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No: **ICC-01/05-01/13**  
Date: **26 February 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 with Confidential Annex A**

**Jean-Jacques Mangenda's 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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**Legal Representatives of the Victims**

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**Unrepresented Victims**

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(Participation/Reparation)**

**The Office of Public Counsel for Victims**

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**Victims Participation and Reparations  
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## I. INTRODUCTION

1. Jean-Jacques Mangenda hereby requests the admission into evidence of 108 items from his list of exhibits. The proposed evidence is relevant and has probative value, as is implicitly required for admission pursuant to Article 69(4) of the Statute.<sup>1</sup> The main categories of documents for which admission is sought are: documents showing the propriety, as reflected in the Prosecution's own practice, of providing telephones and telephone credit to witnesses; documents showing the extent of payments to P-260 and P-245, which is relevant to their credibility; and documents showing the propriety, as reflected in the Prosecution's own practice, of certain payments to witnesses. Other documents tendered include those showing that the Prosecution acquired financial records from Western Union in Austria prior to the issuance of a judicial order; transaction records showing Mr. Mangenda's presence in The Hague on a certain date, contrary to a Prosecution suggestion in one of its questions to a witness; the significance, or lack thereof, of the notice of LRV questions; Mr. Mangenda's practice of "highlighting" transcripts during the Main Case; and a few corrected transcripts and translations of intercepted telephone conversations. This information is relevant to material issues in this case.
2. Most of the documents were both generated and disclosed by the Prosecution. Most of the documents also bear facial indicia of reliability such as signatures, stamps, and letterheads. Many of the documents are mutually corroborative or have been corroborated by evidence heard in the case so far. All of the documents tendered meet – in fact, easily surpass – the threshold of *prima facie* reliability required for admission as evidence.<sup>2</sup>

## II. PROCEDURAL HISTORY

3. On 16 June 2015<sup>3</sup>, 31 July 2015<sup>4</sup> and 21 August 2015<sup>5</sup> respectively, the Office of the Prosecutor filed three requests seeking the admission of a total of 1,028 documentary

<sup>1</sup> All future references to "Article", unless otherwise indicated, refer to Articles of the Rome Statute.

<sup>2</sup> *Bemba et al.*, Transcript, ICC-01/05-01/13-T-27 CONF-ENG, 23 October 2015, p. 90, ll. 4-5, p. 93, ll. 19-24, discussing CAR-OTP-0082-2565 and CAR-OTP-0082-2567; *Bemba et al.*, Transcript, ICC-01/05-01/13-T-15 CONF-ENG, 7 October 2015, p. 74, ll. 21-24, discussing CAR-OTP-0084-1422.

<sup>3</sup> *Bemba et al.*, Prosecution's First Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1013-Conf, 16 June 2015.

materials from the bar table. The Chamber addressed these motions in its decision of 24 September 2015, in which it recognised as ‘submitted’ the materials referred to in the Prosecution’s first, second and third requests, but deferred its Article 69 admissibility assessment until the deliberation of its judgment pursuant to Article 74(2) of the Statute.<sup>6</sup>

4. The Prosecution filed further bar table motions on 28 September 2015 and on 27 November 2015, tendering 57 and 108 items respectively.<sup>7</sup> The Trial Chamber, with the exception of four items, accepted all these items as submitted.<sup>8</sup>
5. On 21 January 2016, Mr. Mangenda filed his list of anticipated evidence.<sup>9</sup>

### III. APPLICABLE LAW

6. Article 69(4) of the 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 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.

7. Previous jurisprudence has interpreted this provision as providing three criteria for admissibility. First, the proposed evidence must be of *prima facie* relevance to the

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<sup>4</sup> *Bemba et al.*, Prosecution’s Second Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1113-Conf, 31 July 2015.

<sup>5</sup> *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.

<sup>6</sup> *Bemba et al.*, 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), ICC-01/05-01/13-1285, 24 September 2015 (“First Decision on Admission of Documentary Evidence”), paras. 9-13, 16 (“[t]he Chamber determines that, as a general rule, these proceedings will be conducted more efficiently if the Chamber defers its assessment of the admissibility of evidence until deliberating its judgment pursuant to Article 74(2) of the Statute. The Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted at that time...”)

<sup>7</sup> *Bemba et al.*, Prosecution’s Fourth Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1310-Conf, 28 September 2015; *Bemba et al.*, Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1498-Conf, 27 November 2015.

<sup>8</sup> *Bemba et al.*, Decision on ‘Prosecution’s Fourth Request for the Admission of Evidence from the Bar Table’, ICC-01/05-01/13-1480, 12 November 2015; *Bemba et al.*, Decision on ‘Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table’, ICC-01/05-01/13-1524, 14 December 2015, para. 6.

<sup>9</sup> *Bemba et al.*, Jean-Jacques Mangenda’s Lists of Evidence and Witnesses, ICC-01/05-01/13-1559, 21 January 2016.

issues at trial.<sup>10</sup> Second, it must have “probative value”, which has been interpreted as “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.”<sup>11</sup> The indicia need not establish “definitive proof of reliability but rather *prima facie* proof based on sufficient indicia.”<sup>12</sup> Third, any potential prejudice to the fairness of the trial caused by the evidence must be weighed against its probative value.<sup>13</sup>

8. The admission of items “from the bar table” – i.e., without requiring authentication or corroboration by a witness in court – has been permitted in *Lubanga*,<sup>14</sup> *Katanga and Ngudjolo*,<sup>15</sup> *Ruto and Sang*,<sup>16</sup> and *Bemba*.<sup>17</sup> The *Ruto* Trial Chamber has described this practice as “established in the jurisprudence of the Court.”<sup>18</sup>
9. This Chamber has emphasised that, in this case, rulings on admissibility will be deferred until the end of proceedings, subject to its discretion to make advance rulings:

[T]he Chamber is able to more accurately assess the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial. The relevance of a particular piece of evidence may not be possible to determine without consideration of other items of evidence, or even the totality of the evidence. A decision on relevance and admissibility upon submission restricts the Chamber's clarity in making these very rulings. The Chamber's evaluation of relevance may also change during the course of the hearing, risking inconsistent admissibility rulings and forcing the Chamber to continuously review an item's irrelevance throughout the proceedings.

<sup>10</sup> *Lubanga*, Corrigendum to Decision on the admissibility of four documents, ICC-01/04-01/06-1399-Corr, 20 January 2011 (“*Lubanga* Decision”), para. 27; *Katanga and Ngudjolo*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, 17 December 2010 (“*Katanga and Ngudjolo* Decision”), section B; *Bemba*, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, ICC-01/05-01/08-2012-Red, 9 February 2012 (“*Bemba* February 2012 Decision”), paras. 13-14; *Bemba*, “Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012, ICC-01/05-01/08-2299-Red, 8 October 2012 (“*Bemba* October 2012 Decision”), para. 8; *Ruto and Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence, ICC-01/09-01/11-1353, 10 June 2014 (“*Ruto and Sang* Decision”), para. 15.

<sup>11</sup> *Ruto and Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence, ICC-01/09-01/11-1353, 10 June 2014, (“*Ruto* Decision”), para. 15.

<sup>12</sup> *Id.* See also *Lubanga* Decision, paras. 28-30; *Katanga and Ngudjolo* Decision, section C; *Bemba* February 2012 Decision, paras. 13, 15; *Bemba* October 2012 Decision, para. 8.

<sup>13</sup> *Lubanga* Decision, paras. 31-32; *Katanga and Ngudjolo* Decision, section D; *Bemba* February 2012 Decision, paras. 13, 16-17; *Bemba* October 2012 Decision, para. 8; *Ruto and Sang* Decision, para. 16.

<sup>14</sup> *Lubanga* Decision; *Lubanga*, Decision on the admission of material from the “bar table”, ICC-01/04-01/06-1981, 24 June 2009.

<sup>15</sup> *Katanga and Ngudjolo* Decision.

<sup>16</sup> *Ruto and Sang* Decision.

<sup>17</sup> *Bemba* February 2012 Decision; *Bemba* October 2012 Decision.

<sup>18</sup> *Ruto and Sang* Decision, para. 13.

Deferring these assessments is also more consonant with the Chamber's right and duty, as enshrined in Rule 63(2) of the Rules, 'to assess **freely** all evidence submitted in order to determine its relevance or admissibility in accordance with article 69'.

[...]

[T]he Chamber always retains the discretion to rule on admissibility related issues upfront when appropriate. This is consistent with the Appeals Chamber's holding that the Chamber must balance its discretion to defer consideration of admissibility issues with its obligations under article 64(2) of the Statute.<sup>19</sup>

#### IV. SUBMISSIONS

10. For the reasons set out in more detail in the attached annex, all of the documents tendered meet the requirements for admission under Article 69(4) of the Statute.
11. The first six categories of documents, as described in the attached annex, concern the scope of payments and other emoluments provided by the Prosecution to its own witnesses. This practice is relevant to issues in this case for two reasons. First, the Prosecution's own practice demonstrates the broad range of payments to witnesses that may be necessary and reasonable under particular circumstances. The existence of such payments, accordingly, is not *prima facie* indicative of any impropriety whatsoever, let alone criminality. A person's awareness of such payments, assuming that there was such awareness, is not indicative of any impropriety. On the contrary, such payments are frequently reasonable and necessary. The Prosecution, as is reflected in the first category, has also frequently supplied telephones to its witnesses and, on at least one occasion, more than one telephone.<sup>20</sup>
12. Second, the value of payments by the Prosecution – in particular to witness P-260 – is highly relevant to witness credibility. No suggestion is made – as was emphasised during trial – that such payments were made to induce any witness to tell untruths. The contention, rather, is that large payments to impecunious witnesses, whether appropriate or not, can constitute a powerful if unintended inducement to witnesses to colour their testimony in a manner favourable to the party associated with those payments. This is all the more so when that party is the Prosecution, which also has the power to prosecute the admitted offences of the witnesses.

<sup>19</sup> First Decision on Admission of Documentary Evidence, paras. 10, 13.

<sup>20</sup> See items 2, 8 and 9, appearing to show the provision of telephones to the same witness more than once.

13. The relevance and *prima facie* reliability of the other categories of documents tendered is discussed in the attached annex. Many of the documents – such as those in categories A through H – were produced and disclosed by the Prosecution itself. All other documents also have *prima facie* reliability.

**V. CONCLUSION AND RELIEF REQUESTED**

14. Jean-Jacques Mangenda respectfully requests the admission into evidence of the 108 items specified in the attached annex.



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**Christopher Gosnell**  
**Counsel for Mr. Jean-Jacques Kabongo Mangenda**

Respectfully submitted this 26 February 2016,  
At The Hague, The Netherlands