

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/05-01/13  
Date: 12 February 2015

**TRIAL CHAMBER VII**

**Before:** Judge Olga Herrera Carbuccion  
Judge Robert Fremr  
Judge Chile Eboe-Osuji

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

**IN THE CASE OF**  
***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO***  
***MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU***  
***AND NARCISSE ARIDO***

**Public Redacted document**

**Public Redacted version of "Prosecution's Motion for the Preservation of  
Evidence", 05 January 2015, ICC-01/05-01/13-788-Conf**

**Source:** The Office of the Prosecutor

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

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## I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests the Pre-Trial Chamber II (“Chamber”), pursuant to articles 54(3)(f) and 57(3)(c) of the Rome Statute (“Statute”), to order the Defence in case ICC-01/05-01/08<sup>1</sup> (“*Bemba* Defence”) in its current and former composition<sup>2</sup> to preserve the full record of interviews of defence witnesses, particularly the prior statements of the 14 witnesses that are the subject of the confirmed charges.<sup>3</sup> This evidence is unique and material to the contentions placed at issue by Jean-Pierre Bemba Gombo (“Bemba”) and Aimé Kilolo Musamba (“Kilolo”), respectively. Absent the Chamber’s order to preserve such material, this important evidence may not be available for the purposes of trial.

2. The Prosecution intends to seek an order for the production of this material from the Trial Chamber in this case once constituted, pursuant to articles 64(3)(c), 64(6)(d), and 69(3) of the Statute and rules 79(4) and 84 of the Rules of Procedure and Evidence (“Rules”). However, as it is unclear when a Trial Chamber might be constituted, the Prosecution engages the Pre-Trial Chamber, which remains seized of the case.

## II. Confidentiality

3. This filing is classified as “Confidential”, as it refers to filings of the same designation.

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<sup>1</sup> (“*Bemba* Case” or “Main Case”).

<sup>2</sup> All current and former Counsel and Legal Assistants with access to, or possession of, the material sought to be preserved.

<sup>3</sup> Witnesses for the Defence in the Main Case: D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64.

### III. Submissions

*a. The evidence to be preserved is highly relevant and material to the proper determination of the issues at trial*

4. The Prosecution seeks the preservation of evidence as an interim measure, pending the constitution of a Trial Chamber in this case and its determination on the production of this evidence. The evidence to be preserved is not privileged. Any such claim is premature at this stage and, in any event, will be determined by the Trial Chamber once the request for production is made.

5. The prior statements of defence witnesses to be preserved are themselves *actual evidence* of the matters at issue before the Court (as opposed to merely comprising a narrative of events under the Court's consideration). The substantive inconsistency of a witness's prior statement with his/her subsequent trial testimony is relevant and probative evidence of whether there has been improper interference. Although not dispositive, it is clearly material to the respective parties in this case.

6. There is a legitimate forensic purpose for the preservation of the requested evidence, which plainly exists. Given the Accused's reliance on and partial use of derivative evidence in this case – the *Bemba* Defence, however composed, must be in the possession of the underlying material.<sup>4</sup> The *Bemba* Defence disclosed only summaries of the expected testimony of Defence witnesses in the Main Case and not the witnesses' prior statements, which the Prosecution now seeks to preserve.<sup>5</sup> This evidence is material to the impending trial and is otherwise unobtainable by the Prosecution.

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<sup>4</sup> See for instance CAR-D21-0004-0463; CAR-D21-0004-0450; CAR-D21-0004-0601; CAR-D21-0004-0640; CAR-D21-0004-0546; CAR-D21-0004-0709-R01.

<sup>5</sup> ICC-01/05-01/08-2222-Conf-AnxA.

7. Further, the Accused's reliance on this evidence in these proceedings is selective. Kilolo affirmatively asserts that his alleged conduct under article 70(1)(c) can be described as "non-illicit refreshing"<sup>6</sup> of the witnesses' memories by reading to them, or having them read, their prior statements.<sup>7</sup> He contends that such conduct does not comprise corruptly influencing witnesses, insofar as the witnesses' testimonies reflect their prior statements to the *Bemba* Defence<sup>8</sup>

8. [REDACTED].<sup>9</sup> [REDACTED].<sup>10</sup>

9. At their core, these arguments place at issue the substance of the witnesses' prior interviews and statements to the *Bemba* Defence by purporting to undermine the confirmed charges concerning corruptly influencing witnesses as regards the *actus reus* or the *mens rea*.

10. These lines of defence cannot be investigated, let alone fairly tested at trial, without knowing what the witnesses actually said during interviews with, or in statements provided to, the *Bemba* Defence. The evidence to be preserved is restricted to matters affirmatively placed at issue by the Accused. Its preservation in whatever form—whether audio recordings, transcriptions,<sup>11</sup> informal or formal statements, or notes attributing statements to the witnesses concerned—is critical not only to the Prosecution's case, but to the Defence's as well. The evidence is either consistent with

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<sup>6</sup> While the Chamber rejected Kilolo's arguments in this regard for the purposes of confirming the charges (see, ICC-01/05-01/13-749, paras.70-71), the Trial Chamber should be given the opportunity to avail itself of all evidence necessary to a fair adjudication of the contested issues before it.

<sup>7</sup> Kilolo specifically asserts that his actions amounted to 'non-illicit refreshing' in the case of 10 witnesses: D-2, D-3, D-13, D-15, D-23, D-25, D-26, D-29, D-54, and D-55. See, ICC-01/05-01/13-674-Conf, para.83. See also, ICC-01/05-01/13-600-Conf-Corr2, paras.219, 608-610, 662; ICC-01/05-01/13-674-Conf, paras.83, 95, 99, 108, 134, 150.

<sup>8</sup> ICC-01/05-01/13-674-Conf, paras.82, 83, 91, 95, 99, 108, 121, 125, 129, 130, 134, 150, 151, 161, 162, 164, 166, 175, 179, 182, 185, 187, 196, 200, 201, 208, 211, 212, 213, 214, 215, 217, 230.

<sup>9</sup> "The Suspect would have been provided with a *précis* of the evidence which his legal team intended to elicit from a witness. The Suspect, as a consequence, fails to see how an insistence that the contents of such a *précis* be repeated in Court should be deemed criminal behaviour", see ICC-01/05-01/13-669-Conf, para.14.

<sup>10</sup> ICC-01/05-01/13-599-Conf, paras.71, 145.

<sup>11</sup> See ICC-01/05-01/13-600-Conf-Corr2, paras.127-129; ICC-01/05-01/13-674-Conf, paras.91, 94.

the witnesses' subsequent trial testimony and therefore, potentially substantiates the Defence claims;<sup>12</sup> or it is not, and rebuts the contentions advanced by the Accused in this case.

11. Evidence in the Prosecution's possession suggests major inconsistencies between the prior statements of witnesses and their subsequent testimony. For example, a 28 August 2013 conversation between Kilolo and Jean-Jacques Mangenda Kabongo ("Mangenda") about a witness's trial testimony notes [REDACTED].<sup>13</sup> [REDACTED].<sup>14</sup> However considered, the evidence sought to be preserved is important to the establishment of the truth in this case.

*b. The evidence to be preserved is unique and otherwise unobtainable from other sources if destroyed*

12. Neither the Prosecution nor the Court has access to the full records of defence witness interviews and prior statements in the *Bemba* Case. Although a few unsigned written records concerning the interviews of some *Bemba* Defence witnesses<sup>15</sup> were disclosed by the *Kilolo* Defence in connection with its confirmation submissions, these documents do not comprise actual *verbatim* transcripts of the interviews. Instead, they are prepared neatly-drafted questions and answers.<sup>16</sup> Nevertheless, Kilolo's proffer of this evidence during the confirmation proceedings definitively establishes the existence of the underlying prior statements of *Bemba* Defence witnesses.<sup>17</sup>

<sup>12</sup> See ICC-01/04-01/06-915, para.62.

<sup>13</sup> CAR-OTP-0079-0122 at 0124, lns. 20-22.

<sup>14</sup> CAR-OTP-0079-0122 at 0126, lns. 98-100.

<sup>15</sup> See CAR-D21-0004-0463; CAR-D21-0004-0450; CAR-D21-0004-0601; CAR-D21-0004-0640; CAR-D21-0004-0546; CAR-D21-0004-0709-R01.

<sup>16</sup> See, e.g. CAR-D21-0004-0450.

<sup>17</sup> See fn.15, *supra*.

13. The summaries of witnesses' evidence disclosed by the *Bemba* Defence in the Main Case are not the duplicative equivalents of the prior statements and the underlying material sought to be preserved.<sup>18</sup> Instead, the summaries only indicate the topics on which the witnesses were expected to testify.<sup>19</sup> Evidence in the *Bemba* trial record establishes that these summaries do not necessarily comprise what the witnesses actually stated to the *Bemba* Defence; in some instances, witnesses have conceded the incorrectness of the summary information provided to the Prosecution by the *Bemba* Defence.<sup>20</sup>

14. In view of these irregularities, the prior statements of defence witnesses must be preserved in whatever form they exist: (1) [REDACTED];<sup>21</sup> and (2) in an intercepted conversation between Mangenda and Kilolo, Kilolo refers to [REDACTED]<sup>22</sup>— which underscore the existence of the relevant underlying material to be preserved.

15. As Kilolo and Bemba have placed the contents of prior defence witness statements at issue, its preservation now is critical to preventing its unavailability at trial.

*c. Preserving the evidence is necessary for the determination of the truth*

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<sup>18</sup> See, e.g. by comparison, the summary of the evidence provided by the *Bemba* Defence regarding the expected testimony of D-15 (CAR-D04-0003-0229) and the witness's prior statement to the Defence (CAR-D21-0004-0709-R01). The summary of the evidence generally refers to the *questions* that were asked of the witness in preparation of his statement, rather than the substance of the answers.

<sup>19</sup> ICC-01/05-01/08-2222-Conf-AnxA.

<sup>20</sup> See e.g., ICC-01/05-01/08-T-333-CONF-ENG ET, p.34, lns.4-22 (D-23 denying knowledge of the command structure of the MLC in the CAR, [REDACTED]).

<sup>21</sup> [REDACTED]. See, ICC-01/05-01/13-600-Conf-Corr2, para.129.

<sup>22</sup> See, CAR-OTP-0080-0238, particularly at 0241, lns.64 – 0242, ln.111.

16. The preservation of evidence is sought as an interim measure to ensure that the Trial Chamber is not ultimately deprived of material necessary to adjudicate the case, and that it is provided every facility to discharge its mandate to search for the truth. Further, the simple act of preserving for trial evidence that is highly relevant to, and probative of, matters placed at issue by the Defence itself, cannot reasonably infringe the Accused's rights.

17. The Prosecution notes that articles 18(5) and 19 of the Code of Professional Conduct for Counsel ("CPCC") appear to require Defence Counsel to preserve the entire case file despite the termination of representation. Nevertheless, the particular circumstances of this case warrant the Chamber's intervention, given: (1) the nature of the article 70 offences confirmed against the Accused, and (2) [REDACTED].<sup>23</sup> As such, the Chamber should not presume the discharge of the *Bemba* Defence's obligations under the CPCC as sufficient to ensure the preservation of evidence in this case.

18. In the circumstances, the integrity of relevant evidence and its potential availability at trial should not rest solely on the Defence, nor should the Chamber's obligation to take such steps as are necessary to preserve material evidence for trial be deferred, absent any compelling competing interest.

#### **IV. Requested Relief**

19. For the foregoing reasons, the Prosecution respectfully requests the Pre-Trial Chamber to (i) order the *Bemba* Defence in its current and former composition to preserve all records of interviews with, and statements of, *Bemba* Defence witnesses in whatever form they exist, particularly those concerning the 14 witnesses identified in the Confirmation of Charges Decision; (ii) direct Registry to notify Lead Counsel in

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<sup>23</sup> ICC-01/05-01/13-674-Conf, para.472.



the Main Case of the present filing; and (iii) should the request be granted, direct Registry to notify current and former members of the *Bemba* Defence, of the Pre-Trial Chamber's order.



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**Fatou Bensouda, Prosecutor**

Dated this 12<sup>th</sup> Day of February 2015  
At The Hague, The Netherlands