

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 28 May 2015

**TRIAL CHAMBER VII**

**Before:** Judge Chile Eboe-Osuji, Presiding Judge  
Judge Olga Herrera Carbuccion  
Judge Bertram Schmitt

**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 the Request for Leave to Appeal the Decision ICC-01/05-01/13-893-Red**

**Decision 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**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Others**

**Trial Chamber VII** ('Chamber') 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 Article 82(1)(d) of the Rome Statute ('Statute'), Rule 155 of the Rules of Procedure and Evidence ('Rules'), and Regulation 33 of the Regulations of the Court ('Regulations') renders this 'Decision on the Request for Leave to Appeal the Decision ICC-01/05-01/13-893-Red'.

## **I. Procedural Background**

1. On 9 April 2015, the Chamber issued the 'Decision on "Request concerning the review of seized material" and related matters' ('Impugned Decision'),<sup>1</sup> appointing an Independent Counsel tasked to (i) be present at the unsealing of seized material; (ii) conduct an initial review of it for the primary purpose of identifying material which is relevant to the charges and not privileged; and (iii) report to the Chamber on the results of the review undertaken.<sup>2</sup> It was also determined that the accused may make observations on the report, as the case may be.<sup>3</sup>
2. On 15 April 2015, the defence of Jean-Pierre Bemba Gombo (the 'Bemba Defence') submitted the "Defence Request for Leave to Appeal ICC-01/05-01/13-893-Red" (the 'Request') seeking leave to appeal the Impugned Decision on the following issue: *'Whether the Trial Chamber erred by finding that the continued appointment of the Independent Counsel was both "necessary and appropriate to prevent undue access by any party to privileged information in this case"'*.<sup>4</sup>
3. On 16 April 2015, the defence of Aimé Kilolo Musamba (the 'Kilolo Defence') lodged the 'Adjonction de la défense de monsieur Aimé Kilolo à la « Defence

<sup>1</sup> ICC-01/05-01/13-893-Conf (a public redacted version is also available, ICC-01/05-01/13-893-Red).

<sup>2</sup> Impugned Decision, ICC-01/05-01/13-893-Red, paras 16 and 22.

<sup>3</sup> Impugned Decision, ICC-01/05-01/13-893-Red, paras 22-23.

<sup>4</sup> Request, ICC-01/05-01/13-908, para. 3.

Request for Leave to Appeal ICC-01/05-01/13-893-Red »' ('Joinder') without advancing arguments of its own.<sup>5</sup>

4. On 20 April 2015, the Office of the Prosecutor ('Prosecution') submitted the 'Prosecution Response to Jean-Pierre Bemba Gombo's Request for Leave to Appeal ICC-01/05-01/13-893-Red' submitting that the Request be rejected.<sup>6</sup>

## II. Submissions

5. The Bemba Defence avers that the issue arises from the Impugned Decision and presents the following arguments in support of its request. It first maintains that the Chamber does not explain how the review procedure would achieve the objectives as stipulated in the Impugned Decision.<sup>7</sup> It argues that the Chamber failed to establish criteria that should guide the Independent Counsel's review of material.<sup>8</sup> This lack of clarity is allegedly further exacerbated by the fact that the Independent Counsel never set out a definition of privilege and how he applies it during review.<sup>9</sup> Rather, the Bemba defence contends, the Independent Counsel conducted his analysis on the basis of instructions and codes provided to him by the Prosecution which are, in turn, not based on objective and impartial information.<sup>10</sup>
6. The Bemba Defence further alleges that the Independent Counsel never explained 'what could constitute exculpatory information, or information that might otherwise be relevant to the preparation of the Defence'.<sup>11</sup> In this context, it argues that while the Prosecution 'might have a right to obtain access to incriminating information, there is no basis for transmitting exculpatory information (that would otherwise be privileged) to any parties

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<sup>5</sup> ICC-01/05-01/13-911.

<sup>6</sup> ICC-01/05-01/13-916.

<sup>7</sup> Request, ICC-01/05-01/13-908, para. 6.

<sup>8</sup> Request, ICC-01/05-01/13-908, paras 7-9.

<sup>9</sup> Request, ICC-01/05-01/13-908, para. 11.

<sup>10</sup> Request, ICC-01/05-01/13-908, paras 12-13.

<sup>11</sup> Request, ICC-01/05-01/13-908, para. 15.

other than the Defence'.<sup>12</sup> The Bemba Defence concludes that it is inadequate to describe the relevance of a particular piece of material without distinguishing whether it is incriminating or exculpatory.<sup>13</sup>

7. The Bemba Defence also takes issue with the Independent Counsel's mandate to identify relevant material.<sup>14</sup> In its view, this task is 'also an obvious reflection of the inherent illegality of the national requests for seizure'.<sup>15</sup> It argues that it was incumbent upon the Prosecution to make specific requests to the national authorities in order to ensure that only material relevant to the allegations was seized. However, as the seized material included irrelevant material, the Bemba Defence maintains that the seizure must be deemed illegal and the material should be returned.<sup>16</sup>
8. Lastly, the Bemba Defence alleges that allowing the Independent Counsel to exclude certain material may deprive its access to 'key contextual information'.<sup>17</sup> Even more, it is argued that without proper judicial oversight, the Independent Counsel exercises 'quasi-judicial decision-making powers'.<sup>18</sup>
9. As regards the requirements of Article 82(1)(d) of the Statute, the Bemba Defence considers that the issue significantly affects the fairness of the proceedings as it is linked to the protection of privilege, the appearance of impartiality and neutrality of the review process, the arbitrary role of the Independent Counsel, and the gap in judicial accountability due to the wide discretionary powers conferred upon the Independent Counsel.<sup>19</sup> It submits that the issue also affects the expeditious conduct of the proceedings as the defence only receives the material after review, thus delaying its ability to

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<sup>12</sup> Request, ICC-01/05-01/13-908, para. 16.

<sup>13</sup> Request, ICC-01/05-01/13-908, para. 17.

<sup>14</sup> Request, ICC-01/05-01/13-908, para. 18.

<sup>15</sup> Request, ICC-01/05-01/13-908, para. 22.

<sup>16</sup> Request, ICC-01/05-01/13-908, paras 23-24.

<sup>17</sup> Request, ICC-01/05-01/13-908, paras 25-26.

<sup>18</sup> Request, ICC-01/05-01/13-908, para. 27.

<sup>19</sup> Request, ICC-01/05-01/13-908, paras 30-33.

assess it.<sup>20</sup> In the alternative, the Bemba Defence alleges that the issue would affect the outcome of the trial, arguing, *inter alia*, that in the absence of an ‘effective and neutral review process’, the Prosecution would receive access to privileged information thus obtaining an ‘unfair trial advantage’.<sup>21</sup> Finally, it is averred that an immediate decision of the Appeals Chamber would materially advance the proceedings.<sup>22</sup>

10. The Prosecution submits that the Request should be rejected as it fails to meet the requirements of Article 82(1)(d) of the Statute.<sup>23</sup> As regards the appealable issue, the Prosecution submits that the defence simply disagrees with the Impugned Decision and recalls that it already unsuccessfully challenged the established procedure before.<sup>24</sup> The Prosecution asserts that the issue also does not arise from the Impugned Decision as it incorrectly reads the Impugned Decision.<sup>25</sup> Moreover, it is alleged that some arguments advance in the Request are speculative.<sup>26</sup>

### III. Preliminary Matters

11. The Chamber finds that the Kilolo Defence submitted the Joinder past the prescribed time limit of Rule 155(1) of the Rules and, therefore, cannot be considered further.

### IV. Applicable Law and Analysis

12. Article 82(1)(d) of the Statute sets out the requirements applicable to the granting of a request for leave to appeal, which are as follows:

- (i) whether the decision involves an issue that would significantly affect:
  - a) the fair and expeditious conduct of proceedings; *or*

<sup>20</sup> Request, ICC-01/05-01/13-908, paras 34-35.

<sup>21</sup> Request, ICC-01/05-01/13-908, paras 36-44.

<sup>22</sup> Request, ICC-01/05-01/13-908, para. 45.

<sup>23</sup> Response, ICC-01/05-01/13-916, paras 10-15.

<sup>24</sup> Response, ICC-01/05-01/13-916, paras 5 and 9.

<sup>25</sup> Response, ICC-01/05-01/13-916, paras 5 and 7.

<sup>26</sup> Response, ICC-01/05-01/13-916, para. 8.

- b) the outcome of the trial; and
  - (ii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
13. The Chamber recalls that, for the purposes of the first prong of this test, the Appeals Chamber has defined an 'issue' as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.<sup>27</sup>
14. Before all else, the Chamber notes that the Bemba Defence advanced arguments which go beyond the scope of the proposed issue, such as the purported illegality of seizure by national authorities. In light of the specific legal analysis at hand, the Chamber will consider only those arguments which are relevant for the purpose of deciding whether or not to grant leave to appeal the Impugned Decision pursuant to Article 82(1)(d) of the Statute.
15. Turning to the merits of the Request, the Chamber observes at the outset that, while the issue, as articulated in paragraph 3 of the Request, arises from the Impugned Decision, the line of argumentation in support of the Request reveals a number of erroneous assumptions made by the Bemba Defence. Considering the limited subject-matter of the present decision, the Chamber will not endeavour to rectify those erroneous assumptions, but instead refers the Bemba Defence to the reasoning set out in the Impugned Decision. Suffice to mention here that Independent Counsel is tasked merely to review seized material as to its relevance and potential privileged character, as defined in Rule 73 of the Rules, and that the Chamber retains judicial control over the review process without being constrained by the Independent Counsel's assessment.<sup>28</sup>

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<sup>27</sup> Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

<sup>28</sup> See also Decision Providing Materials in Two Independent Counsel Reports and Related Matters', 15 May 2015, ICC-01/05-01/13-947, paras 16-20.

16. That said, the Chamber does not consider that the requirements of Article 82(1)(d) of the Statute have been met. The Bemba Defence failed to convincingly demonstrate that the proposed issue significantly affects the *fair* and expeditious conduct of the proceedings in light of the fact that in the present circumstances the Independent Counsel has been appointed *for the very reason* to guarantee that privileged information is protected. Also, the arguments raised are often either speculative or remain mere allegations without further substantiation, such as the alleged gap of judicial accountability, and the purported lack of impartiality and neutrality of the review process.<sup>29</sup> Failure in demonstrating that the fairness requirement has been met, the Chamber will refrain from further addressing whether the issue significantly affects the expeditious conduct of the proceedings.
17. Likewise, the Bemba Defence also did not convincingly demonstrate how the proposed issue would affect the outcome of the trial, as it is based on sweeping arguments, such as that Independent Counsel received ‘instructions’ from the Prosecution, the absence of a neutral and effective review process and the further unspecified speculation that the Prosecution might obtain access to privileged information in the course thereof.<sup>30</sup>
18. Lastly, the Request does not overcome the final threshold which contemplates that the Chamber forms the opinion that an immediate resolution by the Appeals Chamber may materially advance the proceedings. As held elsewhere: ‘To form such a view, the Chamber needs to be persuaded, *inter alia*, that there is advantage in resolving the [issue] at this stage, bearing in mind that issues of this kind may also be raised in an appeal against the final decision under Article 74 of the Statute’.<sup>31</sup>

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<sup>29</sup> See *supra* paragraph 9.

<sup>30</sup> See *supra*, paragraphs 5 and 9.

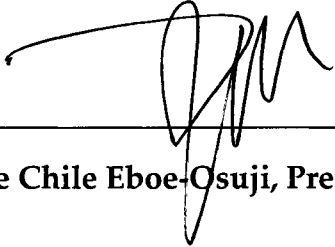
<sup>31</sup> Trial Chamber V(a), Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, 21 January 2014, ICC-01/09-01/11-1154, para. 28.



**FOR THE FOREGOING REASONS THE CHAMBER HEREBY**

**REJECTS** the Request.

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



\_\_\_\_\_  
Judge Chile Eboe-Osuji, Presiding



\_\_\_\_\_  
Judge Olga Herrera Carbuca



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Judge Bertram Schmitt

Dated 28 May 2015

At The Hague, The Netherlands