

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16/03/2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

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*

Confidential

**Defence Request for Leave to Reply to Prosecution's response to Bemba Defence
Request Concerning the Review of Seized Material**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for the Defence of Mr Aimé Kilolo Musamba

Paul Djunga

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for the Defence of Mr Narcisse Arido

Goran Sluiter

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

A. INTRODUCTION

1. On 19 February 2015, the Defence for Mr. Jean-Pierre Bemba Gombo (the Defence) submitted its 'Request concerning the review of seized material' ("the Request").¹

2. On 13 March 2015, the Prosecution filed the 'Prosecution Response to Bemba Defence Request Concerning the Review of Seized Material' ("the Response").²

3. The Response is predicated on misconstructions of the Defence's position and previous decisions in this case, advances positions, which are factually irreconcilable, and claims factual concessions on points that were not put in issue.

4. The Defence requests leave to reply in relation to these matters in order to clarify the record, and ensure that the Trial Chamber's adjudication of the Request is based on the actual arguments and positions advanced by the Defence, as opposed to those which the Prosecution has incorrectly attributed to it.

5. The present request has been filed on a confidential basis in order to accord with the level of confidentiality of the Response. There is nothing of a confidential nature in the present filing, and the Defence has no objection to it being reclassified as public.

B. SUBMISSIONS

Misconstructions of the Defence position and decisions in this case

¹ ICC-01/05-01/13-822.

² ICC-01/05-01/13-842-Conf.

6. The Response has averred that in accordance with the system of review proposed by the Defence:

- The Defence would be sole arbiters as to what is or is not privileged;³ and
- The Defence for Mr. Bemba would be the sole entity reviewing the material, which would intrude on the rights of other parties.⁴

7. These submissions are incorrect, and do not represent the Defence position. Granting the Defence leave to reply in order to clarify these points would eliminate any ambiguities and ensure that the record accurately reflects the Defence proposal.

8. The Response has also claimed firstly, that “the Independent Counsel procedure provides the Bemba Defence an opportunity to be heard”,⁵ and secondly, that the “the Request noticeably omit[s] that the present procedure permits Bemba to challenge the Independent Counsel’s review; it also fails to assert that Bemba has ever sought to avail himself of this possibility.”⁶

9. Apart from one discrete instance pertaining to the seizure of items from Mr. Bemba’s cell, the Defence had no opportunity to be heard before the reports of the Independent Counsel were transmitted to the Prosecution. The most recent decision of the Pre-Trial Chamber continued to exclude the Defence of Mr. Bemba from the process.⁷

³ Response, paras. 6, 7, 16, 17; Cf. Request, paras. 33 (“preliminary involvement of the Bemba Defence”), para. 39 (Defence substituting for Independent Counsel not the Chamber), para. 44.

⁴ Response, para. 23, Cf. Request, para. 38.

⁵ Response, para. 20.

⁶ Response, para. 21.

⁷ ICC-01/05-01/13-765, p.6.

10. The Pre-Trial Chamber also declined to consider any Defence arguments on this matter in its Decision on the Confirmation of the Charges.⁸

11. In light of the fact that the Prosecution has advanced a general claim, which does not reflect the record, Defence should be accorded with an opportunity to adduce specific examples, in which it was excluded from the process, in order to ensure that the Trial Chamber has all relevant information before it.

Factually, irreconcilable positions advanced by the Prosecution

12. In order to support the continued employment of the Independent Counsel, the Prosecution has:

- i. Argued that the Independent Counsel exercised his tasks under the full supervision of the Pre-Trial Chamber;⁹
- ii. Posited that the position of Independent Counsel is supported by domestic practice, for example, the United Kingdom, which allows for an investigatory body/prosecutorial entity to seek advice from an Independent Counsel, or Australia, which permits privileged materials to be reviewed by an independent entity or Counsel, in lieu of the Chamber or Tribunal seized of the case;¹⁰
- iii. Averred that the Defence has failed to substantiate that privileged material or information was transmitted to the Prosecution;¹¹ and
- iv. Claimed that the Independent Counsel's mandate included the task of identifying exculpatory information, with a view to the Chamber lifting privilege in order to transmit it to the parties.¹²

⁸ ICC-01/05-01/13-749, para. 10.

⁹ Response, para. 22.

¹⁰ Response, fn. 14.

¹¹ Response, para. 14.

¹² Response, para. 25.

13. With respect to the first two points, since the Prosecution has advanced the positions that firstly, judicial oversight of a reviewing mechanism is necessary, and secondly, that domestic practice supports the establishment of an independent counsel, there is good cause to verify whether the practice cited by the Prosecution supports the particular mandate and powers of the Independent Counsel appointed in this case, as opposed to an 'independent counsel', operating in a different legal system, where other safeguards or procedures are at play.

14. With respect to the last two points, the Request concerned the future mechanism, which will be adopted and approved by this Trial Chamber for reviewing privileged material. It was not an appeal or request to review the past actions of the Pre-Trial Chamber or Independent Counsel.

15. The fact that the Defence did not, in a procedural request, explicitly list each and every privileged document or piece of information that was transmitted to the Prosecution should not be construed as a concession on this point.

16. Nonetheless, since the Prosecution has now put this in issue in its Response, the Defence is entitled to be heard on this point.

17. Critically, the Prosecution's stance that no privileged information has been transmitted to the Prosecution appears to derive from its argument that privileged information can lose its privileged protection, if it is exculpatory in nature. Given that the legal and practical implications of this position have yet to be litigated, there is good cause for the Defence to be heard in relation to:

- i. Whether and when legal privilege can be lifted – in the absence of the consent of the Defence – due to the fact that the information is exculpatory in nature;

- ii. Whether the Independent Counsel or Chamber should lift privilege in relation to matters pertaining to exculpatory information in the absence of a request from one of the Defence teams for them to do so;¹³ and
- iii. Whether the putative right of Defence teams to receive privileged information, which is exculpatory, extends to a right for the Prosecution to receive the same.

C. RELIEF SOUGHT

18. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba Gombo respectfully requests the Trial Chamber to:

- i. Authorise leave to reply to the Response, in relation to the issues set out herein; and
- ii. Grant the Defence five working days from the issuance of the Trial Chamber's decision, to file the reply.



Melinda Taylor
Lead Counsel of Mr. Jean-Pierre Bemba Gombo

Dated this 16th day of March, 2015

At The Hague, The Netherlands

¹³ ICC-01/05-01/13-836-Conf, fn. 38.