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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 Redacted Version

Response to Prosecution's Sixth Request for Admission of Evidence from the Bar Table

Source: Defence for Jean-Jacques Kabongo Mangenda

Document 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-Jacques Kabongo Mangenda

Mr Christopher Gosnell
Mr Arthur Vercken

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku
Ms Beth Lyons

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. Jean-Jacques Mangenda opposes the Prosecution's request¹ to admit documents "from the bar table". The Prosecution, as required by the Trial Chamber,² closed its case on 27 November 2015.³ As the Prosecution has previously submitted in other cases, it may not "split" its case to present evidence after the Defence has presented its case.⁴ The only exceptions are: (i) "rebuttal" evidence;⁵ or (ii) "fresh" evidence.⁶ The Sixth Bar Table Motion does not articulate which of these two exceptions applies, in relation to which documents, or why. Any such purported explanation by way of reply would be untimely, and the Defence should not be required to formulate a response in the absence of an articulated basis for the exceptional admission of these documents.⁷ The request should be rejected on this basis alone.
2. Those criteria are, in any event, not satisfied. "Fresh" evidence, assuming that this exception exists at the ICC,⁸ is admissible only where the evidence could not have been identified and presented during the Prosecution case-in-chief, notwithstanding the exercise of reasonable diligence.⁹ The burden of showing the unavailability of the evidence "rests squarely" on the

¹ *Bemba et al.*, Prosecution's Sixth Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1784-Conf, 8 April 2016 ("Sixth Bar Table Motion"). This submission is a public redacted version prepared pursuant to the Chamber's direction in its *Decision Closing the Submission of Evidence and Further Directions*, ICC-01/05-01/13-1859, 29 April 2016.

² *Bemba et al.*, Directions on the conduct of the proceedings, ICC-01/05-01/13-1209, 2 September 2015, para.10.

³ *Bemba et al.*, Prosecution's Notice of the Close of its Case-in-Chief, ICC-01/05-01/13-1499, 27 November 2015.

⁴ *Katanga & Ngudjolo*, Prosecution's Observations on Rebuttal Evidence, ICC-01/04-01/07-2398, 20 September 2010 ("*Katanga* OTP Submissions of 20 September 2010"), para.6 ("[t]he Prosecution cannot 'spilt' its case and call further substantive evidence to supplement its own case in chief, after the Defence has presented its case").

⁵ *Id.* para.7 ("[t]he Prosecution can lead highly probative evidence in rebuttal after the Defence's case to refute, impeach, explain or counteract issues raised by the Defence, or to defuse the impact of evidence offered in the Defence case that (1) could not be anticipated by the Prosecution and (2) relate to a significant issue in the trial"); *Kenyatta*, Second Prosecution submission on the conduct of the proceedings, ICC-01/09-02/11-817, 1 October 2013, para.2 ("[t]he Prosecution submits that it should be permitted to adduce evidence to reply to a Defence case, at its conclusion, in order to refute, explain or counteract evidence which (i) the Prosecution could not have reasonably anticipated and (ii) is related to a significant issue in the case").

⁶ *Katanga* OTP Submissions of 20 September 2010, para.11 ("'fresh' evidence is substantive evidence that is intended to be part of the Prosecution's affirmative case, which was not known or available to the Prosecution at the start (or at the end of its case) but which is nonetheless probative of the accused's guilt.")

⁷ *Katanga*, Transcript, ICC-01/04-01/07-T-222-Red2-ENG, 24 November 2010, 76:19-21 ("[i]n such a case, it's up to the Prosecutor to file a specific application and a justified application requesting the production of new evidence, that is, to address new circumstances").

⁸ Neither the Statute nor the Rules provide for the admission of "fresh" evidence, and previous requests by the Prosecution for post-closure admission of purportedly new material have been made on the basis of Article 69(3) of the Statute. The Sixth Bar Table Motion refers to the motion being brought "pursuant to", *inter alia*, Article 69(3), although there is no further discussion as to how this provision should be interpreted in light of the attempt to submit evidence after the close of both the Prosecution and Defence cases. See *Bemba*, Decision on "Prosecution's Application to Submit Additional Evidence", ICC-01/05-01/08-3029, 2 April 2014, paras.25-33.

⁹ *Milošević*, IT-02-54-T, Decision on Application for a Limited Re-opening of the Bosnia and Kosovo Components of the Prosecution Case, 13 December 2005, para.22 ("[f]inally, in the test for re-opening, reasonable diligence is a

applicant.¹⁰ The Prosecution has previously submitted that there are two additional criteria for the admission of such evidence:

the Chamber must consider (1) whether the material “is either significantly more compelling than other items of evidence already disclosed to the defence, or brings to light a previously unknown fact which has a significant bearing upon the case” and (2) whether the late disclosure and addition will prejudice the rights of the Defence under Article 67(1)(b).¹¹

3. The late submission of the material in Category I is prejudicial. The Defence has been deprived of the opportunity to put these matters to P-433 or P-361, both of whom evidently could have commented on the significance and reliability of the proposed evidence. The Prosecution also asserts in its submission that this information is relevant to P-245 and P-260,¹² neither of whom, at this point, can be questioned on the basis of the information now disclosed. The late introduction of this information therefore causes substantial prejudice.
4. Even if the Prosecution is not directly responsible for the late disclosure of this information, the extraordinary delay by the Independent Counsel in disclosing this information is unjustified and unjustifiable. The Prosecution also apparently has some ability to communicate and guide the Independent Counsel, suggesting that the Prosecution may be indirectly responsible for the extraordinary delays. Even if this is not the case, the extraordinary delay by the Independent Counsel does not satisfy the diligence requirement that should be deemed applicable not only to the Prosecution, but to any authority involved in the investigation.
5. The Prosecution does not articulate whether the Category II materials are tendered as rebuttal or “fresh” evidence. In any event, it is plainly impermissible to tender non-contemporaneous testimonial statements other than through Rule 68.
6. The Category III materials seem to be offered as a combination of rebuttal and fresh evidence. None of the information tendered meets the exigent threshold for rebuttal evidence, as defined by the *Lubanga* Trial Chamber:

threshold inquiry: if a party cannot establish that the evidence could not have been obtained and presented during its case in chief, the application fails, and the Trial Chamber need not consider the probative value of the evidence”).

¹⁰ *Popović et al.*, IT-05-88-T, Decision on Motion to Reopen the Prosecution Case, 9 May 2008, para.24.

¹¹ *Katanga* OTP Submissions of 20 September 2010, para.12.

¹² Sixth Bar Table Motion, para.11.

This Chamber broadly agrees with the general approach as set out above in the various Decisions of Trial Chamber II and the ad hoc tribunals. In summary, calling rebuttal evidence is likely to be an exceptional event, and certainly in the context of this application, it will be necessary for the prosecution to demonstrate, first, that an issue of significance has arisen *ex improvis*, second, that the evidence on rebuttal satisfies the admissibility criteria; and, third, this step will not undermine the accused's rights, in particular under Article 67 of the Statute.¹³

7. The documents in Category III neither satisfy the requirements for rebuttal nor “fresh” evidence. The Prosecution had ample opportunity to prove the attribution of telephone numbers¹⁴ and to establish the alleged responsibilities of Mr. Mangenda as a case manager.¹⁵ The Prosecution should not be permitted to tender such additional documents as may come into its possession from time to time after the closure of its case.
8. The [REDACTED] document¹⁶ provides no indication as to whether these are actual distances or whether it is a planning document. The document therefore does not undermine the reliability of the Defence’s own measurements, whose reliability can, in any event, be assessed by the Trial Chamber’s own observations.
9. The tendering of two English translations is untimely. The Prosecution had ample time to prepare and submit these translations during its case. These documents are neither “fresh” nor do they constitute rebuttal material. Further, these documents contain elements that are inaccurate or not as faithful to the original as the French translation. For example:
 - “[REDACTED]” (0074-0993, lines 26 and 30 of the French) places emphasis on the manner in which something was said, whereas the English version erroneously suggests the speaker was placing emphasis on *what* was said;¹⁷

¹³ *Lubanga*, Redacted Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWW-0005, ICC-01/04-01/06-2727-Red, 28 April 2011, para.43.

¹⁴ Sixth Bar Table Motion, para.34.

¹⁵ *Id.* para.35.

¹⁶ *Bemba et al.*, Annex A to Prosecution’s Sixth Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1784-Conf-Anx A, 8 April 2016, tab 21.

¹⁷ CAR-OTP-0074-0993.

- a contrast is made between “[REDACTED]” and “[REDACTED]” (0074-0993, French, line 121) that is absent from the English version at line 120, which gives a false or ambiguous impression as to whom is referred to in the first “[REDACTED]”;¹⁸
- “[REDACTED]” (0074-0993, French, line 162) is mistranslated in the English as “[REDACTED]”;¹⁹
- a creatively slanted interpretation of “[REDACTED]” (lines 18 and 20 of the French and original of 0074-0997) is offered in line 18 of the English as being “[REDACTED]”, (as if to imply a reference to a plan) whereas the plain interpretation of the phrase is that “[REDACTED]”;²⁰
- “[REDACTED]” (French, line 165 of 0074-0997) is erroneously translated into the English word “[REDACTED]” (English, line 158), which has an important impact on the overall interpretation of the sentence;²¹ and
- “[REDACTED]” is again creatively mistranslated at English line 201 as having “[REDACTED]”, instead of just simply “[REDACTED]”, as is reflected in line 208 of the French.²²

10. These discrepancies reflect that the French versions are generally more faithful to the original language, which was partly in French and partly in Lingala.

11. The Prosecution’s request in respect of documents pertaining to D21-0003 is premature and, accordingly, should be rejected.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ CAR-OTP-0074-0997.

²¹ *Id.*

²² *Id.*



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 15 July 2016,
At The Hague, The Netherlands