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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, Redacted

**Defence Request for Leave to Reply to Prosecution Response to “Corrigendum of
the Defence Request for further Orders of Disclosure” (ICC-01/05-01/13-1607)**

Source: Counsel for 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. On the basis of the criterion of ‘relevance’, the Prosecution obtained access to reams of confidential Defence documents, emails, and communications, which they used to build their Article 70 case.

2. Notwithstanding the fact that Prosecution disclosure obligations are far more extensive than those of the Defence, the Prosecution is now seeking to deny the Defence access to key communications concerning the legality of the collection of this evidence.

3. In particular, in its Response to the defence request for further disclosure orders (the Response),¹ the Prosecution has sought to:

- i. Re-litigate legal findings set out in previous decisions concerning the disclosability of all materials concerning the collection of evidence, and the disclosability of email communications as a subcategory of these materials (“the First Issue”);
- ii. Disguise its own repeated and protracted non-compliance by accusing the Defence of failing to request the materials in a timely manner (“the Second Issue”);²
- iii. Assert that it contains no “records” of its meetings with Dutch authorities, without clarifying what it understand by “records” and whether the content of such meetings was recorded in the Prosecution contacts management system (“the Third Issue”);

¹ ICC-01/05-01/13-1607-Conf.

² Alleged delay on the part of the Defence in requesting disclosure may be relevant to sanctions for non-disclosure, but it is not a ground for non-disclosure. It nonetheless bears noting that the Defence for Mr. Bemba first requested the disclosure of the RFAs concerning the Dutch process on 7 June 2014 (ICC-01/04-01/06-2656-Red). The Defence then submitted more detailed correspondence to the Prosecution on 10 July 2015. The Defence has now filed at least three separate motions for disclosure of specific information concerning the Dutch proceedings, and has at all times, emphasised the need for expedition in order to ensure Mr. Bemba’s right to a speedy trial. It is disappointing that the Prosecutor –an impartial Minister of Justice – has resorted to accusations that the Defence is engaging in “gamesmanship” or that it is attempting to derail the trial.

- iv. Assert that it has disclosed all emails concerning the “interception” of the “[Redacted]” number without clarifying whether,
 - a) it in possession of other email correspondence concerning the legality of the interception of other numbers; or
 - b) it is in possession of other email correspondence concerning the legality of the collection of historical data (rather than interception *stricto sensu*) concerning the “[Redacted]” number) (“the Fourth Issue”).
- v. Assert that The Netherlands should be afforded the right to participate in the proceedings, and to assert a retrospective right of privilege over communications concerning the interception/collection of evidence concerning privileged and confidential Defence communications (“the Fifth Issue”).

4. The first two arguments are plainly incorrect and self-serving.

5. As concerns the third argument, the Defence respectfully submits that there is good cause to allow the Defence to reply in relation to whether the Prosecution has construed ‘records’ in an overly narrow sense in order to exclude information contained within its internal contacts management system, and whether such information would, in turn, be disclosable.³

6. During the course of this trial, the Prosecution has disclosed information concerning its contact management system, which suggests that all telephone records and meetings are logged in an internal database. ICC filings also suggest that this practice applies throughout the cases that the Prosecution investigates or prosecutes.⁴

7. Given the detailed and meticulous nature of this system, the absence of any internal record/note/log concerning the 28 August 2013 meeting would be

³ ICC-01/04-01/06-2656-Red paras 17-20.

⁴ ICC-01/04-01/06-2693-Red, para. 21.

surprising, and raise questions concerning the nature and content of this meeting, and the extent to which it could serve as a basis for interception of a number attributed to a Defence counsel.

8. Regarding the third issue, the Prosecution's assertion that it has complied with its disclosure obligations is intrinsically tied to its avowal that these obligations are circumscribed to:

- a. correspondence concerning "interception" (as opposed to the "collection of historical data");⁵
- b. correspondence concerning the "[Redacted]" number (as opposed to correspondence concerning the legality of the collection of evidence concerning other numbers, or correspondence which is indirectly relevant to the legality of the collection of evidence concerning the "[Redacted]" number by virtue of its omission);⁶ and
- c. correspondence which is referred to in the 11 October 2013 RFA (as opposed to email correspondence which is referred to elsewhere, including the 13 September 2013 decision of the Dutch District Court).⁷

9. This is an obvious dissonance between what the Prosecution has claimed to disclose, as compared to the disclosure actually requested by the Defence. Indeed, if the Prosecution had disclosed all requested information, it would not have been necessary for the Prosecution to set out arguments as to why it was not obliged to disclose *other* materials concerning the legality of the collection of evidence in its possession.⁸

10. There is thus good cause for the Defence to clarify the specific nature of the requested information, and the extent to which disclosure of information

⁵ Response, para. 9.

⁶ Response, para. 9.

⁷ Response, para. 8.

⁸ Response, paras. 11-15. See paragraph 15 in particular, in which the Prosecution makes it abundantly clear that it has not yet disclosed "all records in the Prosecution's possession merely 'related to' the collection of any evidence in this case".

concerning the legality of the collection of telecommunication evidence in The Netherlands remains outstanding.

11. As concerns the fifth issue, apart from the fact that the Prosecution failed to suggest this procedure when the issue of disclosure of correspondence with national authorities first arose (i.e in July 2015), the suggested course of action would carve out a new form of retrospective State privilege, which is separate from Article 54(3)(e) or Article 72. This would run counter to existing case concerning the fact that national authorities are not parties to the proceedings; their right to participate is confined to explicit mechanisms set out in the Statute and Rules.⁹

12. If the Trial Chamber considers that there is any merit to the Prosecution's proposal that outside of the framework of Article 54(3)(e) or Article 72, national authorities should be afforded a right to vet the disclosure to the Defence of information in the custody of the Prosecution, then the Defence respectfully submits that there is good cause to grant the Defence leave to submit arguments concerning whether such a proposal is *ultra vires* the Statute and Rules, and what remedies should exist in the event that the national authorities oppose disclosure.

Relief Sought

13. For the reasons set out above, the Defence for Mr. Bemba respectfully requests leave to reply to the Third, Fourth, and Fifth Issue arising from the Response.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

⁹ ICC-01/04-01/06-2799

Dated this 9th day of February 2016

The Hague, The Netherlands