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**International
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Court**

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Date: 09/03/2015

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*

Confidential

**Defence Response to Prosecution's Request for the Production of Evidence (ICC-
01/05-01/13-820-Conf)**

Source: Defence for Mr Jean-Pierre Bemba Gombo

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

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I. INTRODUCTION

1. The Prosecution Request for the Production of Evidence (the Request)¹ lacks any legal or factual basis, and should be dismissed.
2. The Request falls at the first hurdle due to the Prosecution's failure to establish that the Defence is in possession of 'witness statements', or that information falling short of that would satisfy the ratio for its Request.
3. Unsigned internal notes or records of interviews are privileged Defence work product. There is also no statutory basis for displacing this privilege.
4. The Prosecution also cannot exploit the Article 70 case as a vessel for embarking on a fishing expedition or for obtaining evidence pertaining to the Main Case, to which it would not otherwise be entitled, or for obtaining a second bite of the cherry.
5. Property in the documents also vests in the Defence of Mr. Bemba. Apart from the fact that the Request should have been directed to the Defence of Mr. Bemba rather than that of Mr. Kilolo, it is highly improper for the Prosecution to seek to compel the Defence for Mr. Kilolo to act in violation of Mr. Kilolo's continuing obligations under the Code of Conduct by producing these documents without first obtaining the consent of the Defence for Mr. Bemba.
6. This Response has been filed on a confidential basis in order to accord with the classification of the Request. The Defence has no objection to this being reclassified as public.

II. SUBMISSIONS

1. The Prosecution has failed to establish that the Defence is in possession of the Requested Information

7. The Prosecution has requested access to:

¹ ICC-01/05-01/13-820-Conf.

“all prior statements of defence witnesses in case ICC-01/05-01/08 (“Main Case”) in any form, including the full record of interviews comprising audio recordings, transcriptions, interview notes and where available, their translations.”² (“the Requested Information”).

8. The Request has failed to establish that either any present or former members of the Defence for Mr. Bemba are in possession of Defence witness statements.

9. In seeking to establish that either Mr. Kilolo or his Defence are in possession of ‘witness statements’ the Prosecution has cited submissions of the Defence for Mr. Kilolo, which refer to ‘notes’, and ‘audio-recordings’, which were taken during witness interviews.³ However, as acknowledged by the Prosecution, the Defence for Mr. Kilolo has only adduced either documents containing unsigned questions and answers, or summaries.⁴

10. Documents of this type cannot be considered to be ‘witness statements’.

11. Rules 111 and 112 of the Rules of Procedure and Evidence set out the procedural requirements for witness statements, and the record of questioning for suspects or defendants. Critically, for witness statements, the witness must either sign the document or there must be a record of the reasons why the document was not signed.

12. In lines with these provisions, the Prosecution advanced the position in the Main Case that it could not be compelled to disclose the records of pre-assessment interviews with witnesses or investigators notes under Rule 76.⁵ Such documents had not been signed by the witnesses, or prepared in accordance with the procedures under Rules 111 or Rule 112. The documents therefore did not necessarily constitute an accurate reflection of the witnesses’ prospective testimony, but were, rather, internal word product of Prosecution investigators.

13. The Trial Chamber accepted these arguments and followed an earlier precedent in the *Lubanga* case to the effect that screening notes or investigator's notes "are not the same as a signed witness statement or an electronic recording of an interview, both of which provide a certain record of the witness's evidence approved by or coming from the witness.

² ICC-01/05-01/13-820-Conf, para. 1.

³ ICC-01/05-01/13-820-Conf, para. 7.

⁴ ICC-01/05-01/13-820-Conf, para. 8.

⁵ ICC-01/05-01/08-688-Red, paras. 14-15.

Screening notes and investigator's notes will be a personal record - not the witness's - of what the latter said."⁶

14. The same logic necessarily applies to audio-recordings, which are taken on an informal, *ad hoc* basis, without following the procedures set out in Rule 112. This would be the case as concerns recordings which were taken for the purpose of assisting subsequent note-taking rather than for the purpose of introducing the record into evidence or for the purpose of obtaining a full and accurate record of vulnerable witnesses, such as suspects.

15. The Defence can also confirm, unequivocally, that no witness statements or Rule 112 recordings were taken from Defence witnesses during the course of Defence investigations in the Main Case. The notes and summaries were not read to the witnesses or signed by them.

16. Since the Prosecution has averred that anything other than a witness statement is “patently inadequate to fairly test Kilolo’s claims”,⁷ it follows that the Request must therefore be dismissed as being moot.

2. The Prosecution has no right to receive privileged internal work product of the Defence

Rule 73(1) privilege

17. If the Request is construed to encompass materials other than witness statements, it must be rejected on the basis that such material is privileged internal Defence work product.

18. As set out above, notes and informal records taken during the course of witness interviews are not witness statements, but are rather the internal property and product of the Defence. If notes taken by the Prosecution during such interviews can be characterised as ‘investigators notes’, then the equivalent documentation prepared by Defence Counsel or legal assistants must be categorised as ‘Defence Counsel’s notes’.

19. The records in question are not prepared for use in litigation but as an internal *aide memoire* to assist the Defence to firstly, obtain instruction from the client as to whether to

⁶ ICC-01/05-01/08-750-Red, para. 32, citing ICC-01/04-01/06-104-ENG ET WT, p.24, line 19 to p.25, line 2.

⁷ ICC-01/05-01/13-820-Conf, para. 8.

call the person in question as a witness, and secondly, to assist the Defence to prepare any documentation required by the Court in connection with any such prospective testimony.

20. The case law of the ICC has recognised that legal privilege inheres in Defence documentation, which is not *stricto sensu*, a communication between Counsel and Client, but which would, if disclosed, reveal the content of communications between Counsel and Client.

21. For example, in the *Mbarushimana* case, the Pre-Trial Chamber found that the protection afforded by Rule 73(1) extended to internal documents setting out factual and legal background, which were prepared for the use of the Defence, and draft legal submissions or draft correspondence, which were submitted to the client for his observations.⁸

22. It is also notable that Rule 73(1) of the ICC Rules of Procedure and Evidence is based on the ICTY equivalent (Rule 97), which in turn, appears to have been based on a proposal from Lawyers Committee for Human Rights (an American NGO).⁹ Rule 73(1) is thus ultimately derived from the United States' notion of legal privilege, which includes both legal advice between the Defence and the client, and litigation privilege, which protects documents prepared for litigation from disclosure.

23. According to US commentators, this notion of privilege includes "reports, memoranda, or other internal defence memoranda which may contain an attorney's mental impressions, conclusions, opinions, or legal theories"¹⁰ and further recognises that "lawyers must act through investigators and other agents who prepare and aid in preparing documents and document summaries for trial preparation and their reports and memoranda are privileged".¹¹

24. This broader ambit of privilege is reflected in the case law of the ICTY, which has described privilege as protecting "confidential communications and documents that come

⁸ ICC-01/04-01/10-314, p.6; ICC-01/04-01/10-286, p.7.

⁹ V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* (Transnational Publishers 1995) Vol. 2, p.566.

¹⁰ J. Wesley Hall Jr, *Professional Responsibility in Criminal Defense Practice*, (Thomson West, 1996, 2nd ed), p.1089.

¹¹ J. Wesley Hall Jr, *Professional Responsibility in Criminal Defense Practice*, (Thomson West, 1996, 2nd ed), p.1090.

into existence or are generated for the purpose of giving or getting legal advice or in regard to prospective or pending litigation.”¹²

25. The notion that privilege protects not only advice in its purest sense, but also documents generated in conjunction with or in furtherance of such legal advice, is also consistent with other legal jurisdictions.

26. For example, European Union directives specify that privilege extends to (i) all written communications between a lawyer and his/her client after a European Commission administrative procedure has commenced, and which relate to that action; (ii) pre-existing communications that relate to the subject matter of the European Commission investigation; (iii) internal notes that reproduce the advice provided by a lawyer to his/her client;¹³ and (iv) documents that have been prepared for the purpose of seeking legal advice with regards to one's defence (eg working documents).¹⁴

27. Several civil law countries also define professional secrecy broadly to encompass any information that was confided in the lawyer as a result of the lawyer's representation of the client.¹⁵ Notably, Austria specifies that the authorities cannot attempt to subvert the obligations and protections of professional secrecy by suborning testimony from assistants to Counsel or through the production of documents, photographs or recorded speech.¹⁶

28. French ethical rules specifically protect interview notes compiled during investigations:

« Le secret professionnel couvre en toute matière, dans le domaine du conseil ou celui de la défense, et quels qu'en soient les supports, matériels ou immatériels (papier, télécopie, voie électronique...): les consultations adressées par un avocat à son client ou destinées à celui-ci;

¹² *Prosecutor v. Brđjanin & Talić*, IT-99-36-T, Decision on 'Motion for Production of Documents – Dzonlić Testimony' of 11 March 2002, 9 April 2002, para. 7; <http://icty.org/x/cases/brdanin/tdec/en/020409.pdf>.

¹³ *Hilti Aktiengesellschaft v Commission*, T-3/98.

¹⁴ M. Marelus, *Legal Privilege Handbook 2013*, DLA Piper (2013) 4, http://www.dlapiper.com/files/Publication/30de8b8d-3acc-42dc-a35e-d08b924149a1/Presentation/PublicationAttachment/11d4fae4-f974-4f35-a8d6d9378229c2fd/DLA_Piper_Legal_Privilege_Handbook_2013.pdf.

¹⁵ D. Edward QC, 'The Professional Secret, Confidentiality and Legal Professional Privilege in Europe', pp.2-6, http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/update_edwards_repor1_1182333982.pdf

¹⁶ *Ibid.*, p.3.

les correspondances échangées entre le client et son avocat, entre l'avocat et ses confrères [...];
[...]
les notes d'entretien et plus généralement toutes les pièces du dossier, toutes les informations
et confidences reçues par l'avocat dans l'exercice de la profession ».¹⁷

29. In the Democratic Republic of Congo, the obligation to comply with professional secrecy is framed as follows:

« Le secret professionnel concerne toutes les matières, que ce soit dans le domaine du Conseil ou dans celui de la Défense. L'avocat doit faire respecter le secret professionnel par les membres du personnel de son cabinet et par toute personne qui coopère avec lui dans son activité professionnelle. »¹⁸

30. The South African Appellate Division adopted the position of the High Court of Australia that:¹⁹

“privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation.”

31. In line with the United Kingdom common law position, both Australia and South Africa extend the protection of privilege to communications with third parties, “such as a person who witnessed some event”, in the event that litigation is threatened or contemplated.²⁰

32. Rule 73(1)(b) itself contemplates that the Defence might legitimately share privileged material with a “third party”, and that such privilege is not waived unless the “third party” then gives evidence of the disclosure.

¹⁷ Article 2(2) of the *Règlement intérieur national de la profession d'avocat*, Conseil national des barreaux, *Règlement intérieur national de la profession d'avocat*, 28 April 2007, at: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/France_FR_RINpdf2_1251981001.pdf.

¹⁸ Barreau de Kinshasa Gombe, *Règles déontologiques*, at: <http://www.barreaudelagombe.cd/index.php/2012-07-11-12-26-29/la-deontologie>.

¹⁹ *S v Safatsa and Others* 1988 (1) SA 868 (A) at 885-6, citing with approval *Baker v. Campbell*, [1983] HCA 39, para. 24 (Dawson J.).

²⁰ Halsbury's Laws of England (4th ed.), vol. 13, par. 71, cited in *Baker v. Campbell*, [1983] HCA 39, para. 6 (Gibbs J.). For South Africa, see Competition Commission of SA v Arcerlormittal SA Ltd (680/12) [2013] ZASCA 84 (31 May 2013), para. 20; http://www.justice.gov.za/sca/judgments/sca_2013/sca2013-084.pdf.

33. The wording of Rule 73(1) thus protects any communications between the Defence and Defence witnesses unless and until the witness discloses specific information during their testimony. If the witness (as the third party for the purposes of Rule 73(1)) does not disclose specific information, the protection continues to apply to that information.

34. As an example, the Defence may wish to test a specific Defence theory by putting it to prospective witnesses. It may later decide not to pursue that theory or line of defence. To employ the reasoning of the Mbarushimina case, disclosure of any Defence documentation detailing the exchanges between the Defence and the witnesses on these points would have the effect of revealing the content of strategic communications between the Client and Counsel. It would also render the right to silence and related privilege against self-incrimination inutile by forcing the Defence to disclose potential theories and argumentation that the Defence had deliberately decided not to rely on.

35. The ICC Appeals Chamber appears to have accepted that Defence confidentiality may extend to communications with third parties, which might reveal Defence strategy. In the recent *Ngudjolo* Appeals Judgment, the Appeals Chamber found that the Trial Chamber did not err by refusing to grant the Prosecution access to specific components of the communications between Mr. Ngudjolo and outside contacts that were “closely linked to Mr. Ngudjolo’s defence strategy”.²¹

36. Earlier, the Appeals Chamber had been seized of the issue as to whether the Prosecution could obtain access to recorded communications between the accused and Prosecution witnesses. The Appeals Chamber ruled that in making its decision as to whether to grant access:

“the Trial Chamber must endeavour to strike a balance between the rights of the accused, as enshrined in article 67 of the Statute, as well as his right to privacy and right to conduct his defence, on the one hand, and the Prosecutor's responsibilities pursuant to article 54 (1) of the Statute, on the other”.²²

37. If communications (or components thereof) between an accused and Prosecution witnesses can be exempt from disclosure due to the possibility that they relates to the right

²¹ ICC-01/04-02/12-271, para. 269.

²² ICC-01/04-01/07-1718, para. 52.

of the accused “to conduct his defence”, then it follows that communications between Counsel and Defence witnesses on such matters have the same, if not a stronger, presumption of privilege.

Work product privilege

38. Apart from the protection afforded by Rule 73(1), the Requested Information is also protected from disclosure to the Prosecution by virtue of the fact that it constitutes internal work product.

39. Trial Chamber I has found that the following categories of information, *inter alia*, should be considered as ‘internal work product’:²³

- i) all preliminary examination reports;
- ii) information related to the preparation of a case, such as internal memoranda, legal research, case hypotheses, and investigation or trial strategies;
- iii) information related to the prosecution's objectives and techniques of investigation;
- iv) analyses and conclusions derived from evidence collected by the OTP;
- v) investigator's interview notes that are reflected in the witness statements or audio-video recording of the statement;
- vi) investigator's subjective opinions or conclusions that are recorded in the investigator's interview notes; and
- vi) internal correspondence

40. In the above-mentioned *Bemba* Main Case decision, Trial Chamber III also ruled that investigators’ notes and screening notes are not disclosable, unless they contain information that is exculpatory or material to the preparation of the Defence.²⁴

41. The Prosecution’s strict duty to disclose Article 67(2) or Rule 77 materials is intrinsically tied to its statutory investigative powers and duty to search for the truth.²⁵

42. The Defence has no such duty, and thus no reciprocal obligation to disclose information that is material to the preparation of the Prosecution, unless the Defence intends to rely on the information as evidence (as per Rule 78).

²³ ICC-01/04-01/06-2656-Red, para. 17.

²⁴ ICC-01/05-01/08-750-Red.

²⁵ ICC-01/04-01/07-2288, para. 75.

43. It is also overly simplistic for the Prosecution to claim that the Court has found that “the Trial Chamber’s statutory power to order disclosure of evidence from the Defence is not per se inconsistent with an accused’s privilege against self-incrimination”.²⁶ In the decision cited by the Prosecution, the Trial Chamber’s actual wording was that:²⁷

“The starting-point for consideration of this issue is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence, or in any other way. The Chamber has a critical duty to uphold these protections, which are enshrined in the Statute. Article 55(1)(a) provides that a person under investigation shall not be compelled to incriminate himself or herself or to confess guilt. At the Confirmation of Charges, the accused does not have to participate actively: the provisions of Article 61(6), which permit him to object to the charges, challenge evidence or present evidence are permissive rather than mandatory. For the purposes of the trial, by Article 66(1), he is presumed innocent until proven guilty; by Article 66(2) the onus of proof rests with the prosecution; and by Article 67(1)(i) he is not to bear a reverse burden of proof or an onus of rebuttal. Finally, by Article 67(1)(g), he may not be compelled to testify or to confess guilt, and he is entitled to remain silent without that latter stance having any impact on the court's determination of his guilt or innocence. These rights are inviolable.”

44. Although the Chamber found that the ICC legal framework permitted the Chamber to order the Defence to provide some information in advance of the presentation of its case, its ratio and findings focussed solely on the genre of information or evidence, which the Defence intended to submit in the proceedings at some juncture.²⁸

45. This decision did not consider the situation as to whether the Defence could be compelled to produce information that the Defence did not intend to rely on in the proceedings.

46. The Trial Chamber also subsequently found that it did not have the power to compel the Defence to submit additional information, beyond that which had initially been requested from the Defence, in order to assist the Prosecution to assess the credibility of Defence witnesses.

²⁶ ICC-01/05-01/13-820-Conf, para. 11.

²⁷ ICC-01/04-01/06-1235-Corr-Anx1, para. 27.

²⁸ ICC-01/04-01/06-1235-Corr-Anx1, para. 31.

47. In this particular instance, the Prosecution had requested the disclosure of more detailed summaries due to the fact that the Defence had disclosed different versions of a summary, which had discrepancies in information. The Trial Chamber rejected the request on the basis that:²⁹

“its absolutely clear from the decisions that we have handed down, as it is clear from the Rome Statute framework, there are real limitations on the extent to which the Chamber can force the Defence to disclose the full detail of what witnesses are going to say in advance. I know you put it as a principle, but in fact the principle is that the Chamber must only order that which is properly within our powers and we have decided, certainly for the purposes of this trial, that there are limitations”.

48. The Trial Chamber thus ruled that there was no duty in such circumstances for the Defence to assist the Prosecution; rather, the onus fell on the Prosecution to explore such matters through its own investigations or through cross-examination of the witness.³⁰

49. Of key importance is the fact that the Chamber declined to order the Defence to provide more information than that which was required by the initial disclosure decision.

50. Although Article 67(1)(g) might not be violated in circumstances in which the Defence has advance notice that it will be required to disclose information that has not yet been generated by the Defence, it is violated in circumstances where the Defence has no such notice.

51. In the present case, the Defence in the Main Case undertook its investigations, and collated the Requested Information on the understanding that it would not be compelled to disclose anything other than signed witness statements, or summaries. The Prosecution did not seek to vary the terms of the Defence disclosure regime in the Main Case at any point.

52. It is therefore unfair and contrary to Article 67(1)(g) to compel the Defence to disclose information, that the Defence would not have otherwise collated if it had been aware that it could be disclosed to the Prosecution.

²⁹ ICC-01/04-01/06-T-254-Red3-ENG CT, 5 March 2010, p.68, lines 3-10.

³⁰ ICC-01/04-01/06-T-254-Red3-ENG CT, 5 March 2010, p. 67, lines 7-16, p. 68, lines 11-16, p.70, lines 8-21.

53. In this regard, the adversarial system is predicated on the fact that although the Defence cannot advance a positive case that it knows to be false, the Defence has no duty to question witnesses in relation to matters that are adverse to the Defence. The Defence therefore had the right to exclude from the summaries any information that was potentially incriminating, if the information fell outside the scope of the Defence's proposed questioning, and did not contradict the information included in the summary.

54. The rights of the Prosecution were preserved through its ability to elicit any potentially incriminating information through the cross-examination of these witnesses.

55. The Prosecution was afforded a full opportunity to cross-examine these witnesses in the Main Case. The Article 70 investigation had commenced whilst the Defence case in the Main Case was ongoing. The Prosecution therefore had the opportunity to put such matters to witnesses whilst they were testifying, or to request the Trial Chamber to adjourn the proceedings or to recall witnesses if necessary.

56. The Prosecution failed to do so.

57. The protection afforded by Article 67(1)(g) cannot and should not be voided due to the Prosecution's wish to correct its litigation failures in the Main Case.

3. *The Prosecution has failed to provide a legitimate forensic purpose for its access to this material*

58. The Request is both extraordinarily broad, and extraordinarily vague.

59. The Trial Chamber's power to order the production of documents is confined to the factual scope of this case.³¹ The Request nonetheless encompasses all Defence witnesses in the Main Case, irrespective as to whether there is any link or nexus to the confirmed charges in the Article 70 case.

³¹ Article 74(2) restricts the Trial Chamber's competence to the facts and circumstances in the confirmed charges. See also ICC-01/04-01/06-1432, paras. 62-63.

60. The impermissibly broad ambit of the Request creates the appearance that the Prosecution is seeking to employ the Article 70 case as a vehicle for revisiting rulings in the Main Case, and in itself, constitutes grounds for dismissing the Request.

61. The Prosecution has also failed to provide any legitimate forensic purpose for the Requested Information. The Prosecution Request rests on firstly, speculation that the Requested Information will reveal discrepancies between its content and the subsequent testimony of the witnesses, and secondly, the Prosecution's wish to verify the evidential basis of a putative defence that could be raised by the Defence for Mr. Kilolo.

62. As concerns the first aspect, the possibility that there may or may not be discrepancies between the Requested Information and the witnesses' testimony does not advance the Prosecution's Article 70 case or otherwise contribute to the Chamber's duty to establish the truth.

63. Firstly, the existence of such discrepancies is merely suggested by the Prosecution: it has not demonstrated a *prima facie* case to believe that specific discrepancies exist with specific to identified witnesses. The Prosecution's vague assertions do not meet the required evidential threshold for an order for production of information or evidence from a party.³²

64. Secondly, the existence of such discrepancies is common recurrence in international criminal proceedings, which can be attributed to a range of factors, including issues with transcription, translation, or witness memory.

65. As observed by Judge Fulford in the *Lubanga* case:

“It would be completely artificial if we were somehow to try to shoehorn this witness's evidence into a container which is comprised of the amended summary that had been provided.”³³

66. The fact that the Defence for Mr. Kilolo could, at some juncture, rely on the contents of the Requested Information to advance potential Defence arguments, also does not create a basis for disclosure.

³² In the *Lubanga* case, Trial Chamber I required the Defence to adduce *prima facie* grounds to believe that specific intermediaries were engaged in collusion or improper conduct as a condition precedent for the disclosure of their identities: ICC-01/04-01/06-2434-Red2, para. 139.

³³ ICC-01/04-01/06-T-254-Red3-ENG CT, 5 March 2010, p.51, lines 19-23.

67. This particular type of Defence argument (non-illicit refreshing) is not a 'positive defence', and does not attract the disclosure or timing obligations which apply to positive defences such as alibi. The Defence is under no obligation to confirm whether it will rely on such a defence at trial, at a stage where the Prosecution has commenced its case, or even completed the disclosure of its potential evidence.

68. If any of the Defence teams intend to rely on the Requested Information as evidence, then the information will be disclosed in accordance with the time frame determined by the Chamber for the production of Defence evidence. The Prosecution cannot subvert this time line by requesting access to information now, particularly when the Defence has not yet formed a clear intention to use the information in the proceedings.

69. Finally, the Trial Chamber's power to order the production of evidence under Article 64(6)(c) is subject to its overarching duty to ensure that the trial is conducted with full respect for the rights of the accused,³⁴ and must be balanced with its competing duty to "provide for the protection of confidential information".³⁵ In the present instance, any marginal benefit that would accrue to the Prosecution by receiving the Requested Information would be outweighed by the prejudicial impact of disclosure on the rights of the Defence.

4. *Property vests in the Defence for Mr. Bemba, not Mr. Kilolo*

70. The Prosecution has sought to exclude any consideration of the impact of the Request on Mr. Bemba's rights in the Main Case by obtaining the material directly from the Defence of Mr. Kilolo.

71. It is both legally incorrect and unfair to do so.

72. The Request fails to address or consider the rights of Mr. Bemba as the owner of the Requested Information. Rule 73(1) vests the client with the power to waive privilege. The Defence for Mr. Kilolo have neither the power nor the practical ability to assert privilege or to request redactions pertaining to issues related to the Main Case.³⁶

³⁴ Article 64(2).

³⁵ Article 64(6)(c).

³⁶ Cf. ICC-01/05-01/13-820-Conf, para. 14.

73. Article 18(5) of the Code of Conduct further specifies that in the event that Counsel is discharged, the entire case file shall be conveyed to the replacement Counsel (which is Mr. Haynes QC). The former Counsel remains subject to a continuing duty of confidentiality under Article 8 of the Code.³⁷

74. Absent the consent of the Bemba Defence,³⁸ Mr. Kilolo has no competence to disseminate confidential materials, which are the property of the Bemba Defence team.

75. The Request has also improperly attempted to undermine the ability of the Defence for Mr. Bemba to ensure the effective protection of Mr. Bemba's rights in ongoing proceedings in the Main Case.

76. The Request pointedly excludes any consideration as to whether the Requested Information could attract any protection against self-incrimination *vis-à-vis* Mr. Bemba in the Main Case (as opposed to Mr. Kilolo in this case), or whether it could affect *ex parte* protective orders issued in the Main Case.

77. The underlying rationale of the current case is to protect 'the administration of justice' by preserving the integrity of the proceedings.³⁹ This objective would be frustrated if the means and methods used to prosecute the Article 70 case damages or endangers the legal integrity of the very case that it was instigated to protect. Disclosure of the Requested Information to the same Prosecution, which is simultaneously prosecuting the Main Case, would be antithetical to the overarching administration of justice at this Court. The Request must therefore be rejected in order to preserve the appearance of justice, and the content of Article 67(1) in all cases concerning Mr. Bemba.

III. RELIEF SOUGHT

³⁷ Article 18(2).

³⁸ The Defence undertakes to liaise with the Defence for Mr. Kilolo in order to ensure that Mr. Kilolo's right to adduce exculpatory evidence can be exercised in a manner which is consistent with Mr Bemba's right to the protection of legal privilege. Absent any dispute between the two teams, judicial intervention is unnecessary.

³⁹ ICC-01/09-01/13-1-Red2, para.20; Prosecutor v. Slobodan Milošević, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeals on Kosta Bulatović Contempt Proceedings, 29 August 2005, para. 21.

78. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Trial Chamber to reject the Request.



Melinda Taylor
Lead Counsel of Mr. Jean-Pierre Bemba

Dated this 9th day of March, 2015

At The Hague, The Netherlands