

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 22 September 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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 'Joint Defence Request pursuant to Regulation 35 of the
Regulations of the Court to defer notification concerning expert witnesses'**

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII 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*, having regard to Articles 64(3)(c) and 67 of the Rome Statute ('Statute'), Rule 84 of the Rules of Procedure and Evidence and Regulation 35 of the Regulations of the Court, issues the following 'Decision on "Joint Defence Request pursuant to Regulation 35 of the Regulations of the Court to defer notification concerning expert witnesses"'.

I. Procedural History

1. On 2 September 2015, the Single Judge in giving directions on the conduct of proceedings observed that any non-calling party may file a notice challenging the qualifications or written report of an expert within 10 days of that decision or no later than 30 days before the anticipated testimony of the expert witness in question (whichever comes last).¹
2. On 10 September 2015, the defence teams for all five accused persons ('Defence') filed a joint request ('Request') pursuant to Regulation 35 of the Regulations of the Court to defer notification of challenges concerning two witnesses until (a) 10 days from the date on which the Prosecution qualifies P-433's testimony as expert testimony; and (b) 10 days from the date on which the Defence is informed of the likely date of P-361's testimony or 30 days before his expert testimony (whichever is later).²
3. On 14 September 2015, the Office of the Prosecutor ('Prosecution') filed its response to the Request ('Response').³

¹ Directions on the conduct of the proceedings, ICC-01/05-01/13-1209, 2 September 2015, para. 22.

² Joint Defence Request pursuant to Regulation 35 of the Regulations of the Court to defer notification concerning expert witnesses, ICC-01/05-01/13-1235, 10 September 2015, para. 4.

³ Prosecution's Response to "Joint Defence Request pursuant to Regulation 35 of the Regulations of the Court to defer notification concerning expert witnesses" ICC-01/05-01/13-1235, ICC-01/05-01/13-1242, 14 September 2015.

4. On 15 September 2015, the defence for Mr Bemba, Mr Kilolo, Mr Babala and Mr Arido filed a request for leave to reply to the Response ('Request for Leave to Reply') indicating that they wished to make specific submissions in regard to difficulties faced in accessing documents cited in P-361's expert report ('Report') that are available only in Dutch.⁴

II. Submissions

A. Defence

5. In its Request, the Defence submits that the Prosecution has failed to:
 - (i) Clarify whether they intend to present P-433 as an expert witness or a witness of fact and provide information concerning the scope of his proposed testimony;
 - (ii) Indicate when the testimony of P-361 will take place; and
 - (iii) Disclose the Report in a format which would enable the Defence to access the information cited therein.⁵
6. In its Request for Leave to Reply, it was indicated in relation to the last point that in order for the Defence to properly study the Report and fully exercise its right to test any sources relied upon by an expert witness, it requires versions of the documents cited in the Report in one of the working languages of the Court (i.e. English or French), three of which are presently available only in Dutch.⁶

⁴ Joint Defence Request for Leave to Reply to the 'Prosecution's Response to "Joint Defence Request pursuant to Regulation 35 of the Regulations of the Court to defer notification concerning expert witnesses"', ICC-01/05-01/13-1251, 15 September 2015. A corrigendum was issued on 16 September 2015, ICC-01/05-01/13-1251-Corr.

⁵ Request, ICC-01/05-01/13-1235, para. 2

⁶ Request for Leave to Reply, ICC-01/05-01/13-1251, para. 4; ICC-01/05-01/13-1251-AnxA, page 2.

B. Prosecution

7. The Prosecution argues that the Request is moot in relation to P-433 and without merit in the case of P-361.⁷ The Prosecution submits that:
 - (i) On 11 September 2015, it notified the Defence that P-433 was being called as an evidence summary witness and not as an expert witness;⁸
 - (ii) It has already clarified that it intends to call witness P-361 in the 'second half of October' with the scheduling of his evidence being inherently dependent on Defence estimates for examination of Prosecution witnesses;⁹ and
 - (iii) The Defence was provided with a pdf version of the Report containing only seven hyperlinks which, even if rendered non-functional as a result of the upload process, can be easily accessed on the internet.¹⁰

III. Analysis and Conclusion

8. As a preliminary matter, the Single Judge does not consider that further submissions are necessary and, therefore, rejects the Request for Leave to Reply.
9. In relation to P-433, the Single Judge notes that the Prosecution clarified to the Defence on 11 September 2015 that P-433 is not an expert witness and, as such, this part of the Request is moot.
10. In relation to the expected dates of testimony of expert witness P-361, the Single Judge is persuaded by the Prosecution's argument that the Defence was given sufficient information concerning the scheduling of P-361's expert

⁷ Response, ICC-01/05-01/13-1242, para. 1

⁸ Response, ICC-01/05-01/13-1242, para. 2

⁹ Response, ICC-01/05-01/13-1242, para. 4

¹⁰ Response, ICC-01/05-01/13-1242, para. 5

testimony. In relation to the accessibility of information in the Report of expert witness P-361, the Single Judge notes that three documents cited by P-361 in his Report, and requested by the Defence, have not been made available in either of the working languages of the Court.¹¹ The three documents in question are from public sources and are only available in Dutch. Those documents are used by witness P-361 in his Report on the investigation of call records and intercepted communications. Given that the Prosecution places significant reliance upon intercepted data and communications in this case, these Dutch documents may be of relevance to the ability of the Defence to adequately consider the Report and issue any relevant notifications. The Chamber notes that the Defence has sought assistance from the Registry¹² in translating these documents, in line with its previous directions.¹³

11. However, importantly, expert witness P-361 does not make any reference to any part or parts of any of the three relevant documents in his Report and appears to have used them solely as general sources in his consideration of the interception process. In the absence of any indication showing that these documents were used in the Report in a specific manner or to support a specific contention on the part of the expert, the Defence request to defer notification in relation to P-361 is hence rejected without prejudice to the Chamber entertaining a challenge request following the receipt of the requested translations.

¹¹ CAR-OTP-0090-1825, page 21, references 29 to 31.

¹² Request for Leave to Reply, ICC-01/05-01/13-1251, para. 6

¹³ Transcript of Hearing, 24 April 2015, ICC-01/05-01/13-T-8-Red-ENG, page 26 lines 2-4.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request for Leave to Reply; and

REJECTS the Request.

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



Judge Bertram Schmitt, Single Judge

Dated 22 September 2015

At The Hague, The Netherlands