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

Date: **2 June 2016**

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 Redacted Document

**Public redacted version of “Prosecution’s Submission on Keywords to Identify
Items of a Privileged Nature within Seized Materials”, 3 January 2014,
ICC-01/05-01/13-66-Conf**

Source: The Office of the Prosecutor

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

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I. Introduction

1. Pursuant to the 13 December 2013 Order of the Single Judge of Pre-Trial Chamber II, the Prosecution hereby submits its list of keywords to assist an Independent Counsel to identify privileged items among the materials seized at the arrests of suspects JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU and NARCISSE ARIDO (“Submission”).

2. There are certain qualifications however, that should be considered in respect of the use of the keyword list. First, the Prosecution is unaware of Messrs KILOLO and MANGENDA’s electronic filing and labelling systems for attorney-client communications and privileged work-product. The Prosecution is thus not in an informed position to be able to fully identify and suggest keywords to filter out such privileged material. Further, although the use of keywords to identify presumptively privileged material can be useful in many circumstances, where counsel is allegedly complicit in the commission of the crimes charged, their use will be less effective without additional review.

3. The Prosecution thus defers to the discretion of the Single Judge as to the appropriate use of the keyword lists provided by the parties. However, this should be accompanied by a careful review of any potentially privileged material so identified.

II. Request for Confidentiality

4. The Prosecution requests this Submission be received by the Single Judge as “Confidential” as it responds to a confidential order from the Single Judge.

III. Submissions

5. In addition to the names of Suspects, BEMBA, KILOLO and MANGENDA, as well as the names and contact details of current and former members of the Defence in *Prosecutor v. Jean-Pierre Bemba Gombo* (retained by the Registry), the Prosecution considers that the following keywords, in French or English may assist Independent Counsel to screen for privilege in the review of the seized material:

[REDACTED].¹

6. Keyword searches of the seized material should form only part of the review for potential privilege. Given the nature of the case and the manner of its alleged perpetration, it is at best exceedingly difficult to identify genuinely privileged material using keywords alone.² Although the legal privilege recognised by Rule 73(1) extends only to professional communications between an accused and his or her legal counsel, for present purposes the Prosecution is prepared to accept that privileged material may also be found in documents drafted by KILOLO, MANGENDA, other attorneys, or their former client BEMBA, in preparation for litigation or investigations. Privileged material may also consist of KILOLO or MANGENDA's opinions, conclusions, and legal theories arising from their former client's case. Keyword searches should thus be only a preliminary step toward identifying potentially privileged material and should not replace the full review of indicated documents.

¹ [REDACTED].

² Since this case involves the alleged criminal misconduct of attorneys, keyword searches alone will not likely be sufficient to isolate and exclude genuinely privileged material from crime-fraud exception material. See ICC-01/05-52-Conf-Red, "Decision on the Prosecutor's 'Request for judicial order to obtain evidence for investigation under Article 70'", 29 July 2013 at para. 3 (recognizing the crime-fraud exception in that "[t]he statutory right to communicate freely and in confidence with counsel of his own choosing, as set forth in article 67(l)(b) of the Statute, is obviously forfeit whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice, the more so when - as in the present case - the counsel seems to be an accomplice in the scheme.")

7. The Prosecution considers that a further independent review of documents for privilege should be conducted after the keyword searches are complete, since these searches will invariably fail to identify electronic documents insufficiently indexed or formatted to allow a text search. Such documents need to be checked for privilege individually as even the best-constructed electronic search for potentially privileged material cannot guarantee filtering out all such material.

8. Finally, documents, emails, or other electronic written material (SMS, Instant Messaging) that appear privileged should not be considered conclusively so since the context or purpose for which the documents were created may vitiate any privilege. As the Single Judge has found,³ an otherwise privileged communication between accused and counsel will not be privileged if the communication was made in furtherance of the commission of a crime. Neither is the storage location of the document in the electronic device conclusive indication of privilege, although in some cases, this may be strongly indicative of the privileged or non-privileged nature of the document. For instance, a document drafted by counsel, which lays out the defence case strategy, will likely fall under a privilege if it is found latent in a folder on an electronic device. However, that same document may comprise evidence of corruptly influencing a witness if it is found in an email attachment to a witness, thus vitiating any privilege.

³ See ICC-01/05-52-Conf-Red, "Decision on the Prosecutor's Request for judicial order to obtain evidence for investigation under Article 70", 29 July 2013 at para. 3 (recognizing the crime-fraud exception in that "[t]he statutory right to communicate freely and in confidence with counsel of his own choosing, as set forth in article 67(l)(b) of the Statute, is obviously forfeit whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice, the more so when - as in the present case - the counsel seems to be an accomplice in the scheme.")

9. In view of the above, the Prosecution defers to the Chamber as to the use and propriety of the keyword searches of the seized material from the lists provided by the parties. However, the Prosecution considers that an additional review of any indicated potentially privileged material is necessary to assist Independent Counsel fully to identify such material and to ensure the integrity of proceedings before the Court.



Fatou Bensouda, Prosecutor

Dated this 2nd Day of June 2016
At The Hague, The Netherlands