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No: **ICC-01/05-01/13**

Date: **2 March 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 Redacted Version
with Confidential Annexes A and B and Public Annexes C and D

Jean-Jacques Mangenda's Request to Add Four Items to his List of Evidence

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 hereby requests, pursuant to Regulation 35(2) of the Regulations of the Court, the addition of four items to his List of Evidence.¹ Two of the items, attached as confidential Annexes A and B, consist of [REDACTED].² The documents, despite being evidently relevant to these proceedings, were only disclosed on 23 February 2016.³ The addition of these items at this stage, given that these items have long been in the Prosecution's possession, causes no prejudice.
2. The third and fourth items, attached as public Annexes C and D, are *curriculum vitae* of Mr. Mangenda's expert witness, D23-1.⁴

II. PROCEDURAL HISTORY

3. The Prosecution was required to finalise disclosure in this case by 30 June 2015.⁵
4. The Defence was required, by 3 December 2015, to: (i) disclose all material falling under its disclosure obligations as of that time; (ii) provide a provisional list of any witnesses; and (iii) estimate the duration of their testimony. By 21 January 2016, the Defence was required to: (i) disclose all outstanding materials it intends to use during its evidence presentation; (ii) provide a final list of witnesses and list of evidence; and (iii) provide summaries of anticipated testimony.⁶ The Mangenda Defence was granted until 3 February 2016 to disclose its potential expert report and the accompanying witness summary.⁷

¹ All future references to "Regulation", unless otherwise indicated, refer to the Regulations of the Court. This is a public redacted version of Defence submission ICC-01/05-01/13-1673-Conf, filed pursuant to Trial Chamber's orders in its decision ICC-01/05-01/13-1676.

² [REDACTED] and [REDACTED]. These Annexes A and B concern items that have been disclosed *inter partes* on a confidential basis. References to these documents and their contents necessitate the designation of the present filing and these two annexes as confidential.

³ Prosecution Trial Rule 77, Pack 41.

⁴ CAR-D23-0008-0001 and CAR-D23-0008-0004.

⁵ *Bemba et al.*, Decision on Modalities of Disclosure, ICC-01/05-01/13-959, 22 May 2015.

⁶ *Bemba et al.*, Directions on Defence Presentation of Evidence, ICC-01/05-01/13-1450, 3 November 2015; *Bemba et al.*, Further Directions on the Conduct of the Proceedings in 2016, ICC-01/05-01/13-1518, 9 December 2015.

⁷ *Bemba et al.*, Decision on the Mangenda Defence Request for Extension of Time Limit for Disclosure of Potential Expert Report, ICC-01/05-01/13-1555, 20 January 2016, para. 12.

5. The Mangenda Defence complied with both obligations, filing its Lists of Evidence and Witnesses on 21 January 2016⁸ and its supplemental notice of evidence on 3 February 2016.⁹ At the time of the second filing, the appointment of D23-1 as an expert within the meaning of Regulation 44 had not yet been finalised by the Registry.¹⁰
6. On 23 February 2016, the Prosecution disclosed 331 items in its Trial Rule 77 Pack 41, including documents not previously in the possession of, or known to, the Defence.
7. Two of the documents in that disclosure are of great significance to this case, and their relevance could not but have become apparent at the time of Herbert Smetana's testimony from 2 to 4 November 2015. The first document, [REDACTED]. [REDACTED],¹¹ [REDACTED].
8. The second document, [REDACTED].

III. APPLICABLE LAW

9. Regulation 35(2) provides as follows:

The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.¹²

10. Trial Chambers – including this Trial Chamber – have adopted a flexible approach to the amendment of lists of evidence.¹³ This Trial Chamber has taken into account the

⁸ *Bemba et al.*, Jean-Jacques Mangenda's Lists of Evidence and Witnesses, ICC-01/05-01/13-1559, 21 January 2016.

⁹ *Bemba et al.*, Jean-Jacques Mangenda's Supplemental Notice of Evidence to be Tendered, ICC-01/05-01/13-1592, 3 February 2016.

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² Regulation 35(2), Regulations of the Court, ICC BD/01-01-04.

¹³ *Ntaganda*, Decision on the Defence request for reconsideration, ICC-01/04-02/06-611, 27 May 2015, para. 3 (Trial Chamber VI authorising the Prosecution to update its List of Evidence progressively, finding it unnecessary to rule on specific amendments); *see also Ntaganda*, Transcript, ICC-01/04-02/06-T-19-ENG ET,

following considerations in deciding whether to exercise its discretion: (i) whether the applicant has demonstrated that acting within the time limit was not possible for reasons outside of his or her control; (ii) the degree of prejudice, if any, that would result from the proposed amendment; and (iii) more broadly, whether the proposed amendment serves the interests of justice.¹⁴ On the basis of these criteria, this Trial Chamber has authorised the addition of items to the Lists of Evidence of the Prosecution,¹⁵ the Defence for Mr. Jean-Pierre Bemba,¹⁶ the Defence for Mr. Aimé Kilolo Musamba,¹⁷ and the Defence for Mr. Narcisse Arido.¹⁸

11. Notably, late disclosure by another party has been accepted as a basis for motions to add documents to a party's exhibit lists.¹⁹

22 April 2015, p. 11, ll. 18-19; *Katanga and Ngudjolo*, Decision on the Prosecution Motion for leave to disclose and add the investigator's report concerning Witness P-268 to the List of Incriminating Evidence, ICC-01/04-01/07-2325-Red, 27 September 2010, para. 15 (Trial Chamber II exercising its discretion under Articles 64(6)(d) and 69(3) of the Rome Statute to order the production of evidence necessary for the determination of the truth under certain circumstances, even where the Regulation 35(2) conditions were not satisfied. Prior to exercising this discretion, the Chamber required that the following conditions be met: "(i) the new material is either significantly more compelling than other items of evidence already disclosed to the Defence, or brings to light a previously unknown fact which has a significant bearing upon the case; and (ii) the late addition will not cause undue prejudice to the Defence in relation to the latter's right to have adequate time and facilities to prepare in accordance with article 67(1)(b) of the Statute"); *Ruto and Sang*, Public Redacted Version of Decision on the Prosecution's Tenth Application for Addition of Documents to Its List of Evidence, ICC-01/09-01/11-1549-Red, 12 January 2015, para. 21 (Trial Chamber V(A) considering the nature and size of the items to be added and the timing of their original disclosure for inclusion into the list of evidence.)

¹⁴ *Bemba et al.*, Decision on Prosecution Request to add 12 Items to its List of Evidence, ICC-01/05-01/13-1191, 27 August 2015 ("Decision on Prosecution Request"), paras. 9-11; *Bemba et al.*, Decision Regarding Defence Evidence, ICC-01/05-01/13-1566-Conf, 22 January 2016 ("Decision on Bemba Request"), para. 7; *Bemba et al.*, Decision on Kilolo Defence Request to Amend its List of Evidence, ICC-01/05-01/13-1579, 27 January 2016 ("Decision on Kilolo Request"), para. 2; *Bemba et al.*, Decision on the 'Kilolo Defence Request to Replace an Item on its list of Evidence and for Various Orders', ICC-01/05-01/13-1606, 8 February 2016 ("Decision on Second Kilolo Request"), para. 5.

¹⁵ Decision on Prosecution Request, paras. 9-11.

¹⁶ Decision on Bemba Request, para. 7.

¹⁷ Decision on Kilolo Request, para. 2; Decision on Second Kilolo Request, para. 5.

¹⁸ *Bemba et al.*, Decision on Arido Request to Add Items to its List of Evidence, ICC-01/05-01/13-1655, 24 February 2016.

¹⁹ Decision on Second Kilolo Request, para. 5 ("[n]oting that those items were disclosed to the defence teams by the Prosecution after the deadline of 21 January 2016 by which the defence teams were to disclose their evidence and are limited in number, the Single Judge finds there to be little or no prejudice caused to the parties by their addition to the Defence's list of evidence") (footnotes omitted); Decision on Prosecution Request, para. 11 ("[w]ith regard to the handwritten note, the Chamber notes that the Prosecution received the item only after the Disclosure Deadline. The Chamber therefore finds that the filing of the application after the lapse of the Disclosure Deadline was for reasons outside of its control.")

IV. SUBMISSIONS

a. The Addition of the [REDACTED] to the Exhibit List is in the Interests of Justice

12. Mr. Mangenda's request for inclusion of [REDACTED] to his List of Evidence is in the interests of justice.
13. First, the Defence did everything possible – and far more than required – to bring the Prosecution's attention to the likely existence of documents such as the two that have now been belatedly disclosed. Starting in August 2015, the Defence has requested disclosure of information about the circumstances surrounding the Prosecution's investigations in Austria. The Trial Chamber, since that date, has made its position clear that documents relevant to such investigations must be disclosed.²⁰ If there had been any doubt about the relevance of these two documents, it was dispelled by Mr. Smetana's testimony, in which many questions were raised during cross-examination about the circumstances in which the Prosecution had obtained financial records from Western Union. This testimony triggered disclosures of emails relevant to Mr. Smetana's testimony, but these two documents remained undisclosed.
14. Second, the documents are manifestly relevant. The notices indicate that [REDACTED] Nevertheless, [REDACTED].²¹ Whether Mr. Smetana knew of these

²⁰ *Bemba et al.*, Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence, ICC-01/05-01/13-1632, 17 February 2016, paras 13-15, "[t]he Single Judge and Chamber have rendered several pronouncements confirming the defence teams' broader understanding of the Prosecution's disclosure obligations on this point. Most notably, the Chamber held the following: 'The Chamber considers that material which enables the defence to assess the legality of evidence which the Prosecution intends to rely upon at trial is relevant to the preparation of the defence. It therefore falls under the Prosecution's disclosure obligations as set out in Rule 77 of the Rules. It is not necessary for the defence to demonstrate the illegality of the proposed evidence, since this is precisely the reason why the material is sought.' Similar considerations were made in ruling that the Prosecution was required to disclose its requests for assistance [...] the Single Judge [has] emphasised that 'all requests for assistance be disclosed to the Defence, regardless of whether domestic authorities executed the requests for assistance or whether the requests for assistance pertained to intercepted communications or other measures'. The Prosecution's limited reading of the 12 January 2016 Decision cuts completely against the course set out in these previous rulings"; *Bemba et al.*, Public redacted version of Decision on the Bemba Defence Request for Disclosure of Communication with the Dutch Authorities, ICC-01/05-01/13-1542-Red, 16 January 2016, para. 11, "[t]he Single Judge recalls his prior finding that 'it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them'. The Single Judge repeats that this particularly holds true if the Prosecution, as in the present case, relies to a large extent on intercepted data and communications"; *Bemba et al.*, Decision on 'Joint Defence Request for remedies for disclosure violations', ICC- 01/05-01/13-1308-Conf, 28 September 2015, para. 13, "[REDACTED]". *Bemba et al.*, Decision on Mangenda Defence Request for Cooperation, ICC-01/05-01/13-1148-Conf, 14 August 2015, para. 10.

²¹ [REDACTED]

notices, or whether they were discussed during any meetings with Austrian prosecutors, would have been useful information for the cross-examination of Mr. Smetana.

15. Third, the Prosecution suffers no prejudice. The Prosecution, unlike the Defence, has had these documents for forty months. The Prosecution, unlike the Defence, had the benefit of these notices in assessing Mr. Smetana's answers. The Prosecution, unlike the Defence, was able to produce – and then tender into evidence – a statement from [REDACTED] with the benefit of these notices.
16. Fourth, the Defence has expeditiously identified these documents after their disclosure²² and has promptly filed this motion.

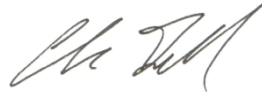
b. The Addition of D23-1's curriculum vitae to the Exhibit List is in the Interests of Justice

17. The Defence inadvertently failed to place Professor Lagodny's *curriculum vitae* and his short biography on its list of exhibits. The documents will assist the Prosecution and the Trial Chamber in evaluating his expertise and, accordingly, their admission into evidence at an appropriate moment would be in the interests of justice. No prejudice is occasioned to the Prosecution, in particular, given that Professor Lagodny's publications are all easily accessible through customary online research tools, and his position was previously identified.

V. CONCLUSION AND RELIEF REQUESTED

18. Mr. Mangenda requests leave to amend his list of evidence to reflect the addition of items [REDACTED], [REDACTED], CAR-D23-0008-0001 and CAR-D23-0008-0004.

²² 329 items were released in Prosecution Trial Rule 77 Package 41 (23 February 2016) and 2 items were released in Prosecution Trial INCR Package 43 (23 February 2016).



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Respectfully submitted this 2 March 2016,
At The Hague, The Netherlands