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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 Annexes A to C**

**Public redacted version of "Prosecution's Motion for Reconsideration of the
Decision on Outstanding Evidentiary Applications, 9 May 2016, ICC-01/05-01/13-
1883-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”) requests reconsideration of Trial Chamber VII’s (“Chamber”) 29 April 2016 Decision on Outstanding Evidentiary Applications (“Decision”),¹ declining to recognise the “formal submission” of ICC-01/05-01/13-845-Conf-AnxD-Red tendered from the bar table.

2. Reconsideration is necessary because the Decision results in a ‘manifestly unsound’ consequence — the exclusion of highly relevant and probative evidence that is important to the fulfilment of the Chamber’s truth-seeking function. Alternatively, it is necessary to prevent an injustice.² There are also certain pertinent factual circumstances, of which the Chamber was unaware at the time of rendering the Decision. Had the Chamber been aware of these circumstances, this would have affected the Decision.³ Thus, granting reconsideration is also in the interests of justice.

II. Confidentiality

3. This filing is classified as “*Confidential*” as it refers to material of the same designation. A “*Public*” redacted version will be filed shortly.

III. Procedural history

4. On 7 January 2016, the Prosecution filed a motion requesting the lifting of redactions and the release of information contained in Independent Counsel reports (“7 January 2016 Motion”).⁴ This included the disclosure of the list of contacts extracted from a SIM card belonging to Kilolo and the telephone number associated

¹ ICC-01/05-01/13-1858, para. 38.

² ICC-01/04-02/06-519, para. 12; ICC-01/04-01/06-2705, para. 18.

³ See ICC-01/05-01/13-1085-Conf, para. 4 (noting that “[n]ew facts and arguments since the decision was rendered may be relevant to [assessing the propriety of reconsideration]”). See also para. 5 (considering whether the facts at issue “were clearly within the Chamber’s contemplation at the time of issuing the Decision”).

⁴ ICC-01/05-01/13-1537-Conf.

with the SIM card.⁵

5. On 23 February 2016, the Chamber granted the Prosecution's motion, authorising "the disclosure of the Contact List (ICC-01/05-01/13-845-Conf-Exp-AnxD) [(“Annex D”)] and corresponding Telephone Number" ("23 February 2016 Decision").⁶ The Chamber reasoned that the Contacts List was relevant to the case and noted that "[n]either of the two defence teams with access to the Contacts List specifically remonstrated against the disclosure of details or contacts thereon."⁷

6. On 9 March 2016, the Chamber set a deadline of 8 April 2016 for the Parties to file, *inter alia*, "any applications relating to adding or subtracting items of evidence from the record."⁸

7. On 10 March 2016, the Registry implemented the Chamber's 23 February 2016 decision, disclosing Annex D, but not the corresponding Telephone Number.⁹

8. On 18 March 2016, the Prosecution disclosed Annex D to the Accused as incriminating evidence.¹⁰

9. On 31 March 2016, having still not received the Telephone Number corresponding to Annex D as the Chamber ordered, the Prosecution contacted the Registry to determine when it expected to fully implement the Chamber's 23 February 2016 Decision.¹¹

10. On 7 April 2016, the Registry communicated to the Parties a message from the Independent Counsel that the telephone number of Annex D is unknown.¹²

⁵ ICC-01/05-01/13-1537-Conf, paras. 19-21.

⁶ ICC-01/05-01/13-1651, para. 18.

⁷ ICC-01/05-01/13-1651, para. 18.

⁸ ICC-01/05-01/13-T-42-CONF-ENG ET, p. 42, ln. 23-p.43, ln. 5.

⁹ ICC-01/05-01/13-1710.

¹⁰ ICC-01/05-01/13-1731.

¹¹ Email from [REDACTED], 31 March 2016 at 14:41 (Annex A).

¹² Email from [REDACTED], 4 April 2016 at 18:16 (Annex B).

11. On 8 April 2016, the Prosecution filed its Sixth Bar Table Motion, requesting the formal submission of Annex D and its inclusion on its list of evidence.¹³

12. On 29 April 2016, the Chamber denied the formal submission of Annex D on the basis that the document “[was] not on the Prosecution’s list of evidence and it made no efforts to seek leave to add this item.”¹⁴

13. On 2 May 2016, the Chamber clarified that its reference to the purported failure to seek Annex D’s addition to its list of evidence, concerned the period from its 10 March 2016 notification to the Parties to the filing of the Sixth Bar Table Motion on 8 April 2016.¹⁵

IV. Submissions

A. Reconsideration is required and justified in the circumstances

14. Several factual circumstances justify reconsideration of the Decision, particularly given the severe sanction of excluding highly relevant and probative evidence from the case on the basis of a purported breach of a Chamber’s practice, as distinct from a regulatory or procedural rule under the statutory framework.

15. The Prosecution, of course, acknowledges the Chamber’s Decision on the Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table, wherein the Chamber declined certain tendered evidence because the Prosecution did not seek their prior addition to its list of evidence.¹⁶ However, that decision arose in the context of the presentation of the Prosecution’s case and concerned items in its possession prior to its presentation of evidence.¹⁷ Indeed, the Chamber specifically referred to the purpose of the list of evidence as “[giving] notice to the accused as to

¹³ ICC-01/05-01/13-1784-Conf (“Sixth Bar Table Motion”), paras. 10-12, 43.

¹⁴ Decision, para. 38.

¹⁵ See email from Trial Chamber VII Communications, 2 May 2016 at 11:04 (Annex C).

¹⁶ ICC-01/05-01/13-1524, paras. 4-6.

¹⁷ ICC-01/05-01/13-1524, paras. 5-6.

which items might potentially be submitted *during the Prosecution's evidence presentation.*"¹⁸

16. However, the present context is distinguishable. Both the posture of the case and the attendant circumstances are different — Annex D was received long after the close of the Prosecution's case, and it was tendered by the Prosecution *during the presentation of the Defence case*. The Prosecution thus had no opportunity to notify the Defence of its intent to rely on the document before, or during, the Prosecution's evidence presentation. Conversely, notifying the Defence of the Prosecution's intent to rely on the document by placing it on the Prosecution's list of evidence during the *Defence case* cannot retroactively provide the intended notice — *i.e.*, that the items listed may be submitted during the Party's presentation of evidence. In these circumstances, therefore, the addition of Annex D to the Prosecution's list of evidence would not have served any significant practical purpose.

17. As detailed above and discussed below, the Prosecution acted diligently in informing the Defence of its intention to rely on the document as evidence in advance of filing its Sixth Bar Table Motion.

18. The Chamber's conclusion that the "Prosecution [having] waited until the 8 April deadline to submit [Annex D]"¹⁹ — 18 working days after its notification — "created an unacceptable risk that the accused were not prepared to respond to [it]"²⁰ and necessitating that the Chamber "protect the accused,"²¹ did not take account of the following significant facts.

¹⁸ ICC-01/05-01/13-1524, para. 5 (emphasis added).

¹⁹ Decision, para. 38.

²⁰ Decision, para. 38.

²¹ Decision, para. 39.

- i. *The relative prejudice to the Prosecution resulting from the exclusion of Annex D justifies reconsideration*

19. The exclusion of Annex D causes serious prejudice to the Prosecution and justifies reconsideration.

20. On several prior occasions the Prosecution sought to obtain seized material – comprising, *inter alia*, Annex D – for analysis. On 19 November 2013, the Prosecution requested the seizure of “any relevant evidence” from the Accused’s persons, premises, offices, *etc.*, on their arrest.²² On 3 March 2014, the Prosecution explicitly sought an opportunity to analyse these materials, yet to be produced before the Court in preparing for the confirmation process.²³ Again, following the March 2015 production before the Court of the materials seized by the [REDACTED] authorities’ on Kilolo’s arrest, the Prosecution sought to obtain this material, which included *inter alia*, the contents of Annex D in preparation for trial.

21. Annex D was prepared by [REDACTED] as early as 9 April 2015.²⁴ At the First Status conference on 24 April 2015,²⁵ the Prosecution noted in respect of the seized materials:

“All we want to do is to have an opportunity to examine material that was seized on the order of the Single Judge on the basis that it may contain relevant evidence in the case and review it and determine how that affects our evidence if at all.”²⁶

To the same end, the Prosecution subsequently requested an inventory of the materials provided by the [REDACTED] authorities.²⁷

²² ICC-01/05-67-Conf, para. 126(9).

²³ ICC-01/05-01/13-234-Conf, paras. 17, 19-20, 22-23.

²⁴ ICC-01/05-01/13-845-Conf, para. 43.

²⁵ ICC-01/05-01/13-T-8-Red-ENG, p. 9, ln.16-p. 10, ln. 1. *See also* p. 10, ln. 10-p. 11, ln. 25.

²⁶ ICC-01/05-01/13-T-8-Red-ENG, p. 11, lns. 22-24.

²⁷ ICC-01/05-01/13-938-Conf.

22. Despite these repeated efforts, Annex D — though in the Court’s custody and control — was never provided to the Prosecution in advance of trial. Nor was it provided during the presentation of the Prosecution’s case, notwithstanding that it was highly relevant to the testimony of Prosecution witnesses (some adversarial) appearing before the Chamber.

23. There is no question that had Annex D been timely provided to the Prosecution it would have been included in its original 30 June 2015 exhibit list. For instance, Annexes A-C of the Independent Counsel’s report which was also with appended Annex D were disclosed as incriminating evidence on 4 June 2015,²⁸ and included in the Prosecution’s original list of evidence.²⁹ Moreover, Annex D would have been used with the witnesses that the Prosecution adduced at trial, particularly D-0002, D-0003, D-0015, D-0023, D-0054, D-0057, and D-0064 whose names and telephone numbers, some of which are designated as “special”, are contained in it. Some of these witnesses, when examined by the Prosecution, denied their knowledge of telephone numbers clearly attributed to them in Annex D.

24. The Chamber’s exclusion of this evidence based on the Prosecution’s ostensible delay of some three and a half weeks in seeking to add Annex D to its exhibit list, when the Prosecution has expressly sought this material from the Court since its March 2015 production by the [REDACTED] authorities, should be reconsidered.

25. In fact, the Defence has been on notice of the Prosecution’s request for this material for the better part of two and a half years. Moreover, the 18 March 2016 disclosure of Annex D as incriminating evidence and the resultant inaction of the Defence to seek to call evidence or to rest their respective cases subject to a determination on its “formal submission” underscores that the Prosecution’s

²⁸ See ICC-01/05-01/13-984-Conf-AnxA, p. 21 (noting the 4 June 2015 disclosure of Annexes A-C of the Independent Counsel’s report - ICC-01/05-01/13-845-Conf, at items 206-208, respectively).

²⁹ See ICC-01/05-01/13-1048-Conf-AnxB, items 343-345.

intention to rely on it was neither unanticipated, nor would its “formal submission” be unfairly prejudicial.

26. The exclusion of Annex D is a disproportionately severe consequence of the Decision affecting the fairness of the proceedings, and the Chamber’s truth-seeking function. The Prosecution was never placed on notice as to a specific date in advance of the 8 April deadline, by which the Chamber would have required it to seek the addition of Annex D to its list of exhibits. Nor, was the Prosecution advised that it could not appropriately seek to add tendered materials to its list of evidence contemporaneously, given that the circumstances of its receipt at a late stage of the case – known to all parties to the proceedings – manifestly satisfied regulation 35 of the Regulations of the Court. Thus, the prejudice to the Prosecution is even more so given the absence of any wilful violation of a rule of procedure, regulation, provision of the Statute, or even a well-seated practice of the Court’s Chambers.

ii. No deadline was set for the Parties to seek the addition of potential exhibits to their respective lists of evidence

27. As the procedural history reflects, the Prosecution diligently sought the disclosure and addition of Annex D in accordance with the Chamber’s 8 April deadline. Even if the Prosecution was required to request the addition of documents to its exhibit list before (as opposed to contemporaneously with) tendering them for admission from the bar table in the context of the Defence cases-in-chief, no deadline was ever set for doing so.³⁰ Had a separate, earlier date been communicated, the Prosecution most certainly would have complied with it.

28. Rather, the Prosecution proceeded in good faith on the basis that the only relevant deadline was 8 April 2016, as articulated by the Chamber. Indeed, the day before Annex D was notified to the Parties — 9 March 2016 — the Chamber set 8

³⁰ See ICC-01/05-01/13-1792-Corr (the *Bemba* Defence seems to have understood the 8 April filing deadline in the same way, having sought to amend its exhibits list on the same date as their tender from the bar table).

April 2016 as the deadline for “the filing of any applications related to adding or subtracting items of evidence from the record.”³¹ No date was set by which the Parties were to apply specifically *in advance* to the Chamber to seek the addition of any such documents to their respective exhibit lists, nor did the Chamber give any indication as to when this should occur in the absence of a deadline. The Prosecution abided by the only deadline set by the Chamber in this respect.

29. The Prosecution also acted in contemplation of the efficient conduct of the proceedings. Despite being in a position to file its Sixth Bar Table Motion earlier than 8 April 2016, the Prosecution waited until it could receive confirmation from the Registry that it had fully implemented the 23 February Decision. The Prosecution reasonably considered that filing piecemeal applications to add and/or admit discrete disclosures of the Independent Counsel’s report as and when the Registry implemented various parts of the Chamber’s 23 February Decision, would be contrary to the interests of judicial economy. Unfortunately, confirmation from the Registry only came on 7 April 2016 – the day before the Chamber’s due date for the admission of any new evidence – when the Registry confirmed that it did not have the telephone number associated with Annex D.³²

iii. The Defence was on notice of the Prosecution’s intention to rely on Annex D as of 18 March 2016 at the latest

30. Given the nature of Annex D and that the Single Judge ordered its disclosure³³ in response to the 7 January 2016 Motion,³⁴ there are ample grounds to believe that the Defence must have anticipated the Prosecution’s intention to rely on Annex D as of its 10 March notification. Significantly, in its 7 January Motion, the Prosecution outlined the importance of Annex D, noting that it was “relevant to the Prosecution’s

³¹ ICC-01/05-01/13-T-42-CONF-ENG ET, p. 42, ln. 21–p. 43, ln. 5.

³² Email from [REDACTED], 4 April 2016 at 18:16 (Annex B).

³³ ICC-01/05-01/13-1651.

³⁴ ICC-01/05-01/13-1537-Conf.

preparation for the Defence cases and to the charged offences, in that [it] attribute[s] telephone numbers to Kilolo and establish[es] certain associations between him and Bemba Defence witnesses within the charged period.”³⁵ In ordering Annex D’s disclosure, the 23 February 2016 Decision recognised “that it contains contacts extracted from the SIM card attributed to Mr Kilolo, which Independent Counsel found relevant to the case.”³⁶ In particular “[i]t attributes phone numbers on the sim [sic] card to names and other information that the Independent Counsel used in the annexes of the March 2015 Report”.³⁷

31. In addition, the Prosecution formalised its intention to rely on Annex D on 18 March 2016 when it disclosed the document to the Parties as *incriminating evidence*³⁸ — a fact that the Defence responses to the Sixth Bar Table Motion uniformly omitted. The Prosecution’s disclosure of Annex D as ‘INCRIM’ was also communicated to the Chamber the same day, per the applicable e-Court protocol.³⁹

32. Moreover, given that Annex D was disclosed not only to the Prosecution, but to *all* Parties on 10 March 2016, the Defence has had just as much opportunity as the Prosecution to review and analyse the document. The Defence could not have been oblivious to its *prima facie* inculpatory nature as of 10 March or soon thereafter, or to the Prosecution’s intention to rely on it.

iv. The Defence took no action having been put on notice at the disclosure of Annex D as incriminating evidence

33. Between the time that the Prosecution disclosed Annex D to the Defence on 18 March 2016 and its 8 April 2016 filing of the Sixth Bar Table Motion (13 working

³⁵ ICC-01/05-01/13-1537-Conf, para. 19.

³⁶ ICC-01/05-01/13-1651, para. 18.

³⁷ ICC-01/05-01/13-1651, para. 18.

³⁸ See CAR-OTP-0093-0634, disclosed in Trial INCRIM Package 46, 18 March 2016.

³⁹ ICC-01/05-01/13-1731, para. 3; *see also* ICC-01/05-01/13-1731-Conf-AnxA.

days), the Defence made no request to call additional witnesses or to adduce evidence intended to counter this newly notified inculpatory document.

34. Further, between 8 April when the Prosecution sought to add Annex D to its list of evidence and 21 April 2016 when the Defence rested their respective cases (a further 9 working days), no such request was ever made. Nor did the Defence, when resting their cases on 21 April 2016, indicate that this was subject to the disposition of the Prosecution's pending application to add and admit Annex D.⁴⁰

35. The Prosecution's purported 18-working day delay in seeking the addition of Annex D to its exhibit list does not create such an imbalance of trial fairness warranting the extraordinarily severe sanction of excluding highly relevant and probative evidence, particularly where the Defence has taken no responsive action following the annex's disclosure as incriminating evidence for some 22 working days. The Defence's failure to substantiate any prejudice in their respective responses to the Prosecution's Sixth Bar Table Motion reinforces this conclusion.

V. Requested Relief

36. For the foregoing reasons, the Chamber should reconsider the Decision, grant the Prosecution's application to add Annex D to its list of exhibits, and recognise the document as "formally submitted."



Fatou Bensouda, Prosecutor

Dated this 11th Day of May 2016
At The Hague, The Netherlands

⁴⁰ See ICC-01/05-01/13-1651, para. 18 (noting, that at least two of the Defence teams had access to Annex D prior to its disclosure to the Prosecution, and despite this fact did not "specifically remonstrate[] against the disclosure of details or contacts thereon").