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

Date: 17/06/2016

**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 “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:** Counsel for Jean-Pierre Bemba Gombo

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

**The Office of the Prosecutor**

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**REGISTRY**

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**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section Other**

1. The Defence for Mr. Bemba respectfully requests the leave of the Honourable Trial Chamber to address the following discrete legal and factual issues, which arise from the ‘Prosecution’s Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69(7) of the Rome Statute’:<sup>1</sup>
  - i. Whether the burden of persuasion in an Article 67(9) application rests fully on the Defence;<sup>2</sup>
  - ii. Whether, as averred by the Prosecution,<sup>3</sup> the April 2014 District Court decision upheld the legality and transmission to the Court of all the wiretaps (as opposed to a discrete period);
  - iii. The related question as to whether it is permissible for the Prosecution to rely on the assumption that the reference to “previous decisions” in the April 2014, decision are decisions of the District Court,<sup>4</sup> particularly when the Prosecution had the means to obtain such decisions but failed to do so;
  - iv. Inaccuracies concerning the Prosecution’s presentation of the entire contents of the [REDACTED] emails,<sup>5</sup> and the gap between the limited time period authorised for identifying the owner of the card, and the first RFA requesting the interception of the 18 number from 1 October 2013 onwards;<sup>6</sup>

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<sup>1</sup> ICC-01/05-01/13-1833-Conf (“the Response”). This request has been filed confidentially, but a public redacted version will be filed forthwith.

<sup>2</sup> Cf with case law set out in ICC-01/05-01/13-1472 concerning the fact that the Defence is only required to demonstrate the existence of issues affecting the legality of the collection of evidence, on a *prima facie* basis, whereas the burden for establishing that such issues do not militate against the admissibility of the evidence remains on the Prosecution (to the standard of beyond reasonable doubt).

<sup>3</sup> Response, para. 7.

<sup>4</sup> Response, para. 40.

<sup>5</sup> For example, at para. 35, the Prosecution avers that it accepted the Dutch Prosecutor’s suggestion to intercept the [REDACTED] number. The disclosed emails indicate that the Dutch Prosecutor indicated that they would ask the magistrate to tap the number to identify the owner of the card, in order to ascertain whether it fell within the scope of the investigation. There is no recorded response from the Prosecution, apart from a later email dated 2 September 2013, in which the Prosecution transmits its formal RFA which again, only requests the call histories of the listed numbers.

<sup>6</sup> Response, para. 19: “Subsequent extension of the interception of all numbers were approved pursuant to timely requests made by the Dutch prosecutors, and on the basis of further RFAs”.

- v. Whether – given the principle of non-inquiry, which precluded the Dutch authorities from reviewing the evidential foundation of the ICC requests – the Investigating Magistrate can be said to have been “fully aware of the relevant facts” leading to the interception of the [REDACTED] number;<sup>7</sup>
- vi. In the alternative, whether the interception of an unidentified, unattributed number for a period of at least four weeks prior to the transmission of the formal RFA, would violate the human rights requirement that there must be a reasonable suspicion for interception;<sup>8</sup> and
- vii. Whether [REDACTED] in fact affirmed that “the Accused could have challenged the legality of the intercepts under Dutch law, but did not file an appeal, rendering the decisions final”.<sup>9</sup>

2. A focused reply on the above issues would promote clarity, and ensure that the Trial Chamber is in a position to render a determination on the basis of all relevant facts and information.



Melinda Taylor

Counsel of Mr. Jean-Pierre Bemba

Dated this 17<sup>th</sup> day of June 2016

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<sup>7</sup> Response, para. 25.

<sup>8</sup> Kolesnichenko v. Russia App 19856/04 (ECHR, 9 April 2009), para.32, Nagla v. Latvia App no. 73469/10 (ECHR, 16 July 2013) Para.94; Misan v. Russia App no. 4261/04 (ECHR, 2 October 2014) Para.56 and 57; and Smirnov v. Russia App no. 71362/01 (ECHR, 7 June 2007), para.44; Smirnov v. Russia App no. 71362/01 (ECHR, 7 June 2007), para.44

<sup>9</sup> Response, para. 41. Cf CAR-OTP-0094-0359 lines 338-389, in which [REDACTED] specifically informs the Prosecution that he cannot tell them this.

The Hague, The Netherlands