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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, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO*

Public

**Defence Response to Prosecution's Motion for Reconsideration of the decision
Outstanding Evidentiary Applications (ICC-01/05-01/13-1858)**

Source: Counsel for Jean-Pierre Bemba Gombo

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

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Introduction

1. The Defence for Mr. Jean-Pierre Bemba requests the Honourable Trial Chamber to reject the Prosecution's Motion for Reconsideration of the Decision on Outstanding Evidentiary Applications (the Reconsideration Motion).¹

Submissions

2. Apart from the fact that the request to rely on the documents in question was filed in a tardy manner, the Reconsideration Motion was filed more than a week after the Trial Chamber issued its decision to exclude it. The Prosecution has provided no explanation for the delay in seizing the Chamber, which in itself, militates against its acceptance by the Trial Chamber.

3. The Reconsideration Motion also fails to provide a cogent basis for reconsideration.

4. It is not correct that the Prosecution acted in a diligent manner to obtain the contacts list from the Court.²

5. The Prosecution has acknowledged that it was aware of the existence of Annex D since 4 June 2015.³

6. The factual basis for the Prosecution's request to access Annex D was the description of the contacts list provided by the Independent Counsel in his report.⁴ The Prosecution had access to this description from 4 June 2015 onwards, but did not request the Trial Chamber to lift the redactions to Annex D until 7 January 2016; that is, more than a month after the close of the Prosecution case.

¹ ICC-01/05-01/13-1883-Conf

² Cf Reconsideration Motion, para. 24.

³ Reconsideration Motion, para. 23.

⁴ ICC-01/05-01/13-1537-Conf, para. 7.

7. The Prosecution received Annex D on 10 March 2016. It then waited a further 21 days before inquiring with the Registry - on an *ex parte* basis – as to whether the Telephone Number would be transmitted.

8. The Prosecution did not – at this point – seek any relief from the Trial Chamber.

9. After it received a negative attribution response, the Prosecution then – at the very last point possible – sought to introduce the contacts list into evidence. In so doing, the Prosecution failed to include any explanation as to why the material had not been tendered earlier, or added to its list as soon as it received it from the Registry.

10. It is, in this regard, disingenuous for the Prosecution to claim that it was unaware of any prior deadline. There is no right for the Prosecution to tender evidence after the close of its case; the deadline was, in fact, the close of the Prosecution case, and the burden fell on the Prosecution to adduce convincing arguments as to why it should be entitled to tender evidence at this stage, and how the introduction of such evidence would not prejudice the Defence. Having failed to do so, the Prosecution cannot invoke the remedy of reconsideration in order to cure its own argumentative failings.

11. It is, moreover, completely illogical for the Prosecution to argue that it was not in a position to add the Contacts List to its list of evidence, because it had not yet received information from the Registry attributing the number to Me. Kilolo.⁵

12. The Prosecution never received information attributing the number to Me. Kilolo; this did not, however, preclude the Prosecution from attempting to introduce it into evidence on 8 April 2016.

⁵ Reconsideration Motion, para. 29.

13. If the absence of this information prevented the Prosecution from adding the contact list at an earlier juncture, then it should have also prevented the Prosecution from adding, and attempting to introduce the contact list into evidence on the 8 April 2016. The fact that it did not, underscores that there was no impediment for adding the list at an earlier juncture. The Prosecution's decision to wait was purely strategic: this is not a basis for relief.

14. The Prosecution also cannot claim that the Trial Chamber's rejection of this item of evidence is unduly prejudicial. In the January 2016 request, the Prosecution argued that access to the telephone number corresponding to the contact list: ⁶

is the only means by which it [the contacts list] can be attributed to Kilolo, and for the Prosecution to have a reasonable and fair opportunity to determine whether, and to what extent, it is reflected in Call Data Records ("CDRs") already formally submitted before the Chamber.

15. The Prosecution thus advanced the position that a positive attribution to Me. Kilolo would be necessary to authenticate the relevance and reliability of the contacts list for the purpose of this case.

16. Since the Registry was unable to obtain any attribution evidence concerning the number, it follows that an impartial and objective Prosecutor would have decided not to tender a list, which it had previously claimed had no evidential value without proper attribution.

17. It is also not correct that the inclusion of Annex D on the Prosecution list of evidence would have served no purpose. The Defence case was not finalised, and it would have been open to the Defence to adduce further evidence in response. Tendering the list at the very end of evidentiary proceedings prevented the Defence

⁶ ICC-01/05-01/13-1537-Conf, para. 21.

from doing so, and was, moreover, contrary to the right of the Defence to be informed promptly of the nature, cause, and content of the Prosecution case.⁷

18. The prejudice to the Defence was, moreover, aggravated by the fact that the Prosecution seized the Registry on an *ex parte* basis with its queries concerning the telephone number; the Prosecution did not even foreshadow its intent to rely on Annex D to the Defence.

19. It is therefore incorrect (and not a ground for reconsideration), for the Prosecution to assert that “the addition of Annex D to the Prosecution’s list of evidence would not have served any significant practical purpose”.⁸

Relief sought

20. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Trial Chamber to dismiss the Reconsideration Motion.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 13th day of May 2016

The Hague, The Netherlands

⁷ The impact that the admission of evidence might have on the accused’s right to a speedy trial is also a relevant factor for deciding whether its prejudicial impact of its admission outweighs the probative value: ICC-01/04-01/07-2635, para. 41.

⁸ Reconsideration Motion para. 16.