



Original: English

No: ICC-01/05-01/13

Date: 9 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

**Motion Requesting Directions for Refreshing Recollection, and for Impeachment, of a
Party's Own Witness**

Source: Defence for Jean-Pierre Bemba Gombo
Defence for Aimé Kilolo Musamba
Defence for Jean-Jacques Kabongo Mangenda
Defence for Fidèle Babala Wandu
Defence for Narcisse Arido

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean-Jacques Kabongo Mangenda

Mr Christopher Gosnell
Mr Arthur Vercken

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Fidèle Babala Wandu

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

Counsel for Narcisse Arido

Mr Charles Achaleke Taku
Mr Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu and Narcisse Arido (“the Defence”) respectfully request the adoption of guidelines concerning the conditions to be met when a calling party wishes to present a prior statement to a witness during its examination-in-chief. The guideline sought in respect of refreshing a witness’s recollection is that the calling party is required to: (i) specifically establish the nature of the witness’s failure to remember; and (ii) determine whether the witness believes that his or her memory would be refreshed by consulting the information. The guideline sought in respect of impeachment is that reference to prior statements by the calling party will be permitted only where: (i) the calling party has sought express permission from the Trial Chamber to do so; and (ii) the Trial Chamber has granted such permission; (iii) on the basis that the witness is demonstrably hostile. Even where these conditions are satisfied, the Trial Chamber should retain a discretion as to whether resort to such materials during an examination-in-chief is appropriate, including with reference to the nature of the external material.
2. These proposed guidelines, which require more than a mere discrepancy between the witness’s *viva voce* testimony and a prior statement, reflect a procedure well-established by international case law. They uphold the principle of orality, confine exceptions thereto, and ensure that any such exceptions are done in circumstances that permit the Trial Chamber to assess the probative value of any testimony elicited as a result of such methods.

II. PROCEDURAL CONTEXT

3. On 5 and 6 October 2015, the Prosecution referred to prior out-of-court statements during the examination-in-chief of its own witness, Witness P-261. The stated purpose of such references was either to: (i) impeach Witness P-261 by reference to previous statements that the Prosecution regarded as inconsistent with the witness’s *viva voce* testimony; or (ii) refresh the witness’s ostensibly faulty recollection.
4. The same issue is likely to recur. A settled procedure may be beneficial to minimise *ad hoc* objections, and to ensure that there is clarity for all parties throughout the case as to the nature and modalities of the exercise. The Trial Chamber has the authority to

issue such guidelines pursuant to Rule 140(1) of the Rules of Procedure and Evidence and in the exercise of its inherent discretion to control the conduct of proceedings.

III. THE PRINCIPLE OF ORALITY IMPLIES THAT RESORT TO LEADING QUESTIONS, INCLUDING BY RESORT TO PRIOR STATEMENTS, MUST BE CONTROLLED AND APPROVED BY THE TRIAL CHAMBER

(i) The General Principle

5. A party calling a witness in an adversarial proceeding is not generally permitted to ask leading questions of its own witness.¹ This ensures that the witness's testimony on behalf of that party is a product of his or her present and actual recollection, and is not the product of suggestion by a party. "Leading" may be accomplished not only by putting an oral proposition to a witness, but also by putting documentary information in front of a witness that may prompt, or "lead", the witness towards a particular answer. Indeed, the presentation of a prior statement of a witness is likely to have a particularly strong suggestive effect since many witnesses will wish to avoid the appearance of inconsistency. Such prior statements, however, are themselves often elicited through leading questions or in conditions that are otherwise less ideal than in a courtroom under judicial supervision. The general rule, therefore, is that the testimonial evidence to be elicited from a witness by the calling party must be done through non-leading questions, including without resort to documentary information such as prior witness statements that have the same effect as a leading question.
6. This does not mean, however, that the calling party is prohibited from leading questions under any and all circumstances. The two circumstances in which leading is widely accepted in international criminal proceedings are: (i) refreshing a witness's recollection because he or she may have forgotten something, particularly because of a substantial lapse of time; or (ii) to impeach a party's own witness for reasons that have been specifically justified by the calling party – i.e. that the witness is hostile.²

¹ *Prlić et al.*, IT-04-74-T, Decision Adopting Guidelines for the Presentation of Evidence, 24 April 2008, para. 5 ("[l]eading questions shall not be permitted in direct examination, except with leave of the Chamber"). Available at: <http://www.icty.org/x/cases/prlic/tdec/en/080424.pdf>. *Lubanga*, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, ICC-01/04-01/06-2127, 16 September 2009, para. 23 ("[t]he purpose of the 'examination-in-chief' is 'to adduce by the putting of proper questions [...] relevant and admissible evidence which supports the contentions of the party who calls the witness'. It follows from this purpose that the manner of such questioning is neutral and that leading questions (i.e. questions framed in a manner suggestive of the answers required) are not appropriate.")

² *Katanga*, ICC-01/04-01/07-T-97-Red-ENG, 8 February 2010, p. 67, ll. 16-22 ("[a]nd if [the witness] is determined hostile by the Court, then you will proceed with cross-examination with the questions which will

(ii) *The Procedure for Refreshing a Witness's Recollection*

7. The general approach to refreshing a witness's recollection was set out in the *Katanga* Directions for the conduct of proceedings:

In principle, a witness shall testify to what he or she remembers having observed. Witnesses are not allowed to simply read from earlier statements or documents. However, given the length of time that has passed between the facts relevant to this case and the often traumatic nature of the facts to which the witnesses have to testify, the Chamber may allow witnesses to refer to documents in order to refresh their memory, but only insofar as:

- a) The documents in question contained the personal recollections of the witness, and
- b) Copies of the document have been made available to the opposing party, who may rely on the parts referred to by the witness during cross-examination.³

The justifications given in the *Katanga* case for permitting refreshing recollection – the passage of time and the traumatic nature of the events – are notably absent in the present case.

8. Subsequent ICC practice has confirmed, in accordance with the principle of orality and the rule against leading questioning, that “refreshing recollection” should be exceptional.⁴ Where it has been permitted, the practice is subject to two express pre-conditions. First, the calling party must demonstrate the precise nature of the memory lapse that cannot be remedied through questioning. This ensures that the witness's actual state of recollection is established clearly for the record before the refreshment exercise is undertaken, which in turn assists the Trial Chamber to subsequently assess the weight to be accorded to that refreshed recollection.⁵ Indeed, resort to

show possible contradictions and which will give rise to hostility. It won't go into new issue. If you take, on the other hand, a decision not to consider that person as hostile then you will continue with your classic questions within the framework of the examination-in-chief.”)

³ *Katanga*, Directions for the conduct of proceedings and testimony in accordance with rule 140, ICC-01/04-01/07-1665, 20 November 2009, para. 109. See *Gbagbo & Blé Goudé*, Directions on the Conduct of Proceedings, ICC-02/11-01/15-205, 3 September 2015, para. 47 (adopting the same approach as the *Katanga* Trial Chamber).

⁴ See e.g. *Lubanga*, Prosecution's Submissions pursuant to the Trial Chamber's 'Decision on prosecution's requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008', ICC-01/04-01/06-1390, 10 June 2008, paras. 8, 13, 18 (referring to the practice as “exceptional”).

⁵ *Hadžihasanović & Kubura*, IT-01-47-AR73.2, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, 2 April 2004 (“if refreshment is permitted, the Trial Chamber may consider the means by which the memory was refreshed, when assessing the reliability and credibility of the witness's testimony”). Available at: http://www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/040402.htm.

“refreshment” has been denied entirely where the Trial Chamber observed that the witness did not seem to be suffering from a lapse of memory, but was merely departing from what had been previously said.⁶ The fact that the previous statement was prepared with the involvement of the calling party may be a factor militating against the use of the document as a means of refreshing recollection.⁷

9. Second, the witness must be asked whether, and affirm that, the prior statement would assist their memory.⁸
10. Both principles are illustrated in the following passage from the *Bemba* case:

Q. Sir, do you not remember exactly when the second incident occurred?
Sir, would your statement refresh your recollection in this instance? Madam President, can I just have a short moment to locate it?
 Thank you. PRESIDING JUDGE STEINER: Yes, Mr Haynes. MR HAYNES: I formally object to this but I don't imagine that's going to get me anywhere, but I do think it is appropriate when a witness is being asked to recall events he said he saw, **if perhaps a preliminary question is put to him, namely, whether he can say whether it was during the hours of daylight or the hours of darkness, that seems to me to be the importance of the point in time and he doesn't need his memory refreshed as to that from his statement.** PRESIDING JUDGE STEINER: Mr Iverson, maybe I've lost something here, which is possible, when we are checking at the same time the statement and the transcript, but first I would like you to clarify which second event, what event you are talking about, and maybe followed by the question suggested by the Defence. **At the end Mr Haynes is 100 per cent right, because the Chamber will allow, if need be, that you refresh the memory of the testimony -- of the witness.** MR IVERSON: I agree,

⁶ *Katanga*, Decision on the “Prosecution’s Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility”, ICC-01//04-01/07-1958, 11 March 2010, para. 15 (“[t]he Chamber decided that, having regard to the precise circumstances of P-250’s testimony, it did not consider that it was necessary to refresh P-250’s memory by showing him his previous statements. In coming to this conclusion, the Chamber specifically took into consideration the fact that P-250 sometimes provided seemingly inconsistent answers as compared to his prior statements. On the facts, the Chamber considered that the witness did not lack memory and thus paragraph 109 was not applicable”); *Katanga*, ICC-01//04-01/07-T-308-ENG, 12 September 2011, p. 14, ll. 1-10 (where the Prosecution submitted that “he’s at this point trying to refresh the witness’s memory with the statement, and I understand that at this point that he’s trying to make an application to refresh the witness’s memory on this issue. Now, to the extent that that application is being made, let me say that the Prosecution is opposed to that application, if it is indeed being made, because the way the witness has been responding to questions so far and clearly being able to remember issues that were broached during his direct examination and cross-examination. So, Mr. President, we are opposed to that application and it is an inappropriate use of the statement of the witness at this stage of the proceedings.”)

⁷ *Katanga*, ICC-01//04-01/07-T-86, 27 November 2009, p. 25, ll. 1-2 (“the objection of Counsel O’Shea is favourably received and you can continue with another question”).

⁸ See e.g. *Ruto & Sang*, ICC-01/09-01/11-T-130-Red-ENG, 5 September 2014, p. 86, l. 23 (“Q. Would it assist you to refresh your memory from your statement in this regard?”); *Ruto & Sang*, ICC-01/09-01/11-T-129-Red-ENG, 4 September 2014, p. 46, ll. 14-15 (“Q. Would it help you to refresh your memory to check your diary as to that date?”)

Madam President. I think Mr Haynes' proposal is absolutely reasonable.⁹

11. Judges have also cautioned that once the refreshing exercise is complete, the witness should not merely be asked whether he or she adopts the words placed in front of him or her, but whether memory of the event has been revived:

Q. So, Mr Witness, I asked you if you recalled anything else (Redacted) about Mr Ruto's speech during the interview with Kass FM. Does that refresh your memory on (Redacted) A. Yes. PRESIDING JUDGE EBOE-OSUJI: Witness, at this stage the question to you would be: If your memory has been refreshed, can you now tell the Court what you recall (Redacted) It need not be what's in the statement. It needs to be what your memory, as you sit there, tells you about (Redacted) now that your memory has been refreshed.¹⁰

12. In summary, a discrepancy between a prior statement and oral testimony is not, in itself, sufficient to justify refreshing recollection by resort to a prior statement. At a minimum, two additional conditions are required: (i) a genuine lapse of memory must be established, and less intrusive methods of memory refreshment been attempted but failed; and (ii) the witness confirms that the document to be shown will assist his or her memory. Even then, the witness should be requested to clarify whether the information refreshes his or her recollection, rather than merely acknowledging that the words were stated on a previous occasion.

(iii) *The Procedure For Impeaching a Party's Own Witness*

13. A calling party may impeach its own witness on the basis of alleged inconsistencies with prior statements only after the witness has been declared "hostile" by the Trial Chamber.¹¹ As recently explained in the *Ntaganda* case, "hostility" is a question that generally arises from the nature of the witness's testimony, and is not lightly established:

⁹ *Bemba*, ICC-01/05-01/08-T-177-ENG, 28 October 2011, p. 32 (emphasis added). See *Bemba*, ICC-01/05-01/08-T-177-ENG, 28 October 2011, pp. 35, 39 (referring to refreshment of a witness's recollection by resort to a prior statement as "a last resource tool", and taking noting the witness's "psychological wellbeing" as a basis for permitting the practice).

¹⁰ *Ruto & Sang*, ICC-01/09-01/11-T-44-Red2-ENG, 8 October 2013, pp. 83-84.

¹¹ See e.g. *Katanga & Ngudjolo*, ICC-01/04-01/07-T-98-Red-ENG, 9 February 2010, p. 19, l. 4 – p. 20, l. 19; *Lubanga*, Decision on the prosecution's "Request on the Manner of Questioning of Witness DRC-OPT-WWWW-0015" and contact by the prosecution with Court witnesses, ICC-01/04-01/06-2201-Red, 1 February 2010, para. 20 ("[t]he change in his account is fundamental, since he has seemingly resiled from some of the central elements of his first witness statement").

If, during the testimony of a witness, the calling party believes that a witness is hostile, or adverse, to the said party and not desirous of providing the expected evidence, it may – having provided the witness with an opportunity to explain deviations from expected testimony – make an application to have the Chamber declare the witness as “hostile”. A request to declare the witness as hostile, without first having attempted to refresh the witness’s memory, may only be made in those situations where – without recourse to a previous statement – it is clear that the witness is not desirous of providing the expected testimony at the instance of the calling party and behaves objectively hostile, or adverse to the calling party. To assess whether a witness is hostile or adverse to the calling party, the Chamber may consider, *inter alia*, i) whether the witness has been hostile in his or her general demeanour; ii) whether the witness’s answers tend to show evasiveness on the part of the witness; iii) whether the testimony of the witness before the Court has been in whole or in part deliberately or systematically inconsistent with a prior statement; iv) whether the witness has become systematically adverse to the calling party, not only be appearing to deliberately impugn the calling party’s case, but in addition by appearing to systematically support the case of the calling party.¹²

14. Hostility is a matter to be decided, as reflected in the foregoing passage, by the Trial Chamber and not the calling party. The *Ntaganda* approach follows that adopted in the *Katanga* case:

[h]aving deliberated, the Chamber would firstly like to indicate that it intends to rule on a case-by-case basis with regards to – with regards to applications to have a witness declared hostile by the appellant party. In this regard and in the case in question it considers that with a view to all of the answers that Witness 250 has provided to the questions that were put by the Prosecution since the start of his testimony, that this witness cannot be described as hostile. It notes that the witness has to date come up with precise answers to a great majority of questions that were put to the witness, certain of which were reiterated. It also notes that the answers which were more evasive or which didn't totally concord with other questions, that the answers minimising previous declarations or statements with regards to previous subjects or answers which weren't as complete as previous statements that were given cannot in themselves make it possible for Witness 250 to be declared as hostile. And this *fortiori* given regard to the behaviour that this witness has shown with regard to the Prosecutor up to now throughout the debate.

The Chamber would like to stress that the simple fact of sometimes having unfavourable answers is not in itself enough to mean that a witness is declared hostile. The Chamber notes that it is late, after several days of examination-in-chief, that the Prosecutor has mentioned the possible hostility of the witness; and at this level in a general way it asks each and all of the participants to be extremely attentive in the future to

¹² *Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-619, 2 June 2015, para. 47.

the need to be much quicker if any of them consider that it -- that it is right to submit to the Chamber the possible hostility of a witness.¹³

15. The ICTY Appeals Chamber, though articulating grounds for impeachment that are slightly broader than hostility, has held that a Trial Chamber commits “discernible error” by “leav[ing] the scope of the challenge to the discretion of the impeaching party”:

Despite the Prosecution’s assertion that the Trial Chamber has not abandoned or undermined its authority to control the nature and extent of a witness’ examination under Rule 90(F), it is difficult to interpret the Impugned Decision otherwise. By Stating that “a party need not seek permission to challenge the credibility of its own witness nor is the process of having a witness declared ‘hostile’ necessary before taking such a step”, the Trial Chamber leaves no room for objections to impeachment. Furthermore, objections to the scope of the challenge also appear to be precluded by the Trial Chamber’s assertion that it “would not place any limitations on the way in which such a challenge may be conducted.” This is the prejudice occasioned by the discernible error.¹⁴

16. These cases confirm that the calling party bears the burden of applying to the Trial Chamber for permission to attempt to impeach its own witness using a prior statement. The only recognised basis for doing so at the ICC is a declaration that the witness is

¹³ *Katanga & Ngudjolo*, ICC-01/04-01/07-T-98-Red-ENG, 9 February 2010, p. 19, l. 19 – p. 20, l. 19; *Katanga & Ngudjolo*, ICC-01/04-01/07-T-97-Red-ENG, 8 February 2010, p. 65, l. 14 – p. 66, l. 10 (“[w]here a witness is considered as hostile, it is up to us to show it. If he's not hostile to you, you can continue with your examination-in-chief without being simplistic, the Chamber has listened well to Counsel O'Shea, without being simplistic, the Chamber does have the feeling that in order to determine if a witness is hostile then it is necessary to examine that person to see whether he responds to questions orally during the debate in a way that is directly opposed to what he affirmed in a previous statement before the investigators. It is also necessary to determine whether this witness refuses to reply to a question while he perfectly replied to the same -- while he replied to the same question during a statement before one of your investigators. Or if he replies in a totally different way, so, Prosecutor, it is important that tomorrow at 2.00 that you can tell the Chamber if you consider that this witness is hostile. If he's hostile to you. It is -- and if that is the position that you take, you have to indicate it clearly to us, not the examples, but you need to indicate the points to us which in the answers that were given you -- they make you think that that witness is hostile. The Chamber will then withdraw in order to examine the answers that you will give to us, and if it considers that the witness is indeed hostile, it will give you leave to proceed with a cross-examination as envisaged in paragraph 67 of this decision.”)

¹⁴ *Popović et al.*, IT-05-88-AR73.3, Decision on Appeals Against Decision On Impeachment of a Party’s Own Witness, 1 February 2008, paras. 26-28. Available at: <http://www.icty.org/x/cases/popovic/acdec/en/080201.pdf>. See also *Limaj*, T. 2736-2737 (1 February 2005) (“[t]he general position is that a party calling a witness may not discredit that witness. Discredit is a complex concept of varying application, but this need not be separately developed for present purposes. Where a witness is unfavourable and also in the case of an adverse or hostile witness, the prohibition against discrediting is relaxed. There are, however, material distinctions between an unfavourable witness and an adverse one in this context. If the present application is to succeed on this dichotomy the witness must be shown to be adverse, or as it is often described, hostile. What, then, is an adverse or hostile witness? The statement in Stevens Digest of the Evidence, Article 147, has long been regarded as offering reliable guidance and has received express judicial approval. It reads: ‘If a witness appears to the judge to be hostile to the party calling him, that is to say not desirous of telling the truth to the Court at the instance of the party calling him.’ In that situation, the law has been long settled at common law that a judge may, as a matter of discretion permit the examination by the party calling the witness to be conducted in the manner of a cross-examination to the extent which the judge considers necessary for the purpose of doing justice.”) <http://www.icty.org/x/cases/limaj/trans/en/050201ED.htm>.

hostile which, in most circumstances, can be assessed only in relation to the their testimony before the court. Only once the Trial Chamber has ruled on the application may such questions be put to the witness.

IV. CONCLUSION AND RELIEF REQUESTED

17. Direct testimony on behalf of a party should not be elicited through leading questions, including indirect leading by resort to prior statements.¹⁵ Any exceptions thereto should be expressly defined; subject to express approval by the Trial Chamber; and be transparently presented so that the probative value of any testimony elicited can be appropriately assessed.
18. The Trial Chamber is accordingly requested to require a calling party seeking to refresh a witness's recollection with a prior statement: (i) to establish the nature of the witness's failure to remember; and (ii) to ask the witness whether he believes that his memory would be refreshed by resort to the information sought to be put before the witness. The Trial Chamber is also requested in respect of any attempt to impeach a party's own witness to: (i) require any party seeking to impeach its own witness to make a specific application to do so; (ii) make a ruling on the application; and (iii) permit such questions only when the conditions set out by the *Ntaganda* Trial Chamber as quoted above are satisfied.

¹⁵ The Prosecution could, incidentally, have used Rule 68(3) to tender P-261's prior statement into evidence. Having not done so, it should not be permitted to engineer an *à la carte* introduction of the statement by reading selected passages into the record as part of its questioning.



Melinda Taylor
Counsel for Mr. Jean-Pierre Bemba Gombo



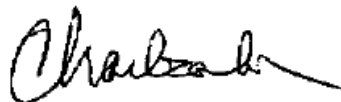
Paul Djunga Mudimbi
Counsel for Mr. Aimé Kilolo Musamba



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda



Jean-Pierre Kilenda
Counsel for Mr. Fidèle Babala Wandu



Chief Charles A. Taku
Counsel for Mr. Narcisse Arido

Respectfully submitted this 9 October 2015,
At The Hague, The Netherlands