

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 March 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

**Confidential Document
with
Confidential Annex A**

**Prosecution Response to Bemba Defence Request Concerning the Review of
Seized Material**

Source: The Office of the Prosecutor

Document 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 Michael Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Göran Sluiter

The Office of Public Counsel for the Victims**The Office of Public Counsel for the Defence****States Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Herman von Hebel

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations Section Others**

I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the Accused, Jean-Pierre Bemba Gombo's request for (i) the termination of the appointment of the Independent Counsel, and (ii) an order that all privileged materials be reviewed solely by the Bemba Defence ("Request").¹ To the extent that the Bemba Defence wishes to be heard in relation to the procedure to be adopted by Trial Chamber VII ("Chamber") for the review of potentially privileged material, the Prosecution defers to the discretion of the Chamber.

2. *First*, the Chamber is entitled to establish any modality for the review of evidence which it deems necessary. Nonetheless, the procedure for reviewing potentially privileged material established by the Pre-Trial Chamber sufficiently protects the interests of the Parties² and should be maintained. Further, as established by the Single Judge, the procedure affords the Bemba Defence an opportunity to challenge any designation of privileged material made by the Independent Counsel.³

3. *Second*, the Request advances no legal basis for Bemba's standing to review material in which he holds no privilege.

4. *Third*, the mandate of the Independent Counsel remains to be fulfilled and its termination at this juncture would cause unnecessary delay in making evidence available for trial proceedings.

¹ ICC-01/05-01/13-822.

² See, e.g., ICC-01/05-01/13-41-Red; ICC-01/05-01/13-362-Red.

³ ICC-01/05-01/13-362-Red, p.5.

II. Confidentiality

5. This Response is classified as “Confidential”, as it refers to material that is not available to the public.

III. Submissions

A. The Chamber has broad discretion as to the procedure to be adopted for the review of potentially privileged evidence

6. The Request is fatally overbroad. While the Chamber is not bound by the procedural practices or protocols adopted by Pre-Trial Chamber II,⁴ the Request’s proposal that the review of potentially privileged material in this case be conducted solely by Bemba ignores that the Chamber – having plenary authority for the conduct of proceedings – cannot defer to an ‘interested party’ regarding the admissibility and availability of evidence. This is reflected in the Pre-Trial Chamber’s decision to appoint the Independent Counsel, setting out that the role of the Independent Counsel was

for the assistance of, but without prejudice to, the proper exercise of the Single Judge’s responsibility to ensure respect for the privileged communications of Mr Bemba (for which purpose Mr Bemba may present his observations), and [is] equally without prejudice to the Chamber’s power to assess the admissibility, relevance and probative value of an any item of evidence⁵

⁴ ICC-01/04-01/06-1084, para.5.

⁵ ICC-01/05-01/13-362-Red, p.5; ICC-01/05-01/13-457, p.3.

7. Authorising Bemba to exclusively review seized material for privilege, in the circumstances of the case where there is potential evidence of criminality therein, effectively cedes to an interested party the power to decide what *evidence* is or is not available for trial.

8. Contrary to the Request, the Independent Counsel provides the better mechanism for the Chamber to review potentially privileged material that is before it, prior to its dissemination to the Parties, if required, which fully protects the interests of *all* the parties concerned. Notably, although collaterally attacked by the Defence before the Court's Presidency and the Appeals Chamber, neither has in any way criticised the propriety or fairness of the appointment or function of an Independent Counsel in these proceedings.⁶

9. Further, the Request adds nothing to the arguments previously litigated before the Pre-Trial Chamber in this case,⁷ and fails to identify any colourable issue left unaddressed by the process involving the Independent Counsel.

10. As regards the Bemba Defence's alternative request to be involved in the review process concerning potentially privileged material, the Prosecution does not object to the Bemba Defence being heard as to the procedure to be adopted by the Chamber, or regarding the review of such material. However, as explained below, the current procedure adequately protects the interests of the Parties, the integrity of the trial process, and specifically allows for the involvement of the Bemba Defence.

⁶ ICC-01/05-01/13-511-Anx; ICC-01/05-01/13-648-Conf-Red2; ICC-01/05-01/13-560.

⁷ See *e.g.*, ICC-01/05-01/13-362-Red; ICC-01/05-01/13-50; ICC-01/05-01/13-457.

- (i) *The Independent Counsel is the appropriate mechanism for vetting potentially privileged material*

11. Contrary to the Defence's assertion that there is "no logical or justifiable reason to employ an Independent Counsel to perform the role of vetting privileged information, particularly at this phase of the proceedings",⁸ the necessity for an Independent Counsel remains as long as there is material to be screened for potential privilege. This is patent, given the nature of the case and the status of, and prior relationship among certain of the Accused. Indeed, since the charges have been confirmed,⁹ it is vital that the integrity of the proceedings and the attendant processes are transparent and fair. In this context, the assessment of material before the Court for potential privilege is an exercise best carried out under the supervision and auspices of a Chamber.

12. The Independent Counsel's mandate has been clearly set down by the Pre-Trial Chamber and contradicts the characterisation given it in the Request. First, the Independent Counsel's role has never been only to identify inculpatory material.¹⁰ The Single Judge has emphasised that the Independent Counsel's mandate is, *inter alia*, to review the seized material to identify any potentially privileged item and providing a report to the Pre-Trial Chamber regarding "any [and] all material which might be relevant to the determination of the charges".¹¹ Further, the assertion that the appointment of the Independent Counsel usurps the judicial function,¹² has been raised and rightly rejected previously. The Single Judge has clarified that "the Independent Counsel does not replace either the Single Judge [or] the Chamber in the exercise of their judicial responsibility, and that [the Independent Counsel's]

⁸ ICC-01/05-01/13-822, para.36.

⁹ ICC-01/05-01/13-749.

¹⁰ ICC-01/05-01/13-822, para.40.

¹¹ ICC-01/05-01/13-366-Red, p.7. *See also*, ICC-01/05-01/13-41-Red.

¹² ICC-01/05-01/13-822, paras.41-43.

mandate can in no way be equated to the performance of functions of a judicial nature".¹³

13. As Counsel for Bemba is aware, the appointment of an independent third party, such as a counsel or judge, to protect privileged material in the context of a seizure of evidence is an established practice in many jurisdictions, including before international tribunals.¹⁴

14. The Request erroneously suggests that fairness necessitates the adoption of a new procedure to review potentially privileged material¹⁵ and that any other means of vetting potentially privileged material aside from vesting the task with Mr Bemba is either "*ultra vires*, inappropriate, or engenders a significant risk that privileged or *ex parte* information will be disseminated to the Prosecution."¹⁶ The Request ignores that the very purpose of the appointment of the Independent Counsel in this case was to protect the Parties' interests and the integrity of the proceedings.¹⁷ Additionally, the Request fails to identify a single document vetted by the Independent Counsel in substantiation of its contention that the established procedure does not effectively protect potentially privileged information.

¹³ ICC-01/05-01/13-362-Red, p.3.

¹⁴ See, e.g. England and Wales: The Bar Council, Independent Counsel for Legal Professional Privilege, January 2014. Paragraph 3 states "Law enforcement agencies therefore routinely instruct counsel to advise them in relation to material where privilege may exist or has been claimed", see <http://www.barcouncil.org.uk/for-the-bar/professional-practice-and-ethics/other-issues/independent-counsel-for-lpp/>; United States: U.S. Code, Title 28, Part II, Chapter 40, Section 594, Authority and duties of an independent counsel. Under subsection 5, the functions of an independent counsel include "determining whether to contest the assertion of any testimonial privilege", see <https://www.law.cornell.edu/uscode/text/28/594>; Australia: A Review of Legal Professional Privilege and Federal Investigatory Bodies – Resolving Privilege Disputes. An example of the practice of a federal investigatory body includes that where a claim for privilege is made, one of the options is "seeking independent third party review or arbitration", see <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC107.pdf>; Netherlands: In these proceedings, material seized by the Dutch national authorities was reviewed by a judge pursuant to Dutch national law, see e.g., ICC-01/05-01/13-419-Anx; ICTY: *Prosecutor v. Popović et al.*, IT-05-88-A, Decision on Prosecution motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege, 16 July 2002, see <http://www.icty.org/x/cases/popovic/acdec/en/120716.pdf>.

¹⁵ ICC-01/05-01/13-822, paras.16-22.

¹⁶ ICC-01/05-01/13-822, para.2.

¹⁷ ICC-01/05-01/13-41-Red.

15. The Request's reliance on the *Mbarushimana* case is inapposite. There, the Registry had been tasked with reviewing seized material, but due to "reasons of a technical and operational nature", it was not "feasible for the Registry to perform the search on the relevant seized material in accordance with the instructions, method and timeframe set by the Chamber".¹⁸ Accordingly, Pre-Trial Chamber I consequently "partially modif[ied] the system for review of the potentially privileged material" to include review by the Defence, as it was "concerned about the need to make it feasible for the confirmation hearing to take place as scheduled".¹⁹

16. The Accused Narcisse Arido previously and unsuccessfully relied on *Mbarushimana* and the single ICTY case cited in the Request in these proceedings when challenging the procedure adopted by the Pre-Trial Chamber.²⁰ Further, the circumstances of both of these cases are incomparable to the present proceedings, where offences against the judicial process are at issue and Bemba (an obviously interested party) seeks to be vested with the exclusive right to review the seized material.

17. The Request provides no support for the proposition that the exclusive unsupervised review of potentially privileged material should be placed solely in the hands of an interested party to the proceedings. Further, the fact that there are substantial grounds to believe that Bemba committed crimes against the administration of justice through, *inter alia*, the abuse of the lawyer client privilege presents an unjustifiable risk to the availability of evidence to the Chamber.

¹⁸ ICC-01/04-01/10-105, p.5.

¹⁹ ICC-01/04-01/10-105, p.5.

²⁰ ICC-01/05-01/13-334.

(ii) *The Request does not accurately reflect the record*

18. Contrary to the Request, the Prosecution has never “evaded the detention regulations by monitoring the communications of Counsel.”²¹ Indeed, the claim transparently misrepresents the record. The Prosecution did not receive any material until it had been: *first*, judicially reviewed under Dutch law for potential privilege;²² *second*, reviewed by the Independent Counsel for potential privilege as mandated by the Pre-Trial Chamber in order to protect the Parties’ interests;²³ and *third*, ultimately reviewed by the Single Judge who authorised its release.²⁴ This process has been fully set down in filings available to the Bemba Defence and the Request does not cite a single source for this inconceivable contention. Counsel is well-aware that the review – not monitoring – of the communications in question was judicially sanctioned²⁵ and followed the Chamber’s vetting procedure to exclude potentially privileged communications. In authorising such review, the Pre-Trial Chamber was first satisfied that:

at least some of the communications between [Bemba] and his counsel, overlapping as they are with calls made to individuals the Prosecutor has grounds to suspect [are] involved in a bribery scheme aimed at perturbing the course of justice, might indeed not qualify as being ‘made in the context of the professional relationship between a person and his or her legal counsel’ within the meaning and for the purposes of Rule 73 of the Rules of Procedure and Evidence.²⁶

²¹ ICC-01/05-01/13-822, para.35.

²² ICC-01/05-01/13-424, p.9.

²³ ICC-01/05-01/13-41-Red.

²⁴ ICC-01/05-01/13-362-Red.

²⁵ ICC-01/05-46; ICC-01/05-50.

²⁶ ICC-01/05-52-Conf, para.3.

19. Having noted that the statutory right of an accused to communicate in confidence with counsel “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”,²⁷ the Pre-Trial Chamber appointed the Independent Counsel to “review and screen all relevant recordings” so that “privilege would be strictly maintained on all such recordings”.²⁸ Moreover, prior to the Independent Counsel reviewing such material and reporting thereon to the Single Judge, the material had first been screened by the Dutch authorities for privilege.²⁹ Thus, the Bemba Defence’s claim that the “Prosecution deviated from the framework foreseen by the Court’s regulatory framework”³⁰ is simply a contrivance to support the Request.

(iii) *The Independent Counsel procedure provides the Bemba Defence an opportunity to be heard*

20. The Pre-Trial Chamber established that the role of the Independent Counsel is

to provide to the Defence of Mr Bemba (as the individual in principle vested with the right to privileged communications with his counsel) all items [...] identified by the Independent Counsel as non-privileged and relevant to the present case, *in order for Mr Bemba to provide observations, if he so wishes, on the selection made by Independent Counsel prior to any item being made available to the Prosecutor and the other Defence teams.*³¹

²⁷ ICC-01/05-52-Conf, para.3. The Pre-Trial Chamber further noted that this “abuse of the statutory right [...] entails that neither the accused nor the lawyer are any longer entitled to the confidentiality which otherwise pertains to lawyer-client communications as a matter of course.”

²⁸ ICC-01/05-52-Conf, para.7.

²⁹ ICC-01/05-01/13-424, p.9.

³⁰ ICC-01/05-01/13-822, para.35.

³¹ ICC-01/05-01/13-362-Red, p.4 (emphasis added). *See also*, ICC-01/05-01/13-457, p.4.

21. Additionally, the Pre-Trial Chamber made clear “that the Defence may challenge the results of [the Independent Counsel’s] review of the concerned material” and “that the ultimate determination thereupon is left with the Single Judge and the Chamber as part of their judicial functions”.³² Not only does the Request noticeably omit that the present procedure permits Bemba to challenge the Independent Counsel’s review; it also fails to assert that Bemba has ever sought to avail himself of this possibility.

B. Bemba does not have legal standing in relation to some potentially privileged material

22. The Request’s assertion that “the very nature of privilege is such that it will encompass information and matters that will only be known to the Defence”³³ while true, also reveals a critical failing in the context of this case. The Request’s proposal that the review of potentially privileged material be solely the purview of Bemba ignores that such material may contain information (such as matters of individual privacy and/or counsel-client privilege involving the clients of Bemba’s former counsel, the Accused Aimé Kilolo Musamba) over which Bemba has neither any right or privilege.

23. The Bemba Defence’s submission that Bemba should be “vested with the exclusive power to waive privilege, either by consent in writing, or through voluntary disclosure to a third person”³⁴ undermines the Request. The information yet to be reviewed for potentially privileged material includes, *inter alia*, items seized from Kilolo’s home and putative law office. As a legal practitioner in Belgium, Kilolo’s correspondence and work related material is likely to include information pertaining to his domestic practice. The Bemba Defence has no legal standing – nor

³² ICC-01/05-01/13-362-Red, p.5.

³³ ICC-01/05-01/13-822, para.26.

³⁴ ICC-01/05-01/13-822, para.28.

can it make any such claim – to review potentially privileged material of third parties entirely unrelated to these proceedings.

24. Bemba's reference to provisions of the Code of Professional Conduct for counsel regarding the termination of representation is inapposite.³⁵ The referenced provisions relate to Counsel's transfer of "any communication that counsel received relating to the representation"³⁶ and "the entire case file, including any material or document relating to it."³⁷ They do not cover the situation outlined above.

25. In addition, the Request suggests that no other entity reviewing privileged material would possess the right to lift privilege where the information is potentially exculpatory.³⁸ This fails to take account that the mandate of the Independent Counsel was the review of seized material for the purposes of "identifying any item which is privileged or otherwise obviously irrelevant for the purposes of these proceedings"³⁹ which, the Single Judge stated, necessarily involved "investigat[ing] incriminating and exonerating circumstances equally".⁴⁰ Indeed, Kilolo unsuccessfully made a similar argument which was dismissed as "boldly misrepresent[ing] [the review process mandated by the Pre-Trial Chamber] by purporting that it instructed Independent Counsel 'with finding *incriminating* evidence only as opposed to both incriminating *and* exculpatory evidence'".⁴¹ The Pre-Trial Chamber's decisions on the appointment and mandate of the Independent Counsel clearly demonstrate the implicit power of a Chamber to lift privilege for exculpatory material where it is in the interests of justice to do so.

³⁵ ICC-01/05-01/13-822, para.38.

³⁶ Article 15(2) of the Code of Professional Conduct for counsel.

³⁷ *Ibid.*, article 18(5).

³⁸ ICC-01/05-01/13-822, para.29.

³⁹ ICC-01/05-01/13-41-Red, p.4.

⁴⁰ ICC-01/05-01/13-419-Anx, para.7.

⁴¹ ICC-01/05-01/13-419-Anx, para.12 (original emphasis).

C. The mandate of the Independent Counsel has not ceased

26. The mandate of the Independent Counsel continues. Pursuant to the Single Judge's 13 December 2013 decision, the Independent Counsel was appointed to review material seized during searches of Bemba's person and cell, the respective residence of the Accused Narcisse Arido and Fidèle Babala Wandu, and "any additional material which might have been seized for the purposes of these proceedings and which may be made available to the Court by the relevant national authorities at a later stage".⁴² Again on 25 April 2014, the Independent Counsel was reappointed by the Single Judge to review DVDs containing the contents of email accounts, including Kilolo and the Accused Jean-Jacques Mangenda Kabongo,⁴³ finding it "appropriate that the same person already appointed as Independent Counsel" be appointed for the "purposes of the acquisition and review of the DVDs, both in light of the relevant professional requirements and skills and of the need to ensure that this supplementary operations be carried out as expeditiously as feasible".⁴⁴ As acknowledged in the Request, the Independent Counsel's "mandate was intrinsically tied to the implementation of specific procedural decisions issued by the Single Judge."⁴⁵ Because the initial mandate of the Independent Counsel set out in the 13 December 2013 decision is still outstanding, let alone the additional mandate contained in the 25 April 2014 decision, the Prosecution submits that the Chamber should endorse the continuation of the functions by the Independent Counsel in the interests of the integrity of the proceedings.

27. Additionally, the Single Judge observed that "establishing a system of acquisition, review and transmission of [material] other than the one devised in the 13 December 2013 Decision [...] would inevitably entail significant delays, likely to

⁴² ICC-01/05-01/13-41-Red, pp.3,5.

⁴³ ICC-01/05-01/13-366-Red, p.7.

⁴⁴ ICC-01/05-01/13-366-Red, p.8.

⁴⁵ ICC-01/05-01/13-822, para.12.

jeopardise the very possibility that the [material] be eventually made available for the purposes of these proceedings".⁴⁶ While the Single Judge's reference was to the pre-confirmation stage, it is clear that the Independent Counsel's continuing review of the outstanding seized material for potential privilege will ensure consistency and avoid subsequent undue delay.

28. As the Bemba Defence is aware, the Parties made their submissions in confirmation and the Confirmation Decision was issued without the Independent Counsel having completed his review. To terminate the Independent Counsel's mandate now, without any substantive reason for so doing, would only unnecessarily delay the proceedings.

IV. Relief Requested

29. Based on the foregoing, the Prosecution respectfully requests the Chamber to deny the Request.



Fatou Bensouda, Prosecutor

Dated this 12th Day of March 2015
At The Hague, The Netherlands

⁴⁶ ICC-01/05-01/13-366-Red, p.8.