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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 Leave to Appeal Decision Providing Materials in Two Independent
Counsel Reports and Related Matters, ICC-01/05-01/13-947**

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 Defence for Mr. Jean-Pierre Bemba Gombo hereby requests leave to appeal the 'Decision Providing Materials in Two Independent Counsel Reports and Related Matters' ('the Decision'),¹ in relation to the following issues:

- i. Whether "communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege", as set out in Rule 73(1) of the ICC Rules of Procedure and Evidence; and
- ii. Whether the principle of open justice requires that any analysis of the Independent Counsel concerning relevant and non-privileged documents should be transmitted to the parties.

II. Submissions

1. The two issues arise from the Decision

2. At paragraph 14 of the Decision, the Trial Chamber found that:

Rule 73(1) communications are not subject to disclosure unless:
 (a) the person consents in writing to such disclosure; or
 (b) the person voluntarily disclosed the content of the communication to a third party and that third party gives evidence of that disclosure. However, communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege.

3. Since the Trial Chamber is not bound by the legal rulings of the Pre-Trial Chamber, this finding constitutes an independent ruling from the Trial Chamber. The issue therefore arises from the Decision.

4. In terms of the second issue, the principle of open justice requires full transparency in judicial proceedings² and dictates that the parties must be provided

¹ ICC-01/05-01/13-947.

with an effective opportunity to be heard in relation to any evidence that is put to the Chamber.³

5. Notwithstanding this principle, the Trial Chamber ruled that Annex A, which relates to the “Independent Counsel's process in selecting the materials contained in Annex A1” should not be transmitted to the parties.⁴

6. The Trial Chamber further directed that the “Remarques” column for all entries, including those where the content is provided to the other parties, is to be redacted in full along with any corresponding footnotes.”⁵

7. The justification – that this information was “never intended to be shared with all parties”⁶ – does not constitute a valid ground for deviating from the principle of open justice. There are no protective issues at stake, and the principle of judicial transparency militates in favour of, not against, the full disclosure of all information concerning the process by which the Independent Counsel selected the materials.

8. In contrast to the Defence, the Independent Counsel has no general form of legal privilege or legitimate expectation of privacy or confidentiality as concerns his analysis or theories. He is not an “agent or a delegate of the Chamber”,⁷ and falls outside the scope of the confidentiality of internal Chamber’s deliberations.

² ICC-01/04-01/06-T-104-ENG, 16 January 2009, pp 3-4; *Werner v. Austria*, Judgement of November 24, 1997, para. 45.

³ *Piersack v. Belgium*, ECHR, judgment of 1 October 1982, Series A No. 53, para. 30; *Hauschildt v. Denmark* (1990) 12 EHRR 266, para. 48; *Bulut v. Austria*, ECHR, judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II-347, at 356 (paras. 31-33); *Du Cubber v. Belgium* (1984) 7 EHRR 236, at 243, para. 24; and *Gregory v. United Kingdom* (1997) 25 EHRR 577, at 593, para. 45.

⁴ ICC-01/05-01/13-947, para. 29.

⁵ ICC-01/05-01/13-947, para. 34.

⁶ ICC-01/05-01/13-947, para. 29.

⁷ ICC-01/05-01/13-947, para. 16.

9. The confidential *ex parte* nature of his initial review derives from the confidentiality level of the documents, which he analyses. If, however, the documents themselves can be transmitted to the parties, then it follows that any analysis corresponding to these documents can also be transmitted to the parties.

10. The Trial Chamber has viewed and considered this analysis. This, in the absence of any countervailing form of privilege, creates a *prima facie* right for the parties to be informed of its contents.

11. In this regard, the Trial Chamber noted that:

the Chamber has not relied solely on the Independent Counsel's analysis of the selected materials - the Chamber has conducted its own independent analysis of the relevance and potentially privileged character of the documents in question.⁸

12. The word 'solely' appears to suggest that whilst the Reports of the Independent Counsel was not the exclusive basis for the Trial Chamber's decision, their contents may have informed the Decision to some degree.

13. The documents attached to the Independent Counsel Reports are likely to be relied upon by the Prosecution as incriminating evidence. Since the Trial Chamber has authorised their transmission to the Prosecutor, the Chamber has already determined (albeit to a lower evidential threshold), that the documents are either relevant to the charges, or constitute 'communications effected in furtherance of the crime'.

14. The Defence will have the opportunity to respond to and address the contents of the documents at trial. Nonetheless, the Trial Chamber's appreciation of these documents has already been, to some degree, influenced or informed by the analysis of the Independent Counsel.

⁸ ICC-01/05-01/13-947, para. 16.

15. Accordingly, unless the Defence is provided with the Independent Counsel's analysis of documents which were transmitted to all the parties, it will not have an effective opportunity to address and rebut any element of pre-determination that might be attributable to the analysis of the Independent Counsel.

16. This issue as to whether the principle of open justice requires that any analysis of the Independent Counsel concerning relevant and non-privileged documents should be transmitted to the parties therefore arises from the Decision.

2. The issues affect the fairness of the proceedings in a significant manner

The first issue

17. The term "fair" in the context of article 82(1)(d) is associated with the norms of a fair trial, "the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1) and 21(3)); making its interpretation and application subject to internationally recognised human rights".⁹

18. The notion and scope of legal privilege is tied directly to several key aspects of the right to a fair trial, including:

- i. The defendant's right to communicate with his Defence in a confidential manner (Article 67(1)(b)); and
- ii. The right not to be compelled to testify or to confess guilt and to remain silent (Article 67(1)(g).

⁹ ICC-01/04-168, para. 11.

19. If the Trial Chamber has framed the exception to legal privilege in an overly broad manner, then it follows that the Defence will have been deprived of protection, which was intended to ensure its fair trial rights.

20. The nature of this prejudice is underscored by the scope and duration of the charges, and the amorphous nature of this ‘crime-fraud’ exception. The Trial Chamber has considered that the temporal span of the Article 70 case runs from the end of 2011 to 14 November 2013,¹⁰ which encompasses components of the Prosecution case, and the entirety of the Defence case.

21. The Trial Chamber has also elaborated that this exception does not require communications in themselves to reflect criminality:

where such communication falls – either as privileged or as crime/fraud excepted – will depend on a proper appreciation of the broader context of the given communication.¹¹

22. Rather than focusing on whether the communication falls within the scope of the professional relationship between Counsel and Client, this exception defines privilege by reference to the Prosecution’s case. The focus is not on the interests and rights of the defendant, but the relevance to charges which have yet to be proven at trial. As a result, if the charges are dismissed, the Prosecution will have unjustly received significant amounts of material concerning the Main Case, which should have been protected by privilege.

23. In order to be effective, privilege must have an innate quality. Counsel and defendants must be able to reliably predict whether their communications will be protected, if privilege is to mean anything.

¹⁰ ICC-01/05-01/13-947, para. 19.

¹¹ ICC-01/05-01/13-947, para. 18.

24. However, the broad and variable nature of this ‘crime-fraud’ exception makes the question of whether information is privileged dependent on a subjective assessment as to the relevance of the communication to a broader context. It also blurs the line between communications allegedly directed to criminal activity and those which concerned *prima facie* legitimate defence activities.

25. This lack of certainty and ambiguity contravenes the basic requirement that:

a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.¹²

26. The Trial Chamber is required to base its decision on a forecast as to the consequences if its decision is in fact wrong.¹³ It is thus clear that if wrongly decided, the issue will affect the fairness of the proceedings. in a significant manner.

The second issue

27. The idea that documents and arguments, which have been considered by the Chamber, should remain forever hidden from the parties is inimical to the idea of open justice.

28. The issue at stake is the appearance of justice, and the need for full transparency in all matters concerning the judicial process. The issue is not judicial impropriety, and the Defence is not, in any manner, suggesting impropriety on the part of the Trial Chamber.

¹² R. v Derby Magistrates Court, Ex p. B. [1996] 1 AC 487, para. 58.

¹³ ICC-01/04-168.

29. This dictates that the power of the Chamber to determine what is kept *ex parte* from the parties must be regulated by the articles and rules of the ICC, and not judicial discretion. Thus, in the seminal case of *Scott v. Scott*, Viscount Haldane LC held that:

Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of decency or morality that the hearing should take place in private. If there is an exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limit to the individual discretion of the judge.¹⁴

30. The Decision does not cite to any legal basis for non-disclosure, nor does it refer to any factual imperative, which would justify the non-disclosure of the Independent Counsel's analysis. The analysis has been disclosed to the parties in the past. If there is anything in the analysis itself which would prejudice the proceedings, then it follows that the analysis should also have been excised from the version which was transmitted to the Chamber.

31. The issue therefore affects the fairness of the proceedings in a significant manner.

3. Both issues affect the expeditiousness of the proceedings

32. Article 82(1)(d) only requires parties to demonstrate that the issue affects the expeditiousness of the trial generally; not in a particular way (i.e. that it retards rather than advances it).

¹⁴ [1913] AC 417 at p. 435.

33. The first issue defines the scope of material which will be transmitted to the Prosecution. It is thus directly linked to the degree of expedition with which the Prosecution can investigate and advance its case.

34. The second issue affects the ability of the Defence to construct its position and arguments in connection with applications to admit the materials. In effect, the Defence will be compelled to shadow-box allegations and linkages, unaware of which ones have in fact been placed before the Chamber. This is inefficient, and will retard Defence preparation for the trial.

4. In the alternative, the first issue affects the outcome of the trial

35. As set out above, tying the definition of privilege and its exception to the nature of the Prosecution charges results in shifting, unpredictable and potentially non-existent protection.

36. In the absence of a fixed and certain definition of privilege, there is a significant risk that the Prosecution will receive privileged information, to which it is not otherwise entitled.

37. This is not a hypothetical issue: the Pre-Trial Chamber declined to confirm the charges concerning alleged false documents, which raises the question as to the status of any Defence communications on these documents, which were transmitted to the Prosecution.

38. The very nature of privilege is such that its protection is vitiated if the Prosecution obtains access to the contents of privileged information. Even if the Trial Chamber later intercedes to rule against the Prosecution relying on the information in the proceedings, the damage would be irreversible. The Prosecution will have had access to information concerning Defence strategy, and internal views

concerning the strengths and weakness of the Defence case. This will both undercut the efficacy of that strategy and accord the Prosecution with an unfair litigation advantage. This would undermine the integrity of the entire proceedings.

5. An immediate decision of the Appeals Chamber on both issues would materially advance the proceedings

39. 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”:

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.¹⁵

40. 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-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.

41. Appellate intervention would ensure that the parameters of legal professional privilege are defined in a certain manner, which would facilitate Defence preparation, and provide clarity as to the legal status of information upon which the Prosecution might seek to rely in the proceedings.

42. The gravity of an unwarranted violation of privilege (if the Decision has been wrongly decided) is also such that these issues cannot be deferred to the final judgment or appeal. Improper access would prejudice Defence strategy in the Main

¹⁵ ICC-01/04-168, para. 16.

Case, and prejudice ongoing or future Defence investigations on matters that have now been disclosed to the Prosecution.

43. 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, and to facilitate the transmission of the Independent Counsel's analysis as concerns future reviews.

44. 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.¹⁶ 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.¹⁷

45. Finally, the materials analysed by the Independent Counsel are likely to be the subject of a bar table motion either before or during trial. If the Trial Chamber decided the issue concerning the Independent Counsel's analysis in an incorrect manner, then there will be an appearance that the Trial Chamber's perception of the relevance of these materials might have been influenced by the analysis of the Independent Counsel. The correctness of the Trial Chamber determination that the parties should not be granted access to the Independent Counsel's analysis cannot be deferred until the end of trial.

¹⁶ ICC-01/04-01/06-489, p.13.

¹⁷ *Prosecutor v. Nziroreza*, 'Decision on Joseph Nziroreza's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK', Case No. ICTR-98-44-T, 9 October 2007.

III. Relief sought

46. 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 in relation to the following issues:

- iii. Whether “communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege”, as set out in Rule 73(1) of the ICC Rules of Procedure and Evidence; and
- iv. Whether the principle of open justice requires that any analysis of the Independent Counsel concerning relevant and non-privileged documents should be transmitted to the parties.



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Dated this 25th day of May 2015

The Hague, The Netherlands