclosure. With Witness P-261 on the day where he started
12 we had on our office the unredacted version of his statement where we could find all
13 the phone numbers we needed.

14 So we think -- we request the Prosecutor to disclose immediately these list of contacts
15 for all the other witnesses so that we're not stuck with material received at the last
16 minute in the preparation of our cross-examination.

17 PRESIDING JUDGE SCHMITT: Mr Vanderpuye, do you want to respond to this
18 request?

19 MR VANDERPUYE: Thank you, Mr President. I think Mr Larochelle is well aware
20 that the information that we provided to the Defence concerning Prosecution contacts
21 with this witness is work product under Rule 81.

22 What we've done in this case is we have in response to specific requests that have
23 been made by -- first by the Bemba Defence for a given period of time and secondly
24 by the Arido Defence concerning this information, we have decided in the -- in the
25 interests of being expeditious to simply disclose our internal contact -- witness contact

1 database information. We've redacted it appropriately because it is work product.

2 Alternatively, we can extract information from it and provide that, but the fastest way
3 to do it was to disclose it in this way, which is what we've done.

4 With respect to 261, that was done concerning Ms Taylor's request for a period of time
5 from November, I think, until December of I think it was 2013, which we provided.

6 We provided her the dates of the contact and then subsequently provided the
7 substance of those contacts.

8 We've done the same thing with respect to this witness. We will do the same thing
9 with respect to 245. But our view of it is that the fact that the Prosecution has had

10 contact with its witnesses cannot be a mystery to the Defence at this stage of the

11 proceedings. It's obvious. Not only that, but the nature of those contacts is entirely
12 exploitable and explorable, if you can use that term, during the course of

13 cross-examination as it is in any case. And there is nothing that precludes the
14 Defence from doing that.

15 Further, the fact of the contacts is not material to the preparation of the Defence.

16 What the Defence knows is that the Prosecution has been in contact with its witnesses
17 is something that any Defence would know. Anybody on the street would know

18 that. So it does not comprise material that is necessarily met -- that is material to the
19 preparation of the Defence under Rule 77. And we provided it as a courtesy, as we

20 indicated, in our -- in our correspondence with the -- in our near daily correspondence

21 I should say with the Defence on these types of issues.

22 So I don't think Mr Larochelle's request holds any merit in this case. And to the

23 extent -- and to the extent that he has the material, he can prepare for the examination
24 of the witness. There's no prejudice as a result of this information being disclosed.

25 MR LAROCHELLE: Quickly, your Honour, when the witness sends an email --

1 PRESIDING JUDGE SCHMITT: But very quickly, please.

2 MR LAROCHELLE: When the witness sends an email begging for money to the
3 Prosecutor, that's something which can affect his credibility and we should not be
4 seeking that repeatedly. It should be -- it should be volunteered by the Prosecutor,
5 not extracted list a wisdom tooth. I'm sorry.

6 And we still have not received for example the RFA that was sent to the country
7 where these people reside allowing them to summon them and -- we're still -- despite
8 our repeated request and even your Honours' order to that effect, we have not
9 received the RFA upon which the Cameroonian police was involved in these matters.
10 So this is just replying for the Prosecutor.

11 PRESIDING JUDGE SCHMITT: But of course you understand that I have again to
12 give Mr Vanderpuye one or two sentences to respond to that.

13 MR VANDERPUYE: Mr President, Article 69(8) of the Statute reads as follows:
14 "When deciding the relevance or admissibility of evidence collected by a State the
15 Court shall not rule on the application of the State's national law."

16 Mr Larochelle's argument is predicated on the notion that the legality of the collection
17 of evidence with respect to the identification of witnesses, their location and all of this
18 kind of preliminary steps to actually get the witness or to engage the witness
19 somehow violates some international human right or some -- or the Statute itself
20 pursuant to Article 69(7). It doesn't. The Statute is explicit on this issue and what
21 they -- what Mr Larochelle is trying to do is to create an impression that information
22 concerning the interactions of the Cameroonian police or Cameroonian authorities
23 with witnesses there has an impact on the admissibility or relevance of the
24 information that is produced as a result of it. It does not. The Statute is clear on
25 that issue.

1 Secondly, he is aware of this information and he's aware of our invitation to him and
2 the other Defence as early as August to put these questions to the Prosecution so that
3 it can answer it. The Chamber is aware of that. It was in our filing. You have
4 your emails -- the emails of that exchange in front of you.

5 He was assigned to this case back in March. It was no mystery that the -- who the
6 witnesses were in this case, who the Prosecution was in contact with. The first
7 application for this specific material was made on 25 September, four days before the
8 opening statements in this case.

9 This is an issue that is of the Defence's making in this case and I don't think it's
10 appropriate necessarily at this stage for them to try to argue that there is some
11 prejudice that enures from it or that the Prosecution has been lax or inappropriate in
12 dealing with disclosure matters.

13 We have been proactive, we have invited this material, and the fact that he sits on his
14 hands and raises it 10 minutes before the witness is -- comes to testify I don't think is
15 appropriate and I don't think it should be dealt with in this fashion.

16 PRESIDING JUDGE SCHMITT: We take -- please, Mrs Taylor, but please shortly.

17 MS TAYLOR: Very quickly. I'm just very concerned that we seem to be relitigating
18 issues which were ruled upon by the Trial Chamber. The Trial Chamber has ruled
19 on the relevance of the RFAs so I'm concerned that the Prosecution is trying to reopen
20 that issue by referring to Article 69(8) when we have a decision. Than you.

21 PRESIDING JUDGE SCHMITT: Thank you very much. We take notice of all the
22 positions and of course we will discuss this with the Chamber and we will come back.
23 Now for the protective measures for P-260 we have to go into private session.

24 Please, court officer.

25 (Private session at 10.55 a.m.)

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- 23 (Recess taken at 11.02 a.m.)
- 24 (Upon resuming in open session at 11.34 a.m.)
- 25 THE COURT USHER: All rise.

1 PRESIDING JUDGE SCHMITT: I think we have to go into private session for these
2 rulings.

3 (Private session at 11.35 a.m.)

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- 17 (Recess taken at 11.41 a.m.)
- 18 (Upon resuming in private session at 11.48 a.m.)
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10 (Closed session at 11.51 a.m.)
11 (Redacted)
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14 (Redacted)
15 (Open session at 11.52 a.m.)
16 THE COURT OFFICER: We are in open session, Mr President.
17 PRESIDING JUDGE SCHMITT: Thank you.
18 Good morning, Mr Witness. You are going to testify before the International
19 Criminal Court. On behalf of the Chamber I would like to welcome you to the
20 courtroom.
21 The Chamber has been established to try the case of the Prosecutor against Jean-Pierre
22 Bemba Gombo and others. You are called to testify to assist us in our search for the
23 truth. Mr Witness, you should have a card in front of you with a solemn
24 undertaking. Could you please have a look if you have it.
25 Could you please read out this solemn undertaking.

1 WITNESS: CAR-OTP-P-0260

2 (The witness speaks French)

3 THE WITNESS: (Interpretation) I solemnly declare that I shall speak the truth, the
4 whole truth and nothing but the truth.

5 PRESIDING JUDGE SCHMITT: Mr Witness, you are now under oath. You have
6 already been informed about the importance to speak the truth. Nevertheless,
7 I want to reiterate to you that as you have just promised, you have to speak the truth,
8 and that it is an offence within the jurisdiction of this Court to give false testimony.
9 Court officer, could we then go to private session, please.

10 (Private session at 11.55 a.m.)

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25 (Open session at 12.10 p.m.)

1 THE COURT OFFICER: We are in open session.

2 MR VANDERPUYE: Thank you.

3 Q. Witness, we're in open session so I'm going to ask you to be aware of that and
4 be careful not to reveal information that may tend to identify you, okay?

5 A. Yes, Mr Prosecutor.

6 Q. First I want to ask you can you confirm that you testified in the case of The
7 Prosecutor versus Jean-Pierre Bemba Gombo, and if you remember, can you tell the
8 Chamber when that occurred?

9 A. Yes, I remember that I testified in the Jean-Pierre Bemba Gombo case in May
10 and June 2013.

11 Q. Okay. And in the context of your testimony in that case, were you called as a
12 Prosecution witness, Defence witness, or a witness of the Chamber; do you recall?

13 A. I remember that I was a Defence witness.

14 Q. And during the course of your testimony, did you testify in the favour of
15 Mr Bemba?

16 A. Yes, I testified for Mr Jean-Pierre Bemba.

17 MR VANDERPUYE: If we could go into private session, Mr President, please.

18 PRESIDING JUDGE SCHMITT: I thought so. Yes, private session.

19 (Private session at 12.12 p.m.)

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16 (Open session at 12.19 p.m.)

17 THE COURT OFFICER: We are back in open session.

18 MR VANDERPUYE: Thank you.

19 Q. Witness, we're are back in open session, so again I just want to remind you of
20 that so that we try to be careful not to say anything that reveals your identity, okay?

21 A. Yes, I understand that.

22 Q. Now prior today -- prior to today, rather, you and I met before. Can you
23 confirm that?

24 A. Yes, we met before today.

25 Q. And can you confirm that we met most recently last week in the offices of the

1 Victim and Witnesses Unit?

2 A. Yes, I can confirm that.

3 Q. And can you confirm that we've also met on occasions prior to having met last
4 week at the Victim and Witnesses Unit, without telling publicly where that occurred?

5 A. Yes, I can confirm that.

6 MR VANDERPUYE: Mr President, can we go into private session, please.

7 PRESIDING JUDGE SCHMITT: Yes. Private session, please.

8 (Private session at 12.21 p.m.)

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9 (Recess taken at 1.01 p.m.)

10 (Upon resuming in open session at 2.30 p.m.)

11 THE COURT USHER: All rise.

12 MR TAKU: Your Honours, for the record Mr Tharcisse Gatarama is here now.

13 Mr Michael Rowse has been assigned to other duties for today, so

14 Mr Tharcisse Gatarama, legal assistant, is here with us today.

15 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Taku.

16 Chamber will now issue an oral decision on three Arido Defence requests made this
17 morning.

18 And the word "decision" already shows, Mr Larochelle, that your label "housekeeping
19 matters" was not 100 percent correct, put it this way.

20 First, as to the request for outstanding payments from the VWU, the VWU has

21 confirmed to the Chamber that a list of payments for P-260 and P-245 can be

22 distributed to the parties by the end of today. This list would include dates,

23 amounts and the general purpose of the payments. To this extent the first request by
24 the Arido Defence is granted.

25 This said, the Arido Defence is reminded that when the Chamber asked for a formal

26 finding on an outstanding issue as it did with this issue, it should either proceed as

1 directed or explain to the Chamber why it could not make a written filing.

2 Second, as to the Arido Defence request for an extension of deadline to respond to the

3 Prosecution's judicial notice application, this is filing 1339, the request is granted.

4 The response deadline for this motion is now the filing deadline on Friday, 16

5 October 2015. This new deadline applies to all the Defence teams.

6 Third, as to the matter raised of the extent of the Prosecution's witness contact

7 disclosure, the Chamber has already concluded that information relating to inter alia

8 the fact and frequency of witness contacts does not per se impact on witness

9 credibility. This is decision 1309.

10 Particularly in view of the information already disclosed regarding P-260's contacts,

11 the Chamber does not have any reason to believe that the Defence teams lack

12 sufficient information to examine P-260 on these matters.

13 This concludes these oral decisions.

14 And then my question would be, do we continue in private session or in open session

15 with the examination of the witness?

16 MR VANDERPUYE: Thank you, Mr President. I think we have to continue in

17 private session. That's where we were when we left off I think.

18 PRESIDING JUDGE SCHMITT: Then we go into private session.

19 (Private session at 2.33 p.m.)

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21 (Redacted)

22 (Open session at 2.56 p.m.)

23 THE COURT OFFICER: We're in open session.

24 PRESIDING JUDGE SCHMITT: And I understand, Mr Vanderpuye, that we are at

25 some point in time moving from what the witness has said in the past to what he is

1 saying today.

2 MR VANDERPUYE: Most definitely, Mr President, most definitely.

3 Q. I want to ask you some questions about your contacts with the Defence prior to
4 testifying in this case. So I'm going to ask you to be very careful not to reveal any
5 information that may tend to identify you as we're now in public session. Do you
6 understand that, sir?

7 A. Yes, I understand.

8 Q. I'm sorry. All right. Have you been in contact with any member of the
9 Defence, and you can see there are five of them over here, since the last time you met
10 with the Office of the Prosecutor?

11 A. I never met a member of the Defence since the time I met the representative of
12 the OTP -- correction -- the representatives of the OTP.

13 Q. Have you been in contact -- I'm sorry. Let me just see what your answer was.

14 All right. My question was whether you had been in contact with any member of
15 the Defence and your answer appears to be recorded in the record that you never met
16 with a member of the Defence. So let me ask my question, maybe it was not clear.
17 Have you been in contact other than meeting with any member of the Defence
18 involved in this case since the last time you met with the Office of the Prosecutor or
19 members of the Office of the Prosecutor?

20 A. I just said a few moments ago that when I met the members of the OTP, I had
21 never been, not a single time in contact with the members of the Defence.

22 Q. Thank you. Now we have it very clear in the record.

23 Let me ask this question then: Were you in contact with anybody claiming to be
24 associated with any member of the Defence in this case since the last time you met
25 with the Office of the Prosecutor?

1 A. I believe I came before this Court to tell the truth and nothing but the truth.

2 The day that I met with the representatives of the OTP, I had never met anyone at all
3 anywhere, and if someone told you that he had met with me, I am living proof and I
4 am before you that he -- with the evidence, such a person should state so.

5 Q. Just to be clear, nobody is accusing you of anything. I'm just asking questions
6 and if you could just respond to the -- respond to those questions, that will help move
7 things along, okay?

8 A. Okay.

9 Q. All right. I'm going to ask you this question now: Have you been in contact
10 with anybody associated with the Defence either directly or indirectly since the first
11 time you met with the Office of the Prosecution?

12 MR LAROCHELLE: This has been asked and answered I think we are --

13 PRESIDING JUDGE SCHMITT: I think it has not been asked -- it has been partly
14 asked and answered. It has not completely been answered in respect of the time
15 frame you are now pointing out. So I overrule it in so far.

16 Please answer the question.

17 THE WITNESS: (Interpretation) I have not understood the substance of the
18 purpose of the Prosecutor's question, your Honour.

19 PRESIDING JUDGE SCHMITT: I think Mr Vanderpuye you should rephrase it and
20 make clear what -- about what time we are speaking here.

21 MR VANDERPUYE:

22 Q. Since the first time you met with members of the Office of the Prosecutor in
23 April I think you said it was in 2014 until now, have you been in contact or has
24 anybody had contact with you that is, to your knowledge, related to any of the
25 accused in this case or any of the Defence teams in this case? That's my question. If

1 it's not clear, let me know.

2 A. I have already stated that from the time I met with the representatives of the
3 OTP, I have not had any contact with anyone else except people who have come from
4 the Office of the Prosecutor.

5 Q. All right.

6 MR VANDERPUYE: I'd like to go into private session if we could.

7 PRESIDING JUDGE SCHMITT: We go into private session.

8 (Private session at 3.03 p.m.)

9 (Redacted)

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11 (Redacted)

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16 (Redacted)

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Trial Hearing

(Private Session)

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- 11 (The hearing ends in private session at 4.02 p.m.)
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