



Original: **English**

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

Date: 19 May 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 Prosecution's Motion for Reconsideration of the '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

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

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

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(2) and 67(1) of the Rome Statute and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Prosecution's Motion for Reconsideration of the "Decision on Outstanding Evidentiary Applications"'.

1. 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.¹
2. On 10 March 2016, a contact list reviewed by the Independent Counsel ('Contact List') was notified to, *inter alia*, the Office of the Prosecutor ('Prosecution').²
3. On 8 April 2016, the Prosecution submitted the Contact List as evidence.³ In the same request, it also requested to add the Contact List to its list of evidence.
4. On 29 April 2016, the Chamber rejected the request to recognise the Contact List as formally submitted on grounds that the Prosecution made no effort to add this item to its List of Evidence between 10 March 2016 and 8 April 2016 ('Contact List Decision').⁴ The Chamber emphasised that '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'.⁵

¹ Transcript of Hearing, ICC-01/05-01/13-T-42-CONF-ENG, page 42 line 21 to page 43 line 5.

² Redacted version of Annexe D du Rapport du Conseil indépendant sur la levée des scellés et l'analyse de pièces saisies par les autorités françaises et les autorités belges (Décisions ICC-01/05-01/13-41 et ICC-01/05-01/13-366 et 446), ICC-01/05-01/13-845-Conf-AnxD-Red. *See also* Decision on the 'Prosecution's motion for the lifting of Redactions and the Release of Information Contained in Independent Counsel Reports', 23 February 2016, ICC-01/05-01/13-1651.

³ 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).

⁴ Decision on Outstanding Evidentiary Applications, ICC-01/05-01/13-1858, para. 38; Email from Trial Chamber VII Communications to the parties, 2 May 2016 at 11:04 ('The lack of effort referenced in paragraph 38 is in relation to the Prosecution failing to seek leave to add this item to its list of evidence at any time between 10 March 2016 (when it was notified of the item) and the 8 April 2016 deadline').

⁵ ICC-01/05-01/13-1858, para. 38.

5. On 9 May 2016, the Prosecution requested that the Chamber reconsider this decision, grant the Prosecution's application to add the Contact List to its list of evidence and recognise the document as formally submitted ('Request').⁶
6. On 13 May 2016,⁷ the defence for Mr Bemba⁸ and Mr Kilolo⁹ responded to the Request, submitting that it be rejected.
7. The Prosecution acknowledges that the Chamber previously declined certain tendered items because the Prosecution did not seek their prior addition to its list of evidence.¹⁰ However, the Prosecution submits that the posture of the case and attendant circumstances are different, further arguing that: (i) with reference to repeated past efforts to obtain the Contact List, the relative prejudice to the Prosecution resulting from excluding it justifies reconsideration; (ii) no deadline was set for the parties to seek the addition of potential exhibits to their lists of evidence; (iii) the defence was on notice of the Prosecution's intention to rely on the Contact List as of 18 March 2016 at the latest, when this list was formally disclosed as incriminating evidence and (iv) the defence took no action after having been put on notice of the disclosure of the Contact List.¹¹
8. Recalling the applicable law on reconsideration,¹² the Chamber considers that the Prosecution fails to demonstrate a 'clear error of reasoning' or that reconsideration is necessary 'to prevent an injustice'. In the Contact List Decision, the Chamber

⁶ 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, ICC-01/05-01/13-1883-Red (with three confidential annexes; public redacted version notified on 11 May 2016).

⁷ The response deadline was shortened to this date. Email from Trial Chamber VII Communications to the parties, 10 May 2016 at 12:44.

⁸ Defence Response to Prosecution's Motion for Reconsideration of the decision Outstanding Evidentiary Applications (ICC-01/05-01/13-1858), ICC-01/05-01/13-1892.

⁹ Response on Behalf of Mr Kilolo to 'Prosecution's Motion for Reconsideration of the Decision on Outstanding Evidentiary Applications' (ICC-01/05-01/13-1883-Conf), ICC-01/05-01/13-1894-Conf.

¹⁰ Request, ICC-01/05-01/13-1883-Red, paras 15-16, *referencing* Decision on 'Prosecution's Fifth Request for the Admission of Evidence from the Bar Table', 14 December 2015, ICC-01/05-01/13-1524, para. 6.

¹¹ Request, ICC-01/05-01/13-1883-Red, paras 16, 19-35.

¹² Decision on Babala Defence Request for Reconsideration of Closing Submission Page Limit, 18 April 2016, ICC-01/05-01/13-1812; Decision on Defence Request for Reconsideration of or Leave to Appeal 'Decision on "Defence Request for Disclosure and Judicial Assistance"', 24 September 2015, ICC-01/05-01/13-1282, para. 8; Decision on Kilolo Defence Request for Reconsideration, 15 July 2015, ICC-01/05-01/13- 1085-Conf, para. 4.

considered that the Prosecution's failure to seek leave to add the Contact List to its list of evidence before 8 April 2016 unfairly prejudiced the defence. This was because the defence did not have any additional time to react to this new item before having to file their own outstanding evidentiary applications.¹³

9. None of the submissions in the Request justify altering this determination. The Prosecution's various efforts to obtain the Contact List prior to March 2016 justifiably explain why it did not submit this item before this time. Indeed, in the Contact List Decision, the Chamber recognised the formal submission of other items which the Prosecution only acquired in March 2016.¹⁴ However, these past efforts to obtain the Contact List – as well as unsuccessful attempts by the Prosecution in March 2016 to identify the phone number corresponding to it – do not explain the Prosecution's subsequent failure to seek leave to add the Contact List to its list of evidence sufficiently before the 8 April 2016 deadline.
10. Although the Chamber did not set out any formal deadline for adding items to its list of evidence, the Prosecution should have been justifiably alerted from the Chamber's previous determinations that the Prosecution could not unduly delay its request to add items until a point when the defence could not reasonably react to them.¹⁵ In this regard, it is noted that three defence teams sought additions to their list of evidence soon before the 8 April deadline, affording at least a minimum opportunity for the other parties to present further evidence in reaction to these items.¹⁶

¹³ Contact List Decision, ICC-01/05-01/13-1858, para. 38.

¹⁴ Contact List Decision, ICC-01/05-01/13-1858, para. 37 (in reference to two lesser redacted versions of items which were already on the Prosecution's list of evidence).

¹⁵ See ICC-01/05-01/13-1524, para. 6. It is noted that, in the Contact List Decision, the Chamber did recognise the formal submission of a document which the defence for Mr Bemba and Mr Mangenda sought to add to their lists of evidence after 8 April 2016. However, although the Chamber admonished these defence teams for their delay in seeking to acquire the document, once the document was acquired they immediately sought leave to add it to their lists of evidence. Contact List Decision, ICC-01/05-01/13-1858, paras 56-58 (granting a 22 April 2016 request for an item acquired earlier that same day).

¹⁶ See Contact List Decision, ICC-01/05-01/13-1858, para. 23; Decision on Three Requests to Add Items to Lists of Evidence, 14 April 2016, ICC-01/05-01/13-1806. One defence team did successfully seek leave to add items to their list of evidence on 8 April 2016, but this request was unopposed.

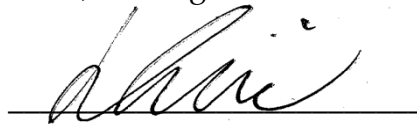
11. The Chamber is likewise unpersuaded that the disclosure of the Contact List as incriminating evidence sufficiently put the defence on notice that it may be added to the list of evidence on the 8 April deadline. The Chamber required the Prosecution to submit a list of evidence¹⁷ specifically to facilitate the defence's preparation by having it identify the sub-set of incriminating materials which it actually intended to use at trial. This appears to have been an effective measure in focusing the defence's preparation efforts.¹⁸ If disclosure of material as 'incriminating' were sufficient notice for the accused, as the Prosecution argues, then a list of evidence would be superfluous. These submissions effectively amount to a request to reconsider the idea of a list of evidence after the evidence presentation has closed¹⁹ – such a course is entirely unjustified.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the relief sought in the Request; and

ORDERS the Registry to reclassify the Kilolo Defence response to the Request (ICC-01/05-01/13-1894-Conf) as 'public'.

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 19 May 2016

At The Hague, The Netherlands

¹⁷ Order setting the commencement date for trial, 22 May 2015, ICC-01/05-01/13-960, para. 13.

¹⁸ In e-court, a search for items which were provided in an 'incrim' disclosure pack showed a result of 4008 items. In contrast, only 2288 items appear on the Prosecution's latest list of evidence. Annex A to Prosecution's Third Updated List of Evidence, 31 August 2015, ICC-01/05-01/13-1196-Conf-AnxA.

¹⁹ See Decision Closing the Submission of Evidence and Further Directions, 29 April 2016, ICC-01/05-01/13-1859.