

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 June 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-redacted version of

**Decision on Independent Counsel Report on Material transmitted by the Dutch
Authorities**

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 (the ‘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*, having regard to Articles 64(2), (3), (6), 67 and 68(1) of the Rome Statute and Rules 73, 77 and 84 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 33 of the Regulations of the Court, issues the following ‘Decision on Independent Counsel Report on Material transmitted by the Dutch Authorities’ (the ‘Decision’).

I. Background

1. On 9 April 2015, the Chamber maintained a procedure, initially established by the Pre-Trial Chamber,¹ for an appointed independent counsel (the ‘Independent Counsel’) to review certain seized materials in this case (the ‘Independent Counsel Decision’).² The Independent Counsel has been tasked with: (i) being present at the unsealing of seized material; (ii) reviewing it and (iii) promptly submitting a report to the Chamber as to which materials he considers to be relevant and not privileged.³ These reports are to be notified *ex parte* to the Chamber and the defence teams that represent the accused who own this material or are potential privilege holders thereof.⁴ These defence teams are to make any observations on the reports within five days of being notified of them,⁵ at which point the Chamber will rule on any objections raised and provide the material to the other parties as appropriate.

¹ Pre-Trial Chamber II, Decision on Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70", 29 July 2013, ICC-01/05-52-Conf; Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings, 13 December 2013, ICC-01/05-01/13-41-Conf-Exp (ICC-01/05-01/13-41-Red) and Decision on the "Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel", 25 April 2014, ICC-01/05-01/13-366-Conf (ICC-01/05-01/13-366-Red).

² Decision on ‘Request concerning the review of seized material’ and related matters, 9 April 2015, ICC-01/05-01/13-893-Red (confidential version notified same day).

³ Independent Counsel Decision, ICC-01/05-01/13-893-Red, paras 19-23, page 13.

⁴ Independent Counsel Decision, ICC-01/05-01/13-893-Red, paras 22-24.

⁵ Independent Counsel Decision, ICC-01/05-01/13-893-Red, paras 23-24.

2. Upon a cooperation request of the Court, the Kingdom of the Netherlands searched the persons of Mr Bemba, Mr Kilolo and Mr Mangenda, and their residences, vehicles, offices and other relevant locations, and seized all evidential materials.⁶ According to the instructions of the Chamber,⁷ the transferred material was unsealed on 20 April 2015.⁸
3. On 4 June 2015, the Independent Counsel submitted his report on the documentary part of the seized material ('Report'),⁹ providing redaction proposals for the two batches of material. Annexes 1 ('Annex 1') and 3 ('Annex 3') of the Report contain the unredacted versions of each batch ('First Batch' and 'Second Batch', respectively). Annexes 2 and 4 contain the same material, with the redaction proposals to the First and Second Batch respectively.¹⁰
4. On 10 June 2015, the defence for Mr Mangenda ('Mangenda Defence') and for Mr Bemba ('Bemba Defence') provided their responses ('Mangenda Response' and 'Bemba Response').¹¹ On 11 June 2015, the defence for Mr Kilolo ('Kilolo Defence') provided its response.¹²

⁶ Annex to the Registry submissions related to material seized in the proceedings and transferred by the Dutch authorities to the Registry on 27 January 2015, 24 February 2015, ICC-01/05-01/13-815-Conf, page 1.

⁷ Independent Counsel Decision, ICC-01/05-01/13-893-Red, paras 19-21 and page 13.

⁸ Joint report on the implementation of Decision ICC-01/05-01/13-893-Conf and related to the unsealing and transmission of seized material, 5 May 2015, ICC-01/05-01/13-931-Conf, para. 1.

⁹ Rapport du Conseil indépendant sur l'analyse des pièces saisies par les autorités néerlandaises (ICC-01/05-01/13-893-Conf), ICC-01/05-01/13-982-Conf-Exp, available only to the defence for Mr Bemba, Kilolo and Mangenda and the Independent Counsel with four confidential *ex parte* annexes with the same access.

¹⁰ Annex 2 and 4 of the Report, ICC-01/05-01/13-982-Conf-Exp-Anx2 and ICC-01/05-01/13-982-Conf-Exp-Anx4.

¹¹ Defence Observations on the "*Rapport du Conseil indépendant sur l'analyse des pièces saisies par la autorités néerlandaises (ICC-01/05-01/13-893-Conf)*" (ICC-01/05-01/13-982-Conf-Exp), ICC-01/05-01/13-990-Conf-Exp, available to the Independent Counsel and the Defence teams of Mr. Bemba, Mr. Kilolo and Mr. Mangenda only; Defence Observations on « *Rapport du Conseil indépendant sur l'analyse des pièces saisies par les autorités néerlandaises (ICC-01/05-01/13-982-Conf-Exp)* », ICC-01/05-01/13-994-Conf-Exp, available only to the Bemba Defence with confidential *ex parte* annexes A and B, available only to the Bemba Defence.

¹² Observations de la Défense de monsieur Aimé Kilolo relatives au rapport du Conseil indépendant du 3 juin 2015., filed on 10 June 2015 and registered on 11 June 2015, ICC-01/05-01/13-995-Conf-Exp, available only to the Independent Counsel and the Defence teams of Mr. Bemba, Mr. Kilolo and Mr. Mangenda.

II. Parties Submissions and Analysis

5. As a preliminary matter, the Chamber notes that the Independent Counsel Decision established a system whereby the concerned parties were to respond after five days of notification of the Report.¹³ The Chamber is aware that the Kilolo Defence dated its response 10 June 2015, however it was only registered on 11 June 2015, one day after the deadline. Given that the Kilolo Defence was made aware of the possibility that belated filings might be disregarded in the future¹⁴ and the fact that the Kilolo Defence did not provide any explanation why the response was filed late or apply for an extension of time, the Chamber will not consider its response.
6. The Chamber recalls that the role of the Independent Counsel is to review intercepted or seised material, identifying that which is relevant and non-privileged.¹⁵ The Chamber conducts its own independent analysis of the material identified by Independent Counsel, taking into account the submissions of defence teams, where appropriate.
7. The Chamber incorporates by reference a previous decision in which it outlined its approach when assessing material identified as relevant and non-privileged by Independent Counsel, including its understanding of Rule 73 of the Rules and the exceptions to the privilege contained therein.¹⁶
8. The Chamber especially wishes to emphasise its previous findings that it considers communications with the fourteen witnesses who have allegedly been interfered with (the 'Fourteen Witnesses') in the main time frame set

¹³ Independent Counsel Decision, ICC-01/05-01/13-893-Red, para. 22.

¹⁴ Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 15 May 2015, ICC-01/05-01/13-947, para. 7, Fn19.

¹⁵ Independent Counsel Decision, ICC-01/05-01/13-893-Red, paras 12, 13 and 16.

¹⁶ Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 15 May 2015, ICC-01/05-01/13-947, paras 13-19. *See also*, Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the review of potentially privileged material, 15 June 2011, ICC-01/04-01/10-237, pages 7-8.

by the decision confirming the charges (end of November 2011 to 14 November 2013, the 'Relevant Timeframe') to be non-privileged or falling under the crime/fraud exception. Further, it recalls that communication between the accused relating to the Fourteen Witnesses, to money transfers or whereabouts or conduct of the accused are relevant and not privileged.¹⁷

First Batch (Annex 1 of the Report)

9. The First Batch contains 12 documents. Document 1 appears to be a note done in the preparation of the testimony of one of the Fourteen Witnesses for the defence in case of the *Prosecutor v Jean-Pierre Bemba Gombo* ('Main Case').¹⁸ Document 2 and Document 3 seem to be related to a transfer of money between two of the accused during the Relevant Timeframe.¹⁹ Document 4 is a receipt for a flight of one of the defence witnesses in the Main Case who was mentioned in the document containing the charges.²⁰ Documents 5 to 9 are statements of defence witnesses in the Main Case receiving sums of money in the Relevant Timeframe from one of the accused.²¹ Documents 10 and 11 are handwritten notes from a potential defence witness in the Main Case who was eventually withdrawn.²² Document 12 appears to be internal notes on payments involving one of the accused or one of the Fourteen Witnesses.²³
10. The Independent Counsel proposes to redact the right-hand part of Document 1.

¹⁷ ICC-01/05-01/13-947, paras 19-20.

¹⁸ Annex 1, page 1.

¹⁹ Annex 1, pages 3-5.

²⁰ Annex 1, page 6.

²¹ Annex 1, page 7-11.

²² Annex 1, page 12-13.

²³ Annex 1, page 14.

11. The Mangenda Defence submits that one indicated redaction in Document 1 is justified on the ground of lack of relevance, but that all the other proposed redactions (in the First and Second Batch) seem to 'remove information that is both relevant and exculpatory'.²⁴
12. The Bemba Defence submits that the information contained in Document 1 is privileged and/or internal work product and does not constitute relevant information.²⁵ In case the Chamber finds the information to be relevant to the case, the Bemba Defence avers that the Office of the Prosecutor ('Prosecution') is obliged, according to Rule 77 of the Rules, to disclose the filings made in the case Main Case which put the information contained in Document 1 into context. Therefore, the Bemba Defence requests that in this case the Prosecution be ordered to disclose any filings from the Main Case that are related to this information ('Bemba Request').²⁶
13. Having regard to the principles set out above, the Chamber finds that Document 1 is relevant as it concerns contact with one of the Fourteen Witnesses with the view to arranging his testimony. Due to the content of the material, information related to preparatory work for the testimony of one of the 14 Witnesses, the Chamber considers that, even assuming that the document is covered by Rule 74 of the Rules, it falls under the crime/fraud exception to privilege.
14. After having assessed the proposed redactions, the Chamber is of the view that the right side of the document can be redacted, as the information contained therein is not relevant to the case. Accordingly, the document shall be transmitted to the parties with the redactions as proposed by the Independent Counsel.

²⁴ Mangenda Response, ICC-01/05-01/13-990-Conf-Exp, paras 1-2.

²⁵ Bemba Response, ICC-01/05-01/13-994-Conf-Exp, paras 4-13.

²⁶ Bemba Response, ICC-01/05-01/13-994-Conf-Exp, paras 14-20.

15. With regard to the Bemba Request to order the Prosecution to provide material that put Document 1 in the necessary context, the Chamber recalls that the parties are to engage in *inter partes* consultations before seising the Chamber of any request relating to disclosure. The Bemba Defence does not demonstrate that, once the Prosecution is provided with Document 1, (i) the Prosecution will fail to abide by any disclosure obligations arising from or relating to this document or (ii) that *inter partes* consultations on the matter are not possible. Therefore, the Chamber does not consider it necessary to instruct disclosure of specific documents under Rule 77 of the Rules at this point in time. Accordingly, the Chamber rejects the Bemba Request at this time.
16. With regard to Documents 3 to 9 and Document 12, considering the principles laid out above, the Chamber is of the view that they are relevant. The person mentioned in Documents 4 and 5 is not one of the Fourteen Witnesses, but the Chamber notes that the information in Document 4 is related to one of the defence witnesses in the Main Case flying, to a location that, is mentioned in the decision on the confirmation of the charges during the Relevant Timeframe. Document 5 pertains to the one of the accused and is related to financial transactions implicating a defence witness of the Main Case during the Relevant Timeframe. Therefore, the Chamber finds the information contained in all of these documents to be relevant and, even if being in the ambit of Rule 73 of the Rules, to fall under the crime/fraud exception. Accordingly, these documents shall be transmitted to the parties.
17. In respect of Documents 10 and 11, the Chamber notes that they concern communication with a potential defence witness in the Main Case who eventually did not testify. He is mentioned in the supporting material of the warrant of arrest, as well in as in other supporting material in an early stage of the proceedings. Since the witness is not one of the Fourteen Witnesses or

relied on by the Prosecution in later stages of the proceedings, the Chamber does not consider the documents to be relevant. Accordingly, Document 10 and 11 shall not be transmitted to the parties.

Second Batch (Annex 3 of the Report)

18. The Second Batch contains 10 documents. Document 1 appears to be a financial overview involving the Victims and Witnesses Unit and defence witnesses of the Main Case, several of them being part of the Fourteen Witness.²⁷ Document 2 is a confirmation of receipt of money from a defence witness of the Main Case.²⁸ Documents 3 to 9 contain information regarding the preparation of protection requests to the Court for six defence witnesses in the Main Case.²⁹ Document 10 contains an address in France.³⁰
19. The Independent Counsel proposes to redact parts of Documents 5 to 8.
20. In respect to the Second Batch, the Bemba Defence submits that Document 1 is an internal work product. Documents 3 to 9 are, according, to the Bemba Defence, notes taken by the case manager related in preparation of protective measures requests for witnesses.³¹ The Bemba Defence argues that these witnesses had a legitimate expectation that the information they provided would be treated confidentially and therefore their prior consent is necessary to disclose the information to the other parties.³² Furthermore, the Bemba Defence proposes additional redactions to the ones provided by

²⁷ Annex 2, page 2-3.

²⁸ Annex 2, page 4.

²⁹ Annex 2, page 5-15.

³⁰ Annex 2, page 16.

³¹ Bemba Response, ICC-01/05-01/13-994-Conf-Exp, paras 27-29.

³² Bemba Response, ICC-01/05-01/13-994-Conf-Exp, paras 30-34.

the Independent Counsel, should the Chamber nevertheless decide to disclose the information to the other parties.³³

21. In respect of Documents 1 and 3 to 9, the Chamber notes that all but Document 6 concern one of the Fourteen Witnesses. Document 6 concerns a witness who the Prosecution mentioned as being implicated in events related to the charges. Due to the content of the documents, the Chamber finds that, even assuming *arguendo* that they qualify as lawyer-client communications, they fall under the crime/fraud exception. Accordingly, the Chamber considers all documents to be relevant and not privileged.
22. As to the argument of the Bemba Defence that the witnesses had a legitimate expectation that this information in Documents 3 to 9 is kept confidential, although the Chamber considers that disclosure is governed by law and not the mere expectation of witnesses alone, the Chamber agrees that information related to matters of witness safety are not shared with any party under normal circumstances. However, all witnesses are implicated in allegations of witness interference. It is in the nature of such proceedings that, in order to determine if such interference has been committed, confidential information related to those witnesses and their interactions with the Court may be divulged. Any concerns for the witnesses' safety or physical and psychological well-being, as well as their privacy, are being addressed by redacting the pertinent information. Furthermore, the Chamber points out that the information is only disclosed to the parties to this case as confidential information, thus limiting the number of people receiving this information.
23. With regard to Document 2, the Chamber notes that the confirmation of money transfer comes from a defence witness in the Main Case who was

³³ Bemba Response, ICC-01/05-01/13-994-Conf-Exp, para. 35 and ICC-01/05-01/13-994-Conf-Exp-AnxB-Corr.

mentioned in filings in the early stages of the pre-trial proceedings, but was not mentioned in the decision on the confirmation of the charges or in any of the allegations in the document containing the charges. The Chamber is not persuaded that this document is relevant and accordingly it shall not be transmitted to the parties.

24. Likewise, in respect of Document 10, the Chamber finds that the address seems not to be relevant to the case. Accordingly, the document shall not be transmitted to the parties.

25. Having considered redactions proposed by the Independent Counsel for Documents 5 to 9 and the additional ones proposed by the Bemba Defence, the Chamber finds that the redaction proposals by the Independent Counsel address adequately the above-mentioned concerns. The Chamber complements them with the following redactions to ensure consistency and fully safeguard the witnesses' rights:

- [REDACTED]
- [REDACTED]
- [REDACTED]

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

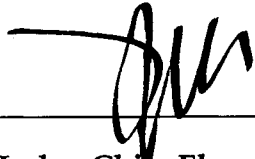
DISMISSES the Bemba Request;

INSTRUCTS that the First Batch and Second Batch of the Report are transmitted to the parties, with the exceptions of Documents 10 and 11 of the First Batch (pages 12 and 13 of Annex 1) and Documents 2 and 10 of the Second Batch (pages 4 and 16 of Annex 2);

INSTRUCTS that, prior to their transmission, the Independent Counsel apply the redactions proposed in annexes 2 and 4 of the Report, as well as the additional redactions as specified in paragraph 26 of this Decision; and

ALLOWS for an extension of the 30 June 2015 disclosure deadline for the Prosecution to add these documents to its list of evidence within two days of notification of the documents contained in the First and Second Batch.

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



Judge Chile Eboe-Osuji
 (Presiding)



Judge Olga Herrera Carbuccion


Judge Bertram Schmitt

Dated 30 June 2015

At The Hague, The Netherlands