

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 March 2016

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 Prosecution Request to Contact Witness D20-1 in Order to Obtain
Material and Information**

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

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) 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 Article 64(6)(f) of the Rome Statute and Rule 84 of the Rules of Procedure and Evidence ('Rules') issues the following 'Decision on Prosecution Request to Contact Witness D20-1 in Order to Obtain Material and Information'.

I. Procedural History and Submissions

1. On 1 March 2016, the Office of the Prosecutor ('Prosecution') raised an issue regarding D20-1, the expert witness ('Witness') scheduled to testify on behalf of the defence for Mr Bemba ('Bemba Defence'). It explained that it previously interviewed the Witness and that he had agreed to provide further material to the Prosecution. The Prosecution now wished to contact the Witness in respect of this material.¹ The Bemba Defence presented numerous objections to the request² and the Chamber instructed the parties to advance their positions in writing.³
2. On 2 March 2016, the Prosecution applied to contact D20-1 in order to obtain from him certain material and information ('Request').⁴ It submits that, during an interview conducted with the Witness, he agreed to provide certain material and information, subject to the assertion of any privilege by the Bemba Defence.⁵ The Prosecution underlines that it does not request any material from the Bemba Defence but only from the Witness, who had consented.⁶ It argues

¹ Transcript of Hearing on 1 March 2016, ICC-01/05-01/13-T-39-Conf-Eng, p. 44, line 17 to p. 45, line 7.

² ICC-01/05-01/13-T-39-Conf-Eng, p. 45, line 10 to p. 46, line 9.

³ Email from Trial Chamber VII Communications to the parties on 1 March 2016, at 12:09.

⁴ Prosecution's Notice of its Intent to Contact Witness D20-0001, ICC-01/05-01/13-1682-Conf, with two confidential annexes A and B.

⁵ Request, ICC-01/05-01/13-1682-Conf, paras 1 and 8.

⁶ Request, ICC-01/05-01/13-1682-Conf, para. 9.

that the material and information are potentially relevant for the reliability and accuracy of the Witness's report and that without them the Prosecution's preparation could be diminished.⁷ Lastly, it submits that the Bemba Defence did not assert any privilege and, in any case, is prepared to waive it.⁸ The material includes, *inter alia*, prior instructions the Witness received from the Bemba Defence, emails he exchanged with the Bemba Defence concerning the production of his report, prior drafts of the report, contemporaneous notes and by-products of the analysis conducted for the report, previous declarations or testimonies the Witness had given in other cases and any written views or opinions expressed by his colleagues in relation to the report.⁹

3. On 3 March 2016, the Bemba Defence filed its response, submitting that the Request should be rejected.¹⁰ It submits that the Witness only agreed to provide certain material to the Prosecution and that the material and information contained in the Request are far broader.¹¹ It further argues that, although having waived privilege for certain material, it does not generally agree to the transmission of the requested material.¹² Further, the Bemba Defence explains that the Witness indicated his willingness to extract information which may be relevant to specific questions but was unwilling to transmit the entire email communication to the Prosecution.¹³
4. On 4 March 2016, due to the imminent start of the testimony of the Witness, the Chamber sent an email to the parties, dismissing part of the Request as moot

⁷ Request, ICC-01/05-01/13-1682-Conf, para. 8.

⁸ Request, ICC-01/05-01/13-1682-Conf, paras 2 and 10.

⁹ See, Request, ICC-01/05-01/13-1682-Conf, para. 5.

¹⁰ Defence Response to Prosecution's Notice to contact D20-0001 (ICC-01/05-01/413-1682-Conf), ICC-01/05-01/13-1691-Conf, with five confidential annexes A, B, C, D and E.

¹¹ Response, ICC-01/05-01/13-1691-Conf, paras 18-22, 30.

¹² Response, ICC-01/05-01/13-1691-Conf, para. 35.

¹³ Response, ICC-01/05-01/13-1691-Conf, para. 36.

and rejecting the remainder of the Request, indicating that a fully reasoned decision would follow in due course.¹⁴

II. Analysis

5. The Single Judge notes that the Witness wrote to the Prosecution and Bemba Defence on 3 March 2016.¹⁵ Therein, he clarified his previous agreement to provide the Prosecution with certain material in the sense that he would not oppose this provision if the Bemba Defence or a court order instructed him to do so. In respect of the information he agreed he would provide to the Prosecution, the Witness informed the Prosecution that he would provide it on Monday, 7 March 2016.¹⁶
6. Accordingly, the Single Judge considers the Request moot with regard to the information the Witness agreed to provide to the Prosecution.
7. In respect to the remainder of the Request, the Prosecution's submissions that there is no impediment to the provision of the material are unpersuasive. The Witness does not actually consent to providing this material on his own volition – he will only do so upon direction by the Bemba Defence or Chamber. This lack of consent is significant because, unlike the Prosecution, the Bemba Defence does not have extensive obligations similar to those imposed on the Prosecution (*see*, Article 67(2) of the Rome Statute and Rules 76 and 77 of the Rules), which require it to acquire and provide information about witnesses, which it does not intend to use during trial.
8. The Single Judge further notes that, besides general assertions that the requested material could be potentially relevant and that its absence could 'diminish' the examination of the Witness, the Prosecution does not provide

¹⁴ Email from Trial Chamber VII Communication to the parties on 4 March 2016, at 10:15.

¹⁵ ICC-01/05-01/13-1691-Conf-AnxA.

¹⁶ ICC-01/05-01/13-1691-Conf-AnxA.

specific reasons as to why it should be provided with the material. The Single Judge also emphasises that the Prosecution has the opportunity to resolve any remaining uncertainties in respect of the production of the report, the methods used to prepare it and the assumptions on which the Witness relied on during its in-court examination of the Witness. Accordingly, the Single Judge rejects the remainder of the Request.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DISMISSES the Request as moot with respect to the information that the Witness agreed to provide to the Prosecution; and

REJECTS the remainder of the Request.

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

A handwritten signature in black ink, appearing to read 'Bertram Schmitt', is written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 8 March 2016

At The Hague, The Netherlands