



Original: English

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

Date: 18/04/2016

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 with Confidential Annex A

**Public Redacted Version of Corrigendum to Defence Request for Admission of
Documents through a Bar Table Motion**

Source: Counsel for Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for the Defence of Mr Aimé Kilolo Musamba

Paul Djunga

Steven Powles

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken De Vreuschmen

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Roland Azama Shalie Rodoma

Counsel for the Defence of Mr Narcisse Arido

Charles Achaleke Taku

Beth Lyons

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

Introduction

1. The Defence for Jean-Pierre Bemba hereby submits an application to admit evidence from the ‘bar table’, pursuant to Article 69(4) of the Statute (the Application).

2. The Application addresses the following categories of information:
 - a. Open source articles and photographs;
 - b. Open source NGO/IGO reports;
 - c. Open source ICC reports;
 - d. Open source documents issued by the ICC Assembly of State Parties;
 - e. Correspondence between the Bemba Defence team and ICC sections, and related documentation (i.e. mission plans, invoices submitted to CSS);
 - f. Internal Bemba Defence team correspondence (and related attachments);
 - g. Correspondence between Me. Kilolo and defence witnesses in the Main Case;
 - h. Information provided by neutral and impartial Registry sections concerning internal practices and policies;
 - i. Translations provided by the Registry Language Support Section (LSS) in relation to specific extracts of evidence relied upon by the Prosecution;
 - j. Audio and transcripts of detention unit recordings from 2008 and 2009;
 - k. Filings from other ICC cases; and
 - l. Filings from the Main Case (which are submitted from the bar, in the event that the request for Judicial Notice is rejected).
 - m. Documents disclosed by the Prosecution;

3. The evidence in question is relevant to material issues arising from the charges, and bears *prima facie* indicia of reliability.

4. The admission of this evidence from the bar would also cause no prejudice to the parties, or affect the fair and impartial conduct of the proceedings.

5. An item-by-item analysis of each item of evidence is attached as Confidential Annex A.

6. The present request is filed confidentially. A public redacted version will be filed forthwith.

Submissions

I. Chain of custody and authenticity

7. The Application concerns evidence which was obtained from:
- a. Open sources;
 - b. Registry officials of the ICC or ICTY;
 - c. A copy of the contents of the laptop, attributed to Aime Kilolo, transmitted from the Registry to the Article 70 Bemba Defence team,¹ pursuant to the order of the Trial Chamber;²
 - d. Copies of CSS correspondence with the Bemba Defence team, which was transmitted from CSS to the Article 70 Bemba Defence team,³ pursuant to the order of the Trial Chamber;⁴
 - e. Copies of correspondence between the OPCD and the Bemba defence team, which was transmitted from the OPCD to the Article 70 Bemba Defence team;⁵
 - f. The Prosecution through disclosure;
 - g. Internal and external correspondence from the Bemba defence team, which was transmitted to the Article 70 Defence team.
8. The Defence has included the internet link for all open source documents. The provenance is thus clearly verifiable, and sufficiently established for the purpose of admission from the bar.⁶
9. As concerns information from ICC Registry officials, the response has either been filed directly in the record,⁷ or has been transmitted to the Defence from the official ICC or

¹ CAR-D20-0005-0428

² ICC-01/05-01/13-947

³ CAR-D20-0005-0766

⁴ ICC-01/05-01/13-1095

⁵ CAR-D20-0006-0752

⁶ ICC-01/04-01/07-2635, para. 24.

⁷ See CAR-D20-0006-1325, CAR-D20-0006-1337

ICTY email accounts of persons in authority in the relevant section.⁸ The origin is thus immediately apparent and verifiable by virtue of the identity of the person filing the submission or transmitting it to the Defence.

10. As concerns attachments to such correspondence (such as the records submitted by Me. Kilolo and Me. Nkwebe concerning the registration of the [REDACTED] number), the Defence has disclosed chain of custody emails, which set out the date on which the relevant records or attachments were transmitted by the Registry to the Article 70 Defence for Mr. Bemba.⁹

11. The copy of the laptop attributed to Aimé Kilolo was prepared by the same persons, and in accordance with the same procedures utilised for the copy transmitted to the Independent Counsel. The information relied on by the Defence thus has the same authenticity and reliability as the equivalent tendered by the Prosecution *via* the extracts filed by the Independent Counsel.

12. As concerns correspondence transmitted from CSS and OPCD, the Defence has disclosed letters detailing the chain of custody of this information.¹⁰

13. The Defence is not in a position to verify the original chain of custody of information disclosed from the Prosecution. Nonetheless, in light of the fact that the Prosecution is in a position to do so, and has not alerted the Chamber or parties to any issues, the admission of such information occasions no prejudice to the Prosecution or a fair and impartial trial. As concerns documents emanating from P-169,¹¹ P-169 affirmed their authenticity during sworn testimony before Trial Chamber III.¹²

II. Submissions on specific categories

a. Open source articles and photographs

⁸ CAR-D20-0006-1213, CAR-D20-0006-2000, CAR-D20-0006-2004, CAR-D20-0006-2015, CAR-D20-0005-0352, CAR-D20-0006-1036 ; CAR-D20-0006-2021 ; CAR-D20-0006-2020 ; CAR-D20-0006-2028.

⁹ CAR-D20-0006-5000 (re-disclosed on 13 April 2016).

¹⁰ CAR-D20-0006-0752, CAR-D20-0005-0766

¹¹ CAR-OTP-0072-0508_R02, CAR-OTP-0072-0504_R01, CAR-OTP-0083-1303, CAR-OTP-0083-1327-R02, CAR-OTP-0083-1212.

¹² ICC-01/05-01/13-T-361, p.14, lines 14-16; p.18, line 25 – p.19, line 3; p.20, lines 2-4; p.21, lines 4-15; p.29, lines 14-16; p.29, line 23 – p.30, line 4.

14. The Defence has submitted several open source media articles for the purpose of providing contextual information concerning the interpretation of words and phrases in detention unit recordings;¹³ they do not pertain to issues, which are germane to the charges.

15. The content of these articles is readily apparent from the face of the documents, and does not require further testimony or explanation to establish the meaning.

16. As concerns the open source photographs of the mausoleum in Gemena, these items are corroborated by another open source document, which confirms the existence of such a building in Gemena during the relevant time period.¹⁴

17. As concerns open source extracts concerning the definition of the Lingala word ‘ba’ which are taken from an online Lingala dictionary¹⁵ and a French-Lingala dictionary (google books),¹⁶ the ICC has repeatedly cited dictionaries in construing the meaning of certain words or terms.¹⁷ Extracts from dictionaries have also been admitted at the ICTY.¹⁸

18. The contents of these two dictionaries corroborate each other, and are also corroborated by independent translation advice provided by LSS,¹⁹ and a linguistic expert who testified in the Main Case.²⁰

b. Open source NGO/IGO reports;

19. The Defence has tendered two reports and one related attachment, which were prepared by the International Bar Association (the IBA).²¹

20. The Defence has tendered the reports in order to address contextual issues concerning the facilities and assistance provided to Defence Counsel during the charged events, the relevant mechanisms which were tasked to ensure or vet effective legal

¹³ CAR-D20-0006-1000; CAR-D20-0006-1002;

¹⁴ CAR-D20-0006-0001

¹⁵ CAR-D20-0006-2028

¹⁶ CAR-D20-0006-2063

¹⁷ ICC-01/04-01/06-3129, footnote 267, ICC-02/04-01/15-66, footnote 8, ICC-01/04-01/07-3615, footnote 87.

¹⁸ ICTY, Simić et al., (IT-95-9), Trial Hearing, 9 May 2002, p.7768-7769, lns 14-1 ICTY, Hadžihasanović & Kubura, (IT-01-47), Trial Hearing, 10 March 2005, p.17153, lns 12-20.;

¹⁹ CAR-D20-0006-2028, CAR-D20-0006-1272.

²⁰ CAR-D20-0006-2030, at 2048 lines 6-8.

²¹ CAR-D20-0006-0712, CAR-D20-0006-0436, CAR-D20-0006-0446,

representation at the ICC, and information concerning the drafting history of specific provisions in the ICC Code of Professional Conduct for Counsel.

21. These issues are directly relevant to firstly, the question as to whether certain alleged conduct was committed pursuant to a joint criminal plan (as opposed to inexperience, or expediency due to a lack of institutional resources and support), and secondly, the question as to whether the conduct of individual Defence team members should be imputed to the client.

22. The IBA is an independent and impartial NGO, which monitors the proceedings before the ICC.²² The methodology employed to compile its reports are clearly delineated in the reports, as are the sources of its information.

23. The Defence has also tendered a report on best practices for witnesses, which was commissioned by the Registry of the Special Court for Sierra Leone.²³ The identity and qualifications of the authors are set out in the report, as are the methodology they employed, and sources of information.

24. The report corroborates evidence provided by D21-0009, and information filed by the ICC VWU²⁴ concerning the types and nature of witness assistance, and the empirical correlation between such assistance and a witness's subsequent testimony.²⁵

c. Open source ICC report

25. The Defence has tendered a report prepared by an independent and external team of legal experts, which investigated specific allegations of misconduct by VWU staff in the DRC field office, at the time of the charged events, and general issues concerning the infrastructure and functioning of the VWU at that time.²⁶ The report was commissioned by the ICC Registrar, and was conducted by well-known legal experts, and chaired by Brenda Hollis, a former ICTY and SCSL Prosecutor.²⁷

²² The non-partisan nature of their reports is reflected by the fact that the ICC Prosecution has relied on similar IBA monitoring reports in submissions before the ICC: see ICC-01/09-01/11-1344-Anx, pp. 4-5.

²³ CAR-D20-0006-0555

²⁴ CAR-D20-0006-1325

²⁵ Pages 13-20 of the Report.

²⁶ CAR-D20-0006-0002

²⁷ <http://www.rscsl.org/RSCSL-Officials.html>

26. The report corroborates other evidence concerning contextual issues, i.e. evidence from D21-0009 concerning structural concerns regarding the background and role of VWU staff in the field offices.²⁸ The report sets out its methodology and source of information.

d. Open source documents issued by the ICC Assembly of State Parties

27. The Assembly of State Parties is an official entity of the ICC, and has the power to adopt, and approve legal directives issued by ICC organs.²⁹

28. At the time-period of the charges, the ICC promulgated several policy papers, and directives, which touch on the responsibility of the parties for the conduct of intermediaries. Specific aspects of these policies were replicated in ASP documents, and adopted and approved by the ASP.³⁰

29. Given that the ICC organs receive such documents and would have been in a position to correct errors, there is a presumption of accuracy as concerns the reproduction of policy and legal information in ASP documents, which were received from the Court.

30. At the time of the charges, the Court had not promulgated the Code of Conduct for Intermediaries,³¹ or the ‘Guidelines Governing the Relations between the Court and Intermediaries’.³²

31. In the absence of any such legal instruments, the ASP documentation on the issue of legal and administrative oversight for intermediaries is probative as concerns the legal status of intermediaries at during the time period falling within the charges. In particular, the ASP documentation sets forth the position of the Court that firstly, intermediaries did not have the legal status of staff, or agents of the ICC, and secondly, that any misconduct on the part of intermediaries could not be imputed to the Court itself, or the organ utilising them.³³

²⁸ CAR-D21-0015-0001.

²⁹ “The Assembly of States Parties is the management oversight and legislative body of the International Criminal Court.” https://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx

³⁰ CAR-D20-0005-0514; CAR-D20-0005-0537; CAR-D20-0005-0544; CAR-D20-0005-0550 ;

³¹ https://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/CCI-Eng.pdf

³² https://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf

³³ CAR-D20-0005-0514, CAR-D20-0005-0537, CAR-D20-0005-0544, CAR-D20-0005-0550.

e. Correspondence between the Bemba Defence team and ICC sections, and related documentation (i.e. mission plans, invoices submitted to CSS)

32. This correspondence was transmitted from the Defence to official ICC sections (addressed *via* their official, verifiable ICC email addresses) in the “ordinary course of business”; i.e. Defence preparation in the Main case. Minutes were drafted contemporaneously, and exchanged between the participants in the relevant meetings.

33. This correspondence is addressed to five different sections within the Court: CSS, VWU, the ICC Detention Unit (DU), the Prosecution, and the OPCD.

34. The correspondence between CSS and the Defence (and attached documentation) is probative as concerns the following issues:

- i. The amount of funding available to the Defence during the charged time period, and the impact that this had on Defence investigations;³⁴
- ii. The fact that since Mr. Bemba was not legal aid funded, the Defence were required to fund missions costs in advance;³⁵
- iii. The fact that no funding was provided by the Court for some Defence missions;³⁶
- iv. The fact that neither CSS nor VWU provided the Defence with any funds as concerns the logistical expenses incurred by potential Defence witnesses during their meetings with the Defence (i.e. transport, hotel costs, daily subsistence allowance, and incidentals);³⁷
- v. The costs (both estimated and actual) incurred by the Defence for accommodation, taxis, subsistence, and incidentals in areas relevant to the charges (i.e. Douala, Brazzaville, [REDACTED]), and the Registry’s assessment as to whether these costs were necessary and reasonable;³⁸

³⁴ CAR-D20-0005-0212; CAR-D20-0005-0214 ; CAR-D20-0005-0232 ; CAR-D20-0005-0251 ; CAR-D20-0005-0288 ; CAR-D20-0005-0305; CAR-D20-0005-0762 ;

³⁵ CAR-D20-0005-0270; CAR-D20-0005-0276; CAR-D20-0005-0280; CAR-D20-0005-0281

³⁶ CAR-D20-0005-0214 ; CAR-D20-0005-0249 ; CAR-D20-0005-0284 ;

³⁷ CAR-D20-0005-0285 ; CAR-D20-0005-0559.

³⁸ CAR-D20-0005-0222 ; CAR-D20-0006-1036; CAR-D20-0005-0233 ; CAR-D20-0005-0234 ; CAR-D20-0005-0235 ; CAR-D20-0005-0237 ; CAR-D20-0005-0239 ; CAR-D20-0005-0245 ; CAR-D20-0005-0246 ; CAR-D20-0005-0258 ; CAR-D20-0005-0262 ; CAR-D20-0005-0263 ; CAR-D20-0005-0264 ; CAR-D20-0005-0272 ; CAR-D20-0005-0282 ; CAR-D20-0005-0283 ; CAR-D20-0005-0771 ; CAR-D20-0005-0293 ; CAR-D20-0005-0297 ; CAR-D20-0005-0298 ; CAR-D20-0005-0299 ; CAR-D20-0005-0302

- vi. The dates of Me. Kilolo's missions in the DRC;³⁹
- vii. Security concerns and interference faced by Defence team members on mission;⁴⁰ and
- viii. The extent to which payments to intermediaries, or payments from intermediaries to potential witnesses/witnesses was regulated in 2012-2013, and the absence of any certainty concerning the specific rates which should apply.⁴¹

35. The correspondence between VWU and the Defence is probative as concerns the following issues:

- i. The fact that the Registry and the Defence had been informed that DRC military witnesses needed authorisation from their superiors in order to meet with the Defence, or to leave their military base;⁴²
- ii. The difficulties incurred by the Registry/VWU in obtaining such authorisation, in particular, for D-54 and D-13;⁴³
- iii. The practice of the VWU to encourage the Defence and witnesses to use cover-stories as concerns their involvement with the Defence, in particular, if authorisation had not been received from the witness's superiors for a particular interaction;⁴⁴
- iv. The logistical problems faced by the Defence in bringing witnesses to the Court,⁴⁵ and the unwillingness of the Defence to be engaged in this area of responsibility due to lack of capacity and funding;⁴⁶
- v. The context of contacts between the Defence and witnesses;⁴⁷
- vi. The relationship between VWU field staff and Defence witnesses;⁴⁸
- vii. Security concerns faced by Defence witnesses in the DRC *via-a-vis* the DRC authorities, and linkage to association with Defence;⁴⁹

³⁹ CAR-D20-0005-0222 ; CAR-D20-0005-0239 ; CAR-D20-0005-0245 ; CAR-D20-0005-0246

⁴⁰ CAR-D20-0005-0776

⁴¹ CAR-D20-0006-2000, CAR-D20-0006-2004, CAR-D20-0006-2015

⁴² CAR-D20-0005-0732 at 0733 and 0735; CAR-D20-0005-067; CAR-D20-0005-0598; See also ICC-01/05-01/08-2485-Conf-Exp-Anx3 (at page 3) - [REDACTED]

⁴³ CAR-D20-0005-0655; CAR-D20-0005-0682; CAR-D20-0005-0740; CAR-D20-0005-0632; CAR-D20-0005-0717; CAR-D20-0005-0719; CAR-D20-0005-0608

⁴⁴ CAR-D20-0005-0722 at 0723; CAR-D20-0005-0670.

⁴⁵ CAR-D20-0005-0673; CAR-D20-0005-0682;

⁴⁶ CAR-D20-0005-0725; CAR-D20-0005-0697; CAR-D20-0005-0756 Corroborated by (ICC-01/05-01/08-2497, paras. 4 and 5).

⁴⁷ CAR-D20-0005-0725

⁴⁸ CAR-D20-0005-0640

⁴⁹ CAR-D20-0005-0664; CAR-D20-0005-0719; CAR-D20-0005-0779 ; CAR-D20-005-0209 ; CAR-D20-0005-0348 ; CAR-D20-0005-0608 ; CAR-D20-0005-0627 ; CAR-D20-0005-0623

- viii. Lack of funding from VWU to remunerate the expenses of potential Defence witnesses, who were interviewed in the field.⁵⁰

36. Correspondence between the Defence and the Detention Unit is probative as concerns the procedure for verifying Me. Kilolo's use of the [REDACTED] number, and the listing of this number for discrete time periods corresponding with Me. Kilolo's missions in [REDACTED]. The correspondence is comprised of:

- i. Emails between the Defence and the Detention Unit, in which the Defence request that this number be allocated to Me. Kilolo for use during discrete periods, which corresponded to missions in the DRC;⁵¹
- ii. A [REDACTED] record concerning the purchase of an account for the [REDACTED] number, by Me. Nkwebe Liriss in 2009;⁵²
- iii. A Vodacom record concerning the identification of the person registered with the [REDACTED] number in April 2012;⁵³ and
- iv. Privileged phone lists for discrete months in 2012, which shows the [REDACTED] number being added for the duration of missions, and then taken off after the completion of the missions.⁵⁴

37. The records submitted by Me., Nkwebe and Me. Kilolo in order to have the [REDACTED] number registered by the detention unit were stamped, signed by a relevant official from Vodacom, and are on forms bearing the watermark/logo of Vodacom.⁵⁵ They therefore bear *prima facie* indicia of reliability.

38. Correspondence between Prosecution and the Defence is probative as concerns the following issues:

- i. The Prosecution's awareness that it was required to follow the Witness-Protocol, which prohibited direct contact between the

⁵⁰ CAR-D20-0005-0352.

⁵¹ CAR-D20-0006-0479, CAR-D20-0006-0480, CAR-D20-0006-0482, CAR-D20-0006-0485

⁵² CAR-D20-0006-0465

⁵³ CAR-D20-0006-0478

⁵⁴ CAR-D20-0006-2009, CAR-D20-0006-2010, CAR-D20-0006-2011, CAR-D20-0006-2012, CAR-D20-0006-2013

⁵⁵ CAR-D20-0006-0478, CAR-D20-0006-0465

Prosecution and D-57 prior to his testimony, unless the procedures set out in the Protocol were followed;⁵⁶

- ii. The scope of parties' duty to correct misstatements of fact (reword), or not to rely on evidence that they believe or have reason to know might be false.⁵⁷

39. Correspondence between the Defence and the OPCD preceded the commencement of the trial, and is relevant to the status of investigations at this juncture.⁵⁸ The correspondence is relevant to the issue as to whether there was a joint criminal plan to adduce unreliable evidence and testimony, as opposed to investigations conducted in an inexperienced or ineffective manner, which were dependent on assistance from intermediaries due to lack of funding.

40. Finally, the Defence seeks the admission of a discrete section of information concerning the attribution of a sim card, which was seized by the Belgium authorities.⁵⁹ This information is relevant to the reliability of the contacts list extracted from this sim card,⁶⁰ in particular, since the date and identity of the person who added the numbers are unknown.

f. Internal defence working documents

41. As a preliminary point, the Defence underscores that Mr. Bemba expressly waived privilege as concerns the introduction of these documents into evidence. The same applies as concerns the equivalent documents tendered by the Defence for Mr. Mangenda. This waiver is document specific, and does not extend to internal Defence working documents tendered by the Prosecution.

42. These documents are analogous to business records, which were created in the ordinary course of business during the same time period as the charges. There were sent between email addresses, which the Prosecution has attributed to Main Case Defence team members.

⁵⁶ CAR-D20-0005-0001

⁵⁷ CAR-D20-0005-0025; CAR-D20-0005-0027; CAR-D20-0005-0019; CAR-D20-0005-0017; CAR-D20-0005-0012; CAR-D20-0005-0014; CAR-D20-0005-0023; CAR-D20-0005-0021; CAR-D20-0005-0006; CAR-D20-0005-0008; CAR-D20-0005-0002; CAR-D20-0005-0004; CAR-D20-0005-0010.

⁵⁸ CAR-D20-0005-0031; CAR-D20-0005-0767

⁵⁹ CAR-D20-0006-2020, CAR-D20-0006-2121

⁶⁰ ICC-01/05-01/13-845-Conf-Exp-AnxD

43. The content provides important contextual information concerning the meaning of certain phrases and exchanges in intercepted communications, and the knowledge of Mr. Bemba regarding alleged illegal conduct.

44. In particular, the Prosecution has averred that the phrases “faire la couleur” or “les couleurs” should be understood to mean illegal coaching or the bribing of witnesses.⁶¹ This phrase itself is a translation of various different combinations of the Lingala word “langi”, which have the sense of putting something in colour.

45. It is, however, apparent from several contemporaneous email exchanges (and their attachments) that this phrase (or variations thereof) was employed regularly within the Defence team itself to connote the act of editing internal Defence documents.⁶² Red appears to have been used to refer to deletions, and yellow, additions.

46. These phrases were not employed uniquely in communications between Me. Kilolo and Mr. Mangenda. Rather, the use of ‘colourful’ terminology to denote aspects of the editing process encompassed all Defence team members, and included draft motions and questionnaires which were used during Defence investigations. It is reasonable to infer that any knowledge of the part of Mr. Bemba as concerns these phrases could have been derived from his interactions with any or all of the Defence team members.

47. A further internal email between the Defence case manager and Me. Kilolo is relevant to the issue as to whether Mr. Bemba had any actual knowledge that Me. Kilolo was contacting D-15 outside of the framework of the contacts authorised by the Trial Chamber for the purpose of ascertaining D-15’s consent and availability to testify.⁶³

48. The internal email dated 8 November 2013 is also relevant to the context and object of Defence investigations conducted at that time (and the funding for such investigations).⁶⁴

⁶¹ ICC-01/05-01/13-1110-Conf-AnxA, p. 35.

⁶² CAR-D20-0005-0426; CAR-D20-0005-0509; CAR-D20-0005-0419; CAR-D20-0005-0418; CAR-D20-0005-0416; CAR-D20-0005-0415.

⁶³ CAR-D20-0005-0559. See also ICC-01/05-01-01/08 2794-Red, CAR-D20-0002-0019, ICC-01/05-01/13-T-12-CONF-ENG, p. 51, lines 17-25.

⁶⁴ CAR-D20-0005-0430

g. Correspondence between Me. Kilolo and defence witnesses in the Main Case

49. The Defence is not submitting this evidence on the basis that it is authentic, or for the truth of its contents. Rather, the existence of this correspondence is probative as concerns the type of information which may have been transmitted from Me. Kilolo to Mr. Bemba during this time period.⁶⁵

h. Information provided by neutral and impartial Registry sections concerning internal practices and policies

50. Although this information is in an email or filing format, the content is analogous to internal directives, fact-sheets, and policies, as opposed to testimony on issues of fact.

51. The Trial Chamber has ruled that “the Court’s legal texts do not need to be formally submitted in order to be referenced or relied upon.”⁶⁶ The fact that information concerning the *modus operandi* of different Registry sections is not always set out fully in the Court’s legal texts and directives should not, in itself, preclude the defence from being able to introduce identical or similar information obtained through other means.

52. The information has been provided by persons, who are in a position to verify its accuracy. It has also been transmitted from their official email addresses, or in some cases, filed directly into the record after official verification by the Registry.⁶⁷

53. The information set out therein is probative to the following issues:

- i. The extent to which payments made by the parties (and privately funded Defence teams) during the course of investigations are either regulated or proscribed by international courts and tribunals;⁶⁸
- ii. The type and scope of training which is provided to Defence teams as concerns their interactions with potential witnesses;⁶⁹
- iii. The use of cover-stories with sensitive witnesses as part of the Court’s good practices;⁷⁰

⁶⁵ See D20-0005-0351; CAR-D20-0005-0349; CAR-D20-0005-0350;

⁶⁶ Email from Trial Chamber VII communications, titled “Formally Submitted Items for D21-9”, dated 15 March 2016.

⁶⁷ CAR-D20-0006-1325, CAR-D20-0006-1337

⁶⁸ CAR-D20-0006-1213; CAR-D20-0006-1325 at 1327, 1328, 1331,1332,1333, 1334

⁶⁹ CAR-D20-0006-1325 at 1328

- iv. The provision of mobile devices and phone credits to witnesses in the field;⁷¹
- v. The types of assistance and payments to witnesses which are considered to be acceptable/consistent with the administration of justice;⁷²
- vi. The extent to which the Defence interactions with witnesses and the VWU were as clearly regularly as those of the Prosecution, by virtue of the joint Registry-Prosecution Protocol;⁷³ and
- vii. The procedures and modalities for placing telephone calls at the ICC detention unit.⁷⁴

i. Translations provided by LSS in relation to specific extracts of evidence relied upon by the Prosecution;

54. The ICTY, ICTR, and ICC have recognised that in case of disputes concerning the accuracy of translations, it is appropriate for Registry to prepare an official version.⁷⁵

55. On 18 December 2015, the Defence wrote to the Prosecution concerning an apparent translation error in several intercepts.⁷⁶ Concretely, whereas some intercepts had translated “ba Romeo” in a plural sense (i.e. les Romeos), in a particularly important intercept, the Prosecution had translated it in the singular form.⁷⁷ In response, the Prosecution averred that based on their contextual analysis of the intercept, the phrase ‘ba Romeo’ should be translated in a manner which referred to a single person.⁷⁸

56. The Defence therefore requested the Registry translation services to provide an independent, and impartial translation advice concerning the translation of the words “ba Romeo”. Their response was that,

⁷⁰ CAR-D20-0006-1325 at 1329

⁷¹ CAR-D20-0006-1325 at 1329

⁷² CAR-D20-0006-1325 at 1329-1331.

⁷³ CAR-D20-0006-1325-1334

⁷⁴ CAR-D20-0006-1337.

⁷⁵ 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.

⁷⁶ CAR-D20-0006-0915

⁷⁷ [REDACTED]

⁷⁸ CAR-D20-0006-0915

”ba” followed by a proper noun means that reference is being made to a group of people including the one cited and preceded by “ba”. In other words, it means X and company.⁷⁹

57. This response (which is provided in context with the initial translation inquiry) is probative as to the neutral and impartial translation of this phrase in the intercepts relied upon by the Prosecution.

58. It is also corroborated by earlier translations of “ba Romeo” in the plural form, which were prepared by STIC in 2008 and 2009.⁸⁰

59. Finally, the Defence requested LSS to prepare a literal translation of a particular intervention by Mr. Bemba, which refers to ‘baRomeo-Mike’ in an actual communication.⁸¹ The Defence submits that the literal translation received from LSS is relevant and probative to the Trial Chamber’s determination for the following reasons (which are also set out in the Defence request to add this item to its list of evidence).

60. It has – prior to judgment - yet to be established that certain codes had a uniform meaning throughout the charges, or that they were employed by the different defendants to mean the same thing both throughout the charges, or throughout an individual conversation. It is therefore possible that different persons may have used the same ‘Code’ to refer to different things. It is also possible that a person’s understanding of what is being discussed might change throughout the conversation.

61. The fact that the Prosecution is relying on intercepted communication, rather than testimony heightens the imperative of ensuring that any analysis of the conversation is not tainted by expectation bias or assumptions based on the charges. In line with the principle of individual criminal responsibility, the Chamber’s analysis as to the intent and knowledge of interlocutor A in saying X, also should not be unduly influenced or determined by a subsequent response from interlocutor B.

62. A completely assumption free approach requires that the translation should objectively reflect any differences in tenses (singular or plural), which are used by different

⁷⁹ CAR-D20-0006-1272.

⁸⁰ In the audio conversation of 6 January 2009 (CAR-D20-0006-0910), ba Roméo is mentioned at 00.29-00.31 seconds. The translation of ‘les Roméo’ (CAR-D20-0006-0613) is at line 5.

⁸¹ CAR-D20-0006-2028.

participants, or at different points of the conversation. In particular, if interlocutor A uses a lingala prefix which refers to groups or a plurality (i.e. ‘ba’), then this must be objectively reflected in this particular extract of the translation in order to reflect the possibility that at that juncture of the conversation, interlocutor A believed he was discussing a group of persons or things.

63. The inclusion of information concerning whether ‘ba’ followed by a code, should be translated as plural or singular is this germane to the Trial Chamber’s appreciation of possible meanings of different elements of the intercepted communications. .

j. Audio, translated transcripts of detention unit recordings from 2008 and 2009

64. These translations, which were prepared by the Registry language services, are relevant to the objective translation of ‘ba’ when used with ‘Romeo’,⁸² and the question as to whether certain codes (‘Romeo’, ‘*enfants*’) have either a uniform meaning, or have the meaning attributed to them by the Prosecution. From the context of the communication, it would appear that [REDACTED].⁸³

65. The time period of these communication (2008-2009) preceded the commencement of the trial process (and the related) commencement of Defence investigations.⁸⁴ After reviewing Registry reports with transcripts of the communications, the Single Judge concluded that there no evidence that Mr. Bemba had interfered in the proceedings (i.e with witnesses).⁸⁵ Accordingly, from both the context and the timing of the communications,⁸⁶ it would appear that ‘*enfants*’ and ‘Romeo’ would be unlikely to be codes, which refer to witnesses.

k. Filings from other ICC cases

66. These filings contain factual information concerning the practices and policies of the ICC on issues concerning witness payments. For example, during the hearing of 30 August

⁸² CAR-D20-0006-0911. CAR-D20-0006-0614.

⁸³ CAR-D20-0006-0910, CAR-D20-0006-1032

⁸⁴ See CAR-D20-0005-0767

⁸⁵ ICC-01/05-01/08-475, paras. 64, 74 and 75

⁸⁶ CAR-D20-0006-1031, CAR-D20-0006-0911.

2010, a neutral representative of the Registry provided objective information concerning the nature and scope of Registry payments for witnesses and intermediaries in the DRC.⁸⁷ This information is analogous to an internal Registry directive or policy on these issues.

67. The hearing of 15 September 2014 in the *Ruto et al.* case also reflects information concerning practices concerning Prosecution payments to witnesses.⁸⁸ The information referred to in the hearing was disclosed by the Prosecution to the Defence. Since the Prosecution is one organ, the Prosecution cannot dispute the authenticity and reliability of information that it has disclosed to the Defence in one case, during the course of litigation in another case.⁸⁹

l. Documents disclosed by the Prosecution

68. As noted above, the Prosecution cannot reasonably contest the authenticity of documents, which it has disclosed to the Defence. Trial Chamber VII has already deemed these documents, which concern the system and practice of payments to witnesses, to be relevant to the issues in this case.⁹⁰

69. The content is also reflective of the pressure placed by witnesses on the parties, due to the insecurity and living conditions in the region. The manner in which the parties reacted to such pressure was in turn, impacted by the resources and institutional support at their disposal,⁹¹ and the witnesses relationship with VWU.⁹²

m. Filings from the Main Case

⁸⁷ CAR-D20-0005-0048.

⁸⁸ ICC-01/09-01/11-T-136-Red-ENG

⁸⁹ Prosecutor v. Limaj et al., Case no IT-03-66-T, Decision on Joint Defence Motion on Prosecution's Late and Incomplete Disclosure, 7 June 2005, p. 25.

⁹⁰ ICC-01/05-01/13-1154, para. 12.

⁹¹ CAR-D20-0006-0591

⁹² CAR-D20-0005-0655, CAR-D20-0005-0655, CAR-D20-0006-0002. See also CAR-D21-0015-0001, which was recognised as formally submitted on 15 March 2016.

70. The authenticity of filings from the Main Case is beyond dispute.⁹³ The Defence set out an item-by-item description of relevance in the annex to its Judicial Notice Motion.⁹⁴ The relevance of the content of issues to this case has also been recognised by Trial Chamber III.⁹⁵

71. As concerns Defence filings which include factual submissions, the Defence for Mr. Bemba in the Article 70 case is not in a position to verify or attest to the accuracy or truthfulness of such submissions. Nonetheless, as underscored in the Judicial Notice Motion, the fact that the Defence made such submissions, and the related rulings of the Trial Chamber, are relevant to the context in which the charged conduct took place.

72. Finally, the Defence requests to admit the transcripts of a linguistic expert, who testified in the Main Case, in relation to discrete aspects of his testimony concerning the meaning of the word ‘ba’, when it precedes something.⁹⁶ In particular, in response to a question as to what the word ‘Bantu’ signifies, the expert testified that,

Bantu is a term that was coined from the word “ntu”, which means person and whose plural is “Bantu; “”Ba” meaning the plural marking and “ntu” meaning the root or the core part.⁹⁷

73. The expert is admitted on the ICC list of experts,⁹⁸ and delineated his qualifications in the area of linguistics while under oath.⁹⁹ The Prosecution did not challenge his qualification to provide expert testimony concerning linguistic issues concerning Lingala. Although he was called as a Defence expert, his testimony preceded the Article 70 case, and as such, it would not have been prejudiced or impacted by any Defence interests concerning the interpretation of the word ‘ba’. It is also corroborated by other evidence concerning the definition of ‘ba’.¹⁰⁰

74. Finally, the admission of this discrete expert will occasion no prejudice to the parties. The Prosecution was afforded any opportunity contest the expert’s linguistic credentials in 2012, but did not do so. Given that it concerns linguistic advice on the objective definition

⁹³ ICC-01/05-01/13-1473, para. 3.

⁹⁴ ICC-01/05-01/13-1728-Conf-AnxA-Corr

⁹⁵ ICC-01/05-01/08-3331-Corr, paras. 24 and 25; ICC-01/05-01/08-3334, para. 5.

⁹⁶ CAR-D20-0006-2030 at 2048 lines 6-8.

⁹⁷ CAR-D20-0006-2030 at 2048 lines 6-8.

⁹⁸ <https://www.icc-cpi.int/iccdocs/PIDS/other/180815-List-of-Experts-Eng.pdf>

⁹⁹ CAR-D20-0006-2030 at 2036.

¹⁰⁰ CAR-D20-0006-2028, CAR-D20-0006-2063, CAR-D20-0006-2028, CAR-D20-0006-1272.

of a specific word, it is also not analogous to testimony on the facts and circumstances of a case; in effect, it is more analogous to an extract from a dictionary, but is of heightened evidential value due to the fact that the information was provided under oath, and the credentials of the expert were vetted by the ICC Registry.

75. For the same reasons adduced in connection with other filings from the Main case,¹⁰¹ the Defence requests in the alternative that the Trial Chamber take judicial notice of its contents. Given that this specific extract is analogous to a dictionary, judicial notice would be consistent with the findings of Judge Hunt in the *Milosevic* case that judicial notice can be afforded to extracts from dictionaries and atlases.¹⁰² It would also be consistent with ICC Chamber's reliance on such information, notwithstanding the absence of prior disclosure to parties, or the introduction of such information into the case record.¹⁰³

Relief sought

76. For the reasons set out above, the Defence respectfully requests the Honourable Trial Chamber to grant the Application.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 18th day of April 2016

The Hague, The Netherlands

¹⁰¹ ICC-01/05-01/13-1728

¹⁰² *Prosecutor v. Milosevic*, Dissenting Opinion of Judge Hunt, 'Decision on the prosecution's interlocutory appeal against the Trial Chamber's 10 April 2003 decision on prosecution motion for judicial notice of adjudicated facts', 28 October 2003, para. 8.

¹⁰³ See above, para. 16.