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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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

Public Redacted Document

**Public redacted version of "Prosecution's Response to the Bemba Defence's
Request for Admission of Documents through a Bar Table Motion," 25 April 2016,
ICC-01/05-01/13-1841-Conf-Exp**

Source: The Office of the Prosecutor

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

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell

Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Ms Beth Lyons

The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
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States Representatives**Amicus Curiae****REGISTRY****Registrar**

Mr Herman von Hebel

Counsel Support Section**Victims and Witnesses Unit**

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section	Others
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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the admission of most of the items tendered through Bemba Defence’s Request for Admission of Documents through a Bar Table Motion (“Bemba Motion”)¹ for either lack of *prima facie* relevance, or probative value. These items relate to general issues and background and are not responsive to the allegations against the Accused.

2. The Prosecution’s position concerning each group of documents or, where applicable, individual items of evidence are particularised below. It otherwise defers to the Chamber’s discretion in respect of the admissibility of the remaining documents.

II. Confidentiality

3. This filing is submitted as “Confidential, *ex parte*, only available to the Prosecution and Bemba Defence as it contains information related to a protected witness in the ICC-01/05-01/08 case (“Main Case”). A “Confidential Redacted” version is being filed concurrently, as it responds to a confidential Defence designation. A “Public Redacted” version will be filed thereafter.

III. Applicable Law

4. The submissions on the applicable law as set out at paragraphs four and five of the “Prosecution’s Response to Babala’s Request for the Admission of Evidence from the Bar Table Motion (ICC-01/05-01/13-1781-Conf)”² are incorporated by reference herein.

¹ ICC-01/05-01/13-1794-Conf-Corr with Confidential Annex A, ICC-01/05-01/13-1794-Conf (“Annex A”).

² ICC-01/05-01/13-1821-Conf, paras. 4-5.

IV. Submissions

A. Open source articles and photographs³

5. *Code “village”*: The Prosecution does not contest the existence of a mausoleum built for Bemba’s father or its location in Gemena, the Democratic Republic of the Congo (“DRC”).⁴ However, the Defence fails to establish the link with the meaning of the code “*Village*” through these items. In particular, these items do not demonstrate that the mausoleum was being built at the specific time that the relevant telephone conversations between the Accused from the Detention Unit (“DU”) took place.⁵ To the contrary, the Prosecution has adduced evidence showing that the code refers to the Central African Republic (“CAR”), or CAR nationals.⁶ Moreover, the Bemba Defence has already conceded that this term was used to denote CAR nationals, including Defence witnesses exiled in Cameroon.⁷

6. *Code “[REDACTED]”*: As the Bemba Defence is fully aware,⁸ there is concrete and dispositive information contained in the conversation CAR-OTP-0086-0921, dated 21 January 2013, that the term “[REDACTED]” Babala refers to therein denotes a specific individual, witness D-66 in the Main Case, by the name [REDACTED]. The witness testified from 30 November to 4 December 2012 in the Main Case as the last

³ Generally, the Prosecution has attempted to follow the structure of the Bemba Motion in addressing its arguments. However, this was not always possible because a) some of the documents listed at Annex A under a specific category are sometimes discussed under a different category in the Motion, or not discussed at all in the Motion; and b) some of the same arguments are discussed in relation to different categories in the Motion. In this case, for ease of the argument, the Prosecution has addressed the arguments in relation to the items tendered to demonstrate that the Prosecution’s translation of the code “Romeo” is incorrect, below, in paras. 31-32.

⁴ CAR-D20-0006-0001, CAR-D20-0006-0053, CAR-D20-0006-0054. See Bemba Motion, para. 16.

⁵ The Defence refers to a conversation, CAR-OTP-0074-0374, that the Prosecution never submitted into evidence. See, ICC-01/05-01/13-1794-Conf-AnxA, p. 3, row 2, CAR-D20-0006-0053.

⁶ ICC-01/05-01/13-1110-Conf-AnxA, paras. 147-150.

⁷ ICC-01/05-01/13-599-Conf, para. 128. See also ICC-01/05-01/13-1110-Conf-AnxA, para. 147, fn. 297.

⁸ *Contra* Annex A, CAR-D20-0006-0689, CAR-D20-0006-0696, CAR-D20-0006-0698, and CAR-D20-0006-0700.

witness before that winter recess, and before that conversation took place.⁹ Considering the protected status of this witness in the Main Case, and that this contention was never directly challenged by the Bemba Defence,¹⁰ the Prosecution has not sought to lift the identity of this witness. It is not appropriate for the Defence (who is well aware of this information) to attempt to capitalize on the Chamber's likely unfamiliarity with this fact to argue that the Prosecution's interpretation is unfounded. If the Chamber deems it necessary, the Prosecution is prepared to seek leave from Trial Chamber III to vary the protective measures accorded to D-0066 to allow a full vetting of the arguments on this point.

B. Open source NGO/IGO reports

7. The Prosecution opposes the admission of the four documents submitted in this category. None of the documents are probative of any contested issue. Two of the items, comprising an International Bar Association ("IBA") commentary on the draft Code of Professional Conduct for Counsel are submitted as "relevant to the understanding of the drafters concerning the distinction between the obligations of Counsel and those of the client" and "differences in legal opinion concerning ethical obligations".¹¹ These two documents represent only a set of recommendations, and their relevance to salient issues in the case is unclear, at best. The Bemba Motion does

⁹ See, ICC-01/05-01/08-T-279-CONF-ENG ET to ICC-01/05-01/08-T-281-CONF-ENG ET. The Prosecution argued this in ICC-01/05-01/13-1113-Conf-AnxA, row 74. Given the protected status of this individual, the Prosecution did not explicitly put an emphasis on the details of the conversation that show clearly that the two Accused [REDACTED], with Babala [REDACTED]. Namely, Babala informed Bemba in this conversation that the witness is supposed to go "to the country to visit the children that COLLEGUE has asked him to see". He then mentioned that the "[REDACTED] du pays" had already testified or, literally had been to visit Kilolo at the "White House" ("*celui du COLLEGUE D'EN HAUT*" », "*il n'y a pas longtemps il était chez le COLLEGUE D'EN HAUT, dans la maison blanche*"), and that he was going to visit other witnesses ("*enfants*") as KILOLO asked him. For the interpretation of the code "*la maison blanche*" as ICC, see, ICC-01/05-01/13-1110-Conf-AnxA, para. 187, fn 393. [REDACTED].

[REDACTED].

The witness himself confirmed that [REDACTED], during his testimony: see ICC-01/05-01/08-T-279-CONF-ENG ET, p. 54, ln. 25 – p. 55, ln. 5.

¹⁰ See ICC-01/05-01/13-1199-Conf-AnxA, p. 31, row 74.

¹¹ CAR-D20-0006-0436; CAR-D20-0006-0446.

nothing to elucidate their relevance.

8. The document “Best Practices applicable at SCSL”,¹² which describes forms of assistance and the importance of preparation to the well-being of witnesses before another international tribunal, has absolutely no relevance to this case. The Chamber has already found this type of information irrelevant in rejecting the proposed testimony of Kilolo Defence witness D21-0001 on the basis that it did not consider that it required “general background on the challenges and practical realities of international defence counsel for purposes of its Article 74 decision.”¹³ Moreover, no value can be attached to evidence related to the “importance of thorough preparation for cross-examination”.¹⁴ The Defence suggestion that illicit coaching in the Main Case might have been acceptable as in accordance with best practices before another court, does not withstand scrutiny in absolute terms, and even more so, given the specific and express prohibition of witness preparation in the Main Case.¹⁵

9. Similarly, the IBA report on Counsel Matters at the International Criminal Court¹⁶ also provides only a general overview of some main issues concerning the role of (*inter alia*) Defence counsel at the Court. It is not capable of demonstrating whether any of the issues it discusses – even, if accepted as true – had a material impact on the Accused’s conduct in the Main Case.

C. Open source ICC reports

10. Under this category, the Defence submits a report on the review of allegations of sexual assault of four victims under the protection of the ICC in the DRC by a Court staff member, commissioned in relation to allegations that arose during the

¹² CAR-D20-0006-0555.

¹³ ICC-01/05-01/13-1600, para. 9.

¹⁴ Annex A, p. 9, row 3.

¹⁵ ICC-01/05-01/08-1016, para.34.

¹⁶ CAR-D20-0006-0712.

Lubanga case.¹⁷ The Prosecution opposes the admission of this report. The Bemba Defence arguments are not only misleading, but have no relevance to this case. *First*, the report does not put the emphasis on the DRC field office as “dysfunctional”, but refers to dysfunctionality in relation to general shortcomings in VWU’s management.¹⁸ *Second*, the report does not refer to the “negative reputation” of VWU staff originating from a police background. Instead, it refers to the negative reputations of police among civilian populations, not specifically related to the DRC, or to VWU staff.¹⁹ *Third*, none of its contents shows any discernible link to this case.

D. Open source documents issued by the ASP

11. The Prosecution opposes the admission of the four documents tendered under this category,²⁰ related to the position of the Court with respect to the responsibility of the parties for the acts of intermediaries used to facilitate the collection of evidence or contacts with witnesses, as well as their legal status.²¹

12. The Defence fails to articulate a link between the content of these documents and any salient issue in this case, and it does not specify which “intermediaries” it has in mind.²² In any event, while a party acting in good faith cannot be held responsible for acts of intermediaries, this plainly cannot apply to situations where a party *knowingly* acts pursuant to a common criminal plan to corrupt witnesses and present false evidence in court or is aware of others’ such acts.

¹⁷ CAR-D20-0006-0002. The report is also attached to a *Lubanga* filing, ICC-01/04-01/06-3055.

¹⁸ See CAR-D20-0006-0002 at 0005-0006.

¹⁹ See CAR-D20-0006-0002 at 0006.

²⁰ CAR-D20-0005-0514, CAR-D20-0005-0537, CAR-D20-0005-0544, CAR-D20-0005-0550.

²¹ Bemba Motion, paras. 27-31.

²² *Contra* Annex A, pp. 12-13.

E. Correspondence between the Bemba Defence and ICC sections, and related documentation

13. The Prosecution opposes most of the documents tendered by the Defence in this category. Most of these items do not demonstrate a link with the factual allegations brought against the Accused, but amount to generic arguments, several of which the Prosecution has previously addressed in other filings.²³

i. Correspondence with the CSS

14. Most of the documents submitted in this category²⁴ generally relate to the funding available to the Defence from the Court, the costs the Defence incurred during their missions, and the resultant alternative means of funding it had to gather.²⁵ As such, the Defence does not present a specific factual or legal nexus to a contestable issue in the case to justify the admission of these records. Just like the records regarding the Prosecution's payment practices to witnesses,²⁶ the overall financial position of the Bemba Defence during the Main Case – whether precarious or not – has no bearing on the individual criminal behaviour of the Accused charged in this case. Regardless of what the reimbursement scheme for witnesses was in the Main Case, it is clear that paying witnesses in exchange for their false testimony is proscribed before this Court. The same applies to the records purporting to show a

²³ See, for example, ICC-01/05-01/13-1720-Conf; ICC-01/05-01/13-1833-Conf; ICC-01/05-01/13-1737-Conf-Corr.

²⁴ The Bemba Defence also tenders in another subcategory, for similar purposes, document CAR-D20-0005-0352 regarding the Practices of reimbursement in VWU; as well as CAR-OTP-0072-0508_R02, and CAR-OTP-0083-1327-R02, submitted in Category M as reflected in Annex A, for the purpose of showing the system and practices of payments for witnesses in the Main Case. See, Bemba Motion, para. 35 viii.

²⁵ 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; CAR-D20-0005-0270; CAR-D20-005-0276; CAR-D20-0005-0280; CAR-D20-0005-0281; CAR-D20-0005-0214; CAR-D20-0005-0249; CAR-D20-0005-0284; CAR-D20-0005-0285; CAR-D20-0005-0559; 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.

²⁶ See ICC-01/05-01/13-1720-Conf, in particular, paras. 4-8.

lack of a clear remuneration scheme for intermediaries at the Court.²⁷

15. Separately, the documents that show that certain witnesses were lodged together in Cameroon, simply confirms that these witnesses were in contact with each other, and does not bear on, let alone refute, allegations that the Accused illicitly coached them.²⁸ Additionally, document CAR-D20-0005-0288 does not show what it purports to and should be dismissed for lack of relevance.²⁹

16. The Prosecution does not oppose the admission of the documents showing Kilolo's dates on missions in the DRC,³⁰ nor those tendered to show chain of custody.³¹

17. The Prosecution further does not oppose the admission of documents CAR-D20-0006-1283 and CAR-D20-0006-1295, both referred to by witness D20-0002.³²

ii. Communications with the Victims and Witnesses Unit

18. The Prosecution opposes the admission of the documents related to the official authorisation required for Defence witnesses in the Main Case, including D-0054 and D-0013,³³ as well as documents showing logistical difficulties in obtaining the witnesses' attendance in court.³⁴ Aside from the fact that some of these records do not

²⁷ CAR-D20-0006-2000; CAR-D20-0006-2004; CAR-D20-0006-2015.

²⁸ CAR-D20-0005-0285.

²⁹ Does not go to the issue it purports to, namely the security concerns and interference by defence. In any event, this issue is plainly irrelevant to this case.

³⁰ CAR-D20-0005-0222; CAR-D20-0005-0239; CAR-D20-0005-0246.

³¹ CAR-D20-0005-0428, CAR-D20-0005-0766.

³² However, see, ICC-01/05-01/13-1833-Conf, *in particular* paras. 7-13, 33-44; ICC-01/05-01/13-1737-Conf-Corr; *see also*, ICC-01/05-01/13-1753, ICC-01/05-01/13-1633.

³³ CAR-D20-0005-0732; CAR-D20-0005-0670; CAR-D20-0005-0598; CAR-D20-0005-0608; CAR-D20-0005-0627; CAR-D20-0005-0655; CAR-D20-0005-0682; CAR-D20-0005-0470 (this document in fact shows that authorisation was given); CAR-D20-0005-0632; CAR-D20-0005-0717; CAR-D20-0005-0001.

³⁴ CAR-D20-0005-0722; CAR-D20-0005-0670; CAR-D20-0005-0673; CAR-D20-0005-0682; CAR-D20-0005-0725; CAR-D20-0005-0697; CAR-D20-0005-0756. The Prosecution also opposes the following documents for the same reasons: CAR-D20-0006-1011; CAR-D20-0005-0664; CAR-D20-0005-0740.

in fact show what the Defence alleges,³⁵ their relevance is tenuous at best. Even if the Chamber was to find that they are relevant, the Chamber should evaluate them in light of the evidence showing that witnesses D-0054, D-0015, as well as D-0013, were frequently contacted, and instructed on what to testify prior to and during their respective testimonies.³⁶

19. Other documents in this category are similarly irrelevant. The sole document submitted to illustrate the type of contacts between the Defence and witnesses, refers simply to the logistical difficulties in obtaining a passport.³⁷ Likewise, documents related to security concerns faced by the Defence have no connection to any contestable issues.³⁸ Finally, the document being tendered to demonstrate “the relationship between VWU field staff and Defence witnesses”³⁹ is not only irrelevant, but also misleading: instead of “staff”, it only refers to the behaviour of one staff member, and as such, fails to establish any relevance at all to the present case.

iii. Communications with the ICC Detention Unit

20. The Prosecution opposes the admission of the documents in this category for lack of probative value. None of these documents,⁴⁰ which are being tendered to show that the number “[REDACTED]” belonged to Kilolo, and before him, the late Lead Counsel Liriss Nkwebe, add anything of value to the evidence already adduced by the Prosecution,⁴¹ nor do they disprove the contention that Babala used the

³⁵ CAR-D20-0005-0470 (this document in fact shows that authorisation was given); CAR-D20-0005-0719 (this document shows that there were logistical difficulties, not that there was no authorisation).

³⁶ See ICC-01/05-01/13-1110-Conf, paras. 65-106, 204-211.

³⁷ CAR-D20-0005-0725. This document is also being tendered for illustrating “the unwillingness of the Defence to be engaged in [bringing witnesses to The Hague] due to lack of capacity and funding.” Bemba Motion, para. 35 iv.

³⁸ CAR-D20-0005-0664; CAR-D20-0005-0719; CAR-D20-0005-0779; CAR-D20-0005-0209; CAR-D20-0005-0348; CAR-D20-0005-0608; CAR-D20-0005-0627; CAR-D20-0005-0623.

³⁹ Bemba Motion, para. 35 vi.

⁴⁰ CAR-D20-0006-0476; CAR-D20-0006-0479; CAR-D20-0006-0480; CAR-D20-0006-0482; CAR-D20-0006-0485; CAR-D20-0006-0465; CAR-D20-0006-0478; CAR-D20-0006-2009; CAR-D20-0006-2010; CAR-D20-0006-2011; CAR-D20-0006-2012; 2 CAR-D20-0006-2013.

⁴¹ See, CAR-OTP-0074-0067; CAR-OTP-0074-0079.

number during the charged period, as the evidence tendered by the Prosecution amply shows.⁴²

21. Moreover, the lists of privileged phone numbers merely show that the number was listed, in Kilolo's name, in the period 12-24 April 2012⁴³ and from 6 July 2012 onwards, without any clarity as to how long.⁴⁴ Again, the Prosecution has already submitted evidence showing that the number in Kilolo's name was on the list of privileged numbers in 2012 and 2013.⁴⁵ Even still, any inferences arising from these documents are refuted by the fact that the number was used by Babala, including in October 2012.⁴⁶

iv. Correspondence with the Prosecution

22. The Prosecution opposes the admission of the documents in this subcategory. The Bemba Defence's arguments for their admission are baseless and illogical. *First*, the arguments on the "scope" of a party's duty to correct alleged "intentional misrepresentations of fact" seem to imply⁴⁷ that the Prosecution in the Main Case made such uncorrected misstatements. The argument is both baseless and premature. None of the Chambers in this or the Main Case have made any findings to date that the Prosecution has made misstatements and the Defence is, unsurprisingly, unable to show anything to the contrary. In any case, the link to any material issues in this case is missing. As a consequence, the records are irrelevant.

23. *Second*, the Defence arguments regarding the duty "not to rely on evidence that

⁴² See, ICC-01/05-01/13-1110-Conf, paras. 45-46.

⁴³ CAR-D20-0006-2011; CAR-D20-0006-2012.

⁴⁴ CAR-D20-0006-2013.

⁴⁵ See above, fn 41.

⁴⁶ ICC-01/05-01/13-1110-Conf, para. 45.

⁴⁷ 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-D20-0005-0010.

[parties] believe or have reason to know might be false”⁴⁸ appears to rest upon the fantastical premise that presenting evidence in this case that witnesses lied in the Main Case is equal to presenting false evidence.⁴⁹ This is obviously incorrect. Finding otherwise would put this Court in an untenable position of not being able to adjudicate article 70 offences on the basis of the evidence emanating from witnesses who committed or assisted in committing these offences. Moreover, the Defence knows that the Prosecution is not relying on 14 false witnesses as witnesses of truth⁵⁰ – rather, the Prosecution has charged the 14 witness incidents. As the nature of this case warrants, the Prosecution has never concealed the false nature of the testimonies that the witnesses who testified in this case provided in the Main Case, and has emphasised to the Chamber the possibility that they may not be inclined to tell the truth at all times when testifying, for precisely these reasons.⁵¹

24. Finally, documents showing that the Prosecution *in the Main Case* relied on an allegedly false witness (P-169) are obviously irrelevant to these charges,⁵² amount to no more than a *tu quoque* defence, and should be rejected.

v. Correspondence with the OPCD

25. The Prosecution opposes the admission of two documents tendered in this subcategory.⁵³ These documents say nothing about the alleged inexperience of the Defence counsel in the Main Case, and consist of an exchange of opinions and recommendations regarding investigations and case preparation between the Principal Counsel of the OPCD and former Bemba Lead Counsel Nkwebe Liriss. In any case, the issues regarding Defence funding generally are irrelevant. As such, the

⁴⁸ Bemba Motion, para. 38 ii.

⁴⁹ See CAR-D20-0005-0006; CAR-D20-0005-0008.

⁵⁰ Bemba Motion Annex, p. 37, row 63: CAR-D20-0005-0006.

⁵¹ See, ICC-01/05-01/13-T-10-CONF-ENG, p. 34, ln. 21 – p. 35, ln. 10.

⁵² CAR-D20-0005-0002; CAR-D20-0005-0004.

⁵³ CAR-D20-0005-0031; CAR-D20-0005-0767.

documents are not relevant to any material issues in the case.

26. The Prosecution does not oppose the admission of the documents tendered to show chain of custody.⁵⁴

vi. Other

27. The Prosecution opposes the admission of documents purporting to show that the reliability of the evidence extracted from the SIM card seized by the Belgian authorities and taken from Kilolo's phone, and which contained the contact list that was recently unredacted and disclosed to the parties⁵⁵ is affected,⁵⁶ for lack of probative value. As the Chamber is aware, the SIM card was seized through a formal judicially supervised process, and was unsealed by the Independent Counsel in the presence of the Registry officials.⁵⁷ Moreover, the reliability of the SIM card is attested to by the fact that it contained text messages exchanged between Kilolo and witnesses in the case on his number "+939",⁵⁸ as affirmed by both the Independent Counsel and the Single Judge.⁵⁹ The contents of the SIM card contact list additionally show that Kilolo was the user of the number and was responsible for the contact list. The contact list shows attributions of phone numbers to Main Case Defence witnesses, some of which are designated as "special", and are the same numbers that were used to illicitly coach these witnesses.⁶⁰

⁵⁴ CAR-D20-0006-0752; CAR-D20-0006-0591.

⁵⁵ ICC-01/05-01/13-845-Conf-Red-AnxD.

⁵⁶ CAR-D20-0006-2020; CAR-D20-0006-2021.

⁵⁷ ICC-01/05-01/13-845-Conf.

⁵⁸ See, ICC-01/05-01/13-845-Conf-AnxB-Red, *e.g.* p. 6.

⁵⁹ See, ICC-01/05-01/13-845-Conf-tENG, paras. 43 and 46; cited in ICC-01/05-01/13-1651, para. 18.

⁶⁰ See ICC-01/05-01/13-1784-Conf, paras. 11-12, ICC-01/05-01/13-1784-Conf-AnxA, p. 2, row 1. See also, CAR-OTP-0093-0634.

F. Internal Bemba Defence correspondence⁶¹

28. The Prosecution opposes admission of the documents purporting to show that the term “*faire la couleur*” primarily meant highlighting transcripts and other documents within the Bemba defence team.⁶² While the Prosecution acknowledges that codes can have different meanings, these are necessarily context-specific. The phrases used in the tendered documents are not the same as those used by Kilolo and Mangenda in the context of the Overall Strategy, but instead, more literal terminology is used, such as “*surligner*”, “*remettre*”, or “*colorer en rouge*”.⁶³ Further, Bemba ignores the evidence that shows that the term, as coined and used by the Accused in the charged period, could not have meant literal, but figurative “highlighting” – namely, illicit coaching of witnesses in advance of and during their testimonies.⁶⁴

29. The Prosecution does not oppose the admission of document CAR-D20-0005-0430. This document shows that Kilolo – just as indicated in the intercepted communications⁶⁵ – planned to accuse the Prosecution of suborning witnesses, and is thus corroborative of their content.

G. Correspondence between Kilolo and Defence witnesses in the Main Case

30. The Prosecution opposes the admission of CAR-D20-0005-0559 for its obvious lack of relevance. The type of information that Bemba and Kilolo may have exchanged says nothing about other information that may have been transmitted

⁶¹ The Prosecution notes that Annex A to the Bemba Motion contains documents not discussed in the Motion. The Prosecution addresses these documents thematically in the other sections. *See above*, section E ii.

⁶² CAR-D20-0005-0426; CAR-D20-0005-0509; CAR-D20-0005-0510; CAR-D20-0005-0560; CAR-D20-0005-0512; CAR-D20-0005-0419; CAR-D20-0005-0418; CAR-D20-0005-0416; CAR-D20-0005-0415. *See*, Bemba Motion, paras. 44-46.

⁶³ *See*, Annex A, pp. 57, rows 25-26, p. 54, row 18, p. 55, row 21.

⁶⁴ ICC-01/05-01/13-1110-Conf-AnxA, paras. 113-129.

⁶⁵ *See*, CAR-OTP-0074-1031 (Audio), CAR-OTP-0080-0322 at 0325-0326 (French Translation).

between them. The emails related to P-260,⁶⁶ should have been put to the witness during his cross-examination. That strategic decision does not equate to a basis of admissibility. Nevertheless, should the Chamber decide to admit them, they should be given limited weight as a consequence.

H. Information provided by neutral and impartial Registry sections concerning the practices and policies of the ICC

31. The Prosecution opposes the admission of the two documents in this category that concern the scope of the VWU mandate, for *prima facie* lack of relevance to the issues in this case.⁶⁷

32. Additionally, for the same reasons the Prosecution opposes the admission of document CAR-D20-0006-1213, regarding general practices of VWU support at other international courts and tribunals. Moreover, the email does not provide any concrete responses that would be “corroborative of practices and policies of VWU” at different courts and tribunals in relation to the lack of regulation and oversight of parties.⁶⁸

I. Translations provided by the STIC in relation to specific extracts of evidence relied upon by the Prosecution

33. The documents that the Defence adduces to demonstrate that the Prosecution’s translation of the code “[REDACTED]” is erroneous,⁶⁹ should be rejected for lack of

⁶⁶ CAR-D20-0005-0351; CAR-D20-0005-0349; CAR-D20-0005-0350.

⁶⁷ CAR-D20-0006-1325; CAR-D20-0006-1337.

⁶⁸ ICC-01/05-01/13-1794-Conf-AnxA.

⁶⁹ The Prosecution addresses in this section all the arguments the Defence makes across all categories (A, E, I, J, and M) in relation to the translation of the term «ba Romeo » and «[REDACTED]». The Prosecution notes that the Category I as represented in the Annex to the Bemba Motion contains only one document that is referred to in the respective section of the Motion (CAR-D20-0006-1272), as well as two documents that were received from the CSS (not ‘LSS’), (CAR-D20-0006-1283 and CAR-D20-0006-1295). Other documents referred to in section of the Bemba Motion are found elsewhere in the Annex: CAR-D20-0006-0915 and CAR-D20-0006-2028

relevance or probative value. *First*, despite the Prosecution already having provided an explanation to this effect to the Defence,⁷⁰ the Defence deliberately ignores that the codes “ROMEO” and “[REDACTED]” are two different codes, denoting different things, and in different contexts. The Defence’s arguments as to the meaning of the former do not affect the meaning attributed to the latter. *Second*, the Defence’s argument rests on the erroneous premise that codes have to be translated *literally*,⁷¹ which is a contradiction in terms. On the contrary, to have any meaning at all, codes have to be interpreted contextually, especially when they are based on use of initials. *Third*, given the importance of context, the transcripts and translations of conversations outside of the charged period — from 2008 and 2009 — are entirely irrelevant to this analysis. *Fourth*, while the Prosecution does not dispute that the word “*ba*”⁷² normally denotes the use of plural in Lingala,⁷³ in its analysis of the challenged Detention Unit conversation underpinning the Defence arguments, the Defence unsurprisingly omits the relevant context which is fatal to its position — namely, the portion of the conversation in which it is revealed that “[REDACTED]” will be there (“*akozala*”), in third person *singular*.⁷⁴

34. Notwithstanding this explanation, the Defence cannot properly tender through a bar table a testimony of a linguistic expert who testified in another case⁷⁵ on the basis, *inter alia*, that the Prosecution in the Main Case had an opportunity to examine him. The point is, the Prosecution had no such opportunity in *this case* and on *this issue*. Consequently, the relevant DU conversation or the specific use of the word

are found on pages 28 and 46, respectively (Category E) and CAR-D20-0006-0910 and CAR-D20-0006-0913 are found on page 67 (Category J). The Prosecution also addresses here document CAR-D20-0006-2030 from Category M (see Bemba Motion, paras. 72-74), which is denoted as Category L at Annex (see p. 110, row 114).

⁷⁰ CAR-D20-0006-0915.

⁷¹ See Bemba Motion, paras. 59-60.

⁷² See Bemba Motion, paras. 54-64; CAR-D20-0006-2025; CAR-D20-0006-2063; CAR-D20-0006-0910; CAR-D20-0006-0613; CAR-D20-0006-1032 (the Defence lists two documents with the same ERN on pages 68-69 of Annex A).

⁷³ The Prosecution does not dispute the meaning of the term “Comité des sages” or “Lisanga” in relation to the meaning of “Romeo”. See, CAR-D20-0006-1000 and CAR-D20-0006-1002.

⁷⁴ See, CAR-D20-0006-0915.

⁷⁵ CAR-D20-0006-2030, see Bemba Motion, paras. 72-74.

“ba” in it was never put to the Witness for him to opine on, nor was his evidence relevant to the question ever tested.

J. Audio and transcripts of detention unit recordings from 2009

35. For similar reasons the Prosecution also opposes the admission of the documents purporting to show that the term “*enfants*” does not denote witnesses.⁷⁶ The Prosecution does not dispute that this term may not have a “uniform” meaning, but, as noted its meaning is context-specific. Recordings from 2008 and 2009 only serve to underscore the point.

K. Filings from other ICC cases⁷⁷

36. The Prosecution incorporates by reference its response to Mangenda’s “Request for Admission of Evidence from the Bar Table” (“Mangenda Bar Table Motion”).⁷⁸ The documents are *prima facie* irrelevant as they have no bearing on any of the issues in this case.

L. Documents disclosed by the OTP⁷⁹

37. The Prosecution incorporates by reference its response to the Mangenda Bar Table Motion.⁸⁰ The documents are *prima facie* irrelevant as they have no bearing on any of the issues in this case. Difficulties or lack of funding the Defence encountered in the Main Case⁸¹ are not responsive to a single concrete allegation the Prosecution

⁷⁶ CAR-D20-0006-0911; CAR-D20-0006-0614; CAR-D20-0006-1031; CAR-D20-0006-1016.

⁷⁷ ICC-01/09-01/11-T-136-Red-ENG.; CAR-D20-0005-0048.

⁷⁸ ICC-01/05-01/13-1720-Conf, paras. 4-8.

⁷⁹ In the Annex A, the documents in this category are listed as Category M. Furthermore, the Defence does not list the documents it addresses in the Motion under this category, in the same category in the annex. CAR-D20-0006-0591 is listed in Category E, p. 31, row 48; CAR-D20-0005-0655 is listed in Category F, p. 48, row 4, and CAR-D20-0006-0002 is listed in Category C, p. 11, row 1 and also addressed in Bemba Motion, para. 25.

⁸⁰ ICC-01/05-01/13-1720-Conf, paras. 4-8.

⁸¹ *Contra* Bemba Motion, paras. 68-69.

has made against the Accused. It is the individual conduct of the Accused that is at stake here, in the context of each incident charged – and not the general situation in which the Bemba Defence team was in relation to the collection of evidence in the Main Case. The records which show the Main Case Prosecution witness P-0169's various requests for reimbursements, are equally irrelevant. In this regard, the Defence's arguments on whether it is an article 70 offence for a party to rely on a witness who has received "reimbursement and payment of a considerable amount of expenses incurred [sic] the Prosecution"⁸² or who has a "belief" that they will receive material benefits as a result of their testimony and have provided "false information" concerning threats in order to receive benefits⁸³, amount to a *tu quoque* defence, and should be rejected for that reason.

M. Filings from the Main Case submitted from the bar in the event that judicial notice is rejected⁸⁴

38. Given that the Chamber has taken judicial notice of the filings submitted in this Category,⁸⁵ the relief Bemba seeks is moot. These filings were not accepted for the truth of their contents, and the Defence recognises that their inability to verify or attest to the accuracy or truthfulness of the factual submissions in the Main Case.⁸⁶ To the extent that the Chamber may be willing to consider the argument that "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", the Prosecution maintains its position as set out in its Response to the Defence Judicial Notice Motion.⁸⁷

⁸² Annex, pp. 113-120, rows 6-26; CAR-OTP-0043-0404; CAR-OTP-0046-0410 to 0416; CAR-OTP-0062-0030 to 0031; CAR-OTP-0065-0900; CAR-OTP-0065-0923 to 0925; CAR-OTP-0065-0985 to 0987; CAR-OTP-0066-0280, CAR-OTP-0066-0284; CAR-OTP-0066-0294; CAR-OTP-0066-0295; CAR-OTP-0066-0297.

⁸³ CAR-OTP-0072-0504_R021; CAR-OTP-0083-1303; CAR-OTP-0083-1212.

⁸⁴ In the Annex A, these documents are listed as Category L. Additionally, the Prosecution addresses the arguments in relation to the testimony of the linguistic expert in the Main Case above, at para. 32.

⁸⁵ ICC-01/05-01/13-1805.

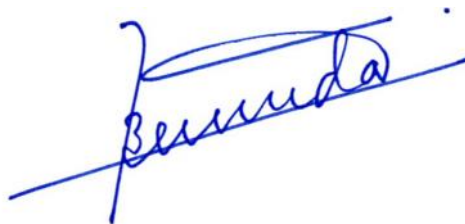
⁸⁶ Bemba Motion, para. 71.

⁸⁷ ICC-01/05-01/13-1751-Conf.

39. The Prosecution notes that, contrary to the Bemba Defence assertions, not all of the filings the Defence lists in this category were referenced in the Bemba's request for judicial notice.⁸⁸ With respect to these filings, the Chamber should take the same limited approach as delineated above: the filings have no relevance to this case and, if at all, should not be admitted for the truth of their contents.

V. Relief Requested

40. For the foregoing reasons, the Prosecution opposes the admission of the documents as discussed above, and defers to the Chamber's discretion with respect to the remaining documents tendered.



Fatou Bensouda, Prosecutor

Dated this 17th Day of June 2016
At The Hague, The Netherlands

⁸⁸ ICC-01/05-01/08-2735, ICC-01/05-01/08-258, ICC-01/05-01/08-3200-Conf-Red.