

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 25 February 2016

Date of public redacted version: 06 January 2017

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 redacted version of

Decision on Prosecution Request to Exclude Defence Witnesses D20-2 and D21-9

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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

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 ('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 67(1)(e) and 69 of the Rome Statute issues the following 'Decision on Prosecution Request to Exclude Defence Witnesses D20-2 and D21-9'.

I. Procedural History and Submissions

1. On 17 February 2016, the Office of the Prosecutor ('Prosecution') filed an application, requesting that the testimony of D20-2 and D21-9 be excluded ('Request') or, alternatively, that D20-2's evidence be restricted to his personal perceptions ('Alternative Request').¹
2. On 22 February 2016, the defence for Mr Bemba ('Bemba Defence') and for Mr Kilolo ('Kilolo Defence') filed their responses to the Request ('Bemba Response'² and 'Kilolo Response',³ respectively). The Bemba Defence submits that the Request should be rejected in respect of D20-2 and the Kilolo Defence submits that the entire Request should be dismissed.⁴
3. On 23 February 2016, the Chamber rejected the Request with respect to D21-9 and indicated that the reasons for this decision will follow.⁵

¹ Prosecution's Motion to Exclude the Evidence of Witnesses D20-0002 and D21-0009, or, in the alternative, to Restrict the Scope of Witness D20-0002's Evidence, ICC-01/05-01/13-1633 with one Annex.

² Defence Response to Prosecution's Motion to Exclude the Evidence of Witnesses D20-0002 and D21-0009, or, in the alternative, to Restrict the Scope of Witness D-20-0002's Evidence (ICC-01/05-01/13-1633), ICC-01/015-01/13-1647-Conf, a public-redacted version was filed on the same day, ICC-01/05-01/13-1647-Red.

³ Response to 'Prosecution's Motion to Exclude the Evidence of Witnesses D20-0002 and D21-0009, or, in the alternative, to Restrict the Scope of Witness D20-0002's Evidence' (ICC-01/05-01/13-1633), ICC-01/05-01/13-1648-Conf.

⁴ Bemba Response, ICC-01/05-01/13-1647-Red, para.12 and Kilolo Response, ICC-01/05-01/13-1648-Conf, para. 4.

⁵ Email of Trial Chamber VII Communications to the parties and Registry on 23 February 2016, at 10:55.

4. The Prosecution argues that D20-2 and D21-9 (together, 'Witnesses') are presented as witnesses of fact and can therefore not provide expert testimony.⁶ In respect of D20-2, the Prosecution submits that his anticipated evidence extends beyond what he personally perceived and includes 'general expertise' on Dutch law, such as 'standards procedures in The Netherlands for the search and seizure of potentially privileged materials and the role of a Dean therein' and 'standard procedures in The Netherlands for the interception of potentially privileged telephone conversations, and the role of a Dean therein'.⁷ Alternatively, should the Chamber decide to allow D20-2 to testify, the Prosecution requests the Chamber to restrict D20-2's testimony to his personal perceptions regarding relevant matters.⁸
5. With regard to D21-9 the Prosecution contends that his entire testimony concerns issues requiring expertise. According to the Prosecution, D21-9 is called as a witness in order to provide general evidence about the functioning of the Victims and Witnesses Unit ('VWU'), including the practices of preparing and paying witnesses by the VWU.⁹
6. In its response, the Bemba Defence asserts that the testimony of D20-2 goes only to facts he personally experienced [REDACTED] involving these proceedings.¹⁰ The Bemba Defence argues that any questions as to D20-2's [REDACTED] are impractical without first determining if the standard procedure had been followed.¹¹
7. The Kilolo Defence submits that D21-9's anticipated testimony is about what he personally heard and experienced during the production of the report he was

⁶ Request, ICC-01/05-01/13-1633, para. 4.

⁷ Request, ICC-01/05-01/13-1633, para. 5.

⁸ Request, ICC-01/05-01/13-1633, para. 8.

⁹ Request, ICC-01/05-01/13-1633, para. 6.

¹⁰ Bemba Response, ICC-01/05-01/13-1647-Conf, para. 3.

¹¹ Bemba Response, ICC-01/05-01/13-1647-Conf, paras 5-6.

commissioned to prepare for the Registry.¹² Alternatively, should the Request be granted it requests that D21-9 is called as an expert witness or, in the further alternative, that his evidence is presented via Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules') and that the Chamber rule on its admissibility later.¹³

II. Analysis

8. The Single Judge notes that both defence teams assert that the Witnesses will only testify to matters of their own perception, in which case the Request is gratuitous. The Single Judge is convinced that, in the case of the testimony of D20-2, his personal experience would form the basis for responding to questions regarding his understanding of [REDACTED]. The preliminary question of establishing the standard approach of a certain procedure in order to compare it with the procedure employed in the situation D20-2 was involved in is likewise still based on D20-2's own personal observations. This witness has, [REDACTED], personal first-hand experience and does not rely on abstract knowledge in order to answer them. The answers he provides are [REDACTED] related to the events he was personally involved in.¹⁴ Accordingly, the Single Judge rejects the Request with regard to D20-2 and dismisses the Alternative Request as moot.
9. In respect of D21-9, the Single Judge is of the view that the witness's anticipated testimony is reliant on his own personal experience during the production of the report he was commissioned to provide to the Registry. D21-9's background and the fact that the witness has extended experience in the functioning of the VWU does not automatically qualify his testimony as expert testimony if it is based on his personal observations during the production of his report.

¹² Kilolo Response, ICC-01/05-01/13-1647-Conf, para. 6-11.

¹³ Kilolo Response, ICC-01/05-01/13-1647-Conf, paras 12-13.

¹⁴ See, CAR-D20-0006-1316.

Accordingly, the Single Judge rejects the Request with regard to D21-9 – he may testify before the Chamber at the seat of the Court.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request and;

DISMISSES the Alternative Request as moot.

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

A handwritten signature in black ink, appearing to read 'BSchmitt', is written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 25 February 2016

At The Hague, The Netherlands