

**Cour
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Internationale**

**International
Criminal
Court**



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No.: **ICC-01/05-01/13**
Date: **30 November 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

Public Document

**Prosecution Motion pursuant to Regulation 35 to Add one Document to the
“Additional Evidence” Submitted regarding the Sentencing Proceedings**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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I. Introduction

1. Pursuant to regulation 35(2) of the Regulations of the Court (“RoC”), the Office of the Prosecutor (“Prosecution”) requests that Trial Chamber VII (“Chamber”): (1) permit the Prosecution to add one publicly available document to the “additional evidence” it submitted on 23 November 2016¹ in compliance with the Chamber’s 20 October 2016 Sentencing Calendar;² and (2) recognise the Briefing Paper as formally submitted.

2. The requested extension is justifiable in the circumstances, is supported by good cause, and is in the interest of justice. Further, the addition and submission of the Briefing Paper in no way causes unfair prejudice to the Defence.

3. The proposed evidence comprises a Briefing Paper prepared by the Open Society Justice Initiative, entitled “Witness Interference in Cases before the International Criminal Court.”³ It examines the nature and extent of witness interference in ICC cases based upon a comprehensive survey of publicly available information. The Briefing Paper is *prima facie* relevant to the sentencing proceedings in this case because it bears directly on the actual and potential consequences of the Convicted Persons’ conduct to the Court as a whole, and presents considerations relevant to the Chamber’s assessment of the need to deter such conduct in the future. The report is authentic, reliable and is of high probative value in respect of salient sentencing considerations before the Chamber.

¹ ICC-01/05-01/13-2047.

² ICC-01/05-01/13-1990.

³ CAR-OTP-0094-2547: Briefing Paper, Witness Interference in Cases before the International Criminal Court, Open Society Justice Initiative, 15 November 2016 (“Briefing Paper”).

II. Submissions

4. There is good cause for the Prosecution's request. Regulation 35(2) of the RoC, authorises a Chamber to extend a time limit "if good cause is shown." The Appeals Chamber has held that:

Such reasons as may found a good cause are necessarily associated with a party's duties and obligations in the judicial process. A cause is good if founded upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.⁴

5. Although the Briefing Paper appears to have been finalised on or about 16 November 2016 (indicated by the electronic date stamp of the pdf file), the Prosecution only became aware of its existence on 28 November 2016. It is unclear when the Briefing Paper was posted to the Open Society Justice Initiative's website from which it was downloaded. However, it seems likely that this occurred after its apparent presentation during a side event on witness interference at the Assembly of States Parties mid-last week (23 November 2016),⁵ the day of the deadline set by the Chamber for the Parties' to identify and submit any "additional evidence" for the purposes of the sentencing proceedings.⁶ The Prosecution was never in a position to identify or add this material timely to its 23 November 2016 Bar Table Motion, the means by which it submitted its "additional evidence." Good cause thus exists for the requested extension.

⁴ ICC-01/04-01/06-834, para. 9.

⁵ See Schedule of the Fifteenth Session of the Assembly of State Parties, 16-24 November 2016, p. 9 (showing a panel on "witness interference" co-hosted by the Republic of Korea and Open Society for Justice Initiative on 23 November 2016 between 13:00-15:00).

⁶ ICC-01/05-01/13-1990, para. 2(ii).

6. As noted, the Briefing Paper is *prima facie* relevant and probative of matters falling squarely within the ambit of sentencing issues before the Chamber. In particular, the Briefing Paper notes the prevalence of witness interference in ICC cases, underscoring and substantiating the gravity of the Convicted Persons' conduct and the impact of such on the integrity of the Court's proceedings and on its vital function. Significantly, the Briefing Paper observes that:

Out of the nine ICC cases involving charges of crimes against humanity and/or war crimes that have reached the trial stage—which address crimes in the Democratic Republic of Congo (DRC), the Central African Republic (CAR), Kenya, Côte d'Ivoire, and Uganda—our research has found allegations of interference in at least eight: *Lubanga*, *Katanga & Ngudjolo*, *Bemba*, *Muthaura & Kenyatta*, *Ruto & Sang*, *Gbagbo & Blé Goudé*, *Ntaganda*, and *Ongwen*. The crimes charged in these cases affected hundreds of thousands of victims. The only case in which we found no public reference to witness interference allegations was *Al-Mahdi*, a unique case in which the accused, charged with destruction of cultural property in Mali, issued a guilty plea and underwent a subsequent speedy trial.⁷

7. These and other findings contained in the Briefing Paper are of significance to an understanding and appreciation of the epidemic of witness interference which continues to impact the Court, and its consequences. For instance, the Briefing Paper notes, “[t]he research indicates that witness interference at the ICC has been widespread”⁸ and that “[w]itness interference on [the scale found at the Court] has major implications for the ICC and its cases.”⁹ Those implications include undermining the rule of law and the Court's commitment to due process and legal accountability, obstruction of the Court's truth-finding function, impeding the fight against impunity, distortion of case outcomes, and the imposition of significant institutional and financial costs.¹⁰ One additional and potential grave consequence is the erosion of the ICC's legitimacy over time.¹¹

⁷ CAR-OTP-0094-2547, at 2548-2549.

⁸ CAR-OTP-0094-2547, at 2549.

⁹ CAR-OTP-0094-2547, at 2550-2551.

¹⁰ CAR-OTP-0094-2547, at 2551.

¹¹ CAR-OTP-0094-2547, at 2551.

8. Granting the addition and submission of the Briefing Paper does not unfairly prejudice the Convicted Persons. *First*, as noted, the document is publicly available. *Second*, it was disclosed to the Defence yesterday, 29 November 2016.¹² *Third*, the document is not lengthy or unreasonably burdensome. *Fourth* its submission does not entail the calling of any additional evidence. *Finally*, the Chamber's recognition of the Briefing Paper as formally submitted is in the interests of justice, and will assist its consideration and analysis of salient facts attendant to a fair determination of the sentences regarding the Convicted Persons.

III. Relief Requested

9. For the reasons above, the Prosecution requests the Chamber to: (1) extend the deadline for disclosure and addition of the Briefing Paper to the "additional evidence" submitted on 23 November 2016, pursuant to regulation 35 of the RoC; and (2) recognise the Briefing Paper as formally submitted in respect of the sentencing proceedings.



Fatou Bensouda, Prosecutor

Dated 30th Day of November 2016
At The Hague, The Netherlands

¹² ICC-01/05-01/13-2068-Conf-AnxA.