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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 Redacted Document

**Public redacted version of "Prosecution's Submission on Keywords to Identify
Items of a Privileged Nature within Seized Material", 13 February 2014, ICC-01/05-
01/13-186-Conf**

Source: The 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. [REDACTED],¹ the Office of the Prosecution ("Prosecution") hereby submits a list of keywords to assist the Belgian authorities to identify privileged items within the materials seized on the arrest of Suspect Aimé Kilolo Musamba ("Submission").

2. The Prosecution notes that the Belgian authorities' request for keywords is general, and not limited to the identification of privileged material.² Nevertheless, the Prosecution defers to the Chamber's assessment of the request.

3. There are at least two serious constraints on the effectiveness of keywords searches to identify privileged material in this case. First, the Prosecution is unaware of Mr. Kilolo's electronic filing and labelling systems concerning lawyer-client communications and/or confidential work-product. Thus, the Prosecution is not able fully to identify and/or suggest keywords to filter out this material within the electronic data as a whole, or to apply progressively (i.e., to compartmentalized collections) therein.

4. Second, although keyword searches might identify presumptively privileged material in other cases, they will not be particularly productive here. Mr. Kilolo is alleged to have committed crimes which, by their nature, are integrally related to legal proceedings and his role as lead counsel. Search terms likely to identify potentially privileged materials in normal circumstances are, in this case, just as likely to yield information evidencing the commission of crimes. Thus, there is a danger that highly relevant evidence may be excluded because of an erroneous pre-designation as 'privileged'. Conversely, a search for *relevant* material, will at least guarantee closer inspection of items that may be privileged.

¹ [REDACTED].

² ICC-01/05-01/13-82-Conf-Anx2, Registry's transmission of the request of the Kingdom of Belgium dated 9 January 2014, 10 January 2014, reclassified on 7 February 2014 (stating [REDACTED]).

II. Request for Confidentiality

5. This Submission is filed as “Confidential” as it responds to an Order of the Single Judge so designated.

III. Submissions

6. In addition to the names of Suspects Bemba, Kilolo and Mangenda, as well as the names and contact details of current and former members of the Defence in *The Prosecutor v. Jean-Pierre Bemba Gombo* (retained by the Registry), the Prosecution considers that the following keywords, in French and/or English may assist the Belgian authorities to screen for potentially privileged information in the review of the seized material:

[REDACTED].³

7. A keyword search of the seized material should form only part of their review for potential privilege. Given the nature of the case and the crimes allegedly perpetrated, identifying genuinely privileged material (e.g., information that does not comprise or further crimes or fraud) based on keywords alone, would be exceedingly difficult.⁴ This is only compounded where the search is carried out by persons not fully familiar with the particulars of the case.

8. Although the legal privilege recognised by Rule 73(1) of the Rules of Procedure and Evidence extends only to professional communications between an accused and

³ In a Boolean search it is best practice to use truncations and wildcards, if supported by the review application, such as: “work product*”, “priv*”, “attorney client”, “confidential”.

⁴ Since this case involves, *inter alia*, the alleged criminal misconduct of attorneys, keyword searches alone will not likely be sufficient to isolate and exclude genuinely privileged material from material comprising or furthering a crime or fraud.

his or her legal counsel, the Prosecution accepts this may also cover ‘confidential’ material that may be found in documents drafted by Kilolo or his former client Bemba in preparation for litigation or investigations. This may comprise, for example, Kilolo’s opinions, conclusions, and theories arising from his former client’s case. As such, keyword searches must be only a preliminary step toward identifying potentially privileged material. It should not replace the full review of any indicated documents.

9. A further independent review of the seized material for privileged information should be conducted after the completion of keyword searches because they will fail to identify documents insufficiently indexed or formatted to allow an electronic text search. These will need to be checked individually as no electronic search can guarantee filtering out all such material.

10. Finally, as the Single Judge has found, an apparently privileged communication between accused and counsel is not privileged if the communication was made in furtherance of the commission of a crime.⁵ It is therefore, crucial that all seemingly privileged relevant material be examined and not presumptively excluded. The purposes for which documents, emails, or other electronic written material (SMS, Instant Messaging) were created may well vitiate any claim of privilege.

11. Similarly, the storage location of the document in an electronic device should not be dispositive of whether it is privileged. A document found in an area of the electronic data containing other clearly privileged information, may not be

⁵ See, ICC-01/05-52-Conf-Red, Decision on the Prosecutor’s ‘Request for judicial order to obtain evidence for investigation under Article 70, 29 July 2013. para. 3 (recognizing the crime-fraud exception in that “[t]he statutory right to communicate freely and in confidence with counsel of his own choosing, as set forth in article 67(l)(b) of the Statute, is obviously forfeit whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice, the more so when - as in the present case - the counsel seems to be an accomplice in the scheme”).

privileged if it is found elsewhere in the device in other circumstances (i.e., attached to an email communicated to a non-privileged party or bearing on the commission of a crime).

12. The Prosecution defers to the Chamber's interpretation of the request of the Belgian authorities, and the propriety of the keyword searches of the seized material from the lists provided by the parties. The Prosecution considers that the additional review of any potentially privileged material indicated is necessary to ensure the preservation of evidence material to this case for the benefit of the proceedings and the Court.



Fatou Bensouda, Prosecutor

Dated this 27th February 2015

At The Hague, The Netherlands