

**Cour
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**International
Criminal
Court**

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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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

**Confidential Document
URGENT**

**Prosecution's Response to Bemba's "Request for Leave to Reply to the
'Prosecution's Consolidated Response to Defence Motions Seeking Exclusion of
Evidence under Article 69(7) of the Rome Statute'"**

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 Office of the Prosecutor ("Prosecution") opposes Bemba's "Request for Leave to Reply to the 'Prosecution's Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69(7) of the Rome Statute'" ("Request").¹ The Request fails to justify the relief requested. Moreover, the Request advances substantive arguments in relation to some of the issues it seeks leave to reply on, in violation of regulation 24(5) of the Regulations of the Court,² and the Appeals Chamber's guidance.³

II. Confidentiality

2. This response is filed as "*Confidential*" because it responds to a filing of the same designation. The Prosecution will file a "*Public Redacted*" version following the Defence's filing of the same.

III. Submissions

3. Contrary to Bemba's submissions, all of the issues he seeks to raise could have been anticipated or further elaborated by him in his application pursuant to Article 69(7) of the Rome Statute ("Motion").⁴

4. As to the first issue, Bemba can hardly say the question of who possesses the burden of persuasion is unanticipated.⁵ Bemba itself raised the issue when it sought leave to reply to the Chamber's prior determination on the Defence's request to

¹ ICC-01/05-01/13-1848-Conf.

² Regulation 24(5) states "[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations."

³ ICC-01/04-01/06-824 OA7, para. 68 ("[t]he Appeals Chamber disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave."); *see also* ICC-01/05-01/08-602 OA2, para. 9 (in the context of rule 103 of the Rules of Procedure and Evidence, "[t]he submissions of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so.").

⁴ ICC-01/05-01/13-1799-Conf.

⁵ Request, para. 1(i).

declare certain materials inadmissible.⁶ The Prosecution also previewed its position a month ago when, in response to Bemba's and Mangenda's objections to the Prosecution's submission of evidence in relation to Witness D23-0001, the Prosecution argued that "[t]he burden of excluding evidence under article 69(7) ... is on the Defence."⁷

5. The remaining arguments⁸ are all issues Bemba could have, and should have, argued in its initial motion,⁹ or has put forward already.¹⁰ The legality and transmission of the wiretaps is the very issue raised by the Motion. Thus, the scope of the Dutch District Court's decision¹¹ and representations made to the Dutch authorities by the Prosecution¹² are neither new nor unexpected issues. The same applies to the Prosecution's understanding of Mr Martens' evidence, which was detailed in its response to Bemba's rule 68(2)(b) application.¹³ The Defence also departs from its original arguments in light of the Prosecution's Response, despite being in possession of documentation contradicting its position.¹⁴

6. Finally, inappropriately and in contravention of the regulation 24(5), Bemba advances its substantive arguments on issues in its footnotes,¹⁵ further obviating any need to grant the Request.

⁶ ICC-01/05-01/13-1472, p. 3.

⁷ ICC-01/05-01/13-1786-Conf-Anx4, p. 8.

⁸ Request, paras. 1(ii)-(vii).

⁹ *See, in particular*, Request, paras. 1(ii), *cf.* with Motion, para. 77; Request, para. 1(vi), *cf.* with Motion, *especially* paras. 31-32.

¹⁰ Request, para. 1(vi).

¹¹ Request, paras. 1(ii)-(iii).

¹² Request, para. 1(iv)-(vi).

¹³ ICC-01/05-01/13-1737-Conf-Corr, paras. 6-7.

¹⁴ *See e.g.* Request, para. 1(iv), *cf.* with Motion, paras. 26-35. Moreover, in fn. 5 of the Request, the Defence itself misrepresents the contents of the emails regarding the interception of the "918" number, stating that "there is no recorded response from the Prosecution", which is patently incorrect. The relevant response is in CAR-OTP-0092-0799, at 0799, indicating that the Prosecution accepted the suggestion for interception of the number and inquired whether a formal separate request would be needed. The Dutch Prosecutor responded that it would not, because the original request had been "for all known numbers".

¹⁵ *See* Request, fns. 2, 5, 8, 9.

IV. Relief Requested

7. For the foregoing reasons, the Request should be denied.



Fatou Bensouda, Prosecutor

Dated this 28th Day of April 2016
At The Hague, The Netherlands