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**International
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Court**

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Date: **2 September 2015**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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***

**Confidential Document
With
Confidential Annex A**

**Prosecution's Response, or in the alternative, Request to seek Leave to Reply to
Bemba's and Arido's Submissions to the Mangenda Defence Motion to Declare
Inadmissible Telephone Intercepts of Mangenda (ICC-01/05-01/13-1136-Conf-Corr)**

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. The Trial Chamber VII ("Chamber") should deny the submissions filed by Bemba and Arido in support of Mangenda's motion.¹ The Submissions create new arguments to which the Office of the Prosecutor ("Prosecution") did not have an opportunity to respond and which, like Mangenda's motion,² misconstrue the Prosecution's investigation, its request for judicial authorisation to collect recordings of telephone calls placed or received by Kilolo and Mangenda, and the Single Judge's authorisation of the Prosecution to seize the relevant national authorities of a corresponding request for the Accused's surveillance.

2. The Prosecution should have the right to respond, or in the alternative, now seeks leave to reply to those arguments. The Motion and the Submissions should be denied.

II. Confidentiality

3. This filing and its Annex A are classified as "Confidential" as they respond to filings of the same designation. The Prosecution does not object to their reclassification as "Public".

¹ ICC-01/05-01/13-1179-Conf ("Bemba Submission"); ICC-01/05-01/13-1178-Conf ("Arido Submission") (collectively "Submissions").

² ICC-01/05-01/13-1136-Conf-Corr ("Motion").

III. Submissions

A. The Chamber should permit the Prosecution to respond or, in the alternative, reply to the Submissions

4. The Chamber should allow the Prosecution to respond to the new arguments raised by Bemba and Arido in their filings supporting the Motion. Fairness requires nothing less. Despite claiming that his submission “is confined to the specific grounds for exclusion set out in the Mangenda Motion”,³ Bemba argues “further”⁴ different forms of alleged misrepresentations by the Prosecution than those advanced by Mangenda.⁵ Arido and Bemba also advance new arguments in support of Mangenda’s unsubstantiated contention⁶ that an exclusionary rule applies if the Prosecution deliberately misled the Single Judge,⁷ which it did not.⁸ Both are new arguments to which the Prosecution should have the right to respond, pursuant to regulation 24(1) of the Regulations of the Court (“RoC”).⁹ However, the Prosecution considers that a response is necessary only as to the first argument.

5. The Submissions continue what has now become a predictable pattern of the Defence to advance new arguments and new forms of relief in circumvention of the rules of procedure, depriving the Prosecution of the right to respond to those arguments.¹⁰ Contrary to the clear intention of the Chamber in scheduling deadlines

³ Bemba Submission, para.12.

⁴ Bemba Submission, para.14.

⁵ See Bemba Submission, paras.15-21.

⁶ In his motion, Mangenda failed to cite any support for his assertion that “[w]hen judicial authorisation is induced by a material misstatement, many national systems, depending on the circumstances, will not permit any information obtained as a result of such a violation to be used as evidence.” Motion, para.5.

⁷ Bemba Submission, paras.22-89; Arido Submission, paras.3-14.

⁸ See generally ICC-01/05-01/13-1180-Conf.

⁹ See ICC-01/05-01/13-1154 (“Decision on Disclosure”), para.8; ICC-01/09-02/11-886, para.8.

¹⁰ See e.g. ICC-01/05-01/13-1161; ICC-01/05-01/13-1078-Conf; ICC-01/05-01/13-1032; ICC-01/05-01/13-1031.

for filings and responses, this kind of gamesmanship¹¹ defeats not only the expeditious conduct of the proceedings, but undermines its fairness.¹²

6. Alternatively, and for the reasons articulated above, the Prosecution requests leave to reply pursuant to regulations 24(5) and 34(c) of the RoC in light of the new arguments contained in the Submissions.

B. Bemba misconstrues the Single Judge's judicial order

7. Bemba's submission reflects a fundamental misunderstanding as to the scope of the judicial authorisation requested by the Prosecution and granted by the Single Judge. Contrary to Bemba's assertions,¹³ neither the Prosecution's request to pursue the interception of phone calls as a further investigative measure, nor the Single Judge's authorisation of the Prosecution to request such action of the relevant State authorities, was predicated strictly on Bemba's alleged misuse of the attorney-client privilege. As articulated in the Prosecution's request, the case under investigation concerned a "scheme to bribe Defence witnesses in exchange for false testimony and false documents."¹⁴ The Prosecution thus sought authorisation to collect recordings of

¹¹ See e.g. ICC-01/05-01/13-1202, para.4; ICC-01/05-01/13-1206-Conf, para.3.

¹² See ICC-02/04-112, para.27 ("fairness also extends to other parties in proceedings such as the Prosecution."); *Joint Dissenting Opinion of Judges Ekaterina Trendafilova and Cuno Tarfusser*, ICC-01/04-02/12-271-AnxA, para.6 ("As correctly contended by the Prosecutor, the "right to a fair trial [which] is guaranteed under [a]rticle 64(2) [of the Statute] [...] obliges the Court to ensure that neither party is put at a disadvantage when presenting its case"); *Prosecutor v. Tadić*, Appeal Judgement, IT-94-1-A, 15 July 1999, paras.43, 44, 48, 52; *Prosecutor v. Kalimanzira*, Appeal Judgement, ICTR-05-88-A, 20 October 2010, para.34; *Prosecutor v. Nahimana et al.*, Appeal Judgement, ICTR-99-52-A, 28 November 2007, para.173; *Prosecutor v. Kayishema and Ruzindana*, Appeal Judgement, ICTR-95-1-A, 1 June 2001, para.69; *Prosecutor v. Renzaho*, Appeal Judgement, ICTR-97-31-A, 1 April 2011, para.191. Chambers sitting in multi-accused cases in other tribunals have been mindful of these types of tactics and, in line with considerations of fairness and efficiency, have put into place procedural safeguards. For instance, in the *Prlić* case, a case involving six accused, a Pre-Trial Chamber of the ICTY required that "[w]herever possible, the Defence should file joint motions and responses" and that in any event "[t]he deadline for any Accused to join a motion filed by a co-Accused shall be seven days from the filing of that motion" to which "[t]he Prosecution should file a single response, within fourteen days of the initial motion."; *Prosecutor v. Prlić et al.*, IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006, para.9(q). See also *Prosecutor v. Milutinović et al.*, IT-05-87-T, Order on Procedure and Evidence, 11 July 2006, para.12; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecution Request for Extension of Time to Respond to Expected Defence Motions, 21 October 2004, p.2.

¹³ Bemba Submission, paras.15-19.

¹⁴ ICC-01/05-51-Conf ("Request for Authorisation"), para.14.

the phone conversations of Kilolo and Mangenda because it had “sufficient grounds to believe that [Bemba], KILOLO and MANGENDA are likely to be using telephone calls to participate in the scheme to pay Defence witnesses” and that “the recorded calls from Belgium and The Netherlands are likely to be the source of further relevant information bearing on this investigation.”¹⁵ Given the nature of those communications and that they potentially implicated the attorney-client privilege, the Prosecution requested that certain safeguards be put into place.¹⁶

8. The Single Judge’s authorisation comported with the Prosecution’s request.¹⁷ The Single Judge correctly understood that the Prosecution’s investigation concerned a scheme to bribe witnesses in violation of article 70.¹⁸ He noted that there were “sufficient elements warranting access by the Prosecutor to those recordings which might have been instrumental to the furthering of the scheme under investigation, in spite of the fact that such recordings involve conversations to counsel for the Accused.”¹⁹ Given Kilolo’s and Mangenda’s roles on Bemba’s Defence team, the Single Judge understood that those intercepts potentially concerned privileged communications, adopting the safeguards proposed by the Prosecution, and ordering the Independent Counsel to “screen all relevant recordings”, identify those recordings which are “relevant for the limited purpose of the Prosecutor’s investigation”, and deliver them to the Prosecutor.²⁰ The Single Judge protected against any misunderstanding of his decision by requiring that “[a]ny question or issue which may arise in connection with the aforementioned review [...] be promptly submitted [by the Independent Counsel] to the Single Judge for determination.”²¹ Thus, even assuming, *arguendo*, that the Prosecution’s understanding of the judicial

¹⁵ Request for Authorisation, para.29. *See also* para.22.

¹⁶ *See* Request for Authorisation, paras.23, 26-29.

¹⁷ *See* ICC-01/05-52-Conf (“Decision on Request for Authorisation”), p.3.

¹⁸ Decision on Request for Authorisation, p.3.

¹⁹ Decision on Request for Authorisation, para.5.

²⁰ Decision on Request for Authorisation, para.7.

²¹ Decision on Request for Authorisation, para.7. *See also* ICC-01/05-01/13-893-Red, paras.19-25; ICC-01/05-01/13-1094-Conf, para.1.

authorisation was overbroad²² – which it was not – the Single Judge put into place safeguards to ensure that the Prosecution would only receive those communications comporting with the strict limits of the decision.

9. Bemba misunderstands and ignores these salient features of the Prosecution's request and the Single Judge's authorisation.

IV. Relief Requested

10. If necessary, leave should be granted to reply to the Submissions.

11. The Motion and the Submissions should be denied.



Fatou Bensouda, Prosecutor

Dated this 2nd Day of September 2015
At The Hague, The Netherlands

²² Bemba Submission, paras.15, 20.