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

Public Document with Public Annex A

**Prosecution Response to Jean-Pierre Bemba Gombo's Request for Leave to Appeal
the Decision ICC-01/05-01/13-947**

Source: Office of the Prosecutor

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I. Introduction

1. The Bemba Defence application for leave to appeal¹ the Trial Chamber's "Decision Providing Materials in Two Independent Counsel Reports and Related Matters"² should be dismissed. The First Issue is unclear and misunderstands the Decision and the crime/fraud exemption to lawyer-client privilege. The Second Issue similarly misrepresents and disagrees with the Decision. Neither Issue warrants leave to appeal being granted by the Trial Chamber.

2. However, although the Second Issue does not justify leave to appeal under article 82(1)(d), the Prosecution would not object if the Trial Chamber were to disclose Annex A and the "*remarques*" column,³ as well as similar material generated by the Independent Counsel in the future, to the Parties in order to ensure expediency and avoid unnecessary litigation.

II. Submissions

A. The Two Issues are not appealable

(i) *The First Issue is unclear and misunderstands the Decision and the crime/fraud exemption*

3. The First Issue is unclear. In particular, it is not clear whether the Defence disagrees with the application of the crime/fraud exemption to lawyer-client privilege in this case,⁴ or with the Trial Chamber's approach to reviewing the

¹ ICC-01/05-01/13-962 ("Application" or "Bemba Application").

² ICC-01/05-01/13-947 ("Decision").

³ Decision, paras.29 and 34.

⁴ Application, para.2 quoting paragraph 14 of the Decision. On this understanding of the Defence's argument, the Defence apparently submits that communications between a lawyer and his or her client in furtherance of crime or fraud are privileged under rule 73(1), notwithstanding that this exemption is well-recognised in domestic and international jurisdictions. See ICC-01/05-52-Red2, para.4 referring to *Prosecutor v. Bangura et al.*, Decision on the Prosecutor's request for Subpoenas, SCSL-11-02-T, Trial Chamber II, 28 June 2012, paras.13-15. This decision refers to several cases from the United Kingdom, *inter alia*, to *R. v. Cox and Railton*

Independent Counsel's selected material.⁵ The Defence has the burden of identifying with clarity⁶ and sufficient specificity⁷ the issue that it wishes to have certified for appeal. Otherwise, the Chamber will be unable to determine whether the requirements under article 82(1)(d) are met.⁸ The Defence's unclear submissions fail to satisfy this burden and accordingly, the First Issue does not constitute an appealable issue within the terms of article 82(1)(d).

4. The First Issue similarly does not arise because it is premised on misunderstandings about the crime/fraud exemption to the lawyer-client privilege, and the Decision itself. First, the Defence assumes that all communications between a lawyer and his or her client are privileged and only when it is established that they were made in furtherance of a crime or fraud, the privilege is lifted.⁹ This is not correct. Any communication between a lawyer and his or her client in furtherance of a crime or fraud is *not* "[a] communication[] made in the context of the professional relationship between a person and his or her legal counsel" and thus is not privileged under rule 73(1).¹⁰ The Trial Chamber clearly stated that "communications effected in furtherance of crime or fraud are *exempted* from the principle of professional privilege".¹¹

[1884] 14 QBD 153 and O'Rourke v. Darbishire [1920] AC 581. As an example of a civil law jurisdiction, see Spain. Supreme Court (Criminal Division, Section 1). Sentence 1394/2009, 25 January 2010, pp.31-32. See also D. Piragoff, *Evidence in R. Lee* (ed.), "The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence" (Transnational Publishers 2001), p. 360: although the Rome Statute does not expressly envisage the crime/fraud exemption, the drafters considered that it was subsumed within the *chapeau* of rule 73(1), *ie.* Communications in furtherance of crime or fraud are not "communications made in the context of the professional relationship between a person and his or her legal counsel".

⁵ Application, paras.20-21, referring to the Decision, paras.18-19. In the introductory paragraph 15 of the Decision, the Trial Chamber stated that "[i]t will now identify the considerations underlying its overall approach to evaluating the Independent Counsel's selected materials".

⁶ ICC-02/11-01/11-99-Conf, paras.14-15.

⁷ ICC-01/04-02/06-604, para.17.

⁸ ICC-02/11-01/11-389, para.28; ICC-02/11-01/11-464, para.26.

⁹ This erroneous understanding can be seen in the Application, paragraphs 22 ("[r]ather than focusing on whether the communication falls within the scope of the professional relationship between Counsel and Client, [...]"), 23 ("[i]n order to be effective, privilege must have an innate quality.") and 35 ("tying the definition of privilege and its exception").

¹⁰ ICC-01/05-52-Red2, para.3. See also D. Piragoff, *Evidence in R. Lee* (ed.), "The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence" (Transnational Publishers 2001), p. 360.

¹¹ Decision, para.14, second sentence. Emphasis added.

5. Second, the Defence conflates the showing necessary for the application of the crime/fraud exemption to lawyer-client privilege with the standard of proof required for a conviction for such offences under article 74.¹² This is also not correct. The Prosecution has already shown to the required standard that the crime/fraud exemption applies in this case.¹³ This necessarily differs from, and is independent of, the Trial Chamber's determination of whether the accused persons are guilty beyond reasonable doubt of the crimes which may underlie the exemption. To hold otherwise would effectively immunize lawyer-client communications in furtherance of crimes and frauds in the absolute.

6. Third, the Application also misunderstands the Decision. The review procedure adopted by the Trial Chamber does not make the crime/fraud exemption of an "amorphous nature",¹⁴ nor "broad and variable".¹⁵ Nor does the Decision create uncertainty or ambiguity regarding the definition of privilege.¹⁶ First the Single Judge,¹⁷ and more recently the Trial Chamber,¹⁸ tasked the Independent Counsel with identifying materials which are relevant to the charges *and* non-privileged. This does not entail that all relevant material will automatically fall within the crime/fraud exemption.¹⁹ These are two different determinations which require different assessments which do not necessarily overlap.

¹² Application, para.22, third sentence: "[...] 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". See also paras.35 and 37.

¹³ ICC-01/05-52-Red2, paras.3,5.

¹⁴ Application, para.20.

¹⁵ Application, para.24.

¹⁶ *Contra*, Application, paras.25 and 36.

¹⁷ ICC-01/05-01/13-41-Red, pp.4,6; ICC-01/05-01/13-366-Red, p.7.

¹⁸ Decision, paras.15-20. See also ICC-01/05-01/13-893-Red, para.16: "(ii) conducting an initial review of the Seized Material, for the primary purpose of identifying material which is relevant to the charges *and* not privileged". [Emphasis added]. See also para.22. ICC-01/05-01/13-41-Red, pp.4,6; ICC-01/05-01/13-366-Red, p.7.

¹⁹ *Contra*, Application, para.22: "this definition ties 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*" and para.35: "tying the definition of privilege and its exception *to the nature of the Prosecution charges*" [Emphasis added].

7. The Defence's assertion that professional privilege is "dependent on a subjective assessment as to the relevance of the communication to a broader context"²⁰ also misconstrues the Decision. The Trial Chamber indicated that some of the communications are quite brief (such as an SMS message simply saying "OK") and in order to determine whether they are privileged or crime/fraud exempted, the broader context of the given communication needs to be considered.²¹ This statement is perfectly correct: materials cannot be assessed in isolation, but need to be read in their proper context.

8. For the reasons above, the First Issue does not arise from the Decision.

(ii) *The Second Issue disagrees and misunderstands the Decision*

9. The Second Issue likewise does not justify leave to appeal under article 82(1)(d), as elaborated below. However, the Prosecution would not object if the Trial Chamber were to disclose Annex A and the "*remarques*" column,²² as well as similar material generated by the Independent Counsel in the future, to the Parties. This measure may ensure expediency and avoid unnecessary litigation.

10. The Second Issue does not arise from the Decision. The Defence merely disagrees with the Trial Chamber's withholding of Annex A and the "*remarques*" column from the Parties, and advances arguments premised on a mischaracterisation of the Decision. The Defence assumes that the Trial Chamber's decisions on the relevance of the materials disclosed to the Parties have been influenced by the Independent Counsel's assessment,²³ and speculates that the Chamber may already be influenced in deciding on the relevance and admissibility of this material at trial.²⁴

²⁰ *Contra*, Application, para.24.

²¹ Decision, para.18.

²² Decision, paras.29 and 34.

²³ *Contra* Application, para.12.

²⁴ Application, paras.13-14.

This premise is unsupported and speculative. First, the Trial Chamber conducted its own and independent assessment of the material to determine its relevance and potentially privileged character,²⁵ without being constrained by the Independent Counsel's assessment.²⁶ Second, the Trial Chamber clearly stated that this determination was made without prejudice to future decisions on the admission of items into evidence or its ultimate decision on the merits.²⁷ Third, judges of this Court are professional judges who are able to distinguish between irrelevant and relevant material submitted and discussed at trial.²⁸ Fourth, the Court's statutory framework permits the Defence to review and challenge any evidentiary assessment made by the Chamber: *if* and *when* the Prosecution submits the material before the Trial Chamber, the Defence will have the opportunity to object and raise issues relating to its relevance or admissibility.²⁹ Subsequently, the Chamber has the obligation to issue a reasoned decision³⁰ on an item-by-item basis.³¹ If the Defence were then to consider that the Chamber's assessment relied on extraneous elements, it could seek leave to appeal.

11. On these grounds, the Second Issue should be dismissed.

²⁵ Decision, para.16.

²⁶ ICC-01/05-01/13-966, para.15.

²⁷ Decision, para.17. See also ICC-01/05-01/08-75, para.57 referring to ECtHR, *Morel v. France*, Judgment of 6 June 2000, Reports of Judgments and Decisions 2000-VI, Application no. 34130/96, para. 45; *Werner v. Poland*, Judgment of 15 November 2001, Application no.26760/95, para.43: "(...) the fact that the judge has detailed knowledge of the case file does not entail any prejudice on his part that would prevent his being regarded as impartial when the decision on the merits is taken. Nor does a preliminary analysis of the available information mean that the final analysis has been prejudged."

²⁸ *Prosecutor v. Stanislav Galic*, IT 98-29 A, Appeals Chamber Judgment, 30 November 2006, para.44: "[..]In particular, a fair-minded observer would know that Judges' training and professional experience engrain in them the capacity to put out of their mind evidence other than that presented at trial in rendering a verdict." See also *Prosecutor v Anto Furundija*, IT-95-17/1-A, Appeals Judgment, 21 July 2000, paras.196 and 197: "In the view of the Appeals Chamber, there is a presumption of impartiality which attaches to a Judge. This presumption has been recognised in the jurisprudence of the International Tribunal and has also been recognised in municipal law" and "[t]he Appeals Chamber endorses this view, and considers that, in the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal 'can disabuse their minds of any irrelevant personal beliefs or predispositions.'" Quoted in *Prosecutor y. Jean Paul Akayesu*, ICTR-96-4, Appeals Chamber Judgment, 1 June 2001, para.269.

²⁹ Rule 64(1) of the Rules of Procedure and Evidence ("Rules"). ICC-01/05-01/08-1386 OA5 OA6, para.48.

³⁰ Rule 64(2). ICC-01/05-01/08-1386 OA5 OA6, para.59.

³¹ ICC-01/05-01/08-1386 OA5 OA6, para.53: "[t]he scheme established by article 69(4) and (7) of the Statute and rule 71 of the Rules of Procedure and Evidence thus anticipates that a Chamber's determination of the relevance or admissibility of evidence be made on an item-by-item basis".

B. Article 82(1)(d) criteria are not met

12. In addition, the two Issues would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor their resolution by the Appeals Chamber would materially advance the proceedings.

(i) *The First Issue does not meet the requirements of article 82(1)(d)*

13. With respect to the First Issue, the Defence fails to show that the requirements of article 82(1)(d) are met. The Defence's arguments, once again, are based on a misreading of the Decision and its misunderstanding of the crime/fraud exemption.³²

14. The Defence's submissions on fairness and that the proceedings would be materially advanced are speculative.³³ Similarly, the arguments on expeditiousness and the purported impact of the issue on the outcome of the trial presuppose – without any basis – that the Prosecution is receiving³⁴ – and has received³⁵ – privileged material. As Chambers of this Court have found, an applicant cannot speculate in the abstract that the decision causes prejudice to the rights of the accused,³⁶ but must instead support its submissions.³⁷

³² Application, paras.19-24 (on fairness), para.33 (on expeditiousness), paras.35-38 (on the outcome of trial) and paras.40-42 (on materially advance).

³³ Application, para.22 (on fairness) and 42 (on materially advance).

³⁴ Application, para.33 (on expeditiousness).

³⁵ Application, para.37 (on the outcome).

³⁶ See on fairness: ICC-01/04-168 OA3, para.10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 paras.33 and 39; ICC-01/09-02/11-88, para.25, see also paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para.36; ICC-01/09-02/11-275, paras.28-29; ICC-01/09-01/11-301, para.30. On the outcome: ICC-01/04-01/07-1958, para.20; ICC-01/09-02/11-406, paras.42-43. On materially advance: ICC-01/04-01/06-2109, para.22 (“Any suggested unfairness, at this stage, is wholly speculative. It follows that an immediate resolution of the issue by the Appeals Chamber will not materially advance the proceedings”).

³⁷ ICC-01/04-02/06-604, para.19.

(ii) *The Second Issue does not meet the requirements of article 82(1)(d)*

15. Similarly, the Defence fails to show that the Second Issue meets the requirements of article 82(1)(d). The Defence's arguments on the purported impact of the Second Issue on the fairness and expeditious conduct of the proceedings, as well as on how the Appeals Chamber's intervention would materially advance the proceedings are also speculative and unsupported³⁸ and further show the Defence's disagreement with the Decision.³⁹

16. On fairness, and contrary to the Defence's submissions,⁴⁰ the fact that a given measure is not expressly provided for in the statutory texts of the Court (albeit regarding disclosure) cannot *per se* entail that that measure is in violation of, or otherwise has a significant impact on, the fairness of the proceedings.⁴¹

17. On fairness and expeditiousness, the Trial Chamber stated in its Decision that its determinations as to the relevance of the materials for the purposes of disclosure were taken independently from the Independent Counsel's assessments⁴² and without prejudice to its future decisions on the admission of the material into evidence or its ultimate decision on the merits.⁴³ Moreover, the Court's statutory framework provides enough safeguards to ensure that the Chamber's evidentiary assessments are transparent, reasoned and subject to challenge and review.⁴⁴ Thus, the Defence will not need "to shadow-box allegations and linkages" in order to evaluate and challenge the Chamber's evidentiary assessments.⁴⁵

³⁸ Application, paras.28-29 (fairness), 34 (expeditiousness) and 43 and 45 (materially advance).

³⁹ Application, para.30.

⁴⁰ Application, para.29.

⁴¹ ICC-01/05-01/13-51, p.5.

⁴² Decision, para.16 and ICC-01/05-01/13-966, para.15.

⁴³ Decision, para.17.

⁴⁴ Rule 64(1) and (2) of the Rules. See ICC-01/05-01/08-1386 OA5 OA6, paras.48, 53, 57 and 59.

⁴⁵ *Contra*, Application, para.34.

18. Also, and as already noted, *if* and *when* the Prosecution tenders any of the material into evidence, the Defence will have the opportunity to respond to the Prosecution's arguments. Similarly, if the Defence disagrees with the Chamber's evidentiary assessments, it could then seek leave to appeal that decision.⁴⁶ Hence, the Appeals Chamber's intervention at this stage will not materially advance the proceedings.

III. Relief Requested

19. For the above reasons, the Application should be rejected. Neither issue meets the criteria for leave to appeal under article 82(1)(d).

20. Notwithstanding this position, the Prosecution would not object if the Trial Chamber were to disclose Annex A and the "*remarques*" column, and similar material generated by the Independent Counsel in the future, to the Parties.



Fatou Bensouda, Prosecutor

Dated this 29th day of May 2015
At The Hague, The Netherlands

⁴⁶ *Contra*, Application, para.45.