

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 31/08/2015

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***

Confidential

**Defence Request for leave to appeal the 'Decision on 'Defence Request for
Disclosure and Judicial Assistance'**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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Victims Participation and Reparations Section Other

Introduction

1. The Defence for Mr. Jean-Pierre Bemba Gombo respectfully seeks reconsideration, or in the alternative, leave to appeal the 'Decision on 'Defence Request for Disclosure and Judicial Assistance',¹ in relation to the discrete issue as to whether Trial Chamber's decision to maintain the redactions to the correspondence and Status Conference transcripts, which relate to the 'anonymous informant', was consistent with the criteria set by the Appeals Chamber for redactions.

2. This request has been filed on a confidential basis due to the fact that it cites to a confidential decision. The Defence has no objection to it being reclassified in its entirety as public.

Submissions

The issue arises from the Decision

3. Rather than considering whether the maintenance of the redactions was justified at this stage of the proceedings, the Trial Chamber addressed the request from the opposite direction: i.e. whether the Defence had identified a legitimate forensic basis for the information covered by redactions, which outweighed the need to maintain the redactions.²

4. The Trial Chamber also accepted the hypothesis that disclosure of this information could affect the security of the person, notwithstanding firstly, the absence of any objective basis to conclude that this would be the case, and secondly,

¹ ICC-01/05-01/13-1166-Conf.

² Para. 13.

the entirely contradictory position that disclosure of information concerning an 'anonymous' person, could 'identify' them.³

5. This approach places the burden of argumentation and justification on the Defence, and displaces the presumption of full disclosure.

6. The Trial Chamber's ruling was thus directly contrary to the directives of the Appeals Chamber that:

- a. "The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of nondisclosure of information is the exception to this general rule";⁴
- b. The fact that the information is relevant to the Defence heightens the obligation of the Chamber to carefully balance the interests at stake,⁵ but the converse does not apply (i.e. in line with the principle of full disclosure, the Prosecution does not have the right to redact irrelevant information);
- c. Even if persons are not relied upon by the Prosecution as witnesses, if the Prosecution has communicated with them in relation to the case, the Defence may have an interest in contacting them, or employing information from them in their investigations, which should not be stymied unnecessarily by redactions;⁶
- d. Where the risk to the person is hypothetical, or not grounded by factual evidence, the Chamber should not grant the redactions;⁷

³ Paras. 17-18. The Status Conference transcripts were redacted to a degree, which allowed their dissemination to the public, not just the Defence. It must be presumed that at least some of the information captured by these redactions could have been transmitted, on a confidential basis, to the Defence. See for example, ICC-01/05-01/13-T-5-Red2-ENG, p. 1 lines 23-24, p. 6 line 14.

⁴ ICC-01/04-01/07-476, para. 64.

⁵ ICC-01/04-01/07-476, para. 57.

⁶ ICC-01/04-01/07-476, para. 62.

⁷ ICC-01/04-01/07-476, para. 60.

7. In referring to prior rulings of the Single Judge, which were issued in the context of the pre-confirmation phase (and prior to the disclosure of the unredacted version of the statement and investigator's notes concerning P7 and P-261), the Trial Chamber also omitted to consider the Appeals Chamber's instructions that:

- a. "It may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial";⁸ and
- b. The Chamber's "determination must be kept under review and altered should changed circumstances make that appropriate", in order to comply with the principle of full disclosure.⁹

8. The dissonance between the Trial Chamber's ruling and the above principles merits reconsideration, in line with the above-stated duty of the Chamber to review the continued necessity and propriety of redactions.

9. In the alternative, this dissonance satisfied the criteria for appellate intervention.

The issue significantly affects the fairness and expeditiousness of the proceedings

10. The redactions in the email exchange and Status Conference currently cover information concerning particular persons, and dates and locations, which are relevant to the alleged scheme.¹⁰

11. Access to the redacted information would facilitate the ability of the Defence to cross-reference the allegations of the anonymous informant, with the statements of the persons referred to by the informant, and would further Defence

⁸ ICC-01/04-01/07-475, para. 68.

⁹ ICC-01/04-01/07-476, para. 64.

¹⁰ See for example, ICC-01/05-01/13-T-5-Red2-ENG, p. 2.

investigations into the credibility of Prosecution witnesses, and to test whether key evidential issues are corroborated or disputed by other persons.

12. The fact that the Prosecution claims not to know the identity of the person is also no answer to the question as to whether the Defence might have a legitimate interest in either contacting this person, or using this information.

13. The informant is a person, who claimed to have detailed information concerning the events, which gave rise to the charges in this case. Even if the informant is unwilling to cooperate with the Defence, it cannot be excluded that the informant had a source, who might be of a different position.

14. The Defence might also wish to confront Prosecution witnesses, with information or allegations supplied by the anonymous informant. The Defence will not, however, in a position to make a reasoned determination as to whether it should do so without full access to any information which could concern the credibility, and motives of the anonymous informant.

15. The continued maintenance of the redactions thus significantly impedes the ability of the Defence to undertake relevant investigative steps on Mr. Bemba's behalf, or to explore evidential issues concerning the charges, which in turn, affects Mr. Bemba's right to a fair and expeditious trial.

An immediate resolution of the Appeals Chamber would materially advance the proceedings

16. If the Trial Chamber erred in its determination to maintain the redactions, the Defence will have been unnecessarily and unfairly denied access to information, which could have spawned information that touches on the credibility and veracity of Prosecution witness testimony.

17. An immediate resolution is also required in order to ensure that the Defence is in a position to utilise this information in a timely manner, which in turn will avoid the prospect of unnecessary witness recalls, or delays in the proceedings.

Relief Sought

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

- i. Lift the redactions to the Status Conference transcripts or email exchanges concerning the anonymous informant; or
- ii. Grant leave to appeal the 'Decision on 'Defence Request for Disclosure and Judicial Assistance'.



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Done this 31th of August 2015