

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/05-01/13  
Date: 11 February 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's Motion to Exclude the Testimony of Witness D23-1  
and the Submission of his Report**

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**

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**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 Articles 64(2), 67(1)(c) and (e) and 69 of the Rome Statute ('Statute') and Rule 63(5) of the Rules of Procedure and Evidence ('Rules') and Regulation 24(5) of the Regulations of the Court, issues the following 'Decision on Prosecution's Motion to Exclude the Testimony of Witness D23-1 and the Submission of his Report'.

## **I. Procedural History**

1. On 20 January 2016, the Single Judge allowed the defence team for Mr Mangenda ('Mangenda Defence') an extension of time to disclose an expert report and designate the expert as a witness.<sup>1</sup> The Mangenda Defence explained that this witness, D23-P-0001 ('D23-1'), its only proposed witness, is to provide testimony about the legality and propriety of the manner in which Western Union financial records were obtained from the Republic of Austria. In response to objections from the Office of the Prosecutor ('Prosecution') on the relevance of the proposed testimony, the Single Judge found that any argument on the admissibility of evidence was premature at that time.<sup>2</sup>
2. On 3 February 2016, the Mangenda Defence confirmed disclosure of D23-1's report (CAR-D23-0006-0001) and provided the summary of his proposed expert testimony.<sup>3</sup>
3. On 8 February 2016, the Prosecution requested that the Chamber exclude the report and proposed expert testimony of D23-1 ('Request').<sup>4</sup>

<sup>1</sup> Decision on the Mangenda Defence Request for Extension of Time Limit for Disclosure of Potential Expert Report, 20 January 2016, ICC-01/05-01/13-1555.

<sup>2</sup> ICC-01/05-01/13-1555, para. 11.

<sup>3</sup> Jean-Jacques Mangenda's Supplemental Notice of Evidence to be Tendered, ICC-01/05-01/13-1592 (with confidential annex).

4. On 10 February 2016,<sup>5</sup> the Mangenda Defence<sup>6</sup> and the defence team for Mr Arido<sup>7</sup> responded that the relief sought in the Request should be rejected.
5. On 11 February 2016, the Prosecution sought leave to reply to two issues raised in the Mangenda Defence response.<sup>8</sup>
6. In order to reach its decision, the Single Judge does not consider it necessary to receive the reply proposed by the Prosecution. The Single Judge therefore rejects this request.

## II. Analysis

7. The Prosecution submits that D23-1's report and anticipated testimony should be deemed *prima facie* inadmissible because they: (i) are irrelevant to the issues in this case;<sup>9</sup> (ii) contravene Article 69(8) of the Statute and Rule 63(5) of the Rules<sup>10</sup> and (iii) are not warranted under any other provision of the Statute or Rules.<sup>11</sup>
8. The Mangenda Defence responds that national law is relevant in the context of assessing possible violations under Article 69(7) of the Statute<sup>12</sup> and provides competing interpretations of Article 69(8) and Rule 63(5).<sup>13</sup>

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<sup>4</sup> Prosecution's Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report, ICC-01/05-01/13-1605 (with annex).

<sup>5</sup> The response deadline was set for this date. Email from a Legal Officer of the Chamber to the parties, 8 February 2016 at 16:45.

<sup>6</sup> Response to Prosecution Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report (ICC-01/05-01/13-1605), ICC-01/05-01/13-1618 (with five annexes).

<sup>7</sup> Narcisse Arido's Response to 'Prosecution's Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report' (ICC-01/05-01/13-1605), ICC-01/05-01/13-1617.

<sup>8</sup> Prosecution's Request for Leave to Reply to Filing ICC-01/05-01/13-1618, ICC-01/05-01/13-1620.

<sup>9</sup> Request, ICC-01/05-01/13-1605, paras 1, 3-6.

<sup>10</sup> Request, ICC-01/05-01/13-1605, paras 1, 7-11. Article 69(8) provides that '[w]hen deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law'. Rule 63(5) provides that '[t]he Chambers shall not apply national laws governing evidence, other than in accordance with article 21'.

<sup>11</sup> Request, ICC-01/05-01/13-1605, paras 1, 12-15.

<sup>12</sup> Article 69(7) provides that '[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings'.

<sup>13</sup> See especially ICC-01/05-01/13-1618, paras 26-29.

9. The Single Judge recalls that, although the parties are entitled to a degree of deference in the selection and presentation of their evidence, their discretion is not unlimited.<sup>14</sup> The Chamber may intervene in these matters in order to ensure the fair and expeditious conduct of the trial.<sup>15</sup> Expert witnesses may be struck from the witness list prior to testifying if, for example, their anticipated testimony is irrelevant or goes solely to factual and/or legal matters which usurp the functions of the Chamber.<sup>16</sup> Such rulings are exceptions to the general rule in this Chamber that considerations of evidentiary relevance will be deferred until the judgment.<sup>17</sup>
10. The Single Judge recalls that P-267, a Prosecution witness who testified on Western Union transfer records, was asked a series of questions related to the legality and propriety of the manner in which financial records were obtained in this case. These included questions on: (i) the laws regulating the provision of Western Union transactions;<sup>18</sup> (ii) the crimes forming the basis for the Austrian court order for the disclosure of Western Union records;<sup>19</sup> (iii) the timing and circumstances of Western Union's transfer of these records;<sup>20</sup> (iv) whether Western Union was entitled to provide preliminary information prior to a court order<sup>21</sup> and (v) whether Western Union exercised its right to appeal against any such orders.<sup>22</sup>

<sup>14</sup> Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, 4 February 2016, ICC-01/05-01/13-1600, para. 6.

<sup>15</sup> ICC-01/05-01/13-1600, para. 6.

<sup>16</sup> Further Directions on the Conduct of the Proceedings in 2016, 9 December 2015, ICC-01/05-01/13-1518, para. 15. For decisions litigating the relevance or propriety of expert witnesses prior to their appearance, see Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016, ICC-01/04-02/06-1159; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu, 7 August 2013, ICC-01/09-01/11-844; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Prosecution's Motion to Exclude Defence Political-Military Strategy Expert", 21 August 2012, ICC-01/05-01/08-2273.

<sup>17</sup> Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285, para. 13 (despite the Chamber's approach that relevance considerations will be deferred until the trial judgment, the Chamber 'always retains the discretion to rule on admissibility related issues upfront when appropriate').

<sup>18</sup> Transcript of Hearing, 3 November 2015, ICC-01/05-01/13-T-34-CONF-ENG, page 5 line 1 to page 6 line 8.

<sup>19</sup> ICC-01/05-01/13-T-34-CONF-ENG, page 16 line 22 to page 18 line 5.

<sup>20</sup> ICC-01/05-01/13-T-34-CONF-ENG, page 28 line 14 to page 38 line 6.

<sup>21</sup> ICC-01/05-01/13-T-34-CONF-ENG, page 45 line 12 to page 46 line 10; Transcript of Hearing, 4 November 2015, ICC-01/05-01/13-T-35-CONF-ENG, page 65 line 23 to page 72 line 9.

<sup>22</sup> ICC-01/05-01/13-T-34-CONF-ENG, page 58 line 11 to page 61 line 6.

All parties asked questions related to these matters, including the Prosecution during its redirect examination.<sup>23</sup>

11. It is undeniable that P-267's examination raised the issue of the legality and propriety under which the Prosecution obtained Western Union records. It is in the interest of fairness that the Chamber does not interfere with the Mangenda Defence's choice for D23-1 to provide evidence on these same matters.

12. Further, the Prosecution itself notes that '[A]rticle 69(7) may require a determination on national law such as where, as presumably suggested here, Mangenda asserts a violation to the right to privacy', even while insisting that this does not '*ipso facto* permit the Chamber to make determinations on national law'.<sup>24</sup> Such an argument effectively concedes<sup>25</sup> that the Mangenda Defence arguments in this vein are not frivolous, and the Single Judge does not consider D23-1's testimony and/or report to be so clearly irrelevant as to preclude the Mangenda Defence from presenting this evidence and making its corresponding arguments. If and when an Article 69(7) challenge is raised by the Mangenda Defence on these matters, only then will the Chamber address how national law factors into its inquiry and the disputed interplay between Article 69(7) and 69(8) of the Statute.

13. As a final matter, the Single Judge notes that the Prosecution submits that, to the extent the Chamber permits D23-1's testimony and 'in accordance with Decision 1209, the Prosecution also reserves the right to orally challenge [D23-1]'s qualifications or the overall relevance of his anticipated testimony prior to any ruling on whether the witness may testify as an expert in this case.'<sup>26</sup> The Single Judge considers that the present decision constitutes an 'overall relevance' ruling for purposes of D23-1 being allowed to testify, and recalls that the conduct of

<sup>23</sup> ICC-01/05-01/13-T-35-CONF-ENG, pages 72 line 14 to page 74 line 21.

<sup>24</sup> Request, ICC-01/05-01/13-1605, para. 13.

<sup>25</sup> *In this regard, see also* ICC-01/05-01/13-1617, paras 5-12; ICC-01/05-01/13-1618, para. 18.

<sup>26</sup> Request, ICC-01/05-01/13-1605, n. 1.

proceedings decision referenced by the Prosecution does not set out an oral procedure for challenging expert qualifications. The conduct of proceedings decision instead mandates that such challenges be made in writing prior to the appearance of the witness.<sup>27</sup> Though this procedure can be varied when appropriate,<sup>28</sup> the Prosecution cannot unilaterally reserve the right to challenge D23-1's qualifications in a manner deviating from the conduct of proceedings decision.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**REJECTS** the Prosecution's request for leave to reply; and

**REJECTS** the relief sought in the Request.

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



**Judge Bertram Schmitt, Single Judge**

Dated 11 February 2016

At The Hague, The Netherlands

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<sup>27</sup> Directions on the conduct of the proceedings, 2 September 2015, ICC-01/05-01/13-1209, para. 22.

<sup>28</sup> For expert witness P-361, because it was not immediately apparent as to when he would testify, the Chamber allowed for the defence teams to question this witness orally on his qualifications. Transcript of Hearing, 5 October 2015, ICC-01/05-01/13-T-13-Red-ENG, page 5 line 1 to page 6 line 17.