

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 July 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccia
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 Defence Request for Leave to Appeal the 'Decision Providing
Materials in Two Independent Counsel Reports and Related Matters'**

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

Others

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Trial Chamber VII (the ‘Chamber’) of the International Criminal Court (the ‘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 (the ‘Statute’) and Rule 155 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on Defence Request for Leave to Appeal the “Decision Providing Materials in Two Independent Counsel Reports and Related Matters”’.

I. Background and submissions

1. On 15 May 2015, the Chamber issued the ‘Decision Providing Materials in Two Independent Counsel Reports and Related Matters’ (the ‘Impugned Decision’).¹
2. On 25 May 2015, the Bemba Defence sought leave to appeal the following two issues which it submits arise from the Impugned Decision and satisfy the leave to appeal criteria (the ‘Defence Request’):²
 - a. Whether communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege, as set out in Rule 73(1) of the Rules (‘Issue One’); and
 - b. Whether the principle of open justice requires that any analysis of the Independent Counsel concerning relevant and non-privileged documents should be transmitted to the parties (‘Issue Two; together with Issue One, the ‘Issues’).
3. In relation to Issue One, the Bemba Defence submits that (i) if the Chamber defined the ‘crime/fraud exception’ to legal privilege in an overly ‘broad and variable’ manner, then the Defence will have been deprived of a protection

¹ Decision Providing Materials in Two Independent Counsel Reports and Related Matters, ICC-01/05-01/13-947.

² Defence Leave to Appeal Decision Providing Materials in Two Independent Counsel Reports and Related Matters, ICC-01/05-01/13-947, 25 May 2015, ICC-01/05-01/13-962.

intended to ensure its fair trial rights; (ii) even if the Chamber later refuses to permit the Office of the Prosecutor (the 'Prosecution') to rely on this information, the damage has already been done insofar as the Prosecution already has access; and (iii) appellate resolution would protect Defence rights, clarify the parameters of legal professional privilege for purposes of trial preparation and prevent further transmission of privileged materials.³

4. In relation to Issue Two, the Bemba Defence submits that (i) the Prosecution is likely to rely on the information transmitted to the parties as incriminating evidence; (ii) the Chamber has been (or at least may appear to have been) influenced by Independent Counsel's analysis; and (iii) unless the Defence is provided access to this analysis, it will not have an effective opportunity to 'address and rebut any element of pre-determination that might be attributable to the analysis of the Independent Counsel'.⁴
5. On 29 May 2015, the Prosecution responded to the Defence Request (the 'Prosecution Response').⁵ It submits that Issue One (i) is unclear, (ii) is based on a misunderstanding of the Impugned Decision, and (iii) presupposes, without basis, that the Prosecution has or will receive privileged material.⁶ The Prosecution further argues that Defence submissions in relation to Issue Two (i) misrepresent the Impugned Decision, (ii) presuppose that the Chamber has been influenced by the Independent Counsel's assessment and (iii) speculate that the Prosecution will seek the admission of the information.⁷
6. No other party responded to the Defence Request.

³ Defence Request, ICC-01/05-01/13-962, paras 17-26, 35-38 and 40-43.

⁴ Defence Request, ICC-01/05-01/13-962, paras 4-16, 27-31, 34, 43 and 45.

⁵ Prosecution Response to Jean-Pierre Bemba Gombo's Request for Leave to Appeal the Decision ICC-01/05-01/13-947, 29 May 2015, ICC-01/05-01/13-971.

⁶ Prosecution Response, ICC-01/05-01/13-971, paras 1, 3-8 and 13-14.

⁷ Prosecution Response, ICC-01/05-01/13-971, paras 1, 9-11 and 15-18.

II. Analysis

7. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in its previous decisions.⁸
8. The Chamber is satisfied that Issue One constitutes an appealable issue arising from the Impugned Decision.⁹ On the other hand, Issue Two, without foundation, presupposes that the Chamber was influenced by Independent Counsel's analysis of the relevant material and has made some predetermination concerning its admissibility and/or probative value. In the Impugned Decision, the Chamber expressly stated that it 'conducted its own independent analysis of the relevance and potentially privileged character of the documents in question'.¹⁰ The Chamber also reiterated, as has been repeatedly stressed,¹¹ that its findings were 'without prejudice to future decisions the Chamber may make on the parameters of the charges, the admission of any items into evidence or its ultimate decision on the merits'.¹² Thus, as Issue Two relies on misrepresentations of these findings, it does not constitute an appealable issue arising from the Impugned Decision.
9. Further, as required under the first limb of Article 82(1)(d) of the Statute, the Defence fails to demonstrate that either of the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

⁸ Decision on the Request for Leave to Appeal the Decision ICC-01/05-01/13-893-Red, 28 May 2015, ICC-01/05-01/13-966, paras 12-13; Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800, 27 March 2015, ICC-01/05-01/13-877, paras 5-7.

⁹ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, 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.

¹⁰ Impugned Decision, ICC-01/05-01/13-947, para. 16.

¹¹ See, *inter alia*, Decision on 'Request concerning the review of seized material' and related matters, 9 April 2015, ICC-01/05-01/13-893-Red, para. 17; Pre-Trial Chamber II, Decision on the "Defence request to compel the attendance of the Independent Counsel for examination during the confirmation proceedings" submitted by the Defence for Jean-Pierre Bemba Gombo", 4 June 2014, ICC-01/05-01/13-457, page 3; Pre-Trial Chamber II, Decision on the filing in the record of items seized upon the searches of the person and cell of Jean-Pierre Bemba Gombo, 19 May 2014, ICC-01/05-01/13-408, page 6.

¹² Impugned Decision, ICC-01/05-01/13-947, para. 17.

The Defence speculates in the abstract as to the prejudice it *may* suffer *if* the Prosecution seeks the admission of certain information, *if* the Chamber admits it and/or *if* the Chamber ultimately relies upon it. The Chamber notes that, even assuming *arguendo* that it erred in defining the ‘crime/fraud exception’, this does not necessarily and automatically mean that material erroneously provided to the Prosecution would be inadmissible.¹³

10. Specific to Issue One, the Defence submits that, once privileged information is provided to the Prosecution, any ‘damage’ is ‘irreversible’.¹⁴ It thereby implies that, in its opinion, appellate resolution of the Issues, insofar as they concern information already in the Prosecution’s possession, would not have any prospective effect. In relation to those materials that are being, or will be, reviewed by Independent Counsel, the Defence will have the opportunity to make submissions and the Chamber will ensure that access is limited to a necessary and proportional extent. Finally, concerning Defence arguments alleging uncertainty as to which communications may be considered privileged, it suffices to repeat the clear and circumscribed definition of the ‘crime/fraud exception’ provided in the Impugned Decision: ‘communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege’.¹⁵
11. For the same reasons, the Defence also fails to persuade the Chamber that appellate resolution at this stage may materially advance the proceedings, as required under the second limb of Article 82(1)(d) of the Statute.¹⁶

¹³ See Article 69(7) of the Statute (the Chamber is required to declare evidence obtained in violation of the Statute inadmissible only if the further criteria under sub-rules (a) or (b) are met).

¹⁴ Defence Request, ICC-01/05-01/13-962, para. 38.

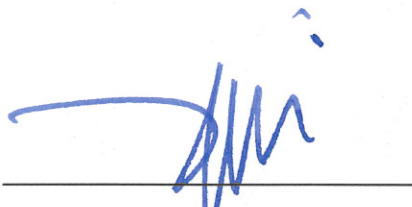
¹⁵ Impugned Decision, ICC-01/05-01/13-947, para. 14.

¹⁶ See Decision on the Request for Leave to Appeal the Decision ICC-01/05-01/13-893-Red, 28 May 2015, ICC-01/05-01/13-966, para. 18.

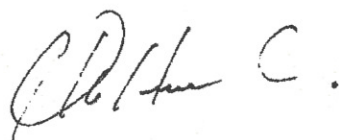
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Request.

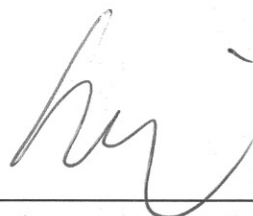
Done in both English and French, the English version being authoritative.

A blue ink signature, appearing to be 'Chile Eboe-Osuji', written over a horizontal line.

Judge Chile Eboe-Osuji
(Presiding)

A black ink signature, appearing to be 'Olga Herrera Carbuca', written over a horizontal line.

Judge Olga Herrera Carbuca

A black ink signature, appearing to be 'Bertram Schmitt', written over a horizontal line.

Judge Bertram Schmitt

Dated 21 July 2015

At The Hague, The Netherlands