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No.: ICC-01/05-01/13
Date: 28 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 Leave to Appeal Decision on the Request to strike
two witnesses from the Prosecution's Witness List**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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Detention Section

Victims Participation and Reparations Section

Others

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 Rule 155 of the Rules of Procedure and Evidence ('Rules') issues the following 'Decision on Defence Request for Leave to Appeal Decision on the Request to strike two witnesses from the Prosecution's Witness List'.

I. Procedural History

1. On 10 August 2015, the five defence teams in this case requested that two witnesses be struck out from the witness list submitted by the Office of the Prosecutor ('Prosecution') due to, *inter alia*, the non-disclosure of any statement or summary of their anticipated testimony and the failure to secure the consent of the witnesses to testify.¹
2. On 31 August 2015, the Chamber issued the 'Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from the Witness List' ('Impugned Decision').² Therein, the Chamber rejected the Defence request on the grounds that it had not identified a disclosure violation on the part of the Prosecution.³ As regards the Prosecution's failure to pursue a statement of witness P-198 under Article 54(1)(a) of the Statute, the Chamber held that 'the prejudice caused by such a breach would be minimal in the present circumstances'.⁴
3. On 7 September 2015, the defence teams for Mr Narcisse Arido, Mr Fidèle Babala Wandu, Mr Jean-Pierre Bemba Gombo, and Mr Aimé Kilolo Musamba

¹ Joint Request to Strike Prosecution Witnesses P-198 and P-201 From the Witness List, ICC-01/05-01/13-1132.

² Impugned Decision, ICC-01/05-01/13-1202.

³ Impugned Decision, ICC-01/05-01/13-1202, paras 11 and 15.

⁴ Impugned Decision, ICC-01/05-01/13-1202, paras 14-15.

(collectively, 'Defence') requested that leave be granted to appeal the Impugned Decision ('Application').⁵

4. On 10 September 2015, the Prosecution responded to the Request.⁶

II. Submissions

A. The Defence

5. The Defence requests that it be granted leave to appeal the Impugned Decision on three issues, as follows:
 - (i) Whether the Prosecution can call a witness to testify as a Prosecution witness, in circumstances in which the Prosecution has failed to make good faith efforts to first obtain the witness's consent;
 - (ii) Whether the Trial Chamber failed to consider/give sufficient weight to the individual rights of each Defence team under Article 67(1) of the Statute in finding that the prejudice arising from the lack of a statement was 'minimal', and did not, therefore bar the calling of the witnesses; and
 - (iii) Whether the Trial Chamber failed to give sufficient consideration to the rights of witnesses under Article 55 and Article 68(1) of the Statute and Rule 74 of the Rules, which militate against compelling witnesses to testify, without being informed of the prospective subject matter of their testimony.⁷
6. As regards the first issue, the Defence purports that the witnesses concerned are opponents to the current government in the Democratic Republic of the Congo.⁸ It avers that without having secured the consent of the witnesses to testify before the Court they may be compelled to testify on pain of sanctions which are implemented by the State Party concerned.⁹ With a view to protect these witnesses, the Defence alleges that a 'degree of circumspection' must be

⁵ Request, ICC-01/05-01/13-1222.

⁶ ICC-01/05-01/13-1232.

⁷ Application, ICC-01/05-01/13-1222, para. 1.

⁸ Application, ICC-01/05-01/13-1222, para. 16.

⁹ Application, ICC-01/05-01/13-1222, para. 18.

exercised and good efforts be made to obtain the consent of the two witnesses.¹⁰

The Defence questions 'whether the Prosecution can move the Court to exercise such a power in circumstances in which it has not adduced evidence that it made good faith efforts to first obtain the voluntary testimony of the witness'.¹¹

7. In relation to the second issue, the Defence contends that it has the right to be informed fully of the evidence in support of the charges sufficiently in advance of the trial.¹² It alleges that this right extends to receiving statements¹³ 'as it would (...) be unfair to exempt the Prosecution from collecting and disclosing even the minimum amount of information'.¹⁴ Further, the Defence argues that 'in a joint trial, the alleged knowledge of one accused is of no assistance to the other co-accused'.¹⁵ It maintains that each accused must benefit from 'his panoply of Article 67(1) rights in an effective manner'.¹⁶ The Defence is of the view that, in particular, Article 67(1)(g) of the Statute would be encroached upon if it were to contact the witnesses 'as [it] would be required to video-record and disclose any such interviews to the Prosecution', in accordance with the protocol on contacts with witnesses.¹⁷
8. With regard to the third issue, the Defence avers that the Chamber did not take into account the 'impact of not being questioned prior to testifying on the stand' on the physical security and psychological well-being of the witnesses.¹⁸ The Defence also maintains that without knowing the possible lines of questioning, the witnesses would not be in a position to draw the attention of the Chamber to risks associated with their testimony and would also not assist the Chamber to ascertain the truth 'if they are being called, "cold"'.¹⁹ The Defence also alleges

¹⁰ Application, ICC-01/05-01/13-1222, para. 20.

¹¹ Application, ICC-01/05-01/13-1222, para. 21.

¹² Application, ICC-01/05-01/13-1222, paras 25-31.

¹³ Application, ICC-01/05-01/13-1222, para. 30.

¹⁴ Application, ICC-01/05-01/13-1222, para. 32.

¹⁵ Application, ICC-01/05-01/13-1222, para. 35.

¹⁶ Application, ICC-01/05-01/13-1222, paras 37-38.

¹⁷ Application, ICC-01/05-01/13-1222, para. 40.

¹⁸ Application, ICC-01/05-01/13-1222, paras 44-45.

¹⁹ Application, ICC-01/05-01/13-1222, paras 46-47.

that the witnesses concerned have the right to avail themselves of the protections of Article 55 of the Statute and Rule 74 of the Rules.²⁰

9. The Defence contends that the three issues impact significantly the fundamental rights of the accused and the overall expeditiousness of the proceedings.²¹ In the view of the Defence, the lack of any 'indicia concerning the prospective testimony' of the witnesses undermines the Defence right to be informed, delays Defence preparation, and will necessitate multiple adjournments during trial.²² The Defence also avers that the testimony of the two witnesses, being 'material' witnesses, would affect the outcome of the trial.²³ Finally, the Defence alleges that an immediate decision of the Appeals Chamber would materially advance the proceedings.²⁴

B. The Prosecution

10. The Prosecution alleges that none of the three issues constitute appealable issues arising from the Impugned Decision²⁵ and none of the three issues fulfil the Article 82(1)(d) criteria.²⁶ As regards the first issue, the Prosecution alleges that the issue, as formulated by the Defence, is not the question upon which the decision turned.²⁷ As regards the second and third issues, the Prosecutor maintains that they are equally improperly formulated and speculative,²⁸ representing a mere disagreement with the decision of the Chamber²⁹.
11. In relation to the second issue, the Prosecution alleges, more specifically, that the Defence did not demonstrate that the five accused suffered more than 'minimal' potential prejudice despite the fact that some accused have 'first-hand

²⁰ Application, ICC-01/05-01/13-1222, paras 49-53.

²¹ Application, ICC-01/05-01/13-1222, paras 54 and 56.

²² Application, ICC-01/05-01/13-1222, para. 56.

²³ Application, ICC-01/05-01/13-1222, para. 57.

²⁴ Application, ICC-01/05-01/13-1222, paras 58-60.

²⁵ ICC-01/05-01/13-1232, para. 2.

²⁶ ICC-01/05-01/13-1232, paras 2 and 20-26.

²⁷ ICC-01/05-01/13-1232, paras 5-9.

²⁸ ICC-01/05-01/13-1232, paras 10-12.

²⁹ ICC-01/05-101/13-1232, para. 13.

knowledge of the relevant events’.³⁰ The Prosecution also highlighted that procedural rights and opportunity to undertake investigations were guaranteed to all accused.³¹ With regard to the third issue, the Prosecution maintains that the Defence merely re-litigates the merits of the Impugned Decision and refers to the measures adopted by the Chamber to give protection to the witnesses concerned.³²

III. Analysis

12. The Single Judge recalls the applicable law relating to Article 82(1)(d) of the Statute, as set out in previous decisions.³³ In particular, the Single Judge emphasises that, for the purposes of the first prong of this test, the Appeals Chamber defined an ‘issue’ as ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of conflicting opinion’.³⁴

13. As regards the first issue, the Single Judge holds that the issue, as presented by the Defence, does not arise from the Impugned Decision. The Chamber entertained the question whether or not the Prosecution had violated its disclosure obligations and in this context considered that the Prosecution is permitted to call witnesses when it has not obtained their consent to testify.³⁵ Whether or not the witnesses concerned will be summoned to testify, and what this could mean for the two witnesses concerned, is not discussed in the Impugned Decision. Rather, the question to summon the witnesses is a distinct follow-up matter to the Impugned Decision.

³⁰ ICC-01/05-01/13-1232, para. 15.

³¹ ICC-01/05-01/13-1232, paras 15-17.

³² ICC-01/05-01/13-1232, paras 18-19.

³³ 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; 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 the Decision Related to the Timing of Opening Statements, 16 September 2015, ICC-01/05-01/13-1258, para. 8.

³⁴ 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.

³⁵ Impugned Decision, ICC-01/05-01/13-1202, para. 11.

14. In relation to the second issue, the Single Judge finds that the issue does not meet the Article 82(1)(d) criteria. The Defence takes issue with the reasoning of the Chamber and alleges in general terms a violation of its rights, amongst other to be promptly and fully informed of the charges and evidence. Yet, generic assertions are not sufficient. The Defence does not substantiate how the Impugned Decision, in light of the circumstances set out by the Chamber therein,³⁶ would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial for each accused.
15. Finally, with regard to the third issue, the Single Judge holds that this issue does not arise from the Impugned Decision. The impact of not having given a statement prior to the testimony of the Court on the rights of the witnesses, as guaranteed under the Statute, was not the subject-matter of the Impugned Decision. Rather, the Defence had requested to strike the two witnesses from the Prosecution's list of witnesses as a result of the latter's alleged disclosure violation.³⁷ Which measures were to be adopted in order to safeguard the rights of witnesses appearing before the Court was addressed by the Chamber in another decision.³⁸ That said, the Defence cannot advance in a request for leave to appeal issues that are outside the ambit of the Impugned Decision with a view to litigating aspects which may arise in the further course of the proceedings.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Application.

³⁶ Impugned Decision, ICC-01/05-01/13-1202, para. 14.

³⁷ Joint Request to Strike Prosecution Witnesses P-198 and P-201 From the Witness List, 10 August 2015, ICC-01/05-01/13-1132.

³⁸ Directions on the conduct of the proceedings, 2 September 2015, ICC-01/05-01/13-1209, paras 18-19.

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

A handwritten signature in black ink, appearing to be 'BS', is written over a horizontal line.

**Judge Bertram Schmitt,
Single Judge**

Dated 28 September 2015

At The Hague, The Netherlands