

**Cour
Pénale
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**International
Criminal
Court**

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Date: 03/03/2016

TRIAL CHAMBER VII

**Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan**

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, C, D and E

**Defence Response to Prosecution's Notice to contact D20-0001 (ICC-01/05-01/13-
1682-Conf)**

Source: Counsel for Jean-Pierre Bemba Gombo

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

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Introduction

1. On 2 March 2016, the Prosecution filed a "Notice" concerning its intention to contact D20-0001 "in accordance with the Contacts Protocol" in order to obtain documents and information (the Requested Materials).¹

2. The Notice is completely unfounded, and addresses issues which are moot. The Prosecution addressed its request to D20-0001, and D20-0001 has in turn, provided a clear response as to which information he is, and is not prepared to transmit to the Prosecution.

3. In the absence of any basis to seize the Chamber, the Defence respectfully expresses its concern that there is an appearance that the Prosecution might be attempting to create issues out of thin air, in order to discredit the Defence, and potentially the Defence witness.

Submissions

4. There is no basis for the Prosecution to establish direct contact with D20-0001.

5. The Prosecution Notice has not elaborated on what is meant by "direct contact". Nonetheless, since the Prosecution has already directed several emails concerning the Requested Materials to the Defence, to which D20-0001 was copied,² the Defence must assume that the objective of the Notice is to contact D20-0001, *ex parte* the Defence.

¹ ICC-01/05-01/13-1682-Conf.

² Annex A

6. Contrary to the position asserted by the Prosecution, D20-0001 has never "implicitly consented" to being directly contacted by the Prosecution.

7. The witness indicated that he only wished to be contacted by the Prosecution directly, if it concerned "simple" logistical issues concerning the scheduling of an interview.³ He also requested the presence of the Defence during the questioning by the Prosecution.

8. As the Trial Chamber is aware, when the Prosecution wrote to the Witness on an *ex parte* basis previously, he also responded copying the Defence – thereby confirming his preference for the Defence to be copied to such communications. The matters set out in the Prosecution Notice concern issues of substance. If the Prosecution were to contact the witness on an *ex parte* basis in relation to such matters, it would undermine his specific request for the Defence to be "present" during any discussion concerning such issues.

9. The Contacts Protocol cited by the Prosecution also does not permit any direct, *ex-parte* contact between the Prosecution and a Defence witness, who has not consented to such contact.⁴

10. The only precedent in this case concerning such a deviation is the genesis of the case itself; which is when the Single Judge permitted the Prosecution to contact Defence witnesses directly rather than *via* the Defence in order to investigate allegations of bribery and false testimony.

11. To suggest in any way that there are grounds for adopting this precedent in the current circumstances in the current case, and in relation to the current witness is improper and unfounded.

³ Annex B.

⁴ "Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Other Parties" ICC-01/05-01/13-1093-Anx.

12. The Defence has followed the provisions of the Contacts Protocol, and facilitated contact between the Prosecution and D20-0001.

13. In requesting such contact, the Prosecution clarified that it did not intend to engage in a formal deposition-style process.⁵

14. The Prosecution was afforded a full and unfettered opportunity to put questions to D20-0001, which he answered. Notwithstanding the questionable relevance of many of the questions, the Defence did not object or in any way impede the Prosecution's questioning of the witness.

15. The Prosecution did not ask for the interview to be extended, nor did it request to schedule a further interview. The witness is scheduled to testify on 10th of March 2016, and the Prosecution will have a further opportunity to put questions to him during his testimony under oath.

16. The Prosecution assertion that D20-0001 "consented to provide the Materials, subject to any assertion of privilege by the Bemba Defence" is not correct.

17. Firstly, the Requested Materials are far broader than the specific documents and information discussed with D20-0001.

18. For example, contrary to the Prosecution's claim that Mr. Harrison already consented to provide emails "exchanged with the Bemba Defence [and others] in relation to the creation of the expert report"⁶, Dr. Harrison only agreed to provide specific information and facts extracted from the emails concerning the transmission dates of materials.⁷ The Prosecution did not contemporaneously request, nor did D20-0001 agree to provide actual emails.

⁵ Annex C.

⁶ Notice, para 5.

⁷ ICC-01/05-01/13-1682-Conf-AnxB, lines 403-413 & 467-472.

19. As concerns "instructions", again, D20-0001 did not agree to provide actual emails, and his willingness to provide the "instructions" was subject to the express caveat that whereas he did not personally have a "problem", he would need to seek advice from the Defence as to firstly, whether there were issues of privilege, and secondly, "UN procedures and protocols in terms of[...] disclosure of this kind of communication".⁸

20. At the only point in the interview where emails concerning the preparation of the report were discussed, the Prosecution failed to request the emails, and limited its request to notes from phone calls with the Defence.⁹ Again, D20-0001 expressed the view that his position was conditional on firstly, the position of the Defence, and secondly, verification concerning issues regarding privilege and disclosure.¹⁰

21. In the absence of a position expressed by the witness on such materials, the request was in effect, a request for disclosure from the Defence.

22. Given the broad scope of the request, the Defence repeatedly requested the Prosecution to articulate the specific legal basis for its request for the materials. The Prosecution failed to do so.

23. Secondly, the Prosecution's Notice fails to distinguish between D20-0001's position as concerns:

- i. tangible objects, which are in D20-0001's possession, and which were never provided to the Defence (notes, drafts et cetera);
- ii. information, which D20-0001 offered to verify, and transmit to the Prosecution; and
- iii. email correspondence between D20-0001 and the Defence.

⁸ ICC-01/05-01/13-1682-Conf-AnxB, lines 550-556.

⁹ ICC-01/05-01/13-1682-Conf-AnxB, lines 580-583.

¹⁰ ICC-01/05-01/13-1682-Conf-AnxB, lines 580-583.

24. As concerns the first category, D20-0001's assistant inquired with the Defence as concerns the remuneration scheme for work associated with the preparation of such materials.¹¹

25. The Defence promptly met with the Counsel Support Section (CSS) to inquire as to this issue, and conveyed the preliminary position of CSS to the Prosecution and D20-0001 that any associated workload would not be covered by Defence legal aid, and should be addressed by the Prosecution.¹² CSS has subsequently confirmed this position in writing.¹³

26. The Defence has also made clear to the Prosecution and D20-0001 that it asserts no privilege over these tangible objects, and it falls entirely within the discretion of D20-0001 as to whether he wishes to transmit them to the Prosecution.

27. The Defence does not itself have a copy of these objects or documents, and therefore requested to be copied to the transmission so that it will also have a copy, should D20-0001 choose to transmit such materials.

28. The Prosecution has no right to request, and obtain such documents *ex parte* the Defence.

29. As concerns the second category – information – D20-0001 has indicated that he intends to respond to certain specific queries, upon his return to the United Kingdom.¹⁴

30. As concerns the queries which fall outside the scope of the agreement that D20-0001 provided either during the interview itself, or his subsequent correspondence, it is neither useful nor appropriate to engage in a series of interrogatories *via ex-parte* emails and contact, when the witness is available to be

¹¹ Annex D.

¹² Annex A.

¹³ Annex E.

¹⁴ Annex A.

questioned under oath in an *inter partes* manner, under the supervision and direction of the Trial Chamber.

31. Several of the questions set out in the Prosecution's request were also already addressed by D20-0001 during the interview; for example, his hourly rate (100 euros),¹⁵ and the number of hours allocated to him (33.5 hours). If the Prosecution wish to question D20-0001 regarding the specific "breakdown" of such hours, they can put such questions to him when he testifies, subject to any rulings from the Trial Chamber concerning relevance.¹⁶

32. Regarding the third category (email correspondence between the Defence and D20-0001 concerning the creation of the report), it is not correct that D20-0001 consented to the transmission of these materials, subject to any assertion of privilege.

33. As noted above, the transmission of actual emails, rather than information extracted from select emails, was not discussed during the interview.

34. In terms of the provision of specific information derived from such emails, D20-0001 made very clear that he was not familiar with legal procedures at the Court, and although he no objection from his part, he would need to seek guidance from the Defence as concerns the specific rules concerning disclosure and privilege. In essence, the witness indicated that he would agree to the provision of this information, if the Defence itself agreed to provide the information, or was otherwise obliged to do so.

35. The Defence indicated subsequently to D20-0001 that it would be prepared to waive privilege concerning the transmission of actual email correspondence to the Prosecution should D20-0001 agree to transmit such correspondence to the

¹⁵ ICC-01/05-01/13-1682-Conf-AnxB, lines 587-588.

¹⁶ The Defence notes that Trial Chamber III rejected a Prosecution request to question a Defence expert witness concerning his payment, due to the absence of relevance: Oral decision of 13 September 2012, ICC-01/05-01/08-T-244-ENG, pages 58-60.

Prosecution. This does not constitute a blanket waiver, and it does not translate to a blanket right to obtain correspondence *ex-parte* the Defence.

36. In any case, D20-0001 clarified that he is willing to review his correspondence, and extract information which may be relevant to specific queries of the Prosecution, but does not intend to transmit actual email correspondence in the absence of a specific request from the Defence or a judicial order.¹⁷

37. There is no basis for the Prosecution to second-guess his position on this matter, or to establish direct contact in relation to an issue which has been answered in an unequivocal manner by the witness.

38. In order to dispel any unfounded suspicion that the Defence is any way "hiding" something or obstructing the Prosecution, the Defence would be prepared to submit all such email correspondence to the Trial Chamber.

39. The Defence should not, however, be forced to be in this position in the first place. Correspondence between an expert witness and the Defence are not ordinarily disclosable,¹⁸ and, despite repeated requests from the Defence, the Prosecution has failed to provide a legal basis for such disclosure. Trial Chamber I

¹⁷ Annex A.

¹⁸ In the Prosecutor v. Lubanga, Trial Chamber I ruled that the personal notes of an expert witness are not disclosable, what counts is the witness's evidence and not their personal notes: Oral decision of 7 January 2010, ICC-01/04-01/06-T-223-ENG, pages 1-2, and 7.

In the Prosecutor v. Gotovina, the Prosecution requested from the Defence all the information provided to their proposed expert witnesses, any communications between the Defence and their proposed expert witnesses, and any draft reports circulated between the proposed experts and the Defence. The Trial Chamber ruled that there was "no obligation for the Defence to disclose to the Prosecution the material sought in the Request" (para. 9); "With regard to communications between the proposed experts and the Defence, as well as prior drafts of expert reports, the Chamber considers that the parties are able to raise these matters with the proposed experts during their examinations." (para. 11). Prosecutor v. Gotovina et al., 'Decision on Disclosure on Expert Materials', 27 August 2009.

In the Prosecutor v. Stanisic and Simatovic, the Trial Chamber determined that the rule concerning expert witnesses did "not entail any obligation to disclose communication (...) in preparation of [the expert report] or early drafts thereof. To find otherwise would be an unreasonable broadening of the rule". 'Decision On Stanisic Request For Order Of Disclosure Of Materials Related To The Admissibility Of The Expert Report of Reynard Theunens, 11 March 2011, para. 20.

has noted that communications with a potential expert could raise issues of privilege, and the protection against self-incrimination.¹⁹ Trial Chamber VII has also confirmed in this specific case that due to the privilege against self-incrimination, the Defence cannot be compelled to disclose notes or recordings of meetings with Defence witnesses.²⁰

40. The Defence disclosed its formal letter of instruction to D20-0001, and D20-0001 informed the Prosecution that his instructions remained consistent throughout the process,²¹ and that the Defence did not attempt to influence his findings, or change them.²²

41. The Prosecution also cannot make a colourable claim that its preparation has been hindered given that it refused to provide minutes and correspondence between it, and its expert/forensic witnesses when requested to do so by the Defence.²³ Given that the Prosecution's disclosure obligations are far broader than those of the Defence, the Prosecution's current position is, to put it mildly, puzzling.

¹⁹ *Prosecutor v. Lubanga*, Transcript, ICC-01/04-01/06-T-58-ENG, 30 October 2007, p. 29, lines 22-25, p. 30, lines 1-19

²⁰ ICC-01/05-01/13-907.

²¹ ICC-01/05-01/13-1682-Conf-AnxB, lines 543-549

²² ICC-01/05-01/13-1682-Conf-AnxB, lines 556-577, 970-972

²³ On 8 September 2015 the Defence emailed the OTP requesting disclosure of all instructions provided to P-433 in creating his report, all related emails between P-433 and the OTP in creating his report and all related memoranda. The Prosecution failed to provide these materials to the Defence. The five Defence teams also requested the Prosecution to provide the minutes of its meeting with Mr. Pluijmers. Although the Prosecution informed the Chamber that it provided the Defence with minutes, the Prosecution only provided the Defence with an extremely cursory assertion that its discussion with Mr. Pluijmers was confined to his inclusion on the Court's list of experts, and the scope of his expertise: ICC-01/05-01/13-1002, para. 20.

Relief sought

42. For the reasons set above, the Defence respectfully requests the Honourable Trial Chamber to dismiss the Notice.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 3rd day of March 2016

The Hague, The Netherlands