

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 29 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, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU and NARCISSE ARIDO***

Public

**Decision on the Prosecution's Request for Discrete Instructions to the
Independent Counsel in Relation to the Seized Material**

Decision 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-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

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

States Representatives

Others

Independent Counsel

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Trial Chamber VII (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (the ‘Case’), having regard to Articles 64(2) and 67(1)(c) of the Rome Statute (the ‘Statute’), issues the following Decision on the Prosecution’s Request for Discrete Instructions to the Independent Counsel in Relation to the Seized Material.

Submissions

1. By its application of 13 May 2015 (the ‘Application’),¹ the Office of the Prosecutor (the ‘Prosecution’) requests the Chamber to direct Independent Counsel,² in his review of potentially privileged material obtained by national authorities (the ‘Seized Material’), to identify any and all records of interviews of Defence witnesses in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (the ‘Main Case’) in any form, including audio recordings, transcriptions, interview notes and, where available, their translations (collectively, the ‘Requested Material’) with a view to disclosing them to the parties in the Case, if necessary in redacted form, pursuant to the Chamber’s direction.³
2. The Prosecution argues that the Requested Material is likely to be amongst the Seized Material⁴ and would be probative evidence of whether there has been improper interference with the testimony of witnesses in the Main Case.⁵ It submits that substantive inconsistencies between a witness’s prior

¹ 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.

² Independent Counsel was appointed by the Chamber in Decision on ‘Request concerning the review of seized material’ and related matters, 9 April 2015, ICC-01/05-01/13-893-Conf; a public redacted version is also available, ICC-01/05-01/13-893-Red.

³ Application, ICC-01/05-01/13-946-Conf, paras 1 and 13.

⁴ Application, ICC-01/05-01/13-946-Conf, paras 7-9.

⁵ Application, ICC-01/05-01/13-946-Conf, para 5.

statements and/or interviews and his or her subsequent trial testimony, may comprise strong evidence of witness tampering.⁶

3. The Prosecution argues that specific instructions must be given to Independent Counsel to bring this 'highly material evidence' to the Chamber's attention, in light of the Chamber's previous decision which denied the Prosecution's request for this evidence.⁷ The Prosecution submits that the redaction of any information concerning the internal work product of the defence, which is not subject to disclosure pursuant to Rule 81(1) of the Rules of Procedure and Evidence, would eliminate any concern regarding the Prosecution's access to this material.⁸ The Prosecution further submits that, unlike its prior request for the production of the evidence directly from the accused, the present Application does not engage the rights of the Accused under Article 67(1)(g) and (i) of the Statute.⁹

Analysis

4. The Chamber considers it unnecessary to receive responses from the Accused before ruling on the relief sought by the Prosecution.
5. The Chamber recalls that Independent Counsel has been tasked to review the Seized Material only as regards its relevance to this Case and its potentially privileged status.¹⁰ Instructing Independent Counsel to identify for disclosure purposes the Requested Material, in accordance with the Application, would effectively and unwarrantedly broaden the mandate of Independent Counsel. Furthermore, this is likely to result in a multiplication of issues – a matter of public policy concern for the administration of justice

⁶ Application, ICC-01/05-01/13-946-Conf, para. 5.

⁷ Application, ICC-01/05-01/13-946-Conf, para 11, referring to Decision on Prosecution Request for Production of Evidence in Possession of the Defence, ICC-01/05-01/13-907.

⁸ Application, ICC-01/05-01/13-946-Conf, paras 2 and 12.

⁹ Application, ICC-01/05-01/13-946-Conf, para. 3.

¹⁰ Decision on 'Request concerning the review of seized material' and related matters, 9 April 2015, ICC-01/05-01/13-893-Conf, paras 19-23.

in general and a matter of particular concern for this Chamber in the particular circumstances of this case, as forewarned earlier in the proceedings.¹¹

6. In any event, the Prosecution investigation cannot continue indefinitely. Notwithstanding previous submissions made by the Prosecution that there is some outstanding information which the Prosecution is expecting to review, which may or may not lead to further prosecutorial action bearing on the Case,¹² the Chamber already emphasised during the first status conference on 24 April 2015, that the trial 'need[s] to begin and to proceed expeditiously'.¹³ The Chamber foreshadowed during that status conference that, if need be, it would impose a deadline within which the Prosecution must collect and analyse any further expected evidentiary material¹⁴ and recalls that it has since set the deadline of 30 June 2015 for the Prosecution to disclose any incriminating material it intends to rely on at trial.¹⁵ The Chamber reiterates that '[t]he trial may not thus be delayed on the speculative hope that further evidence may be uncovered from materials not now in the possession of the Prosecution.'¹⁶ In these circumstances the Chamber declines to grant the Application that would effectively require the Independent Counsel to conduct a fishing expedition on the behalf of the Prosecution. Such an enlarged mandate would run counter to the role of the Independent Counsel who acts independently of the parties and the Chamber and, as such, does not exercise his functions as an agent of the Prosecution.¹⁷

¹¹ ICC-01/05-01/13-T-8-CONF-ENG, page 4, lines 8-15.

¹² ICC-01/05-01/13-T-8-CONF-ENG, page 71, lines 5-8.

¹³ ICC-01/05-01/13-T-8-CONF-ENG, page 71, lines 9-10.

¹⁴ ICC-01/05-01/13-T-8-CONF-ENG, page 71, lines 10-12.

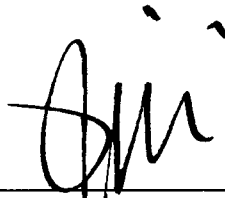
¹⁵ Decision on Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959, para. 52 and page 19.

¹⁶ ICC-01/05-01/13-959, para. 50.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

REJECTS the Application.

Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Bertram Schmitt

Dated 29 May 2015

At The Hague, The Netherlands