

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 September 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

**Confidential Document
with
Confidential Annexes A and B**

**Prosecution's Response to Joint Defence Request to Restrict the Scope of P-0433's
Testimony**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The joint Defence request to restrict the scope of Witness P-0433's testimony¹ should be denied. P-0433's expected evidence is appropriate summary evidence. In his report — the subject matter of his prospective testimony — the Witness summarises evidence relevant to the issues in this case and draws corresponding observations. The summarised materials are of unquestionable authenticity and reliability. The Office of the Prosecutor ("Prosecution") does not intend to elicit evidence from the Witness requiring specialised knowledge or expertise. Further, the Defence and the Trial Chamber VII ("Chamber") will have the opportunity to question the Witness about the summarisation process to test its accuracy and comprehensiveness.

2. The Witness's evidence falls within the class of "summarising evidence" found admissible by other international courts. The case-law referenced by the Defence largely concern witnesses who were not called to provide summary evidence, or reflect the Defence's misreading of that case-law. The two decisions cited by the Defence relating to summary witnesses actually support the Prosecution's intended examination of the Witness and refute the limitations sought by the Defence.

II. Confidentiality

3. This filing is classified as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC"), as it refers to filings and materials of the same designation. A public redacted version will be filed.

¹ ICC-01/05-01/13-1271-Conf ("Motion").

III. Submissions

A. P-0433's expected evidence is appropriate summary evidence

4. P-0433's anticipated testimony centres on his report, which compiles and summarises material relevant to the issues of the case and in a manner appropriate for its admission as "summarising evidence".² His evidence does not "delve[] into the realm of argument and opinion".³ Rather, in his report the Witness performs the following review:

- He lists calls between telephone numbers indicated in the call data records ("CDRs") provided by various telecommunication service providers, and from telecommunications data provided to the Prosecution by the Independent Counsel, under direction by the Single Judge.⁴
- He uses the Victims and Witnesses Unit ("VWU") cut-off dates provided and identified by VWU.⁵
- He lists which telephone numbers are attributable to which individuals as reflected in, *inter alia*, documents and emails seized from the Accused's persons, open source records, and other material obtained by the Independent Counsel and released to the Parties, under direction by the Single Judge.⁶

By summarising these various sources, the Witness simply observes how many calls and contacts reflected in the records examined took place between the Accused and

² *Prosecutor v. Milošević*, IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002 ("*Milošević Decision*"), para.21.

³ Motion, para.12.

⁴ See CAR-OTP-0090-0612 ("Report"), at 0613-0614, paras.3.1-3.6. See also CAR-OTP-0090-0724.

⁵ See CAR-OTP-0078-0290.

⁶ See generally CAR-OTP-0090-0831.

Defence witnesses in the Main Case after the VWU cut-off date and during the course of their testimony, as well as the length of those calls.

5. The Prosecution does not intend to elicit information requiring specialised knowledge or expertise from the Witness.⁷ Contrary to the Defence's assertions, the Witness does not opine "as to what constitutes a 'cut off' date"⁸ nor does he try to interpret the VWU's protocol.⁹ The VWU cut-off date for the Main Case witnesses was provided by VWU pursuant to an order of the Single Judge of Pre-Trial Chamber II¹⁰ and was tendered for admission in the Prosecution's Third Bar Table Motion.¹¹ The Witness simply summarises the dates provided by VWU and draws observations based on those dates.

6. The Witness's prospective evidence does not concern "the nature of certain forensic evidence"¹² or assert whether a specific CDR reflects an actual "contact".¹³ Both in his report and anticipated evidence, the Witness refrains from commenting on how CDRs, the intercepted communications, or other summarised materials, were extracted, accepting the data at face value. To the extent the reliability and accuracy of these materials may be contested – and it is not clear that this is the case – P-0361, a telecommunications expert, will testify regarding CDR data and the wiretap or interception process.¹⁴ Accordingly, Witness P-0433 will not be used to "cure any lacuna"¹⁵ in P-0361's expert report. Their evidence concerns distinct subjects, i.e. what is the evidence in this case on the one hand, and what is the reliability and accuracy of this *type* of evidence on the other.

⁷ *Contra* Motion, paras.30-33, 36-38.

⁸ Motion, para.17.

⁹ See Motion, para.17.

¹⁰ See ICC-01/05-01/13-182.

¹¹ See ICC-01/05-01/13-1170-Conf ("Third Bar Table Motion"), paras.35-38; ICC-01/05-01/13-1170-Conf-AnxA, p.24, count 4.

¹² Motion, para.14.

¹³ Motion, para.17.

¹⁴ ICC-01/05-01/13-1263-Conf-AnxA, p.6.

¹⁵ Motion, para.39.

7. That the Witness is employed by the Prosecution does not preclude the presentation of his evidence.¹⁶ The ICTY Appeals Chamber has noted that simply because a summary has been prepared for the purposes of the particular litigation “may be relevant as to whether it should be admitted, but, [...] it would be quite wrong to suggest that such a summary is *ipso facto* unreliable.”¹⁷ Rather, it is fundamentally a question of weight, not admissibility. In this case, the Prosecution will elicit testimony as to the methodology used in summarising the evidence. Any questions as to the reliability or sufficiency of that methodology, or as concerns the basis of the witness’s observations,¹⁸ can be put to the witness during cross-examination.

B. The authenticity and reliability of the summarised material is uncontroversial

8. The authenticity and reliability of the evidence underlying the Witness's report is without question. Virtually all of the documents summarised by the Witness have been tendered for admission by the Prosecution through its various bar table motions. For the reasons outlined in those motions, the reliability and authenticity of the CDRs,¹⁹ intercepted communications,²⁰ recordings and call logs,²¹ materials obtained from the Accused,²² VWU documents,²³ Independent Counsel reports and related materials,²⁴ and Detention Centre materials²⁵ are unassailable.

¹⁶ *Contra* Motion, paras.34, 36-37.

¹⁷ *Milošević* Decision, para.23.

¹⁸ *Contra* Motion, paras.12, 14, 35.

¹⁹ ICC-01/05-01/13-1013-Conf ("First Bar Table Motion"), paras.36-38.

²⁰ See First Bar Table Motion, paras.23-27.

²¹ See First Bar Table Motion, paras.17-25.

²² See Third Bar Table Motion, paras.31-33.

²³ See Third Bar Table Motion, para.37.

²⁴ See First Bar Table Motion, paras.11-29.

²⁵ See ICC-01/05-01/13-1113-Conf, paras.10-27.

9. Contrary to the Defence's assertions, the Witness did not rely upon undisclosed filings in the Main Case in preparing his report – and the Defence points to no such reference. Further, the Witness will not testify on issues “predicated on his knowledge and familiarity with issues and filings” in the Main Case that have not been disclosed to the Defence.²⁶ To the extent the Defence wishes to challenge the authenticity and reliability of the documents summarised in the report, it had the opportunity to do so in response to the Prosecution's bar table motions.

10. The Defence only identifies one instance in which the Witness refers to an e-mail inadvertently not disclosed in this case.²⁷ The only other instance is in footnote 19 of the report, which also references an e-mail that was not disclosed.²⁸ Those e-mails copied members of BEMBA's defence team, including KILOLO and MANGENDA. As such, their late disclosure causes no prejudice to BEMBA, KILOLO and MANGENDA, given their access to the e-mails at the time, as members of BEMBA's defence. Further, as the emails do not concern or are used in anyway to substantiate allegations against BABALA or ARIDO, there is no prejudice. Nevertheless, the emails are attached to this response for their benefit.²⁹ Notably, the e-mails are referenced in the report only for a point strictly intended as background information and tangential to the Witness's summary, namely that “Court records show at one point the Defence proposed calling D-13 as early as 19 November 2012”³⁰ and that “Defence records show at one point the Defence proposed calling D-57 as early as 01 October 2012”.³¹

²⁶ Motion, para.15.

²⁷ Motion, para.15.

²⁸ The Prosecution has reviewed all of the documents referenced in the Witness's report and annexes. Apart from the two emails referenced and attached in Confidential Annex B, the Prosecution has identified three other documents that were not disclosed: (1) CAR-OTP-0075-0239 is duplicative of CAR-OTP-0075-0237, which was disclosed; and (2) the information contained in CAR-OTP-0079-0247 and CAR-OTP-0083-1337 will not be relied upon by the Prosecution and is duplicative of other documents used in support of the propositions for which they are cited in the annexes

²⁹ See Confidential Annex B.

³⁰ Report, at 0619-0620, para.4.5.1.

³¹ Report, at 0626, para.4.13.1. Had those emails been genuinely relevant to the Defence's full and comprehensive understanding of the Witness's report, the Defence would have likely requested their disclosure after the report was disclosed to them in June 2015.

11. Finally, to the extent the Chamber has any questions regarding the admissibility of the evidence summarised by the Witness, the Chamber has the discretion to hear P-0433's testimony and condition the admission of his report and supporting annexes on the admission of the underlying documentation.

C. The witness's evidence falls within the class of "summarising evidence" found admissible by other international courts

12. The Defence does not contest the admissibility of summary evidence under article 69. Such summary evidence has been found probative and admissible evidence by the *ad hoc* tribunals and does not result in the Prosecution "present[ing] a particularly long opening statement".³² As noted by the ICTY Appeals Chamber in the *Milošević* case, "summarising evidence – the summarising of material which is relevant to the issues of the case" is admissible and "has been admitted on many occasions in appropriate cases".³³ As the ICTY Appeals Chamber notes "[i]f the material being summarised is uncontroversial, there will clearly be a considerable saving of time if that material is summarised either in a document or by one witness rather than given by many witnesses."³⁴ That circumstance is particularly apt here where, as noted above, the underlying evidence being summarised is uncontroversial, has been tendered into evidence, and is of such a nature that its summarisation would assist the Chamber in its resolution of the facts in this case. In particular, the material summarised in the report concerns thousands of calls, scattered across various electronic documents and data sets. The summarisation of that data is appropriate in this case, and in line with the *raison d'être* behind admitting summary evidence – namely to assist in the presentation of cases "which

³² Motion, para.13.

³³ *Milošević* Decision, para.21. See also *Milošević* Decision, Partial Dissenting Opinion of Judge Shahabuddeen, para.1.

³⁴ *Milošević* Decision, para.21.

sprawl over time and space and stretch over the testimony of hundreds of witnesses.”³⁵

13. The Defence’s reference to case-law from the ICC and from the ICTY and ICTR is unpersuasive. Neither of the two ICC decisions referenced by the Defence³⁶ nor the ICTY and ICTR decisions cited in footnote 15 of the Motion concern “summarising evidence”. The case-law concerning investigators who were not called as summarising witnesses³⁷ is also inapposite to the issues here, as the P-0433 is not being called as an investigator, but as an analyst who summarised materials relevant to the issues in the case.

14. The Defence also misapprehends at least one of the cases it references.³⁸ The witness in the *Popović* decision cited by the Defence³⁹ was not attempting to provide “summarising evidence”. The witness was an investigator who had been employed by the Defence strictly to gather documents in Popović’s defence.⁴⁰ Indeed, despite the fact that the witness testified that he was unfamiliar with the contents of the documents he had collected⁴¹ and the Defence’s position that it had called the witness to only testify about the process related to obtaining the documents and not the content of the documents themselves,⁴² the Trial Chamber permitted the Prosecution to elicit testimony during cross-examination regarding the subject-matter of the documents collected by the investigator to the extent he was familiar with that information.⁴³ Pertinently, the Defence entirely ignores others decisions in the *Popović*

³⁵ *Milošević* Decision, Partial Dissenting Opinion of Judge Shahabuddeen, para.2.

³⁶ Motion, paras.19-20.

³⁷ Motion, paras.22, 28-29.

³⁸ The Defence references a decision in the *Milutinović* case, but fails to provide a citation to that authority. Motion, para.29. Absent such citation and given the Defence’s broad and undetailed description, the Prosecution cannot respond to the Defence’s submissions on that decision. The Prosecution submits that the Chamber should also disregard the Defence submissions on that decision.

³⁹ Motion, para.28.

⁴⁰ *Prosecutor v. Popović et al.*, IT-05-88-T, T.21916-21917, 6 June 2008.

⁴¹ *Prosecutor v. Popović et al.*, IT-05-88-T, T.21943-21945, 6 June 2008.

⁴² *Prosecutor v. Popović et al.*, IT-05-88-T, T.21945, 6 June 2008.

⁴³ *Prosecutor v. Popović et al.*, IT-05-88-T, T.21945, 6 June 2008.

case where the Trial Chamber admitted the summary evidence of witnesses, including those employed by the Prosecution.⁴⁴

15. The two decisions concerning summarising evidence referenced by the Defence support – not undermine – the Prosecution's position. In *Milošević*,⁴⁵ the ICTY Appeals Chamber accepted as a matter of law that summarising evidence is admissible.⁴⁶ It declined to admit the summarising evidence in that case – a summary by an investigator of statements made by other witnesses taken by other investigators – because, *inter alia*, the material being summarised had not been tendered by the Prosecution and would have, in fact, been inadmissible under ICTY rules.⁴⁷ In other words, "the compiled summary, if admitted, would have circumvented the stringent requirements of Rule 92 *bis*",⁴⁸ the rule concerning the admission of witness statements *in lieu* of in-court testimony. Furthermore, the Chamber has reasoned that had the underlying evidence been tendered, the summary would become unnecessary.⁴⁹ The Defence's narrow reading and selective passaging of that decision⁵⁰ ignores this holding and salient reasoning. In this case, the underlying materials have been tendered, are of unquestionable reliability and authenticity, and are of such nature that even with their admission, the Witness's summary of that evidence would still benefit the Chamber for the reasons expressed above.

16. Similarly, in *Perišić*,⁵¹ the Chamber accepted that, as a matter of law, the admission of summary evidence was permissible and appropriate depending on the

⁴⁴ See *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Joint Defence Motion Requesting Determining as to the Admissibility of the Testimony of Jean Rene Ruez, 6 September 2006 ("Popović Decision"); *Prosecutor v. Popović et al.*, IT-05-88-T, T.18895-18896, 10 December 2007.

⁴⁵ See Motion, paras.26-27.

⁴⁶ *Milošević* Decision, para.21. See also *Milošević* Decision, Partial Dissenting Opinion of Judge Shahabuddeen, para.1.

⁴⁷ See *Milošević* Decision, para.23. See also para.24.

⁴⁸ *Prosecutor v. Perišić*, IT-04-81-T, Decision on Defence Motion *In Limine* for Prosecution Witness Bretton Randall, 11 February 2009 ("Perišić Decision"), para.13.

⁴⁹ See *Milošević* Decision, para.23. See also para.24.

⁵⁰ Motion, para.27.

⁵¹ See Motion, paras.23-25.

circumstances of the case.⁵² The Chamber noted that the “basic issue” in determining the appropriateness of that evidence was “whether the material being summarised would itself be admissible.”⁵³ Following the *Milošević* Decision, the Chamber concluded that the summary evidence of a Prosecution witness was “not *ipso facto* inadmissible”,⁵⁴ but decided to limit the witness’s testimony because the witness only intended to provide a “selective summarisation” based on what the witness believed was most pertinent.⁵⁵ No similar “selective summarisation” was conducted by the Witness in this case when compiling his report. While the Witness's report generally considers voice contacts with a duration of 10 seconds or more as “substantive”,⁵⁶ the report summarises all calls between the Accused and Defence witnesses in the Main Case, including those with a duration of 0 seconds.⁵⁷ The comprehensive nature of the report thus distinguishes this case from the *Perišić* Decision by removing the very concerns that resulted in the limitations imposed by the ICTY Trial Chamber.

IV. Relief Requested

17. For the foregoing reasons, the Motion should be denied.



Fatou Bensouda, Prosecutor

Dated this 24th Day of September 2015
At The Hague, The Netherlands

⁵² *Perišić* Decision, para.9 referencing *Milošević* Decision, para.21. See also para.13 (“The Trial Chamber concurs with the Prosecution that ‘[t]here is no rule or guideline prohibiting the use of summary witnesses or other summary evidence’ in this Tribunal and recalls that it has indeed been admitted in previous trials, including when provided by investigators of the OTP.”) citing *Milošević* Decision, para.21 and *Popović* Decision.

⁵³ *Perišić* Decision, para.9 citing *Milošević* Decision, para.21.

⁵⁴ *Perišić* Decision, para.14.

⁵⁵ *Perišić* Decision, paras.12, 15.

⁵⁶ Report, at 0613. *Contra* Motion, para.14.

⁵⁷ See generally CAR-OTP-0090-0630.