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Date: 27/11/2015

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

**Public Redacted Version of Defence Response to Prosecution's Fourth Request for
the admission of Evidence from the Bar Table (ICC-01/05-01/13-1310)**

Source: Counsel for 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. In its 'Fourth Request for the Admission of Evidence from the Bar Table',¹ the Prosecution is once again tendering evidence, without rhyme or reasons to relevance and reliability.
2. The flaws in last three bar table motions remain evident, and fatal.
3. If anything, the failure of the Prosecution witnesses called until now to provide necessary information regarding the authenticity and reliability of this type of evidence compounds the reasons for its exclusion.
4. This response has been filed on a confidential basis due to the fact that it cites to the contents of confidential documents, and telephone numbers.

Submissions

Category I: Logs from the Detention unit

5. The Prosecution has failed to adduce information concerning by whom these logs were compiled, how they were compiled, and what safeguards (if any) were in place to protect the integrity and reliability of the data.
6. In this regard, the method employed by the detention unit to attribute specific contacts to 'JPB' has not been explained, nor is there any information concerning the procedure employed by the detention unit to verify the identity of the recipient of the call.

¹ ICC-01/05-01/13-1310-Conf.

7. There is also no information in evidence concerning the manner in which contacts are recorded, for example:
- i. Whether missed contacts are recorded;
 - ii. How the duration of the contact is calculated;
 - iii. Whether contacts in which the detention unit only reaches the voicemail are recorded;
 - iv. Whether the contacts include instances where the detention unit reached the person, but did not transfer the call to Mr. Bemba (for example, if the person called indicated that they could not take the call at that time); and
 - v. Whether the contacts include instances where the detention unit called a number, which was answered by someone other than the intended recipient.²
8. The logs are not stamped, and were provided in a modifiable format. The Prosecution has also failed to provide any documents or testimony, which verifies the protection of data integrity in the production and transmission process. As such, the logs failed to meet the reliability test for admission.³
9. Also absent is information concerning the modalities and manner in which the contacts were effected; for example, whether Mr. Bemba pays for some or all of the calls, how payment is calculated (by contact or duration), where Mr. Bemba's phone is located (which contextualises duration), the capabilities and functions of this phone, and the time periods during which Mr. Bemba is permitted to receive calls (which again, contextualises

² The Defence incorporates its submissions in the previous responses to bar table motions by reference. See, ICC-01/05-01/13-1199-Conf, paras. 7-12; ICC-01/05-01/13-1245-Conf, paras. 66-67.

³ The Defence incorporates its submissions in the previous response to bar table motion by reference. See, ICC-01/05-01/13-1199-Conf, paras. 13 and 96.

duration, and specific timing). This information is crucial to a proper understanding of call patterns.

10. Contrary to the assertions of the Prosecution, the log of privileged contacts does not show contacts between Mr. Bemba and Mr. Babala through the privileged line, nor do they evidence the existence of multi-party calls.⁴

11. As concerns the first aspect, the privileged logs concern numbers attributed by the Prosecution to Me. Kilolo, and do not evidence any contact with the [REDACTED] number during the period covered by these specific logs. The frequency of contact between Mr. Bemba and Mr. Babala on a non-privileged line throughout the time period of the charges further undermines the Prosecution's theory that Mr. Babala used the [REDACTED] number to contact Mr. Bemba, as the detention unit guards would have become extremely familiar with Mr. Babala's voice, and would have been in a position to ascertain that the dialled person was Mr. Babala and not Me. Kilolo.

12. With respect to the allegation of 'multi-party calls', as confirmed by the Prosecution's own expert witness, the detention call logs only show contacts between Mr. Bemba and the person dialled by the detention unit; it is impossible to ascertain contacts between Mr. Bemba and third parties.⁵

13. The non-existent probative value of these logs is compounded by the prejudicial impact of their admission. The admission of the entirety of the privileged logs for the period of April until August 2013 reveals privileged contacts between members of the Defence who are not involved in the Article 70 case. The admission of such contacts would violate Mr. Bemba's right to have privileged contacts with members of his Defence.

⁴ For the allegation of multi-party calls, see ICC-01/05-01/13-1110-Conf, paras. 46 and 109. The Defence incorporates its submissions in this regards by reference to the previous response to bar table motion: ICC-01/05-01/13-1245-Conf, paras. 71-75.

⁵ ICC-01/05-01/13-T-17-CONF-ENG, p. 42, lines 14-25, p. 43, lines 1-3.

14. As concerns the non-privileged logs, if the purpose of the introduction of the log is to demonstrate the volume of contact with Mr. Babala, then that purpose does not require the admission of the entire call logs. Both Mr. Bemba and the persons whom he contacted have a right to privacy, which would be violated through the admission of such information.

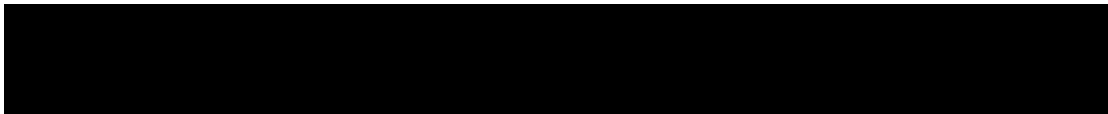
15. In any event, the non-privileged call logs, which purportedly reflect the frequency of contact between Mr. Bemba and Mr. Babala, are of no probative value to the allegation that “the Accused circumvented the ICC Detention Centre’s monitoring system through multiparty calls, abusing the Registry’s privileged line”.⁶

Category II: Invoices, e-mails, and letters containing the Accused’s contact information

16. In the Request, the OTP only touches briefly upon the ownership of the email account in question.⁷ It failed to provide any information confirming the authenticity and accuracy of the documents further than their face value.

17. The seizure of emails with persons who have no linkage to the charges is also a grave and disproportionate incursion of the right to privacy.

Financial invoices - items 11-23

18. 

⁶ ICC-01/05-01/13-1310-Conf, para. 9.

⁷ ICC-01/05-01/13-1310-Conf, para. 13.

19.



Emails

CAR-OTP-0075-0271

20. In the absence of any contextual information concerning the identity of the person whom Mr. Arido is communicating with (and the purpose of such communication), it is impossible to ascertain the reliability of this alleged attribution.

CAR-OTP-0075-0284, CAR-OTP-0075-0482, CAR-OTP-0075-0635

21. The emails and letter have no relevance to the charges. The contents concern a Defence witness who is not one of the 14 witnesses. The provenance and status of the letter are also unclear, as reflected the absence of an actual signature, or official stationary of any kind.

Category III: Call Data Records

22. The Defence reiterates the position expressed in past Bar Table Motion Responses concerning the absence of information regarding the methodology for the creation, and transmission of this type of information.⁸ The documents are not stamped, and were transmitted in a modifiable format.

⁸ See, ICC-01/05-01/13-1074-Conf, paras. 59-62 and 75-79; ICC-01/05-01/13-1199-Conf, paras. 7-13; ICC-01/05-01/13-1245-Conf, paras. 66-67.

23. As set out in earlier BTM responses, in order to admit intercepted materials, it is necessary to call either the entity which created the intercept materials, or the participants in the communications.⁹ The Prosecution has not called anyone from the Dutch police to explain the manner in which the information was intercepted, and recorded. Moreover, several of these contacts allegedly pertain to witnesses who have not been interviewed by the Prosecution, and who are not included in the Prosecution witness list.

24. The piecemeal manner in which the Prosecution has addressed the admission of evidence in this case has also undermined the ability of the Defence to assess relevance. For example, the Prosecution has asserted that the records are relevant because they purportedly show contacts between witnesses and the Defence during the cut-off period.¹⁰ This assertion is predicated on the attribution of numbers and the accuracy of the “cut-off date” – both of which are highly contestable.¹¹

Category IV: Intercepted Communications

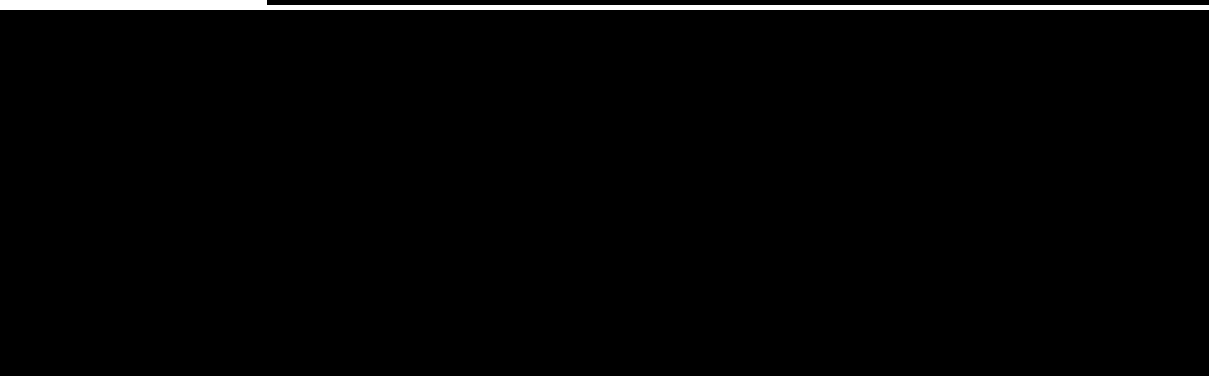
CAR-OTP-0079-1509

25. The Prosecution’s arguments concerning this document turn on the alleged relevance of the SMS and calls within; this has not, however, been

⁹ See, ICC-01/05-01/13-1199-Conf, para. 3.

¹⁰ ICC-01/05-01/13-1310-Conf, para. 15.

¹¹ Regarding the attribution, for example, the Prosecution has asserted that CAR-OTP-0077-1024 show calls between [REDACTED]



established.

[REDACTED]

[REDACTED]¹² It bears
no relevance to the charges concerning the alleged corruption of witnesses.

SMS messages

26. [REDACTED]

27. [REDACTED]

28. [REDACTED]

29. As found by the ICTY, where there is a correlation between a particular document and a witness, “failure to put the document to such a witness is relevant to the exercise of the Chamber’s discretion to admit the document.

¹² [REDACTED]

¹³ CAR-OTP-0080-1355, CAR-OTP-0080-1358, and CAR-OTP-0080-1359.

¹⁴ ICC-01/05-01/13-1310-Conf-AnxA, p. 11.

¹⁵ [REDACTED]

¹⁶ [REDACTED]

Further, if the document is admitted, the failure is likely to limit the value of the document in evidence".¹⁷

Category V: Other Materials

2008 Report (CAR-OTP-0047-1622)

30. This document consists of all information stored in the SIM card seized from Mr. Bemba. The Prosecution seeks to admit the document for the purpose of attributing a phone number to D-15.

31. The authors of this report have not been called to give evidence, and the circumstances surrounding its creation have also not been adduced into evidence in this particular case. The Defence therefore has no means to test its reliability or the legality of its creation. In this regard, the seizure of such data for the purposes of assisting the ICC in connection with an Article 5 case does not automatically mandate the use of such information in an Article 70 case.

32. Moreover, on the one hand, the content of the document is outdated since Mr. Bemba's SIM card was seized years before the charged incidents involving D-15. In order to establish attribution of a particular communication on a particular date to a particular person, it would be necessary to establish that the person in question was using the number on the date in question. A report from 2008 completely fails to do this.

33. On the other hand, it is highly disproportionate and would violate Mr. Bemba's right to privacy if the entirety of the report [REDACTED]

¹⁷ *Prosecutor v. Djordjevic*, Trial Chamber, "Decision on Prosecution's Motion to Admit Exhibits from the Bar Table", 28 April 2009, para. 5; *Prosecutor v. Boskoski and Tarculovski*, Trial Chamber, "Decision on Tarculovski's Second Motion for Admission of Exhibits from the Bar Table with Annex A", 7 April 2008, para. 5. The Defence also incorporates its submissions in previous response to bar table motion in this regard: ICC-01/05-01/13-1074-Conf, paras. 9-11.

[REDACTED] were to be admitted. The prejudicial impact as concerns the privacy rights of both Mr Bemba and innocent third parties far outweighs any limited value which might result from the admission of this report.¹⁸

Contact telephone numbers for CAR witnesses

34. As noted above, in order to attribute a particular communication with a particular person, it is necessary to establish that the person in question had use of the number in question at the time in question.

35. Far from establishing attribution of specific communications to specific persons, this document does the opposite. This document suggests that multiple persons had the use of the same number during the same time period. For example, CAR-D004-PPP-0009, CAR-D004-PPP-0004, and CAR-D004-PPP-0006 all provide a number as their contact number (which has also been attributed to Mr. Arido). Given that it appears that the number was shared between multiple persons, it cannot be excluded that other persons utilised this number during the time period of the charges.

36. CAR-D004-PPP-0029 and CAR-D004-PPP-0030 also provide the same contact number, and presumably shared the usage of this number during the relevant time period.

CAR-OTP-0072-0234 and CAR-OTP-0072-0329

37. These reports are, in essence, testimonial. [REDACTED]

[REDACTED] If the Prosecution wished to admit this information, it should either have called this

¹⁸ The Defence incorporates by reference its submission on disproportionality and violation of Mr. Bemba's right to privacy in its previous response to bar table motion: ICC-01/05-01/13-1199-Conf, paras. 74-77 and 83-84.

investigator to testify in relation to the methodology and results of his investigation, or it should have sought its admission through Rule 68.

38. Admitting this information from the bar deprives the Defence of the ability to pose questions concerning the methodology employed for intercepting and extracting this information, and the reliability of the results.

The privileged telephone numbers of Mr. Bemba (CAR-OTP-0074-0067-0072, and CAR-OTP-0074-0079)

39. These series of documents are dated from 1 January 2008 until 2013, and 6 July 2012 respectively. It is not apparent, however, when the numbers were added to these lists, which is of particular importance to the time period of the charges.

40. Nor is any information in evidence as to the procedures, which were employed verify attribution before numbers were included on the list. Finally, the Prosecution avers that these lists are relevant to the attribution of certain numbers to Me. Kilolo, and yet it provides no explanation as to how this general argument on relevance can be reconciled to the Prosecution's position that one of the numbers associated with Me. Kilolo cannot be attributed to Me. Kilolo.

41. There are also persons on the lists, who no longer have any association with the case. These persons have a right that their private contact details (which were provided to ICC detention unit for the specific purpose of facilitating privileged communications) are not admitted into evidence in this case.

The non-privileged telephone numbers of Mr. Bemba (CAR-OTP-0074-0075, CAR-OTP-0082-0315)

42. The Prosecution has asserted that this list demonstrates that Mr. Bemba abused his privileged telephone rights in order to contact Mr. Babala.¹⁹ The Prosecution has not, however, fulfilled its burden of argumentation as concerns how the list demonstrates that this occurred.

43. The burden of argumentation is higher for items admitted through the bar; the Defence should not be required to speculate as to the factual foundation for the purposed relevance of this list. If the Prosecution wishes to assert that Mr. Bemba contacted Mr. Babala *via* a privileged number, then it should adduce proof, rather than mere speculation, that this happened.

Annexes from the Independent Counsel (CAR-OTP-0074-0926, CAR-OTP-0080-1138)

44. The Defence incorporates by reference the arguments set out in its Response to the Third Bar Table Motion regarding the Independent Counsel reports. The admission of communications *en masse* rather than on an individualised basis is also contrary to the Appeals Chamber's direction that admissibility must be assessed on an item-by-item basis.²⁰

45. The prejudice stemming from this 'bulk' approach is aggravated by the fact that the pre-confirmation Independent Counsel reports were compiled in relation to broader allegations than those which were confirmed, and therefore include communications falling outside the scope of the current charges.

46. This risk is reflected by the Prosecution's argument that CAR-OTP-0074-0926 is relevant [REDACTED].²¹

¹⁹ ICC-01/05-01/13-1310-Conf, para. 24.

²⁰ ICC-01/05-01/08-1386, para. 2. The Defence incorporates its submissions in this regard by reference to its previous response of bar table motion: ICC-01/05-01/13-1074-Conf, para. 21.

²¹ ICC-01/05-01/13-1310-Conf-AnxA, p.14.

[REDACTED]

CAR-OTP-0077-0942

47. This table purposes to be information extracted from Defence protection forms. The initial protection forms have not been tendered into evidence, and as such, there is no basis to verify the reliability of this derivative work product. The document also does not specify the date when certain numbers were provided by the witness in question, which is a key factor for attribution.

CAR-OTP-0085-0502

48. [REDACTED]

49. No information has been tendered *via* a witness or *via* the bar concerning the processes or methodology employed for collating this information. Both P-361 and P-433 testified that they are not familiar with CDRs from the DRC or

[REDACTED]²²

50. The document is not stamped, and was transmitted in a modifiable format.

51. The document allegedly shows the contacts between Babala [REDACTED] and D-25.²³ This number is not, however, registered under

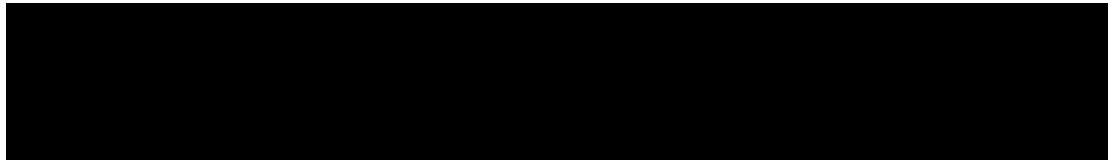
²² ICC-01/05-01/13-T-12-CONF-ENG ET, p. 65, lines 8-11 and p. 67, lines 2-12; ICC-01/05-01/13-T-16-CONF-ENG ET, p. 72, lines 5-7.

²³ ICC-01/05-01/13-1310-Conf-AnxA, p. 16.

Mr. Babala's name in the Vodacom subscriber database,²⁴ and the Prosecution has further acknowledged that this number is also provided by P-272 as his contact number.²⁵

52. As set out above, when a phone number is linked to multiple persons, call data records are not in themselves a reliable form of deducing conclusions regarding attribution for specific contacts between specific persons at specific times. The ambiguity concerning number attribution is also heightened in connection with CDRs which do not include precise cell-site location information.

53.



CAR-OTP-0090-1872

54. On the basis of a random word association, the Prosecution has sought to attribute a specific number found under [REDACTED] to Mr. Babala. On that basis alone, it has also averred that this constitutes evidence of mis-use of the privileged phone lines at the Detention Unit.

55. The list of contacts does not specify when Me. Kilolo listed this number as "Babala bis"; i.e. whether it was listed under these names before or after this number was used to call Mr. Bemba at the detention unit, during the time period of the charges.

²⁴ [REDACTED] See, CAR-OTP-0085-0493 and CAR-OTP-0071-0495.

²⁵ See, ICC-01/05-01/13-1110-Conf, fn. 527, citing CAR-OTP-0090-0831 at 0833.

²⁶ [REDACTED]

56. This designation is also emblematic of a pattern of random name associations on Me. Kilolo's contact list. For example, one number has been designated under the name [REDACTED]. Clearly, this is not a number which was shared between Mr. Bemba, Joachim Kokate and Peter Haynes. Rather, the association of names to numbers appears to be done independently of the actual user or attribution of the number.

Relief Sought

57. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Trial Chamber to reject the Prosecution's fourth request to admit evidence from the bar table.



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Date this 27th November 2015

The Hague, The Netherlands