

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 12 October 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul C. 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

**Decision on Babala and Arido Defence Request for Leave to Appeal the Trial
Chamber's 'Decision on Prosecution Requests for Admission of Documentary
Evidence' (ICC-01/05-01/13-1285)**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for 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

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Article 82(1)(d) of the Rome Statute ('Statute') and Rule 155 of the Rules of Procedure and Evidence, issues the following 'Decision on Babala and Arido Defence Request for Leave to Appeal the Trial Chamber's "Decision on Prosecution Requests for Admission of Documentary Evidence" (ICC-01/05-01/13-1285)'.

1. On 24 September 2015, the Chamber issued a decision recognising the formal submission of items discussed in three Prosecution 'bar table' requests ('Impugned Decision').¹
2. On 29 September 2015, the defence teams for Mr Babala and Mr Arido sought leave to appeal this decision in respect of five issues ('Request').²
3. On 5 October 2015, the Prosecution responded to the Request, submitting that it be rejected in full.³
4. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.⁴
5. The first issue raised by the Babala and Arido Defence is '[w]hether the Trial Chamber erred in law by considering that the Prosecution's first Bar Table Motion contained sufficient information to permit it to rule on the request'.⁵ The Chamber did indicate that it had sufficient information from the Prosecution to rule on its

¹ 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.

² Babala and Arido Defence Request for Leave to Appeal the Trial Chamber's "Decision on Prosecution Requests for Admission of Documentary Evidence" (ICC-01/05-01/13-1285), ICC-01/05-01/13-1317.

³ Prosecution's Response to the Babala Defence's and Arido Defence's Request for Leave to Appeal the "Decision on Prosecution Requests for Admission of Documentary Evidence", ICC-01/05-01/13-1337.

⁴ Decision on Defence Request for Leave to Appeal 'Decision on Arido Defence Request to Interview Prosecution Investigators', 7 October 2015, ICC-01/05-01/13-1346 (notified 8 October 2015); Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800, 27 March 2015, ICC-01/05-01/13-877, paras 5-7.

⁵ Request, ICC-01/05-01/13-1317, paras 4-5, 16-17, 25-30.

request,⁶ but recalls that this ruling was made in the context of articulating a general rule that the Chamber would defer its assessment of the admissibility of evidence 'until deliberating its judgment pursuant to Article 74(2) of the Statute'.⁷ The Chamber did not find that the Prosecution has made a sufficient showing to enable reliance on the submitted materials in the absence of *viva voce* witness testimony - only that the Prosecution did not need to re-file its request in order for the Chamber to defer its assessment of it to a later point in time. The Chamber is not persuaded that ruling that the Prosecution's motion was sufficient under these circumstances significantly affects the fairness or expeditiousness of the proceedings or the outcome of the trial. As regards the Defence argument that it was hampered in its right to challenge the evidence,⁸ the Chamber finds that such allegation is prematurely advanced, given that the evidence analysis will take place at the judgment stage and, as such, the Impugned Decision has not prevented the parties from objecting to the evidence as they deem fit. Accordingly, the Chamber finds that this issue, as formulated by the Defence, does not fulfil the Article 82(1)(d) criteria.⁹

6. The second issue raised is '[w]hether the Trial Chamber erred in law by failing to render a decision as to the type of material which can be submitted through the bar table'.¹⁰ When considering the relevance, probative value and potential prejudice of each item of evidence submitted for the trial judgment, the Chamber will also necessarily consider 'what type of materials can be submitted through

⁶ Impugned Decision, ICC-01/05-01/13-1285, para. 3.

⁷ Impugned Decision, ICC-01/05-01/13-1285, para. 9.

⁸ Request, ICC-01/05-01/13-1317, paras 16-18.

⁹ See also Appeals Chamber, *The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2010, ICC-01/05-01/08-1386, OA5 & OA6 ('*Bemba* OA5-OA6 Judgment'), para. 64.

¹⁰ Request, ICC-01/05-01/13-1317, paras 6-7, 16-17, 25-30.

the bar table'.¹¹ As the Chamber's judgment will resolve the point raised, this issue is premature and does not arise from the Impugned Decision.

7. The third issue raised is '[w]hether the Trial Chamber erred in law by failing to take into account the rights of the Accused when finding that decisions on admissibility of evidence will be made at the time of the final judgement'.¹² The Chamber never issued a decision determining that it would not take into account the rights of the accused, and the Impugned Decision repeatedly referenced both the accused's rights and the Chamber's obligations to ensure that the proceedings are both fair and expeditious.¹³ The Chamber simply decided that it would defer admissibility considerations to the end of the proceedings, as expressly permitted by the Appeals Chamber.¹⁴ To the extent the Babala and Arido Defence are challenging the exercise of the Chamber's discretion, 'failing to take into account the rights of the accused' is comparable to challenging the entirety of the Chamber's reasoning - this is insufficiently discrete to qualify as an appealable issue.

8. The fourth issue raised is '[w]hether the Trial Chamber erred in law by stating that "it may not necessarily discuss these aspects [i.e. the relevance, probative value and potential prejudice] for every item submitted in the final judgement"'.¹⁵ This issue is also premature – it is tantamount to taking issue with the reasoning of the final judgment before it has even been delivered. This issue does not arise from this decision, and in fact cannot arise from any decision taken prior to the trial judgment.

¹¹ See also Impugned Decision, ICC-01/05-01/13-1285, para. 15 (indicating that further guidance would also be given on whether certain materials in the Prosecution's motions required introduction through Rule 68 of the Rules).

¹² Request, ICC-01/05-01/13-1317, paras 9-10, 19-21, 25-30.

¹³ Impugned Decision, ICC-01/05-01/13-1285, paras 8 (quoting *Bemba* OA5-OA6 Judgment, ICC-01/05-01/08-1386, para. 37), 11, 13.

¹⁴ Impugned Decision, ICC-01/05-01/13-1285, para. 8, quoting *Bemba* OA5-OA6 Judgment, ICC-01/05-01/08-1386, para. 37.

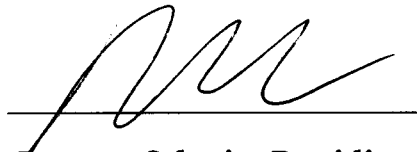
¹⁵ Request, ICC-01/05-01/13-1317, paras 11-12, 23, 25-30.

9. The fifth issue raised is 'whether the Trial Chamber erred in law by finding that the submissions of the Bemba and Arido Defence regarding Article 69(7) constituted new requests'.¹⁶ The Impugned Decision did nothing to change who has the burden of persuading the Chamber of the admissibility or inadmissibility of a piece of evidence. The only consequence of treating the Bemba and Arido Defence arguments as new requests under Article 69(7) of the Statute is that the Prosecution was given an opportunity to make an additional submission on the arguments advanced.¹⁷ The Chamber fails to see how that could significantly affect the fair or expeditious conduct of the proceedings or the outcome of the trial.

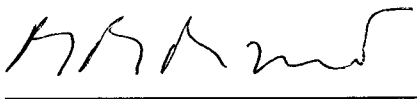
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the relief sought in the Request.

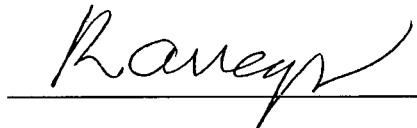
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 12 October 2015

At The Hague, The Netherlands

¹⁶ Request, ICC-01/05-01/13-1317, paras 13-14, 24, 25-30.

¹⁷ Impugned Decision, ICC-01/05-01/13-1285, para. 14.