



Original: English

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

Date: 29/06/2016

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 with confidential Annexes A, B and C

**Public Redacted Version of “Defence Response to Prosecution Request to
Summon a Witness (ICC-01/05-01/13-1237-Conf)”**

Source: Counsel for Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for the Defence of Mr Aimé Kilolo Musamba

Paul Djunga

Steven Powles

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken De Vreuschmen

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Roland Azama Shalie Rodoma

Counsel for the Defence of Mr Narcisse Arido

Charles Achaleke Taku

Philippe Laroche

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

Introduction

1. On 14 September 2015,¹ the Prosecution submitted a request for the Trial Chamber to issue a summons against D-54 (the Request).
2. The Defence concurs that D-54 is a material witness who could shed light on the intercepts in question, and fully endorses his proposed testimony.
3. There is, however, insufficient justification for the use of such an extreme measure at this point. There is no objective information establishing that D-54 would be unwilling to testify if requested to do so, and if sufficient measures are employed to guarantee his security and protection. The request should therefore be dismissed on that basis.
4. In the alternative, given the ramification as concerns both the reliability of testimony procured under compulsion and D-54's protection and security as a Defence witness, the Trial Chamber's consideration of this Request should be suspended pending the disclosure of additional information concerning:
 - i. The contacts between the Prosecution and D-54, and the contents of the interaction which took place on 3 July 2015 (which is potentially exculpatory); and
 - ii. The contacts between the Prosecution and the [REDACTED] authorities in relation to D-54.
5. This response has been filed on a confidential basis in order to accord with the level of the Request, and due to the citation of confidential information concerning the security of D-54.

¹ ICC-01/05-01/13-1237-Conf-Red

The Prosecution has not adduced objective evidence in support of its request to summons D54

6. A summons is a coercive mechanism, which exposes the witness to a risk of sanctions. For this reason, it should only be employed as a measure of last resort.²

7. In a motion of twenty pages, only one paragraph is dedicated to explaining why the use of coercive powers is justified.

8. In the Request, the Prosecution avers that:

the Prosecution has exhausted all avenues to secure P-201's voluntary attendance. After multiple attempts, the Prosecution first established communication with P-0201 on 3 July 2015. When asked whether he was willing to testify before the Court, P-0201 unequivocally stated that he did not want to testify and had already said what he had to say during his testimony in the Main Case.

9. An abridged version of this information is repeated at paragraph 29.

10. This information is pure, unsupported hearsay.

11. If D54 has indeed, "unequivocally stated that he did not want to testify", then this begs the question as to why the record of him saying so in "unequivocal" terms has not been disclosed.

12. The Defence has the right to know in what terms D54's purported refusal was conveyed to the Prosecution. In order to assess whether D54 was in fact unwilling (as opposed to unable) to testify, the Prosecution should have examined and addressed any security or legal concerns which could have affected D54's ability to testify, once again, before the ICC.

² ICC-01/05-01/13-1222.

13. The Defence should also have been informed of the manner in which D-54 was approached, as this could have impacted on his response. It is evident, for example, that P-0272 was arraigned by [REDACTED] authorities in order to assess his willingness to meet with the ICC Prosecution.³ If D-54 was approached in a similar manner, he may have been extremely reluctant to provide any information which could divulge his prior, unauthorised involvement in the Main Case, or which would in any way antagonise the [REDACTED] authorities.

14. In the absence of any objective record as to D-54's purported refusal to testify, it cannot be excluded that D-54's refusal was in fact, mere reluctance in the face of insufficient (or indeed no) information as to why his testimony was required, or, an expression of fear regarding the consequences which could result from further testimony before the ICC.

15. In terms of the first aspect, the Request notes that D-54 informed the Prosecution that, for unspecified reasons, he did not want to testify, and "he had already said what he had to say during his testimony in the Main Case".⁴ If D-54 does not consider his testimony in the Main Case to be false, and is unaware of the questions which the Prosecution wishes to put to him, then it is understandable that he would not understand the need or utility for him to testify again in relation to the same issues.

16. A witness (who is also a suspect) cannot be considered obstructive if they are not given sufficient information in order to make an informed decision as to whether to waive their right to silence. A suspect under Article 55 also has an absolute right of silence. There is no utility in summoning D-54 if he has no

³ CAR-OTP-0088-0155-R01 at 0160, lines 157-170; CAR-OTP-0088-0155-R01 at 0161, lines 175-185.

⁴ ICC-01/05-01/13-1237-Conf-Red, para. 29.

intention of waiving this right. Nor can he be compelled or threatened with adverse consequences if he refuses to do so.

17. Regarding the possibility that his reluctance could be attributable to protection issues, although the Prosecution has alluded to the fact that D-54 is a [REDACTED] [REDACTED], they have failed to note the significant impediments this engenders as concerns his ability to testify before an international court. These constraints (including the need to obtain his supervisor's consent) were addressed at length in the Main Case, but have been glossed over in the Request, and have not been disclosed in this case.

18. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED].⁵ [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED].⁶

19. D-54 was also the beneficiary of protective measures in the Main Case, which stipulated that the fact that he was a witness for the Defence of Mr. Bemba should not be disclosed to any entity outside the Court, including the [REDACTED] Government

20. If D-54 is now summonsed with the assistance of the [REDACTED] authorities in order to testify in the Article 70 case, this will alert the [REDACTED] authorities to the fact that he has material information concerning the Defence in the Main Case; it will be impossible for them not to guess that he testified for the Defence of Mr. Bemba in the Main Case, and that he did so without official

⁵ ICC-01/05-01/08-T-346-CONF-RED-ENG, p.5, line 14 to p.8, line 6; p.15, line 6 to p.17, line 8; and p.25, line 5 to p.27, line 14.

⁶⁶ ICC-01/05-01/08-T-346-CONF-RED-ENG, p.25, line 5 to p.27, line 14.

authorization. This would be contrary to his right to protection, and will expose him to an obvious risk of retaliation, and punishment.

21. The Prosecution is aware that several Defence witnesses in the Main Case were subjected to threats and retaliation by the [REDACTED] authorities, and that the former Lead Counsel, was at one point, arrested at gun-point by [REDACTED] intelligence operatives at [REDACTED] airport.⁷

22. Given this context, Article 68(1) requires that alternative measures should first be exhausted before a decision is taken to adopt a course of action that could expose D-54 to unnecessary risk, and undermine Main Case protective measures.

23. In light of the dearth of information as concerns what measures have been taken to secure his testimony through alternative means, the Request should be dismissed.

In the alternative, the Request should be suspended pending disclosure of records and contacts concerning D-54

24. Notwithstanding the fact that D-54 is a suspect (which triggers an obligation to record statements pursuant to Rule 112), and a Defence witness in the Main Case, the Prosecution has refused repeated requests for disclosure of any information concerning either its efforts to contact D-54, or its eventual contact with D-54.⁸

25. The Prosecution has refused to disclose the notes of the investigator who contacted D-54, notwithstanding the fact that such notes constitute the basis for the current Request, and are self-evidently, material to the preparation of the Defence.

⁷ ICC-01/05-01/08-3203-Red2, paras. 85-86.

⁸ Annex A.

26. The Trial Chamber has found that the circumstances under which a witness recants his or her testimony may be relevant to the preparation of the Defence.⁹ These 'circumstances' include the question as to whether a witness should be called to testify in relation to their past testimony voluntarily, or pursuant to a summons. It follows that the Defence teams have the right to receive any information which could be relevant to the question as to whether the criteria for a summons are met in this case.

27. The converse is also true; if a witness refuses to recant their testimony but affirms it, then both the affirmation and the circumstances surrounding it are relevant to the preparation of the Defence.

28. If D-54 asserted that that he had nothing to add to his testimony in the Main Case, then he was in effect, affirming the veracity of his testimony in the Main Case. This is exculpatory. The Prosecution not only had a duty to disclose these notes, but as soon as the witness informed the Prosecution of this position, Article 54(1) required the Prosecution to explore this matter with the witness with a view to identifying any further information that could be exculpatory or relevant to the Defence. The duty to collect information on this point applied irrespective as to whether the D-54 wished to testify as a witness or not; Article 54 sets out broad powers to collect information from a range of sources, who might not testify as witnesses.

29. It would, therefore, be inadequate for the Prosecution to limit its contact to witnesses to issues which concern the presentation of the Prosecution case, whilst ignoring matters that concern potentially exonerating circumstances.

⁹ ICC-01/05-01/13-1172, para. 20.

30. The Defence for Mr. Bemba also has an ongoing duty to ensure that D-54 is not subjected to adverse consequences or security risks, as a result of his testimony as a Defence witness in the Main Case. The Trial Chamber has confirmed that any contacts with witnesses in the article 70 case do not affect the obligations of the parties in the Main case.¹⁰ In particular, Trial Chamber VII has underscored that:¹¹

The Chamber, mindful of its obligation to protect the safety, physical and psychological well-being, dignity and privacy of witnesses in accordance with Article 68(1) of the Statute, will not allow the general disclosure of the fact that witnesses are involved in ICC proceedings, in light of the serious effect this may have on their protection in connection with the Main Case.

31. Although Trial Chamber III acknowledged that the Prosecution could contact Defence witnesses after their testimony, this was subject to the caveats that firstly, the Prosecution should coordinate any such contacts with VWU, and secondly, “in principle, the Items generated during the course of contacts between prosecution and witnesses called by the defence may be material to the preparation of the defence”, and as such, the Prosecution was obliged to review such materials with a view to complying with its obligations under Article 67(2) and Rule 77.¹²

32. Notwithstanding these legal directives, when the Defence requested information concerning the Prosecution’s contacts with D-54 or any [REDACTED] authorities in relation to D-54, the Prosecution refused point blank to divulge any particulars.¹³ The Prosecution also failed to respond to a Defence query in relation to whether and when the Prosecution coordinated with the VWU before contacting Defence witnesses.¹⁴

¹⁰ ICC-01/05-01/13-1093, para. 30.

¹¹ ICC-01/05-01/13-1093, para. 23.

¹² ICC-01/05-01/08-3070, paras. 16, 25.

¹³ Annex A.

¹⁴ Annex B.

33. Even if the Prosecution intends to call D-54 as a witness in the Article 70 case and therefore assumes responsibility for ensuring his protection vis-à-vis his status as a Prosecution witness in the Article 70 case, it would also face a potential conflict of interest if it were to assume responsibility for his status as both a Defence witness and a Prosecution witness.

34. Since many issues concerning D-54's protection and testimony in the Main case were addressed in an *ex parte* manner, the Prosecution is also not equipped to do so in an effective manner. Although the Defence has attempted to pursue the issue of D-54's protection with VWU, VWU has indicated that in the absence of concrete information provided by the Defence, it is not in a position to undertake any measures.¹⁵ This underscores the need for all relevant records and communications to be disclosed to the Defence for Mr. Bemba, as it is the party which is most familiar with the risks which relate to his status as a Defence witness in the Main case.

35. The Defence cannot, however, identify specific risks or seek specific relief if it is not apprised of the specific details of the contacts, which are the source of the risk. Contrary to the position asserted by the Prosecution,¹⁶ the Defence for Mr. Bemba does have a procedural interest in such matters, and should not be arbitrarily or unnecessarily excluded from information put before the Court concerning D-54, which could relate to his protection or status as a Defence witness.

Relief sought

36. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Trial Chamber to:

- i. Dismiss the Request; or

¹⁵ Annex C.

¹⁶ ICC-01/05-01/13-1237-Conf-Red, para. 4.

- ii. In the alternative, suspend its consideration pending the disclosure of the information identified above to the Defence for Mr. Bemba.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 29th day of June, 2016

The Hague, The Netherlands