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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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 with Confidential Annexes A, B and C

**Public Redacted Version of Defence Response to Prosecution's First Request for
the Admission of Evidence from the Bar Table (ICC-01/05-01/13-1013-Conf)**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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Introduction

1. The ‘Prosecution’s First Request for the Admission of Evidence from the Bar Table’ (the Request)¹ concerns mere noise and words, signifying nothing.
2. The Prosecution has put together a collection of items, without proper analysis or justification as to:
 - i. Why the items have not been tendered through a witness;
 - ii. Whether the items are what they purport to be;
 - iii. How the content relates to the charges;
 - iv. Attribution of numbers, voices, or dates; and
 - v. The source or legality and reliability of the method of collection.
3. The Prosecution was not required to file the Request by this date; it was open to the Prosecution to submit it at any time during the proceedings.
4. Having volunteered to file the Request at this juncture, the Prosecution can expect and receive no leniency as concerns the strict criteria for the admission of evidence from the bar table.
5. As found by Trial Chamber II, if,

when tendering an item of evidence, the party is unable to demonstrate relevance and probative value, including its authenticity, it cannot be admitted. It does not suffice to argue that its content may be corroborated by other evidence or that the Chamber may subsequently determine its proper evidentiary weight”.²
6. There is therefore no basis for affording the Prosecution multiple bits of the cherry.
7. The Defence therefore requests the Trial Chamber to dismiss the Request with prejudice as concerns their ability to tender this evidence from the bar at a future time.

Submissions

- 1. The Prosecution has failed to justify why it has not tendered this evidence through its witnesses, or after the witnesses’ testimony.**

¹ ICC-01/05-01/13-1013-Conf.

² Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07, Decision on Prosecutor's bar table motions, 17 December 2010, para. 13.

8. The Request falls at the first hurdle due to the Prosecution's failure to explain or justify why it has not tendered the items through a witness.

9. Although it is possible, in theory, to admit evidence *via* a bar table motion, such a mechanism should be used sparingly, and not as the first port of call,³ particularly as it does not allow for a proper 'contextualisation' of the evidence in question.⁴

10. This preference for tendering evidence through witnesses is of heightened importance at the ICC, due to the principle of a presumption of orality, which governs the principles of admissibility set out in Article 69,⁵ and which distinguishes the ICC from its *ad hoc* Tribunal counterparts.

11. For this reason, ICC Trial Chambers have required the parties to justify why evidence is submitted *via* a bar table motion, rather than through a witness.⁶ Trial Chamber II has further held that:

the fact that evidence is being tendered without authentication by a witness may be an important factor in the Chamber's assessment of its admissibility.⁷

12. It is apparent from the 30 June 2015 disclosure that the Prosecution intends to call:

- i. Former Defence witnesses, who allegedly participated in some of the intercepted communications; and
- ii. A Prosecution expert witness, and investigator, who will presumably testify in relation to attribution issues, and the processes by which the items were collected.

13. The Prosecution has also included on its potential list of evidence an internal memorandum concerning specific details of attribution and analysis concerning the intercepts and Call Data Records (CDRs).⁸ The Prosecution did not disclose this information until 30 June 2015.

³ *Prosecutor v. Karadzic*, "Decision on Prosecution First Bar Table Motion", 13 April 2010, para. 9.

⁴ *Prosecutor v. Karadzic*, 'Decision on Prosecution's Motion for Admission of Evidence from the Bar Table, 1 May 2012, para. 4.

⁵ ICC-01/05-01/08-1386, para. 3.

⁶ ICC-01/09-01/11-847-Corr, para. 17.

⁷ ICC-01/04-01/07-2635, para. 12.

⁸ CAR-OTP-0090-0612, CAR-OTP-0090-0630, CAR-OTP-0090-0724, and CAR-OTP-0090-0831. The report is dated 1 June 2015.

14. There is therefore an appearance that the Prosecution intends to litigate or elicit testimony in relation to these communications on multiple occasions. This is exactly the type of multiplication of procedures which the parties were enjoined to avoid.⁹

15. By filing its Request now, the Prosecution has sought to compel the Defence to disclose its lines of cross-examination in advance of the linked witness's testimony. This subverts the adversarial process, as applied at the ICC.¹⁰ This is particularly prejudicial in light of the fact that the Prosecution telecommunications expert –Mr. Pluijmers – is not due to complete his report until after the response will have been filed.¹¹ The Prosecution has also requested delayed disclosure as concerns the statements of P-261.

16. As a result of this delayed disclosure, the Defence is not in a position to ascertain the full contours of the Prosecution case, and whether its response to certain items might raise issues of self-incrimination.

17. Moreover, since the evidence will be discussed during the testimony of these witnesses in any case, its submission through the bar table fails to expedite the proceedings or promote judicial economy, and deprives the Defence of important contextualisation.

18. The Request also requires the Trial Chamber to determine a range of issues, which have yet to be litigated at trial, and which are not ripe for consideration.

19. For this reason, Trial Chamber I cautioned that the “Trial Chamber will not ordinarily engage in questions involving a detailed examination and resolution of facts or evidence before the commencement of the trial itself.”¹²

2. The Prosecution has failed to address whether the admissibility criteria are fulfilled in connection with each item of evidence

20. The Prosecution has also conceded that it has failed to comply with the Appeals Chamber's directive that relevance or admissibility must be determined on “an item-by-item” basis.¹³ There is no basis for departing from this requirement, and admitting

⁹ ICC-01/05-01/13-T-8-ENG, p. 5, lines 4-6.

¹⁰ ICC-01/04-01/07-1665, para. 97.

¹¹ One of the Prosecution witnesses – [Redacted]

¹² ICC-01/04-01/06-1084, para. 44.

¹³ Request para 9, citing ICC-01/05-01/08-1386, para. 53.

categories of evidence in their entirety.¹⁴ Article 69 of the Statute applies with full force to Article 70 cases, and as such, neither the burden of proof nor the principle of orality are diluted for this case.

21. In line with the Appeals Chamber's judgment of 3 May 2011,¹⁵ the Prosecution must demonstrate that the criteria for admissibility are met for each and every item of tendered evidence. This requirement is not just a technical requirement, but goes to the heart of the ability of the respondent to assess whether the criteria are met. For this reason, it has been held at the ICTR that the "[t]he Chamber cannot permit a wholesale admission of documents based on generalised arguments".¹⁶

22. In this case, the prejudice ensuing from the Prosecution's failure to include an item-by-item assessment is further exacerbated by the Prosecution's refusal to provide any indication as to relevance as part of its metadata accompanying disclosure. The Prosecution also requested to file its Pre-Trial Brief, after the expiration of the deadline for the Defence response.¹⁷

23. Apart from the fact that it is inappropriate to require the Chamber to construct the Prosecution's case for it by foraging through the 345 documents comprising the Request, the Prosecution has itself conceded that the criteria for admissibility are not fulfilled on the basis of the tendered documents alone.

24. Throughout its Request, the Prosecution has sought to demonstrate the relevance or probative value of certain items by referring to evidence, which has yet to be tendered,¹⁸ or which is comprised of unsworn witness statements, from persons who have yet to testify,¹⁹ and who may never testify.²⁰

25. This is not permissible.

¹⁴ Request, para. 10.

¹⁵ ICC-01/05-01/08-1386, para. 2.

¹⁶ Prosecutor v. Ndindiliyimana et al, Trial Chamber "Decision on Bizimungu's Motion to Admit As Exhibits Certain Documents Marked for Identification", 14 February 2008, para. 5. See also para. 12.

¹⁷ ICC-01/05-01/13-1055-Conf.

¹⁸ For example, Request para 18(referring to CAR-OTP-0078-0290), para. 19 "combined with the testimony of witnesses in the Main Case", citing also ICC-01/05-01/08-T-345-Conf-Eng;

¹⁹ Request, paras. 34. 37 (referring to witness statements from D-55), para. 48 (referring to untendered statement from the Director for Global Investigations at Western Union Headquarters, Vienna).

²⁰ Request, para. 50, referring to alleged admissions from the Accused in their confirmation submissions.

26. As found by the Appeals Chamber,

the Trial Chamber may not rely, for the purposes of its final decision, on items that have come to the Chamber's knowledge but that have not been submitted and discussed at trial. As stated above, the items on the Revised List of Evidence had, at the time of the Impugned Decision, not yet been submitted. While the Prosecutor may (and probably will) submit many of these items in the course of the trial, he has discretion, as the case unfolds, and subject to the Trial Chamber's powers under article 69 (3) of the Statute, to rely on some and to abandon the rest.²¹

27. Similarly, if the Trial Chamber were to rely on documents, which are not yet admitted into evidence, for the purpose of assessing the admissibility of items in the current Request, there is a risk that the final judgment will be based on information, which has never been tendered at trial.

28. This Trial Chamber has also indicated that:

“it is not the role of the Chamber to conduct any *proprio motu* investigation into the materials the parties do not intend to rely on at trial. In this regard, the Chamber is mindful of Article 74(2) of the Statute, which directs the Chamber to base its judgment on the merits 'only on evidence submitted and discussed before it at trial'.”²²

29. It is therefore inappropriate for the Prosecution to request the Trial Chamber to conduct its own investigation into the admissibility of the tendered items, based on disclosed items which have not yet been submitted into evidence, and those which will never be submitted into evidence (i.e the Independent Counsel Reports).

30. According, even if it were possible to assess the tendered items as general categories rather than individual items, since each category lacks the requisite information to determine and approve admissibility, the Request as a whole should be dismissed

3. The Prosecution has failed to establish the relevance of each item of evidence, with a sufficient degree of specificity and clarity.

31. In a bar table motion,

²¹ ICC-01/05-01/08-1386, para. 45.

²² ICC-01/05-01/13-959, para. 28.

Unless immediately apparent from the exhibit itself, it is the responsibility of the party tendering it to explain: (1) the relevance of a specific factual proposition to a material fact of the case; (2) how the item of evidence tendered makes this factual proposition more probable or less probable. If submissions on these points are not sufficiently clear or precise, or if the Chamber cannot ascertain the relevance of an item of evidence with reasonable precision, it may decide to reject it on those grounds.²³

32. Rather than complying with this obligation, the Prosecution has sought to “incorporate by reference” the Reports of the Independent Counsel and the findings of the Single Judge, which were directed towards the disclosure process.²⁴

33. This does not satisfy the Prosecution’s obligation to establish relevance for admissibility purposes.

34. The Prosecution has not sought to admit the Reports of the Independent Counsel into evidence, nor has the Prosecution listed him as a witness. The Prosecution has also adduced no legal authority which supports its right to rely on non-testimonial evidence or opinion.

35. Both the Reports of the Independent Counsel and the related decisions of the Single Judge were also directed towards the disclosure process, during the preliminary phase of the proceedings. The notion of relevance has changed in light of the Pre-Trial Chamber’s decision on the confirmation of the charges. This is reflected by the Prosecution’s own concession that several items, which were included in the Independent Counsel Reports, are not relevant to the current charges.²⁵

36. Moreover, notwithstanding the Single Judge’s independent power to assess relevance, the Single Judge’s decision was predicated on the Independent Counsel’s translation of summaries of the communications, and interpretation of codes.

37. Since the Independent Counsel is not a professional translator, these summaries did not form a reliable basis to determine relevance,²⁶ as reflected by the Prosecution’s own disagreement with the translation placed before the Single Judge in some instances.²⁷

²³ ICC-01/04-01/07-2635, para. 16.

²⁴ Request, para. 15.

²⁵ Request, footnote 13.

²⁶ As an example, the Prosecution translation of CAR-OTP-0079-1762 reflects significant discrepancies with the translation provided by the Independent Counsel: i.e. g. *corruptu* [line 24] versus *influence*; *il a menti* [line 250] versus *qu’il a dit est faux*; *l’argent* [line 261] versus *les sous*; *sa part* [line 441] versus *l’argent*; *Le Livre* [line 514] v. *l’argent*; In the translation of CAR-OTP-0082-1065, *un mouton* (line 234) versus *chien*;

38. The Independent Counsel's interpretation of codes was also based on a list provided by the Prosecution.²⁸

39. This particularly problematic as the relevance of several documents turns on the precise meaning of codes or colloquial phrases, for which the meaning is not readily apparent. This is itself, grounds for refusing the admission these communications from the bar.

40. The Prosecution has itself averred that "[a]n understanding of these codes is necessary to comprehending [sic] the significance of the intercepts themselves, and other key evidence in the case".²⁹

41. If that is the case, then it is clear that the meaning of these codes and phrases must first be established before the Trial Chamber can make a determination concerning the admissibility of the related communications.³⁰

42. Not all of the codes or phrases originate from communications attributed to Mr. Bemba, and as such, the Defence has been unable to obtain information concerning their meaning from the speakers in question.

43. As the Prosecution is not calling the Independent Counsel to testify in relation to the interpretation of colloquial phrases and 'codes', it is impermissible to rely on the Independent Counsel's non-testimonial opinions concerning the meaning or relevance of certain phrases for the purposes of disposing of this Request.

44. The Prosecution has also, in a highly improper manner, attempted to influence the Trial Chamber's appreciation and analysis of such codes by inserting its own interpretation

L'homme de Francais (lines 184-191) versus Bravo; in CAR-OTP-0082-1326, Documents (line 781) v Bouquins.

²⁷ ICC-01/05-01/13-597-Conf-AnxB, footnote 180.

²⁸ ICC-01/05-63-Red.

²⁹ Request, para. 21.

³⁰ "Whether the content of the document is easily understandable or requires further explanation or interpretation" is a factor for determining whether to admit documents from the bar: ICC-01/04-01/07-1665, para. 100.

of codes into the text of transcripts. For example, ‘des livres’ has been capitalised, and they have inserted their own interpretation of the code in brackets afterwards (de l’argent).³¹

45. There also appears to be errors in the Prosecution’s transcription and translation of several key communications.³²

46. The ICTY, ICTR, and ICC have all recognised that in case of dispute, it is appropriate for Registry to prepare an official version.³³ The existence of such translation/transcription errors therefore militates against the admission of the tendered items, at least until the issues of dispute can be resolved.

47. In some cases, the Prosecution has even failed to include a translation into either English or French,³⁴ which is an automatic ground for exclusion.³⁵

48. Finally, some of the communications are redacted in a significant manner, which prevents the Defence from ascertaining the context of the communication.³⁶ For this reason, “the nature and extent of any permanent redactions in a given document are relevant factors in determining admissibility.”³⁷

49. Although the redactions were implemented to respect legal privilege,³⁸ it cannot be excluded that the privileged component might include exculpatory elements. The appropriate solution to a conflict between privilege and the defendant’s right to receive exculpatory or mitigating information would be to exclude the item in question, rather than violate the privilege or erode the rights of the Defence.³⁹

4. The Prosecution has failed to establish the probative value of each item

³¹ CAR-OTP-0080-0317. See also CAR-OTP-0082-1379.

³² See Annex A.

³³ *Prosecutor v. Ntakirutimana*, ‘Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record’, 24 June 2004, p. 2-3; *Prosecutor v. Mladic*. ‘Decision on Prosecution First Motion to Admit Evidence from the Bar Table: Mladic Notebooks’, IT-09-92-T, 25 September 2012; See also ICC-01/04-01/06-1974, paras. 34, 37 concerning the responsibility of the Registry to prepare a reliable record of contested evidential issues. See also ICC-01/04-01/07-T-266-Red-ENG, p. 51.

³⁴ See Annex A.

³⁵ ICC-01/04-01/06-676.

³⁶ The Defence has not been provided with the original, unredacted versions of these communications.

³⁷ *Prosecutor v. Stanisic and Simatovic*, Fifth Decision on Stanisic Defence Bar Table Motion of 17 February 2012, 24 May 2012, paras. 8, 12; *Prosecutor v. Stanisic and Simatovic*, Decision on Prosecution Motion for Admission Into Evidence of Rebuttal Material From the Bar Table: Miscellaneous Documents; 5 November 2012, para. 15.

³⁸ ICC-01/05-01/13-421-Conf-Anx, para. 12.

³⁹ ICC-01/04-01/06-1644, para. 25; ICC-01/04-01/06-1486, para. 3.

50. The items have been filed without the required description as to the full chain of custody, the author/provenance of each item, and the methodology employed to record, extract, or compile the intercepted information. These flaws are evident in all categories of information, and in each individual tendered item.

51. Even if some defendants might be in a position to ascertain or verify the authenticity or authorship of a particular item, Rule 136(2) specifies that “[i]n joint trials, each accused shall be accorded the same rights as if such accused were being tried separately”.

52. Each defendant in this case is entitled to rely on his privilege against self-incrimination.⁴⁰ It is therefore not open to the Defence to question other Defence teams in relation to the source, content, or reliability of particular communications, particularly if the defendant in question does not elect to testify. This militates against the admission of such communications against the defendants, who are not the authors of the relevant communications.⁴¹

53. The flaws in each individual item are set out in Annexes A, B, and C. A general summary for each category is set out below.

i) Intercepts

54. The intercepts have been presented in the following manner:

- i. The prosecution has included a transcript (transcribed and translated by the Prosecution), which is based on the Prosecution’s own attribution of dates and names. The transcript does not specify the time, which the communication allegedly occurred;
- ii. This is followed by an audio recording, which does not note the phones numbers involved in the recording, the date of the recording, or the person or entity which produced the recording; or
- iii. An excel sheet which purports to list the corresponding phone logs, but does not in fact do so due to the absence of phone numbers or times in the recordings.

⁴⁰ “There is no duty in law or morals for the accused to fill a vacuum created by the investigative procedural gap of the Prosecution.” Prosecutor v. Mucić et al., ‘Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample’, 19 January 1998, para. 49.

⁴¹ ICC-01/04-01/07-2635, para. 53.

55. The format of presentation (i.e extracts typed by the Prosecution or copied recordings rather than original intercepts), prevents the Defence from verifying that the conversation took place on the date provided by the Prosecution. It is also unfair and unduly onerous to require the Defence to sift through hundreds of documents (which are not in evidence) in order to verify whether there is a concrete foundation for the date provided by the Prosecution.

56. In the absence of specific times of day at which the conversations occur, it also cannot be presumed that the conversations correlate to certain CDRs, particularly as the duration for CDRs might be shorter or longer than intercepted conversations depending on the method used to calculate them.

57. The excel containing the CDRs also does not correspond directly to the transcriptions of the intercepts, but instead, to documents and filings which are not in evidence (such as ICC-01/05-01/13-6-Conf, and related annexes).

58. It is thus impossible to impossible to locate the metadata of interception in the "corresponding" phone logs without implicitly regarding the intermediate filings; the information that the Prosecution has sought to tender is insufficient to establish the connection on its own.

59. Apart from the fact that the Request includes no attribution evidence, the Defence is not in a position to identify the voice of all participants, particularly as they might be speaking in Lingala, or the audio quality might be extremely poor.

60. In terms of the providence of these materials, it can be assumed, perhaps, that these conversations were recorded by some unit attached to the detention unit, or by domestic authorities, but, [i]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence".⁴²

61. At a bare minimum, it was necessary for the Request itself to include concrete information concerning the entity which recorded the communications, and the process by which numbers and calls were identified and recorded.⁴³

⁴² ICC-02/04-179, para. 36.

⁴³ ICC-01/04-01/07-1665, para. 100.

62. It also cannot be presumed that appropriate procedures were employed and that these procedures were reliable; all systems have potential flaws. The question as to whether these recordings might have been flawed in any way cannot be assessed without any information concerning the recording processes.

63. It is for this reason that the ICTY has held that intercepts “bear no *prima facie* indicia of authenticity or reliability, and as such these requirements [authenticity and reliability] must generally be fulfilled by hearing from the relevant intercept operators or the participants in the intercepted conversation”.⁴⁴

ii) *Sms messages*

64. The SMS messages have been presented as

- i. Text on a blank paper, which is not attributed to anyone or any number; or
- ii. Tables converted into pdf format (which renders it impossible to ascertain the origin) with text and unattributed numbers.

65. The text submitted by the Prosecution is in fact just that –text emanating from the Prosecution, which has no evidential value in and of itself, and which has not been linked to specific information with evidential value.

66. The table versions have not been translated from Dutch to English.⁴⁵ The tables also do not explain whether Party A or Party B is the sending or receiving phone. It is not possible for the Defence to ascertain a trend, as in some instances, the content of the message appears to emanate from the person, who is actually alleged to have received not sent the message.⁴⁶

67. SMS messages are stored on telephones in a coded form, and must first be decoded before they can be extracted.

⁴⁴ Prosecutor v. Tolimir, ‘Decision on Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table’, 20 January 2012, para. 14. See also Prosecutor v. Karadžić Decision on the Prosecution’s First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component 31 March 2010 at para 9; Prosecutor v. Stanisić and Zupljanin, Decision Denying the Stanisić Motion for Exclusion of Recorded Intercepts, 16 December 2009 at para. 16, *Prosecutor v. Ayyash et al.*, ‘Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements, and on the Legality of the Transfer of Call Data Records to UNHCR and STL’s Prosecution’, 6 May 2015, p. 36.

⁴⁵ Annex A.

⁴⁶ [Redacted]

68. There is, however, nothing in evidence at present to explain how the ‘text’ - described by the Prosecution as SMS messages - was extracted and derived from specific telephones.

69. It would also be necessary to know the protocol used by the specific telephone network for the transmission of SMS messages, whether the message went through a coding/decoding process during its transmission, and whether that might have impacted on the text or visual appearance of the received message.

70. The Prosecution has also not tendered into evidence the original format in which they were received by the Prosecution i.e. as a database or image files.

71. The Prosecution has also asserted rather than established the authorship of the SMS messages, notwithstanding the fact that verification of authorship is a component of admissibility.

72. In this regard, Trial Chambers I and II have required the party tendering correspondence to establish that the signature of the alleged author of the letter is authentic and that the author in fact drafted its contents.⁴⁷ By analogy, SMS messages would also require proof that the particular person wrote and sent the message.

73. The Prosecution has nonetheless failed to establish that the imputed authors had exclusive control over the phone linked to them or that they were in control of the phone at the time that the message was sent. Nor has the Prosecution demonstrated that the message was actually sent (as opposed to having been saved as a draft), and then received by the alleged receiver. The latter aspect also requires the Prosecution to establish that the alleged recipient was in possession of the phone at the time that the SMS was delivered, and that it was not read or deleted by someone else with access to the phone.

74. None of these aspects can be assumed, as reflected by the fact that at least one of the messages appears to have been signed by someone other than the person, to whom the Prosecution has attributed the phone number.⁴⁸

⁴⁷ ICC-01/04-01/07-T-244, pp.17- 20; ICC-01/04-01/06-1981-Anx, p.2.

⁴⁸ CAR-OTP-0080-1348.

iii) Call Data Records (CDRs)

75. Although the Prosecution has asserted that the "[t]he proposed CDRs reflect communications among the Accused, and between the Accused and witnesses involved in the confirmation incidents in the case,"⁴⁹ it has failed to tender reliable evidence, if any at all, to prove the alleged attribution of phone number.⁵⁰

76. The excel tables containing the call data records are not signed or stamped, and there is no indication as to who produced them, and on the basis of what they were produced. These are grounds for exclusion.⁵¹

77. The absence of information concerning methodology is particularly problematic in the case of CDRs as the length might vary significantly, for example, depending on whether the company in question times the call from the first ring, or from connection. This in turn, could obscure the question as to whether a connection was made, whether the call went to voice-mail, or whether it was a missed call.

78. The manner in which CDRs are stored, extracted and displayed might vary significantly amongst Telecommunication Service Providers (TSPs). Sufficient information on the protocols of each TSP must be provided in order to facilitate a fair interpretation on data from various source.

79. The source identities are provided in extremely vague terms (for example, DRC rather than a specific TSP).

80. The information provided by the Prosecution is also riddled with inaccuracies and ambiguities.⁵² It is impossible to resolve these errors, within the confines of bar table litigation.

iv) Financial records

⁴⁹ Request, para 31.

⁵⁰ See Annexes B and C.

⁵¹ ICC-01/04-01/07-2635, para. 24.

⁵² [Redacted]

81. The Western Union records have been provided as an unstamped, undated excel spreadsheet. It is unclear as to who produced this spread-sheet. The Prosecution has also not included copies of the transactions, upon which it can only be assumed, that the spreadsheet was based.

82. Although the Prosecution has asserted that [Redacted] “verifies the authenticity of the financial records provided to the Prosecution”,⁵³ he has not yet testified, and his statement is not otherwise in evidence.

83. In terms of the Express Union record, it would appear that they were originally derived from a spreadsheet, which has been printed, and then stamped, but not dated. The original spreadsheet has not been included in the Request. Although the Prosecution has averred that the “proposed items are also accompanied with a letter, signed by the [REDACTED] of Express Union”,⁵⁴ this letter has not in fact been included as part of the Request, and is not otherwise in evidence.

84. No explanation has been provided as to the meaning of the different headings, or why the format and information input varies for different records.⁵⁵

85. As result of the printed format of the records, certain information, which would otherwise be available in the spreadsheet, cannot be viewed. Crucially, this includes the full phone numbers, which have been linked to certain persons.

86. Some of the electronic information appears to have become scrambled at some point. Although it is obvious that this has occurred in some instances,⁵⁶ since this mistake was not identified and corrected, it cannot be excluded that other transactions are affected by this error. An unidentified person has also written on the records (CAR-OTP-0073-0050, CAR-OTP-0073-0058, CAR-OTP-0073-0039), although it is unclear what the notations signify, whether this occurred before or after the documents were stamped, and on what basis they were inserted (i.e. whether there was an error in the electronic version, which in turn is relevant to the reliability of the compilation).

⁵³ ICC-01/05-01/13-1013-Red, para. 48.

⁵⁴ Request, para. 49.

⁵⁵ For example, the headings for CAR-OTP-0073-0036 differ from others.

⁵⁶ CAR-OTP-0073-0044, CAR-OTP-073-0051, CAR-OTP-0073-0052.

87. In this connection, the Request includes no information concerning the means by which the Western Union and Express Union accounts were compiled, and the means used to verify whether the listed amounts were in fact sent or received.

88. Moreover, although the Prosecution submits in its Request that “such enterprises compile and maintain complete records in the regular course of business, and in accordance with domestic laws”,⁵⁷ it has not confirmed that these records were compiled and maintained in the regular course of business. There is also no information in the Request which would enable the Defence to verify independently whether these spreadsheets were created during the ordinary course of business or pursuant to a specific request from the ICC Prosecution.

89. The Request has failed to establish the identity of the persons who were the alleged senders and recipients of the transfers in question or that certain accounts can be attributed to specific persons.

90. Finally, in many cases, the phone numbers do not correlate to the phone numbers attributed by the Prosecution to the person in question.⁵⁸

5. Issues of prejudice and legality

91. Article 69 (4) and Article 69(7) both provide a means by which evidence might be excluded due to its prejudicial impact, or issues concerning the legality by which the evidence was obtained. The Request nonetheless provides insufficient information to enable the Defence to address these issues in a meaningful manner.

92. In particular, as concerns issues of legality, the Prosecution cannot rely on the decisions of the Single Judge in order to satisfy this point.

93. The Prosecution requested a significant component of the materials (i.e. financial records, and intercepted information which does not emanate from the detention unit, Mssrs. Bemba, Kilolo and Mangenda, or Belgium and The Netherlands) directly from States, without obtaining any ICC judicial authorisation.

⁵⁷ ICC-01/05-01/13-1013-Red, para. 47.

⁵⁸ See reference code 16.1, Annex B.

94. Moreover, although the Single Judge authorised the Prosecution to “seize the relevant authorities of Belgium and of the Netherlands, with a view to collecting logs and recordings of telephone calls placed or received by Mr Aime Kilolo and Mr Jean-Jacques Mangenda”,⁵⁹ the Single Judge did not issue a determination as to whether the grounds for lifting privilege were met in connection with specific materials.

95. To the contrary, the Single Judge only issued a very general finding that: “some of the communications between the Accused and his counsel [...], might indeed not qualify as being "made in the context of the professional relationship between a person and his or her legal counsel" within the meaning and for the purposes of Rule 73 of the Rules of Procedure and Evidence.”⁶⁰

96. Clearly, not all communications emanating from Me. Kilolo and Mr. Mangenda were relevant to the charges or fell within the crime/fraud exception. Me. Kilolo and Mr. Mangenda were in regular contact with other members of the Defence, witnesses who are not the subject of these charges, and court officials.

97. In the absence of any specific direction from the Single Judge, it therefore fell within the discretion of the Prosecution to formulate the precise terms of reference for the related requests for assistance. The Single Judge’s ruling therefore did not exempt the Prosecution from its duty to ensure that the terms of reference were consistent with the terms of the Statute (in particular, Articles 21(3), 54(1), and 67(1)), and did not inadvertently capture irrelevant or privileged information.

98. These requests, in turn, should have been implemented in accordance with domestic law procedures.⁶¹

99. Nonetheless, apart from references to pre-confirmation filings, the Prosecution has not – at this point of the proceedings – placed into evidence any information concerning the domestic processes and decisions, whereby this evidence was obtained.

⁵⁹ ICC-01/05-52-Red2

⁶⁰ ICC-01/05-52-Red2, para. 3.

⁶¹ Article 88 and 93(1) of the Statute.

100. For example, at paragraph 36 of the Request, the Prosecution refers to requests for assistance, which were transmitted to Cameroon, France, and the Democratic Republic of the Congo. These requests and any related decisions implementing them have not yet been tendered into evidence.

101. There is also a lacuna as concerns the disclosure and translation of cooperation requests and domestic decisions,⁶² which is in the process of being addressed with the Prosecution, and Registry.⁶³

102. It is neither efficient nor fair to require the Defence to advance arguments concerning legality on a piecemeal basis, or without the benefit of all relevant information.

103. It would also be prejudicial to expect the Defence to raise issues of privilege within the contest of its response to this Request.

104. The Trial Chamber has determined that “communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege”,⁶⁴ and further, that “whether a given communication satisfies the crime/fraud privilege exception must be evaluated in the context of the charges as a whole”.⁶⁵

105. The notion of privilege is therefore tied inextricably to the charges themselves, the evidence underpinning the charges, and the potential lines of Defence that the defendants might wish to employ in response to these charges.

106. Hence, the question as to what is or is not privileged might evolve or mutate, depending on strength or credibility of evidence on certain points. For example, the question as to whether a specific communication might be relevant to the charges (and thus not privileged) might also depend on the meaning of certain ‘codes’ or ‘colloquial phrases’, which have yet to be established beyond mere assertion.

107. Given the defendant’s right of silence and the structure of an adversarial trial, the Defence should not be compelled to put forward its potential Defence to specific

⁶² [Redacted]

⁶³ [Redacted]

⁶⁴ ICC-01/05-01/13-947, para. 47.

⁶⁵ ICC-01/05-01/13-947, para. 18.

communications, or its interpretation of any disputed conversations until after the close of the Prosecution case.

108. Article 67(1)(g) of the Statute dictates that adverse consequences cannot be drawn from the defendant's exercise of his right to silence. It therefore follows that the Defence cannot be considered to have waived Mr. Bemba's right to assert privilege over specific communications, simply because the Defence considers that it is both unnecessary and disproportionately prejudicial to do so within the context of this particular filing.

Relief Sought

109. For the reasons set above, the Defence requests the Trial Chamber to dismiss the Request with prejudice.



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Dated this 9th October 2015
The Hague, The Netherlands