

**Cour
Pénale
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**International
Criminal
Court**

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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***

Confidential

With Confidential Annexes A, B, and C

**Defence's response to Prosecution's Request pursuant to Regulation 35 to vary the
Time Limit for Disclosure of an Expert Report**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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I. Introduction

1. The Defence for Jean-Pierre Bemba Gombo opposes the Prosecution request to vary the time limit for the disclosure of the expert report (the Request).¹

2. The Prosecution has failed to demonstrate that it has taken all reasonable steps to obtain this evidence in a diligent manner.

3. The Prosecution has previously conceded that in order to respect the right of the Defence to adequate time and facilities to prepare its case, expert reports should be disclosed within the same time frame as witness statements.²

4. Given the scope and technical subject matter of the report, delayed disclosure would also be unduly prejudicial to the rights of the Defence, and would be likely to delay the commencement of the trial.

5. Finally, the Defence notes with concern that the Prosecution has indicated, in a footnote, that the Prosecution will address the issue of the 'expert witness' from Western Union in a separate filing.³

II. Submissions

6. The Prosecution application for an arrest warrant was based primarily on intercepted information. The need for an expert witness to interpret and analyse such information should have been apparent from the very outset.

¹ ICC-01/05-01/13-989-Conf.

² ICC-01/05-01/13-T-8-CONF-ENG, p. 46, line 12.

³ Request, footnote 2.

7. Since the pre-confirmation phase was conducted on an *inter partes* basis, the feasibility of jointly instructing an expert could have been explored with the Defence teams during the pre-confirmation phase.

8. However, whilst the Prosecution conducted its own forensic analysis of the materials in 2014,⁴ the Prosecution does appear to have taken steps towards calling an expert witness on such issues until January 2015, when it approached and met with Mr. Rene Pluijmers unilaterally.

9. The Defence were not invited to this meeting, and no minutes were taken.⁵

10. The Prosecution did not disclose any concrete information concerning the nature and status of expert witnesses until the Status Conference of 24 April 2015, during which the Prosecution indicated that they intended to call three experts, one of whom was "not really an expert".⁶ As concerns the other two, the Prosecution intended to call an expert in the field of communications, and the other was a linguist, whom they were 'exploring' the possibility of calling.⁷

11. The Prosecution also confirmed that they had not explored the possibility of joint instruction. They nonetheless sought to attribute their failure to disclose an expert report to the fact that the Prosecution "had not engaged an expert pending consultations with the Defence or the possibility of jointly instructing an expert."⁸

12. The correspondence later disclosed by the Prosecution reflects the fact that prior to the Status Conference, the Prosecution had in fact started the process of

⁴ CAR-OTP-0083-0002; CAR-OTP-0075-2551.

⁵ Confidential Annex A.

⁶ ICC-01/05-01/13-T-8-CONF-ENG, p. 33, lines 18-19.

⁷ ICC-01/05-01/13-T-8-CONF-ENG, p. 34, lines 1-6.

⁸ ICC-01/05-01/13-T-8-CONF-ENG, p. 46, lines 14-16.

retaining Mr. Pluijmers as a Prosecution expert;⁹ the possibility of retaining him on a joint basis had not been mooted or discussed with him.

13. To the contrary, when this possibility was first broached with the expert (four months later), expert indicated that he would prefer any communications to be channelled through a common interlocutor i.e. the Registry rather than the Defence.¹⁰ This in itself eliminated the feasibility of joint instruction.

14. It is also incorrect that the Trial Chamber 'instructed' the Prosecution to engage with the Defence with a view jointly instructing a witness.¹¹ As clarified by the Presiding Judge: "It wasn't a preference, it was a suggestion that would be helpful to the case to be explored."¹²

15. It was therefore clear that the possibility of pursuing joint instructions should be pursued in a manner which was consistent with the Prosecution's duty of diligence and disclosure obligations. The Chamber thus specified that any dialogue should be concluded by 15 May 2015, and in the report should be filed "promptly thereafter".¹³

16. After the conclusion of the Status Conference, although the Prosecution entered into discussions with the Defence, it did so in a manner which was not consistent with the Chamber's directive that such discussions should be concluded by 15 May 2015.

17. For example, the Defence were not disclosed any details or particulars regarding Mr. Pluijmers until 6 May 2015, which is when the Prosecution provided the Defence with his curriculum vitae.

⁹ ICC-01/05-01/13-956-Conf-AnxA.

¹⁰ Confidential Annex B.

¹¹ Cf Request, para. 2.

¹² ICC-01/05-01/13-T-8-CONF-ENG, p. 47, lines 2-3.

¹³ ICC-01/05-01/13-T-8-CONF-ENG, p. 49, lines 23-25.

18. During the meeting of 6 May 2015, the Prosecution also raised the issue of authenticity but nonetheless indicated that even if the Defence were to stipulate on issues of authenticity, it is likely that it would still be necessary for the Prosecution to call an expert witness.

19. The Prosecution then disclosed 'bullet point' expectations of his testimony on 8 May 2015. Although the Defence requested information concerning other potential experts, the Defence was only informed that the Prosecution had considered instructing an expert from the United Kingdom, but decided not to do so.¹⁴

20. Contrary to the representations of the Prosecution,¹⁵ the Prosecution did not disclose the minutes of its meeting with the expert, on 6 May 2015. Upon further inquiries from the Defence as to the existence of these minutes, on 19 May 2015, the Prosecution confirmed that these minutes did not in fact exist.¹⁶

21. Notwithstanding the 15 May deadline, the Prosecution filed its report to the Trial Chamber on 21 May 2015.¹⁷ In this filing, the Prosecution claimed that the Defence had 'requested' additional time for the conclusion of the issue of joint instruction.¹⁸

22. This is not the case. Prior to 15 May 2015, the Defence teams indicated that they required more information concerning the proposed experts, and the nature of Prosecution interactions with its proposed expert.

¹⁴ Confidential Annex B.

¹⁵ Confidential Annex C.

¹⁶ Confidential Annex A.

¹⁷ ICC-01/05-01/13-956-Conf.

¹⁸ ICC-01/05-01/13-956-Conf, para. 8.

23. Defence teams had also indicated that they had insufficient time or information to obtain instructions from their clients on issues of authenticity. Nonetheless, none of the Defence teams requested the Prosecution to seise the Chamber with a request to extend the 15 May deadline as concerns the joint instructions of expert witnesses.

24. The Prosecution was not requested by the Defence or mandated by the Trial Chamber to refrain from taking the necessary steps to comply with its 30 June 2015 deadline.

25. The Prosecution also appears to have inquired February 2015 as to how much time Mr. Pluijmers required to complete his report.¹⁹

26. Accordingly, when the Trial Chamber issued its decision on the disclosure time table on 22 May 2015,²⁰ the Prosecution should have been in a position to assess whether it would be able to disclose the report within the required deadline if it prolonged with the Defence further. The Prosecution in fact concedes that it was aware – when the Trial Chamber established the disclosure time-table – that the prolongation of hypothetical discussions concerning joint instructions would render the “the deadline untenable with respect to Mr Pluijmers expert report”.²¹

27. The Prosecution failed to apprise either the Trial Chamber or the Defence of this fact for a further **19 days**.

28. The Prosecution has omitted to include any explanation or justification as to why it did not raise this issue as soon as it was aware that any delays in instructing Mr. Pluijmers would affect the ability of the Prosecution to disclose his report within the required deadline.

¹⁹ ICC-01/05-01/13-956-Conf-AnxA.

²⁰ ICC-01/05-01/13-959.

²¹ ICC-01/05-01/13-989-Conf, para. 4.

29. Apart from the absence of good cause, the requested delay would also be prejudicial to the rights of the Defence.

30. The requested three week delay will mean that the report will be disclosed during the judicial recess. This affects the availability of persons, whose assistance the Defence might require in order to analyse the report.

31. For example, if after having reviewed the report, it is apparent that the Defence requires expert assistance to either analyse it or produce a counter-expertise, the Defence will be compelled to liaise with the Registry regarding the funding of such a person. It is also self-evident that it will be difficult for the Defence to identify an experienced expert, who is available at short-notice in July and August to perform such tasks within a very compressed time frame.

32. Given that the Prosecution has had more than a year and a half to produce its report, the right of the Defence to adequate time and facilities to prepare its response should not be compromised.

III. Relief sought

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



Melinda Taylor
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Dated this 15th day of June 2015
The Hague, The Netherlands