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No.: ICC-01/05-01/13
Date: 14 December 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul C. 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

**Decision on ‘Prosecution’s Fifth Request for the Admission of Evidence from the Bar
Table’**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 64(2), 64(9), 69 and 74(2) of the Rome Statute and Rules 63, 64 and 68 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table"'.

1. On 27 November 2015, the Office of the Prosecutor ('Prosecution') filed its fifth bar table request ('Request') seeking to admit 108 items into evidence ('108 Items').¹ The Prosecution has indicated that, subject to the resolution of the Request, it 'rests its case-in-chief'.²
2. On 7 December 2015,³ the defence teams ('Bemba Defence', 'Kilolo Defence', 'Mangenda Defence', 'Babala Defence' and 'Arido Defence', respectively) responded to the Request.⁴
3. The Chamber recalls its previous rulings on 'bar table' requests and, in particular, its decision that it will generally defer its assessment of the admissibility of evidence until deliberating its judgment.⁵ Consistently with this practice, the Chamber will only engage with certain preliminary issues or other 'statutory pre-

¹ Prosecution's Fifth Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1498-Red (with confidential annex; redacted version of filing notified on 30 November 2015).

² Prosecution's Notice of the Close of its Case-in-Chief, 27 November 2015, ICC-01/05-01/13-1499.

³ The response deadline had been shortened to this date. Email from a Legal Officer of the Chamber to the parties, 27 November 2015 at 17:32.

⁴ Réponse de l'équipe de Défense de M. Fidèle BABALA WANDU à la «Prosecution's Fifth Request for the Admission of Evidence from the Bar Table» (ICC-01/05-01/13-1498-Conf), ICC-01/05-01/13-1513-Red (with confidential annex; public redacted version notified 10 December 2015); Response to "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table", ICC-01/05-01/13-1514-Conf; Narcisse Arido's Response to the Prosecution Fifth Bar Table Motion (ICC-01/05-01/13-1498-Conf), ICC-01/05-01/13-1515-Conf (with confidential annex); Kilolo Defence Response to "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table", ICC-01/05-01/13-1516-Conf (with confidential annex); Response to Fifth Bar Table Motion, ICC-01/05-01/13-1517-Red (with confidential annex; public redacted version notified 9 December 2015).

⁵ Decision on 'Prosecution's Fourth Request for the Admission of Evidence from the Bar Table', 12 November 2015, ICC-01/05-01/13-1480; Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285.

requisites' raised by the defence teams, deferring consideration of the remainder of the arguments raised until the trial judgment.

A. Items not on the list of evidence

4. Both the Bemba and Babala Defence object to five items being formally submitted on grounds that the Prosecution did not include them in its list of evidence.⁶ Four of these items are annexes to an independent counsel report,⁷ and the fifth is a transcript of a video (the video itself is on the list of evidence, but the transcript is not).⁸
5. The Prosecution was directed to file a list of evidence in this case in order to give notice to the accused as to which items might potentially be submitted during the Prosecution's evidence presentation.⁹ The Chamber has required the Prosecution to seek leave whenever requesting additions to its list¹⁰ – for these five items, it has not done so.
6. As for the four annexes to the independent counsel report, the Chamber notes that the Prosecution made specific references to which parts of this report it wanted to include on its list of evidence.¹¹ The Chamber considers that the failure to include these four annexes on the list of evidence creates an unacceptable risk that the accused were unprepared for these items during the Prosecution's evidence presentation, particularly given that they were only submitted contemporaneously with the Prosecution closing its evidence presentation. In

⁶ ICC-01/05-01/13-1513-Red, para. 9; ICC-01/05-01/13-1517-Red, para. 6, *referencing* Annex A to Prosecution's Third Updated List of Evidence, 31 August 2015, ICC-01/05-01/13-1196-Conf-AnxA.

⁷ Annexes 8, 9, 13 and 19 of Rapport intermédiaire du Conseil indépendant sur l'analyse des pièces saisies par les autorités belges (ICC-01/05-01/13-893-Conf), 1 July 2015, ICC-01/05-01/13-1047-Conf-Anx8-Red; ICC-01/05-01/13-1047-Conf-Anx9; ICC-01/05-01/13-1047-Conf-Anx13-Red; ICC-01/05-01/13-1047-Conf-Anx19. These annexes were transmitted to the parties by virtue of the Decision on the Independent Counsel Report of 2 July 2015, 20 July 2015, ICC-01/05-01/13-1094-Conf.

⁸ CAR-OTP-0087-2679.

⁹ Articles 64(2) and 67(1)(b) of the Statute; Order setting the commencement date for trial, 22 May 2015, ICC-01/05-01/13-960, para. 13.

¹⁰ Decision on Prosecution Request to add 12 Items to its List of Evidence, 27 August 2015, ICC-01/05-01/13-1191.

¹¹ ICC-01/05-01/13-1196-Conf-AnxA, page 17 (list of evidence includes ICC-01/05-01/13-1047-Conf-Anx20).

order to protect the rights of the accused, the Chamber does not recognise the formal submission of these items.

7. As to the video transcript, given that the video concerned was indicated on the list of evidence, the defence was given ample notice that the video itself may be submitted during the trial and no prejudice is caused by considering the transcript once the video is recognised as formally submitted. In principle, the Chamber considers that recognising the formal submission of audio-visual material automatically includes recognising the formal submission of any associated transcripts or translations which were duly disclosed. This would be the case irrespective of whether these transcripts/translations were on the list of evidence or formally submitted, though it is clearly preferable to formally submit these associated documents so there is no confusion as to their status. To conclude otherwise would serve no useful purpose – the submitting party clearly wanted these documents to be considered, and it would be unduly formalistic to recognise the submission of a video but not a written record designed to faithfully reflect its contents for better comprehension. For these reasons, the Chamber recognises the formal submission of the video transcript.

B. Objections raised under Rule 68 of the Rules

8. The Mangenda Defence argues that certain items submitted in the Request cannot be recognised on grounds that they do not comply with the formal pre-requisites in Rule 68 of the Rules.¹² The only concrete examples given by the Mangenda Defence are two independent counsel reports,¹³ and the Chamber has already

¹² ICC-01/05-01/13-1514-Conf, para. 4.

¹³ CAR-OTP-0079-1553 (ICC-01/05-01/13-6-Conf-AnxA-Red); CAR-OTP-0079-1571 (ICC-01/05-01/13-6-Conf-AnxB-Red).

considered that these kinds of materials are not testimonial within the meaning of Rule 68 of the Rules.¹⁴ Accordingly, this objection is dismissed.

9. The Arido Defence also challenges document CAR-D21-0004-0546 on Rule 68 grounds.¹⁵ This document is allegedly an email that Mr Kilolo sent to members of the defence team in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* containing a non-verbatim transcript of an interview with D-26. The Prosecution submits that this email is relevant 'to establishing that KILOLO's coaching of D-0026 was inconsistent with information provided by the witness during his 2012 interview with the *Bemba* Defence'.¹⁶ The Prosecution's argumentation makes it clear that this email is not offered for the truth of its contents – it is only offered to prove that D-26 gave information inconsistent with what he was subsequently told to say by Mr Kilolo. Offering prior statements to prove inconsistencies falls outside the scope of Rule 68 of the Rules¹⁷ and, accordingly, this objection is also dismissed.

C. Working language translations

10. The Mangenda Defence objects to two documents 'for which no translation has been provided into an official language of the Court'.¹⁸ The two documents challenged actually do have working language translations,¹⁹ but the Prosecution did not include these translations in the Request. For the same reasons as indicated in paragraph 7 above concerning the video transcript, these working language translations are automatically recognised as submitted along with the underlying material. These two documents may be considered by the Chamber in its judgment.

¹⁴ Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, paras 44-45.

¹⁵ ICC-01/05-01/13-1515-Conf, para. 6.

¹⁶ Annex A of the Request, ICC-01/05-01/13-1498-Conf-AnxA, page 56.

¹⁷ ICC-01/05-01/13-1478-Red-Corr, para. 34.

¹⁸ ICC-01/05-01/13-1514-Conf, para. 2, *referencing* CAR-OTP-0079-1553 (ICC-01/05-01/13-6-Conf-AnxA-Red); CAR-OTP-0079-1571 (ICC-01/05-01/13-6-Conf-AnxB-Red).

¹⁹ CAR-OTP-0085-0596; CAR-OTP-0085-0606.

11. The Mangenda Defence also makes submissions on how certain items do not have ‘official’ translations.²⁰ The Chamber considers this argument to relate to the reliability of the transcripts in question, and defers how much consideration it will give to the fact that some submitted transcripts were generated by the parties.

D. Conclusion

12. As to the remainder of the arguments raised against the 108 Items, and consistently with its previous rulings, the Chamber defers consideration of them until it assesses the evidence in the trial judgment. The Chamber will therefore recognise the items referred to in the Request as submitted, save for those rejected in paragraph 6.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

RECOGNISES the 108 Items as ‘submitted’, except for ICC-01/05-01/13-1047-Conf-Anx8-Red, ICC-01/05-01/13-1047-Conf-Anx9, ICC-01/05-01/13-1047-Conf-Anx13-Red and ICC-01/05-01/13-1047-Conf-Anx19;

ORDERS the Registry to ensure that the e-court metadata reflects which of the 108 Items have been formally submitted to the Chamber; and

ORDERS the parties to prepare and submit public redacted versions of their respective filings (excluding annexes) or request reclassification thereof, if they have not already done so, within fourteen days of notification of the present decision.

²⁰ ICC-01/05-01/13-1514-Conf, para. 3.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Schmitt', written over a horizontal line.

Judge Bertram Schmitt, Presiding Judge

A handwritten signature in black ink, appearing to read 'Perrin de Brichambaut', written over a horizontal line.

Judge Marc Perrin de Brichambaut

A handwritten signature in black ink, appearing to read 'Raul C. Pangalangan', written over a horizontal line.

Judge Raul C. Pangalangan

Dated 14 December 2015

At The Hague, The Netherlands