

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/05-01/13
Date: **2 September 2015**

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***

Confidential Document

**Prosecution's Response to the Defence Request for Leave to Appeal the "Decision
on 'Defence Request for Disclosure and Judicial Assistance'"**

Source: Office of the Prosecutor

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

Court to:

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I. Introduction

1. The Bemba Defence seeks reconsideration of, or certification to appeal,¹ the Trial Chamber's decision not to vary redactions ordered by the Single Judge of Pre-Trial Chamber II.² These requests are based on the mistaken premise that the Trial Chamber made a *de novo* determination of the issue.³ Since this premise is incorrect, the Bemba Defence neither shows any proper justification for the exceptional measure of reconsideration, nor any issue genuinely arising from the Decision which may be certified for appeal under article 82(1)(d) of the Rome Statute.

2. Furthermore, given the limited scope of the redacted information, and the circumstances, the Bemba Defence fails to show that the maintenance of the redactions significantly affects the fairness and expedition of the proceedings, or that immediate resolution by the Appeals Chamber would materially advance the proceedings.

3. For all these reasons, the Motion should be dismissed.

II. Confidentiality

4. This response is filed as "Confidential" as it refers to the Decision and the Motion, which are so designated. The Prosecution does not object to its reclassification as "Public" should the Chamber deem it appropriate.

¹ See ICC-01/05-01/13-1198-Conf ("Motion").

² See ICC-01/05-01/13-1166-Conf ("Decision").

³ See e.g. Motion, para.3.

III. Submissions

5. The Bemba Defence (mis)characterises the Decision as erroneous because its “decision to maintain the redactions” relating to the anonymous informant was not “consistent with the criteria set by the Appeals Chamber for redactions.”⁴ Yet the appellate guidance to which the Bemba Defence refers,⁵ and the arguments in the Motion,⁶ apply to a Chamber’s *original decision* authorising redactions. This is evident from the Appeals Chamber’s own words, which addressed the standards to be applied on a motion for non-disclosure.⁷

6. As the Decision states in express terms, it made no original decision authorising redactions. Rather, given that the Single Judge of Pre-Trial Chamber II had already authorised redactions, the Decision considered whether there was any “cogent reason or change in circumstances that would lead the Chamber to *vary* the redactions ordered by the Single Judge.”⁸ The Bemba Defence had made no such showing.⁹

⁴ See Motion, paras.1 (framing this more neutrally as the issue for which certification to appeal is sought), 8 (asserting that “[t]he dissonance between the Trial Chamber’s ruling” and the Appeals Chamber’s guidance “merits reconsideration”).

⁵ See Motion, para.6 (citing ICC-01/04-01/07-476 OA2 (“*Katanga* Decision”), paras.57, 60, 62, 64, 68).

⁶ See Motion, paras.3 (asserting that, “[r]ather than considering whether the maintenance of the redactions was justified at this stage of the proceedings,” the Trial Chamber considered “whether the Defence had identified a legitimate forensic basis for the information covered by redactions, which outweighed the need to maintain the redactions”, citing Decision, para.13), 4 (asserting that the Trial Chamber “accepted that disclosure of this information could affect the security of the person, notwithstanding [...] the absence of any objective basis to conclude that this would be the case, and [...] the entirely contradictory position that disclosure of information concerning an ‘anonymous’ person could ‘identify’ them”), 5 (asserting that the Decision’s approach placed “the burden of argumentation and justification on the Defence, and displaces the presumption of full disclosure”).

⁷ See e.g. *Katanga* Decision, para.52 (“the correct approach in such circumstances is for the Pre-Trial Chamber to rule on a case-by-case basis, pursuant to rule 81(2), where the balance of interests lies on the facts of a *specific application for non-disclosure*”, emphasis added).

⁸ Decision, para.18 (emphasis added). The paragraph of the Decision cited by the Motion as supposedly reflecting the Trial Chamber’s reasoning is no more than a rehearsal of the established law under rule 77 of the Rules of Procedure and Evidence: *compare* Motion, para.3, *with* Decision, para.13.

⁹ Decision, para.18.

7. The mistaken premise of the Motion fatally undermines its claims both for reconsideration and certification.

A. The Trial Chamber should not reconsider the Decision

8. As recently emphasised, “[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.”¹⁰ Unlike leave to appeal, therefore, reconsideration is often concerned with the *merits* of the underlying decision. The Bemba Defence, however, fails to meet this high test in showing either that the Decision was clearly erroneous or that reconsideration is necessary.¹¹

9. None of the arguments advanced to justify reconsideration is convincing, or even apposite, because the Decision did not concern a request for non-disclosure but rather a request to vary a prior determination concerning non-disclosure. In particular, since the Single Judge in his original decision—which the Bemba Defence did not seek leave to appeal¹²—may be presumed to have discharged his obligations under the Statute and Rules properly,¹³ the Trial Chamber was required only to consider whether the Bemba Defence had now shown good cause to vary that determination. Indeed, such an analysis was precisely contemplated by the Appeals Chamber in *Katanga* when it stated that a determination on non-disclosure should be altered if “*changed* circumstances make that appropriate”.¹⁴

¹⁰ ICC-01/04-02/06-611, para.12 (citing decisions of this Court—including ICC-01/09-01/11-1813, para.9; ICC-01/09-02/11-863, para.11; ICC-01/04-01/06-2705, para.19—as well as decisions of other international courts and tribunals). *See also* ICC-01/05-01/13-1085-Conf, para.4.

¹¹ *Contra* Motion, para.8.

¹² *See* Decision, para.17.

¹³ *See* Motion, para.6 (detailing some of the principles of the *Katanga* Decision).

¹⁴ *See* Motion, para.7 (quoting *Katanga* Decision, para.64) (emphasis added).

10. None of the Bemba Defence's arguments shows an error in the Trial Chamber's analysis that there was no cogent reason or changed circumstances requiring variation of the Single Judge's order.

- The Motion shows no error in the Trial Chamber's balancing of the interest underlying the redactions ordered by the Single Judge ("*inter alia*, for purposes of the Informant's 'personal safety and security'") against its view that there was little "concrete basis" for the Bemba Defence's argument as to the significance of that information and the lack of "any undue prejudice" to the Bemba Defence as a result of maintaining the redactions.¹⁵ In this context, the Bemba Defence's argument concerning any difference between the approach of the Trial Chamber and an analysis whether "maintenance of the redactions was justified at this stage" appears to be a distinction without a difference.¹⁶
- The Bemba Defence shows no error in the Trial Chamber's deference to the Single Judge's assessment that the redactions were necessary for the informant's safety and security, notwithstanding the fact that the Prosecution does not know the person's identity.¹⁷ Manifestly, not all information which may prejudice a person's safety and security itself discloses their identity.
- Finally, the Bemba Defence's implication that the Trial Chamber erred by placing the burden on the Bemba Defence is also wrong.¹⁸ As the moving

¹⁵ See Decision, paras.4, 10, 15, 17-18.

¹⁶ *Contra* Motion, para.3.

¹⁷ See Decision, paras.10, 17. *Contra* Motion, para.4. The further assertion in footnote 3 of the Motion is speculative.

¹⁸ *Contra* Motion, para.5. Although the *Katanga* Appeals Chamber stated that "[t]he overriding principle is that full disclosure should be made", this did not amount to an assertion (as the Bemba Defence seems to contend) that, once a Chamber has authorised limited non-disclosure, there is any presumption in favour of granting subsequent motions to vary that decision. See *Katanga* Decision, para.64.

party, the Bemba Defence did indeed bear the burden of persuasion, just like any moving party in any motion. This constituted no error.

11. The Bemba Defence also implies that the Trial Chamber erred by failing to consider the distinction between the “context of the pre-confirmation phase” and the pre-trial phase.¹⁹ The Bemba Defence made no such argument before the Trial Chamber in its original motion.²⁰ Yet in any event the distinction is not material in this instance. The Bemba Defence fails to explain how the factors articulated by the Single Judge have materially changed as the proceedings have advanced.²¹

B. The Trial Chamber should not grant leave to appeal the Decision

12. Distinct from requests for reconsideration, applications for leave to appeal under article 82(1)(d) of the Statute are not concerned so much with the merits of the underlying decision (beyond identifying an issue genuinely arising from that decision) but with the *impact and significance* of that decision upon the proceedings and why the issue must be resolved immediately on an interlocutory basis. The Bemba Defence’s assertion that its criticism of the merits of the Decision as such “satisfie[s] the criteria for appellate intervention” is thus incorrect.²²

13. In any event, since the Motion mischaracterises the nature of the Decision, the identified issue is not an “appealable” issue genuinely arising from the Decision.²³ Although it is true that the Trial Chamber decided “to maintain the redactions” ordered by the Single Judge, this was not the same as a decision authorising non-

¹⁹ See Motion, para. 7.

²⁰ See ICC-01/05-01/13-1098-Conf-Red.

²¹ See Decision, paras. 17-18.

²² *Contra* Motion, para. 9.

²³ *Contra* Motion, paras. 1 (defining the “discrete issue” as “whether [the] 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”), 9.

disclosure (for which the Appeals Chamber has provided guidance).²⁴ As such, there is no "identifiable subject or topic requiring a decision for its resolution".²⁵

14. Nor in any event does the identified issue significantly affect the fairness and expedition of the proceedings, as required by article 82(1)(d).²⁶ Although the Bemba Defence reiterates that the information which is the object of the disputed redactions is "relevant",²⁷ would assist in analysing the allegations of the informant,²⁸ or might assist in identifying the informant or other witnesses²⁹ or challenging the information of Prosecution witnesses,³⁰ this shows no basis to depart from the Trial Chamber's existing view—based on similar arguments³¹—that these possible benefits of lifting the redactions are "speculation" and "unsupported on any concrete basis."³² Speculative arguments cannot significantly affect the proceedings, as required by article 82(1)(d). Nor is there any basis in these circumstances to conclude that the Bemba Defence's ability to undertake relevant investigations is adversely affected.³³

15. The Bemba Defence does not seek to argue that the identified issue significantly affects the outcome of the trial, as alternatively proved by article 82(1)(d).

16. Finally, immediate resolution of the identified issue by the Appeals Chamber would not materially advance the proceedings.³⁴ As previously noted, the Trial Chamber has already concluded that the Bemba Defence's view of the possible fruits

²⁴ See *above* paras.5-6, 9.

²⁵ See *e.g.* ICC-01/04-168 OA3, para.9.

²⁶ *Contra* Motion, paras.9-15.

²⁷ Motion, para.10.

²⁸ Motion, para.11.

²⁹ Motion, paras.12-13.

³⁰ Motion, para.14. See *also* para.16 (the information which is the object of the redactions "could have spawned information that touches on the credibility and veracity of Prosecution witness testimony").

³¹ See *e.g.* Decision, para.4 ("(iv) the Informant and P-7 are sources of information relevant to the credibility of Prosecution witnesses; and (v) the Informant could be a source of other relevant information").

³² Decision, para.15.

³³ *Contra* Motion, para.15.

³⁴ *Contra* Motion, paras.9, 16-17.

of the redacted information is speculative.³⁵ The need for the Appeals Chamber's intervention to avert any associated (speculative) delay is, likewise, speculative.³⁶

IV. Relief Requested

17. For all the reasons above, the Motion should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 2nd day of September 2015
At The Hague, The Netherlands

³⁵ See above para.14. *Contra* Motion, para.16.

³⁶ *Contra* Motion, para.17.