Cour Pénale Internationale

International Criminal Court

Original: **English**

No.**: ICC-01/05-01/13**
Date: **25/09/2015**

**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 with Confidential Annex A*

**Public Redacted Version of Joint Defence Request to Restrict the Scope of P0433's Testimony**

**Source:** **Counsel for Jean-Pierre Bemba Gombo**
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**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## Introduction

1. The Defence teams for Messrs. Bemba, Kilolo, Mangenda, Babala and Arido (hereinafter "the Defence") request the Trial Chamber to issue an order:

   i. limiting the scope of the testimony of [REDACTED] to issues of which [REDACTED] has factual knowledge; and

   ii. excluding testimony, which is either opinion evidence or argument.

2. This order is required to preserve the fairness and impartiality of the proceedings, and to ensure that [REDACTED] is not employed as a vehicle for the admission of partial opinion, argument, or evidential conclusions which fall within the domain of the Trial Chamber.

3. This request has been filed on a confidential basis due to the fact that it cites to confidential Prosecution documents. A public redacted version will be filed forthwith.

## Relevant background issues

4. Apart from [REDACTED] attendance at certain interviews, the Defence received no notice concerning [REDACTED] potential involvement in the trial process until the Prosecution submitted its list of witnesses, which included [REDACTED].[1]

5. The Prosecution also disclosed an analysis report (the Report),[2] but the fact that it was authored (partly or in whole) by [REDACTED] was not confirmed until

[1] ICC-01/05-01/13-1048.
[2] CAR-OTP-0090-0612.

the Prosecution filed its Pre-Trial Brief, which attributed the report to [REDACTED].

6. By this juncture, the Defence had been compelled to advance its position on the authenticity and reliability of a plethora of intercepted communications included in the Prosecution's First Bar Table Motion, without the benefit of the disclosure of [REDACTED] Report.

7. No further statement or information was provided in relation to [REDACTED] proposed testimony.

8. [REDACTED].[3]

9. [REDACTED]. [REDACTED].[4]

10. On 17 September 2015, the Prosecution submitted a summary of [REDACTED] proposed testimony, in which the Prosecution evinced its intention to elicit testimony in relation to the following:[5]

[REDACTED]

**Submissions**

11. The Defence does not oppose [REDACTED] being called to testify in relation to factual issues within [REDACTED] personal knowledge. This includes:

i. [REDACTED];

ii. [REDACTED].[6]

[3] ICC-01/05-01/13-1235-Conf-AnxA.
[4] Annex A.
[5] ICC-01/05-01/13-1263-Conf-AnxA, p. 3.
[6] The Defence attaches the caveat that such issues require the Defence to receive the RFAs and correspondence concerning the transmission of evidence from domestic authorities to the ICC sufficiently in advance of [REDACTED] testimony to prepare cross-examination in an effective manner. The Defence requires access to the RFAs and correspondence in order to ascertain which entity was responsible for formatting the evidence, and transforming the raw data into Excel tables

12. The Report does not, however, focus on such issues but delves into the realm of argument and opinion, and further attempts to summarise or analyse evidence on the basis of particular, contested assumptions. [7] In effect, the Report is built on evidential conclusions and argument, which belong in a Pre-Trial Brief, Opening Statement, or Final Trial Brief.

13. If [REDACTED] were to 'testify' in relation to such issues, the Prosecution would be afforded the opportunity to present a particularly long opening statement, albeit with the appearance of the gravity and weight of sworn testimony. Moreover, rather than being a forum for eliciting the truth, the courtroom would devolve into a forum for debate concerning these assumptions and conclusions.

14. The Report also includes analytical conclusions regarding the nature of certain forensic evidence. The basis for such conclusions are not, however, cited in the Report, [8] or disclosed elsewhere.

15. The Report further cites to materials from the Main Case, which have never been disclosed to the Article 70 Defence teams. [9] Whereas both the Prosecution and [REDACTED] have had access to filings in the Article 70 case and any filings in the Main Case they deemed necessary for their work, the Article 70 Defence teams have not. It is therefore unfair for [REDACTED] to testify in relation to issues, which are

etc. If, as appears at present, the ICC Prosecution had no involvement in this process, [REDACTED] would not be in a position to testify on such matters. The Prosecution had the option to call the persons who were involved in the interception process, but declined to do so. It would be wholly inappropriate for [REDACTED] to be used as a substitute for direct evidence on these matters, particularly in circumstances in which the Prosecution has refused to disclose information concerning the national processes involved in advance of the commencement of the trial.

[7] For example, paragraph 3.8 asserts that the Report does not include CDRs which do not contain identified contact between the Accused and defence Witnesses. This statement is based on the implicit assumption that the Prosecution has successfully attributed the communications in this report to the Accused and Defence witnesses.

[8] For example, the assumption on page 2 concerning the fact that communications of 10 seconds or more can be considered to be 'substantive'. See also footnote 4 regarding the generation of times.

[9] CAR-OTP-0090-0626, footnote 41.

predicated on [REDACTED] knowledge and familiarity with issues and filings, which have never been disclosed in this case.

16. The Prosecution has also presaged their intention to elicit testimony from [REDACTED] in relation to:[10]

[REDACTED]

17. The attribution of numbers to particular persons, the specific date of the 'cut-off' point, and the question as to whether a specific Call Data Record reflects an actual 'contact' (as opposed to call-forwarding, missed calls et cetera) are contested issues, which must be determined by the Trial Chamber as the ultimate arbiter of fact. [REDACTED] can, at most, testify that a call data record includes information concerning two numbers on a particular date; [REDACTED] cannot, however advance conclusions and opinions, which are predicated on the Prosecution's case theory. Nor should [REDACTED] be permitted to give evidence as to what constitutes a 'cut off' date or that any given contact was not in accordance with the Victims and Witness Unit protocol. This is obviously outside [REDACTED] area of knowledge and competence. [REDACTED] can, at most, give evidence of a purported contact on a given day at a given time.

18. A strict delineation of the scope of [REDACTED] testimony is also consistent with the case law and practice of the ICC and the *ad hoc* Tribunals.

19. In the *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II ordered the Prosecution's Lead Investigator to testify in relation to the conduct of investigations, the methodology employed to take witness statements, and the methods used to identify and collect exculpatory information.[11] The Trial Chamber

[10] ICC-01/05-01/13-1263-Conf-AnxA, p. 3.
[11] ICC-01/04-01/07-1603, para. 17.

also imposed a strict prohibition on the elicitation of testimony concerning the situation or testimony of specific witnesses.[12]

20. In the *Prosecutor v. Abu Garda,* the Trial Chamber imposed clear limits concerning the scope of the testimony of a Prosecution witness called by the Defence.[13] In particular, the Trial Chamber underscored that the investigator's testimony should be confined to "objective facts", and that:[14]

> questions aimed at eliciting from the Defence's Proposed Witness judgments or evaluations of a discretionary nature (including without limitation matters of prosecutorial discretion) will be considered as not admissible.

21. In terms of the practice of the *ad hoc* Tribunals, where the parties have elected to call a person as a witness of fact, the Trial Chamber has a corresponding duty to exclude irrelevant details, matters of personal opinion, or expertise beyond the remit of a fact witness.[15]

22. In cases in which investigators have been permitted to testify at the ICTY and ICTR, their testimony has related to investigative acts or information within their personal knowledge: i.e. information within their personal knowledge concerning chain of custody, and the handling of evidence.[16] Investigators were not, however, authorised to testify in relation to the contents of evidence that they have not created.[17]

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[12] *Prosecutor v. Katanga et al.*, Transcript, 25 November 2010, pp. 65, lines 17-20.

[13] *Prosecutor v. Abu Garda,* Decision on Witness to be called by the Defence at the Confirmation Hearing, 19 October 2009, ICC-02/05-02/09-186.

[14] Page 5.

[15] *Prosecutor v Ndindlilyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecutor's Testimony Opposing the Testimony of Witness DE4-30 as a Factual Witness,* 16 May 2007, para. 9, *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Requete de la Defence de M. Ngirumpatse en Retrait de la Deposition du Temoin GFJ et des Pieces Afferentes,* 6 August 2008, para. 4; *Prosecutor v. Milutinovic,* 'Decision On Prosecution Request For Certification Of Interlocutory Appeal Of Decision On Admission Of Witness Philip Coo's Expert Report', 30 August 2006, para. 11.

[16] *Prosecutor v. Karamera* et al., ICTR-98-44-T, Decision on Joseph Nzirorera's motion to exlcude the testimony of Prosecution witness Upendra Baghel, 30 October 2007, para. 1.

[17] *Bikindi v. Prosecutor*, ICTR-01-72-A, Judgement, 18 March 2010, para. 177.

23. A decision from the *Prosecutor v. Perisic case* is particularly apposite to the current application. In that case, the Trial Chamber upheld a Defence application to limit the scope of the testimony of a Prosecution investigator to issues concerning the provenance, and chain of custody of evidence tendered through him.[18]

24. In reaching this determination, the Trial Chamber endorsed the argument of the Defence that,

> Mr. Randall is not called to testify as an expert witness and therefore should not be permitted to present his opinions or draw conclusions on the contents and interpretation of documents with which he familiarised himself only by virtue of having reviewed them in the context of his employment with the OTP.[19]

25. The Trial Chamber further expressed its concern that: [20]

> the Prosecution's intention to "ask Mr. Randall to summarize the contents of collections of documents and individual documents, and to assist the Chamber in identifying relevant passages in others, would necessarily be based upon a selection of passages and documents Mr. Randall deems most pertinent and therefore entail giving opinions and conclusions on the relevance and contents of the documents in question.
>
> […]
>
> The Trial Chamber notes that, as an investigator, Mr. Randall may testify as a fact witness only in relation to provenance and chain of custody of the documents he has obtained in the context of his employment with the [21]OTP, since no other relation between Mr. Randall and the documents has been established. Given the voluminous amount of "thousands of pages of documents" the Prosecution intends to introduce through Mr. Randall, the Trial Chamber finds that trial expediency - the Prosecution's paramount

[18] 'Decision On Defence Motion In Limine For Prosecution Witness Bretton Randall', 11 February 2009.
[19] Para. 12.
[20] Para. 12 and 15.
[21] Transcript 30 May 2002, pages 5941-5944, http://www.slobodan-milosevic.org/documents/trial/2002-05-30.html.

> reason for Mr. Randall's projected presentation of summary evidence - would be best served by limiting Mr. Randall's examination-in-chief strictly to those issues that can be of assistance to the Trial Chamber. Considering its concern regarding selective summarisation expressed above and given the Trial Chamber's duty to thoroughly analyse the evidence and familiarise itself with it, the Trial Chamber fails to see how Mr. Randall could assist it on matters going beyond provenance and chain of custody of the documents in question.

26. In the *Milosevic* case, the Trial Chamber rejected a Prosecution request to call its investigator as a fact-summary witness on the grounds, *inter alia,* that the testimony would constitute a repetition of the Prosecution case, and would further trespass into the functions of the Trial Chamber.

27. In upholding the decision,[22] the Appeals Chamber noted that the proposed testimony of the investigator was comprised of conclusions, which were based on the investigator's perception and evaluation of the evidence he had heard. [23] These conclusions pertained to:[24]

> facts which the Trial Chamber is obliged to consider and in relation to which it must make its own findings before coming to the issue of the accused's guilt in relation to them . That task does not require expertise beyond that which is within the capacity of any tribunal of fact, that of analysing the factual material put forward by the witnesses. Whatever expertise the OTP investigator may claim to have in relation to such a task, the Trial Chamber was entitled to decline his assistance in the very task which it had to perform for itself.

28. In the *Popovic* case, a defence investigator was authorised to testify in relation to issues concerning the provenance, and methods used for the collection of evidence, and whether the investigator was aware of the contents of the evidence, but not in relation to the contents themselves.[25]

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[22] *Prosecutor v. Milosevic*, 'Decision on Admissibility of the Prosecutor Investigator's Evidence', 30 September 2002.
[23] Para. 17.
[24] Para. 17.
[25] Transcript 6 June 2008, T21943 –T21945.

29. In the *Milutinovic* case, the Trial Chamber also emphasied that a Prosecution investigator/analyst could only testify in relation to facts, and not his opinion of such facts.

30. Although the *ad hoc* Tribunals have permitted the Prosecution to call internal analysts as 'expert' witnesses, the Prosecution has not designated [REDACTED] as an expert witness, or complied with the procedural regulations for doing so.

31. [REDACTED] has not been included on the list of experts, and the instructions and sources relied upon by [REDACTED] to prepare [REDACTED] Report have not been cited in the Report, or disclosed to the Defence. In such circumstance, any testimony would constitute inadmissible opinion evidence.[26]

32. [REDACTED].[27]

33. In terms of the first aspect, the role of an expert is to assist the Chamber in a neutral and impartial manner, and not to assist one of the parties.[28]

34. [REDACTED].[29]

35. [REDACTED] Report is also directed towards advancing the Prosecution's case regarding contacts between the accused and the fourteen witnesses. In this

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[26] There must be sufficient information as to the sources used in support of the statements. The sources must be clearly indicated and accessible in order to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions. In the absence of clear references or accessible sources, the Trial Chamber will not treat such a statement or report as an expert opinion, but as the personal opinion of the witness, and weigh the evidence accordingly". *Prosecutor v. Dragomir Milosevic*, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, at para 8.
[27] [REDACTED].
[28] *Prosecutor v. Katanga and Ngudjolo*, Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305,1345,1360,1401,1412 and 1456), 7 October 2009 at para 68.
[29] CAR-OTP-0080-0165 (D3); CAR-OTP-0080-0494 (D2); CAR-OTP-0082-0460-R02 (P7); CAR-OTP-0082-0460-R03 (P7).

regard, [REDACTED] Report is not framed as an objective analysis [REDACTED], but as a presentation of allegations against the accused, [REDACTED]. [30]

36. The *ad hoc* Tribunals have also expressed reservations concerning the probative value of testimony emanating from an 'expert' employed by the Prosecution. Although the question as to whether their testimony will be accepted has varied between cases, the degree of involvement of the 'expert' in the strategy and work of the Prosecution team are relevant to the question as to whether the expert can be deemed to be sufficiently impartial.[31]

37. For example, in the case of Prosecutor v. Dordevic, the Trial Chamber found that it could not accept expert testimony from a Prosecution investigator/military analyst (Phillip Coo), due to Mr. Coo's involvement in Prosecution witness interviews, and the formulation of strategy concerning the case. [32]

38. The burden is also on the party calling the witness to establish that the witness possesses the requisite expertise and impartiality.[33]

39. In the present case, given that the Prosecution has elected to call Mr. Pluijmers as an expert in relation to telecommunications issues, it would be particularly inappropriate for the Prosecution to utilise [REDACTED] in order to cure any lacuna in his expert report, or to avoid risking adverse testimony which could emanate from an independent expert.

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[30] See for example, CAR-OTP-0090-0622, para. 4.8.4.
[31] *Prosecutor v. Milutinović et al.*, IT-05-87-T, Transcripts of 13 July 2006, T.840; *Prosecutor v Taylor*, No. SCSL-2003-01-T, Decision on Defence Application to Exclude the Evidence of Proposed Prosecution Witness Corinne Dufka, 19 June 2008, para. 15.
[32] Decision on Defence Notice under Rule 94 *bis*, 5 March 2009, *para. 19.*
[33] *Prosecutor v. Galic,* Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Phillips, 3 July 2002, at page 3.

## Relief sought

40. For the reasons set out above, the Defence respectfully request the Trial Chamber to issue an order:

i. limiting the scope of the testimony of [REDACTED] to issues of which he has factual knowledge; and

ii. excluding testimony, which is either opinion evidence or argument.

Melinda Taylor
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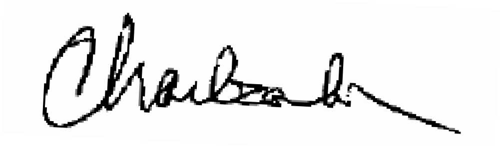

Charles Achaleke Taku
Lead Counsel of Mr. Narcisse Arido

Dated this 25th day of September, 2015

The Hague, The Netherlands