



Original: English

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

Date: 25/05/2015

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 the Annexes of the Report of
the Independent Counsel, ICC-01/05-01/13-845-Conf-Exp, with Confidential *Ex
Parte* (Bemba Defence only) Annexes A, B C, D, and E**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for the Defence of Mr Aimé Kilolo Musamba

Paul Djunga

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for the Defence of Mr Narcisse Arido

Charles Achaleke Taku

Philippe Larochelle

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

A. INTRODUCTION

1. The Defence for Mr. Jean-Pierre Bemba Gombo hereby submits its observations (“the Observations”) concerning Annexes B, C, and D to the Report of the Independent Counsel.¹

2. The Defence has also submitted the following Annexes:

- Annexes A, and B set out a break-down of each communication set out in Annexes B and C to the Report of the Independent Counsel;
- Annex C sets out dates of witness familiarisation;
- Annex D is [REDACTED]; and
- Annex E is [REDACTED].

B. OBSERVATIONS

Confidentiality level

3. The Defence has submitted these Observations and Annexes on an *ex parte* (Bemba Defence only) basis.

4. The Observations are submitted for the sole purpose of asserting privilege – where applicable. The fact that it might be necessary for the Defence to provide certain contextual information for the purpose of asserting privilege should not, in itself, constitute a waiver of the privileged nature of the contextual information.²

¹ ICC-01/05-01/13-845-Conf-Exp-AnxB; ICC-01/05-01/13-845-Conf-Exp-AnxC; ICC-01/05-01/13-845-Conf-Exp-AnxD.

² ICC-01/04-01/10-277.

5. The Defence therefore requests that absent a waiver of privilege from the Defence, the *ex parte* nature of the Observations be maintained throughout the proceedings.

6. Moreover, these Observations should not be treated as concessions or positive assertions of fact, for any purpose other than the assertion of privilege. The fact that the Defence has – on the basis of the information known to it at this juncture – asserted that certain actions appear to have been conducted in the course of a professional Defence relationship, should also not be construed as ratification by Mr. Bemba of the acts in question.

Standard for the assertion of privilege

7. Rule 73(1) protects “communications made in the context of the professional relationship between a person and his or her legal counsel”.

8. Rule 73(1) should therefore protect any communications, which concerned activities which were conducted on behalf or in furtherance of the Defence of Mr. Bemba. This extends to confidential communications with third parties, concerning ongoing investigations, or matters related to Defence preparation and strategy.³

9. The focus of this inquiry is Defence-specific. The question is not whether the information in question would be relevant to the Prosecution or would assist its investigation. Everything within the possession of the Defence could, potentially, assist the Prosecution. If relevance or utility are employed as the litmus test for deciding what should be transmitted to the Prosecution, Rule 73(1) would be transformed into a rule of disclosure rather than an absolute form of privilege. It

³ ICC-01/05-01/13-836, paras. 18-35. Pre-Trial Chamber I has also ruled that Rule 73(1) may extend to “documents which do not ostensibly appear to be communications between a person and his or her legal counsel but which may attract privilege depending on their content and the circumstances, context or purpose of their creation or communication”: ICC-01/04-01/10-237, p. 7.

would also allow the Prosecution to invoke Article 70 as a means for obtaining access to information that would otherwise fall outside the disclosure obligations of the Defence in Article 5-related proceedings.

10. In accordance with the standard established in the *Mbarushimana* case, in order to assert privilege over documents which do not fall within an obvious category of privilege, it suffices for the Defence to provide information as to “how the content of the document or the circumstances, context or purpose of its creation or communication may give rise to privilege within the meaning of rule 73(1) of the Rules”.⁴

11. The degree of substantiation required by the Chamber to verify the existence of privilege must also be tailored to the specific circumstances of the present exercise.

12. The Observations have been formulated on the basis of information within the knowledge of the current Defence team for Mr. Bemba, within the limited deadline for doing so. It is, however, the nature of Defence work that Counsel may interact with a range of different persons on a range of different issues, in order to ensure that all potential evidential leads are pursued in a timely manner. Due to Me. Kilolo’s arrest and the subsequent Article 70 proceedings (which triggers Me. Kilolo’s right to silence), it has not been possible to conduct a thorough debriefing or transfer of the case file.

13. In light of these factors, it would be unduly onerous and prejudicial to require the Defence to submit specific details for each and every communication, in order to attract the protection of privilege, particularly if the communications fall within a pattern of lawful Defence inquiries.

14. Nonetheless, should the Chamber consider that the information herewith provided is insufficient with respect to all or any specific communications, it would

⁴ ICC-01/04-01/10-237, p. 7.

be appropriate to accord the Defence with a limited opportunity to provide supplementary observations in relation to such communications.⁵

15. Mere speculation is also not a sufficient basis for rendering a contrary determination, and excluding privilege. Speculation is not an objective evidential standard. It provides insufficient legal certainty as concerns the circumstances in which privilege could be excluded.

16. Legal privilege is the cornerstone of a fair trial. Without it, the defendant's right to silence, right to effective and informed legal advice, and privilege against self-incrimination would be meaningless. If speculation and inferences were employed to second-guess the legitimacy of Defence strategy, there would also be a risk that privilege could be excluded for specious or unjustified reasons, which would render the nature of the protection illusory.

17. Given that the ICC regulations require the Prosecution/Registrar to establish "reasonable grounds to believe" that the defendant has engaged in misconduct in order to justify the monitoring of non-privileged communications,⁶ a similar if not more vigorous threshold should apply in order to exclude any presumption of privilege.⁷

The Trial Chamber must disregard the analysis and commentary of the Independent Counsel

18. The Independent Counsel has employed an evidentially unsound and prejudicial method to review and vet these communications, which has tainted both his analysis and the vetting process itself.

⁵ This would be consistent with the approach of Pre-Trial Chamber I: ICC-01/04-01/10-237.

⁶ Regulation 101 of the Regulations of the Court; Regulation 175(1) of the Regulations of the Registry.

⁷ *Liberty v. United Kingdom*, Application no. 58243/00, Judgment, 1 July 2008, paras 60-69.

19. In particular, the Independent Counsel has:
- a. Conducted his analysis on the basis of Prosecution theories and factual assumptions;
 - b. Failed to take into consideration relevant exculpatory information or explanations;
 - c. Presented factual information in a manner, which lacks objectivity; and
 - d. Relied upon incorrect legal assumptions.

20. In terms of the first two aspects, rather than compiling an objective analysis of data, the Independent Counsel has reviewed the communications through the lens of the Prosecutor. In particular, he has relied on the Prosecution's analysis set out in ICC-01/05-01/13-63-Conf-Exp-AnxB, and theories which he developed in earlier Reports.

21. However, whereas the Independent Counsel repeatedly refers to extrinsic materials in order to develop his hypothesis that the communications are incriminating,⁸ he fails to do so in circumstances where extrinsic materials confirm the legitimate and privilege nature of Defence activities. [REDACTED].

22. [REDACTED].⁹ [REDACTED].

23. [REDACTED],¹⁰ [REDACTED].

24. [REDACTED].¹¹

⁸ ICC-01/05-01/13-845-Conf-Exp-AnxB, pp.2, 11-12, 14-16, 19-20, 22; ICC-01/05-01/13-845-Conf-Exp-AnxC, pp.2-3, 10, 16-17, 35, 37, 39, 43, 50, 54, 57, 65, 67, 70-72, 75, 77-78, 83-84, 86, 90-91, 95.

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

25. [REDACTED].

26. [REDACTED] [REDACTED].¹²

27. [REDACTED].¹³ [REDACTED]¹⁴

28. [REDACTED],¹⁵ [REDACTED].¹⁶

29. [REDACTED].¹⁷

30. [REDACTED].¹⁸ [REDACTED],¹⁹ [REDACTED].

[REDACTED]

31. [REDACTED].²⁰

32. [REDACTED].²¹ [REDACTED].

33. [REDACTED].²² [REDACTED].

34. [REDACTED].²³

35. [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED]; [REDACTED]

¹⁸ [REDACTED].

¹⁹ [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

36. [REDACTED].²⁴

37. [REDACTED].²⁵ [REDACTED].²⁶

38. [REDACTED].

39. [REDACTED].

C. RELEIF SOUGHT

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



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 25th of May, 2015

The Hague, The Netherlands

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].