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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 Redacted

**Public Redacted Version of Defence Observations on ICC-01/05-01/13-670-Conf-
Exp-AnxB, with Confidential *Ex Parte* (Bemba Defence only) Annex A**

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. The Defence for Mr. Jean-Pierre Bemba Gombo hereby submits its observations (“the Observations”) concerning ICC-01/05-01/13-670-Conf-Exp-AnxB.

2. The Defence has also submitted Annex A, which includes individual observations on each email reviewed by the Independent Counsel.

B. OBSERVATIONS

Confidentiality level

3. For the reasons set out in ICC-01/05-01/13-917-Conf-Exp, the Defence has submitted these Observations and Annex A on an *ex parte* (Bemba Defence only) basis.

4. However, since paragraphs 1-4 and 18-25 do not contain any information which could reveal the contents of either ICC-01/05-01/13-670-Conf-Exp-AnxB or other privileged or *ex parte* Defence information, the Defence has also submitted a public redacted version of these Observations.

[REDACTED]

5. [REDACTED].

6. [REDACTED].

7. [REDACTED].¹ [REDACTED].²

8. [REDACTED]:

[REDACTED].³

9. [REDACTED].⁴ [REDACTED].⁵ [REDACTED].⁶

10. [REDACTED].⁷

11. [REDACTED].⁸

Observations concerning exculpatory material, or material which is otherwise relevant to the preparation of the Defence

12. [REDACTED].⁹

13. [REDACTED].

14. [REDACTED].

15. [REDACTED].

16. [REDACTED].

17. [REDACTED].

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ [REDACTED].

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

18. At this point in time, it is unclear as to whether the information owner will be provided with the records, in their entirety, once the review is completed. In any case, since the materials have also not been transmitted in their entirety to the information owner or the privilege holder at this juncture,¹⁰ there is a risk that key exculpatory information has not been transmitted to the Defence in a timely manner. This will, in turn, unnecessarily delay Defence investigations and preparations.

19. For reasons which will be further elaborated below, the Defence requests the Trial Chamber to convene a Defence only Status Conference to address this issue.

Observations concerning the treatment of exculpatory material, or material which is otherwise relevant to the preparation of the Defence

20. Absent a waiver from the defendant, Rule 73(1) does not envisage that privilege is lifted as a result of the fact that material might be exculpatory or otherwise relevant to the preparation of other Defence teams.

21. Where the Statute sets out an absolute form of privilege (such as information protected by Article 54(3)(e)) the Chamber does not possess the power to lift the privilege – even if the material contained therein is exculpatory – in the absence of the consent of the privilege owner.¹¹ Rather, in such circumstances, the Chamber has a duty to implement counter-balancing measures, in order to compensate for any resultant prejudice to the Defence.¹²

22. Mr. Bemba does not waive privilege. Rule 73(1) does, however, envisage that privilege is not lifted in circumstances in which Defence communications are

¹⁰ It also cannot be presumed that the information owner has retained a copy of the materials in question, particularly if they concern SMS or phone records.

¹¹ ICC-01/04-01/06-1486, para. 3.

¹² ICC-01/04-01/06-1644, para. 25.

transmitted to third parties, provided that those third parties do not subsequently give evidence in connection with the disclosed material.

23. The Defence for Mr. Bemba therefore requests the Trial Chamber to convene a Defence team only Status Conference for the purpose of receiving submissions from the respective Defence teams, in relation to the implementation of measures, which are compatible with Rule 73(1), and the case law of the ICC.

24. In particular, the Defence proposes the following system for consideration at the Status Conference:

Firstly, the immediate disclosure of privileged materials to other Defence teams on strict condition of confidentiality – such that the Defence could use the material in order to further their investigations and preparation, but would not be able to use the material as evidence without first obtaining the consent of the Defence for Mr. Bemba; and

Secondly, if the Defence for Mr Bemba is not in a position to provide consent to the use of the materials as evidence in the proceedings, either:

- a) The Trial Chamber could order the Prosecution to withdraw any factual allegations pertaining to the privileged (exculpatory) materials; or
- b) Where appropriate and feasible, the Defence for Mr. Bemba could formulate factual admissions, which could be utilised in *lieu* of the privileged material.

C. RELEIF SOUGHT

25. The Defence for Mr. Jean-Pierre Bemba Gombo respectfully requests the Honourable Trial Chamber to:

- a) order the non-disclosure of any communications that fall within Rule 73(1), Rule 73(2), or Rule 81(1) of the Rules of Procedure and Evidence; and
- b) Convene a confidential *ex parte* Defence teams only Status Conference to discuss the issues outlined above.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 21st day of April, 2015

The Hague, The Netherlands