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Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO**

Public Redacted Version

**Motion on behalf of Aimé Kilolo Musamba pursuant to Article 69(7) of the
Statute to exclude evidence obtained in violation of the Statute and/or
internationally recognized human rights (ICC-01/05-01/13-1796-Conf).**

Source: Defence for Mr. Aimé Kilolo Musamba

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

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I. Introduction

1. On 9 March 2016 the Trial Chamber ordered that all submissions pursuant to Article 69(7) seeking the exclusion of evidence obtained in violation of the Statute and/or internationally recognized human rights shall be filed by 8 April 2016.¹
2. The Defence for Mr Aimé Kilolo hereby seek exclusion of:
 - (i) All evidence obtained from Western Union; and
 - (ii) All telephonic and intercepted telecommunications evidence.
3. Such exclusion is premised on the basis that such evidence was obtained by means in violation of both the Statute and internationally recognized human rights standards.

II. Relevant legal principles

4. Article 69(7) of the Statute provides:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of proceedings.

¹ ICC-01/05-01/13-T-42-CONF-ENG ET p. 43 lines 1 to 5 and in ICC-01/05/13-1753 at para. 10.

5. The Trial Chamber has previously held that, in considering applications pursuant to Article 69(7) of the Statute, the Chamber will:

[F]irst consider whether the Prosecution obtained the [evidence] in violation of the Court's statutory scheme or internationally recognized human rights. If such a violation is determined, the Chamber will then consider whether this violation 'casts substantial doubt on the reliability of the evidence' or whether the admission of the evidence 'would be antithetical to and would seriously damage the integrity of its proceedings'.²

6. In *Lubanga*³ the Trial Chamber considered the admissibility of evidence under Article 69(7) of the Statute in circumstances where evidence was obtained pursuant to an illegal search and seizure in the Democratic Republic of Congo.⁴
7. The domestic authorities searched the private home of a member of the accused's political party, in the presence of an OTP investigator, when that person was not present.⁵
8. The Trial Chamber held this to be in breach of the person's right to privacy and that a breach of any human rights, regardless of severity, could trigger the application of Article 69(7).⁶

² ICC-01/05-01/13-1257 at para. 9 [Emphasis added].

³ ICC-01/04-01/06-1981.

⁴ ICC-01/04-01/06-1981 at para. 35.

⁵ ICC-01/04-01/06-1981 at para. 35.

⁶ ICC-01/04-01/06-1981 at para. 35.

9. In determining whether such breach undermined the reliability of the evidence or is antithetical to/would seriously damage the integrity of the proceedings, the Chamber held that the probative value of the evidence, or the gravity of the crimes charged, should not be taken into account.⁷
10. In holding the material to be admissible the Chamber held that the integrity of the proceedings were not in any way undermined as, notwithstanding the presence of the OTP investigator, he had not been able to influence the search and there was no evidence he himself had acted in bad faith. Thus, the illegal conduct had been carried out by the Congolese authorities and did not directly implicate any member of the OTP.⁸
11. Moreover, and importantly, as it was the rights of someone other than the accused that had been violated the impact on the integrity of the proceedings was not as severe as it might have been.⁹ Moreover, notwithstanding the breach of rights, the Chamber held that the violation did not affect the reliability of the evidence in that particular case.¹⁰
12. Rule 95 of the Rules of Procedure and Evidence of the ICTY (Exclusion of Certain Evidence), is in similar terms to Article 69(7) of the ICC Statute. Pursuant to ICTY Rule 95 evidence shall not be admitted 'if obtained by methods which cast substantial doubt on its reliability or its admission is antithetical to, and would seriously damage, the integrity of the proceedings'.

⁷ ICC-01/04-01/06-1981 at paras. 43-44.

⁸ ICC-01/04-01/06-1981 at paras. 46-47.

⁹ ICC-01/04-01/06-1981 at para. 47.

¹⁰ ICC-01/04-01/06-1981 at para. 40.

13. Thus, as with Article 69(7), illegality in the manner in which evidence is obtained will only lead to its exclusion if there is a concomitant impact on either the reliability of the evidence or the integrity of the proceedings.¹¹

14. Article 8 of the European Convention of Human Rights¹² provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

15. The Trial Chamber has previously stated:

The fact that international human rights law affords a right to privacy is beyond question and the Chamber is duty-bound to respect this right pursuant to Article 21(3) of the Statute. The exercise of this right may not be interfered with except 'in accordance with the law'. Being 'in accordance with the law' for reviewing interference with the right to privacy requires, among other things, that: (i) the measure or measures in question should have some basis in law; (ii) the law in question should be accessible to the person concerned and foreseeable as to its effects; and (iii) as regards foreseeability, the law must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons

¹¹ Confirmed in *Kordic and Cerkez* IT-95-14/2, Hearing 2 February 2000, T13694, Lines 8-21.

¹² Similar safeguards are set out in Art. 17 of the ICCPR and Art. 11 of the IACHR.

*concerned – if need be, with appropriate advice – to regulate their conduct.*¹³

16. With regards the need to comply with domestic law and procedure, Article 99(1) of the Statute provides *inter alia*:

Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

17. Article 99(1) therefore requires requests for assistance to be conducted in accordance with the relevant procedure under the law of the requested State.

18. The inviolability of domestic law when executing such requests is further highlighted by the stipulation in Article 99(1) that the manner specified in the request need not be complied with if it is ‘prohibited by [the law of the requested State]’.

19. It has been noted that Article 99(1) ‘recognises that the procedures of national law will be used to execute ... request[s]’.¹⁴ During negotiations in Rome it was a generally accepted view that ‘national procedural law would have to apply to the execution of requests’.¹⁵ As a result, ‘States

¹³ ICC-01/05-01/13-1257 at para. 16.

¹⁴ *Commentary on the Rome Statute of the International Criminal Court* ed. Otto Triffterer at p. 1137 para. 6.

¹⁵ *Ibid.*

must have procedures under national law for all forms of cooperation specified.¹⁶

20. Importantly, it has been recognized that ‘it may be that to carry out a specific measure in accordance with procedures of national law, such as search and seizure, the requested State will need certain particular information *i.e.* enough to meet a domestic standard’. To accommodate this, Article 96(3) obliges States, upon the request of the Court, to inform the Court about any particular requirements of the applicable law.¹⁷ Thus, it is clear that, in the execution of such requests, ensuring compliance with domestic law is a requirement of that Statute.

III. Inadmissibility of Evidence of Western Union Money Transfers

(i) *Material obtained in violation of the Statute and internationally recognized human rights*

21. It is plain that the OTP sought to and obtained evidence from Western Union in advance of having in place any appropriate and applicable order.

22. In short, the upshot of what has occurred in this case is that an OTP investigator has, absent any kind of appropriate authorization or order, procured details of a counsel’s banking transactions during the course of ongoing proceedings in which that counsel was appearing against the OTP. Such *ad hoc*, rogue, behavior is untenable.

¹⁶ *Ibid.*

¹⁷ *Ibid* at para. 7.

23. It is important to highlight, at this stage, the chronology and manner in which the parties were first alerted to the fact that the OTP in this case received material from Western Union absent a requisite order. It was not as a result of timely and voluntary disclosure by the OTP.

24. During the course of his examination in chief on 2 November 2015 Mr Smetana (P-267) was asked:

Q: Was Western Union requested to provide information about money transfers in this case?

A: Yes. I have received from the Austrian prosecutor an order to release this data. And if necessary, I even have it with me in my – in my bag, so ...

Q: So I take it that you got a request via the Austrian authorities?

A: Exactly.

Q: And to whom did you provide the information once you've complied with the request?

A: Actually, directly to the address in the – for the Austrian court, it's in the Landesgerichtsstrasse, if you need that too.

Q: No, that – that will be fine.¹⁸

25. The clear impression created, as can be seen from the exchange above, was that material was provided only pursuant to an applicable order.

¹⁸ ICC-01/05-01/13-T-33-ENG ET WT at p. 22 lines 11 to 21.

26. On hearing that the witness had a copy of the relevant order with him, the Defence for Mr Kilolo requested to receive a copy and the Presiding Judge indicated that it was appropriate for the witness to so provide it.¹⁹

27. On the second day of his testimony Mr Smetana confirmed, unequivocally, that he considered himself regulated by Austrian law.²⁰ Moreover, and importantly, that pursuant to Austrian law, it is only when a court order or an order from the Prosecutor is received that Western Union is permitted to release information.²¹ He reiterated:

*If the order comes from the Court and it's signed by the Prosecutor, then we can release this information.*²²

28. Mr Smetana appreciated the importance of receiving an order and stipulated that prior to any such order material details were not provided:

Q: So is it correct, Mr Witness, that Western Union informed the Prosecution of the contents of certain transactions?

A: We informed of the contents, but did not -- we didn't give the details away before we have received official documents from the Prosecution.

Q: So you gave the names and the contents of the amounts?

*A: Not, not at that time we give this away until we get the Austrian Prosecutor's writing and letter.*²³

¹⁹ ICC-01/05-01/13-T-33-ENG ET WT at p. 34 lines 8 to 15.

²⁰ ICC-01/05-01/13-T-34-ENG ET WT at p. 5 lines 4 to 11.

²¹ ICC-01/05-01/13-T-34-ENG ET WT at p. 5 lines 4 to 11.

²² ICC-01/05-01/13-T-34-ENG ET WT at p. 6 lines 7 to 8 [Emphasis added].

²³ ICC-01/05-01/13-T-34-ENG ET WT at p. 29 line 24 to p. 30 line 5.

29. Mr Smetana clearly stated that “I didn’t provide anything prior to up to the time I get the official letter”.²⁴

30. He confirmed that the official authorization request was dated 8 November 2012²⁵ and [REDACTED].²⁶

31. It will be recalled that, on 2 November 2015, just prior to the commencement of Mr Smetana’s testimony, the Prosecution stated:

*We’re quite convinced that the Defence has everything that they’re entitled to have in respect of testing the legality, if it’s an issue even in this case, of the acquisition of the Western Union material.*²⁷

The Prosecution undertook to ascertain if there was additional correspondence.²⁸ There was, of course, at that stage, no mention of disclosing the Austrian order as it was the witness himself who later volunteered it.

32. Towards the end of the witness’ second day of testimony the Prosecution belatedly confirmed that there was, in fact, further relevant correspondence.²⁹

33. As the disclosed email correspondence made clear, and as reluctantly accepted by Mr Smetana, Western Union material was provided to the

²⁴ ICC-01/05-01/13-T-34-ENG ET WT at p. 38 line 3.

²⁵ ICC-01/05-01/13-T-34-ENG ET WT at p. 38 line 13, referring to CAR-D24-0002-1349.

²⁶[REDACTED].

²⁷ ICC-01/05-01/13-T-33-ENG ET WT at p. 6 lines 8 to 10.

²⁸ ICC-01/05-01/13-T-33-ENG ET WT at p. 11 lines 18 to 20.

²⁹ ICC-01/05-01/13-T-34-ENG ET WT at p. 43 lines 13 to 15 and p. 61 lines 22 to p. 63 line 6.

OTP well before any appropriate authorization on 15 November 2012.³⁰

[REDACTED]³¹ and [REDACTED]³² (if not before) and [REDACTED].³³

34. On Mr Smetana's own evidence it is clear that information was provided by Western Union to the OTP absent the requisite authorization.

35. That such conduct is contrary to Austrian law was reinforced by the expert report and testimony of Professor Otto Lagodny (D23-P-0001).

[REDACTED]:

[REDACTED].³⁴

36. [REDACTED].³⁵

37. [REDACTED]:

[REDACTED].³⁶

38. Professor Lagodny's evidence is unequivocal.

39. Given Mr Smetana's clear and unchallenged evidence that it was the law of Austria that governed the OTP's request and Western Union's provision of information,³⁷ it ill behooves the Prosecution to now claim that it may be Irish, or indeed any other law that in fact applies.³⁸

³⁰ ICC-01/05-01/13-T-35-ENG ET WT at p. 47 line 8 to p. 72 line 4.

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ ICC-01/05-01/13-T-34-ENG ET WT at p. 5 lines 4 to 11.

³⁸ ICC-01/05-01/13-T-44-ENG ET WT at p. 26 line 16, referring to CAR-OTP-0093-0239. See also CAR-OTP-0093-0217.

40. If no such order was required pursuant to Austrian law, as may now be claimed, it begs the question as to why such an order was both sought and belatedly obtained.
41. The same rationale applies to the Prosecution's attempt to now assert that Western Union transactions contain an inherent waiver to the applicability of banking secrecy,³⁹ and that Article 38(5) of the Austrian Banking Act does not apply 'if the consumer grants his or her express written consent to the disclosure of secrets'.⁴⁰
42. Again, if no order was required under Austrian law, why was one ultimately obtained?
43. It is also of note that, even the order ultimately provided gives rise to concern. [REDACTED].⁴¹ [REDACTED].⁴² This is apposite as under Austrian Cooperation Act⁴³ does not provide for judicial assistance with the ICC for Article 70 investigations.
44. Obtaining evidence from Western Union without the requisite order was in violation of both the Statute and internationally recognized human rights standards.
45. In light of the above, it is plain that evidence obtained in violation of Austrian law was not obtained in accordance with the requirement in Article 99(1) of the Statute which requires that 'requests for assistance

³⁹ ICC-01/05-01/13-T-44-ENG ET WT at p. 40 line 24 referring to CAR-OTP-0093-0217.

⁴⁰ ICC-01/05-01/13-T-44-ENG ET WT at p. 32 line 18.

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ Federal Law no. 135: Cooperation with the International Criminal Court (13 August 2002).

shall be executed in accordance with the relevant procedure under the law of the requested State’.

46. Moreover, it is plain that information concerning Western Union transfers made by any accused constitutes, *prima facie*, an interference with the right to privacy. Such interference will only be permissible if, *inter alia*, it is ‘in accordance with the law’.

47. It is self-evident that material obtained in violation of Austrian law cannot be said to have been obtained ‘in accordance with the law’. There has therefore been a clear violation of the right to privacy.

(ii) *Admission of the evidence would be antithetical to and would seriously undermine the integrity of the proceedings*

48. In contrast to the situation in *Lubanga*, in this case the violations in question did not arise in spite of but as a direct result of OTP conduct.

49. Unlike *Lubanga*, where the OTP investigator was held to have been unable to influence the illegality of the search, in this case it was the OTP that instigated it.

50. Moreover, unlike *Lubanga*, this case involves material obtained in direct violation of the rights of the accused, not simply a third party.

51. If the Trial Chamber upholds a finding that material was first obtained without the requisite order being in place, in the absence of evidence to the contrary, the inescapable conclusion is that those in the OTP requesting the material must have known that there was no lawful basis for doing so.

52. Efforts made to seek such an order after the material was provided strongly militates towards a finding that it was plainly appreciated by those concerned that such an order was required. Mr Smetana confirmed as much in his evidence before the Trial Chamber.⁴⁴

53. The integrity of these proceedings is further undermined by virtue of the very important significance of the Western Union material. It formed the bedrock of the Prosecution's case in seeking and securing judicial assistance to obtain evidence for the Article 70 investigation⁴⁵ with the Prosecution asserting the Mr Kilolo and Mr Mangenda may have been paying witnesses while they were at the seat of the Court.⁴⁶ It was on this basis that the Prosecution sought to justify the collection of electronic communications.⁴⁷

54. That the inception of this case is rooted in conduct contrary to both the Statute and internationally recognized human rights standards is completely antithetical to and undermines the integrity of these proceedings.

⁴⁴ ICC-01/05-01/13-T-34-ENG ET WT at p. 6 lines 7 to 8.

⁴⁵ ICC-01/05-46 Conf-Exp at para. 1 (dated 8 May 2013), referring in footnote 6 to ICC-01/05-44 Conf-Exp, paragraphs 3 and 4.

⁴⁶ ICC-01/05-51-Conf at para. 21.

⁴⁷ ICC-01/05-51-Conf at para. 21.

IV. Inadmissibility of Telephonic and Intercept Evidence

55. It is acknowledged that the Trial Chamber has previously rejected Defence submissions regarding the inadmissibility of the intercept evidence pursuant to Article 69(7).⁴⁸

56. It follows that for the intercepted evidence to now be considered inadmissible there must have been some material development in the matters presented to the Trial Chamber for consideration.

57. It is respectfully submitted that the following three matters are of importance in this regard:

- (i) That the inception of the investigation, and the trigger for commencing the intercept process, is tainted by the unlawfulness set out above in relation to the Western Union material;
- (ii) The non-existent protection against the disclosure of potentially privileged material as described by former Dean of the Bar, Bas Martens; and
- (iii) The evidence of the Prosecution's expert witness, Mr Rene Pluijmers (P-0361), as to the limitations of his ability in identifying the telephone and intercept evidence as authentic.

Each will be considered in turn.

⁴⁸ ICC-01/05-01/13-1257 and ICC-01/05-01/13-1284 and ICC-01/05-01/13-1425.

(i) Tainted trigger for investigation

58. It is apparent that the investigation in this case was instigated by the OTP on the basis of the Western Union transactions.⁴⁹

59. The tainted manner in which that material was first obtained, as set out above, casts a shadow over all evidence and material subsequently obtained as a result of reliance on that material in seeking authorization for the steps in the investigation thereafter. That resulted the telephonic and intercept evidence obtained by the OTP.

60. The Prosecution should not be permitted to benefit from their cavalier approach to the requirements of the Statute and internationally recognized human rights standards.

(ii) The information provided by [REDACTED]

61. [REDACTED].⁵⁰

62. [REDACTED].⁵¹[REDACTED].⁵²

63. [REDACTED].⁵³

⁴⁹ ICC-01/05-46 Conf-Exp at para. 1 (dated 8 May 2013), referring in footnote 6 to ICC-01/05-44 Conf-Exp, paragraphs 3 and 4 and ICC-01/05-51-Conf at para. 21.

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

64. Prior to their arrest, the accused in this case were not aware that their potentially privileged communications were being intercepted and monitored. [REDACTED].⁵⁴

65. [REDACTED].⁵⁵[REDACTED].⁵⁶

66. [REDACTED]⁵⁷

67. [REDACTED]⁵⁸, this does not answer the fact that he was not even afforded any such opportunity. It follows that an important safeguard that should have been afforded the accused in this case was not in place.

(iii) Failure to call best evidence and doubt as to the authenticity of telecommunications and intercept evidence.

68. Rather than present witnesses from either the telecommunication service providers or those directly involved in the interception process, the Prosecution opted to try and verify the authenticity of the various material through an expert witness – Mr Pluijmers.

69. Mr Pluijmers quite properly accepted the limitation of his role, he was not himself involved in obtaining the call data records nor was he involved in obtaining the intercepted communications.⁵⁹

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ ICC-01/05-01/13-T-17-CONF-ENG ET at p. 12 lines 17 to 22 and at p. 15 lines 18 to 21.

70. He could therefore not be 'sure' that the CDR materials had been provided by the ten telecom service providers, the most he could say is that it is was either 'likely' or 'highly likely' that they had been generated by the respective telecom service providers.⁶⁰ The only way he could be sure is in circumstances when he 'receive[s] the information directly from the [telecom service provider]'.⁶¹

71. Similarly, in relation to the intercept material, the highest he could put it is that it is 'highly likely' that the material derived from the stated source.⁶² It follows that, as with the CDR, Mr Pluijmers could not be 'sure'.

72. Article 66(2) provides that the 'onus is on the Prosecutor to prove the guilt of the accused'. Article 66(3) provides that 'in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt'.

73. It was of course open to the Prosecution to present such evidence through either the telecom service providers or those involved in the interception process. Their failure to do so has denied the Defence an opportunity to properly and fully challenge such evidence.

74. Any shortcomings in the process this may have highlighted is perhaps best exemplified by the shortcomings that became apparent during the course of testing the propriety of the manner in which the Western Union evidence had been obtained through Mr Smetana. The Defence were denied a similar such opportunity in relation to the manner in which the CDR's and intercepts were obtained.

⁶⁰ ICC-01/05-01/13-T-17-CONF-ENG ET at p. 13 lines 3 to 12.

⁶¹ ICC-01/05-01/13-T-17-CONF-ENG ET at p. 13 lines 13 to 23.

⁶² ICC-01/05-01/13-T-17-CONF-ENG ET at p. 15 lines 2 to 15.

(iv) Serious doubt on the reliability of the evidence and/or antithetical to and would seriously damage the integrity of the proceedings

75. The cumulative shortcomings set out above result in there being serious doubt as to the reliability of the CDR and intercept evidence. Plainly, the Court cannot be more convinced than the witness as to the reliability and provenance of the material, if Mr Pluijmers could not be 'sure', neither can the Court be satisfied beyond reasonable doubt.

76. Moreover, the cumulative short comings in the manner in which the CDR's and intercept evidence was obtained renders it a breach of the right to privacy and admission antithetical to the integrity of the proceedings.

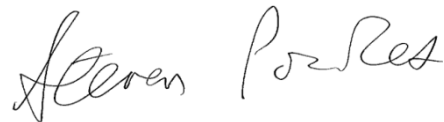
RELIEF REQUESTED

1. The Defence for Mr Aimé Kilolo respectfully request the Trial Chamber find that (i) the Western Union evidence, and (ii) the telephonic and intercepted communications are inadmissible pursuant to Article 69(7) of the Statute.

RESPECTFULLY SUBMITTED.



Maître Paul Djunga Mudimbi
Lead Counsel of Mr. Aimé Kilolo Musamba



Mr. Steven Powles
Associate Counsel of Mr. Aimé Kilolo Musamba

Dated this 3 May 2016,
At The Hague, The Netherlands.