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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

**Public Redacted Version of “Defence Response to Prosecution’s Request for
Application of Non-Standard Redactions (ICC-01/05-01/13-1669-Conf)”**

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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Introduction

1. The Defence for Mr. Jean-Pierre Bemba hereby submits its response to the Prosecution's request for redactions (the Request).
2. The asserted legal basis for the Request is erroneous.
3. Article 54(3)(f) of the Statute is not a vehicle for asserting so-called confidentiality "obligations" on a retrospective basis in order to avoid disclosure to the Defence.
4. The redaction of information concerning the identity of persons involved in the interception process would also be unduly prejudicial to the Defence.
5. The Request should therefore be dismissed.

Confidentiality

6. The present Response has been filed on a confidential basis in order to accord with the confidential nature of the Request. If authorised, the Defence will submit a public redacted version.

Submissions

7. The legal provisions cited in the Request (Article 54(3)(f), Article 64(3)(c) and Rule 81(3)) do not provide a legal foundation for the requested redactions.
8. Article 54(3)(f) refers to measures taken by the Prosecution to preserve the confidentiality of information, protection of persons, and the preservation of

evidence. None of these powers translate to a legal basis to redact the identity of persons involved in the interception process.

9. As concerns the protection of the confidentiality of information, the current application does not concern 'lead' information, or information derived from confidential sources. The Prosecution has chosen to introduce intercepted and recorded information from the Dutch authorities into the trial record, and, in order to fulfil the admissibility criteria, has made the positive assertion that the procedures used to intercept the information complied fully with Dutch law.

10. Having done so, it would be unduly prejudicial for the Prosecution to claim a "confidentiality" interest as concerns information which is necessary to test these assertions.

11. The Defence has made clear that it intends to challenge the legality of this process, and to that end, has endeavoured to collect information concerning the processes which were employed. This may include, where necessary, interviewing persons involved in the process. The Defence cannot conduct such necessary investigations if the names of the relevant authorities are redacted.

12. Although the Trial Chamber authorised redactions to the identity of [REDACTED] during the pre-trial stage, it did so on a temporary basis, with a clear understanding that the Defence would have an opportunity to question the officers in question at some point during the trial.¹

13. In contrast, the Prosecution has not sought temporary redactions in its Request; if granted, the redactions would permanently impede the Defence from pursuing legitimate inquiries.

¹ ICC-01/05-01/13-1015-Conf.

14. The Defence also questions the veracity of the uncorroborated assertion that the names of Dutch prosecutors are not normally disclosed in Court proceedings, concerning a particular defendant.

15. The Dutch Magistrate authorised the transmission of several documents to the ICC (and the Defence), which included the names of the Dutch authorities involved in the process. The Dutch authorities omitted to alert the Court to any privilege or security issues for the entire duration of the pre-trial stage, and Prosecution case.²

16. The adoption of a legal position where the Prosecution, and Prosecution witnesses appear to have an unfettered right to interview Dutch authorities involved in the interception process,³ when the Defences does not, would also raise significant equality of arms, and fairness issues in this case.⁴

² As noted in previous filings, the Memorandum of Understanding between the Prosecution and The Netherlands also specifies that issues of privilege or confidentiality must be asserted before information is transmitted to the ICC, and not afterwards. See ICC-01/05-01/13-1589-Red-Corr, para. 34.

³ The Defence notes that during his testimony, the Prosecution witness, Mr. Pluijmers, acknowledged that during the preparation of his expert report, he spoke to the Dutch police officer, who was responsible for conducting the intercepts, ICC-01/05-01/13-T-17-CONF-ENG ET, p.15 at lines 22-25 and p.16 at lines 1-19.

⁴ The following findings of the ICTY Trial Chamber in the *Prosecutor v. Simic*, are particularly apposite to the implicit proposition that the ICC Prosecution is entitled to be informed of the identity of the Dutch, but not the Defence:

“The only matter now put forward by the ICRC which had not been put forward in one or the other of its different approaches to the Second Motion by Todorovic and to the Related Motion by his three co-accused is its reference to the Office of the Prosecutor as “an official institution of the Tribunal”. The ICRC appears to assume that the prosecution is placed in some special position as a party in proceedings before the Tribunal. Article 16 of the Tribunal’s Statute, to which the ICRC has referred, describes the Prosecutor as “a separate organ” of the Tribunal but also one which acts “independently” of it. And such an assumption overlooks Article 21.1, which provides that all persons shall be equal before the Tribunal. That includes the prosecution. It should be clearly understood that, as a party before the Tribunal, the prosecution is not treated in any special way. Nor, it is hoped, would the prosecution claim such a special position.⁴⁴ For the reasons given in Section III of this decision, it remains quite unacceptable for the prosecution but not Todorovic to have access to the ICRC Decision Filings when he seeks to argue that the law stated in the ICRC Decision is wrong.”

Prosecutor v. Simić et al., ‘Decision on (1) Application by Steven Todorović to Re-Open the Decision of 27 July 1999 (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999 and (3) Conditions for Access to Material’, 28 February 2000, para 9.

17. In contrast to the scenario addressed by ICC-01/05-01/13-1015, the Dutch authorities were not involved in interviewing protected Prosecution witnesses or third parties; their role concerned the collection of evidence from the defendants in this case. If anything, it is arguable that the Defence has a stronger entitlement to be disclosed this information than the ICC Prosecution.

18. If correct, the proposition that a defendant is not entitled to be disclosed the identity of the prosecutors involved in a criminal process (and the interception of privileged and private information concerning the defendant) would also have far-reaching implications for the legality of the Dutch process, and its potential conformity with the obligations of The Netherlands under the European Convention on Human Rights.

19. The Defence should therefore be provided with this position in writing so that it can, at the very least, attempt to obtain a remedy *vis-à-vis* The Netherlands.

Relief sought

20. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Trial Chamber to reject the Request.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 15th day of June 2016

The Hague, The Netherlands