Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No: **ICC-01/05-01/13**
Date: **7 October 2015**

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 Redacted Version

Response to "Prosecution's Third Request for the Admission of Evidence from the Bar Table"

Source: **Defence for Jean-Jacques Kabongo Mangenda**

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

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I. INTRODUCTION

1. Jean-Jacques Mangenda does not oppose the admission of items A.6 and A.15, but opposes the admission of all 102 other documents tendered by way of the Prosecution's third bar table motion.[1] The Prosecution has failed to offer individualised submissions on the documents' indicia of reliability; failed to establish those indicia, for example, with reference to other admissible evidence such as testimony; and failed to justify tendering these documents without testimonial context and support.

2. The Prosecution's attempt to introduce testimonial statements (B.1-B.4.1 and E.1) should be rejected. The *lex specialis* for the introduction of out-of-court statements is Article 69(2) of the Rome Statute and Rule 68 of the Rules of Procedure and Evidence. The statements tendered do not meet the requirements of Rule 68 and, accordingly, are inadmissible.

3. Document E.2.1 is a revised version of Tab 81 of the Prosecution's First Bar Table Motion, and yet the Prosecution has not withdrawn the previously-tendered version. Further, this intercept was obtained on the basis of a judicial authorisation induced by the Prosecution's material misstatements, which is the object of a pending Defence motion.[2] Contrary to previous submissions by the Prosecution, the document does not "[REDACTED],"[3] even assuming that such a claim could be considered appropriate or relevant to determining its admissibility.

II. APPLICABLE LAW

4. Article 69(4) of the Rome Statute provides that:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and

[1] *Bemba et al.*, Prosecution's Third Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1170-Conf, 21 August 2015 ("Motion"). This is a public redacted version of Defence submission ICC-01/05-01/13-1243-Conf, filed pursuant to the Chamber's order in ICC-01/05-01/13-1285.
[2] *Bemba et al.,* Corrigendum to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements By the Prosecution, ICC-01/05-01/13-1136-Conf-Corr, 13 August 2015; *Bemba et al.,* Request for Leave to Reply to Prosecution Response to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda, ICC-01/05-01/13-1194-Conf, 28 August 2015.
[3] *Bemba et al.,* Prosecution's Response to the Mangenda Defence Motion to declare Inadmissible Telephone Intercepts of Mr Mangenda, ICC-01/05-01/13-1180-Conf, 24 August 2015 ("Prosecution's Response to Inadmissibility Motion"), para. 1.

> any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

"Probative value" has been interpreted as meaning "tending to prove or disprove the material issue or fact in question" which, in turn, requires "indicia of reliability including authenticity, that are sufficient in the circumstances in accordance with generally accepted legal principles."[4] The indicia need not establish "definitive proof of reliability but rather *prima facie* proof based on sufficient indicia."[5]

5. Tendering documents in an evidential vacuum – i.e., before any evidence has been received – does not accord with ICC practice. The sole exception to the contrary is a single decision in 2008 admitting four documents.[6] Since then, not a single document has been admitted from the bar table by any ICC Trial Chamber prior to commencement of trial.[7]

6. The reason is that the "reliability" of a document can generally only be established through evidence adduced in court. Thus, a bar table motion may not generally be the "first port of call" for the admission of documents.[8] Exceptions are permitted only where "the relevance and reliability of a document may be sufficiently apparent to justify its admission as an exhibit without the need for any evidence or any further evidence, relating to the document."[9] One recent ICTY decision has summarised the jurisprudence of that Tribunal, which has long experience with the practice of bar

[4] *Ruto and Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence, ICC-01/09-01/11-1353, 10 June 2014, para. 15.
[5] *Id.*
[6] *Lubanga*, Decision on the admissibility of four documents, ICC-01/04-01/06-1399, 13 June 2008, paras. 37-40, corrigendum filed on 20 January 2011 (*Lubanga*, Corrigendum to Decision on the admissibility of four documents, ICC-01/04-01/06-1399-Corr, 20 January 2011, paras. 37-40.)
[7] The interval between the start of the Prosecution case and the filing of a bar table motion was 84 days in the *Ruto* case; 235 days in the *Katanga* case; and 205 days in the *Bemba* case. *See Ruto and Sang*, Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9), ICC-01/09-01/11-1121, 2 December 2013; *Katanga and Ngudjolo*, Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, ICC-01/04-01/07-2290, 16 July 2010; *Bemba,* Prosecution's submission of the list of materials it requests to be admitted into evidence, ICC-01/05-01/08-1514, 14 June 2011.
[8] *Ruto and Sang*, Decision on the Joint Defence Application for Admission of Documentary Evidence Related to the Testimony of Witness 536, ICC-01/09-01/11-1436, 15 July 2014, para. 11 ("[a]lthough the admission of evidence other than through a witness is permissible in the Court's proceedings, the Chamber nonetheless considers admission of evidence through a witness to be a preferable approach, where possible. It is recalled that while the Chamber guided the Ruto Defence to seek admission of the relevant evidence through a 'bar table motion', it also indicated that the Ruto Defence has the possibility of calling witnesses to testify on this matter"); *Karadžić*, IT-95-5/18-T, Decision on the Prosecution's First Bar Table Motion, 13 April 2010, para. 13 ("First *Karadžić* Bar Table Decision").
[9] *Boškoski and Tarčulovski*, IT-04-82-T, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E, 14 May 2007, para. 13.

table motions as a means of introducing evidence:

> Thus, while evidence does not need to be introduced through a witness in every circumstance, and there may be instances where it is appropriately admitted from the bar table, it is the Chamber's view that the most appropriate method for the admission of a document or other items of evidence is through a witness who can speak to it and answer questions in relation to it. The bar table should not generally be the first port of call for the admission of evidence. It is, rather, a supplementary method of introducing evidence, which should be used sparingly to assist the requesting party to fill specific gaps in its case at a later stage in the proceedings.[10]

7. The Trial Chamber explained that the wholesale introduction of documents would unfairly shift the burden from the Prosecution to the Defence of testing and illuminating the reliability of such evidence.[11] The introduction of large volumes of information "from the bar table" short-circuits the "contextualization"[12] provided by trial proceedings,[13] and may encourage the indiscriminate dumping of low-quality information onto the record[14] without any incentive to provide fuller explanation.

8. The *Boškoski* Trial Chamber declared that:

> As a general rule, it will be necessary for the Chamber to receive evidence from one or more witnesses, who can speak about a proposed exhibit, before the Chamber can be satisfied that there is sufficient apparent relevance and reliability to justify the admission of an exhibit.[15]
> …
> It is desirable that documents are tendered for admission through witnesses who are able to comment on them. A party is not necessarily precluded from seeking the admission of a document even though it was not put to a witness with knowledge of the document (or its content) when that witness gave testimony in court. However, the failure to put the document to such a witness is relevant to the exercise of the Chamber's discretion to admit the document.[16]

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[10] First *Karadžić* Bar Table Decision, para. 9.
[11] *Id.* para. 8 ("a significant consequence of the admission of evidence from the bar table is that it is then incumbent upon the opposing party to identify the most appropriate witness with whom to challenge a particular document instead of being able to cross-examine the witness who the offering party has determined is best able to speak to that document in the context of its case. In the present circumstances, given the number of items that are the subject of the Motion, this carries the real possibility of over-burdening the Accused.")
[12] *Karadžić*, IT-95-5/18-T, Decision on Prosecution's Motion for Admission of Evidence from the Bar Table, 1 May 2012, para. 4.
[13] *Mladić*, IT-09-92-T, Transcript (10 November 2011), T.109.
[14] *Karadžić*, IT-95-5/18-T, Decision on Accused's Motion to Admit Documents Relevant to Witnesses KDZ490 and KDZ492 from the Bar Table, 9 January 2012, para. 8.
[15] *Boškoski & Tarčulovski*, IT-04-82-T, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E, 14 May 2007, para. 10.
[16] *Boškoski & Tarčulovski*, IT-04-82-T, Decision on Tarčulovski Second Motion for Admission of Exhibits from the Bar Table with Annex A, 7 April 2008, para. 5.

The *Gotovina et al.* Trial Chamber has explained that this procedure "allows for proper contextualization of the document without which the Chamber is left to determine relevance and probative value primarily on the basis of the documents alone."[17]

9. Documents are not suitable for admission, regardless of timing of introduction, from the bar table unless the indicia of reliability and authenticity can be assessed based on the documents themselves, or where the connection with evidence previously heard during trial is self-evident. Documents should be denied admission, conversely, when their relevance is ambiguous or debatable,[18] or where relevance can be inferred only on the basis of several steps of reasoning offered by the party's counsel, rather than on the evidence itself.[19] Similarly, documents whose reliability cannot be established on their face should generally not be admitted from the bar table.[20] The issue is not only whether a document has some degree of reliability, but also whether the available indicia of reliability are sufficient to allow the Chamber to make any reasonable assessment thereof.

10. Past practice establishes that submissions from the bar table should address each of the criteria of admissibility in respect of each document tendered. The *Ruto* Trial Chamber ordered the Prosecution to file a new application accompanied by a table to include "a short description of the content of each document, averment of its authenticity, an

[17] *Gotovina et al.*, IT-06-90-T, Decision on Prosecution's Motion to Admit Documents Into Evidence and to Add Two Documents to the Prosecution's Rule 65*ter* Exhibit List, 25 November 2008 ("*Gotovina* Decision of 25 November 2008"), para. 15 (italics added). *See* First *Karadžić* Bar Table Decision*,* para. 9 (describing bar table motions as "a supplementary method of introducing evidence, which should be used sparingly"); *Karadžić*, IT-95-5/18-T, Order on Procedure for Conduct of Trial, 8 October 2009, Appendix A, para. R ("[t]he use by the parties of bar table motions shall be kept to a minimum"); *Prlić et al*., IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on the Conduct of Trial Proceedings, 28 April 2006, para. 8(j) ("As a general rule, the party tendering a piece of evidence shall do so through a witness who is either the author of that evidence, or who can speak to its origins and content.")
[18] *Stanišić & Simatović*, IT-03-69-T, Second Decision on Simatović Defence Third Bar Table Motion, 17 September 2012, para. 12 ("The Defence has had ample opportunity to present these documents through witnesses in order to provide the Chamber with the necessary context, but chose not to do so. As such, the Chamber is left to guess how to interpret or contextualise these documents when determining their admission into evidence. Therefore, the Chamber is unable to determine the probative value of these documents. For these reasons, the Chamber denies their admission into evidence from the bar table.")
[19] *Strugar,* IT-01-42-T, Decision II on the Admissibility of Certain Documents, 9 September 2004, paras. 14, 16; *Milutinović et al*., IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 41 ("[t]he relevance of independent reports is extremely difficult to assess without a witness to provide context"); *Haradinaj et al*., IT-04-84-T, Decision on Prosecution's Motion to Tender Documents on its Rule 65ter Exhibit List, 30 November 2007, para. 18 ("[v]arious lists of names and some remarks on ammunition on pages 1 and 19 of the translated document lack contextualization. The Chamber therefore cannot regard them as relevant.")
[20] *See e.g. Gotovina* Decision of 25 November 2008, para. 15; *Delić,* IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008, para. 18.

indication of the reason for not tendering the document through a witness (if that is the case), an index of the most relevant portions of the document, as well as a description of its relevance and intended probative value."[21]

11. This is also the consistent practice of the ICTY, where the tendering party is required to provide a table describing the indicia of reliability of each document and its relevance.[22] The moving party is even typically required to circulate a Word version of the table of such submissions so that the responding party can make particularised submissions in response.

12. Electronic recordings of oral conversations are particularly unsuitable for admission from the bar table because additional information is almost always required to establish the requisite indicia of reliability. As consistently held at the ICTY, where such recordings are a common form of evidence:[23]

> a special category of evidence in that in and of themselves, they bear no *prima facie* indicia of authenticity or reliability, and as such these requirements must generally be fulfilled by hearing from the relevant intercept operators or the participants in the intercepted conversation.[24]

13. ICTY Trial Chambers have consistently required, at a minimum, the introduction of at least some evidence in respect of the methodology of collection and attribution before considering admission from bar table.[25]

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[21] *Ruto*, Decision on the Conduct of Trial Proceedings (General Directions), ICC-01/09-01/11-847-Corr, para. 27 ("The Chamber takes notes of the 'Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)', which does not follow the procedure set out in this decision. The Prosecution is directed to re-file its application in the format described above. The re-filing shall re-start the running of the time limit for responses, which shall also follow the procedure set out in this decision.")

[22] *Stanišić & Simatović*, IT-03-69-T, Second Decision on Simatović Defence Third Bar Table Motion, 17 September 2012, paras. 10, 11; *Stanišić & Simatović*, IT-03-69-T, Second Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012, para. 10.

[23] First *Karadžić* Bar Table Decision, para. 13.

[24] *Tolimir*, IT-05-88/2-T, Decision on Prosecution's Motion for Admission of 28 Intercepts from the Bar Table, 20 January 2012, para. 14. *See* First *Karadžić* Bar Table Decision, para. 13.

[25] *Tolimir*, IT-05-88/2-T, Decision on Prosecution's Motion for Admission of 28 Intercepts from the Bar Table, 20 January 2012, para. 14 ("the Chamber notes, as submitted by the Prosecution, that a large collection of intercepts have already been admitted in this case as a result of the testimony of numerous experienced and trained ABiH and MUP intercept operators who have established the reliability of the interception process and have been able to speak to the authenticity of the intercepts. The Chamber finds, therefore, that the reliability and authenticity of this general collection of intercepts has already been established. The Proposed Intercepts form part of the general collection of intercepts already admitted in this case and as such, the Chamber is satisfied that the reliability and authenticity of the Proposed Intercepts was sufficiently established for the purposes of admitting them into evidence from the bar table"); *Karadžić*, IT-95-5/18-T, Decision on Prosecution's First Bar Table Motion for the Admission of Intercepts, 14 May 2012, para. 15 ("weight to be attributed to the Intercepts. The Chamber has also received evidence relating to the methodology used for obtaining, transcribing and storing the Intercepts, the method used for identifying speakers, and the procedure adopted in handing over the

III. SUBMISSIONS

(i) Testimonial Statements, Whether of the Accused or Other Persons, Are Governed by Rule 68, and Are Not Admissible Without Satisfying Those Requirements (B.1-B.4.1 and E.1)

14. The Prosecution tenders several statements under the general admissibility standard prescribed by Article 69(4) without acknowledging that there is a *lex specialis* that applies to out-of-court testimonial statements arising from Article 69(2) and Rule 68. Indeed, the Prosecution cites no case-law at all in support of its request to tender these testimonial statements, and should not be permitted to correct this deficiency by way of a reply to which the Defence has no opportunity to respond.

15. Article 69(2) provides that:

> The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence.

16. Rule 68, as recently amended by the Assembly of States Parties, provides as follows:

> **Rule 68 Prior recorded testimony**
>
> 1. When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript *or other documented evidence of such testimony*, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met.[26]

Sub-sections 2 and 3 of Rule 68 set out a carefully calibrated test for determining whether an out-of-court statement may be admitted as evidence: (i) without cross-examination (sub-section 2); or (ii) with cross-examination (sub-section 3).

Intercepts to the Prosecution. The Chamber is therefore satisfied that there are sufficient indicia of reliability to negate the Accused's submission that this category of documents is "not sufficiently reliable to be admitted in general.")

[26] Italics added.

17. Article 69(2) and Rule 68 would be made a mockery if a party could avoid their requirements simply by tendering out-of-court statements from the bar table. The question that arises, however, is what out-of-court statements should be considered testimonial in nature (and therefore subject to Article 69(2) and Rule 68), and what out-of-court statements should be considered documentary in nature (and therefore subject to the more general admissibility standard of Article 69(4)).

18. The issue was previously addressed in *Katanga*:

> The Chamber emphasises that the right to examine, or to have examined, adverse witnesses only applies to testimony. Not every communication of information by an individual is testimony in this sense [….] It is only when a person acts as a witness against the accused that the accused obtains the right to examine, or have examined, that person, and only then can rule 68 be applied. Conversely, if an out-of-court statement does not qualify as testimony in this sense it can be admitted without the guarantees of rule 68. It is important, therefore, to distinguish between out-of court statements that qualify as prior recorded testimony under rule 68 and those that do not [….] The following criteria can, therefore, only serve as guidelines and are not intended to create fixed categories. The first key factor is whether the out-of-court statement was given to a person or body authorised to collect evidence for use in judicial proceedings. The most common example is when a person gives a statement to a representative of the Office of the Prosecutor. However, statements given to other entities acting at the behest of the Court can also qualify as witness testimony [….] The second key factor in determining whether an out-of-court statement qualifies as testimony in the sense of article 67(1)(e) and rule 68 is that the person making the statement understands, when making the statement, that he or she is providing information which may be relied upon in the context of legal proceedings.[27]

19. Documents B.1 to B.4.1 and Document E.1 fall within this category. These were all statements generated in anticipation, and for the purpose, of future litigation. The non-traditional format of E.1 makes the document no less testimonial in character, especially as its content includes specific and precise factual assertions as opposed to providing general background information about the context of certain crimes. The factual propositions of the Independent Counsel, the author of E.1, are manifestly testimonial in character. These propositions should not be admitted as evidence in this

[27] *Katanga*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, 17 December 2010, paras. 45-49. See *Ruto*, Decision on the Prosecution's Request for Admission of Documentary Evidence, ICC-01/09-01/11-1353, 10 June 2014, para. 25 ("Article 69(2) of the Statute and Rule 68 of the Rules set out a distinct regime in respect of the 'testimony' of a witness. The Chamber will, where relevant, consider on a case-by-case basis below whether the tendered material may be more properly considered as potentially falling within that regime.")

case without satisfying the requirements of Article 69(2) and Rule 68.

20. Some common law jurisdictions, as an exception to the general rule against hearsay, permit statements of accused persons to be admitted as evidence against themselves only (but not against others, as such admission would violate the right to cross-examine witnesses). This learning appears to have been accepted in some ICTY decisions that have not, however, been relied upon by the Prosecution.[28] In the absence of such reliance, the Defence does not consider that there is any need to address why those decisions are distinguishable from present circumstances.

21. The tendered statements do not comply with the requirements of Rule 68(2). No showing has been made, let alone any submission offered, that Rule 68(2)(a) is satisfied in respect of any of the statements. Sub-rules (b), (c) and (d) of Rule 68(2) are manifestly not satisfied.

(ii) A Revised Transcription or Translation of a Telephone Conversation Recorded Pursuant to a Judicial Order Obtained on the Basis of Material Misstatements By the Prosecution Should be Denied

22. Document E.2.1 is a slightly revised transcription of a document already tendered as Tab 81 of the Prosecution's First Bar Table Motion. The Prosecution has not formally withdrawn the tendering of Tab 81, but the Defence presumes that such withdrawal is intended.

23. The Prosecution Pre-Trial Brief cites Document E.2.1 as evidence of Mr. Mangenda "[REDACTED]."[29] The Prosecution also has asserted that the intercepts, including this one, "[REDACTED]."[30] The apparent purpose of this claim is to suggest that even if the Prosecution made material misstatements, they should not give rise to exclusion of the information because – according to the Prosecution – it is so facially damning of the accused.

24. The premise is flawed and dangerous. Even assuming it to be correct, however, Document E.2.1 demonstrates how exaggerated is this claim. The sum total of Mr.

[28] [REDACTED].
[29] *Bemba et al.*, Prosecution Pre-Trial Brief, ICC-01/05-01/13-1110-Conf, 31 July 2015, para. 245 ("Prosecution Pre-Trial Brief").
[30] Prosecution's Response to Inadmissibility Motion, para. 1.

Mangenda's "planning and execution of illicitly coaching witnesses", as reflected in this document, consists of the words "[REDACTED]" and "[REDACTED]".[31] The words of his interlocutor reveal no express intention to give false testimony, to present evidence that a party knows is false, or to corruptly influence a witness.[32] The Prosecution will undoubtedly rely – as it is entitled to do – on the totality of admissible evidence to prove its case, and invite the Trial Chamber to draw certain inferences; but to assert that these intercepts have an overpowering probative value so as to justify any and all previous impropriety is not only legally misguided, but also factually incorrect.

(iii) The Prosecution Offers No Individualised Submissions on Indicia of Reliability, Let Alone Tendered Admissible Evidence Substantiating Those Indicia

25. Well-established case law requires that documents tendered by way of a bar table motion must be supported by individualised submissions as to the indicia of reliability supporting the admission of each and every document tendered. The Prosecution has offered no such individualised submissions, relying instead on general and non-comprehensive arguments in the main body of its motion. The bar table motion is categorically deficient for this reason, as are all documents tendered that are unaccompanied by particularised submissions on reliability.

26. The Prosecution has also failed to offer information that could be easily obtained that would substantiate the origin of some of the documents tendered. No investigator's statements have been disclosed, for example, to substantiate the specific factual assertions that appear in the Motion. The absence of any statement or affidavit means either that: (i) the Prosecution is putting itself forward as a witness; or (ii) the Trial Chamber is obliged to base its findings about indicia of reliability on unsworn submissions by the Office of the Prosecutor.

IV. CONCLUSION AND RELIEF REQUESTED

27. The Prosecution's Third Bar Table Motion suffers from many of the same defects as do its first two motions, as well as new defects: (i) the attempt to circumvent Rule 68

[31] Prosecution Pre-Trial Brief, para. 245, fn. 745 (referring to lines 61-75, of which only two are spoken by Mr. Mangenda – lines 64 and 67).
[32] [REDACTED].

in tendering testimonial statements from the bar table; (ii) the failure to justify the admission of a conversation recorded by the police on the basis of material misstatements to a judge; (iii) the absence of particularised submissions substantiating indicia of reliability, let alone proper evidential grounds providing those indicia; and (iv) the failure to provide translations in one of the official languages of the Court.

28. Mr. Mangenda does not object to the admission of documents A.6 and A.15. He does, however, object to the admission of the 102 other documents tendered in the bar table motion.

Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 7 October 2015,
At The Hague, The Netherlands