

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/05-01/13
Date: 10 February 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

Confidential Document

Prosecution Response to Defence Request ICC-01/05-01/13-1611-Conf

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the**Court to:****The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell

Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Ms Beth Lyons

The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
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States Representatives**Amicus Curiae****REGISTRY****Registrar**

Mr Herman von Hebel

Counsel Support Section**Victims and Witnesses Unit****Detention Section**

Victims Participation and Reparations Section	Others
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I. Introduction

1. The Bemba Defence's requested leave to reply ("Request")¹ should be dismissed. The Request circumvents regulation 24(5) of the Regulations of the Court by advancing substantive arguments in reply to the pending Prosecution Response ("Response")² without first obtaining the Chamber's leave. Additionally, the Request exceeds the scope of a permissible reply, and fails to justify the relief requested. In the alternative, the Chamber should schedule a hearing, which may resolve more swiftly the specific issues raised in the Defence's Original Request.³

II. Confidentiality

2. This filing is classified as "Confidential" as it responds to a filing of the same designation. The Prosecution does not oppose its reclassification as "Public".

III. Submissions

3. Contrary to the permissible scope of regulation 24(5), the Request advances substantive arguments without the Chamber's prior authorisation.⁴ On this basis alone, the Request should be dismissed *in limine*.⁵

4. In addition, the Request mostly rehashes the Defence's original arguments, impermissibly attempting to bolster them under the guise of responding to alleged new issues arising out of the Response.⁶ However, the arguments advanced in the

¹ Defence Request for Leave to Reply to Prosecution Response to "Corrigendum of the 'Defence Request for further Orders of Disclosure'", ICC-01/05-01/13-1611-Conf.

² ICC-01/05-01/13-1607-Conf.

³ ICC-01/05-01/13-1589-Conf-Corr ("Original Request").

⁴ See Request, paras. 5-12.

⁵ See ICC-01/04-01/06-824 OA7, para. 68; ICC-01/05-01/08-602 OA2, para. 9. See also ICC-01/05-01/08-2985, para. 5.

⁶ See Request, paras. 3-10. Cf. Original Request, paras. 19-25 (the Prosecution has allegedly failed to disclose materials concerning the 'legality' of telephone surveillance) 21-28 (the Prosecution's alleged protracted

Request were either already elaborated in the Original Request, or could have been raised at its filing. For example, the argument raised in paragraphs 12-18 of the Original Request, concerning the alleged ambiguity and lack of clarity regarding the Prosecution's disclosure of records and alleged overly restrictive definition of "correspondences", is revamped in paragraphs 3-10 of the Request. Similarly, the Defence should not be allowed to now "clarify the specific nature of the requested information,"⁷ having failed to do so in the Original Request. A reply is not a means for a Party to supplement or cure defective submissions already placed before the Chamber.

5. Further, there is no basis for the Defence's speculation on whether the Prosecution has "construed 'records' in an overly narrow sense in order to exclude information contained within its internal contacts management system".⁸ The Defence's dissatisfaction with the Prosecution's disclosure does not give it an automatic right to request the review of all Prosecution records or to challenge the Prosecution's record-keeping practices.⁹ More importantly, it does not provide sufficient basis for the Defence to argue that this constitutes a valid ground to be granted leave to reply.

6. The Defence's distortion of the facts concerning the interception of Kilolo's Dutch telephone number is as transparently tactical as it is unavailing. As the Prosecution has made plain, the 28 August 2013 meeting with the Dutch authorities was not the basis for the interception of Kilolo's Dutch number. Rather, that consideration first arose in the emails exchanged between the Prosecution and the

disclosure), 12-18, (alleged ambiguity and lack of clarity regarding disclosure of records, and overly restrictive definition of "correspondences").

⁷ Request, para. 10.

⁸ Request, para. 5.

⁹ See Request, paras. 5-7.

Dutch authorities on 28-30 August 2013.¹⁰ Any other assertion is simply without merit and cannot serve as a basis for disclosure.

7. The sole issue on which the Defence advances a new argument — the Dutch authorities' standing to intervene in these proceedings — misconstrues the Prosecution's arguments. The Defence's suggestion that the Prosecution asserts that national authorities are entitled to veto disclosure is entirely unfounded.¹¹ To the contrary, the Prosecution has reasonably proposed that the Chamber exercise its broad discretion to receive the observations of the Dutch authorities on the matter, given their obvious interest in the divulgation of material in part authored by their agents. As such, the issue the Defence identifies does not arise from the Prosecution's submissions.

8. The Request clarifies one thing only: what the Defence actually seeks is *all* material 'related to' the collection of evidence in this case,¹² irrespective of their immateriality, and any claimed qualification thereof is illusory.¹³ The Defence fails to advance any legally cognisable basis for granting it leave to reply, and the Chamber should thus reject the Request.

9. In the alternative, the Prosecution proposes that the Chamber consider holding a hearing to resolve the specific issues raised in the Original Request. Given the number of related *inter partes* disclosure requests, a hearing may be beneficial to the Chamber and would facilitate the expeditious and effective disposition of the matter before the commencement of the Defence case.

¹⁰ See ICC-01/05-01/13-1607-Conf, para. 8; ICC-01/05-01/13-1589-Conf-AnxB, p. 2.

¹¹ See Request, paras. 11-12.

¹² See Request, para. 9, fn. 8.

¹³ Cf. Original Request, paras. 1, 39 (framing requested disclosure in terms of "all material and records concerning the legality of the collection of telecommunication evidence by the Dutch authorities, which is in its possession").

IV. Relief Requested

10. For the reasons above, the Chamber should dismiss the Request. In the alternative, the Chamber should schedule a hearing on the limited issue of the scope of the Prosecution's disclosure in relation to the legality of collection of telecommunications evidence.



Fatou Bensouda, Prosecutor

Dated this 10th Day of February 2016
At The Hague, The Netherlands