

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 15 May 2015

TRIAL CHAMBER VII

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

Public Redacted Document
With
Confidential Annex A

Public redacted version of “Prosecution’s Request for Discrete Instructions to the Independent Counsel in Relation to the Seized Material”, 13 May 2015, ICC-01/05-01/13-946-Conf

Source: The Office of the Prosecutor

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

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Detention Section

**Victims Participation and Reparations
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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests that Trial Chamber VII (“Chamber”) direct the Independent Counsel in his review of potentially privileged material obtained by national authorities (“Seized Material”), to identify any and all records of interviews of Defence witnesses in the *Bemba* case (“Main Case”) in any form, including audio recordings, transcriptions, interview notes and, where available, their translations (collectively “Prior Statements”) with a view to disclosing them to the Parties in redacted form – if necessary - pursuant to the Chamber’s direction.

2. These Prior Statements, as detailed in previous submissions,¹ are important evidence to determine the truth because they relate to the allegation of improper witness interference which, in the Chamber’s words, is “the very matter to be determined in this case”.² Moreover, the Prosecution’s request focuses exclusively on evidence elicited from witnesses and excludes any internal work-product which is not subject to disclosure under rule 81(1) of the Rules of Procedure and Evidence (“Rules”). Should the Independent Counsel identify in the Prior Statements any information within the purview of rule 81(1) of the Rules, redactions where appropriate could be applied before disclosure to the Parties.

3. Unlike the Prosecution’s prior request for the production of evidence directly from one of the Accused,³ this application does not seek to compel the Accused or to invoke the Defence’s disclosure obligations. Instead, this request is limited to having the Independent Counsel instructed to identify evidence obtained by national authorities pursuant to cooperation requests from the Court and which is now in the

¹ ICC-01/05-01/13-820-Conf, paras.4-6; ICC-01/05-01/13-788-Conf, paras.5-11.

² ICC-01/05-01/13-907, para.14.

³ ICC-01/05-01/13-820-Conf. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (“Accused”).

Court's custody. Accordingly, the disclosure of the Prior Statements would be independent from the Accused's will or the Defence's obligations,⁴ and therefore, would not violate the accused's rights under article 67(1)(g) and (i) of the Rome Statute ("Statute").

II. Confidentiality

4. This filing is classified as "Confidential", as it refers to material that is not available to the public. The Prosecution will file a public redacted version as soon as possible.

III. Submissions

A. The evidence sought is highly material to the case and is likely to be included in the Seized Material

5. As previously noted,⁵ the requested material would be probative evidence of whether there has been improper interference with the testimony of witnesses in the Main Case, which lies at the core of this case. Substantive inconsistencies between a witness's prior statements and/or interviews and his subsequent trial testimony, although not dispositive, may comprise strong evidence of witness tampering. In fact, Kilolo argued that in his non-illicit preparation of witnesses he merely reminded witnesses of the content of their prior statements⁶ and, in support of his contention, he produced some material related to certain witnesses' prior interviews.⁷

⁴ Rule 79 of the Rules.

⁵ ICC-01/05-01/13-820-Conf, paras.4-6; ICC-01/05-01/13-788-Conf, paras.5-11.

⁶ [REDACTED].

⁷ [REDACTED].

6. Because of their significant relevance to this case, it is important that the Independent Counsel is made aware of the need to identify the Prior Statements for their future disclosure to the Parties under the regimen specified by the Chamber.⁸

7. The evidence sought is likely to be found in the material seized from all of the accused persons and the searched premises and is now in the Court's possession.⁹

8. First, the existence of the Prior Statements and Kilolo's prior possession of them as Bemba's counsel in the Main Case is not in dispute; Kilolo's submissions¹⁰ and independent evidence¹¹ confirm this.

9. Second, considering the broad scope of the material seized, and the places searched, it is reasonable to infer that evidence of the Prior Statements is likely to be found in the material already transmitted to the Court. This includes (1) physical and electronic items seized upon the search of the accused persons, the site of their arrest, any vehicle in their possession and any site connected to them including offices at the Court, work-place offices and homes;¹² and (2) the accused persons' email accounts transmitted to the Court at the Prosecution's request,¹³ which [REDACTED].¹⁴

B. Specific instructions to the Independent Counsel must be given so as to preserve highly relevant material

10. The Prosecution has previously sought a production order for this evidence,¹⁵

⁸ ICC-01/05-01/13-893-Conf.

⁹ The materials seized from all Accused have been gradually transmitted to the Court; [REDACTED].

¹⁰ [REDACTED].

¹¹ CAR-OTP-0080-0238 at 0241, lns.64-70, at 0242, lns.105-106; CAR-D21-0004-0310 at 0318, lns.270-274; CAR-OTP-0080-0494 at 0514, lns.723-724; CAR-OTP-0080-0100 at 0111, lns.380-405, 0112, lns.414-415; [REDACTED]; D-55, ICC-01/05-01/08-T-265-CONF-ENG ET, 30 October 2012, p.14, lns.18-22.

¹² ICC-01/05-01/13-1-Red2-tENG.

¹³ See ICC-01/05-01/13-310-Conf; See also ICC-01/05-01/13-366-Conf.

¹⁴ [REDACTED].

¹⁵ ICC-01/05-01/13-820-Conf.

which was denied because the Chamber was not satisfied that such an order would not violate the rights of the accused under article 67(1)(g) and (i) of the Statute (“Decision on the Production Motion”).¹⁶ However, a similar concern does not arise with respect to the Seized Material. Their production does not depend on the will of the Accused, and therefore no self-incrimination issue arises.¹⁷ Nor would such material fall within the scope of the attorney-client privilege, which is strictly limited to communications made in the context of the professional relationship between the suspect/accused and his or her legal counsel and does not extend to witnesses’ Prior Statements.¹⁸

11. Because of this decision, it is imperative that specific instructions be given to the Independent Counsel to ensure that highly material evidence is brought to the Chamber’s attention to decide on its disclosure to the Parties. These instructions would prevent the Decision on the Production Motion resulting in the Independent Counsel disregarding important evidence during his review.

C. The Independent Counsel’s review will preserve the Defence’s internal work product

12. The primary mandate of the Independent Counsel is to filter any material that may be privileged. Also consistent with his mandate, the Independent Counsel should be directed to identify relevant material such as the Prior Statements and exclude any information that may contain internal work product under rule 81(1) of

¹⁶ ICC-01/05-01/13-907, para.14.

¹⁷ The jurisprudence of European Court of Human Rights has held that, “[t]he right not to incriminate oneself [...] does not extend to the use in criminal proceedings of material [...] which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant ...” (emphasis added). See ECHR, *Saunders v UK*, Appl. no. 19187/91, “Judgment”, 17 December 1996, para.69. See also ECHR, *Jalloh v. Germany*, Appl. no. 54810/00, “Judgment”, 11 July 2006, para.102; ECHR, *J.B. v Switzerland*, Appl. no. 31827/96, “Judgment”, 3 August 2001, para.68.

¹⁸ Rule 73(1) of the Rules.

the Rules, such as the opinion of investigators or counsel commenting on the evidence. Redaction of such information, following a proposal from the Independent Counsel to the Chamber, would eliminate any concern regarding the Prosecution's access to this material.

IV. Conclusion

13. For the foregoing reasons, the Prosecution requests the Chamber to direct the Independent Counsel to conduct a review of the totality of the seized material in the Court's custody to identify all records of interviews of Defence witnesses in the Main Case in any form, including audio recordings, transcriptions, interview notes and, where available, their translations, for their provision to the Parties in accordance with the procedure adopted by the Chamber.



Fatou Bensouda, Prosecutor

Dated this 15th Day of May 2015
At The Hague, The Netherlands