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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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

Defence Request for Leave to Appeal ICC-01/05-01/13-893-Red

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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A. INTRODUCTION

1. On 9 April 2015, the Trial Chamber issued its 'Decision on 'Request concerning the review of seized material' and related matters' (the Decision),¹ in which the Trial Chamber:

- i. Found that "the review procedure adopted by the Single Judge is necessary and appropriate to prevent undue access by any party to privileged information in this case";²
- ii. Declined to consider submissions regarding the role of the Independent Counsel on the grounds that they were "repetitive";³ and
- iii. Emphasised that the Independent Counsel is "neutral and independent".⁴

2. The Trial Chamber further ruled that both the information owner and the potential privilege owner have the right to submit observations concerning any reports prepared by the Independent Counsel, prior to the transmission of such reports to the Prosecution.

3. The Defence hereby requests leave to appeal of the Defence in relation to the following issue:

Whether the Trial Chamber erred by finding that the continued appointment of the Independent Counsel was both "necessary and appropriate to prevent undue access by any party to privileged information in this case".

¹ ICC-01/05-01/13-893-Red.

² ICC-01/05-01/13-893-Red, para. 14.

³ ICC-01/05-01/13-893-Red, para. 14.

⁴ ICC-01/05-01/13-893-Red, para. 21.

4. The Defence does not seek leave to appeal in relation to the modalities established by the Trial Chamber in relation to the submission of observations by the information owner and the potential privilege holder.

B SUBMISSIONS

B.1 The issue arises from the Decision

5. In the Decision, the Trial Chamber found that:⁵

precautionary measures are necessary to ensure that relevant material, both incriminating and exculpatory, is identified and provided to the parties; that the confidentiality of any privileged material is only lifted to a necessary and proportional extent; and that privileged or irrelevant original material is promptly returned to its rightful owner.

6. The Chamber did not, however, explain how the particular procedure adopted by the Single Judge (which is predicated on the role of the Independent Counsel) would achieve these objectives.

7. Apart from these overall objectives, the Trial Chamber also set out no instructions or criteria, which should guide the Independent Counsel's future review of materials, in particular, as concerns how the notions of 'relevance', 'incriminating', 'exculpatory', or 'privilege' should be defined or applied.

8. In terms of the judicial approach which guided the review during the pre-confirmation phase, the Single Judge ordered the Independent Counsel to identify:⁶

those providing elements which might be relevant for the limited purposes of the Prosecutor's investigation and delivering them to the Prosecutor. Accordingly, privilege would be strictly maintained on all such recordings which would not offer elements of interest or relevance for the purposes of the Prosecutor's investigation.

⁵ ICC-01/05-01/13-893-Red, para. 3.

⁶ ICC-01/05-52-Red, para.7.

9. If the Trial Chamber maintains the position that privilege is lifted for any items of interest or relevance to the Prosecution's investigation, then there is a clear issue as to whether such instructions constitute an appropriate means of identifying material, which is not privileged.

10. If the Trial Chamber does not maintain this position, then the absence of clarity on this point raises the issue as to whether there is sufficient detail and certainty concerning the legal framework for the Independent Counsel.

11. This lack of certainty and clarity is exacerbated by the fact that the Independent Counsel has never set out a definition of privilege, nor has he explained how he interprets and applies legal privilege.

12. Rather, it appears that the Independent Counsel conducted his analysis on the basis of instructions and codes provided to him by the Prosecution,⁷ which are in turn, based on the Prosecution's strategic theories and suppositions, rather than objective and impartial information.

13. As a result of such instructions, the reports prepared by the Independent Counsel have been peppered with assumptions, and Prosecution-oriented argument.⁸

14. This, in itself, gives rise to a fundamental tension between the Trial Chamber's description of the Independent Counsel as an entity which is both 'neutral and independent', and the actual terms of the Independent Counsel's review and instructions.

⁷ ICC-01/05-T-4-Conf-Red-ENG, p.22; ICC-01/05-T-2-Conf-Red-ENG, p.18, lines 10-12; ICC-01/05-T-4-Conf-Red-ENG, pp.15-16.

⁸ ICC-01/05-01/13-845-Conf-Exp-AnxB, p.17 (n°28); p.18 (n°29, n°30), p.19 (n°31); ICC-01/05-01/13-845-Conf-Exp-AnxC, p. 27 (n°43); p.28 (n°44 and n°45); p.29 (n°47); p.32 (n°52 and n°53); p.36 (n°60).

15. The Independent Counsel has also never set out an explanation as to what could constitute exculpatory information, or information that might otherwise be relevant to the preparation of the Defence.

16. This omission is highly problematic. Whereas the Prosecution might have a right to obtain access to incriminating information, there is no basis for transmitting exculpatory information (that would otherwise be privileged) to any parties other than the Defence, on an *ex parte* basis.

17. It is therefore inadequate and inappropriate to merely describe the material as being 'relevant', without making any distinction as to whether it is incriminating (in which case there might be a basis for transmitting it to the Prosecution) or exculpatory (in which there is not).

18. It is also striking that the mandate of the Independent Counsel includes the additional task of identifying relevant information.

19. The domestic systems, which were relied upon by the Prosecution support the notion of an Independent Counsel, limit the scope of the review conducted by such Counsel to the question as to whether the material is privileged or not.⁹ The Counsel are not called upon to classify the materials as 'relevant'.

20. For example, according to the UK Bar Council advice for Independent Counsel, the role of such Counsel is to "consider the material and give an opinion as to whether or not its contents are privileged."¹⁰ Moreover, "independent counsel

⁹ ICC-01/05-01/13-842-Conf, para. 14. The 'Independent Counsel' framework in the United States is not a useful reference as concerns the mandate of a 'neutral' counsel, insofar as the United States version operates as an adjunct of the Department of Justice/ Attorney-General, and is, to all intents and purposes, a prosecuting entity: United States: U.S. Code, Title 28, Part II, Chapter 40, Section 594, Authority and duties of an independent counsel.

¹⁰ Rule 7, <http://www.barcouncil.org.uk/for-the-bar/professional-practice-and-ethics/other-issues/independent-counsel-for-lpp>.

should not normally expect to be required to advise upon wider issues in relation to the search”.¹¹

21. Material such as emails and telephone communications can only be monitored and seized to the extent, which is strictly necessary for investigative purposes.¹² Any review for privilege is therefore conducted on the assumption that the material must be relevant, if the seizure was conducted in a lawful manner.

22. The fact that in contrast, the Independent Counsel has been vested with the task of identifying relevant material is also an obvious reflection of the inherent illegality of the national requests for seizure.

23. It was incumbent on the Prosecution to submit sufficiently detailed and tailored requests in order to ensure that the national authorities only accessed and seized material, which was relevant to the allegations.

24. It is not the role of either the Trial Chamber or the Independent Counsel to compensate for the investigative failures of the Prosecution. If the seized material includes irrelevant information, then the seizure itself was illegal, and the material should be returned.

25. The fact that the Independent Counsel has been imbued with the task of excluding irrelevant materials also potentially deprives the Defence of access to key contextual information. In particular, if the Independent Counsel decides not to include certain material in his report, the parties are never apprised of either the nature or content of the withheld material, and have no means to seek review of his discretion.

¹¹ Rule 8.

¹² ICC-RoR221-02/09-6-Corr, para. 45; ‘Order on Conditions of Detention’, Case No. CH/PRES/2009/01/rev, 21 April 2009, paras. 19-20.

26. The fact that the excluded information does not pertain to the Prosecution's charges could in fact, be exculpatory in the sense that the excluded information could provide relevant context, which proves that other items classified as 'incriminating' had a lawful purpose.

27. Since there is no indication that the Independent Counsel has provided an item-by-item break down to the Trial Chamber in relation to the excluded material, the Trial Chamber is also not in a position to exercise any oversight over his discretion. This in turn raises questions concerning the precise legal status of the Independent Counsel, and whether he has been delegated quasi-judicial decision making powers by the Chamber.

28. In light of the above considerations, there is a clear issue as to whether the continued appointment of the Independent Counsel was both "necessary and appropriate to prevent undue access by any party to privileged information in this case."

B.2 The issue affects, significantly, the fairness of the proceedings

29. The Trial Chamber has described the Independent Counsel as a mechanism for identifying and vetting privileged information.

30. Whether the Independent Counsel is in fact either a necessary or appropriate mechanism for doing so is intrinsically linked to the protection of privilege itself, and the right of the Defence to enjoy its protection in an effective manner, as enshrined in both Article 67(1)(b) of the Statute, and Rule 73(1) of the Rules of Procedure and Evidence.

31. The use of a particular Counsel, who has received instructions from the Prosecution, and repeatedly relied on such instructions in the preparation of his

reports, also affects the appearance of the impartiality and ‘neutrality’ of the review process.

32. The lack of clarity concerning the system employed by the Independent Counsel to identify relevant, incriminating, exculpatory or privileged information renders his role arbitrary, and undermines the fairness of the review procedure.¹³

33. Finally, the wide degree of discretion vested in the Independent Counsel also creates a gap in judicial accountability, which affects, to a significant degree, the ability of the Trial Chamber to ensure that the “trial is fair and expeditious and [...] conducted with full respect for the rights of the accused”.¹⁴

B.3 The issue affects, significantly, the expeditiousness of the proceedings

34. Under the scheme adopted by the Trial Chamber, the information owner and the potential privilege holder do not receive the materials until after the Independent Counsel has conducted his review. The role of the Independent Counsel thus delays the ability of the Defence teams to vet the materials, and assert privilege (if appropriate) in a timely manner.

35. If the information in question is exculpatory or otherwise material to the preparation of the Defence, the fact that it has to be first viewed and analysed by the Independent Counsel before it is transmitted to either the information owner or the privilege holder delays the ability of such teams to use the materials as part of their investigations or trial preparation.

¹³ See *Kopp v. Switzerland*, 3/1997/797/1000, 25 March 1998, paras. 73-75.

¹⁴ Article 64(2) of the Statute.

B.4 *In the alternative, the issue affects the outcome of the trial.*

36. For the purpose of assessing whether the Article 82(1)(d) criteria are met, the Trial Chamber cannot base its assessment on their own views as to the correctness of the Decision.¹⁵ Rather, the Trial Chamber must take into consideration the possible impact on the fairness of the proceedings if its determination was incorrect. This assessment is necessarily ‘speculative’ in nature, as the Trial Chamber is required to forecast the consequences.

37. If it is correct that the involvement of the Independent Counsel in the review process is unnecessary or inappropriate, then the review process would be tainted, and ineffective.

38. As set out above, the analysis of the Independent Counsel is based on instructions provided by the Prosecution, and his conclusions are predicated on assumptions derived from such instructions. The reports are framed in such a manner that it is extremely difficult for the Trial Chamber to substitute its own evaluation for that of the Independent Counsel, in particular, as concerns excluded materials.

39. In the absence of an effective and neutral review process, the Prosecution would receive access to privileged information, to which it is not otherwise entitled.

40. The very nature of privilege is such that its protection is vitiated if the Prosecution obtains access to the contents of privileged information.

41. Even if the Trial Chamber later intercedes to rule against the Prosecution relying on the information in the proceedings, the damage would have been done.

¹⁵ ICC-01/05-01/08-1169, para. 21.

42. The Prosecution would have already obtained access to sensitive Defence information, including internal Defence discussions or comment on the strengths and weaknesses of the respective Prosecution and Defence cases, and witnesses. The Prosecution would thus obtain an unfair trial advantage.

43. It would also constitute a serious abuse of process,¹⁶ and potentially violate Mr. Bemba's right to silence and privilege against self-incrimination.

44. The outcome of this case would thus be shaped by the involvement of the Independent Counsel in the review process.

B.5. An immediate decision of the Appeals Chamber would materially advance the proceedings

45. As noted by the Appeals Chamber in its "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal":¹⁷

A wrong decision on an issue in the context of Article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances, the proceedings will not be advanced but on the contrary they will be set back.

46. In the present case, an immediate resolution of the issues by the Appeals Chamber is required to ensure that the defendant's protection against self-

¹⁶ See for example, *HKSAR v Wong Hung Ki* (黃洪基) [2010] 4 HKC 118, 11 May 2010, in which the Court ordered a permanent stay of the proceedings due to the fact that the Prosecution had inappropriately listened to intercepts of privileged conversations. The Court found that "The adversarial system could not work justly if lawful confidential communications between client and legal adviser were not insulated from law enforcement authorities responsible for investigating and prosecuting a case. But for the astute preservation of that confidentiality, the process by which we determined guilt or innocence was undermined. In general, therefore, where there was a deliberate violation of a suspected person's right to legal professional privilege, that constituted an affront so great to the integrity of the system of justice and therefore the rule of law that the associated prosecution was rendered abusive and ought not to be countenanced by the court."

¹⁷ ICC-01/04-168, para. 16.

incrimination under article 67(1)(g), and right to freely communicate with his lawyer, as recognised by article 67(1)(b), are implemented and safeguarded in an effective manner. Legal professional privilege is an absolute privilege, which only the defendant can waive, but one which also becomes absolutely meaningless if the Prosecution has accessed privileged materials.

47. The gravity of an unlawful or unwarranted violation of privilege (if the Decision has been wrongly decided) is such that these issues cannot be deferred to the final judgment or appeal. Improper access could potentially require the proceedings to be stayed on a permanent basis.

48. It is also necessary to obtain appellate intervention as to the correctness of the Trial Chamber's approach in order to forestall future transmissions of materials, which should remain privileged. For this reason, the Single Judge held in the *Lubanga* case that in light of the fact that several applications for protective measures were pending, an immediate decision by the Appeals Chamber in relation to the procedure and criteria for protective measures would materially advance the proceedings.¹⁸ The ICTR has also held that the enumeration of a legal principle, which is likely to be applied through the proceedings, constitutes an issue the resolution of which would materially advance the proceedings.¹⁹

C. RELIEF SOUGHT

49. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba Gombo respectfully requests the Honourable Trial Chamber to grant leave to appeal the 'Decision on 'Request concerning the review of seized material' and related matters'.

¹⁸ ICC-01/04-01/06-489, p.13.

¹⁹ *Prosecutor v. Nzirorera*, 'Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK', 9 October 2007.



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Dated this 15th day of April, 2015
The Hague, The Netherlands