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**International
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Court**

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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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

**Public Redacted Document
with
Confidential Annex A**

**Public redacted version of "Prosecution's Response to the Kilolo Defence's
'Request for Admission of Evidence from the Bar Table'", 25 April 2016,
ICC-01/05-01/13-1840-Conf**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes Kilolo’s “Request for Admission of Evidence from the Bar Table.” (“Motion”).¹ Many of the documents tendered are inadmissible: (1) nine documents are missing pages or otherwise incomplete; (2) one document is erroneous and is not what it purports to be; (3) many documents are *prima facie* irrelevant as they have no discernible link to any fact or issue in the case; and (4) six documents are witness statements that fail to meet the requirements of rule 68 of the Rules of Procedure and Evidence (“Rules”), one of which also circumvents Trial Chamber VII’s (“Chamber”) exclusive province as the arbiter of the law.

2. The Prosecution’s objections concerning each document tendered for admission is particularised at Annex A.² It otherwise defers to the Chamber’s discretion in respect of the admissibility of the remaining documents.

II. Confidentiality

3. This response is filed as “*Confidential*” because it responds to a filing of the same designation. The Prosecution will file a “*Public Redacted*” version following the Defence’s filing of the same.

III. Applicable Law

4. The submissions on the applicable law as set out at paragraphs four and five of the “Prosecution’s Response to Babala’s Request for the Admission of Evidence from the Bar Table Motion (ICC-01/05-01/13-1781-Conf)”³ are incorporated by reference herein.

¹ ICC-01/05-01/13-1797-Conf.

² The Prosecution notes that apart from the last column containing the Prosecution’s individualized response to each document, the remaining columns are reproduced from the annex appended to the Motion. Any mistakes or errors in those columns, thus, originate from the original filing.

³ ICC-01/05-01/13-1821-Conf, paras. 4-5.

IV. Submissions

A. Many documents are incomplete

5. Nine documents tendered by Kilolo are missing pages or otherwise incomplete.⁴ Their admission would thus unfairly prejudice the Parties and the Chamber in omitting relevant context necessary to their full understanding. Should the Chamber nevertheless be minded to receive the documents in evidence, the Kilolo Defence should be required to submit the documents in full, inclusive of the omitted pages and/or attachments.

B. The Category III document is erroneous

6. Document CAR-D21-0005-0035⁵ is erroneous and its admission as such would be unduly prejudicial and against the interests of justice. Although the document purports to be a copy of the Prosecution's [REDACTED] Request for Assistance ("RFA") to the Netherlands authorities, it is actually a composite of two separate and distinct RFAs. The first two pages of the document contain the contents of the Prosecution's [REDACTED] RFA to the Netherlands.⁶ The remaining pages, however, contain the contents of the Prosecution's [REDACTED] RFA to the Netherlands.⁷

7. In light of the above, the admission of CAR-D21-0005-0035 would be inappropriate, as the document is clearly not at all what it purports to be. Should the Defence seek to admit the correct versions of the RFAs which comprise the document (CAR-OTP-0090-1949 and CAR-OTP-0090-1941), the Prosecution would not object. However, the Prosecution notes that the document is tendered solely as going to "the

⁴ See Annex A, items 2, 17, 20, 21, 34, 43, 60, 73, 80.

⁵ Annex A, item 49.

⁶ CAR-OTP-0090-1949 ([REDACTED]).

⁷ CAR-OTP-0090-1941 ([REDACTED]).

issue of the legality of intercepted communications” for which the deadline concerning such challenges has already elapsed.⁸

C. Many of the documents lack any link to any relevant evidence or issue in the case

8. Many of the documents tendered have no bearing on the issues in this case, even if the factual proposition underlying the document is accepted. For instance, the vast majority of the Category I documents relate to expenses incurred by the *Bemba* Defence during the Main Case: the Defence’s mission expenses,⁹ payments to experts,¹⁰ payments to external lawyers,¹¹ and monies deposited in Bemba’s account.¹² These documents are tendered to show that the *Bemba* Defence was “privately funded”, that Kilolo personally paid some of Bemba’s attorney fees, and that money was deposited into Bemba’s account at the detention unit. Even if true, none of these facts bear on the specific illicit payments and gifts given to Main Case Defence witnesses at issue in this case. Nor does Kilolo articulate any such link, thereby falling short of the Defence’s burden to demonstrate the relevance of the documents to the specific issues in this case.

9. The same argument applies to other documents:

- Many of the Category VI documents¹³ are tendered to show the “climate of insecurity under which the defence had to sometimes investigate”. Kilolo, however, fails to draw any link, nor is any link obvious, between a “climate of insecurity” and the crimes alleged.

⁸ See ICC-01/05-01/13-T-42-CONF-ENG ET, p. 43, lns. 1-5.

⁹ See Annex A, items 1-17, 20-27, 29-42.

¹⁰ See Annex A, items 43-44.

¹¹ See Annex A, item 28.

¹² See Annex A, item 45.

¹³ See Annex A, items 58-61.

- Four documents¹⁴ are tendered to show the public's reaction to Kilolo's arrest.

Kilolo, however, fails to identify any link between this issue and the charges. Instead, the documents are merely critical of this trial – a matter patently irrelevant to the evidence underlying Kilolo's guilt.

- The Kilolo Defence fails to explain the relevance of the ostensible permissibility of witness proofing in Belgium¹⁵ to the issues in this case. The rules on witness proofing that are at issue in this case are set out in the Main Case's "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial"¹⁶ and in Trial Chamber III's "Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial", which states unambiguously that "no proofing or preparation of witnesses for trial by the parties shall be allowed".¹⁷ Further, the Chamber has already taken judicial notice of these documents.

10. The relevance of many documents tendered is also dependent on facts not in evidence, thereby rendering them *prima facie* irrelevant. For instance, the Category II documents are advanced under the presupposition that they show that the promised 500.000 CFA franc to D-0002 would have been reasonable "to cover a year of standby".¹⁸ *First*, no witness or document has ever been advanced by the Defence demonstrating that the monies offered or paid to D-0002 or other Cameroon witnesses were for such purpose. *Second*, the Defence adduced no evidence that Kilolo possessed any reliable indication of the cost of living in Cameroon, and specifically in the place where the Witness then resided, when the payment or offer was made. Thus, there is no link between the documents, public records concerning the poverty line in Cameroon, with the payments at issue in this case.

¹⁴ See Annex A, items 75-78.

¹⁵ Annex A, item 80.

¹⁶ See ICC-01/05-01/08-972-Anx.

¹⁷ See ICC-01/05-01/08-1016, paras. 31-35.

¹⁸ See Annex A, items 46-48.

11. The same argument applies to:

- CAR-D21-0017-0001,¹⁹ to the extent Kilolo tenders the document as evidence of his mental state, which he fails to indicate. In particular, there is no nexus between the document and the behaviour alleged in that there is no evidence showing that Kilolo acted because of proofing practices in Belgium. Indeed, Kilolo does not even agree that he was a member of the Brussels bar.²⁰
- Many of the documents identified in Category XI relating to payments and items from the Prosecution to witnesses in the Main Case.²¹ The Prosecution incorporates by reference its response to Mangenda's "Request for Admission of Evidence from the Bar Table"²² that these documents are *prima facie* irrelevant as they have no relation with any fact or evidence elicited at trial.

12. Finally, some of the documents are *prima facie* irrelevant, as they do not support the purported reasons for which they are tendered. For instance:

- CAR-D21-0013-0090,²³ an email from Co-counsel Peter Haynes to the other members of the *Bemba* Defence, has nothing to do with "transparency in coordination with the Registry", the basis for which the document is tendered. No member of the Registry is copied to the email nor is it linked to any such communication.

¹⁹ See Annex A, item 80.

²⁰ Kilolo did not agree to the matter when it was proposed to him by the Prosecution as an agreed fact: ICC-01/05-01/13-1072-Conf; ICC-01/05-01/13-1072-Conf-AnxA, item 16.

²¹ See Annex A, items 94-135.

²² ICC-01/05-01/13-1720-Conf, paras. 4-8.

²³ Annex A, item 72.

- CAR-D21-0013-0098,²⁴ a draft email prepared by Legal Assistant Kate Gibson to Victims and Witnesses Unit (“VWU”) representatives approved by Kilolo, has nothing to do with “transparency in coordination with the Registry”. While the actual email sent by Gibson to the VWU would fall within the purported basis for relevance, the draft email has no such connection unless Kilolo shows, which he fails to do, that it was actually sent.
- CAR-D21-0013-0250,²⁵ an email claiming to attach receipts for payments made to witnesses in Cameroon, does not show that receipts for payments to the Cameroonian witnesses were given to the VWU. None of the attachments are included in the document and the email contains no details concerning those receipts, including the recipients, the amount, the basis for the costs, or the time and date of the payments.

13. Admitting the last two documents – CAR-D21-0013-0098 and CAR-D21-0013-0250 – would also be unduly prejudicial and against the interests of justice. For the reasons outlined above, CAR-D21-0013-0098 should be replaced with the email that was actually sent to the VWU, as opposed to the draft prepared by Gibson. Further, CAR-D21-0013-0250 should not be admitted in any case, absent the attachments identified in the email.

D. The Motion attempts to circumvent the requirements of rule 68 and the Chamber’s role as the ultimate arbiter of the law

14. Items 50 to 54, and 74 are *prima facie* inadmissible. The documents are witness statements Kilolo seeks to admit for the truth of their contents, namely his purported “morality” and one witness’ opinion as to the immunity of counsel at this Court and the mandate of the Independent Counsel. As such, the documents’ admission is

²⁴ Annex A, item 70.

²⁵ Annex A, item 73.

governed by rule 68.²⁶ The Chamber has ruled that, irrespective of its questionable relevance,²⁷ the admission of witness evidence concerning Kilolo's character should be submitted *via* rule 68(2)(b),²⁸ and set 8 April 2016 as the deadline to submit the necessary application under that rule.²⁹ Kilolo was thus on ample notice as to the admissibility requirements for such statements and the deadline set by the Chamber for submitting applications under rule 68(2)(b).

15. However, none of the statements meet the requirements of rule 68(2)(b), as they omit the required declarations or attestations required under rule 68(2)(b)(ii) and (iii). Further, for the reasons identified in the Prosecution's response to Kilolo's previous rule 68(2)(b) motion – incorporated by reference herein³⁰ – the statements should not be admitted absent an opportunity by the Prosecution to examine the witnesses.

16. Item 74 is also inadmissible as it attempts to circumvent the Chamber's province as the ultimate arbiter of the law. [REDACTED]'s statement, a commentary on "the issue of immunity and of a counsel at the ICC and also the legality of the mandate of the Independent Counsel" goes to legal matters solely within the authority of the Chamber to decide. The Chamber rightly denied a similar attempt by Mr Karnavas to intervene on such legal matters as *amicus curiae*.³¹ Indeed, this Chamber and Pre-Trial Chamber II have already rendered decisions on the matters underpinning [REDACTED]'s statement.³² Finally, given that the deadline for all Defence evidentiary challenges has expired³³ and the Defence cases closed³⁴ there is no discernible basis to admit this statement at this stage. In view of the Chamber's

²⁶ ICC-01/09-01/11-1938-Corr-Red2, para. 149 ("the application of the general rule (Article 69 of the Statute) to admit this prior recorded testimony, would amount to a circumvention of the applicable law.").

²⁷ ICC-01/05-01/13-1600, para. 15.

²⁸ ICC-01/05-01/13-1600, paras. 16-17.

²⁹ ICC-01/05-01/13-T-42-CONF-ENG ET, pp. 42-43, lns. 18-10.

³⁰ ICC-01/05-01/13-1816-Conf, paras. 8-11.

³¹ See ICC-01/05-01/13-1212.

³² See ICC-01/05-01/13-947; ICC-01/05-01/13-362-Red

³³ See [REDACTED].

³⁴ ICC-01/05-01/13-1829.

previous decision,³⁵ to the extent the statement was relevant to such evidentiary challenges, the Defence could have made use of it to challenge the admissibility of Prosecution evidence under article 69(7) of the Rome Statute. Their failure to do so is a strategic decision, which is not thereby converted to a basis for admissibility.

V. Relief Requested

17. For the foregoing reasons, the Prosecution opposes the admission of the documents as discussed above and set out at Annex A, and defers to the Chamber's discretion with respect to the remaining documents tendered.



Fatou Bensouda, Prosecutor

Dated this 29th Day of April 2016
At The Hague, The Netherlands

³⁵ See ICC-01/05-01/13-1753, para. 12.