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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

**Public Redacted Version of “Defence Observations on «Addendum au Rapport du
Conseil indépendant sur la levée des scellés et l’analyse de pièces saisies par les
autorités françaises et les autorités belges (Décisions ICC-01/05-01/13-41 et ICC-
01/05-01/13-366 et 446)»”**

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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**Victims Participation and Reparations
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Other

Introduction

1. On 7 July 2015, the Registry transmitted the Report of the Independent Counsel to the Defence for Mr. Jean-Pierre Bemba.¹ On 9 July, its annex was transmitted to the Defence.²
2. The annex to the Report does not contain information with forensic value or relevance to this particular case.
3. Moreover, as the Report and its annex were transmitted to the Defence after 30 June 2015 (which was deadline for the disclosure of evidence that the Prosecution intends to rely upon at trial), the Prosecution should not be permitted to include it on its list of evidence.
4. In such circumstances, it would be inutile and disproportionately prejudicial to authorise the transmission of this information to the Prosecution.
5. The Defence has filed these Observations on a *confidential ex parte* (Kilolo and Bemba Defence only) basis, corresponding to the confidential level of the Independent Counsel Report in question. The Defence will file a confidential redacted version forthwith.

Submissions

The annex has no forensic value or relevance

1. It is impossible to advance any meaningful comment on the substance of the annex to the Independent Counsel Report. It is the personal work product of the

¹ ICC-01/05-01/13-1035-Conf-Exp.

² ICC-01/05-01/13-1035-Conf-Exp-Anx.

Independent Counsel, rather than the original material extracted from Me. Kilolo's memory card.

2. In addition, the information therein is insufficient and ambiguous to be forensically relevant.

3. The annex is said to be a table of "*contacts pertinents [...] reproduits*" from a list of contacts in Me Kilolo's "*carte mémoire*".³

4. At the outset, it exceeds the mandate of the Independent Counsel to *reproduce* materials and identify his work product as the relevant materials.⁴ It is particularly problematic since the Independent Counsel failed to explain how the information was stored and displayed in the original format, and to elaborate how exactly the table in the annex was reproduced.

5. The manual removal of selected entries from the original list of contacts destroyed the data integrity of this information. As a result, both the Defence and the Trial Chamber are deprived of the capacity to independently verify the content of the work product. Should there be a typographical error in a number, for instance, it will remain undiscovered.

6. The annex also does not, on its own, provide sufficient information for attribution purpose.

7. The table (which was compiled by the Independent Counsel) consists of a random combination of what appear to be names of various persons and places, and a series of numbers. There is no contextual information that could shed light on the nexus between these words and the number.

8. In particular, as a result of the fact that the information has been extracted from its original context and internal organisation, it is impossible to ascertain whether there was a system as concerns the particular combinations of words

³ ICC-01/05-01/13-1035-Conf-Exp, para 7.

⁴ See ICC-01/05-01/13-366-Conf.

attributed to each number, or whether this combination resulted from a display error, or were appended there as sub-headings or metadata which has no relevance to the actual number itself.

9. For example, the word combination “Bemba kokate [REDACTED] peter” does not correspond to a number of either Peter Haynes QC or Joachim Kokate, but appears to be the number of a potential Defence witness, who was resident in [REDACTED].

10. Similarly, the words “Bemba location avion courtier” are misleading in the absence of their proper context. These details were included in the Defence request for Mr. Bemba to be released temporarily to the DRC, for the purposes of registering to vote in the election. The Defence had proposed that the Court could rent a plane to transport Mr. Bemba there and back, and had submitted specific companies as part of its proposal.

11. Moreover, the Independent Counsel failed to provide any information on what a “*carte mémoire*” is and where it comes from. It may refer to the SIM card, the SD card or other chips which all have the ability to store a contact list as such. This is directly relevant as the extraction procedure would vary depending on the type of memory card.

Private or privilege information

12. On the basis of the information provided, it is impossible to discern the context, content, and purpose of these words and numbers.

13. It is also unclear if these contacts were stored in a phonebook, list of contacts, or internal Defence documents saved on the memory card. Whilst the overall cluster of names and numbers on the memory card may have been irrelevant to the charges, the cluster might have elucidated whether these particular subset of contacts were collected for specific Defence missions (i.e. [REDACTED]), for the

completion of witness protection forms, or were linked to investigative inquiries falling outside the scope of this case.

14. The reproduction by the Independent Counsel has thus impeded the ability of the Defence to identify the relationship between this data, and the work of the Defence.

15. In its decision of 15 May 2015, the Trial Chamber underscored that:

the requirement to ensure the fairness of the trial, pursuant to Article 64 of the Statute, does recommend the exercise of discretion in the Chamber to decide the scope of materials covered by the crime/fraud exception.⁵

16. In line with this cautious approach, in circumstances in which there is too much ambiguity to draw any conclusions on proper attribution of numbers or context, the contact information in the annex must be regarded as either private or privileged.

17. Accordingly, the Defence requests the Trial Chamber not to transmit the annex to the Prosecution.

The contents of the Independent Counsel Report and its annex cannot be relied upon as incriminating evidence without the prior authorisation of the Trial Chamber

18. In the first status conference before the Trial Chamber, the Chamber emphasised that:

this trial will need to begin and to proceed expeditiously. The Chamber must state right away that if need be it will impose a deadline within which the Prosecutor must collect and analyse any further evidentiary material it says that it is expecting.⁶

⁵ ICC-01/05-01/13-947, para. 15.

⁶ ICC-01/05-01/13-T-8-CONF-ENG, page 70, lines 9-12.

19. On 22 May 2015, the Trial Chamber ruled that “by [30 June 2015], the Prosecution must disclose all evidence upon which it intends to rely at trial.”⁷

20. Reading the above together, it is very clear that the Prosecution no longer enjoys the right to freely add items to its list after the 30 June deadline.

21. When the Trial Chamber set this deadline, the Trial Chamber anticipated that certain materials received from national authorities would not become available to the Prosecution prior to its expiration. The Trial Chamber nonetheless did not exempt this category of materials from the disclosure deadline. Therefore the “evidence” or “evidentiary material” referred to in the Trial Chamber’s ruling includes the materials reviewed by the Independent Counsel.

22. Continuous disclosure beyond the stipulated deadline would undermine the very purpose of this deadline – which is to ensure the defendant’s right to adequate time and facilities to prepare their respective defences.

23. The need for sufficient time is of particular importance in connection with ambiguous information, which would need to be forensically tested and verified in order to ascertain potential relevance, and lines of Defence.

24. The Prosecution has a right that there is a fair trial. This will not occur if the Defence is forced to review and respond to disclosure on a piecemeal basis, without any fixed cut-off, and respite from the accompanying litigation.

25. Finally, it must be noted that the delays in the review process are attributable to the scope of the materials seized by the national authorities, which in turn, stems from the Prosecution’s failure to submit targeted request for relevant information. The Independent Counsel has been mandated to identify ‘relevant’ information. The fact that it was necessary to appoint an Independent Counsel in the first point is a testament to the illegal and overly broad nature of the Prosecution’s requests for assistance to national authorities.

⁷ ICC-01/05-01/13-959, para 49.

26. In such circumstances, the defendants' right to a speedy trial must be given priority over the Prosecution's ability to continue to benefit from the fruits of its various fishing expeditions.

Relief Sought

27. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Trial Chamber to:

- i. Confirm that the information in the annex to the Independent Counsel Report is either not relevant to the Article 70 case, or contains privileged information /confidential work product; and
- ii. Order the annex not to be transmitted to the Parties.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 29th of June 2016

The Hague, The Netherlands