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

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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

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

Request concerning the review of seized material

Source: Counsel for Mr. Jean-Pierre Bemba

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Introduction

1. The Trial Chamber has an independent power and a duty to adopt a scheme for reviewing privileged information, which fully respects the particular rights of Mr. Jean-Pierre Bemba-Gombo and the fair and expeditious conduct of the proceedings, and which is tailored to the particularities of the trial stage.
2. The most effective, fair and efficient method for vetting privileged information is to vest this task with the Defence for Mr. Bemba. Any other scheme is either *ultra vires*, inappropriate, or engenders a significant risk that privileged or *ex parte* information will be disseminated to the Prosecution.

Submissions

The Trial Chamber has both the power and the duty to issue its own procedure for the review of privileged information, after having heard from the Defence

3. Pursuant to Article 64(2) of the Statute, the Trial Chamber has the obligation to ensure that the trial is fair, and conducted with full-respect for the rights of the accused.
4. This equates to a duty for the Trial Chamber to make its own assessment as to whether the specific procedures before it comport with the rights of the accused under Article 67(1) of the Statute.
5. As concluded by Trial Chamber I in the *Lubanga* case,

“[The] Statutory and regulatory framework undoubtedly establishes the unfettered authority of the Trial Chamber to rule on procedural matters and the admissibility and relevance of evidence, subject always to any contrary decision of the Appeals Chamber.”¹

6. For this reason, ICC Trial Chambers have frequently departed from procedural practices and protocols adopted by the Pre-Trial Chamber, and instead, issued their own, which were tailored towards the particularities of the trial stage.
7. For example, in the *Ntaganda* case, the Trial Chamber issued its own protocol for the procedure for reviewing redactions. In so doing, the Chamber referred to its duty to “ensure, pursuant to Article 64(2) of the Statute, that the trial is fair and expeditious, and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”² The Chamber further explained that “[it had] followed the approach that it consider[ed] most appropriate to increase the expeditiousness and focus of the proceedings whilst remaining fully consistent with the rights of the accused.”³
8. The Trial Chamber in the *Gbagbo* case adopted a similar line of reasoning.⁴
9. Of particular importance, in circumstances where Counsel have been appointed by the Pre-Trial Chamber (for example, Legal Representatives for Victims), the mandate has generally been limited to the phase presided over by that Chamber.

¹ ICC-01/04-01/06-1084, para. 5.

² ICC-01/04-02/06-411, para. 16.

³ ICC-01/04-02/06-411, para. 19.

⁴ ICC-02/11-01/11-737, para. 23.

10. For example, in the Kenya cases, the Trial Chamber appointed separate Counsel for Victims for the trial phase.⁵ This temporal limit on their mandate derived from the fact that the Pre-Trial Chamber had no power to bind the Trial Chamber in relation to matters concerning both the modalities of victim participation at the trial phase, and the role of the Legal Representatives in the case.
11. Thus, the Appeals Chamber found that although the appointment of a Legal Representative appointed by the Pre-Trial Chamber continued unless and until it was revoked by the Trial Chamber, the procedural rights that attached to the appointment were necessarily dependent on a future decision of the Trial Chamber.⁶
12. The Independent Counsel appointed by the Single Judge to review privileged materials has no ‘client’, or continuing obligations under the Code of Conduct. His mandate was intrinsically tied to the implementation of specific procedural decisions issued by the Single Judge.
13. These procedural decisions were, in turn, limited in scope and effect to the pre-confirmation phase.
14. In one of the last decisions issued by the Single Judge in this case, the Single Judge observed that:⁷

“the powers enshrined in article 57 (including, in particular, the one to adopt any such measures as might be required for the preservation of evidence pursuant to article 57(3(c) of the Statute), the exercise of which is solicited by both the Prosecutor’s First and Second Requests, are to be

⁵ ICC-01/09-01/11-460; ICC-01/09-02/11-498.

⁶ ICC-01/09-01/11-409 , para. 21.

⁷ ICC-01/05-01/13-799, pp. 5-6.

construed as instrumental to the Pre-Trial Chamber's core function, namely to determine whether the evidence as made available to it establishes or not substantial grounds to believe that the suspects have committed the crimes as charged by the Prosecutor;

CONSIDERING that articles 61(11), 64(6)(a) and (d) of the Statute make it clear that, once the charges have been confirmed, the powers vested in the Pre-Trial Chamber during the pre-trial phase, with particular respect to those powers relating to the production of evidence, are vested in the Trial Chamber;

CONSIDERING that, accordingly, as a matter of principle and absent compelling reasons to decide otherwise (first and foremost, the existence of a unique investigative opportunity within the meaning and for the purposes of article 56 of the Statute), it is not appropriate for the Pre-Trial Chamber to exercise its powers relating to the production of evidence once the confirmation decision has been rendered, namely in light of the fact that the statutory framework makes it clear that the debate on the admissibility and relevance of the evidence will henceforth take place before the Trial Chamber".

15. If it is not appropriate for the Pre-Trial Chamber to "exercise its powers relating to the production of evidence once the confirmation decision has been rendered", then it follows that it is also not appropriate for procedural decisions of the Single Judge to continue to govern the means by which evidence is reviewed for privileged information during the trial phase.

Fairness dictates that the Trial Chamber should issue a new procedure for reviewing privileged material at the trial phase, after having heard from the Defence

16. Article 64(3)(a) requires the Trial Chamber to "confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings".

17. The notion of legal privilege is intrinsically tied to the notion of effective legal representation, and the ability of the defendant to participate in the proceedings launched against him. The procedure employed for identifying and reviewing privileged material thus strikes at the heart of the rights of the accused, and the “fair and expeditious conduct of the proceedings”.
18. Both Article 64(3)(a) and the principle of adversarial proceedings therefore translate to a right for the Defence to accorded an effective opportunity to be heard as concerns the adoption of the most effective and fair procedure for the review of privileged information.
19. This has not yet occurred. The initial appointment of the Independent Counsel occurred on an *ex parte* basis in the situation phase. The Single Judge subsequently rejected all Defence attempts to either seek leave to appeal or reconsideration of the appointment of Independent Counsel.⁸
20. The question as to what is the fairest and effective system for reviewing privileged material is also dependent on the phase of the proceedings. For example, at the point when the investigation was being conducted on an *ex parte* basis, it was clearly impossible for the Defence to participate in the procedure.
21. It is also apparent that the Single Judge was concerned that the involvement of the Defence in the review process could delay the confirmation schedule,⁹ at a time when all of the defendants were in detention.

⁸ ICC-01/05-01/13-50; ICC-01/05-01/13-51-Conf; ICC-01/05-01/13-187; ICC-01/05-01/13-749, para. 10.

⁹ ICC-01/05-01/13-446, p. 6.

22. These considerations are no longer applicable, and there is no other logical or legal basis for excluding the Defence from either the process by which the procedure for reviewing privilege is determined, or indeed the review process itself.

The most effective and fair system for the review of privileged/private information is to allow the Defence for Mr. Bemba and the information owner to be involved in the review process

23. In formulating Rule 73(1), the drafters deliberately included an explicit reference to Article 67(1)(b) in order to underscore that the process for identifying and protecting privilege should not encroach upon the confidentiality of Defence communications.¹⁰

24. It therefore follows that the procedure for vetting privileged information must be effective, and ensure that no privileged information is inadvertently transmitted to the Prosecution.

25. The Defence for Mr. Bemba is the only entity, which can effectively identify what is and is not privileged, or which should otherwise not be disclosed to the Prosecution. Only the Defence is aware of:

- i. the full range of person who have worked on the case, and the scope of their professional tasks;
- ii. the identity of all potential witnesses and experts who may have been approached by the Defence;
- iii. the scope of material that is covered by specific protection orders in the Main Case (including *ex parte* rulings); and

¹⁰ D Piragoff, *Evidence* in R. Lee (ed) The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence p. 359 -360.

- iv. information that is otherwise protected from disclosure to the Prosecution by virtue of rulings in the Main Case.

26. Indeed, the very nature of privilege is such that it will encompass information and matters that will only be known to the Defence.

27. The Defence for Mr. Bemba is also best placed to identify discrete information that might need to be redacted in order to protect the security of witnesses or sources, and to submit reasoned requests to the Trial Chamber for this purpose.

28. Moreover, in accordance with Rule 73(1), the 'person' (i.e. the defendant) is vested with the exclusive power to waive privilege, either by consent in writing, or through voluntary disclosure to a third person. It therefore follows that under the ICC legal framework, the right to assert privilege belongs to the client and not his former lawyers, or any other entity which is not instructed by the client.¹¹

29. Thus, if information is potentially exculpatory but otherwise privileged, only the Defence for Mr Bemba has the right to determine whether privilege should be lifted in order to enable disclosure to other Defence teams (and potentially the Chamber or the Prosecution). Any other entity reviewing privileged material would not possess this right.

¹¹ ICC-01/04-01/06-2830, para. 9. See also *Prosecutor v. Brđjanin and Talic*, Decision on 'Motion for Production of Documents - Dzonlic Testimony' of 11 March 2002', 9 April 2002, para. 6.

30. For these reasons, the previous practice of the ICC and other international tribunals has been to vest the Defence with the responsibility for vetting and asserting privilege over seized materials.

31. For example, in the *Mbarushimana* case, the Single Judge explicitly noted that the defendant was best placed to review the seized materials, and to identify which materials were subject to privilege.¹²

32. Similarly, in the *Gotovina* case, the Trial Chamber vested the Defence with the responsibility for conducting a review of the seized material, and asserting privilege.¹³

33. The preliminary involvement of the Bemba Defence is also consistent with the procedural regime set out in the Regulations of the Registry in relation to the monitoring of detention communications.

34. In particular, Regulation 175 regulates the regime applicable to interferences with or intimidation of witnesses, or offences against the administration of justice, Regulation 175 (10) expressly requires the Registrar to notify Counsel for the detained person prior to any disclosure of the transcripts of monitored conversations as evidence of contempt. There is no exception to this requirement. The explicit reference to offences against the administration of justice also evidences the clear intention that the protections afforded by the regulation should continue to apply in connection with Article 70 investigations.

¹² ICC-01/04-01/10-105, p. 5.

¹³ *Prosecutor v. Gotovina*, 'Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia', 12 May 2010, paras. 41-43.

35. The fact that the Prosecution evaded the detention regulations by monitoring the communications of Counsel, rather than those of the Client, does not mean the procedural safeguards are not applicable. To the contrary, the fact that the Prosecution deviated from the framework foreseen by the Court's regulatory framework enhances the need for strict procedural safeguards to be adhered to.
36. There is also no logical or justiciable reason to employ an Independent Counsel to perform the role of vetting privileged information, particularly at this phase of the proceedings.
37. It would appear from the transcripts of the Status Conferences during the investigation phase that the notion of an Independent Counsel was mooted by the Registry and the Prosecution as a means for protecting the interests of the Defence during that *ex parte* phase of the proceedings.¹⁴ Nonetheless, the rationale for such a construct fell away once the arrest warrants were executed, and the Defence were entitled to participate in the proceedings.
38. Moreover, unlike national security proceedings, in which Special Counsel are appointed to represent the interests of the Defence due to the fact that the Defence are not entitled to access the underlying materials, in the present situation, the material in question belongs to the Defence.¹⁵ Any privacy concerns pertaining to the information holder can also be accommodated through the information holder's prior review of the seized material or through a consensual arrangement between the affected teams.

¹⁴ ICC-01/05-51-Red, para. 28; ICC-01/05-48-Conf-Exp.

¹⁵ Articles 15(2) and 18(5) of the Code of Conduct require that all documents and materials must be transmitted to the new Defence team.

39. Accordingly, if the role of Independent Counsel was to identify privileged information or to otherwise protect the interests of the Defence, then this role should be vested in the Defence from this point onwards.

40. If the role of Independent Counsel was, to the contrary, to assist the Prosecution by identifying information that might be relevant to its investigations, then this would have significant implications as concerns the appearance of the impartiality of the Chamber.

41. It would also raise questions concerning the power of the Chamber to appoint someone exercising a quasi-prosecutorial role. In this regard, in the *Lubanga* case, the Prosecution averred that

“the general power to investigate is bestowed expressly upon the Prosecution from among the organs of the Court is set out in Part V of the Statute. Neither the Statute nor the Rules confer any concurrent investigative or judicial functions elsewhere within the Court, and in particular upon the Registry [...] Notably, nothing in the Statute and Rules authorises or even permits the separate exercise of prosecutorial power, including the conduct of law enforcement investigations, by other organs or outside entities.”¹⁶

42. Both Trial Chamber I and Trial Chamber II confirmed the Prosecutor’s exclusive competence for Article 70 investigations, and the absence of an independent power for the Chamber or Registry to investigate such matters.¹⁷

43. The Statute and Rules also do not permit Judges to divest their judicial powers to an independent entity, particularly one, who is not subject to any

¹⁶ ICC-01/04-01/06-2716, para. 2.

¹⁷ ICC-01/04-01/07-2731, para. 18; ICC-01/04-01/06-T-350-Red-ENG, pp. 16-17.

obligations or professional controls. The establishment of such an entity would constitute an “abuse of judicial discretion”.¹⁸

44. The Defence would, in any case, have a right to be heard in relation to any observations or recommendations of such an entity before the Chamber renders its decision.¹⁹ The introduction of a prior review by such an entity merely delays the proceedings.

45. If the role of Independent Counsel is simply to translate materials for the Chamber then this should be done by a translation service. Appointing a Counsel for this purpose serves no purpose other than to taint the neutrality of any translations, and to inflect them with Counsel’s own predispositions.²⁰

Relief sought

46. The Defence for Mr. Bemba respectfully requests the Trial Chamber to:

- i. Terminate the appointment of the Independent Counsel, with immediate effect; and
- ii. Order that all privileged materials should henceforth be reviewed in accordance with the scheme set out in this Request.

¹⁸ *Prosecutor v. Gotovina et al.*, ‘Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia’, 14 February 2011, para. 69.

¹⁹ ICC-01/04-135, p. 13 footnote 52, citing *Morel v. France*, Application no. 34130/96, para. 27. Rule 103(2) further requires that the Defence must be given an opportunity to be heard in relation to any submissions received by the Chamber from an *amicus curiae*.

²⁰ ICC-01/05-01/13-353-Conf; ICC-01/05-01/08-3203-Red2, paras. 204-206; ICC-01/05-01/13-336-Conf-Exp-Anx1.



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Dated this, 19th Day of February 2015
At The Hague, The Netherlands