

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05-01/13**
Date: **27 August 2015**

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

Decision on Prosecution Request to add 12 Items to its List of Evidence

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

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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 (the ‘Chamber’) of the International Criminal Court (the ‘Court’), 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 Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on Prosecution Request to add 12 Items to its List of Evidence’.

I. Background and Submissions

1. On 22 May 2015, the Chamber issued a decision, *inter alia*, instructing the Office of the Prosecutor (the ‘Prosecution’) to file its List of Evidence on 30 June 2015 (‘Disclosure Deadline’).¹ As instructed, the Prosecution submitted its List of Evidence on said date,² which was updated on two occasions.³
2. On 31 July 2015, the Prosecution requested authorisation to add 12 items of evidence (‘12 Items’) to its List of Evidence (the ‘Request’).⁴
3. The Chamber shortened the deadline for responses to 7 August 2015⁵ and the defence for Mr Bemba (‘Bemba Defence’), the defence for Mr Babala (‘Babala Defence’) and the Defence for Mr Kilolo (‘Kilolo Defence’) filed their responses to the Request (‘Bemba Response’, ‘Babala Response’ and ‘Kilolo Reponse’, respectively) on this date.⁶

¹ Decision on Modalities of Disclosure, ICC-01/05-01/13-959, with public annex, ICC-01/05-01/13-959-Anx.

² Prosecution’s List of Witnesses and Evidence, 30 June 2015, ICC-01/05-01/13-1048, with confidential annex B containing the List of Evidence.

³ Prosecution’s Updated List of Evidence, 6 July 2015, ICC-01/05-01/13-1062, with confidential annex A containing the updated List of Evidence and Prosecution’s Second Updated List of Evidence, 27 July 2015, ICC-01/05-01/13-1104, with confidential annex A containing the second updated List of Evidence.

⁴ Prosecution Request to Add Twelve Items of Evidence to its List of Evidence, ICC-01/05-01/13-1114-Conf, a public redacted version was filed on 6 August 2015.

⁵ Email by a Legal Officer of the Chamber to the parties on 3 August, at 10:23.

⁶ Defence Response to ‘Prosecution Request to Add Twelve Items of Evidence to its List of Evidence’, ICC-01/05-01/13-1126-Conf; Réponse de la Défense de M. Fidèle Babala à « Prosecution Request to Add Twelve Items of Evidence to its List of Evidence » (ICC-01/05-01/13-1114-Conf), ICC-01/05-01/13-1127-Conf Réponse de la défense de M. Kilolo à la « Prosecution Request to Add Twelve Items of Evidence to its List of Evidence

4. The Prosecution argues that 'good cause is shown' to admit the 12 Items under Regulation 35 of the Regulations.⁷ One of the items is a handwritten note which was seized from Mr Kilolo's person upon his arrest.⁸ The Prosecution submits that it is a 'highly probative' document, which was only released to the Prosecution on 24 July 2015 as a document annexed to one of the reports of the independent counsel appointed to review intercepted communications and certain seized material ('Independent Counsel').⁹ Further, it avers that admission of the document is 'in the interest of justice, and causes no prejudice to the Accused'.¹⁰

5. In respect of the remaining items, the Prosecution explains that they are call logs related to Mr Bemba's communications from the Court's detention centre. The Prosecution submits that 'these 11 logs will make for a more complete Trial List of Evidence and will serve the interest of justice.'¹¹ As to the reason for the late addition, the Prosecution submits that they were 'inadvertently excluded' from its List of Evidence.¹² Further, it explains that three of the call logs pertain to Mr Bemba's calls on the Registry's privileged line at the detention centre during the relevant timeframe of the charges.¹³ The remaining eight call logs are from Mr Bemba's communication on the non-privileged line of the detention centre and are – in another form – already contained in more wide-ranging call logs which are already on the List of Evidence.¹⁴

(ICC-01/05-01/13-1114-Con). », ICC-01/05-01/13-1128-Conf. The Chamber notes that the Kilolo Response was notified one day after the expiration of the response deadline. However, considering that the Kilolo Defence provided an explanation for the minimal delay and that the Chamber finds it beneficial to receive the Kilolo Defence's submission, the Chamber will consider the its response.

⁷ Request, ICC-01/05-01/13-1114-Red, paras 9, 15 and 16.

⁸ Request, ICC-01/05-01/13-1114-Conf, para. 8.

⁹ Request, ICC-01/05-01/13-1114-Red, para. 9.

¹⁰ Request, ICC-01/05-01/13-1114-Red, para. 10.

¹¹ Request, ICC-01/05-01/13-1114-Red, para. 11.

¹² Request, ICC-01/05-01/13-1114-Red, para. 11.

¹³ Request, ICC-01/05-01/13-1114-Red, para. 12.

¹⁴ Request, ICC-01/05-01/13-1114-Red, para. 13.

6. All three of the responding defence teams request the Chamber to reject the Request. The Bemba and Kilolo Defence both submit in a general manner that there are no exceptional circumstances justifying the Request.¹⁵ The Kilolo Defence additionally argues that the belated addition of the 12 Items is not necessary¹⁶ and that it would not serve the interests of justice.¹⁷
7. With regard to the call logs, the Bemba and Babala Defence both aver that the lack of diligence on the part of the Prosecution to include the items in the initial List of Evidence is not a justification pursuant to Regulation 35 of the Regulations to add them now.¹⁸
8. With regard to the handwritten note, the Bemba Defence submits that the Prosecution should have anticipated that they would receive items of evidence transmitted by Independent Counsel after the deadline imposed by the Chamber and accordingly sought variation before the Disclosure Deadline or announced its intention to request such variation.¹⁹

II. Analysis

9. The Chamber notes that the Prosecution submits that 'good cause is shown' to admit the 12 Items. However, this is the criterion for Regulation 35(2) of the Regulations, first sentence, which applies to situations where the request is made before the expiration of the deadline. The relevant standard for an application after the deadline is Regulation 35(2) of the Regulations, second sentence, for which the applicant needs to show that acting within the time limit was not possible for reasons outside of his or her control.

¹⁵ Bemba Response, ICC-01//05-01/13-1126-Conf, para. 16 and Kilolo Response, ICC-01/05-01/13-1128-Conf, paras 8-12.

¹⁶ Kilolo Response, ICC-01/05-01/13-1128-Conf, paras 13-20.

¹⁷ Kilolo Response, ICC-01/05-01/13-1128-Conf, paras 21-22.

¹⁸ Bemba Response, ICC-01//05-01/13-1126-Conf, paras 6 and 9; Babala Response, ICC-01/05-01/13-1127-Conf, paras 12-19.

¹⁹ Bemba Response, ICC-01//05-01/13-1126-Conf, para. 5.

10. With regard to the eleven phone logs, the Chamber observes that the Prosecution does not explain sufficiently the reasons 'outside its control'. Inadvertence is not a reason outside of the Prosecution's control, but lies plainly within it. Nevertheless, the Chamber accepts the Request in respect of the call logs in the interests of justice. Given the limited number of items, the remaining preparation time available to the defence prior of the commencement of the trial and the fact that large parts of the information contained in the call logs are presented in items already contained in the List of Evidence, the Chamber considers that the prejudice to the defence, if any, is minimal. Accordingly, the Chamber, acting under Article 64(2) and (6)(f) of the Statute, authorises, on an exceptional basis, that the eleven phone logs be added to the list of evidence.

11. With regard to the handwritten note, the Chamber notes that the Prosecution received the item only after the Disclosure Deadline. The Chamber therefore finds that the filing of the application after the lapse of the Disclosure Deadline was for reasons outside of its control. As regards the argument of the Bemba Defence with respect to the foreseeability of such application (and an ensuing duty to inform the Chamber of potential future applications), the Chamber is of the view that in the present situation, where the Prosecution has no indication what sort of evidence it will receive from the Independent Counsel, there is no possibility to anticipate specific future requests. The Chamber therefore finds that there was no obligation for the Prosecution to announce that it might file an application for extension of time in the future. Further, the Chamber notes that the addition involves only one single page document, there is still over a month of preparation time available to the defence ahead of the commencement of trial and limited prejudice would be caused by its

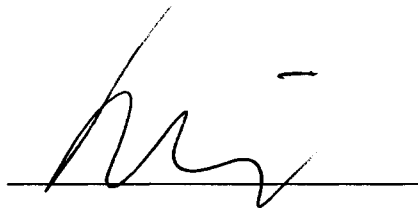
addition to the List of Evidence. As a result, the Chamber authorises the belated addition of this item to the List of Evidence.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY


GRANTS the Request; and

ORDERS the Prosecution to file an updated List of Evidence within two days after the notification of this decision.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt
Presiding



Judge Marc Perrin de Brichambaut



Judge Raul Pangalangan

Dated 27 August 2015

At The Hague, The Netherlands