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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

**Public Redacted Version of Defence Response to Prosecution's Third Request for
the admission of Evidence from the Bar Table (ICC-01/05-01/13-1170)**

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**

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Introduction

1. The current request for admission of evidence from the bar table (“ the 3rd BTM”) is an “everything but the kitchen sink” style application, which is emblematic of the piece-meal and flawed approach adopted by the Prosecution to the admission of evidence in this case.
2. In contrast to the cautious, item-by-item approach required by both the Statute and the Appeals Chamber, the Prosecution has attempted to introduce highly ambiguous, disputed, and prejudicial evidence with very little explanation, or justification as to why admission is justified, or more importantly, why admission from the bar rather than through a witness should be permitted.
3. Attribution is once again assumed, or glossed over, as are the inconsistencies between the attribution posited in its Second Bar Table Motion, as compared to the theory underpinning the Prosecution’s view regarding the relevance of documents in the 3rd BTM.
4. The admission of certain items would be prejudicial to the individual rights of particular defendants, which should be respected in full notwithstanding the fact that this is a joint trial. The fact that a defendant has given a statement to the police/investigators should not deprive co-defendants of the right to exclude any adverse evidence, which they cannot test under cross-examination.
5. Exclusion is all the more warranted in circumstances in which the rights of the interviewed suspect were not respected. Specific communications, which include privileged/confidential information, should also be excluded.¹

Submissions

Request for extension of time to raise issues concerning Article 69(7), which may arise from the disclosure of RFAs/domestic decisions and correspondence

¹ This response has been filed on a confidential basis due to its citation of confidential Prosecution evidence.

6. On 10 September 2015, the Single Judge ordered the Prosecution to disclose Requests for Assistance (RFAs) pertaining to the interception of evidence, within 5 days of the decision.² In so doing, the Single Judge noted that

it is imperative that the Defence be able to test the reliability of the procedures employed in collecting the evidence against them, and the Requests for Assistance may assist in this process.³

7. Until such time that the Defence receives all of the RFAs, it will not be in a position to raise all issues concerning the legality of the collection of the items in this Bar Table Motion, in a comprehensive (as opposed to piecemeal) manner.
8. In this regard, Rule 64(1) of the Rules of Procedure and Evidence provides that “[e]xceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known”. In line with this provision, there is good cause to defer the deadline of the Defence to raise issues concerning the potential exclusion of these items pursuant to Article 69(7) until the Prosecution has completed its disclosure, and the Defence has been afforded sufficient time to identify any admissibility issues arising from such disclosure.

Request for an extension of the word limit

9. Pursuant to Regulation 37 of the Regulations of the Court, the Defence respectfully requests an extension of the page/word limit of 900 words. There is good cause to grant the request in light of the volume of documents involved (which are effectively the equivalent of several bar table motions).

General basis for exclusion

10. The Defence incorporates by reference the arguments set out in its Responses to the First and Second Bar Table Motions regarding the general impropriety of using a bar table motion as the first port of call, the absence of sufficient information concerning chain of custody, relevance, and authenticity, and the prejudice which inheres from litigating evidential issues prior to the commencement of the trial, and without the proper contextualisation provided by

² ICC-01/05-01/13-1234-Conf

³ Para. 13.

witness testimony, which is particularly exacerbated as concerns intercepts and other electronic evidence. These objections apply to all items in the 3rd BTM.

Submissions on Different Categories

Category A

11. Documents, which are admitted for the specific purposes of the confirmation phase, do not form part of the trial record, unless they independently meet the criteria for admission at this stage.⁴
12. The fact that individual Defence teams have relied on such documents at the confirmation phase thus does not exempt the Prosecution from its duty to establish the relevance, and reliability of such documents.
13. A document (written by one person) can-not be used as evidence of a common usage of codes by other persons/accused. Knowledge of financial expenditures also does not equate to knowledge of impropriety. For example, with respect to items 2 and 3,⁵ the breakdown of costs concerns funds expended by the defence for logistical expenses associated with witnesses; these documents cannot be relied on as evidence of knowledge of payments to witnesses. There is no indication from this document that any payments were ever given to witnesses, or that the expenses related to anything other than standard logistical costs.

Category B

14. The summaries of Defence witnesses are not capable of making “more or less probable”⁶ any of the confirmed allegations in the charges.
15. The summaries were not signed by the witnesses in question, nor is there any evidence to establish that the witnesses read them, or approved their contents, or were ever shown them either before, during, or after their testimony.

⁴ ICC-01/04-01/06-1084.

⁵ CAR-OTP-0082-0328, CAR-OTP-0082-0328

⁶ ICC-01/05-01/08-2299-Red, para 12. See also para 20 in which the Trial Chamber excluded documents due to the fact that they fell outside the temporal scope of the charges.

16. The Defence did not rely on these summaries as evidence in the Main Case, and apart from one of the two summaries concerning D-26, the Prosecution did not employ them in the Main Case in order to controvert the testimony of the witnesses, to which they related.
17. The Prosecution has also not adduced any evidence as to the authorship of these summaries, which would in any way link their contents to the individual accused in this case.
18. The documents therefore have no relevance to witness “coaching”.
19. In terms of the admission of the report of General Seara, this is once again, a blatant attempt by the Prosecution to use the Article 70 case as a vehicle for re-opening and re-litigating substantive issues in the Main Case, which fall outside the scope of the charges in this case.
20. The contents of the report have no relevance to “coaching”; if the Prosecution wishes to establish its relevance to allegations of “coaching” or illegal conduct, then it must do so in a coherent and substantiated manner at the time it is seeking the report’s admission, and not on a piecemeal or post-facto basis.
21. At this point in time, no evidence has been admitted in the Article 70 case as to who allegedly met whom, when they allegedly met, and for what purpose. It is therefore premature at best for the Prosecution to seek to rely on a report to contradict an aspect of D-25’s prior testimony, which has not yet been entered into evidence in the Article 70 case.
22. Given the that the Prosecution is not calling any live testimony on this issue,⁷ any putative probative value is outweighed by the prejudicial impact of admitting a report, which lacks sufficient detail to enable the Defence to contextualise the

⁷ The Prosecution has provided no explanation or justification as to why it is tendering a report, which only peripherally mentions meetings with Defence witnesses (and without any information concerning the context or duration of such meetings), rather than calling General Seara to testify in relation to such matters, or eliciting evidence on such matters through the witnesses he allegedly met. The Defence incorporates by references the objections set out in ICC-01/05-01/13-1074-Conf, paras. 8-15.

meeting (such as the purpose or duration), or D-25's testimony concerning any such meeting.

23. Similarly, it is premature and unfounded to admit the [REDACTED] (CAR-DEF-0002-0001). The Prosecution's explanation of the relevance of the report is contingent on an intercept,⁸ which has not yet been admitted into evidence, or attributed to specific persons.⁹ [REDACTED].

Category B: II Statements of defendants

24. The records of the interviews with the defendants are testimonial in nature, and should not be admitted through a bar table motion.¹⁰
25. The Defence has the right to examine or confront any witnesses called against Mr. Bemba.¹¹ It is unclear at this point whether any of the defendants will testify in their defence. If they do testify, then the principle of orality and the procedures of the ICC militate against the admission of their statements prior to their testimony, or in *lieu* of under oath testimony, without following the procedures of Rule 68.¹²
26. If they do not testify, Mr. Bemba will have no opportunity to cross-examine this evidence or to test its credibility or reliability,¹³ in which case, apart from the fact that the Prosecution has failed to comply with the requirements of Rule 68, the prejudicial impact of their admission warrants their exclusion.
27. The question as to the admissibility of these statements should therefore be deferred until after the close of the Defence case, when it will be possible to assess issues of prejudice in a more concrete manner.
28. As concerns the specific statements provided by Narcisse Arido, the prejudicial affect is heightened, and the reliability further undermined by the fact that the

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ ICC-01/09-01/11-1353, paras 86-88 ; ICC-01/09-01/11-1804, para. 27.

¹¹ ICC-01/09-01/11-1804, para. 27.

¹² [REDACTED].

¹³ [REDACTED].

statement fails to include sufficient regarding the circumstances and conditions under which the interview took place, and the absence of a recording.

29. The process by which the statement was taken also violated Mr. Arido's rights under both the Statute, and internationally recognised human rights law.
30. At the time of his interviews, an arrest warrant had been issued against Mr. Arido, he was detained, and he was entitled to enjoy the rights of a suspect, as set out in Article 55 of the Statute (and any such rights which accrue to suspects under French law).
31. Instead, the *Proces verbal* regarding his second interview describes him as a "Temoin" as well as "identite de la personne temoin".¹⁴
32. Mr. Arido was therefore wrongfully treated as a witness "*Temoin Assiste*" under French criminal procedural rules, which is particularly problematic as under French law, a "*temoin assiste*" cannot be placed in detention.¹⁵
33. This distinction resulted in Mr. Arido being deprived of the right to enjoy the rights of suspect which apply under either the ICC Statute, or under French law.
34. In particular, due to the fact that Mr. Arido was not considered to be a suspect of a crime under French law, the interview could not be recorded. In terms of the latter aspect, on one occasion Mr. Arido seems to respond to a question that is not transcribed in this statement.¹⁶ If Mr. Arido never testifies, the Defence will also have no ability to test the accuracy of the record or explore any irregularities. In contrast, ICC Prosecution investigators were present at the interview, and were thus exposed to unrecorded information, to which Mr. Arido's co-accused have no access.
35. It is clear that the French police could not have formulated these questions without the ICC investigator's assistance, and that the French police were acting as mere mouth-pieces for the Prosecution. It is therefore highly prejudicial that

¹⁴ [REDACTED].

¹⁵ Article 113-5 of the French Procedural Criminal Code.

¹⁶ [REDACTED].

the Prosecution could request the French to conduct an interview on the Prosecution's behalf, and with the Prosecution's participation, in circumstances which fails to comport to either the protections for suspects under French law, or the standards which would apply to interviews conducted by the Prosecution under Rule 112 of the ICC Rules of Procedure and Evidence.¹⁷

36. In the second interview, the record explicitly states that the questioning was conducted by the ICC Prosecutors.¹⁸ The fact that the interview occurred in French territory is no basis for excluding Rule 112, since State parties have an obligation to ensure the availability of domestic procedures in order to ensure compliance with the Statute and Rules.¹⁹

37. The absence of a recording also prevents the Defence from understanding the basis of the claim of Mr. Arido's lawyer that "Tout ce qui a été dit à Lyon n'a été fait qu'en dehors de la présence de l'avocat".²⁰

38. Mr. Arido's ability to avail himself of the right to silence also seems to have been impacted by his designation as a "temoin assiste" rather than a suspect. In particular, Mr. Arido appeared to be operating under the assumption that if he fully cooperates with the French police, he could be released.²¹ His lawyer, who had no experience with ICC procedures, may also have been misled by this designation, and was in any case, not in a position to advise him effectively as to his rights as a suspect (*mis en examen*) under French law, due to the fact that he had not been provided access to the case file.²²

39. In light of these circumstances (which includes the generally coercive nature of detention interviews, the absence of a recording, and indicia of unreliability including the ambiguity regarding Mr. Arido's status) the prejudicial aspects of

¹⁷ ICC-01/05-01/13-1179-Conf, paras. 45-73.

¹⁸ CAR-OTP-0077-0170 line 14.

¹⁹ Article 88 of the Statute.

²⁰ CAR-OTP-0077-0176.

²¹ CAR-OTP-0770-0170. During the first interview, Mr. Arido also appears to be operating under the assumption that he was providing information as a witness rather than a suspect (Question: Vous avez manifesté le souhait de témoigner aujourd'hui); CAR-OTP-0077-0169.

²² Before June 2014, a *'Temoin Assiste'* did not have the right to access the case file when interviewed by the French Police; Circulaire du 23 mai 2014 de présentation des dispositions de procédure pénale applicables le 2 juin 2014 de la loi portant transposition de la directive 2012/13/UE du Parlement européen et du Conseil, du 22 mai 2012 relative au droit à l'information dans le cadre des procédures pénales, NOR : JUSD1412016C.

http://www.textes.justice.gouv.fr/art_pix/JUSD1412016C.pdf

these statements, and the impact on the administration of justice, mandates their exclusion.²³

Category C: III Documents taken from the cell of Mr. Bemba

40. The Prosecution has adduced no evidence to establish the provenance/chain of custody of these documents; such matters cannot be presumed.
41. The Prosecution has not established authorship (which again cannot be presumed vis-à-vis documents, which have different handwriting)²⁴ or the date of some of the documents,²⁵ which is of particular importance given that one of the documents refers to expenses paid to Me. Nkwebe, who died in early 2012.²⁶ The documents also engage significant privacy concerns as regards Mr. Bemba's family members (including his children).
42. The documents have no official status, and the source of the information (and its reliability/accuracy) is not clear.
43. The mere possibility that the documents might relate to expenses paid to witnesses does not suffice prove their relevance as the payments could fall outside the time period of the charges, or concern witnesses falling outside of the charges.²⁷ As concerns CAR-OTP-0082-0334, the document does not refer to specific witnesses by name or pseudonym, does not evidence any direct payments to witnesses (as opposed to logistical expenses paid on behalf of

²³ *Prosecutor v. Halilovic*, Decision on Motion for Exclusion of Statement of the Accused, 28 July 2005, para. 25; *Prosecutor v. Sesay*, Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008, paras 66-68; *Prosecutor v. Taylor*, Separate dissenting opinion of Judge Sebutinde on Defence Motion to Exclude Custodial Statements of Issa Sesay, 12 August 2010; ICC-01/05-01/13-1199-Conf, fn. 62.

²⁴ The ad hoc Tribunals have found declined to admit documents, purporting to be the handwriting of a particular person, in the absence of sufficient testimonial or forensic evidence confirming authorship. See *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, 'Decision on the prosecutor's motion pursuant to trial chamber's directives of 7 December 2005 for the verification of the authenticity of evidence obtained out of court pursuant to rules 89 (c) & (d)', 26 April 2006; *Prosecutor v. Milan Milutinovic et al.*, IT-05-87-T, 'Decision on Pavkovic Second Motion for Admission of Documents from Bar Table', 28 Nov 2007, para 7; *Prosecutor v. Seselj*, IT-03-67-T, 'Decision on Prosecution's Motion for Admission of Evidence Relating to Mladic Notebooks with a Seperate Opinion from Presiding Judge Antonetti Attached', 22 Oct 2010, para 40; *Ramush Haradinaj et al.*, IT-04-84bis-T, 'Reasons for Decision Denying Admission of Document Rule 65 Ter Number 03003', 6 Oct 2011, para 9.

²⁵ C.3

²⁶ CAR-OTP-0082-0328

²⁷ [REDACTED].

witnesses), and has no probative value as concerns Mr. Bemba's alleged *mens reas* regarding specific Article 70 incidents, as opposed to lawful Defence investigative activities.

44. Regarding the emails C.5 to C.9, the Prosecution has provided insufficient information concerning provenance or attribution to warrant their admission at this stage.²⁸ The Prosecution has also adduced no justification for violating either privacy rights, or Defence confidentiality as concerns communications with potential witnesses. The contents of these emails reveal no impropriety. It is indeed, highly concerning that the Prosecution seeks to infer wrongful conduct from a caution to witnesses to avoid using Facebook,²⁹ when such a caution is required by ICC best practices for witness protection.

Category D IV: Witness expenses from VWU

45. These expense receipts are probative of no wrongdoing under Article 70 of the Statute, but to the contrary, confirm the lawful nature of Defence payments to witnesses. The receipts also cannot be admitted at this juncture in order to controvert alleged testimony, which is not yet in evidence in the Article 70 case. Given that these witnesses are scheduled to testify in the Article 70 case, these issues should be should explored during their testimony and not litigated *via* a bar table motion. The latter route deprives both the witnesses and the Defence of the ability to explore relevant contextual issues and the understanding of the witnesses concerning the practices of the Court as regards expenses.³⁰

VWU table CAR-OTP-0078-0290

46. This table is comprised of unsworn assertion, which has no evidential value. This table is not a contemporaneous "business record", and was never provided to the Defence in the Main Case during the Defence presentation of evidence.

²⁸ ICC-01/05-01/13-1074-Conf; Commonwealth v. Purdy, 459 Mass. 442, 945 N.E.2d 372 (2011): "Evidence that the defendant's name is written as the author of an e-mail or that the electronic communication originates from an e-mail or a social networking Web site such as Facebook or MySpace that bears the defendant's name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant.... There must be some 'confirming circumstances' sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails."

²⁹ See ICC-01/05-01/13-1170-Conf-AnxA, p. 21, item 6.

³⁰ ICC-01/05-01/13-1074-Conf, paras. 9-12.

47. Although it was prepared for the purposes of litigation, the Prosecution has not called the “authors” as witness, and as such, the Defence will have no opportunity to explore or challenge the factual premises relied upon by the VWU to create the table.
48. In this regard, the underlying material employed to create the table has not been disclosed, and no explanation has been provided as to what is meant by certain terms (such as arrival/departure i.e. from where?).
49. The table also does not include any information as to whether and when the Defence were informed of the “cut-off” date for each witness. The table therefore has no probative value as concerns the *mens rea* of either the accused or the witnesses. As concerns witnesses who are scheduled to testify, the principle of orality requires that such issues should be put to them during their examination.
50. The table also does not include any information as concerns specific instances in which the “cut-off” date was modified, or partially lifted (for example, as concerns D-15, whose testimony was postponed for several months).³¹
51. [REDACTED]
- [REDACTED]
- [REDACTED].³²
52. The level of superficiality used to compile this data (and the complete absence of disclosure of the underlying raw data from the Main Case), undermines the overall reliability of the table.³³ It would also be particularly prejudicial to admit this table in circumstances in which the other Article 70 Defence teams have not

³¹ ICC-01/05-01/13-994-Conf-Exp, paras 6-12. The Defence has no objection to these paragraphs being reclassified as confidential.

³² [REDACTED].

³³ *Prosecutor v. Ayyash*, ‘Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on The Legality of the Transfer of Call Data Records to UNIIC And STL’s Prosecution’, 6 May 2015, para 115.

been provided with access to confidential information in the Main Case, which is relevant to the accuracy and reliability of the table.³⁴

Category E: V

First Report of the Independent Counsel

53. The Independent Counsel's assessment as to these communications has no probative value; these are questions which pertain to the "ultimate issues" in the case. These issues must be adjudicated independently and impartially by the Trial Chamber and not a third party. The Chamber cannot delegate its duty to assess the facts and circumstances in this case to such a person, nor is there any legal basis for relying on his personal opinions.³⁵
54. This report contains unsworn opinions from a person, who has not been listed as a Prosecution witness,³⁶ and who has refused to be interviewed by the Defence.³⁷ The Defence teams therefore have no ability to test the underlying factual assumptions utilised by the Independent Counsel (which appear in some cases, to have been based on 'codes' or suggestions provided by the Prosecution),³⁸ or to question him in relation to his credibility or impartiality. Its admission would therefore be unduly prejudicial to the rights of the Defence, and the requirements of a fair and impartial trial.
55. The communications referred to in this report were the subject of the First Bar Table Motion. As is the case with documents referred to or attached in an expert report,³⁹ the fact that the communications have been referred to in the report does not eliminate the obligation of the Prosecution to establish that each

³⁴ ICC-01/05-01/13-994-Conf-Exp, paras 6-12

³⁵ ICC-01/05-01/13-822, paras. 41-43; ICC-01/05-01/13-908. See also case law of ICTY/ICTR regarding the fact that expert witnesses should usurp the role of the Trial Chamber in adjudicating the ultimate issues for determination, nor should they testify in relation to questions of fact: Prosecutor v. Karemera et al, ICTR-98-44-T, Decision On Prosecution Motion For Reconsideration of the Decision On Prospective Experts Guichaoua, Nowrojee And Des Forges, Or For Certification, 16 November 2007, para 21; Prosecutor v. Nahimana et al, Appeals Judgement, 28 November 2007, paras. 212, 509.

³⁶ See ICC-01/05-01/13-1230 concerning the appropriate avenues for the admission of "testimony".

³⁷ ICC-01/05-01/13-457

³⁸ ICC-01/05-01/13-908, para. 12-13.

³⁹ Prosecutor v. Karadzic Order On Prosecution Request For Clarification And Proposal Concerning Guidelines For The Conduct Of Trial 20 October 2009, para. 5.

communication independently meets the the requirements for admission from the bar.

*Conversation alleged to be between Mr. Mangenda and Mr. Kilolo*⁴⁰

56. Apart from technical issues concerning chain of custody, provenance, attribution and reliability,⁴¹ this communication should be excluded pursuant Article 69(5) in conjunction with Rule 73(1).⁴²

57. The Defence for Mr. Bemba was never accorded an opportunity to assert privilege in relation to this communication; the process for determining whether it should be transmitted to the Prosecution was conducted on an entirely *ex parte* basis.

58. The justification for its transmission was completely lacking in specificity,⁴³ and specious. This communication clearly concerns instructions from the client regarding proposed questions, which are to be put to a Defence witness during re-examination. The defendant has the right to effectively participate in his case, and Counsel have the duty to act on such instructions. There is therefore absolutely no basis for waiving legal privilege.

59. The Defence also have the right and expectation that any communications on such matters will remain privileged, and will not be transmitted to their litigation opponent, or used as evidence against them. The admission of this communication as “incriminating” evidence would be severely detrimental to the right of Mr. Bemba to defend himself through Counsel, and his right to instruct his Counsel in relation to his Defence in full confidentiality.

Independent Counsel Report 20 May 2015 (CAR-OTP-0088-0370, CAR-OTP-0088-0398, CAR-OTP-0088-0504)

60. The reports are comprised of text, which has been viewed and reproduced by the Independent Counsel.

⁴⁰ CAR-OTP-0080-0607

⁴¹ ICC-01/05-01/13-1074-Conf, paras. 53-62; ICC-01/05-01/13-1199-Conf, paras. 11-13.

⁴² ICC-01/05-01/13-1140.

⁴³ ICC-01/05-66-Conf-Exp-Anx-Corr, p.20

61. Although his accompanying analysis has been deleted, the format and content of the report is not ‘raw data’, but an unsworn description of the data prepared by the Independent Counsel, who has no qualifications or experience in the area of telecommunications attribution.
62. As concerns the call data records, it is impossible to test or examine the accuracy of his description due to the fact that the basis of attribution or call direction is not provided. As an example, no explanation has been provided as to why the Independent Counsel has written [REDACTED]⁴⁴
63. The duration of many of the calls is also not provided, which renders it impossible to ascertain whether any form of communication took place (i.e. as opposed to it being a missed call, or call forwarded to voice mail). The basis on which the date or time of the call was ascertained is also not provided. In the absence of specific information concerning the particular time zone in which the call took place, the time provided is potentially inaccurate and/or misleading.
64. This is not information which is self-authenticating or unambiguous; it does not meet the criteria for admission from the bar.⁴⁵
65. The Prosecution has also failed to include an item-by-item assessment as to the relevance of each SMS to the charges. This lacuna is particularly problematic in light of the fact that some messages refer to persons, who are not implicated in the charges,⁴⁶ and others are not directed to any incriminating contact.⁴⁷

Category F

66. Items 1, 2, 3, 4, 5.1, 6.1, 7 and 8 of this Category are alleged to be call logs generated by the Detention Centre.⁴⁸ The Prosecution failed to provide any information specifying the person in charge of the production of the logs, his or her relevant qualification, the protocol for log preservation, the method of

⁴⁴ [REDACTED].

⁴⁵ ICC-01/05-01/13-1074-Conf, paras. 67-83 regarding issues of authenticity and attribution.

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ See ICC-01/05-01/13-1170-Conf-AnxA, pages 31-34.

transmission and the possible data integrity damage in the process. Such information goes to the heart of the authenticity and reliability of the records. A mere reference to “the Detention Centre” is insufficient for the reliability test and, in turn, for the logs to be admitted through the bar table.⁴⁹

67. In the context of the relevance and reliability of the call logs, the Prosecution has failed to indicate any materials supporting the attribution. The analysis of phone contacts does not refer to the attribution of each phone number involved.

68. Notably, the Prosecution incorporates its arguments in support of the relevance, reliability and probative value of these materials made in the Second Bar Table Motion.⁵⁰ The cited paragraphs do not, however, contain any discussion on attribution⁵¹, while the one paragraph specifying attribution relied on in the Second Bar Table is left out.⁵²

69. As to the attributions scattered in Category IX (Other Materials) of this Bar Table, the indicated supporting materials fail to support the alleged attribution.

70. Regarding the Prosecution’s assertion that documents CAR-OTP-0074-0066, and CAR-0074-0065 indicate that Mr. Bemba abused his “privileged phone line”, no such conclusion can be derived from the documents in question.

71. According to the referred paragraphs of the Pre-Trial Brief,⁵³ CAR-OTP-0074-0065 is for the alleged multi-party calls between:

- 1) JPB, AK and D-55 on 5 Oct 2012;
- (2) JPB, AK and D-51; and
- (3) JPB, AK and D-64 on 27 Oct 2012

72. According to the referred paragraph of the Pre-Trial Brief,⁵⁴ this call log is for the alleged multi-party call between JPB, AK and D-19 (date not specified). These

⁴⁹ ICC-01/05-01/13-1199-Conf, para. 11-13.

⁵⁰ ICC-01/05-01/13-1170-Conf, para 43.

⁵¹ See, ICC-01/05-01/13-1170-Conf, footnote 44, citing ICC-01/05-01/13-1113-Conf, paras 10-27.

⁵² See, ICC-01/05-01/13-1113-Conf, para 28.

⁵³ See ICC-01/05-01/13-1170-Conf-AnxA, page 34, item 7, citing ICC-01/05-01/13-1110-Conf, paras 46 and 190.

⁵⁴ See ICC-01/05-01/13-1170-Conf-AnxA, page 35, item 8, citing ICC-01/05-01/13-1110-Conf, para 46.

call logs have little probative value. They do not on their own prove a multi-party call or constitute a detention unit regulation violation. [REDACTED].⁵⁵

73. [REDACTED]⁵⁶ [REDACTED].⁵⁷ [REDACTED].⁵⁸

74. None of the witnesses' phone number appears in the record. Nor is there any indication of a multi-party call. The only inference that can be drawn from the call log is the existence of several contacts between the Detention Unit landline and [REDACTED], which is not in violation of the DU regulations.

75. The Prosecution's Pre-Trial Brief notes "the time overlap between the two calls" in order to support the allegation of a multi-party call. The call log that the Prosecution intends to tender does not show such an overlap.

Communications alleged to be between Mr. Bemba and Mr. Babala

76. The Defence incorporates by reference the submissions set out in its Response to the Second Bar Table Motion concerning issues of attribution, unreliability of the recording, and the grounds mandating exclusion pursuant to Article 69(7) of the Statute.

CAR-OTP-0077-1081

77. [REDACTED].

CAR-OTP-0074-0514

78. This conversation is particularly unreliable, as it is plagued by synchronisation, parts which were not recorded, and parts which are incomprehensible. The Prosecution has also advanced a highly subjective interpretation of the word "correctement" (they have posited "wisely",⁵⁹ as opposed to "correctly" or "appropriately"). If anything, the communication suggests that the person alleged

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ ICC-01/05-01/13-1113-Conf-AnxA, pp. 83-84.

to be Mr. Bemba expressed a concern that any payments should be directly related to correct investigative requirements, and as such, the communication is reflective of no impropriety or *mens rea* as concerns alleged improprieties.

Category G

79. The Prosecution has attempted to rely on what it terms “concessions” of the Defence for Mr. Bemba. The cited “concessions” are confirmation submissions, which were submitted for a specific purpose, and not formal admissions of fact. There is no evidence that Mr. Bemba expressly approved these “concessions” or that he was informed, and consented to their presentation as conceded facts.

80. When presented with these alleged facts in 2015, the Defence expressly declined to admit or concede any such interpretation of codes.⁶⁰

81. In any case, as noted above, the submission of evidence at the confirmation phase is without prejudice to the obligation of the Prosecution to establish that the admissibility criteria are met at the trial stage.

82. The Prosecution has also advanced contradictory interpretations of codes which undermines the overall reliability of its approach. [REDACTED].⁶¹

Category VIII – Photographs

83. The four photographs are allegedly extracted from the Facebook pages of D-6 and P-0274, respectively. However, they are not *prima facie* authentic or reliable.

84. First, the Prosecution provides no material supporting the attribution of the Facebook pages to D-6 or P-0274. Since the creation of a Facebook account does not require any valid identity information, it is impossible to forensically ascertain, even on a *prima facie* basis, that a Facebook account under a certain name is attributable to a person of the same name.

⁶⁰ ICC-01/05-01/13-1072-Conf-AnxB.

⁶¹ [REDACTED].

85. Second, the photographs are not genuine extracts but merely screenshots of a webpage with a pop-up photograph. Unlike a genuine extract, the metadata of the photograph, such as the creation date, the photographing device and the modification traces, are not available, which warrants their exclusion.⁶² Such information is particularly relevant since the photographs are used in conjunction with events on particular date.⁶³

86. Third, the photographs have no probative value at this juncture. The identification of the persons in the images is not yet in evidence. The Prosecution has also failed to provide any explanation or justification as to why this material is not being tendered through a witness.

Category IX: Other materials

87. The Prosecution has provided no explanation of the attribution for these materials, except with respect to the following items.

Item 4, CAR-OTP-0072-0173

88. This is allegedly a chain of emails between the Prosecution and the Defence in the Main Case. The relevant phone number appears in the signature of Mr. Mangenda.⁶⁴

89. In the Email system used by the Defence, i.e. the External Party Network, email signatures are not automatically generated according to one's registered information. Instead, it is manually added by the user. The fact that a phone number is part of someone's email signature is not authenticated by default.

90. In fact, Mr. Mangenda's signature is, on its appearance, a manually created one: it not only contains his personal email address at Yahoo.fr, but also lacks consistency in terms of font, style and language used.

⁶² ICC-01/04-01/07-2635, para. 24.

⁶³ ICC-01/05-01/13-1170-Conf, para 50.

⁶⁴ ICC-01/05-01/13-1170, para 63.

91. Therefore the Prosecution failed to prove that this material is *prima facie* authentic or reliable for the purpose of phone number attribution.

Item 6, CAR-OTP-0044-0071

92. This is the forensic report of Mr. Bemba's SIM card.

93. First and foremost, this document is in German. No translation in an ICC working language has been included on the Prosecution's list of evidence, which mandates its automatic exclusion.⁶⁵

94. The fact that the report is in German has prevented the Defence from being able to ascertain the basis of extraction and attribution for the individual numbers and names. In particular, it is impossible to verify when the contact information was stored, and if there is metadata as such, whether the attribution is outdated or exceeds the relevant period of the confirmed charges.

95. Even if, for argument's sake, the referenced pairs of names and numbers are indeed stored phone numbers on Mr. Bemba's SIM cards, the flaws in attribution are not cured. First, none of the recorded names match the full name of any alleged user.⁶⁶ [REDACTED],⁶⁷ [REDACTED].⁶⁸ Evidence, which only provides the attribution of a first name falls short of the reliability and probative value test, especially when the attribution is not corroborated by any other material.⁶⁹

Item 7, DRC-OTP-0148-0002

96. [REDACTED]

[REDACTED]

97. [REDACTED]

⁶⁵ ICC-01/04-01/06-642.

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

Relief Sought

98. For the reasons set out above, the Defence for Mr. Bemba requests the Trial Chamber to reject the 3rd BTM.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 09th day of October, 2015

The Hague, The Netherlands