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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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 with Confidential Annex A

Public Defence Request for Leave to Appeal, with Confidential 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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Introduction

1. Pursuant to Article 82(1)(d) of the Statute, the Defence for Mr. Bemba respectfully request the leave of the Trial Chamber to appeal the ‘Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible’ (the ‘Decision’).¹

2. The Trial Chamber’s ultimate conclusion that the communications between Mr. Bemba and Mr. Babala, and Mr. Bemba and Mr. Mangenda respectively should be not excluded, was predicated on the following determinations:
 - The Trial Chamber’s legal approach which placed the burden of argumentation concerning the criteria in Article 69(7) and application/waiver of privilege on the Defence rather than the Prosecution (“the First Issue”)

 - The Trial Chamber’s legal determination that passively monitored calls are not subject to the same legal safeguards as concerns actively monitored calls as concerns notice and prior vetting by the Defence (“the Second Issue”);

 - The Trial Chamber’s legal determination that a broad, discretionary power in Article 57(1)(3)(a) constituted a sufficiently specific, certain, and foreseeable legal basis for circumventing explicit privacy rights set out in the Regulations of the Court, the Regulations of the Registry, and internationally recognised human rights law (“the Third Issue”);

 - The Trial Chamber’s determination that the standard of “reasonable suspicion” was both applied and met in circumstances in which the Single Judge did not verify or examine the evidence relied upon by the Prosecution in support of its assertions concerning Mr. Bemba’s alleged involvement in Article 70 offences (“the Fourth Issue”);

 - The Trial Chamber’s finding (based on the Single Judge’s prior decisions and a factually incorrect assertion from the Prosecution)

¹ ICC-01/05-01/13-1432.

that the communications of Mr. Mangenda were not privileged, and could be accessed directly by the Prosecution without any prior vetting (“the Fifth Issue”);

- The Trial Chamber’s definition of the exception to privilege and/or Defence confidentiality as encompassing a communication which was “made on a non-privileged line, falls within the relevant time period and relates to the role of and communications between two accused” (“the Sixth Issue”);² and
- The Trial Chamber’s legal determination that a decision on the admissibility of evidence can be split into separate elements, which can be adjudicated at different points of the proceedings (“the Seventh issue”).

3. The Trial Chamber’s adjudication of these issues affects significantly the fairness and expeditiousness of the proceedings, and the outcome the trial. Given the importance of these issues, an immediate resolution by the Appeals Chamber would materially advance the proceedings.

Submissions

The Seven Issues Arise from the Decision

4. The Prosecution sought the admission of communications between Mr. Bemba and Mr. Babala, and Mr. Bemba and Mr. Mangenda in its Second Bar Table Motion (the 2nd BTM).³
5. Notwithstanding the heightened burden of argumentation which applies to evidence submitted from the bar rather than via a witness, the 2nd BTM included very little argumentation as to the legality of the collection of this evidence. The Prosecution position was in fact restricted to a one sentence

² ICC-01/05-01/13-1432, para. 18.

³ ICC-01/05-01/13-1113-Red.

assertion that “they were obtained in accordance with judicial authorisation”.⁴

6. In their respective responses, the Defence teams for Mr. Babala, Mr. Bemba and Mr. Mangenda argued that the Prosecution had failed to meet the burden of proof concerning the admissibility of this evidence, and, in particular, that the admissibility of these communications was precluded by virtue of Article 69(5) and Article 69(7) of the Statute.⁵
7. The Prosecution did not file a request for leave to reply.
8. In its decision on the three bar table motions submitted by the Prosecution at that juncture,⁶ the Trial Chamber firstly expressed its intention to defer its ruling of the admissibility of evidence under Article 69(4) of the Statute,⁷ and secondly, characterised the submissions of the Defence in relation to Article 69(7) as ‘new requests’, which in turn, allowed the Prosecution to file a ‘response’ to these ‘requests’.⁸
9. After receiving additional submissions on issues which the Prosecution could, and should have addressed in its 2nd BTM, the Trial Chamber then issued the Decision.
10. In terms of the manner in which the Chamber addressed these issues, it is clear that the Chamber imposed the burden of argumentation squarely on the Defence, and not the party seeking the admission of these materials (First Issue).

⁴ ICC-01/05-01/13-1113-Red, para. 18, citing ICC-01/05-46, para.4, p.8; ICC-01/05-50, p.8

⁵ ICC-01/05-01/13-1199; ICC-01/05-01/13-1200; ICC-01/05-01/13-1201.

⁶ ICC-01/05-01/13-1285

⁷ ICC-01/05-01/13-1285, para. 13.

⁸ ICC-01/05-01/13-1285, para. 14.

11. For example, at paragraph 13, the Trial Chamber averred that “the Bemba Defence has provided no cogent reason that would lead the Chamber to depart from the Single Judge’s decision that the Detention Centre Materials were not part of the detention record”. Similarly, at paragraph 13, the Chamber found that the “Bemba Defence makes no submission that it has not been [...] an opportunity” [to be heard as soon as possible], and at paragraph 18, “the Bemba Defence has not provided any cogent reason that would lead it to depart from the finding of the Single Judge that such communications are not privileged”.
12. The mere fact that the Chamber characterised the responses of the Defence as requests was in itself, emblematic of the Chamber’s position that the burden fell on the Defence to prove the applicability of Article 69(7), rather than on the Prosecution to disprove it.⁹
13. In terms of the Chamber’s substantive findings, the Chamber found that firstly, the detention unit communications did not form part of the detention record, and secondly, that passively monitored calls are not subject to the same safeguards as actively monitored calls as regards the requirements of prior notice and disclosure to a detainee’s counsel (“the Second Issue”).¹⁰
14. Regarding the “quality” of the lawfulness of the monitoring of Mr. Bemba’s calls, the Trial Chamber found that,

Articles 57(3)(a) and 70 of the Statute, when read in conjunction with Regulation 100(3) of the Regulations of the Court (‘Regulations’) and Regulations 174 and 175 of the Regulations of the Registry are

⁹ A procedural decision which governs a latter, substantive decision by the Chamber falls within the parameters of the procedural issues encompassed in any appeal of the substantive decision: ICC-02/04-01/05-408.

¹⁰ Decision, footnote 18.

accessible, foreseeable as to their effects and sufficiently precise in order to enable Mr. Bemba to regulate his conduct.¹¹

15. Having so found, the Trial Chamber then noted the Single Judge had granted the Prosecution access pursuant to Article 57(3)(a) of the Statute, and not Article 57(3)(a) in combination with Regulation 100(3) of the Regulations, and Regulations 174 and 175 of the Regulations of the Registry. Indeed, the provisions and procedural safeguards in these Regulations were entirely disregarded by the Single Judge. The issue as to whether Article 57(3)(a) alone constitutes a sufficiently specific and foreseeable basis for monitoring the detainee's communications in a manner which completely differs from the procedures set out in explicit Regulations, therefore arises from the Decision ("the Third Issue").

16. In terms of the lawfulness and necessity of the Prosecution's access to such communications, the Trial Chamber averred that the Single Judge had applied a standard of "reasonable suspicion", accepted that this standard had been met in connection with Prosecution assertions of fact, and concluded that the criterion of necessity was met because the Bemba Defence had not referred to any other measure which was available to obtain access to the requested information.¹²

17. Apart from the absence of any clear indication that the Single Judge in fact applied an evidential threshold of "reasonable suspicion",¹³ both the Single Judge and the Trial Chamber relied on the Prosecution's assertion that there was information suggesting impropriety, rather than conducting an independent analysis as to whether such information existed, and was

¹¹ Decision, para. 15.

¹² Decision, para. 16.

¹³ The decisions cited by the Trial Chamber do not refer to such a standard.

sufficiently relevant and reliable to meet the threshold of a “reasonable suspicion” (“the Fourth Issue”).¹⁴

18. As regards the specific issue of the Prosecution’s reliance on communications between Mr. Mangenda and Mr. Bemba, the Trial Chamber firstly, adopted the Single Judge’s finding that the “‘nature and legal status’ of communications between Mr Bemba and Mr Mangenda on a non-privileged line did not preclude direct access”,¹⁵ secondly, found that the “different composition of Prosecution teams in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“the Main Case”) and the *Bemba et al.*, case adequately addressed concerns regarding defence rights and the integrity of the proceedings”,¹⁶ and thirdly, noted that the Prosecution’s access had been limited to specific persons of relevance to its investigations (“the Fifth Issue”).¹⁷

19. As regards the assertion of privilege by the Defence for Mr. Bemba as concerns the contents of a specific communication between Mr. Bemba and Mr. Mangenda, the Trial Chamber found that the fact that the communication was on a non-privileged line and related to the time period and “role of and communications between the two accused” sufficed to displace legal privilege/internal work-product privilege, and in itself, allow direct access to Prosecution (“the Sixth Issue”).

¹⁴ Decision, para. 16.

¹⁵ Decision, para 17.

¹⁶ As has been noted in filings in the Article 70 case (see for example, ICC-01/05-01/13-336-Conf-Exp-AnxI, paras. 12-14, ICC-01/05-01/13-309-AnxI, para. 12, ICC-01/05-01/13-1199-Conf, para. 78), the Single Judge’s finding that there two teams were composed of different persons was factually incorrect. In fact, apart from the involvement in Mr. Badibanga in the investigation and initial Article 70 litigation, the Article 70 team continues to share the same case manager (Sylvie Vidinha) and investigator (Theodore Ouete) as the Main Case. The Main Case team also continues to receive Article 70 filings, including those which cite directly to communications between Mr. Mangenda and Mr. Bemba (such as the 2nd BTM – see Annex A concerning the members of the Prosecution Main Case and shared appellate section who access article 70 filings including motions which attach or discuss detention center communications).

¹⁷ Decision para. 17.

20. Finally, the Trial Chamber found that although it had reached a determination on Article 69(7) of the Statute, it would defer its ruling on Article 69(4) until the deliberation of its judgment (“the Seventh Issue”).¹⁸

The issues impact significantly on the fairness and expeditiousness of the proceedings

21. The question as to the burden of proof regarding the admission of evidence (“the First Issue”) relates directly to the right of the Defence under Article 67(1)(i) of the Statute not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal. The Appeals Chamber has indicated in this regard that whilst the Defence must raise “issues” regarding the admissibility of evidence at the time that it is tendered, the burden of arguing against a determination of admissibility should not be placed on the Defence.¹⁹ Placing the burden on the Defence to disprove prior rulings by the Single Judge falls foul of this interdiction.

22. Trial Chamber I,²⁰ and the *ad hoc* Tribunals have also found that the question as to whether evidence was obtained by breaches of the Statute or violations of internationally recognised human rights is directly relevant to the reliability of the evidence, and the prejudicial impact of its admission.²¹ Trial

¹⁸ Decision, para. 19.

¹⁹ ICC-01/05-01/08-1386, para. 73.

²⁰ ICC-01/04-01/06-1981, paras. 30, 40. The Trial Chamber found that Article 69(7) is *lex specialis* as concerns the reliability and prejudice component in Article 69(4) (para. 34).

²¹ ICTY, *Prosecutor v. Mucic et al.*, IT-96-21-T, “Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence”, 2 Sep 1997, at paras. 41 -42. “The Trial Chamber now adverts to the required burden of proof in respect of the admissibility of evidence sought to be excluded on the grounds of the voluntariness or not of the Statements or its legality or illegality on which issue has been joined. The Rules insist that all evidence which are reliable and have probative value are admissible. For evidence to be reliable it must be related to the subject matter of the dispute and be obtained under circumstances which should cast no doubt on its nature and character, and the fact that no rules of the fundamental rights have been breached. This can be done if the evidence is obtained in

Chamber I further found that such issues can be considered by the Chamber *proprio motu* (i.e. even if the Defence raises no issues or argumentation under Article 69(7)).²²

23. It follows that as a result of its obligation to fulfil the admissibility criteria in Article 69(4) regarding reliability and absence of prejudice, the burden remains on the Prosecution to exclude the applicability of Article 69(7); the placement of this burden on the Defence therefore affects the fairness of the proceedings.

accordance with Rule 95, by methods which are not antithetical to and would not seriously damage, the integrity of the proceedings. There is no doubt statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95. The burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the Prosecution. Since these are essential elements of proof fundamental to the admissibility of a statement, the Trial Chamber is of the opinion that the nature of the issue demands for admissibility the most exacting standard consistent with the allegation. Thus, the Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt. We agree with the Defence that this is the required standard.”

ICTY, *Prosecutor v. Martić*, IT-95-11-T, "Annex A: Guidelines on the Standards Governing the Admission of Evidence", 19 Jan 2006, para. 9 “9. Rule 95 of the Rules provides for the exclusion of improperly obtained evidence. It declares that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage the integrity of, the proceedings. Accordingly, the Trial Chamber makes it clear at the very outset that statements which are not voluntary, but rather are obtained by means including oppressive conduct, cannot be admitted pursuant to Rule 95. If there are *prima facie* indicia that there was such oppressive conduct, the burden is on the party seeking to have the evidence admitted to prove that the statement was voluntary and not obtained by oppressive conduct.”

ICTY, *Prosecutor v. Oric*, IT-03-68-T, "Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings", 21 Oct 2004, Section III, para (x). “The Trial Chamber draws the attention of the parties to Rule 95, which provides that evidence that was obtained by methods which cast substantial doubt on its reliability or evidence that is antithetical to, and would seriously damage, the integrity of the proceedings, is not admissible. The Trial Chamber makes it clear at the very outset that involuntary statements, obtained from witnesses by oppressive means, cannot pass the test under Rule 95. [fn 20] The burden of proof in establishing that a statement was voluntary lies on the party seeking to introduce it, whereby the standards discussed under guideline B shall be applicable.”

²² ICC-01/04-01/06-1399.

24. The second, third, fourth, fifth and sixth issues all impact significantly on the principle of legality, and the right of the accused, under Article 67(1)(b) to have adequate time and facilities to prepare the Defence, and to communicate freely with counsel in confidence.
25. In terms of the first aspect, the threshold and procedures for accessing detention communications for use as evidence relate directly to Mr. Bemba's right to be free from arbitrary interference with his communications.
26. The manner in which the Single Judge and the Trial Chamber approached the 'reasonable suspicion' threshold also affects significantly the impartial, independent and adversarial nature of the proceedings, and the Prosecution's burden of proof.
27. As found by both the ICC,²³ and the European Court of Human Rights,²⁴ the Judge/ Chamber issuing a ruling as to the existence of a reasonable suspicion is required to make his/her/their own assessment as to whether the evidence fulfils this standard. It is not permissible to rely on mere assertions by the Prosecution.
28. With respect to the rights under Article 67(1)(b), the *ad hoc* Tribunals have found that the right to enjoy privileged communications with members of the Defence other than Counsel is a derivative right.²⁵ In essence, the protection afforded to Counsel-Client communications would become

²³ ICC-01/04-01/07-572, para. 26.

²⁴ *Kolesnichenko v. Russia* App 19856/04 (ECHR, 9 April 2009), para.32, *Nagla v. Latvia* App no. 73469/10 (ECHR, 16 July 2013) Para.94; *Misan v. Russia* App no. 4261/04 (ECHR, 2 October 2014) Para.56 and 57; and *Smirnov v. Russia* App no. 71362/01 (ECHR, 7 June 2007), para.44; *Smirnov v. Russia* App no. 71362/01 (ECHR, 7 June 2007), para.44;

²⁵ *Prosecutor v. Gotovina.*, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia', 14 February 2011, para. 27.

meaningless if communications and work-product, which are intrinsically linked to Counsel-Client communications, have no derivative protection.

29. This right to derivative protection as concerns communications linked to Defence strategy and internal work product is particularly crucial as concerns case managers, whose role and status means that they are involved in a range of confidential evidential issues, and by necessity, act as interlocutors between and on behalf of different Defence team members.

30. In this regard, by virtue of his role in the team, any communication between Mr. Mangenda and Mr. Bemba would necessarily concern the “role and communications between the two accused”.²⁶ The protections which should be afforded to Defence confidentiality will necessarily be rendered illusory if the Chamber were to employ an exception which is tailored specifically towards excluding all case-manager oriented communications.

31. The fact that a non-privileged line was used also cannot be either dispositive or a significant fact as regards the question of protection from disclosure to the Prosecution, since both the Appeals Chamber’s case law²⁷ and Regulation 175 (11) of the Regulations of the Registry envisage - within the context of non-privileged communications - prior vetting in relation to individual communications (and not just persons) potentially captured by Defence confidentiality.

32. The Appeals Chamber has also found that the Chamber is obliged to consider on an item-by-item basis whether there are grounds for excluding

²⁶ Decision, para. 19.

²⁷ ICC-01/04-02/12-271-Corr, para. 263.

evidence due to violations of internationally recognised human rights.²⁸ This obligation translates to a duty to consider the specific circumstances of each communication, rather than the generic circumstances relied on by the Single Judge (i.e. Mr. Mangenda's role). To hold otherwise dilutes, and thus affects significantly, the protection afforded by Article 69(7).

33. Issues linked to the question as to whether and when the Defence can depend on case manager communications and product to remain confidential ex-parte *vis-à-vis* the Prosecution strike at the heart of the ability of the Defence to prepare its case in an efficient, expeditious, and confidential manner, and therefore affect significantly the fairness of the proceedings. This is in line with the finding of the ICTY that the monitoring of such communications can "seriously infringe upon the right of the Accused to a fair trial".²⁹

34. To the extent that such issues also impact on the extent to which the Prosecution can utilise its Article 70 powers in order to seek and obtain direct access to such communications which are merely relevant to the Prosecution, the issues also affect the notion of equality of arms.

35. The Trial Chamber's approval of the right of the Prosecution to access directly case manager-accused communications on the basis of relevance to its case affects significantly the carefully calibrated Defence disclosure regime set out in the Statute and Rules, which is designed to protect the defendant's right of silence and privilege against self-incrimination.

²⁸"Similarly, whether evidence was obtained in violation of the Statute or human rights or relates to the prior or subsequent sexual conduct of a victim or witness can only be determined on an item-specific basis", ICC-01/05-01/08-1386, para. 53.

²⁹ ICTY, *Prosecutor v. Seselj*, IT-03-67-T, "Redacted version of the 'Decision on monitoring the privileged communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex' filed on 27 November 2008", 1 December 2008, paras 22-33.

36. Finally, the Trial Chamber's bifurcation of its consideration of Article 69(7) and 69(4) was unforeseen to the Defence, and has created a situation in which the Trial Chamber has issued a predetermination on issues of legality, whilst leaving it open to the Prosecution to further bolster its arguments on relevance and reliability throughout the trial process. This violates equality of arms. There is no legal or procedure basis for according the Prosecution with an open-ended opportunity to supplement and establish the elements of admissibility under Article 69(4) throughout the trial process, whilst precluding the right of the Defence to do the same as concerns Article 69(7).

37. With respect to expeditiousness, issues of Defence confidentiality and the role of the case manager relate squarely to the preparation of the Defence, which in turn, affects the expeditiousness of the proceedings.

38. The legal, evidential, and procedural threshold for disseminating Defence communications to the Prosecution also affects the volume, and nature of information which can be relied upon by the Prosecution in this case, which in turn impacts, and prolongs the presentation of both the Prosecution case and the Defence case.

The issues affect the outcome of the trial

39. The seven issues all relate to the Prosecution's ability to rely on the Detention Centre Materials. In turn, the Prosecution's case as concerns Mr. Bemba, Mr. Babala and Mr. Mangenda is built mainly on intercepted communications. The admissibility or potential exclusion of such communications will affect specific counts, if not the overall charges against these accused.

40. The issues are therefore germane to the outcome of the trial. This is consistent with the fact that Trial Chamber II has recognised that the procedure and criteria for granting the Prosecution access to detention unit communications for use as evidence are matters which will affect the outcome of a trial.³⁰

An immediate determination by the Appeals Chamber's would materially advance the proceedings

41. In line with the above point, it is absolutely critical that any errors in the Trial Chamber's Decision are corrected prior to the commencement of the Defence case, and not after the completion of the trial itself.

42. If the Detention Centre Materials were excluded – in whole or in part - then the Defence could decide to lead no evidence during the Defence case in relation to several or many counts or allegations, which are only supported by such evidence.

43. Indeed, the crux of the Defence arguments concerning these materials is that they touch on crucial issues regarding the defendant's right of silence and protection against self-incrimination.

44. In the absence of an immediate appellate resolution, the Defence would be compelled to further waive their right of silence by addressing and contextualising the contents of these communications. This would both compound the initial prejudice, and create a situation which is irremediable on final appeal.

³⁰ ICC-01/04-01/07-1303-tENG-Red, para. 15.

45. The scenario therefore fall squarely within Trial Chamber II's conclusion in relation to the use of detention unit materials as evidence that an immediate appellate ruling was necessary because:³¹

the introduction of both incriminating and exculpatory evidence is at stake, which must be analysed by the parties and put into perspective in relation to all the information they currently hold, all of which has an obvious impact on the organisation and conduct of the hearings on the merits.

46. Similarly, if the Trial Chamber erred as concerns its split approach to Article 69(4) and (7), in the absence of an immediate appellate ruling, the Defence will be denied irrevocably both the benefit of legal certainty concerning which evidence is or is not admitted for the purposes of its preparation for the Defence case, and the right to adduce supplementation evidence and information in relation to previously unknown issues of legality regarding these communications.

Relief sought

47. For the reasons set out above, the Defence requests the Trial Chamber to grant leave to appeal in relation to the issues set out herein.

³¹ ICC-01/04-01/07-1303-tENG-Red, para. 20.



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Dated 9 November

2015

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