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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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***

Public Redacted Document

**Public redacted version of “the Prosecution Response to ‘*Requête conjointe de la
Défense de M. Kilolo, M. Mangenda, M. Babala and M. Arido demandant le report du
début du procès afin d’assurer l’équité du procès et les droits des prévenus*’”,
14 September 2015, ICC-01/05-01/13-1240-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**

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the 9 September 2015 «*Requête conjointe de la Défense de M. Kilolo, M. Mangenda, M. Babala and M. Arido demandant le report du début du procès afin d’assurer l’équité du procès et les droits des prévenus*» (“Request”).¹ The Request is unsubstantiated, fraught with inaccuracies and misrepresentations, and untimely. The Prosecution has complied with its disclosure obligations and acted in accordance with the orders and decisions of Trial Chamber VII (“Chamber”). Having chosen not to seek a variation of time limits set almost four months ago, the Defence cannot now, with the trial imminent, claim a lack of time to prepare, predicated in any way on the Prosecution’s alleged conduct. To this extent, the Request must be rejected.

II. Confidentiality

2. This filing is designated as “Confidential” because it responds to a Defence filing of the same designation. A public redacted version of this filing will be filed.

III. Submissions

A. The delayed Request is inexcusable

3. The Request is inexcusably late. The Defence’s contention about the purported inequality resulting from the Prosecution having had «*plus de deux années* » for the preparation of the case, as opposed to «*que de peu de temps avant le début du procès*» for the Defence, is pretextual.² First, the period of time the Prosecution has had to

¹ ICC-01/05-01/13-1228-Conf.

² See Request, para.23. The Defence quote from the “*opinion dissidente*” of Judge Pikis. In fact, Judge Pikis provided a *separate concurring* opinion to that Appeals Chamber decision. See ICC-01/04-01/06-424, pp.5-6, 10.

investigate and prepare its case was known to the Defence since the Accused's arrests in November 2013. The failure of the Defence's clearly strategic decision not to raise this issue earlier does not create grounds for granting the requested relief. Rather, it underscores its spurious nature.

4. *Second*, the Defence have had the overwhelming majority of the materials the Prosecution intends to rely on at trial - comprising call data records, Western Union records, intercepted communications, Detention Unit recordings, and statements of some of the witnesses - for months, since before the confirmation of charges. The Defence devoted hundreds upon hundreds of pages of their confirmation submissions to their analysis and refutation.³ Finally, the Defence received in July of this year, a detailed and footnoted Pre-Trial Brief ("PTB"),⁴ which expanded on the factual submissions in the already detailed Document Containing the Charges ("DCC")⁵ and its own confirmation submissions,⁶ while aligning it to the Confirmation Decision.⁷ Having received all of this information, the Defence cannot claim with any degree of seriousness their ignorance of the case,⁸ uncertainty of the charges,⁹ or of the evidence that the Prosecution intends to use to prove them.¹⁰

³ See the Defence's respective confirmation submissions: For Kilolo, ICC-01/05-01/13-600-Conf-Corr2 (316 pages) and ICC-01/05-01/13-674-Conf (196 pages, as well as Annex 1, 220 pages, Annex 2, 35 pages, and Annex 3, 29 pages); for Mangenda, ICC-01/05-01/13-594-Conf-Corr (106 pages, as well as Annex A, 55 pages, and Annex B, 126 pages); for Babala, ICC-01/05-01/13-671-Conf (56 pages) and ICC-01/05-01/13-678-Conf (6 pages); and for Arido, ICC-01/05-01/13-673-Conf (69 pages); to add to that the Bemba Defence filed their own submissions totaling 67 pages: see ICC-01/05-01/13-599-Conf .

⁴ ICC-01/05-01/13-1110-Conf.

⁵ ICC-01/05-01/13-526-Conf-AnxB1.

⁶ ICC-01/05-01/13-597-Conf-AnxB, and ICC-01/05-01/13-646-Conf.

⁷ ICC-01/05-01/13-749.

⁸ Request, para.23.

⁹ Request, para.67. Other than the superficial mention of this issue at the end of the Request, the Defence does not provide any arguments in its support.

¹⁰ Request, paras.16, 39, 57, 58.

B. The Prosecution has committed no disclosure violations in this case

i. The Prosecution has timely disclosed all the relevant documentary information

5. To date, throughout the process, including the confirmation of charges proceedings, there has been not a single finding that the Prosecution has committed a disclosure violation in this case. The Prosecution has undertaken its disclosure obligations seriously and consistently. It has timely disclosed to the Defence all information material to the Defence's preparation and potentially exculpatory information; all information that the Chamber ordered it to disclose, and information disclosed out of courtesy. As the Defence readily admits, more than 6,200 items have so far been disclosed in this case.¹¹

6. The reference to the 126 items allegedly disclosed «*tardivement*» is specious.¹² Most of the items included in the five disclosures cited by the Defence were disclosed in this fashion due to (i) express Defence requests, upon which the Chamber's ordered the Prosecution to disclose information; (ii) the Chamber's orders making available to the Parties the reports of the Independent Counsel, which the Prosecution then disclosed as incriminating evidence to provide notice to the Defence of its intention to rely on them at trial,¹³ and (iii) the Chamber's orders authorising the delayed disclosure of [REDACTED],¹⁴ which ultimately resulted in some of [REDACTED] being re-disclosed with lesser redactions.¹⁵ Further items were

¹¹ Request, para.20.

¹² Request, para.27.

¹³ See also below paras.17-18.

¹⁴ ICC-01/05-01/08.

¹⁵ Disclosure on 6 July 2015, notified in ICC-01/05-01/13-1061, disclosed as incriminating evidence two annexes to the report of the Independent Counsel regarding material seized by the Dutch authorities, released to the Parties pursuant to a Court order ICC-01/05-01/13-1046-Red, which the Prosecution simultaneously added to its List of Evidence; Disclosure on 21 July 2015, notified in ICC-01/05-01/13-1097, disclosed as incriminating evidence the expert report of P-0361 (René Pluijmers) Disclosure on 27 July 2015, notified in ICC-01/05-01/13-1106, disclosed as incriminating evidence one document containing the Confidential Redacted Annex to the Addendum to the Independent Counsel's report on the seized material from the French and Belgian authorities, namely the list of contacts of Kilolo's SIM card, released to the Parties and added to the Prosecution List of Evidence pursuant to decision ICC-01/05-01/13-1092; and as rule 77 material an investigator's report concerning

disclosed after the 30 June 2015 deadline due to corrections to metadata fields.¹⁶ The disclosure on 9 September 2015¹⁷ similarly contained, for the most part, items either requested by the Defence, or ordered by the Chamber to be disclosed.¹⁸ Absent any substantiation of a disclosure violation, the remark that «*la divulgation tardive*» of an investigator's report concerning P-0260¹⁹ «*laisse à penser que le Procureur a en effet failli à ses obligations de divulgation*»,²⁰ is merely gratuitous and vacuous.

7. Any disclosures made before the 30 June 2015 deadline are even less contentious. The transcripts of the November 2014 interviews with three Prosecution witnesses²¹ were disclosed to the Defence three weeks before this deadline, and almost four months before the start of the trial. They were disclosed when the

as security incident in relation to P-0260, disclosed pursuant to an express request from the Defence on 22 July 2015; Disclosure on 31 July 2015, notified in ICC-01/05-01/13-1117, disclosed as incriminating evidence 15 transcripts of [REDACTED], one witness summary, one statement of limited use, and 14 previously disclosed documents with lifted minor redactions, all in accordance with the Chamber's Decision on Prosecution's Application for Delayed Disclosure ICC-01/05-01/13-1025-Conf-Red2; and as rule 77 additional 13 documents with lifted minor redactions; Disclosure on 28 August 2015, notified in ICC-01/05-01/13-1195, disclosed as incriminating evidence a) nine previously disclosed documents with corrected metadata, as well as a one page document, an annex to a report of the Independent Counsel, which was simultaneously added to the List of Evidence with the Chamber's authorisation through decision ICC-01/05-01/13-1191, and b) 74 documents under rule 77, disclosed in accordance to either express requests from the Defence, (an investigators' report in relation to P-0261 requested on 27 August 2015) or orders from the Chamber (11 Requests for assistance to the Dutch authorities, and witness expenses related to two Prosecution witnesses in the Main Case), one duplicate document, and one document disclosed as it was referred to in the [REDACTED], ICC-01/05-01/13-1110-Conf-AnxA.

¹⁶ See above fn.13, Disclosure on 28 August 2015, notified in ICC-01/05-01/13-1195.

¹⁷ Request, para.29.

¹⁸ The disclosure on 9 September, notified in ICC-01/05-01/13-1229, included 84 documents disclosed as rule 77, including (i) 60 witness related expenses and five explanatory tables thereof, disclosed pursuant to the Trial Chamber VII's Decision ICC-01/05-01/13-1172; (ii) six documents related to rule 68 certification of witnesses P-0214, P-0270, and P-0272 statements; (iii) three documents related to Witness P-0361; (iv) eight Prosecution Requests for Assistance ("RFAs") to the French authorities, disclosed as a courtesy, in response to Arido's Request; (v) one call data record ("CDR"), disclosed at Bemba Defence's request, but a duplicate and (vi) one French translation of a document on the Prosecution's List of Evidence. See above, para.6, fn.13.

¹⁹ Though no reference is provided, the Defence is most likely referring to the disclosure of an investigator's report concerning the [REDACTED] involving P-0260 and [REDACTED]. This report was disclosed on 27 July 2015, pursuant to a specific request from the Arido Defence, who themselves admitted in their 22 July 2015 letter to the Prosecution that "we thought that this issue had faded and been resolved" See above, para.6, fn.13.

²⁰ Request, para.38. The Defence inappositely cites decision ICC-01/05-01/13-1045, which rejected the Kilolo Defence request for contact information of witnesses P-0260 and P-0245, because the two witnesses declined to speak to the Defence.

²¹ The Defence not only misrepresents the so-called "late" disclosure examples, but it also, in the process, commits some basic mistakes: for example, the above-mentioned interview transcriptions were not disclosed **one year and seven months** after they were taken, but **seven** months. See Request, para.38.

transcripts of these audios became available, and the security situation of the witnesses allowed it.

8. Even if any of these so-called late disclosures could have a significant impact on the Defence case preparation – which they do not – the Defence did not file any contemporaneous requests for a trial postponement. The Defence also waited until July or August 2015 to request some of the materials. In the circumstances, the claim that additional disclosures have materially affected the equality of arms between the Parties is at best unconvincing. Again, the Defence’s strategic decisions are their responsibility – as are their consequences.

ii. Late communication of the lack of consent of Prosecution witnesses does not unfairly prejudice the Defence

9. The Defence’s argument regarding the impossibility of preparing because the Prosecution did not communicate on time to the Babala Defence the information regarding the consent of four Prosecution witnesses to speak to the Defence, is misplaced, as well as internally inconsistent.²² *First*, the witnesses were known to the Defence on the filing of the Prosecution’s list of witnesses, which occurred well in advance of the issuance of the Chamber’s witness contact protocol. The Request however, does not explain their efforts to contact these witnesses during this period – again, a strategic decision. *Second*, even assuming that any such efforts were made, no prejudice arises from the Prosecution’s conduct.

10. As the Prosecution informed the Chamber and the Parties on 27 August 2015, it had contacted P-0020, P-0264, P-0263 and P-0270 on 3, 4, 5 and 7 August 2015,

²² Request, para.33 (the Prosecution has delayed the provision of this information by one month); *cf.* with para.55 (the Prosecution has delayed the provision of this information by 54 days).

respectively, and all but P-0270 declined contact with the Babala Defence.²³ Given the lack of consent of three out of the four witnesses, the inadvertently late communication of this information is irrelevant, as it does not negatively affect the Defence's right to question these witnesses. As for P-0270 — a witness being called to testify to a discrete set of facts regarding a transfer of money on behalf of the Accused Kilolo to [REDACTED],²⁴ whose statement is short,²⁵ and who is scheduled to arrive late in the order of presentation of the Prosecution case,²⁶ - any prejudice arising out of the late communication of his consent is minimal, and does not warrant a delay in the start of trial.

iii. There have been no disclosure violations with respect to P-0433

11. Just like the other examples above, the report of P-0433 was disclosed within the applicable time limits. Its disclosure on 30 June 2015 was not «*opportun*»,²⁷ but timely, and within three months of the start of trial. P-0433 is not being called as an expert witness – a fact known to the Defence, since he is not indicated as such on the Prosecution's 30 June 2015 list of witnesses. P-0433's CV and inclusion on the list of experts pursuant to regulation 44 of the Regulations of the Court are unnecessary. Nevertheless, even though there is no requirement to further inform the Defence, the Prosecution will in the coming days disclose the witness's CV, as well as a short summary of his expected testimony.

12. The Defence's claimed inability to begin the analysis of P-0433's report before receiving the expert report of P-0361 is incongruous. *First*, the Defence have P-0361's report, which was timely and duly disclosed per the Chamber's order on 21 July

²³ ICC-01/05-01/13-1190, para.4.

²⁴ See ICC-01/05-01/13-1110, paras.49(a), 198.

²⁵ P-0270's transcribed statement comprises only three transcripts numbering a total of 57 pages.

²⁶ See ICC-01/05-01/13-1048-Conf-AnxA-Red ("List of Witnesses").

²⁷ Request, para.34. The Defence state that the report was disclosed on "*le 31/06/2015*" [sic]. Obviously, the report was in fact disclosed on 30 June 2015.

2015.²⁸ *Second*, the two reports cover related, but distinct aspects of the telecommunications evidence that the Prosecution is relying on, and an understanding of one is not required to analyse the other.

13. Even if this argument is accepted the Defence have not explained why they waited for more than two and a half months after the report's disclosure to alert the Chamber either to their purported inability to understand P-0433's report without the report of P-0361, or that the requisite analysis might require more time. On top of this empty claim, the Defence's vague reference to «*des documents*» in the report that have been undisclosed, is unsubstantiated and inaccurate.²⁹

14. Finally, there is no statement of P-0433 to disclose.³⁰ If there were, the Prosecution would have disclosed it. The Defence's insinuations that «*il est difficile de croire*» that no such statements exist,³¹ are unfounded. Further, there is no obligation on the part of the Prosecution to take statements from its witnesses.³² Instead, P-0433 has produced a detailed analytical report, which was timely disclosed to the Defence. The Defence are thus on sufficient notice as to the nature of P-0433's evidence—which, not surprisingly is to discuss his report and the evidence referred to therein.

iv. The lack of statements and/or consent from Prosecution witnesses is irrelevant

15. Again, as already found by this Chamber,³³ the Prosecution is not required to seek out statements from the witnesses it puts on its list, nor is it required to obtain

²⁸ Disclosure on 21 July 2015, notified in ICC-01/05-01/13-1097, disclosed as incriminating evidence the expert report of P-0361 pursuant to the decision ICC-01/05-01/13-1027 issued on 24 June 2015, which extended the time limit for the submission of the expert report of P-0361 because good cause had been shown.

²⁹ The Defence mentions but two supposedly undisclosed documents: CAR-OTP-0083-1465, which was disclosed on 9 September 2015 because it is cited in the report, and is an identical duplicate of CAR-OTP-0083-1472, disclosed on 6 February 2015; and the draft instructions to P-0361, which remained the same in the final version, obviating any need for additional disclosure.

³⁰ Request, para.36.

³¹ Request, para.36.

³² See ICC-01/05-01/13-1202, para.11. See Request, para.36.

³³ See ICC-01/05-01/13-1202, para.11.

their consent before doing so. It is unclear how the Defence would be placed in a worse position than the Prosecution regarding witnesses P-0198 and P-0201. As the Chamber has accepted, minimal prejudice here ensues for the Defence, as the Accused have been well aware of these two witnesses' identities, the details of the underlying evidence of the incidents involving them, and their relevance to the charges for some time³⁴—indeed, since at the latest, the filing of the DCC on 30 June 2014. Additionally, some of the Accused have personal knowledge of the witnesses, and much of the evidence regarding these witnesses constitutes the [REDACTED].³⁵ Under the circumstances, it is all but certain that the Defence collectively have more information concerning these witnesses than the Prosecution.

16. The witnesses the Prosecution intends to call are clear.³⁶ The Defence's decision not to accept this, does not make it any less so.

v. Amendments to the List of Evidence have been authorised and do not materially affect the Defence preparation

17. The Prosecution's List of Evidence for trial,³⁷ as the Defence is fully aware, has been amended with judicial authorisation.³⁸ The additions to the list have been extremely limited, both in terms of number of items added, and their substance. The added items comprise four documents obtained after the 30 June 2015 deadline and released as annexes to the reports of the Independent Counsel, and 11 logbooks inadvertently excluded from the List of Evidence, only three of which contained information not otherwise included in other documents on the List of Evidence.³⁹ The added reports received from the Independent Counsel contain limited new

³⁴ See ICC-01/05-01/13-1202, para.14.

³⁵ See ICC-01/05-01/13-1202, para.14.

³⁶ Request, paras.55, 56, 58.

³⁷ ICC-01/05-01/13-1048-Conf-AnxB ("List of Evidence").

³⁸ See above para.6, fn13.

³⁹ See ICC-01/05-01/13-1046-Red; ICC-01/05-01/13-1092; and ICC-01/05-01/13-1191. See also, ICC-01/05-01/13-1114-Conf.

information emanating from evidence seized from the individual Accused. Their content is heavily redacted. Any prejudice to the Defence under the circumstances is minimal.

18. The Defence arguments in paragraphs 40 and 41 of the Request are vague and confusing. They further fail to draw any connection between the addition of telephone logs to the Prosecution List of Evidence, and an alleged admission that the attribution of one telephone number is unclear. Beyond that, the Defence's generic claims of errors in translations and technical problems with recordings as preventing its proper preparation are inadequate to delay the trial. None of these issues could have arisen spontaneously and would have been known to the Defence for a substantial period of time. That they are brought forward now is again a strategic decision, and for that reason alone does not merit the relief sought.

vi. The Prosecution does not have control over the Main Case record

19. The Prosecution does not control access to the Main Case record, and does not have the authority to lift the protective measures that are in place in that case. This is no pretence;⁴⁰ but reality. This power is vested in Trial Chamber III, and in the event of an appeal, the Appeals Chamber. The Prosecution has never claimed ignorance as to material information potentially existing in the Main Case record. Rather, the Prosecution has reviewed all the relevant materials in its possession, and made its disclosure decisions accordingly, including, where necessary seeking authorisation from Trial Chamber III. The Defence should not feign surprise and outrage by this state of affairs, as it emanates from the Court's regulatory framework, it has been confirmed by judicial decisions, and is clear to all of the Parties.

⁴⁰ Request, para.47: [...] *le Procureur ose prétendre* [...]” (emphasis added).

20. Further, the Defence have no basis to claim that material information has been withheld from them. As always, should the Defence submit concrete and specific requests for disclosure, the Prosecution is willing to entertain them.

vii. Bar Table Motions are not an impediment to the commencement of trial

21. The Prosecution relied on many of the materials it tendered from the bar table (“Bar Table Motions”) for the confirmation of charges, and, save for the transcripts and translations of some of the recordings thus tendered, these materials were in the Defence’s possession since before the confirmation of charges. The Defence cannot now claim that the requisite analysis of these materials had to start from scratch, or that they were surprised at the volume and type of the evidence thus adduced. What is more, the Prosecution alerted the Chamber and the Parties of its plans to tender large amounts of documents from the bar table during the first status conference in the case on 24 April 2015.⁴¹

22. Nonetheless, the Defence has already analysed these materials on “467 pages”,⁴² on top of the hundreds of pages of analysis it produced for confirmation. Furthermore, the Bar Table Motions, given the amount of detail that is contained in them, serve as a useful tool for the Defence to analyse the evidence. If anything, the tendering of these materials before the trial has started is more beneficial to the Defence than had the Prosecution done so at a later stage during its presentation of evidence.

⁴¹ ICC-01/05-01/13-T-8-Red-ENG, 24 April 2015, p.38, lns.6-25, p.39, lns.1-13, *see*, in particular, lns.8-10. (The Prosecution alerted the Chamber and the Parties to the fact that it would be tendering from the bar table certain “classes” of evidence, including call data records, financial records, intercepted communications with audio files as well as the transcripts and translations, and Detention unit recordings, which would comprise a “substantial number” of material).

⁴² Request, para.52.

23. The Defence fails to appreciate, even this late in the proceedings, that the preparation of this case – and the ensuing trial – cannot be separated from the items that have been tendered *via* Bar Table Motions. To the contrary, this case has, at its core, the documentary and audio-visual evidence thus submitted. It defies logic to claim that the analysis of this key evidence, by virtue of its early submission, disturbs and delays the Defence preparation. The opposite is true: the analysis that the Defence has to undertake is part and parcel of this preparation, and has only been facilitated by the production of additional information that the Prosecution has supplied in the Bar Table Motions.

24. Finally, time and resources spent could have been substantially reduced, had the Defence seriously considered at least some of the 380 agreed facts the Prosecution proposed.⁴³ It is ironic that the Defence, who refused to agree to nearly all of the proposed stipulations, cite a *Katanga* decision referring to the postponement of trial to clarify the true points of contention in the case— a decision intended to encourage the Parties to find as many agreements to evidence as possible.⁴⁴ They have made no genuine effort in this regard, for transparently strategic reasons. Again the Defence fall back on the Chamber to salvage it from a failed litigation strategy. The Request should not be granted on the basis of unsubstantiated and distorted claims concerning the Prosecution's conduct in this case.

⁴³ See ICC-01/05-01/13-1072-Conf, para.2.

⁴⁴ Request, para.8, citing ICC-01/04-01/07-1442-RSC, para.16; *see also*, para.14.

IV. Relief Requested

25. Based on the foregoing reasons, the Chamber should reject the Request, insofar as it targets the conduct of the Prosecution.



Fatou Bensouda, Prosecutor

Dated this 22nd Day of September 2015
At The Hague, The Netherlands