

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 17 June 2016

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 Babala's Request for the
Admission of Evidence from the Bar Table Motion", 20 April 2016,
ICC-01/05-01/13-1821-Conf**

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

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

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the “*Requête de la Défense de M. Fidèle Babala Wandu visant à verser trois éléments par ‘Bar Table Motion’*” (“Bar Table Motion”)¹ seeking the admission of three documents.

2. The tendered documents, comprising an e-mail exchange between the Babala Defence and a support person from BASE regarding how the company indicates forwarded calls in its call data (“E-mail Exchange”), do not satisfy the threshold requirements of relevance and probative value necessary for their admission. The information requested and provided in the E-mail Exchange is unclear and incomplete. The author of the opinion provided on behalf of BASE Belgium is identified by her first name only. Her qualifications and expertise are not provided. Moreover, the information — which is highly technical and requires expertise to evaluate — is untested, making its admission prejudicial to a fair trial.

II. Confidentiality

3. This response is filed “*Confidential*” because it responds to a filing of the same designation. The Prosecution will file a “*Public Redacted*” version following the Defence’s filing of the same.

III. Applicable Law

4. Article 69(4) of the Rome Statute (“Statute”) guides the factors to be considered when making general admissibility assessments.² A Chamber may rule on “the relevance or admissibility of any evidence, taking into account, *inter alia*, the

¹ ICC-01/05-01/13-1781-Conf.

² ICC-01/09-01/11-1353, para. 14.

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.” Article 64(9)(a) of the Statute governs the Chamber’s determination of the “admissibility or relevance of evidence”. Rule 63(2) of the Rules of Procedure and Evidence elaborates on this authority.

5. The Statute and the Rules do not expressly stipulate the manner in which documentary evidence must be introduced. Nonetheless, Chambers have admitted evidence from the bar table,³ considering three key factors: (i) its *prima facie* relevance to the issues at trial;⁴ (ii) its *prima facie* probative value;⁵ and (iii) its prejudicial effect as weighed against the probative value.⁶

IV. Submissions

(i) The E-mail Exchange is not *prima facie* relevant to the issues at trial

6. The E-mail Exchange is irrelevant to any salient issue in the case.

7. The Babala Defence’s contention that the E-mail Exchange is relevant to cast doubt on the Prosecution’s allegations in relation to Babala’s participation in multi-party calls is unsubstantiated.⁷ Not only does it fail to identify how the E-mail Exchange could support a different interpretation, the E-mail Exchange itself does not provide any such indication.

³ ICC-01/04-01/06-1399-Corr and ICC-01/04-01/06-1981 (*Lubanga* case); ICC-01/09-01/11-1353 (*Ruto and Sang* case); ICC-01/04-01/07-2635 (*Katanga and Ngudjolo* case); ICC-01/05-01/08-2012-Red and ICC-01/05-01/08-2299-Red (Main case).

⁴ ICC-01/04-01/06-1399-Corr, para. 27; ICC-01/04-01/07-2635, section B; ICC-01/05-01/08-2012-Red, paras. 13-14; ICC-01/05-01/08-2299-Red, para. 8; ICC-01/09-01/11-1353, para. 15.

⁵ ICC-01/04-01/06-1399-Corr, paras. 28-30; ICC-01/04-01/07-2635, section C; ICC-01/05-01/08-2012-Red, paras. 13 and 15; ICC-01/05-01/08-2299-Red, para. 8; ICC-01/09-01/11-1353, para. 15.

⁶ ICC-01/04-01/06-1399-Corr, paras. 31-32; ICC-01/04-01/07-2635, section D; ICC-01/05-01/08-2012-Red, paras. 13, 16-17; ICC-01/05-01/08-2299-Red, para. 8; ICC-01/09-01/11-1353, para. 16.

⁷ ICC-01/05-01/13-1781-Conf, paras. 13-18.

8. Even assuming *arguendo* that the Babala Defence might suggest that the calls concerned could have been forwarded from one of Kilolo's telephone numbers ([REDACTED]) to one of his other numbers ([REDACTED]), that position would be erroneous. As confirmed by telecommunications expert Rene Pluijmers, transfers to voicemail or other devices can be readily determined from BASE Belgium's Call Data Records ("CDRs") which is indicated by the term "FORWARDING" in column A of the CDRs.⁸ By contrast, the calls identified as illustrative of Babala's participation in multi-party calls with Bemba and Kilolo are simply identified as "CALL[S]".⁹ Moreover, the contacts data extracted from Kilolo's phone undeniably attribute the calling number "[REDACTED]" to Babala.¹⁰

(ii) The E-mail Exchange lacks *prima facie* reliability

9. The E-mail Exchange is also unreliable. The response to the Defence inquiry provided by BASE support is signed by a certain [REDACTED]. Her credentials however are not established, and the Babala Defence does not explain why [REDACTED] would be in a position to attest to the technical matters presented, or why such information should be considered accurate or reliable.

10. Furthermore, the E-mail Exchange is incomplete: the E-mail Exchange comprises four e-mails dated 21 January 2016, 12 February 2016, 14 March 2016 and 17 March 2016, respectively. While the first two, and the last e-mails have an identified sender and receiver, the third, dated 14 March 2016, does not include the receiver, or the subject of the e-mail. It is therefore unclear whether parts of the e-

⁸ CAR-OTP-0090-1825 at 1838 and 1839. See also ICC-01/05-01/13-T-16-CONF-ENG ET p. 81, ln. 2 to p.82, ln. 6. During his testimony, Mr Pluijmers explained that the CDRs from BASE have the same structure as those from KPN Group Belgium (ICC-01/05-01/13-T-16-CONF-ENG ET, p. 81, lns. 7-9). In respect of the CDRs from KPN Group Belgium, call forwarding is addressed at ICC-01/05-01/13-T-16-CONF-ENG ET, p. 77, ln. 16 to p. 78, ln. 23.

⁹ See regarding D-55: CAR-OTP-0072-0391, row 716 and regarding D-51: CAR-OTP-0072-0391, row 363.

¹⁰ See CAR-OTP-0090-1872 at 1873; see also CAR-OTP-0088-0398 at 0405.

mail conversation were deleted. Since only the third e-mail allegedly triggered a response from BASE support, it is equally unclear whether issues were discussed or orally clarified during the exchange.

(iii) The prejudicial effect of admitting the E-mail Exchange outweighs its probative value

11. The Prosecution opposes the admission of the E-mail Exchange, absent a reasonable opportunity to examine [REDACTED]. As mentioned above, aside from being unclear, the E-mail Exchange raises several questions in terms of its provenance, accuracy, reliability, and completeness. Without requiring [REDACTED]'s appearance to give testimony, the Prosecution cannot fairly test or clarify the proposed evidence or challenge the Defence's hypothesis. Thus, admitting the E-mail Exchange absent that opportunity would be prejudicial to the Prosecution and inconsistent with, if not, contrary to the interests of justice.

12. It should be noted that despite being informed of Babala's involvement in multi-party calls during the July 2014 confirmation process,¹¹ nearly a year later the Babala Defence also declined the Prosecution's offer ¹² to jointly instruct the telecommunications expert Mr Pluijmers.¹³ Further, the Babala Defence also refrained from exploring the issue with either Mr Pluijmers or Witness P-0433 during their testimony. Admitting the E-mail Exchange in these circumstances is not justifiable, particularly given the Babala Defence's wholly unexplained failure to pursue or to obtain this information until this late hour.

¹¹ ICC-01/05-01/13-597-Conf-AnxB, para. 67.

¹² ICC-01/05-01/13-956-Conf, paras. 10-16.

¹³ ICC-01/05-01/13-T-16-CONF-ENG ET, p. 48, lns. 6-16.

V. Requested Relief

13. For the foregoing reasons, the Prosecution opposes the admission of the E-mail Exchange, absent a meaningful opportunity to test and challenge the content thereof.



Fatou Bensouda, Prosecutor

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