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

Date: 15/06/2016

**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***

**Public Redacted Version of “Defence Response to “Prosecution’s Motion for the  
Lifting of Redactions and the Release of Information Contained in Independent  
Counsel Reports”, ICC-01/05-01/13-1537-Conf”**

**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 and Witnesses Unit**

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**Victims Participation and Reparations Section Other**

## Introduction

1. The Defence for Mr. Jean-Pierre Bemba opposes the late and unjustified attempt by the Prosecution to conduct further incriminating investigations with a view to reopening their case six months after the deadline for the submission of their list of evidence, and more than two months after the close of their case.
2. The Prosecution has framed its request as a motion to lift redactions and release information contained in Independence Counsel reports (the Request).<sup>1</sup> This terminology does not, however, mitigate the Prosecution's lack of diligence in seeking access to the information in a timely manner, nor does it diminish the prejudice faced by the Defence as a result of the tardy submission of the Request.
3. The Request should therefore be dismissed.

## Submissions

4. The Prosecution has attempted to argue that the information covered by the redactions should be lifted because the "information [is] relevant to the case in light of the trial evidence or the Defence's list of prospective witnesses".<sup>2</sup>
5. Relevance to the Prosecution is not in itself, a valid basis for lifting privilege or confidentiality of Defence communications.
6. To provide a concrete example, the Prosecution has averred that entries 10 and 11 in ICC-01/05-01/13-670-Conf-AnxC-Red should be disclosed to the Prosecution due to the fact that information concerned instructions from the client

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<sup>1</sup> ICC-01/05-01/13-1537-Conf

<sup>2</sup> ICC-01/05-01/13-1537-Conf, para. 14.

regarding the preparation of a witness, and had been deemed relevant by the Independent Counsel.<sup>3</sup>

7. The Independent Counsel had in fact, recommended that all but a very discrete component of these emails be redacted from the Prosecution. In turn, that component was privileged or exculpatory, and did not concern any fraudulent conduct.<sup>4</sup>

8. The Prosecution has, moreover, failed to refer to any new circumstances or issues, which would justify the Trial Chamber reconsidering its previous decision to redact the information in question.

9. The issues delineated by the Prosecution at paragraph 15 of the Request were all known to the Trial Chamber and the Prosecution at the time that the Trial Chamber issued its respective decision on the reports of the Independent Counsel (and related redactions). The relevance of these persons and contacts has not changed in the interim.

10. By arguing that the contacts and persons in question are relevant to the charges, the Prosecution is firstly, seeking to expand the scope of the charges and the related crime-fraud exception, and secondly, re-argue the merits of the Trial Chamber's initial decisions as concerns these redactions.

11. As concerns the first aspect, the Defence had a right to be informed of the specific scope of the charges in this case promptly, and prior to the commencement of the trial. If the Prosecution wished to advance the position that the scope of the incidents in this case should be broadened to encompass third persons or witnesses,

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<sup>3</sup> ICC-01/05-01/13-1537-Conf-AnxA, p. 2.

<sup>4</sup> ICC-01/05-01/13-920-Conf-Exp, paras. 14-17; ICC-01/05-01/13-920-Conf-Exp-AnxA, p. 4; ICC-01/05-01/13-917-Conf-Exp, paras. 23-27

who are not set out in the charges, then this position should have been advanced prior to the commencement of the trial.

12. As regards the second aspect, the Single Judge's previously refused to reconsider the Chamber's stance on redactions due to the fact that the Defence had "advance[d] no new facts or arguments arising since the Impugned Decision".<sup>5</sup> There does not appear to be any valid justification for departing from this position in connection with the current Request.

13. The Prosecution also received the redacted versions of the reports several months ago, and before the commencement of the Prosecution case. There is, however, no explanation or justification as to why the Prosecution did not seize the Chamber with its Request at an earlier and less prejudicial juncture.

14. For example, in its application of 31 July 2015 to add additional items to its list of evidence, the Prosecution also set out its position regarding the alleged attribution of the number [REDACTED] to Mr. Babala.<sup>6</sup> Moreover, in the Prosecution's third bar table motion, the Prosecution relied on the Independent Counsel's attribution of numbers to Mr. Babala in as set out in the Independent Counsel Report ICC-01/05-01/13-845-Conf-AnxC-Red.<sup>7</sup> The Prosecution was therefore clearly aware of the potential relevance of the information set out in Annex D of the same report to its case, but chose to take no action.

15. Similarly, in support of their request to access to information concerning [REDACTED], the Prosecution cites the statement of P-270.<sup>8</sup> This statement was taken by the Prosecution on **4 March 2015**.

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<sup>5</sup> ICC-01/05-01/13-1282, para. 9. See also ICC-01/05-01/13-1166-Conf, para. 18: "The Bemba Defence has provided no cogent reason or change in circumstances that would lead the Chamber to vary the redactions ordered by the Single Judge."

<sup>6</sup> ICC-01/05-01/13-1114-Conf, para. 14.

<sup>7</sup> ICC-01/05-01/13-1170-Conf-AnxA, p. 30.

<sup>8</sup> ICC-01/05-01/13-1537-Conf, para. 16 citing CAR-OTP-0088-0105.

16. In this connection, although the Prosecution has an ongoing duty to review redactions with a view to disclosing information under Article 67(2) or Rule 77 information, it does not have an open licence to do so with a view to bolstering its case with incriminating elements. In particular, the Appeals Chamber underscored in the *Mbarushimana* case that the Prosecution's "investigation should largely be completed at the stage of the confirmation of charges hearing".<sup>9</sup>

17. This finding is underpinned by the assumption that the Prosecution must conduct its investigations with due diligence, and full respect for the defendant's right to a speedy trial. In its decision establishing the deadline for disclosure, Trial Chamber VII also explicitly put the Prosecution on notice that it would adopt a stringent approach as concerns information which was not disclosed in due time as a result of delays occasioned by the review process undertaken by the Independent Counsel.<sup>10</sup>

18. Of further concern, although the Prosecution asserts that it requires access to the information in question "for its preparedness to meet the Defence case",<sup>11</sup> this is a just an oblique way of stating that the Prosecution wishes to admit the information into evidence during the Defence case, due to the fact that it failed to do so during the Prosecution case.

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<sup>9</sup> ICC-01/04-01/10-514, para. 44. See also ICC-01/09-02/11-728, paras. 118-119.

<sup>10</sup> "Some of these materials have been withheld because they are being reviewed by an independent counsel to see if they are privileged, whereas others have not been provided because they contain electronic data which has not been extractable to date. Despite the Prosecution's lack of fault as to why it has not been able to review these materials, waiting for them would entail a delay of an indefinite duration. It is noted that the Prosecution sought and obtained confirmation of charges on the basis that the Prosecution had evidence to establish substantial grounds to believe that the accused committed the crimes charged. The trial may not thus be delayed on the speculative hope that further evidence may be uncovered from materials not now in the possession of the Prosecution. Given the Chamber's obligation to ensure an expeditious trial which occurs without undue delay, at some point the Prosecution must proceed to trial with the evidence in its possession. "ICC-01/05-01/13-959, para. 50.

<sup>11</sup> ICC-01/05-01/13-1537-Conf, para. 21.

19. The present Request thus falls squarely within the terms of the Trial Chamber's previous rejection of the admission of items from the Independent Counsel, which were not placed on the Prosecution list in a timeous manner.

20. In particular, when the Prosecution attempted to tender extracts from reports by the Independent Counsel which had not been placed on its list, Trial Chamber VII ruled that,<sup>12</sup>

The Chamber considers that the failure to include these four annexes on the list of evidence creates an unacceptable risk that the accused were unprepared for these items during the Prosecution's evidence presentation, particularly given that they were only submitted contemporaneously with the Prosecution closing its evidence presentation.

21. The risks referred to above remain present. Some of the requested information concerns Prosecution witnesses who have already testified (for example, D-3 and P-201). The Defence therefore has no means to contextualise or address this information through their testimony.

22. As of 21 January 2016, the Defence waived its right of silence, and advanced its case through the submission of its list of witnesses and exhibits. The Defence obtained instructions as concerns the formulation of these lists on the basis of the information submitted in the record during the Prosecution case. The Defence has also allocated limited time and funds to specific expert/s, and prioritised accordingly.

23. Any late variation in the content of the Prosecution case would require the Defence to review its lists of evidence and witnesses, and either supplement or vary them further after having been first accorded adequate time to conduct supplementary investigations in relation to this information. The ensuing delays would be disproportionate and contrary to Mr. Bemba's right to a speedy trial.

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<sup>12</sup> ICC-01/05-01/13-1524, para. 6.

**Relief sought**

24. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Trial Chamber to reject the Request.

A handwritten signature in blue ink, appearing to be 'MT', is centered on the page.

Melinda Taylor  
Counsel of Mr. Jean-Pierre Bemba

Dated this 15<sup>th</sup> day of June 2016

The Hague, The Netherlands