

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/05-01/13

Date: 7 December 2015

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***

Confidential

**Response to “Prosecution’s Fifth 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:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean-Jacques Kabongo Mangenda

Mr Christopher Gosnell
Mr Arthur Vercken

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Defence,¹ without prejudice to subsequent submissions on relevance and reliability as may be made in accordance with Trial Chamber's previous guidance,² objects as hereinafter specified to the admission of the documents tendered in the "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table."³
2. First, objection is made to any documents tendered for which no translation has been provided into an official language of the Court.⁴
3. Second, objection is made to any document for which no official translation has been obtained and tendered.⁵ The tendering party has the burden of proving that the content of information submitted to the Trial Chamber meets a minimum threshold of reliability. A translation prepared by a party, without any indication that the translation has been certified as true and correct by a properly qualified interpreter, does not meet that basic standard.⁶ The consistent practice at the ICTY, which should be followed here as a minimum guarantee of reliability, is to deny admission of informal translations of exhibits.⁷
4. Third, objection is made to the submission of statements of individuals that are testimonial in nature and, accordingly, can be admitted only pursuant to Rule 68 of the

¹ The present submission is filed confidentially pursuant to Regulation 23bis (2) of the Regulations of the Court. However, the Defence has no objection to reclassification of this submission as public.

² *Bemba et al.*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), ICC-01/05-01/13-1285, 24 September 2015, para. 9 ("[a]s a general rule, these proceedings will be conducted more efficiently if the Chamber defers its assessment of the admissibility of evidence until deliberating its judgment pursuant to Article 74(2) of the Statute. The Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted at that time.")

³ ICC-01/05-01/13-1498-Conf, 27 November 2015 ("Motion").

⁴ See e.g. Document 101, pp. 3-7, 16; Document 102, pp. 3-7, 16.

⁵ Documents 21-25, 27-41: CAR-OTP-0074-0466; CAR-OTP-0074-0450; CAR-OTP-0074-1346; CAR-OTP-0074-0414; CAR-OTP-0074-1542; CAR-OTP-0079-0408; CAR-OTP-0079-0372; CAR-OTP-0079-0338; CAR-OTP-0079-0571; CAR-OTP-0079-0565; CAR-OTP-0079-0539; CAR-OTP-0079-0533; CAR-OTP-0079-0523; CAR-OTP-0079-0519; CAR-OTP-0079-0521; CAR-OTP-0079-1156; CAR-OTP-0079-1299; CAR-OTP-0079-1263; CAR-OTP-0079-1250; CAR-OTP-0079-1220.

⁶ The Prosecution, for example, provided an interpreter's attestation of the translation of the witness statement of P-242. See CAR-OTP-0074-0805 at 0812. See

⁷ *Tolimir*, IT-05-88/2-T, Decision on Third, Fourth and Fifth Motions by the Accused for Admission of Documents from the Bar Table, para. 15 ("[d]ue to the pending official English translations, however, the Chamber instructs the Registry to mark Rule 65 ter numbers 1D01112 and 1D01113 for identification and change their status to exhibits when the Chamber receives the translations"); *Perišić*, IT-04-81-T, Decision on Defence Submission Regarding Trial Chamber's Decision on Defence First and Second Bar Table Motions, 4 February 2011, para. 6 ("official translations of these documents have been uploaded in e-court and admits the documents into evidence"); *Stanisic & Zupljanin*, IT-08-91-T, Decision Granting in Part the Stanisic Defence Bar Table Motion, 14 September 2011, para. 14 ("[a]s a complete English translation has not been provided for Rule 65 ter number 659D1, the Trial Chamber will mark the document for identification, pending the provision of a full translation").

Rules of Procedure and Evidence.⁸ For example, the statements of the counsel interpreting the content of certain intercepted communications⁹ is testimonial. Elemental fairness requires that testimonial statements be subject to cross-examination as a condition of admissibility. Permitting the Prosecution to tender such statements by way of a bar table motion circumvents both Rule 68 and the basic requirement of trial fairness that testimonial information be subject to cross-examination.

5. Fourth, objection is made to the admission of all transcripts based on intercepted communications.¹⁰ The Prosecution has failed to offer evidence establishing the methodology by which transcriptions were made of “intercepts”; how attributions have been made of the identity of speakers; the basis for asserting that certain transcriptions relate to certain audio-files; or the basis for asserting on the transcriptions the date and time of the audio-files. The Defence also re-asserts that the legality of the process by which these intercepts were obtained remains doubtful. 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.”¹¹
6. Fifth, Documents 106 and 107, which are questions filed by the Legal Representatives of Victims to be posed to D-54, are not relevant to the determination of any charges against Mr. Mangenda. The Prosecution claims that these documents are relevant because they were “forwarded” by Mr. Mangenda.¹² Even assuming this claim to be true, Documents 106 and 107 are on their face addressed to Mr. Kilolo himself by the Legal Representatives of Victims.¹³ Mr. Kilolo had a legal right of access to these documents. Whether the document was “forwarded” by Mr. Mangenda, by an intern or by anyone else on the Defence team does not meet even the minimal threshold of materiality, relevance or probative value required for admission of evidence.

⁸ See *Bemba et al.*, Response to “Prosecution’s Third Request for the Admission of Evidence from the Bar Table”, ICC-01/05-01/13-1243-Conf, 14 September 2015, paras. 14-18.

⁹ See e.g. Document 101, pp. 7-15; Document 102, pp. 8-13.

¹⁰ See e.g. Documents 21-25, 27-41; CAR-OTP-0082-2042; CAR-OTP-0086-0596; CAR-OTP-0082-2210; CAR-OTP-0087-0226; CAR-OTP-0087-0873; CAR-OTP-0090-0164; CAR-OTP-0090-0140; CAR-OTP-0089-0047; CAR-OTP-0089-0174; CAR-OTP-0089-0158; CAR-OTP-0089-0117; CAR-OTP-0090-0452; CAR-OTP-0089-0098; CAR-OTP-0089-0089; CAR-OTP-0089-0093; CAR-OTP-0090-1180; CAR-OTP-0089-0399; CAR-OTP-0089-0372; CAR-OTP-0090-1339; CAR-OTP-0089-0297.

¹¹ Rome Statute, Art. 69(7).

¹² ICC-01/05-01/13-1498-Conf-AnxA, pp. 62-63.

¹³ See Document 106, p. 2; Document 107, p. 2.

7. Sixth, the Defence also notes that the Motion, rather than merely “submitting” documents into the record as per the Trial Chamber’s previous guidance, has sought to “admit” the documents. The Defence maintains, in light of the Trial Chamber’s “Decision on ‘Prosecution’s Fourth Request for the Admission of Evidence from the Bar Table’”,¹⁴ that the proper relief to be requested by the Prosecution is that the documents be “submitted” to the Court, with admissibility to be addressed in submissions prior to the final trial judgement. As stated previously, the Defence reserves the right to make fuller submissions at an appropriate time.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 7 December 2015,
At The Hague, The Netherlands

¹⁴ ICC-01/05-01/13-1480, 12 November 2015, para. 3.