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Date: **7 October 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 Redacted Version

**Response to “Prosecution’s Second Request for the 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:

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I. INTRODUCTION

1. The Prosecution's second bar table motion¹ shows that it knew in July 2013 that Mr. Mangenda, instead of using money transferred to him through Western Union to bribe witnesses, was transferring that money directly into Mr. Bemba's UNDU account. The Prosecution did not share this knowledge with the Single Judge when requesting judicial authorisation for unconstrained surveillance of Mr. Mangenda's telephone;² on the contrary, the Prosecution suggested that the purpose of the money was to bribe witnesses in The Hague.³ This was a serious material misstatement. Mr. Mangenda requests that two intercepts – items 109 and 110 – as well as the Prosecution's own characterisation thereof be taken into account in adjudicating his pending Motion to Declare Inadmissible Telephone Intercepts of Mr Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements by the Prosecution.⁴
2. The intercepts lack, however, the necessary indicia of reliability to be admitted as evidence in the case for three reasons: (i) no official translations have been provided; (ii) no evidence has been adduced authenticating the participants in the conversations; and (iii) no evidence has been adduced describing the methodology of recording and storing the conversations. Further, the Prosecution has failed to establish the relevance of some of the information tendered, which should be established through testimonial evidence.

II. APPLICABLE LAW

3. Tendering documents prior to the presentation of any evidence does not accord with ICC practice. The sole exception to the contrary is a single decision in 2008 admitting

¹ *Bemba et al.*, Prosecution's Second Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1113-Conf, 31 July 2015 ("Motion"), Annex A, "Count 109" [REDACTED]. The present submission is a public redacted version of the Defence's Response to "Prosecution's Second Request for the Admission of Evidence from the Bar Table" (ICC-01/05-01/13-1200-Conf), filed pursuant to the Chamber's order in ICC-01/05-01/13-1285.

² *Id.* para. 21.

³ *Situation in the Central African Republic*, Request for Judicial Order to Obtain Evidence for Investigation under Article 70, ICC-01/05-51-Red, 25 February 2014 ("Surveillance Request"), paras. 21-22 ("Mangenda has received a total of USD \$21,595.77 from Babala [...] Mangenda ha[s] received large Western Union payments on dates that coincide with the dates of testimony of several witnesses in The Hague. The payments coincide with the end of the witnesses' testimonies. [...] The times and dates of the transfers of the exact sums of money suggest that KILOLO and MANGENDA may be paying witnesses while they are at the seat of the Court.")

⁴ *Bemba et al.*, Corrigendum to Motion to Declare Inadmissible Telephone Intercepts of Mr Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements by the Prosecution, ICC-01/05-01/13-1136-Conf-Corr, 13 August 2015.

four documents.⁵ Since then, not a single document has been admitted from the bar table by any ICC Trial Chamber prior to commencement of trial.⁶

4. The reason is that the “reliability” of a document can generally only be established through evidence adduced in court. Thus, a bar table motion may not generally be the “first port of call” for the admission of documents.⁷ Exceptions are permitted only where “the relevance and reliability of a document may be sufficiently apparent to justify its admission as an exhibit without the need for any evidence or any further evidence, relating to the document,”⁸ such as, for example, where both defendants agreed to their authenticity.⁹
5. Conversely, documents should be denied admission when their relevance is ambiguous or debatable,¹⁰ or where relevance can be inferred only on the basis of several steps of reasoning offered by the party’s counsel, rather than on the evidence

⁵ *Lubanga*, Decision on the admissibility of four documents, ICC-01/04-01/06-1399, 13 June 2008, paras. 37-40, corrigendum filed on 20 January 2011 (*Lubanga*, Corrigendum to Decision on the admissibility of four documents, ICC-01/04-01/06-1399-Corr, 20 January 2011, paras. 37-40.)

⁶ The interval between the start of the Prosecution case and the filing of a bar table motion was 84 days in the *Ruto* case; 235 days in the *Katanga* case; and 205 days in the *Bemba* case. See *Ruto and Sang*, Prosecution’s Application for Admission of Documents from the Bar Table Pursuant to Article 64(9), ICC-01/09-01/11-1121, 2 December 2013; *Katanga and Chui*, Prosecution’s Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, ICC-01/04-01/07-2290, 16 July 2010; *Bemba*, Prosecution’s submission of the list of materials it requests to be admitted into evidence, ICC-01/05-01/08-1514, 14 June 2011.

⁷ *Ruto and Sang*, Decision on the Joint Defence Application for Admission of Documentary Evidence Related to the Testimony of Witness 536, ICC-01/09-01/11-1436, 15 July 2014, para. 11 (“[a]lthough the admission of evidence other than through a witness is permissible in the Court’s proceedings, the Chamber nonetheless considers admission of evidence through a witness to be a preferable approach, where possible. It is recalled that while the Chamber guided the Ruto Defence to seek admission of the relevant evidence through a ‘bar table motion’, it also indicated that the Ruto Defence has the possibility of calling witnesses to testify on this matter”); *Karadžić*, IT-95-5/18-T, Decision on the Prosecution’s First Bar Table Motion, 13 April 2010, para. 13.

⁸ *Boškoski and Tarčulovski*, IT-04-82-T, Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E, 14 May 2007, para. 13.

⁹ *Id.* paras. 6-7.

¹⁰ *Stanišić & Simatović*, IT-03-69-T, Second Decision on Simatović Defence Third Bar Table Motion, 17 September 2012, para. 12 (“The Defence has had ample opportunity to present these documents through witnesses in order to provide the Chamber with the necessary context, but chose not to do so. As such, the Chamber is left to guess how to interpret or contextualise these documents when determining their admission into evidence. Therefore, the Chamber is unable to determine the probative value of these documents. For these reasons, the Chamber denies their admission into evidence from the bar table.”)

itself.¹¹ Documents whose reliability cannot be established on their face should generally not be admitted from the bar table.¹²

6. Electronic recordings of oral conversations are particularly unsuitable for admission from the bar table because additional information is almost always required to establish the requisite indicia of reliability. As consistently held at the ICTY, where such recordings are a common form of evidence:¹³

a special category of evidence in that in and of themselves, they bear no *prima facie* indicia of authenticity or reliability, and as such these requirements must generally be fulfilled by hearing from the relevant intercept operators or the participants in the intercepted conversation.¹⁴

7. ICTY Trial Chambers have consistently required, at a minimum, the introduction of at least some evidence in respect of the methodology of collection and attribution before considering admission from bar table.¹⁵

¹¹ *Strugar*, IT-01-42-T, Decision II on the Admissibility of Certain Documents, 9 September 2004, paras. 14, 16; *Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 41 (“[t]he relevance of independent reports is extremely difficult to assess without a witness to provide context”); *Haradinaj et al.*, IT-04-84-T, Decision on Prosecution’s Motion to Tender Documents on its Rule 65ter Exhibit List, 30 November 2007, para. 18 (“[v]arious lists of names and some remarks on ammunition on pages 1 and 19 of the translated document lack contextualization. The Chamber therefore cannot regard them as relevant.”)

¹² See e.g. *Gotovina et al.*, IT-06-90-T, Decision on Prosecution’s Motion to Admit Documents Into Evidence and to Add Two Documents to the Prosecution’s Rule 65ter Exhibit List, 25 November 2008, para. 15; *Delić*, IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008, para. 18.

¹³ *Karadžić*, IT-95-5/18-T, Decision on the Prosecution’s First Bar Table Motion, 13 April 2010, para. 13.

¹⁴ *Tolimir*, IT-05-88/2-T, Decision on Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table, 20 January 2012, para. 14. See *Karadžić*, IT-95-5/18-T, Decision on the Prosecution’s First Bar Table Motion, 13 April 2010, para. 13.

¹⁵ *Tolimir*, IT-05-88/2-T, Decision on Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table, 20 January 2012, para. 14 (“the Chamber notes, as submitted by the Prosecution, that a large collection of intercepts have already been admitted in this case as a result of the testimony of numerous experienced and trained ABiH and MUP intercept operators who have established the reliability of the interception process and have been able to speak to the authenticity of the intercepts. The Chamber finds, therefore, that the reliability and authenticity of this general collection of intercepts has already been established. The Proposed Intercepts form part of the general collection of intercepts already admitted in this case and as such, the Chamber is satisfied that the reliability and authenticity of the Proposed Intercepts was sufficiently established for the purposes of admitting them into evidence from the bar table”); *Karadžić*, IT-95-5/18-T, Decision on Prosecution’s First Bar Table Motion for the Admission of Intercepts, 14 May 2012, para. 15 (“weight to be attributed to the Intercepts. The Chamber has also received evidence relating to the methodology used for obtaining, transcribing and storing the Intercepts, the method used for identifying speakers, and the procedure adopted in handing over the Intercepts to the Prosecution. The Chamber is therefore satisfied that there are sufficient indicia of reliability to negate the Accused’s submission that this category of documents is “not sufficiently reliable to be admitted in general.”)

III. SUBMISSIONS

(i) *The Trial Chamber Should Take Into Account [REDACTED] to Assess the Nature of the Prosecution's [REDACTED]*

8. Items 109 and 110 are highly relevant to the Defence's pending motion to exclude from evidence all intercepts obtained pursuant to a judicial authorisation obtained on the basis of material misstatements. These two items were in the Prosecution's possession at the time it made the Surveillance Request to monitor Mr. Mangenda's telephone. They demonstrate that the Prosecution knew that one of its primary grounds for suspecting Mr. Mangenda's involvement in a scheme to pay witnesses was incorrect. This information was not shared with the Single Judge, nor were any steps taken to further investigate the information.
9. Item 109 is a purported recording of a conversation on 20 May 2013 between Jean-Pierre Bemba and Fidèle Babala in which the latter is recorded as saying, referring to Jean-Jacques Mangenda, [REDACTED].¹⁶
10. Item 110 is the recording of a conversation of the same date between Jean-Pierre Bemba and Fidèle Babala in which the former says, in relation to money allegedly sent by the latter to Mr. Mangenda:

[REDACTED].¹⁷

11. The Prosecution interprets these intercepts as follows in the Motion:

[REDACTED].¹⁸

...
[REDACTED].¹⁹

12. The Prosecution had this information in its possession as of 19 July 2013. This is known because the Prosecution refers to these recordings in its Surveillance Request:

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

Since 3 June 2013, the Prosecution has received from the Registry, on a rolling basis, complete logs and partial non-privileged recordings of telephone calls of the Accused. The logs and recordings strongly support the previously collected evidence of the scheme to bribe witnesses in exchange for false testimony and false documents.²⁰

13. One of the principal grounds put before the Single Judge for alleging that Mr. Mangenda was part of such an alleged scheme is the following:

MANGENDA has received a total of USD \$21,595.77 from BABALA and [REDACTED] via Western Union. Both KILOLO and MANGENDA have received large Western Union payments on dates that coincide with the dates of testimony of several witnesses in The Hague. The payments coincide with the end of the witnesses' testimonies. [REDACTED] (CAR-D04-PPPP-0057), whose relative received \$655 from BABALA on 16 October 2012, started testified from 17-19 October 2012. MANGENDA received \$1,866 from [REDACTED] on 20 October 2012. [REDACTED] (CAR-D04-PPPP-0049) testified from 19-23 November 2012. MANGENDA received \$1,866 from BABALA on 22 November 2012. [REDACTED] (CAR-D04-PPPP-0065) testified from 14-18 September 2012. MANGENDA received \$1,866 from [REDACTED] on 17 September 2012. **The times and dates of the transfers of exact sums of money suggest that KILOLO and MANGENDA may be paying witnesses while they are at the seat of the Court.**²¹

14. The Prosecution acknowledges in a recent filing that this allegation was incorrect, but asserts "[REDACTED]".²² It argues that, at the time, the Surveillance Request was "[REDACTED]"²³ and that it "[REDACTED]"²⁴ to look at the record of deposits by Mr. Mangenda to the UNDU before making this allegation.
15. Items 109 and 110 of the Prosecution Motion show the contrary. These recordings, which had been reviewed by the Prosecution at the time of the Surveillance Request, demonstrate that the Prosecution knew at the time that Mr. Mangenda was depositing money allegedly sent to him by Mr. Babala via Western Union directly into Mr. Bemba's account at the UNDU. The Prosecution failed to reveal this information to the Single Judge. The Prosecution also failed, despite the obvious need to do so, to make further inquiries to determine whether payments into Mr. Bemba's UNDU

²⁰ Surveillance Request, para.2.

²¹ *Id.* para.21 (emphasis added).

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

account correspond (as they do in reality) with payments allegedly received from Mr. Babala.

16. These two items, as well as the Prosecution interpretation thereof, are relevant to the evaluation of the Defence's pending Motion to Declare Inadmissible Telephone Intercepts of Mr Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements by the Prosecution.²⁵ The Trial Chamber is respectfully requested to consider these two items, as well as the Prosecution's response thereto, in adjudicating that motion.

(ii) *The Minimum Indicia of Reliability Have Not Been Established*

17. The Prosecution has supplied no official translations of any of the recorded conversations. The transcriptions of those conversations have been prepared by the Prosecution itself. Unlike official translations provided by the Registry, no certification has been provided that the translations, or even the transcriptions for that matter, are accurate.
18. Party-prepared translations unaccompanied by an interpreter's certification are not suitable for admission directly from the bar table. The consistent practice at the ICTY is to deny admission of informal translations as exhibits, at least unless and until an officially-certified Registry translation is provided.²⁶ The Prosecution has provided no information as to how its in-house translations and transcripts were generated. The Defence has already noted a number of blatant transcription and translation errors. In the absence of conferring responsibility for translation on the Registry, it is difficult to see how such errors are to be addressed.

²⁵ *Bemba et al.*, Corrigendum to Motion to Declare Inadmissible Telephone Intercepts of Mr Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements by the Prosecution, ICC-01/05-01/13-1136-Conf-Corr, 13 August 2015.

²⁶ *Tolimir*, IT-05-88/2-T, Decision on Third, Fourth and Fifth Motions by the Accused for Admission of Documents from the Bar Table, para. 15 ("[d]ue to the pending official English translations, however, the Chamber instructs the Registry to mark Rule 65 ter numbers 1D01112 and 1D01113 for identification and change their status to exhibits when the Chamber receives the translations"); *Perišić*, IT-04-81-T, Decision on Defence Submission Regarding Trial Chamber's Decision on Defence First and Second Bar Table Motions, 4 February 2011, para. 6 ("official translations of these documents have been uploaded in e-court and admits the documents into evidence"); *Stanisic & Zupljanin*, IT-08-91-T, Decision Granting in Part the Stanisic Defence Bar Table Motion, 14 September 2011, para. 14 ("[a]s a complete English translation has not been provided for Rule 65 ter number 659D1, the Trial Chamber will mark the document for identification, pending the provision of a full translation").

19. The Prosecution has offered no evidence explaining the methodology by which identities in the recorded conversations have been attributed. The fact that these attributions may have been made by the Registry (assuming this to be the case) does not obviate the need to establish the accuracy of such information. The Registry, like any human institution, can make mistakes of attribution. While convenience is a relevant factor in determining the need for such information, avenues are available by which the Prosecution could present such evidence without significant inconvenience – including producing statements from those involved in the process to explain the methodology by which identities were so attributed.

(iii) The Relevance of the Lone Conversation Involving Mr. Mangenda Has Not Been Established on the Grounds Asserted By the Prosecution

20. The conversation between Mr. Mangenda and Mr. Bemba reveals no impropriety, let alone any criminal objective.²⁷ The conversation, if anything, is exculpatory. Further, the conversation occurs a full ten months before the first impropriety alleged against Mr. Mangenda.
21. In the absence of any demonstrated relevance to the charges, the intercept should be denied admission.

IV. CONCLUSION AND REMEDY

22. The Motion should be rejected in its entirety. The Prosecution has failed to discharge its threshold burden of proof in respect of reliability and relevance. Items 109 and 110, along with the Prosecution's interpretation thereof, constitute information that can and should be taken into account in assessing the nature of the Prosecution's misstatements in its Surveillance Request in July 2013.

²⁷ [REDACTED].



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Dated this 7 October 2015,
At The Hague, The Netherlands