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Date: **29 April 2016**

**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 Outstanding Evidentiary Applications**

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

**The Office of the Prosecutor**

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Mr James Stewart

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Ms Melinda Taylor

**Counsel for Aimé Kilolo Musamba**

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Mr Jean-Pierre Kilenda Kakengi Basila

**Counsel for Narcisse Arido**

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**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**

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**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' or 'ICC'), 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, 69 and 74(2) of the Rome Statute, Rules 63, 64 and 68 of the Rules of Procedure and Evidence ('Rules') and Regulation 35(2) of the Regulations of the Court, issues the following 'Decision on Outstanding Evidentiary Applications'.

## **I. Overview**

1. On 13 November 2015, the Chamber ordered the Office of the Prosecutor ('Prosecution') to request the submission of any outstanding items of evidence or to close its evidence presentation by 27 November 2015.<sup>1</sup>
2. On 27 November 2015, the Prosecution announced it had completed its presentation of evidence.<sup>2</sup>
3. On 9 March 2016, the Chamber set a deadline of 8 April 2016 for the filing of any applications related to adding or subtracting items of evidence from the record.<sup>3</sup>
4. Many such applications were filed on or shortly after 8 April 2016. The present decision will rule on all these evidentiary applications except for those relating to Rule 68 of the Rules and Article 69(7) of the Statute.
5. On 21 April 2016,<sup>4</sup> the defence teams for Mr Bemba ('Bemba Defence'),<sup>5</sup> Mr Kilolo ('Kilolo Defence'),<sup>6</sup> Mr Mangenda ('Mangenda Defence'),<sup>7</sup> Mr Babala ('Babala

<sup>1</sup> Transcript of Hearing, ICC-01/05-01/13-T-37-CONF-ENG, page 58 lines 6-18.

<sup>2</sup> Prosecution's Notice of the Close of its Case-in-Chief, ICC-01/05-01/13-1499.

<sup>3</sup> Transcript of Hearing, ICC-01/05-01/13-T-42-CONF-ENG, page 42 line 21 to page 43 line 5.

<sup>4</sup> The Chamber sought the views of the defence teams by this date as to whether their presentation of evidence is closed subject to the resolution of the outstanding evidence applications. Email from Trial Chamber VII Communications to the parties, 18 April 2016 at 12:21.

<sup>5</sup> Defence Notice Concerning the Close of Evidence, ICC-01/05-01/13-1827.

<sup>6</sup> Kilolo Defence's Notice of the Closing of the Presentation of its Evidence, ICC-01/05-01/13-1829.

<sup>7</sup> Defence Notice of Completion of Presentation of Evidence, ICC-01/05-01/13-1826.

Defence')<sup>8</sup> and Mr Arido ('Arido Defence')<sup>9</sup> confirmed that their presentation of evidence was complete subject to the resolution of the outstanding 8 April 2016 applications and other caveats.

6. The Chamber recalls its previous rulings on 'bar table' requests and, in particular, its decision that it generally 'defers its assessment of the admissibility of evidence until deliberating its judgment'.<sup>10</sup> Consistently with this practice, the Chamber will only engage with certain preliminary issues or other 'statutory pre-requisites', deferring consideration of the remainder of the arguments raised until the trial judgment.
7. Further, and as specified below, the Chamber notes that some of the applications assessed below were filed after the 27 November 2015 and 8 April 2016 deadlines. Regulation 35(2) of the Regulations provides that '[a]fter 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 for reasons outside his or her control'. However, the existence or absence of reasons outside the filing participant's control is not dispositive when the fair and expeditious conduct of the proceedings demands a different outcome.<sup>11</sup> The Chamber will apply this test below in relation to the post-deadline applications.

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<sup>8</sup> Notification de l'équipe de Défense de M. Fidèle Babala Wandu sur la clôture de la présentation de ses éléments de preuves, ICC-01/05-01/13-1824.

<sup>9</sup> Narcisse Arido's Notice of Closing of Defence Evidence Presentation, ICC-01/05-01/13-1825.

<sup>10</sup> 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, para. 9. *See also* Decision on 'Jean-Jacques Mangenda's Request for the Admission of Evidence from the Bar Table', 6 April 2016, ICC-01/05-01/13-1772; Decision on 'Prosecution's Fifth Request for the Admission of Evidence from the Bar Table', 14 December 2015, ICC-01/05-01/13-1524; Decision on 'Prosecution's Fourth Request for the Admission of Evidence from the Bar Table', 12 November 2015, ICC-01/05-01/13-1480.

<sup>11</sup> Article 64(2) of the Statute. *See also* Regulation 29 of the Regulations.

## II. Decisions on the outstanding evidentiary applications

### A. Bemba Defence Request to Submit 292 Items from the Bar Table

8. On 8 April 2016, the Bemba Defence submitted 292 items from the bar table.<sup>12</sup>
9. On 25 April 2016,<sup>13</sup> the Prosecution opposed the submission of most of these items for lack of *prima facie* relevance or probative value.<sup>14</sup>
10. On 26 April 2016, the Bemba Defence sought leave to reply to the Prosecution's response.<sup>15</sup> On 29 April 2016, the Prosecution opposed this request.<sup>16</sup>
11. As regards the Bemba Defence's request for leave to reply, the Chamber does not consider it necessary to receive the reply proposed and rejects this request.
12. As for the merits of the Bemba Defence request, the Chamber notes that the Bemba Defence, in what it identifies as its 'Category L' materials - submits 114 filings from the Main Case 'from the bar, in the event that the request for judicial notice is rejected'.<sup>17</sup> The referenced request for judicial notice has since been granted,<sup>18</sup> but not all of the documents submitted are contained in the judicial notice application.<sup>19</sup> The Chamber considers that it is immaterial that the Bemba Defence did not include these Main Case filings in its judicial notice application. As the Chamber has previously held, 'ICC court records do not require formal

<sup>12</sup> Public Redacted Version of Corrigendum to Defence Request for Admission of Documents through a Bar Table Motion, ICC-01/05-01/13-1794-Corr-Red (with annex; corrigendum notified on 13 April 2016 and public redacted version notified on 18 April 2016).

<sup>13</sup> For this and all the other defence bar table motions, the response deadline was shortened to this date. Email from Trial Chamber VII Communications to the parties, 11 April 2016 at 16:34.

<sup>14</sup> Prosecution's Response to the Bemba Defence's Request for Admission of Documents through a Bar Table Motion (ICC-01/05-01/13-1794-Conf), ICC-01/05-01/13-1841-Conf-Red (redacted version notified 26 April 2016).

<sup>15</sup> Request for Leave to Reply to the 'Prosecution's Confidential Redacted version of "Prosecution's Response to the Bemba Defence's Request for Admission of Documents through a Bar Table Motion (ICC-01/05-01/13-1794-Conf), dated 25 April 2016, ICC-01/05-01/13-1844-Conf.

<sup>16</sup> Prosecution's Response to the Bemba Defence's Request for Leave to Reply to the "Prosecution's Confidential Redacted Version of 'Prosecution's Response to the Bemba Defence's Request for Admission of Documents through a Bar Table Motion'" (ICC-01/05-01/13-1794-Conf), dated 25 April 2016, ICC-01/05-01/13-1853-Conf.

<sup>17</sup> ICC-01/05-01/13-1794-Conf-Corr, paras 70-75.

<sup>18</sup> Decision on 'Defence Request for Judicial Notice', 13 April 2016, ICC-01/05-01/13-1805.

<sup>19</sup> As observed by the Prosecution, see ICC-01/05-01/13-1844-Conf, para. 39.

submission unless the parties wish them considered for the truth of their contents'.<sup>20</sup> As the Bemba Defence appears to have no preference between formally submitting these items and seeking their judicial notice, the Chamber decides to simply take judicial notice of the dates and contents of these items and will not recognise their formal submission.

13. For the remaining items, and consistent with its general approach, the Chamber defers the Prosecution's objections on admissibility considerations until the trial judgment. Noting the submissions of the parties in relation to these items submitted by the Bemba Defence, the Chamber recognises the formal submission of these items except for the Category L materials addressed in paragraph 12 above.

#### **B. Kilolo Defence Request to Submit 177 Items from the Bar Table**

14. On 8 April 2016, the Kilolo Defence submitted 177 items from the bar table.<sup>21</sup>
15. On 25 April 2016, the Prosecution opposed the submission of these items.<sup>22</sup>
16. In the Kilolo Defence request, the Chamber notes the following six items: (i) numbers 50 to 54, which are identified as attestations of persons which relate to the 'good morality of Mr Kilolo' and (ii) number 74, which is a signed document from a person commenting on the issue of 'immunity of a counsel at the ICC and also the legality of the mandate of the Independent Counsel'.<sup>23</sup> In relation to these six items, the Prosecution argues that the Kilolo Defence cannot formally submit these items without meeting the criteria in Rule 68 of the Rules.<sup>24</sup>

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<sup>20</sup> Annex 2 to the Third Registry's report on the evidence recognised as formally submitted to the Chamber, 8 April 2016, ICC-01/05-01/13-1786-Conf-Anx2, page 4.

<sup>21</sup> Kilolo Defence Request for Admission of Evidence from the Bar Table, ICC-01/05-01/13-1797-Conf (with annex).

<sup>22</sup> Prosecution's Response to the Kilolo Defence's "Request for Admission of Evidence from the Bar Table" (ICC-01/05-01/13-1797-Conf), ICC-01/05-01/13-1840-Conf (with annex).

<sup>23</sup> ICC-01/05-01/13-1797-Conf-AnxA, pages 10-11, 14.

<sup>24</sup> ICC-01/05-01/13-1840-Conf, paras 14-16.

17. The Chamber considers that the Kilolo Defence is indeed seeking the submission of these items for the truth of their contents and that they qualify as prior recorded testimony under Rule 68 because these persons have been questioned in their capacity as witnesses in the context of the present legal proceedings.<sup>25</sup> In fact, as regards other Kilolo Defence character witnesses, the Chamber has already determined that such statements fall under Rule 68 of the Rules.<sup>26</sup> Because the Kilolo Defence has not attempted to meet the Rule 68 criteria in relation to these six items objected to by the Prosecution, the Chamber does not recognise their formal submission.
18. For the remaining items, the Chamber considers that the Prosecution's objections relate to admissibility considerations which, consistent with the Chamber's general approach, are deferred until the trial judgment. Noting the submissions of the parties in relation to these items submitted by the Kilolo Defence, the Chamber recognises the formal submission of these items, subject to paragraph 17 above.

### **C. Babala Defence Requests to Add Items to Its List of Evidence and Formally Submit Three Items from the Bar Table**

19. On 8 April 2016, the Babala Defence formally submitted three items from the bar table.<sup>27</sup>
20. On 18 April 2016, the Bemba Defence supported this request.<sup>28</sup>
21. On 20 April 2016, the Prosecution opposed this request, arguing that these items do not satisfy the threshold requirements of relevance and probative value.<sup>29</sup>

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<sup>25</sup> Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, paras 32, 34.

<sup>26</sup> Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, 4 February 2016, ICC-01/05-01/13-1600, para. 16.

<sup>27</sup> Requête de la Défense de M. Fidèle Babala Wandu visant à verser trois éléments par « Bar Table Motion », ICC-01/05-01/13-1781-Conf.

<sup>28</sup> Defence Response to the request submitted by the Defence for Mr. Babala to admit additional items onto its list of evidence (ICC-01/05-01/13-1752-Conf) and its request to admit these items through the bar table (ICC-01/05-01/13-1781-Conf), ICC-01/05-01/13-1817.

22. On 25 April 2016, the Babala Defence sought leave to reply to the Prosecution's response.<sup>30</sup>
23. As preliminary points, the Babala Defence previously requested to add two of these items to its list of evidence.<sup>31</sup> No opposition to this application was filed - this request is granted. As regards the Babala Defence's request for leave to reply, the Chamber does not consider it necessary to receive the reply proposed and rejects this request.
24. Consistent with its general approach, the Chamber defers the Prosecution's objections on admissibility considerations until the trial judgment. Noting the submissions of the parties in relation to these items submitted by the Babala Defence, the Chamber recognises their formal submission.

#### **D. Arido Defence Request to Submit 67 Items from the Bar Table**

25. On 8 April 2016, the Arido Defence submitted 67 items from the bar table.<sup>32</sup>
26. On 25 April 2016, the Prosecution opposed most of this application on grounds that these items lack relevance, are tendered 'for erroneous reasons', lack probative value and would be prejudicial to a fair trial if admitted.<sup>33</sup>
27. On 28 April 2016, the Arido Defence sought leave to reply to the Prosecution response.<sup>34</sup>

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<sup>29</sup> Prosecution's Response to Babala's Request for the Admission of Evidence from the Bar Table Motion (ICC-01/05-01/13-1781-Conf), ICC-01/05-01/13-1821-Conf.

<sup>30</sup> Requête de la Défense de M. Fidèle Babala Wandu sollicitant l'autorisation de répliquer à « Prosecution's Response to Babala's Request for the Admission of Evidence from the Bar Table Motion (ICC-01/05-01/13-1781-Conf) » (ICC-01/05-01/13-1821-Conf), ICC-01/05-01/13-1834-Conf.

<sup>31</sup> Requête de l'équipe de Défense de M. Babala aux fins d'ajouter deux documents à sa liste d'éléments de preuves, 24 March 2016, ICC-01/05-01/13-1752-Conf (with two annexes).

<sup>32</sup> Narcisse Arido's Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1789 (with annex).

<sup>33</sup> Prosecution's Response to Arido's Request for the Admission of Evidence from the Bar Table Motion (ICC-01/05-01/13-1789), ICC-01/05-01/13-1836-Red (public redacted version notified 26 April 2016).

<sup>34</sup> Narcisse Arido's Request for Leave to Reply to 'Prosecution's Response to Arido's Request for the Admission of Evidence from the Bar Table Motion (ICC-01/05-01/13-1789)' (ICC-01/05-01/13-1836-Conf), ICC-01/05-01/13-1851-Conf.

28. Preliminarily, as regards the Arido Defence's request for leave to reply, the Chamber does not consider it necessary to receive the reply proposed and rejects this request.
29. As to the merits of the request, the Prosecution objects to the formal submission of three items on grounds that they fail to meet the Rule 68 criteria.<sup>35</sup>
30. The first two items are investigative reports summarising telephone calls with Main Case witness P-7.<sup>36</sup> The Arido Defence offers these reports to prove that witness D-4 had a military background.<sup>37</sup> The Chamber considers that the Arido Defence is indeed seeking the submission of these reports for the truth of their contents and that they qualify as prior recorded testimony under Rule 68 because these report reflect questioning of P-7 in his capacity as a witness in the context of the Main Case proceedings.<sup>38</sup> Because the Arido Defence has not attempted to meet the Rule 68 criteria in relation to these two reports, the Chamber does not recognise their formal submission.
31. The third item is a handwritten attestation, dated 10 May 2013, which purports to demonstrate the military background of D-4.<sup>39</sup> Although the Arido Defence does not explain the origins of this note, the Chamber is satisfied from its date and formal tone (despite being handwritten)<sup>40</sup> that this letter was written in the author's capacity as a witness in the context of the Main Case proceedings. Because the Arido Defence has not attempted to meet the Rule 68 criteria in relation to this note, the Chamber does not recognise its formal submission.
32. For the remaining items, the Chamber considers that the Prosecution's objections relate to admissibility considerations which, consistent with the Chamber's

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<sup>35</sup> ICC-01/05-01/13-1836-Conf, paras 11, 23.

<sup>36</sup> CAR-OTP-0072-0476; CAR-OTP-0084-0087.

<sup>37</sup> ICC-01/05-01/13-1789-Conf-AnxA, page 10.

<sup>38</sup> ICC-01/05-01/13-1478-Red-Corr, paras 32, 34.

<sup>39</sup> CAR-D24-0003-0054. See ICC-01/05-01/13-1789-Conf-AnxA, page 9.

<sup>40</sup> For example, the first sentence of paragraph 2 of the note begins '*J'atteste sur mon honneur*' and the letter ends with '*[...] cette attestation lui sert et valoir ce que de droit*'.

general approach, are deferred until the trial judgment. Noting the submissions of the parties in relation to these items submitted by the Arido Defence, the Chamber recognises the formal submission of these items, subject to paragraphs 30-31 above.

#### **E. Prosecution Request to Submit 25 Items from the Bar Table**

33. On 8 April 2016, the Prosecution requested to submit 25 items from the bar table.<sup>41</sup>
34. On 18 April 2016,<sup>42</sup> all five defence teams responded to this request. The Bemba Defence objected to the admission of one item,<sup>43</sup> the Arido Defence to 11 items<sup>44</sup> and the other defence teams to all 25 items.<sup>45</sup>
35. As a preliminary point, the Mangenda Defence and Babala Defence make reference to tests from other Chambers and Tribunals relating to the admission of ‘rebuttal evidence’ or ‘fresh evidence’.<sup>46</sup> The Prosecution’s application is nothing more than a request to submit evidence after the 27 November 2015 deadline set by the Chamber, a situation governed squarely by Regulation 35 of the Regulations. The rebuttal and fresh evidence tests reference by the defence teams look somewhat similar in character to the requirements of Regulation 35(2), but the Chamber sees no need to resort to these additional tests and will act in

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<sup>41</sup> Prosecution’s Sixth Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1784-Red (with annex; public redacted version notified 13 April 2016).

<sup>42</sup> The response deadline to this application was shortened to this date. Email from Trial Chamber VII Communications to the parties, 11 April 2016 at 16:34.

<sup>43</sup> Defence Response to Prosecution’s Sixth Request for the Admission of Evidence from the Bar Table (ICC-01/05-01/13-1784-Red), ICC-01/05-01/13-1814.

<sup>44</sup> Narcisse Arido’s Response to the “Prosecution’s Sixth Request for the Admission of Evidence from the Bar Table” (ICC-01/05-01/13-1784-Conf), ICC-01/05-01/13-1818-Conf.

<sup>45</sup> Corrigendum de la « Réponse de l’équipe de Défense de M. Fidèle Babala Wandu à « Prosecution’s Sixth Request for the Admission of Evidence from the Bar Table » (ICC-01/05-01/13-1784) » (ICC-01/05-01/13-1811-Conf, déposée le 18 avril 2016), ICC-01/05-01/13-1811-Conf-Corr (corrigendum notified 20 April 2016); Response to Prosecution’s Sixth Request for Admission of Evidence from the Bar Table, ICC-01/05-01/13-1813-Conf; Kilolo Defence Response to “Prosecution’s Sixth Request for Admission of Evidence from the Bar Table”, ICC-01/05-01/13-1819-Conf (with annex);

<sup>46</sup> ICC-01/05-01/13-1811-Conf-Corr, paras 8-13 (also mentioning Regulation 35); ICC-01/05-01/13-1813-Conf, paras 1-2.

accordance with Regulation 35 and its overarching obligations under Article 64(2) of the Statute.<sup>47</sup>

### *1. Annexes to Independent Counsel Reports*

36. The Prosecution formally submits three annexes to Independent Counsel reports which were notified to it on 16 March 2016.<sup>48</sup> The Chamber is satisfied that this qualifies as a reason outside the Prosecution's control for why it did not request the earlier submission of these items.
37. Of these three items, two are lesser redacted versions of items already recognised as formally submitted.<sup>49</sup> The Chamber sees no reason justifying why this more complete version of existing evidence should not be considered, and accepts that recognising the formal submission of these items would further the fair and expeditious conduct of the proceedings.
38. However, and as noted by the Bemba and Kilolo Defence,<sup>50</sup> the third item<sup>51</sup> is not on the Prosecution's list of evidence and it made no effort to seek leave to add this item. The Chamber recalls that it has previously declared annexes to Independent Counsel reports inadmissible on grounds that the Prosecution did not include them on its list of evidence.<sup>52</sup> This is because this failure created an unacceptable risk that the accused were not prepared to respond to these items, a risk elevated in the present case by the fact that the Prosecution waited until the 8 April deadline to submit this item.
39. In order to protect the accused, and noting the submissions of the parties on the relevance and probative value of ICC-01/05-01/13-982-Conf-Anx4-Red2 and ICC-

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<sup>47</sup> *Supra*, para. 7.

<sup>48</sup> ICC-01/05-01/13-1784-Red, paras 10-13.

<sup>49</sup> ICC-01/05-01/13-982-Conf-Anx4-Red2, ICC-01/05-01/13-845-Conf-AnxA1-Red2.

<sup>50</sup> ICC-01/05-01/13-1814, paras 2-5; ICC-01/05-01/13-1819-Conf-AnxA, page 2.

<sup>51</sup> ICC-01/05-01/13-845-Conf-AnxD-Red.

<sup>52</sup> ICC-01/05-01/13-1524, para. 6.

01/05-01/13-845-Conf-AnxA1-Red2, the Chamber will only recognise the formal submission of these two items and not of ICC-01/05-01/13-845-Conf-AnxD-Red.

## *2. Witnesses statements and related documents*

40. The Prosecution submits: (i) P-805 and P-785's statements to the Prosecution and two letters from the Central African Republic authorities on the military status of witnesses D-4, D-6 and D-8 ('Military Status Documents') and (ii) statements of Kilolo character witnesses D21-4, D21-5 and D21-6 ('Character Witness Documents').<sup>53</sup>
41. For the Military Status Documents, the Prosecution justifies not presenting these materials during its evidence presentation by explaining that it attempted to gain this information in October 2012, but only had limited access to the Central African Republic. The Prosecution indicates that it renewed its investigation when D-4, D-6 and D-8 were added to the Arido Defence's witness list, and that only through its recent efforts was the Prosecution able to identify P-785 and P-805.<sup>54</sup>
42. The Chamber considers that, although the Prosecution only obtained the documents in question in early 2016, it apparently wanted these documents much earlier and makes no effort to explain what efforts it made between late 2012 and the close of the presentation of its evidence to get these materials. The event which prompted the renewed investigation appears to be the Arido Defence's choice to call D-4, D-6 and D-8 during its defence case, but the Prosecution was clearly well aware of the importance of these witnesses at a much earlier time. It is also noted that the Arido Defence subsequently withdrew all three witnesses, which further militates against the notion that these documents must be recognised in the interests of justice. The Chamber is not satisfied that the Prosecution presents sufficient justification that they could not obtain the Military Status Documents for

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<sup>53</sup> ICC-01/05-01/13-1784-Red, paras 15-31.

<sup>54</sup> ICC-01/05-01/13-1784-Red, paras 15, 21-24.

reasons outside its control, nor does it consider that recognising their submission would further the fair and expeditious conduct of the proceedings.

43. As to the Character Witness Documents, the Prosecution's justification for the late submission is that the Kilolo Defence did not identify these individuals until after the Prosecution had completed its evidence presentation. The documents in question relate to three of the character witnesses.<sup>55</sup>
44. The Chamber considers the Prosecution's late submission of these documents to be justified. Unlike witnesses D-4, D-6 or D-8, the Prosecution could not have reasonably foreseen the identity of the Kilolo Defence's character witnesses until the Kilolo Defence revealed their identities following the conclusion of the Prosecution's evidence presentation. Further, the Kilolo Defence was ordered by the Chamber to present its character witness evidence in accordance with Rule 68(2)(b) of the Rules,<sup>56</sup> meaning that the Prosecution could have simply put its questions to the witnesses in court, instead of in writing, if not for the Chamber's intervention. The Chamber is satisfied that these documents are submitted late for reasons outside the Prosecution's control, and that recognising the formal submission of these documents furthers the fair and expeditious conduct of the proceedings.

### *3. Witnesses statements and related documents*

45. The Prosecution requests the formal submission of six other documents.<sup>57</sup>
46. The first document is a floor plan of Courtroom I at the former premises of the Court (as well as a document establishing the chain of custody of the floor plan). The Prosecution submits this evidence in response to a Mangenda Defence affidavit about the courtroom floor plan which was recognised as formally

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<sup>55</sup> ICC-01/05-01/13-1784-Red, para. 31.

<sup>56</sup> Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, 4 February 2016, ICC-01/05-01/13-1600.

<sup>57</sup> ICC-01/05-01/13-1784-Red, paras 33-42.

submitted. The Chamber considers that this Mangenda Defence affidavit was sufficiently unforeseeable to the Prosecution that it qualifies as a reason outside its control justifying the late collection of this evidence. Especially in view of the very limited proposition for which the evidence is presented, the Chamber is satisfied that recognising the formal submission of this document furthers the fair and expeditious conduct of the proceedings.

47. The second and third items are documents which the Prosecution did not submit earlier because they were only disclosed by the Defence after the conclusion of the Prosecution's evidence presentation. The Chamber is satisfied that this qualifies as a reason outside the Prosecution's control for why it did not submit these materials sooner. Particularly in view of the fact that only two such documents are submitted and that it was the Bemba and Kilolo Defence who provided these materials to the Prosecution, the Chamber is satisfied that recognising the formal submission of these documents furthers the fair and expeditious conduct of the proceedings.
48. The fourth and fifth documents are English translations of recordings already recognised as formally submitted. The Chamber recalls its previous finding that, in principle, recognising the formal submission of audio-visual material automatically includes recognising the formal submission of any associated transcripts or translations which were duly disclosed.<sup>58</sup> The Chamber accordingly recognises the formal submission of these translations.
49. The sixth document relates to what was then a pending Prosecution request for disclosure of materials for D21-3. As the Single Judge subsequently rejected this

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<sup>58</sup> ICC-01/05-01/13-1524, para. 7.

Prosecution disclosure request,<sup>59</sup> the Chamber dismisses this part of the relief sought as moot.

#### 4. Conclusion

50. The Chamber only recognises the formal submission of 16 of the items identified by the Prosecution for the reasons above, and does so while noting and deferring the arguments of the parties on the relevance, probative value and potential prejudicial effect of these items.<sup>60</sup> The remainder of the relief sought is rejected.

#### **F. Defence Requests to Submit Items of Evidence After the 8 April 2016 Deadline**

51. On 21 April 2016, the Kilolo Defence requested to add two further items to its initial bar table request.<sup>61</sup>
52. On 22 April 2016, the Bemba and Mangenda Defence jointly requested to submit one audio recording into evidence and add it to their lists of evidence.<sup>62</sup> The Chamber had granted access to this recording the day before.<sup>63</sup>
53. On 26 April 2016, the Babala Defence supported the Bemba and Mangenda Defence request.<sup>64</sup>
54. On 26 April 2016,<sup>65</sup> the Prosecution responded, submitting that these requests should be rejected.<sup>66</sup>

<sup>59</sup> Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence, 20 April 2016, ICC-01/05-01/13-1820.

<sup>60</sup> CAR-OTP-0094-0392; CAR-OTP-0094-0444; CAR-OTP-0093-0447; CAR-OTP-0093-0448; CAR-OTP-0093-0449; CAR-OTP-0093-0460; CAR-OTP-0093-0468; CAR-OTP-0093-0469; CAR-OTP-0094-0002; CAR-OTP-0094-0003; CAR-OTP-0094-0473; CAR-OTP-0094-0474; CAR-D20-0006-0478; CAR-D21-0013-0154; CAR-OTP-0092-5469; CAR-OTP-0092-5477.

<sup>61</sup> Defence request to add two items to its Bar Table Motion, ICC-01/05-01/13-1828-Conf.

<sup>62</sup> Joint Defence Request for addition of one item onto the list of evidence, ICC-01/05-01/13-1831.

<sup>63</sup> Email from Trial Chamber VII Communications to the Registry and parties, 21 April 2016 at 16:23.

<sup>64</sup> Réponse de l'équipe de Défense de M. Fidèle BABALA WANDU à « Joint Defence Request for addition of one item onto the list of evidence » (ICC-01/05-01/13-1831), ICC-01/05-01/13-1845.

<sup>65</sup> The response deadline for these applications was shortened to this date. Email from Trial Chamber VII Communications to the parties, 23 April 2016 at 13:30.

55. As regards the Kilolo Defence request, the Kilolo Defence makes no attempt to justify why this application was filed almost two weeks after the 8 April 2016 deadline for all outstanding evidentiary applications. This request is time-barred and the Chamber rejects it.
56. As regards the Bemba and Mangenda Defence request, the defence teams submit that this recording is significant because it concerns one of the few conversations recorded by both the ICC Detention Unit and the Dutch Authorities. The Bemba and Mangenda Defence argue that this recording makes it possible to identify the existence of synchronisation and alignment problems in the Detention Unit recording. The Bemba and Mangenda Defence indicate that they were only granted access to this recording on 22 April 2016.<sup>67</sup>
57. The Chamber considers that the Prosecution makes some sound points in arguing that the Bemba and Mangenda Defence have not been sufficiently diligent in their efforts to obtain this recording.<sup>68</sup> However, the Chamber notes several fairness considerations militate in favour of recognising the recording's formal submission. First, this request only concerns a single item that is nothing more than a different version of a recording already recognised as formally submitted. Second, the item is not offered for the truth of its contents, but for a limited purpose in showing synchronisation and alignment problems in the recording. Third, it appears that the defence teams would have had access to this recording well before April 2016 had the Prosecution elected to include it in the electronic folder which the defence teams were given access to on 30 May 2014.<sup>69</sup> Fourth, the Prosecution has placed paramount importance on telecommunications evidence in this case, and fairness

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<sup>66</sup> Prosecution's Response to the Joint Defence Request for addition of one item onto the list of evidence (ICC-01/05-01/13-1831), ICC-01/05-01/13-1850; Prosecution's Response to the Kilolo Defence's "Request to Add Two Items to its Bar Table Motion" (ICC-01/05-01/13-1828-Conf), ICC-01/05-01/13-1846-Conf.

<sup>67</sup> ICC-01/05-01/13-1831, paras 2-3, 19.

<sup>68</sup> ICC-01/05-01/13-1850, paras 1-16.

<sup>69</sup> Decision on the "Prosecution's request in respect of access to the Defence to certain materials" and related filings, 19 May 2014, ICC-01/05-01/13-409; Email from the Registry to the Chamber on 21 April 2016 at 13:52.

considerations dictate in favour of recognising this recording as part of the defence's challenge to this evidence.

58. On balance, the Chamber considers that, although the Bemba and Mangenda Defence filed this application late for reasons which could have been avoided with further diligence, the fair and expeditious conduct of proceedings demand a different outcome in this instance. The Chamber recognises this recording as formally submitted, while noting and deferring the Prosecution's other arguments on the recording's probative value.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**GRANTS** the relief sought in Babala Defence request ICC-01/05-01/13-1752-Conf;

**REJECTS** the relief sought in Babala Defence request ICC-01/05-01/13-1834-Conf, Bemba Defence request ICC-01/05-01/13-1844-Conf, Kilolo Defence request ICC-01/05-01/13-1828-Conf and Arido Defence request ICC-01/05-01/13-1851-Conf;

**RECOGNISES** as formally submitted the documents indicated in Bemba Defence request ICC-01/05-01/13-1794-Corr-Red (subject to paragraph 12 above), Kilolo Defence request ICC-01/05-01/13-1797-Conf (subject to paragraph 17 above), Babala Defence request ICC-01/05-01/13-1781-Conf, Arido Defence request ICC-01/05-01/13-1789 (subject to paragraphs 30-31 above) and Bemba and Mangenda Defence request ICC-01/05-01/13-1831;

**RECOGNISES** the formal submission of the documents in Prosecution request ICC-01/05-01/13-1784-Red only to the extent specified in paragraph 50 above; and

**ORDERS** the Registry to ensure that the e-court metadata reflects that the items recognised have been formally submitted to the Chamber.

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



**Judge Bertram Schmitt, Presiding Judge**



**Judge Marc Perrin de Brichambaut**



**Judge Raul C. Pangalangan**

Dated 29 April 2016

At The Hague, The Netherlands