



Original: English

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

Date: 09/10/2015

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 with Confidential Annex A

**Public Redacted Version of Defence Response to the Prosecution's Second Bar
Table Motion**

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 Defence for Mr. Jean-Pierre Bemba respectfully requests the Trial Chamber to reject the ‘Prosecution’s Second Request for the Admission of Evidence from the Bar Table’ (the Second BTM),¹ on the grounds that:

- i. The Prosecution has provided insufficient information concerning the attribution of numbers, or the methodology employed to record the intercepts;
- ii. The intercepted communications are not relevant to the charges;
- iii. The recordings are insufficiently reliable; and
- iv. The intercepted communications should be excluded pursuant to Article 69(7) of the Statute.

2. An item-by-item analysis is set out in Annex A. This filing and Annex A have been filed on a confidential basis in order to accord with the confidentiality level of the Second BTM.

Submissions

The documents do not meet the specific criteria for admission from the bar

3. The Defence incorporates by reference the arguments set out in the Defence response to the first bar table motion concerning, *inter alia*, the need to tender intercepts through a witness, and the impermissibility of referring to documents or items, which are not yet in evidence.²

4. In terms of the particular characteristics of this application, the Prosecution has averred that admission from the bar table would “obviate the need to call Registry staff to attest to the authenticity of the underlying recordings and logs”.

5. Admission from the bar table cannot not, however, ‘obviate’ the need to call persons, who were never listed as Prosecution witnesses, nor can it serve as a sop to the Prosecution’s failure to investigate and substantiate its case, with the degree of detail and specificity required by the Statute.

6. Article 67(1)(i) of the Statute enshrines the duty of the Prosecution to prove all aspects of its case; key issues of fact and law cannot be assumed or taken for granted.

¹ ICC-01/05-01/13-1113-Conf.

² ICC-01/05-01/13-1074-Conf.

7. The Prosecution was obliged to adduce sufficient evidence to establish the authenticity of the detention unit communications and logs, and the reliability of their contents.

8. It has, however, failed to do so.

9. The Prosecution has tendered audio recordings of unknown provenance, and un-established date or attribution. There is no information in either the Second BTM or the list of evidence as to who recorded the conversations, how they were recorded, and what safeguards or mechanisms were in place to ensure an accurate recording and the integrity of the audio and its metadata during the transmission.

10. The Prosecution has asserted that “the Registry – a Court organ – was responsible for having produced and provided the underlying material”.³ The Prosecution has not, however, provided any information as to:

- i. Who from the Registry recorded the calls;
- ii. Were they trained or had sufficient experience to do so;
- iii. Whether it was a telecommunication company or satellite, which channelled the calls, and the reliability the company in question;
- iv. What protocols were adopted for the recordings, including, for example, when did the recordings start and finish, and what types of call are not registered; and
- v. How the recordings were stored pending transmission to the Prosecution.

11. In terms of provenance, the ‘Registry’ is an amorphous concept which encompasses a range of different sections, with different mandates and skills. Specific questions of reliability cannot be established in the absence of concrete information concerning the identity of the actual source, as opposed to the organisation or general entity from which it emanated.⁴

12. Although the Prosecution has placed a date on the cover page of its translation/transcription of individual recordings, the Prosecution has not provided any explanation or justification as concerns the basis for this date attribution.⁵ The possibility that it is not reliable is evidenced by the fact that the Prosecution has attributed different

³ Second BTM, para. 3.

⁴ Prosecutor v. Hadzihasanovic, Trial Chamber Judgment, 15 March 2006, para. 272; Prosecutor v. Boskoski, Trial, Transcript page: T.7793-7795, 14 November 2007:T. 7795. See also Prosecutor v. Milutinovic et al, Trial Chamber “Decision on Lukic Defence Motions for Admission of Documents from Bar Table”, 11 June 2008, paras. 35, 37-38.

⁵ Prosecutor v. Boskoski, “Decision on Boskoski Defence Motion to Amend Its Rule 65ter List and Admit Exhibits from the Bar Table”, 20 March 2008, para. 9:

dates for several of the conversations in Ringtail.⁶ The Prosecution has also corrected dates in transcripts without providing any information or evidential basis for its correction.⁷

13. The ‘call logs’ also lack sufficient indicia as to authenticity or reliability. It is unclear whether the excel tables concerning individual calls were created by the Prosecution, or the Registry, or on what basis they were created. Excel is an easily modifiable format, and they have not been stamped. The metadata in ringtail is linked to a ‘source media’, which has not been disclosed to the Defence.⁸

14. The Prosecution has also sought to tender the ‘list of detention unit contacts’, without tendering information as to:

- i. The specific date on which persons were added to the list; and
- ii. The method used by the Registry to verify whether a particular person is linked to a number, when placed on the list or when conducting a call.

15. It is also questionable that for the purposes of this particular motion, the Prosecution has advanced the position that the Registry’s list of contacts is accurate and reliable, given that it has questioned the accuracy of this list as concerns the attribution of a particular number to Me. Kilolo.⁹

16. At the very least, this discrepancy in the position of the Prosecution underscores the impossibility of admitting this type of information from the bar.

The Prosecution has failed to establish that the intercepted communications are relevant to the charges

17. The confirmed charges pertain to the time period from the end of 2011 until 14 November 2013, and concern specific incidents pertaining to the five defendants, and fourteen identified Defence witnesses in the Main Case.

18. Notwithstanding these clear parameters, the Prosecution has attempted to admit – via the Second BTM – a significant swathe of information, which is either not relevant to the charges, or which falls outside the time period of the charges.

19. The content of many of the communications involve purely political events, which have no links to the facts and circumstances of the charges.

20. Although the Prosecution has averred that the conversations explain the meaning of certain codes, this is not the case. Particular codes might indeed be used, but the context of the conversations shed no light on their meaning. Indeed, it is impossible to extrapolate

⁶ Annex A.

⁷ Annex A.

⁸ CAR-OTP-0077-0503 cites to Source Media Information CAR-OTP-0077-0202 which doesn't exist in E-Court.

⁹ ICC-01/05-01/13-1114-Red.

meaning from mere usage, in circumstances in which the Prosecution itself concedes that certain ‘codes’ appear not to have a fixed meaning.¹⁰

21. It is also impossible to ascertain whether the participants in the communications had a common understanding as to the meaning of certain codes,¹¹ or whether indeed the codes had a particular meaning at all, as opposed to constituting a means to deflect attention or obscure comprehension.¹²

22. Apart from the fact that the content of the conversations is generally, irrelevant, many of the codes are also irrelevant to the charges [REDACTED]. Given the grave privacy violations involved in the collection of these communications (which will be elaborated below), it is clear that any minor probative value would be far outweighed by the prejudicial impact of their admission on their integrity of the proceedings and the rights of the accused.

23. The communications date back to 12 January 2011 (which precedes the commencement of the charges by almost a year, and the Defence case by almost a year and a half), and involve persons [REDACTED], who are neither defendants nor witnesses, and who are not referred to in the Decision Confirming the Charges.¹³

24. The admission of such communications would therefore be contrary to Article 74(2) of the Statute, which precludes the Trial Chamber from basing the judgment on facts and circumstances falling outside of the confirmed charges.

25. In line with this provision, the temporal scope of the charges is a key limiting factor as concerns the admission of evidence. For this reason, Trial Chamber III emphasised that:¹⁴

as part of the relevance test, it will analyse whether the information contained in each item of evidence falls within the material, geographical and temporal scope of the charges. This assessment is necessary since, as previously stressed, each item must be logically connected to one or more facts at issue (the charges) and possess the capacity to make any of those facts more or less probable than they would be without it.

26. The Prosecution’s attempt to conjure relevance from thin air by claiming that the conversations are evidence of a ‘pattern of conduct’ is also flawed.

27. Unlike the ICTY/ICTR, there is no equivalent rule at the ICC permitting the parties to introduce evidence of ‘consistent pattern’. This rule was also incorporated at these Tribunals to address the specific situation of widespread or large scale crimes.¹⁵

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² In *Allan v United Kingdom* (48539/99, para 47), the European Court of Human Rights (ECHR) noted that an apprehension of being surveyed could affect the content and reliability of communications which in turn, militates in favour of more rigorous testing of the admissibility of the evidence.

¹³ ICC-01/05-01/13-749.

¹⁴ ICC-01/05-01/08-2299-Red, para 12. See also para 20 in which the Trial Chamber excluded documents due to the fact that they fell outside the temporal scope of the charges.

28. This case is not a war crime/crimes against humanity case, nor should it be permitted to evolve into one of similar scale. It is an Article 70 case, with defined parameters, which should not be blurred or enlarged through the incorporation of ‘similar pattern’ evidence.

29. Such a practice would engage the possibility that the Article 70 trial would devolve into a detailed consideration of the credibility of all Defence witnesses, or the conduct of the Defence over the entirety of the trial, which would contravene the Trial Chamber and Single Judge’s clear instruction that it should not do so.¹⁶

30. A pattern of conduct also cannot shed light on these charges in circumstances in which the alleged conduct is not directed towards any improper or unlawful conduct.

31. Communications which purportedly refer to money transfers or the identities of politicians, or even mere discussions concerning public issues arising from the trial, are not reflective of a pattern of criminal conduct, and do not possess the capacity to make any of the confirmed facts more or less true.

32. Mr. Bemba had an absolute entitlement to refer to public aspects of the trial with anyone and everyone. As an example, the first conversation is dated 12 January 2012. The trial itself had recently commenced, and this was the second date of hearings after winter recess.

33. [REDACTED]..¹⁷ [REDACTED].

34. [REDACTED]..¹⁸ At no point in time do the inquiries go beyond the type of polite ‘chit chat’ which any person might employ with a person, whose daily life is characterised by the fact that they are standing trial.

35. Similarly, even if the Prosecution were to establish that certain conversations concern financial transfers (which is not the case), neither Mr. Bemba nor Mr. Babala have been charged with discussing or facilitating money transfers. This case concerns allegations that they engaged in conduct which was contrary to the administration of justice, but none of the conversations are related to improper conduct.

36. Their admission would both unnecessarily broaden the scope of a case –which is already overly complicated and broad – and risk diverting the time and efforts of the parties into litigating peripheral issues, which do not advance this case.

The recordings are insufficiently reliable

¹⁵ *Kupreskic case*, Hearing 15 Feb 1999, cited in J. Jones, S. Powles, *International Criminal Practice*, Oxford University Press, p. 749.

¹⁶ [REDACTED].

¹⁷ <http://www.iccnw.org/?mod=newsdetail&news=4463>

¹⁸ [REDACTED].

37. Although the Prosecution has conceded that there is an error of ‘synchronisation’, it has failed to provide any explanation as to how this error arose, nor has it properly accounted for the impact on the reliability of the recordings.

38. Over 51 recordings are plagued by significant technical problems, which impact on the content of the recordings. In approximately 30 recordings, it appears that Mr. Bemba is conducting a conversation with himself, as the other participant’s voice was not recorded. It is impossible to attribute any meaning to Mr. Bemba’s alleged words without the benefit of the context in which he uttered them. A communication also does not exist in the absence of evidence that the words were actually communicated and understood by the other participant.

39. In approximately 21 recordings, the speakers’ voices are ‘synchronised’, which renders it impossible to ascertain the actual content of what each speaker was saying, and the proper sequence of their words. This is particularly problematic in relation to communications, which are alleged to evidence Mr. Bemba’s agreement to a specific proposition; the Prosecution’s interpretation of the sequencing could have the (misleading) effect of conveying the impression that Mr. Bemba has acquiesced to a certain proposition, whereas he could be reacting to an earlier/later comment by the other speaker.

40. For many communications, the speakers do not acknowledge that there is a problem of synchronisation or silence i.e. participant A does not request participant B to wait, or to repeat what they were saying. This suggests that the problem did not lie with the transmission of the conversation, but with the quality of the recording.

41. Synchronisation or the omission of sound from one end could occur if the recording was created by merging two separate recordings. If this was the case, then there would be significant room for error as concerns the actual contents of the conversation.

42. The Defence should not, in any case, be compelled to speculate in relation to such matters. The Prosecution had a clear duty to adduce all relevant information concerning the reliability and provenance of the recordings, and it has failed to fulfil it.

The Call Data logs and recordings should be excluded pursuant to Article 69(7) of the Statute

43. The mass collection of call logs, detention data and recordings, which are the subject of the Second BTM must be excluded pursuant to Article 69(7) because their collection violated Mr. Bemba’s defence rights and right to privacy, and their admission would be antithetical to and seriously damage the integrity of the proceedings.

44. Any interference with a detainee's right to privacy and family life must be lawful, necessary and proportionate.¹⁹ The information collected by the Prosecution directly from the detention unit nonetheless failed to require with these key requirements:

1. The legal basis for transmitting the information directly to the Prosecution on an *ex parte* basis was not foreseeable, clearly circumscribed, or clearly set out in documentation that was public or otherwise available to Mr. Bemba or his Defence;
2. The interception of all of these communications was not supported by evidence of a grounded suspicion of involvement in serious criminal activity;
3. The transmission of all call data logs, and a wide-range of communications over several years was not necessary to fulfil the objective of the Prosecution's request; and
4. The transmission of this information to the Prosecution was disproportionate in reference to the interests of the Prosecution's investigations, vis-à-vis the right to privacy and legal privilege of the persons affected.

45. Mr. Bemba was also denied the right to an effective remedy as concerns the measures which were taken against him.

46. When these violations are viewed cumulatively, it is clear that the admission of this information would seriously damage and be antithetical to the integrity of the proceedings.

The interception and collection of the information was not 'lawful'.

47. In a decision issued in the *Bemba* case, the ICC Presidency delineated the following criteria for determining whether detention monitoring can be considered to be 'lawful':²⁰

[...] a three-fold test of foreseeability is applied, whereby: the interference must have some basis in law; the law must be accessible; and the law must be formulated with sufficient precision to enable an individual to regulate his or her conduct. In addition, the law "must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, in order to give the individual adequate protection against arbitrary interference".

48. Notwithstanding these judicial guidance, rather than applying the specific Regulations of the Court or the Regulations of the Registry, which govern such matters (and which are *lex specialis* as concerns the monitoring of a detainee suspected of engaging in an offence against the administration of justice)²¹ the Single Judge decided to grant the

¹⁹ ICC-01/04-02/06-786-Red4, para. 44.

²⁰ ICC-01/05-01/08-310, para. 38, citing *Vlasov v Russia*, no. 78146/01, Judgment of 12 June 2008, paragraph 125; *Silver and others v The United Kingdom*, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment of 25 March 1983, paragraphs 84-88.

²¹ Regulation 101 of the Regulations of the Court; Regulation 175 of the Regulations of the Registry.

Prosecution's request for judicial assistance by resorting to his broadly framed, discretionary power under Article 57(3)(a) of the Statute.²² The orders were also issued *ex parte* the Defence.

49. Mr. Bemba had no notice that this was a legal possibility.

50. Regulation 89 of the Regulations of the Court stipulates that detention matters “**shall** be governed by the provisions of this chapter”. Mr. Bemba had a legitimate expectation that both these regulations, and the principles set out in the Presidency's decision would continue to guide the monitoring of his communications. This included the Presidency's finding that a detainee should be afforded a right to be heard prior to the making of a decision affecting detention rights.²³

51. The ‘quality’ of the Single Judge's legal decision thus failed to comport with the quality of lawfulness required for covert surveillance.

Transmission/interception was not supported by evidence of a grounded suspicion of involvement in criminal activity;

52. At paragraph 16 of the Second BTM, the Prosecution concedes the damning fact that no judicial entity ever reviewed these intercepts in order to verify whether they had any relevance to the Prosecution, or indeed, whether there was any basis for determining that Mr. Bemba's right to privacy should be displaced, and the contents should be transmitted to the Prosecution.

53. When the Prosecution requested access to these recordings, it based its evidential submissions on information from an ‘anonymous informant’,²⁴ and a separate Article 54(3)(e) source that Mr. Bemba allegedly engaged in three-way communications from the detention unit.²⁵

54. The Trial Chamber recently rejected a Defence request for disclosure and judicial assistance concerning the anonymous informant and P-7,²⁶ and the Prosecution has refused to disclose the identity of the Article 54(3)(e) source to the Defence.²⁷

55. As a result, the Defence has not been accorded with an effective opportunity to contest the foundation and credibility of the information employed as the basis for infringing Mr. Bemba's rights.

56. The Prosecution's claim that Mr. Bemba was involved in any wrongful activity was in any case, purely speculative.

²² ICC-01/05-46, para. 9.

²³ ICC-RoR221-02/09-6-Corr, para. 14.

²⁴ ICC-01/05-44-Red, para. 9.

²⁵ ICC-01/05-44-Red, para. 23.

²⁶ ICC-01/05-01/13-1166-Conf.

²⁷ ICC-01/05-01/13-1098-Conf-Exp-AnxE.

57. The Prosecution adduced no evidence that Mr. Bemba had misused his telephone communications for the purpose of furthering the ‘bribery scheme’ or that he was in any other way involved in the ‘bribery scheme’.²⁸ The Single Judge also made no evidential findings that Mr. Bemba had misused his detention communications for the purposes of engaging in criminal conduct.²⁹

58. The gravamen of the Single Judge’s ruling was that access to all non-privileged recordings would assist the Prosecution to “shed light” on relevant facts, and, provided the communications were not directed to Counsel, that the Prosecution had a ‘legitimate’ interest in accessing all of them.³⁰ The Single Judge appears to have adopted a ‘presumption’ of access, which is only displaced by privilege.

59. Neither the Court’s legal framework nor human rights law permit privacy protections to be lifted or waived in such a broad and generic manner.

60. The Regulations of the Court enshrine a presumption of confidentiality as concerns the detention record of the detainee.³¹ The express language of Regulation 175 of Regulations of the Registry also mandates a case-by-case assessment as to whether communications should be transcribed, and prohibits the transmission of transcribed conversations to the Prosecution (including for Article 70 investigation) unless there are “reasonable grounds to believe” that the conversation violated a law or order of the Court.

61. Even if these detention provisions were displaced, there is no legal basis for lowering the evidential threshold for determining whether to transmit a detainee’s communications to the Prosecution.

62. In this connection, Trial Chamber II ruled in the *Ngudjolo* case that the mere fact that a detainee’s conversation is of ‘interest’ to the Prosecution or might assist them to prove their case, does not constitute a sufficient basis for overriding the defendant’s privacy rights.³²

63. The case law of the *ad hoc* Tribunals has also established that before information gathered from the detention unit can be transmitted to the Prosecutor, there must be a specific evidential assessment as to whether there are grounds to do so.

64. In the *Celebici* case, the ICTY President held that the Chamber must first ascertain that the Prosecution is not engaging in a fishing expedition, but has established a sufficient

²⁸ ICC-01/05-44-Red, para. 22.

²⁹ ICC-01/05-46, para. 2.

³⁰ ICC-01/05-46, para. 4.

³¹ Regulation 92 of the Regulations of the Court.

³² ICC-01/04-01/07 2187 Conf Exp, para. 61, cited in ICC-01/04-01/07-3120-tENG-Red, para.7. The Appeals Chamber upheld the Trial Chamber’s determination on appeal, ICC-01/04-02/12-271-Corr, para 270.

forensic basis for access to detention communications.³³ Even if such a basis exists, the Chamber is still required to take into account the impact on the rights of the accused (including privacy rights), because “the Statute favours the highest consideration of these rights”.³⁴ Even if there was no explicit legal requirement to do so, the principle of “equality of arms” dictates that the Defence should be given notice and an opportunity to respond to any such requests.³⁵

65. In the *Seselj* case, the President emphasised that decisions that impact on a defendant’s detention rights should be grounded on credible evidence (and not mere assertions from the Prosecution). The President also reiterated the importance of complying with the principle of natural justice (which includes the right of the detainee to be heard).³⁶

66. This issue also arose at the Special Court for Sierra Leone, by virtue of a Prosecution request for access to detention logs and the records of Mr. Taylor for the purpose of assisting it to investigate contempt, and the possibility that privileged communications may have been misused for the purpose of contacting third persons.³⁷ The Registry reported that although there were indicia that the accused had misused the privileged telephone, there was no evidence that the accused had attempted to pervert the course of justice, interfere with witnesses, or interfere with the trial proceedings.³⁸ In the absence of any evidence from the Prosecution that the accused had interfered with the proceedings, the Chamber declined to grant the Prosecution access to these materials.

67. Given that these decisions presaged that an *inter partes* approach should be employed in relation to such requests, both a higher evidential threshold and more stringent procedural safeguards should have been applied in relation to covert, *ex parte* measures in this case.

68. This would be consonant with the ECHR’s direction that due to the dangers inherent in secret surveillance, States should limit its usage to situations of “strict necessity”, and employ effective and rigorous scrutiny over the duration, scope and necessity of such measures.³⁹

69. In terms of domestic practice, the Parliamentary Assembly of the Council of Europe has urged States to limit the collection and use of intercepted communications to situations

³³ Decision of the President on the prosecutor's motion for the production of notes exchanged between Zejnil Delalic and Zdravko Mucic, 11 November 1996, para. 40.

³⁴ Paras. 40-41.

³⁵ Para. 44.

³⁶ *Prosecutor v. Seselj*, ‘Decision on Appeal Against the Registrar’s Decision of 19 October 2006’, 23 November 2006.

³⁷ *Prosecutor v. Taylor*, Decision on Public with Annex A and B and Confidential Annex C Urgent Prosecution Request for an Order to Direct the Registry to Disclose Non-Privileged Information, 22 January 2010.

³⁸ Page 3.

³⁹ *Dragojevic v. Croatia*, 68955/11, paras. 83-84, 94:

in which the person concerned has consented, or “ following a court order granted on the basis of **reasonable suspicion** of the target being involved in criminal activity” (emphasis added).⁴⁰

70. Rule 55 of the European Prison Rules (which should guide any detention facility in The Netherlands) also provides that:⁴¹

An alleged criminal act committed in a prison shall be investigated in the same way as it would be in free society and shall be dealt with in accordance with national law.

71. According to this provision, the fact that the individual is in custody should not become a convenient bypass for the Prosecution to collect evidence that they would not have access to in free society.

72. Consequently, the evidential threshold for issuing a warrant should not be lessened, nor should the authorities be permitted to ‘piggyback’ off intrusive measures which are designed to protect the security of the detention facility, in order to avoid the strict standards which regulate surveillance for evidence-gathering purposes.

73. In line with these legal standards, the Single Judge’s vague benediction that the Prosecution was entitled to receive ‘all non-privileged communications’ over an indeterminate period, with unidentified persons, in relation to uncircumscribed topics, would not satisfy requirements that there must be a reasoned judicial determination - grounded in evidence - that access to private communications was necessary to investigate a serious crime, and that such access is strictly circumscribed to this purpose.

Proportionality

74. According to the ICC Appeals Chamber, when faced with a request from the Prosecution for access to detention unit recordings:⁴²

The Trial Chamber must strike a balance between, on the one hand, the rights of the accused under article 67 of the Statute, including the right to privacy and to conduct a defence and, on the other hand, the Prosecutor’s duties under article 54 (1) of the Statute, specifically the duty to establish the truth.

75. This balancing exercise never took place. There was never a judicial assessment as to whether the transmission of these particular communications would compromise Mr. Bemba’s right to privacy and his right to conduct his Defence.

⁴⁰ Parliamentary Assembly of the Council of Europe, Resolution 2045 (2015), paras 19, 19.1 and 19.2. See also Article 4 of Recommendation (2005)10 of the Committee of Ministers on “special investigative techniques”.

⁴¹ European Prison Rules, Criminal acts, para 55.

⁴² ICC-01/04-02/12-271-Corr, para. 263.

76. Neither the Single Judge nor any other entity reviewed the recordings before they were transmitted to the Prosecution. The Single Judge was completely in the dark as to the degree of sensitive information contained therein, and was unable to predict or erect safeguards in relation to the clear probability that the conversations could engage the Defence rights of Mr. Bemba (in particular, as concerns the conversations between Mr. Bemba and Mr. Mangenda).

77. As is apparent from the annex attached to this response, had the Single Judge done so, he would have concluded firstly, that the individual communications reveal no evidence of wrongdoing, and secondly, that the communications address intensely private issues concerning Mr. Bemba's political views, his family life (such as well-wishes given upon the death of Mr. Bemba's stepmother), and confidential *ex parte* matters concerning the internal strategy of the Defence (which will be elaborated below).

78. Given the absence of any 'Chinese walls' at the ICC concerning this case,⁴³ the transmission to the Prosecution of Mr. Bemba's personal views concerning the Prosecution and the ICC was itself, likely to prejudice his position before the Court.

79. If any such judicial review had been conducted, the ineluctable conclusion would have been that any marginal relevance to the Prosecution was far outweighed by the intrusion on the participants' privacy rights, and the violation of Defence confidentiality.

Specific issues of prejudice arising from the transmission of the call data logs and the communications with Mr. Mangenda

80. The Single Judge was a member of the Appeals Panel hearing the *Ngudjolo* appeal at the time that he granted the Prosecution's requests for judicial assistance.⁴⁴

81. The Single Judge was thus aware of the Appeals Chamber's directive that before transmitting Detention unit communications to the Prosecution, it was necessary to assess the impact on both privacy rights, and Defence rights (even if the detainee was conversing with persons who were not part of the Defence, or did not enjoy formal, privileged status).

82. The Single Judge nonetheless:

- i. Failed to identify or consider that privacy and privilege rights inhered in Mr. Bemba's call data logs; and
- ii. Failed to erect any safeguards to protect the confidentiality of the contents of Mr. Mangenda's communications.

⁴³ The Prosecution has filed Mr. Bemba's detention unit communications before the Appeals Chamber and the Plenary of Judges: ICC-01/05-01/08-3203-Red2, para. 257.

⁴⁴ ICC-01/04-02/12-11.

83. In terms of the first aspect, the Single Judge's decision references no consideration of the fact that the call data logs include private contacts with Mr. Bemba's family, and contacts with members of his Defence team who are fully protected by legal privilege. Even if this information was captured by metadata rather than content, it was still a protected form of communication, which should have been vetted prior to transmission to the Prosecution.⁴⁵

84. The scope of the information in the records also greatly exceeded any legitimate interest that the Prosecution might have had in accessing them. In this regard, Trial Chamber VII has ruled in this case that allegations of witness interference do not trigger a right to be apprised of all contacts between a party and its witnesses.⁴⁶ It follows that in the absence of a specific, evidentially grounded exigency, the Prosecution had no right to receive detailed information concerning the timing and frequency of contacts between Mr. Bemba and everyone who contacted him at the detention unit, for the duration of his detention.

85. As concerns the specific case of Mr. Bemba's communications with Mr. Mangenda, it appears that neither the Single Judge nor the Prosecution anticipated that his calls would be encompassed by the Single Judge's May 2013 ruling;⁴⁷ they were nonetheless included due to an administrative determination by the Registrar that such communication were not protected by privilege.⁴⁸

86. The communications were uploaded onto a trim link on 3 June 2013 (that is, whilst the Defence case was ongoing),⁴⁹ without any prior vetting as whether they included information concerning Defence *ex parte* matters, or internal Defence strategy.

87. Although the Single Judge subsequently affirmed the Registrar's determination on a *post facto* basis, his decision to do so falls offends the consistent train of domestic case law which prohibits *post facto* ratification of surveillance.⁵⁰

88. In terms of the content of Mr. Bemba's communications with Mr. Mangenda, the Defence has consistently contested the Single Judge's characterisation as Mr. Mangenda's communications as being non-privileged.⁵¹

⁴⁵ *Malone v. United Kingdom*, Application no. 8691/79, Judgment of 2 August 1984, para. 84; *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, paras. 85-86.

⁴⁶ ICC-01/05-01/13-1172, para. 20.

⁴⁷ Both the Single Judge and the Prosecution appear to have acted on the assumption that Mr. Mangenda's communications would be treated in the same manner as Me. Kilolo's: ICC-01/05-52-Red2.

⁴⁸ ICC-01/05-01/13-T-2-Red-ENG, p. 8 lines 15-24.

⁴⁹ ICC-01/05-01/08-3203-Red2, para. 159.

⁵⁰ See paras. 90-93 of *Dragoejvic v. Croatia* (ibid) regarding Croatian legal requirements of prior judicial authorization; In Canada, *R. v. Larson*, 35 W.C.B. (2nd) 404; *Hunter v Southam Inc.* [1984] 2 S.C.R. 145; *State (N.C.T. of Delhi) Vs. Navjot Sandhu & Afsan Guru* Indian Supreme Court, 4/08/2005, SAIR2005SC3820, 2005CriLJ3950, 122(2005)DLT194(SC), (2005)11SCC600; In Germany, para 100b(1) of StPO mandates prospective monitoring, based on prior judicial authorization (or in exceptional, and temporally limited circumstances, a warrant from the Prosecution).

⁵¹ ICC-01/05-01/13-836, paras. 17-37; ICC-RoR221-03/14-1.

89. Prior to the filing of the Second BTM, the Defence for Mr. Bemba in the Main Case also asserted privilege vis-a-vis the specific conversation between Mr. Mangenda and Mr. Bemba, which was included in the Second BTM. This privilege attracts the protection of Article 69(5),⁵² and excludes any reliance on its contents absent a waiver from Mr. Bemba.

90. Nonetheless, even if this Chamber declines to recognise privilege on the grounds of Mr. Mangenda's formal status, the substance of the communication still engages Defence confidentiality/internal work-product rights, under either Rule 81(1) or Rule 73(2).⁵³

91. It follows that the transmission of this information to the Prosecution, and its use as Prosecution evidence, not only compromised Mr. Bemba's right to privacy, but also his right to communicate with his Defence in confidence, and his right to adequate time and facilities to prepare his Defence. To the extent that *ex parte* transmission of this information to the Prosecution *via* the Article 70 case afforded the Prosecution with an unfair and privileged insight into Defence strategy and views in the Main Case (at a time when the trial had not yet closed), it also violated the principle of equality of arms, and the right to adversarial proceedings.⁵⁴

Violation of the right to an effective remedy

92. The right to an effective remedy is a 'peremptory norm' of international law.⁵⁵ Nonetheless, as a consequence of the *ultra vires* and *ex parte* manner in which Mr. Bemba's detention unit communications were transmitted to the Prosecution, Mr. Bemba was deprived of an effective opportunity to either contest their transmission, or to subsequently seek a remedy in relation to the prejudice which ensued.

93. The ICC regulations governing detention matters recognise that detainees should have a right to a remedy in relation to alleged infringements of their liberties or rights.⁵⁶ The jurisprudence of the ICC, *ad hoc* Tribunals, and ECHR further supports the existence of a right of recourse against measures impacting on detention rights and surveillance measures.⁵⁷

⁵² ICC-01/05-01/08-3264-Conf-Exp, para. 24. See also Article 100-5 of the French Criminal Procedural Code ' [...] *A peine de nullité, ne peuvent être transcrites les correspondances avec un avocat relevant de l'exercice des droits de la défense.* [...] '.

⁵³ ICC-01/05-01/08-3217-Red2, paras. 61-66.

⁵⁴ ICC-01/05-01/08-3217-Red2, para. 57; ICC-01/05-01/08-3203-Red2, para. 136; ICC-01/05-01/08-3264-Conf-Exp, para. 24.

⁵⁵ In the matter of El Sayed, 'Order Assigning the Matter to the Pre-Trial Judge', CH/PRES/2010/01, paras. 26 and 35.

⁵⁶ Regulation 106, Regulations of the Court.

⁵⁷ ICC-RoR221-02/09-6-Corr, para. 14; *Prosecutor v. Seselj*, 'Decision on Appeal Against the Registrar's Decision of 19 October 2006', 23 November 2006; *Drakšas v. Lithuania*, 36662/04.

94. Notwithstanding these legal principles, Mr. Bemba was afforded no opportunity to contest these measures before the Single Judge in the Article 70 case,⁵⁸ the Registrar or Presidency (in their capacity of overseeing the implementation of detention rights),⁵⁹ or Trial Chamber III.⁶⁰

95. As a result, Mr. Bemba had no opportunity to seek a timely remedy in order to avoid further prejudice to his rights (i.e. an injunction as concerns the transmission of the communications or the imposition of redactions).

The unlawful method of collection has affected the reliability

96. As set out above, as a result of the fact that the detention unit is not an evidence gathering facility, sufficient safeguards and mechanisms were not put in place to ensure the integrity and reliability of the recordings, as potential, incriminating evidence.

97. A presumption of unreliability and inadmissibility also attaches to communications which are extracted or obtained from coercive custodial circumstances.⁶¹ In this regard, the ICTR has drawn particular attention to the vulnerable position of suspects who are questioned in custody, and excluded information which was extracted from them in violation of an informed and effective waiver of the right of silence or of counsel.⁶²

The Admission of the Second BTM items would seriously damage the integrity of the proceedings

98. The protracted and extensive violation of Mr. Bemba's privacy and defence rights is particularly egregious in light of his vulnerability, and complete dependence on the detention unit communications regime for all contacts with the outside world, his family, and his Defence.

99. Mr. Bemba – who is presumed innocent - has been held in pre-conviction detention for over seven years, which is itself, the equivalent of a lengthy penal sentence. The fact that Mr. Bemba was – at the same time – subjected intrusive surveillance measures both aggravates the deprivation of his liberty, and heightens the corollary need for greater procedural protections as concerns his fundamental rights.

⁵⁸ ICC-1/05-01/13-187, p. 8.

⁵⁹ ICC-RoR221-03/14-3-Conf-Exp.

⁶⁰ ICC-01/05-01/08-3059; ICC-01/05-01/08-3101; ICC-01/05-01/08-3113.

⁶¹ *Allan v United Kingdom* 48539/99, para 47

⁶² *Prosecutor v. Bagasora*, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004, para. 16; See also UN WGAD Opinion No. 41/2013, para. 31.

100. This is reflected in ECHR rulings that the use of stringent or prolonged surveillance measures or security can aggravate the conditions of detention, undermine the detainee's dignity, and, depending on the context, potentially constitute degrading or inhumane treatment.⁶³ The ECHR has also underscored the need for heightened procedural guarantees in relation to the surveillance of detained persons, as such persons (in that cases, persons detained at a psychiatric institution) "are frequently at the mercy of the medical authorities, so that their correspondence is their only contact with the outside world".⁶⁴

101. The communications, which are the subject of the Second BTM, disclose no breach of the detention regulations, or an order of the Court, and no *prima facie* improprieties. If the Prosecution is now entitled to rely on them as evidence in this case, the bar will be set so low that Mr. Bemba will have to fear that all of his communications could potentially end up in the Prosecution case file.

102. This chilling effect is completely antithetical to both Mr. Bemba's right to family contacts, and his right to communicate with his Defence in confidence.

103. The cumulative nature of the violations in this case (including Defence rights), the protracted and intrusive nature of the surveillance, and the Single Judge's knowing failure to apply appellate safeguards, also mandates the exclusion of the communications.⁶⁵

104. The fact that Mr. Bemba has not been given necessary information concerning the confidential Prosecution evidence (which formed the basis for its application to the Single Judge) or the methodology employed to intercept or record the communications, and has no means to challenge the content of certain coded language utilised by Mr. Babala or Mr, Mangenda (who are also defendants, enjoying the right to silence) also distinguishes this case from ECHR precedents, which found no Article 6 violation.

Relief Sought

105. For the reasons set out above, the Defence for Mr. Bemba requests the Trial Chamber to reject the Second Bar Table Motion.

⁶³ Van der Ven v. the Netherlands, 50901/99, 4 February 2003, paras. 62-63.

⁶⁴ Herczegfalvy v. Austria, 24 September 1992, para. 91.

⁶⁵ ICC-01/05-01/13-1179-Conf.



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Date this 9th day of October 2015

The Hague, The Netherlands