

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 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***

Public

**Decision on Defence Request for Reconsideration of or Leave to Appeal 'Decision
on "Defence Request for Disclosure and Judicial Assistance"'**

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

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) 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') and Regulations 23 *bis* and 24(5) of the Regulations of the Court ('Regulations'), issues the following Decision on Defence Request for Leave to Appeal 'Decision on "Defence Request for Disclosure and Judicial Assistance"'.

1. On 21 August 2015, the Chamber, *inter alia*, dismissed ('Impugned Decision') a request to lift redactions to the potentially identifying information of an anonymous informant ('Informant').¹
2. On 31 August 2015, the defence for Mr Bemba ('Bemba Defence') requested reconsideration of the Impugned Decision or, in the alternative, leave to appeal the following issue ('Request'): whether the Chamber's decision to maintain redactions was consistent with the relevant criteria set by the Appeals Chamber ('Issue').² It submits that the Chamber failed to consider whether the redactions were justified at this stage of the proceedings, the absence of any objective basis for any impact of disclosure on the Informant's security, and the contradictory position that disclosure concerning an anonymous person could identify him or her.³ The Bemba Defence claims that the Chamber erroneously placed the burden on the Defence, thereby displacing the presumption of full disclosure.⁴ On this basis, it submits that reconsideration of the Impugned Decision is warranted.⁵ Alternatively, the Bemba Defence claims that the Issue satisfies the leave to

¹ Decision on 'Defence Request for Disclosure and Judicial Assistance', ICC-01/05-01/13-1166-Conf, paras 15-18.

² Defence Request for leave to appeal the 'Decision on 'Defence Request for Disclosure and Judicial Assistance'', ICC-01/05-01/13-1198-Conf.

³ Request, ICC-01/05-01/13-1198-Conf, paras 3-4.

⁴ Request, ICC-01/05-01/13-1198-Conf, paras 5-7.

⁵ Request, ICC-01/05-01/13-1198-Conf, para. 8.

appeal criteria because the redacted information is material to the defence insofar as it would advance investigations in relation to witness credibility.⁶

3. On 2 September 2015, the Office of the Prosecutor ('Prosecution') responded, submitting that (i) the Request is based on the mistaken premise that the Chamber made the Impugned Decision on a *de novo* basis and, (ii) given the limited scope of the redactions, the Bemba Defence fails to show any significant impact on the fair and expeditious conduct of the proceedings or that immediate appellate resolution would materially advance the proceedings ('Response').⁷
4. On 4 September 2015, the Bemba Defence requested leave to reply to two discrete issues in the Response, namely, whether the Prosecution bears the burden of justifying continued redactions and the standard for reviewing redactions. It submits that it could not have foreseen response submissions in this regard, as they deviate from the relevant protocol ('Reply Request').⁸
5. Also on 4 September 2015, the Prosecution responded, submitting that the Reply Request should be rejected because its submissions accord with the relevant protocol and could have been foreseen ('Reply Response').⁹
6. As a preliminary matter, the Single Judge, noting that the Prosecution and Bemba Defence do not object to reclassification, considers that nothing in the Request, Response or Reply Response warrants confidential classification. Pursuant to Regulation 23 *bis*(3) of the Regulations, the Single Judge reclassifies these filings as 'public'.

⁶ Request, ICC-01/05-01/13-1198-Conf, paras 10-17.

⁷ Prosecution's Response to the Defence Request for Leave to Appeal the "Decision on 'Defence Request for Disclosure and Judicial Assistance'", ICC-01/05-01/13-1208-Conf.

⁸ Request for Leave to reply to the "Prosecution's Response to the Defence Request for Leave to Appeal the "Decision on 'Defence Request for Disclosure and Judicial Assistance'", ICC-01/05-01/13-1214.

⁹ Prosecution's Response to the Defence Request for Leave to Reply (ICC-01/05-01/13-1214), ICC-01/05-01/13-1216-Conf.

7. In relation to the Reply Request, the Single Judge does not consider the proposed submissions to be necessary in order to decide the Request. He therefore dismisses the Reply Request.
8. Turning to the merits, the Single Judge recalls that, concerning the standard for reconsideration of a prior decision, the Chamber has previously found as follows:

Reconsideration 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. New facts and arguments arising since the decision was rendered may be relevant to this assessment.¹⁰

The Single Judge further recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.¹¹

9. The Request is based on arguments made by the Bemba Defence in support of the relief addressed in the Impugned Decision. In the Impugned Decision, the Chamber found that (i) the Bemba Defence's submissions were speculative and 'unsupported on any concrete basis', and (ii) it was 'not apparent that any undue prejudice is caused by maintaining [the] redactions'.¹² The Bemba Defence advances no new facts or arguments arising since the Impugned Decision. Therefore, the Single Judge does not consider that reconsideration is justified.
10. Concerning the request for leave to appeal, the Single Judge notes that a 'mere disagreement' with a decision, here expressed as a request for reconsideration, does not fulfil the criteria of Article 82(1)(d) of the Statute. Furthermore, the Single Judge considers that the Issue and supporting submissions misrepresent the Impugned Decision insofar as the Bemba Defence asserts, without basis, that

¹⁰ Decision on Kilolo Defence Request for Reconsideration, 15 July 2015, ICC-01/05-01/13-1085-Conf, para. 4 (citations omitted).

¹¹ Decision on Babala Defence Request for Leave to Appeal the Decision Related to the Timing of Opening Statements, 16 September 2015, ICC-01/05-01/13-1258, para. 8 and the decision cited in footnote 14; 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.

¹² Impugned Decision, ICC-01/05-01/13-1166-Conf, paras 15 and 18.

the Chamber failed to take into account the stage of the proceedings and relevant appellate jurisprudence. Finally, the Single Judge recalls that the definition of an appealable issue requires the parties to articulate discrete issues. It is generally insufficient to argue that the entirety of the Chamber's reasoning is erroneous when requesting leave to appeal.¹³ By arguing that maintaining the redactions at issue creates a 'dissonance' with appellate jurisprudence, the Bemba Defence is doing little more than challenging the entirety of the Chamber's reasoning on this point. Accordingly, the Single Judge finds that the Issue is not sufficiently discrete to qualify as an appealable issue.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Reply Request;

REJECTS the Request; and

INSTRUCTS the Registry to reclassify the Request (ICC-01/05-01/13-1198-Conf), Response (ICC-01/05-01/13-1208-Conf) and Reply Response (ICC-01/05-01/13-1216-Conf) as 'public'.

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



Judge Bertram Schmitt, Single Judge

Dated 22 September 2015

At The Hague, The Netherlands

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, para. 7.