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TRIAL CHAMBER VII

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
Judge Olga Herrera Carbuccia
Judge Bertram Schmitt

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

Response to "Prosecution's First Request for the Admission of Evidence from the Bar Table"

Source: **Defence for Jean-Jacques Kabongo Mangenda**

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

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I. INTRODUCTION

1. The Prosecution's attempt[1] to introduce [REDACTED] "intercepts", "CDRs", and "financial records" in advance of trial, without any proper evidential context or authentication, should be rejected. No admitted or admissible evidence shows: (i) the origin of any of the data; (ii) its manner of collection; (iii) that the transcripts or "CDRs" correspond to the audio-files; (iv) the manner in which the transcriptions and translations have been made, so as to permit an assessment of their accuracy and reliability; (v) the basis for purported attributions of the identity of speakers appearing on the transcriptions; (vi) what "CDRs" are; (vii) how the "CDRs" were collected; (viii) what the "financial records" purport to show; or (ix) who prepared them and on what they are based.

2. The usual, if not undeviating, practice of the ICC and ICTY is that bar table motions are filed after at least some relevant evidence has been heard as a basis for establishing the requisite indicia of reliability of the documents tendered. The connection between the previously-heard evidence and the documents tendered must also usually be self-evident. Audio-recordings of electronic communications are not suitable for admission from the bar table, and certainly not without at least some pertinent evidence about reliability, because "in and of themselves they bear no *prima facie* indicia of authenticity or reliability."[2]

3. Bar table motions "should not generally be the first port of call for the admission of evidence,"[3] and certainly not in respect of "key"[4] evidence. The introduction of the core

[1] *Prosecutor v. Bemba et al.*, Prosecution's First Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1013-Conf, 16 June 2015 ("Motion"). This submission is a public redacted version prepared pursuant to the Chamber's direction in its *Decision Closing the Submission of Evidence and Further Directions,* ICC-01/05-01/13-1859, 29 April 2016.
[2] *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on Prosecution's Motion for Admission of 28 Intercepts from the Bar Table, 20 January 2012 ("*Tolimir* Decision"), para. 14; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on the Prosecution's First Bar Table Motion, 13 April 2010 ("First *Karadžić* Bar Table Decision"), para. 13.
[3] *Prosecutor v. Ruto and Sang*, Decision on the Joint Defence Application for Admission of Documentary Evidence Related to the Testimony of Witness 536, ICC-01/09-01/11-1436, 15 July 2014, para. 11 ("[a]lthough the admission of evidence other than through a witness is permissible in the Court's proceedings, the Chamber nonetheless considers admission of evidence through a witness to be a preferable approach, where possible. It is recalled that while the Chamber guided the Ruto Defence to seek admission of the relevant evidence through a 'bar table motion', it also indicated that the Ruto Defence has the possibility of calling witnesses to testify on this matter"); First *Karadžić* Bar Table Decision, para. 13.
[4] [REDACTED].

of the Prosecution's case from the bar table would render the trial both less fair and less efficient.

II. APPLICABLE LAW

(i) General Principles of Admissibility of Evidence

4. Article 69(4) of the Rome Statute provides that:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

"Probative value" has been interpreted as meaning "tending to prove or disprove the material issue or fact in question" which, in turn, requires "indicia of reliability including authenticity, that are sufficient in the circumstances in accordance with generally accepted legal principles."[5] The indicia need not establish "definitive proof of reliability but rather *prima facie* proof based on sufficient indicia."[6]

5. Admissible information "shall not" be admitted under Article 69(7) if obtained "by means of violation of this Statute or international recognized human rights" if the violation "casts substantial doubt" on its reliability, or if to do so "would be antithetical to and would seriously damage the integrity of the proceedings."[7]

6. Trial Chambers also have the discretion, as opposed to the obligation pursuant to Article 69(7), to exclude evidence "for reasons of fairness, expeditiousness and public policy."[8] A Trial Chamber may, in particular, weigh the probative value of information as against its prejudicial effect on trial fairness.

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[5] *Prosecutor v. Ruto and Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence, ICC-01/09-01/11-1353, 10 June 2014, ("*Ruto* Decision"), para. 15.
[6] *Id.*
[7] Rome Statute, Art. 69(7).
[8] *Ruto* Decision, para. 16.

7. The criteria of admissibility prescribed by Article 69(4) of the Rome Statute parallel those set out in Rules 89(C) and (D) of the ICTY and ICTR Rules of Procedure and Evidence. Article 69(7) is the only significant deviation. In fact, the Prosecution has previously argued that Rules 89(C) and (D) were "the precursors to Articles 69(3) and (4) of the Rome Statute"[9] and, referring more generally to the rules of evidence, that "the Statute and the Rules of the ICC were drafted in large part based on the long established practice and legal rules developed by earlier international criminal tribunals."[10] ICC Trial Chambers, while not bound to mechanically follow ICTY or ICTR jurisprudence on admission of evidence, have often found that jurisprudence to be persuasive in interpreting Article 69.[11] The admission of documents "from the bar table" is itself directly inspired by ICTY practice.[12]

(ii) Admission of Information "From the Bar Table" Prior to the Start of Trial Is Nearly Unprecedented at the ICC, and Contrary to Contemporary ICTY Practice

8. Information may be tendered based exclusively on submissions of counsel "from the bar table," rather than commentary given by a witness under oath.[13] The distinction should not be exaggerated, however, since submissions "from the bar table" can, and almost always do, refer to prior testimony or documents previously admitted as evidence. Hence, the Prosecution in *Lubanga* tendered documents from the bar table based, *inter alia*, on previously admitted testimony about "the form and substance of some UPC/FPLC

[9] *Prosecutor v. Lubanga*, Prosecution's Submission on the Admissibility of Four Documents, ICC-01/04-01/06-1255, 1 April 2008, para. 17.
[10] *Id*. para. 15. Although the passage is not expressly limited to questions of evidence, the footnote at the end of the sentence makes reference to a source that refers exclusively to the issue of admissibility of evidence, in a motion that concerned admissibility of evidence.
[11] *See* e.g. *Prosecutor v. Lubanga* Decision on the admissibility of four documents, ICC-01/04-01/06-1399, 13 June 2008 ("*Lubanga* 2008 Decision"), paras. 25-32 (adopting ICTY approach to burden of proof on the objecting party, and quoting at length from ICTY decisions in setting on the three cardinal principles of admissibility); *Prosecutor v. Lubanga* Decision on the admission from the "bar table", ICC-01/04-01/06-1981, 24 June 2009 ("*Lubanga* 2009 Decision"), paras. 28-31, 42-45; *Prosecutor v. Lubanga*, Corrigendum to Decision on the admissibility of four documents, ICC-01/04-01/06-1399 Corr, 20 January 2011, ("*Lubanga* 2011 Decision"), paras. 25, 28; *Ruto* Decision, para. 15.
[12] *Prosecutor v. Lubanga*, Prosecution's Application for Admission of Documents from the Bar Table to Article 64(9), ICC-01/04-01/06-1703, 17 February 2009, ("*Lubanga* OTP Submission"), p. 1 (declaring, on the basis of ICTY jurisprudence, that "[t]he procedure of tendering documents from the bar table is an established one"); *Prosecutor v. Ruto and Sang*, Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9), ICC-01/09-01/11-1121, 2 December 2013 ("*Ruto* OTP Application"), para. 7.
[13] *Lubanga* 2009 Decision, para. 1.

documents".[14] Bar table motions at the ICTY often cite prior evidence with particularity as the basis for establishing the admissibility of documents tendered from the bar table.

9. Tendering documents in an evidential vacuum – i.e. before *any* evidence has been received – is almost unprecedented at the ICC. The exception that proves the rule was a decision by the *Lubanga* Trial Chamber to admit four relatively self-explanatory documents[15] concerning "crime-base" evidence only.[16] Never since, however, have documents been tendered by the Prosecution, let alone admitted, from the bar table before trial has begun.[17] In other words, the grand total of documents admitted before the commencement of trial in ICC jurisprudence is four.

10. This practice accords with the jurisprudence of the ICTY, where the current position is reflected in this statement from the *Karadžić* case:

> Thus, while evidence does not need to be introduced through a witness in every circumstance, and there may be instances where it is appropriately admitted from the bar table, it is the Chamber's view that the most appropriate method for the admission of a document or other items of evidence is through a witness who can speak to it and answer questions in relation to it. The bar table should not generally be the first port of call for the admission of evidence. It is, rather, a supplementary method of introducing evidence, which should be used sparingly to assist the requesting party to fill specific gaps in its case at a later stage in the proceedings.[18]

11. The Trial Chamber explained that the wholesale introduction of documents would unfairly shift the burden from the Prosecution to the Defence of testing and illuminating the reliability of such evidence.[19] The introduction of large volumes of information "from

[14] *Lubanga* OTP Submission, p. 6.
[15] *Lubanga* 2008 Decision, paras. 37-40.
[16] *Id.*
[17] The interval between the start of the Prosecution case and the filing of a bar table motion was 84 days in the *Ruto* case; 235 days in the *Katanga* case; and 205 days in the *Bemba* case. *See Ruto* OTP Application; *Prosecutor v. Katanga and Ngudjolo Chui*, Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, ICC-01/04-01/07-2290, 16 July 2010; *Prosecutor v. Bemba,* Prosecution's submission of the list of materials it requests to be admitted into evidence, ICC-01/05-01/08-1514, 14 June 2011.
[18] First *Karadžić* Bar Table Decision, para. 9.
[19] *Id.* para. 8 ("a significant consequence of the admission of evidence from the bar table is that it is then incumbent upon the opposing party to identify the most appropriate witness with whom to challenge a particular document instead of being able to cross-examine the witness who the offering party has determined is best able to speak to that document in the context of its case. In the present circumstances, given the number of items that are the subject of the Motion, this carries the real possibility of over-burdening the Accused.")

the bar table" short-circuits the "contextualization"[20] provided by trial proceedings,[21] and may encourage the indiscriminate dumping of low-quality information onto the record[22] without any incentive to provide fuller explanation.

12. Civil and common law benches alike at the ICTY have adopted this approach. The *Prlić* Trial Chamber's "Guidelines for the Admission of Evidence" declares that "[a]s a general rule, the party seeking to tender evidence shall do so through a witness who can attest to its reliability, relevance and probative value. The evidence must be put to the witness at trial."[23] The *Boškoski* Trial Chamber, also composed of a majority of civil law judges, declared that:

> As a general rule, it will be necessary for the Chamber to receive evidence from one or more witnesses, who can speak about a proposed exhibit, before the Chamber can be satisfied that there is sufficient apparent relevance and reliability to justify the admission of an exhibit.[24]
> …
> It is desirable that documents are tendered for admission through witnesses who are able to comment on them. A party is not necessarily precluded from seeking the admission of a document even though it was not put to a witness with knowledge of the document (or its content) when that witness gave testimony in court. However, the failure to put the document to such a witness is relevant to the exercise of the Chamber's discretion to admit the document.[25]

The *Gotovina et al*. Trial Chamber has explained that this procedure "allows for proper contextualization of the document without which the Chamber is left to determine relevance and probative value primarily on the basis of the documents alone."[26]

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[20] *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Motion for Admission of Evidence from the Bar Table, 1 May 2012, para. 4.
[21] *Prosecutor v. Mladić*, IT-09-92-T, Transcript (10 November 2011), T.109.
[22] *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion to Admit Documents Relevant to Witnesses KDZ490 and KDZ492 from the Bar Table, 9 January 2012 (*Karadžić* Decision on Witnesses), para. 8.
[23] *Prosecutor v. Prlić et al*, IT-04-74-T, Decision on Admission of Evidence, 13 July 2006, Annex, para. 1.
[24] *Prosecutor v. Boškoski & Tarčulovski*, IT-04-82-T, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E, 14 May 2007 ("*Boškoski* OTP Bar Table Decision"), para. 10.
[25] *Prosecutor v. Boškoski & Tarčulovski*, IT-04-82-T, Decision on Tarčulovski Second Motion for Admission of Exhibits from the Bar Table with Annex A, 7 April 2008, para. 5.
[26] *Prosecutor v. Gotovina et al*., IT-06-90-T, Decision on Prosecution's Motion to Admit Documents Into Evidence and to Add Two Documents to the Prosecution's Rule 65*ter* Exhibit List, 25 November 2008 ("*Gotovina* Decision of 25 November 2008"), para. 15 (italics added). *See* First *Karadžić* Bar Table Decision, para. 9 (describing bar table motions as "a supplementary method of introducing evidence, which should be used sparingly"); *Prosecutor v. Karadžić*, IT-95-5/18-T, Order on Procedure for Conduct of Trial, 8 October 2009, Appendix A, para. R ("[t]he use by the parties of bar table motions shall be kept to a minimum"); *Prosecutor v. Prlić et al*., IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on the Conduct of Trial Proceedings, 28 April 2006, para. 8(j) ("As a

13. The supplementary nature of bar table motions, and the primacy of hearing such information explained and contextualised during trial as a condition of admissibility, has led to the practice that bar table motions should not be brought in advance of trial. A Trial Chamber recently instructed the parties "to seek the admission of exhibits from the bar table towards the end of their respective cases-in-chief via a single bar table motion each";[27] another required them to do so "at a later stage of the party's case when it is clear to the tendering party that the relevant documents were not and could not have been, tendered through any witness."[28] The *Prlić* Trial Chamber required any bar table motions to make reference to witnesses previously appearing before the Trial Chamber who had testified on the same subject matter.[29] Requests to deviate from these guidelines have been rejected.[30]

14. Some ICTY decisions have permitted documents to be tendered "from the bar table" early in a party's case, but only where "the relevance and reliability of a document may be sufficiently apparent to justify its admission as an exhibit without the need for any evidence or any further evidence, relating to the document."[31] Various documents concerning crime-base evidence were admitted by the Trial Chamber in *Boškoski* before trial where both defendants agreed to their authenticity.[32]

(iii) Documents Are Suitable for Admission "From the Bar Table" Only When Testimonial or Other Evidential Corroboration Is Unnecessary

15. Documents are not suitable for admission, regardless of timing of introduction, from the bar table unless the indicia of reliability and authenticity can be assessed based on the

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general rule, the party tendering a piece of evidence shall do so through a witness who is either the author of that evidence, or who can speak to its origins and content.")

[27] *Prosecutor v. Hadžić*, IT-04-75-PT, Order on Guidelines for Procedure for Conduct of Trial, 4 October 2012, ("*Hadžić* Order"), Annex A, para. 8.

[28] *Prosecutor v. Mladić*, IT-09-92-T, Transcript (10 November 2011), T.110.

[29] *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision Amending the Decision on the Admission of Evidence Dated 13 July 2006, 29 November 2006, Annex.

[30] *Prosecutor v. Hadžić*, IT-04-75-PT, Decision on Prosecution Request for Early Bar Table Motion, 14 September 2012; *Prosecutor v. Mladić*, IT-09-92-T, Decision on Prosecution's Motion for Reconsideration, Granting Admission from the Bar Table or Certification in Relation to Decision Regarding Associated Exhibits of Witness Tucker, 7 February 2013.

[31] *Boškoski* OTP Bar Table Decision, para. 13.

[32] *Id*. paras. 6-7.

documents themselves, or where the connection with evidence previously heard during trial is self-evident. Documents should be denied admission, conversely, when their relevance is ambiguous or debatable,[33] or where relevance can be inferred only on the basis of several steps of reasoning offered by the party's counsel, rather than on the evidence itself.[34] Similarly, documents whose reliability cannot be established on their face should generally not be admitted from the bar table.[35] The issue is not only whether a document has some degree of reliability, but also whether the available indicia of reliability are sufficient to allow the Chamber to make any reasonable assessment thereof.

16. The admissibility of electronic audio-surveillance has been repeatedly addressed at the ICTY, where such recordings are common. The "bar table is not an appropriate means by which intercepts may be tendered into evidence"[36] because they are:

> a special category of evidence in that in and of themselves, they bear no *prima facie* indicia of authenticity or reliability, and as such these requirements must generally be fulfilled by hearing from the relevant intercept operators or the participants in the intercepted conversation.[37]

17. Trial Chambers have not always required that each and every intercept be commented upon, but at the very least have insisted upon evidence of the methodology of collection and attribution, before admitting any intercepts within that category.[38]

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[33] *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, Second Decision on Simatović Defence Third Bar Table Motion, 17 September 2012, para. 12 ("The Defence has had ample opportunity to present these documents through witnesses in order to provide the Chamber with the necessary context, but chose not to do so. As such, the Chamber is left to guess how to interpret or contextualise these documents when determining their admission into evidence. Therefore, the Chamber is unable to determine the probative value of these documents. For these reasons, the Chamber denies their admission into evidence from the bar table.")

[34] *Prosecution v. Strugar,* IT-01-42-T, Decision II on the Admissibility of Certain Documents, 9 September 2004, paras. 14, 16; *Prosecutor v. Milutinović et al*., IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 41 ("[t]he relevance of independent reports is extremely difficult to assess without a witness to provide context"); *Prosecutor v. Haradinaj et al*., IT-04-84-T, Decision on Prosecution's Motion to Tender Documents on its Rule 65ter Exhibit List, 30 November 2007, para. 18 ("[v]arious lists of names and some remarks on ammunition on pages 1 and 19 of the translated document lack contextualization. The Chamber therefore cannot regard them as relevant.")

[35] *See e.g. Gotovina* Decision of 25 November 2008, para. 15; *Prosecutor v. Delić,* IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008, para. 18.

[36] First *Karadžić* Bar Table Decision, para. 13.

[37] *Tolimir* Decision, para. 14.

[38] *Id*. para. 14 ("the Chamber notes, as submitted by the Prosecution, that a large collection of intercepts have already been admitted in this case as a result of the testimony of numerous experienced and trained ABiH and MUP intercept operators who have established the reliability of the interception process and have been able to speak to the authenticity of the intercepts. The Chamber finds, therefore, that the reliability and authenticity of this general collection of intercepts has already been established. The Proposed Intercepts form part of the general collection of intercepts already admitted in this case and as such, the Chamber is satisfied that the reliability and authenticity of

(iv) Documents May Only Be Admitted on the Basis of Specific and Individualised Submissions Describing Probative Value and Relevance

18. Past practice establishes that submissions from the bar table should address each of the criteria of admissibility in respect of each document tendered. The *Ruto* Trial Chamber ordered the Prosecution to file a new application accompanied by a table to include "a short description of the content of each document, averment of its authenticity, an indication of the reason for not tendering the document through a witness (if that is the case), an index of the most relevant portions of the document, as well as a description of its relevance and intended probative value."[39]

19. This practice is supported by the consistent practice of the ICTY, where the tendering party is required to provide a table describing the indicia of reliability of each document and its relevance.[40] The moving party is even typically required to circulate a Word version of the table of such submissions so that the responding party can make particularised submissions in response.

III. SUBMISSIONS

(i) "Category 1: intercepted communications, corresponding phone logs and transcripts/translation"

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the Proposed Intercepts was sufficiently established for the purposes of admitting them into evidence from the bar table"); *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's First Bar Table Motion for the Admission of Intercepts, 14 May 2012, para. 15 ("weight to be attributed to the Intercepts. The Chamber has also received evidence relating to the methodology used for obtaining, transcribing and storing the Intercepts, the method used for identifying speakers, and the procedure adopted in handing over the Intercepts to the Prosecution. The Chamber is therefore satisfied that there are sufficient indicia of reliability to negate the Accused's submission that this category of documents is "not sufficiently reliable to be admitted in general.")

[39] *Prosecutor v. Ruto*, Decision on the Conduct of Trial Proceedings (General Directions), ICC-01/09-01/11-847-Corr, para. 27 ("The Chamber takes notes of the 'Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)', which does not follow the procedure set out in this decision. The Prosecution is directed to re-file its application in the format described above. The re-filing shall re-start the running of the time limit for responses, which shall also follow the procedure set out in this decision.")

[40] *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, Second Decision on Simatović Defence Third Bar Table Motion, 17 September 2012, paras. 10, 11; *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, Second Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012, para. 10.

20. The Prosecution tenders as part of "Category 1" digital audio-files, large portions of which will be incomprehensible to the Trial Chamber; alleged transcriptions and translations of those audio-files; digital records of what are purported to be text messages; "corresponding phone logs"; and some lists or tables from the Registry.

21. The Prosecution's claim that the "[REDACTED]"[41] is incorrect. Authenticity, which is a precondition of probative value, requires the tendering party to provide a basis "that the document is actually what the moving party purports it to be."[42] Information establishing authenticity must itself be admissible and must be provided prior to admission. Authenticity cannot be based on the allegedly "[REDACTED]"[43] nature of the documents whose admission is sought. As stated in *Katanga* in addressing a Prosecution bar table motion:

> [T]he fact that evidence is being tendered without authentication by a witness may be an important factor in the Chamber's assessment of its admissibility. [….] If at the time of tendering an item of evidence, the party is unable to demonstrate its relevance and probative value, including its authenticity, it cannot be admitted. It does not suffice to argue *that its content may be corroborated by other evidence or that the Chamber may subsequently determine its proper evidentiary weight*.[44]

22. The Prosecution motion commits this error. The "[REDACTED]" of the intercepts is claimed, for example, to be established by "[REDACTED]".[45] This "[REDACTED]" is, in fact, not evidence at all, but merely other documents that have also been tendered for admission as part of the bar table motion itself.[46] This is not an appropriate basis of authentication:

> [U]nless an item of evidence is self-authenticating, or the parties agree that it is authentic, it is for the party tendering the item *to provide admissible evidence demonstrating its authenticity*. Such evidence may be direct or

[41] [REDACTED].
[42] *Prosecutor v. Bagosora et al*., ICTR-98-41-T, Decision on Admission of Tab 19 of Binder Produced in Connection With Appearance of Witness Maxwell Nkole, 13 September 2004, para. 8. *See Prosecutor v. Prlic et al.*, IT-07-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 34 ("[a]uthenticity relates to whether a document is what it professes to be in origin or authorship.")
[43] [REDACTED].
[44] *Prosecutor v. Katanga*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, 17 December 2010, paras. 12-13 (emphasis added) ("*Katanga* 17 December 2010 Decision").
[45] [REDACTED].
[46] [REDACTED].

> circumstantial but must provide reasonable grounds to believe that the exhibit is authentic, which, although not a particularly high standard, does impose a burden of proof on the party tendering the evidence. If no authenticating evidence is provided whatsoever, the documentary evidence will be found inadmissible. It is insufficient merely to state that "the information provided satisfies the required indicia of reliability and each document presents an intrinsic coherence and prima facie probative value, in light of the whole body of evidence introduced in this case."[47]

23. The question of authentication is particularly significant given the nature of the material tendered. These are not documents that have been found in an archive, and whose form is static and fixed. This is information that probably exists only in digital format. It bears "no *prima facie* indicia of authenticity or reliability."[48] The information can be comprehended by a lay-person only by way of some form of processing and presentation – and in this case, transcription and translation. That digital information can apparently be rendered in different forms, and may contain a host of ancillary information that can be generically described as "meta-data". By its very nature, this is not information that exists without some form of processing and manipulation. ICTY Trial Chambers have consistently required as a condition of admissibility in respect of electronic surveillance that evidence be submitted about the nature, origin and methodology by which such information was created,[49] or identifying one of the speakers.[50]

24. Authentication of the tendered material, at a minimum, requires admissible evidence establishing: (i) the meaning of "intercept", including what is being intercepted and how such data is stored; (ii) the methodology by which transcriptions were made of "intercepts"; (iii) how attributions have been made of the identity of speakers; (iv) the basis for asserting that certain transcriptions relate to certain audio-files; (v) the basis for

[47] *Katanga* 17 December 2010 Decision, para. 23.
[48] *Tolimir* Decision, para. 14.
[49] *Id.* ("these requirements must generally be fulfilled by hearing from the relevant intercept operators or the participants in the intercepted conversation"); *Prosecutor v. Karadžić,* IT-95-5/18-T, Decision on the Accused's Bar Table Motion (Sarajevo Intercepts), 9 October 2012, para. 10 ("While the Chamber eventually did admit a number of intercepts offered by the Prosecution from the bar table, it did so at the very end of the Prosecution case when the Prosecution had established their authenticity, either through the evidence of intercept operators or through the use of Rule 94(B).In this particular case, however, the Accused's only comment in relation to the authenticity and reliability of the Intercepts is that they are intercepts "under conditions already found to be reliable". In other words, the Accused makes no attempt to show that each one of the Intercepts offered has either been specifically authenticated by an intercept operator or that judicial notice of its authenticity can be taken due to the operation of Rule 94(B). Accordingly, the Accused has failed to meet the standard set forth in the Chamber's earlier decisions on similar Prosecution motions.")
[50] *Prosecutor v. Stanišić & Župljanin*, IT-08-91-T, Decision Denying the Stanišić Motion for Exclusion of Recorded Transcripts*,* 6 December 2009, para. 23.

asserting on the transcriptions the date and time of the audio-file; (vi) the origin or meaning of lists, "logs" and tables that have no self-evident meaning;[51] (vii) the process by which the "logs" have been produced and what they represent; (viii) the meaning of an "SMS" and how it is stored, collected and reflected in the form produced by the Prosecution; (ix) the basis for attributing "SMS"'s to particular individuals or (x) how this information was obtained or on what legal basis, aside from quoting passing references by the Single Judge[52] to legal proceedings that the Prosecution has not deemed necessary to present to the Trial Chamber. None of the above information – and certainly no admissible or admitted information – has been provided. The Prosecution has not even tendered a sworn affidavit of an investigator explaining how this material may have come into the Prosecution's possession, and his or her knowledge about its creation.

25. The Prosecution's invocation of the conclusions of the Single Judge or the Independent Counsel[53] is inappropriate and insufficient. The conclusions of the former are not a proper basis for decision of this Trial Chamber;[54] those of the latter are categorically inadmissible unless and until he is called as a witness and subject to cross-examination.

26. Mr. Mangenda has not by way of any previous submission admitted his participation in any of the audio-files tendered for admission. The Prosecution's assertion that such authenticity should be presumed in the absence of an objection reverses the burden of proof, and is improper. The claim that such attribution has been established through "media sources, commercial financial records, and evidence from state authorities" is vague and unsubstantiated. These are matters to be proven through evidence, not submissions "from the bar table."

27. The information tendered, furthermore, is apparently the subject of expert testimony by a Prosecution witness who can apparently address questions concerning authenticity.

[51] [REDACTED].
[52] [REDACTED].
[53] [REDACTED].
[54] *Prosecutor v. Lubanga,* Decision on the Prosecution and Defence applications for leave to appeal the Deision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, para. 75 ("[T]he Chamber notes that Pre-Trial Chamber rulings on the admissibility and probative value of evidence are not binding on a Trial Chamber. In this case, a final determination on the admissibility of the evidence will be made by the Trial Chamber for the purpose of determining the criminal responsibility of [the accused], and thus, the outcome of the trial.")

Testimonial evidence will, unlike some evidence that has been admitted from the bar table in other cases,[55] be directly relevant to its admissibility.

(ii) "Category II: call data records"

28. The foregoing submissions apply with even greater force to Category II. Who prepared, for example, "[REDACTED]"? What does it mean? Where does the information upon which the document is based come from? The Prosecution's submissions are nothing but a series of conclusions with no foundation or explanation, and certainly without any foundation or explanation in the form of evidence. Authenticity has not been established, nor have any indicia of reliability been provided.

(iii) "Category III: money transfer records"

29. A primary basis for claiming that the Western Union documents are authentic and have the other requisite indicia of reliability is a statement of a person who is listed as a Prosecution witness.[56] Tendering the documents in advance of this highly relevant witness's testimony is premature, unnecessary and improper.

30. No proper authentication or indicia of reliability have been provided in respect of the Express Union documents. The document cited by the Prosecution as the basis for authentication is inadmissible in its present form and has not even been tendered.[57] The documents are not, as the Prosecution claims,[58] "[REDACTED]." [REDACTED], for example, has no self-evident meaning nor is it self-authenticating. The document has no signature, date, self-evident meaning, indication of authorship, or indication of distribution. The document does not meet any of the criteria of admissibility.

[55] *See Lubanga* 2008 Decision.
[56] *Prosecutor v. Bemba et al.,* Prosecution's List of Witnesses and Evidence, ICC-01/05-01/13-1048-Conf-AnxB, 30 June 2015.
[57] [REDACTED].
[58] [REDACTED].

(iv) The Lack of Information About the Manner In Which the Documents Were Obtained Deprives the Parties and the Trial Chamber of the Ability to Consider Whether the Information Should Be Excluded

31. The Prosecution places in issue the legality of the electronic surveillance by claiming that the tendered material was obtained "[REDACTED]."[59] This claim falls far short of the requirements imposed by Article 69(7); having made the claim, however, it should have been substantiated. The Prosecution instead merely cites to transcripts of *ex parte* conferences involving the Prosecution, the Single Judge and the Independent Counsel in which there are passing references to Dutch judicial authorisations.[60]

32. The more relevant issue, however, is whether the surveillance yielding the information tendered in the bar table motion was collected in violation of the rights referred to Article 69(7). The Prosecution has not provided sufficient information on this issue. The Defence does not, for example, have all of the submissions upon which the surveillance was ordered to enable it to assess whether any surveillance was authorized on the basis of material misstatements. Admitting the documents from the bar table at this very early stage, without the Defence having had a full opportunity to obtain the relevant documentation, would be premature.

IV. CONCLUSION AND REMEDY

33. The Motion should be rejected in its entirety. The Prosecution has failed to discharge its threshold burden of proof in respect of authentication. The ham-fisted attempt to introduce all "[REDACTED]"[61] evidence through a "bar table motion" in advance of trial, without any evidential foundation or concomitant opportunity of testing, is unfair and procedurally defective.

34. The Trial Chamber may wish to consider whether denying the Motion without prejudice is an adequate remedy. The inappropriateness of the timing of the Motion, and the

[59] [REDACTED].
[60] [REDACTED].
[61] [REDACTED].

absence of particularized submissions on reliability, are evident. The Motion has caused the Defence, and will cause the Trial Chamber, to waste time and resources. A minimum remedy, in addition to denial of the Motion, should be an order precluding the Prosecution from filing any further bar table motions. The consequence would be to require that any and all documents be tendered through appropriate witnesses.

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Dated this 15 July 2016,
At The Hague, The Netherlands