

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/05-01/13  
Date: 27 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 Motion for Reconsideration or Leave to Appeal Decision ICC-01/05-  
01/13-1284**

**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

**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**

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**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 Articles 64(2) and 82(1)(d) of the Rome Statute ('Statute') and Rule 155 of the Rules of Procedure and Evidence, issues the following 'Decision on Motion for Reconsideration or Leave to Appeal Decision ICC-01/05-01/13-1284'.

## **I. Procedural History**

1. On 24 September 2015, the Chamber rejected a challenge by the defence team for Mr Mangenda ('Mangenda Defence') to declare all telephone intercepts of Mr Mangenda inadmissible ('Impugned Decision').<sup>1</sup>
2. On 29 September 2015, the Mangenda Defence sought reconsideration of or, alternatively, leave to appeal the Impugned Decision ('Request').<sup>2</sup>
3. On 5 October 2015, the Prosecution responded to the Request, submitting that it be rejected in full ('Response').<sup>3</sup>
4. On 8 October 2015, the Mangenda Defence sought leave to reply to the Response.<sup>4</sup>

## **II. Analysis**

5. As a preliminary matter, the Chamber does not consider it necessary to receive the additional submissions proposed in the Mangenda Defence request for leave to reply. Accordingly, the Chamber rejects this request.

<sup>1</sup> Decision on Request to declare telephone intercepts inadmissible, ICC-01/05-01/13-1284.

<sup>2</sup> Motion for Reconsideration or, In the Alternative, for Leave to Appeal the Decision on Request to Declare Telephone Intercepts Inadmissible (ICC-01/05-01/13-1284), ICC-01/05-01/13-1319-Red (with two annexes; public redacted version notified 7 October 2015).

<sup>3</sup> Prosecution response to Mr Mangenda's "Motion for Reconsideration or, In the Alternative, for Leave to Appeal the Decision on Request to Declare Telephone Intercepts Inadmissible", ICC-01/05-01/13-1338-Conf.

<sup>4</sup> Request for Leave to Reply to Prosecution response to Mr. Mangenda's "Motion for Reconsideration or, In the Alternative, for Leave to Appeal the Decision on Request to Declare Telephone Intercepts Inadmissible", ICC-01/05-01/13-1351-Conf.

### A. Request for Reconsideration

6. The Chamber recalls the applicable law relating to reconsideration as set out in previous decisions.<sup>5</sup>
7. The Mangenda Defence seeks reconsideration on the basis of two errors which are allegedly made in the Impugned Decision. First, the Mangenda Defence submits that the Chamber should reconsider its finding in respect of the allegation that Mr Mangenda paid witnesses through Western Union on grounds that the Prosecution possessed evidence at that time to refute this allegation.<sup>6</sup> Second, the Mangenda Defence submits that the Chamber should reconsider its finding that there was sufficient circumstantial evidence to support the allegation that Mr Mangenda may be paying witnesses in person while they are at the Seat of the Court.<sup>7</sup>
8. The Impugned Decision never determined that Mr Mangenda paid any witnesses. The Chamber merely concluded that, on the information available to the Prosecution when requesting to intercept Mr Mangenda's telephone contacts before the Pre-Trial Chamber, the Prosecution could have reasonably brought this hypothesis forward.<sup>8</sup>
9. The Chamber considers that what the Mangenda Defence describes as 'clear errors' or 'new facts' are in fact repetitions of arguments considered and rejected in the Impugned Decision. The Mangenda Defence has not advanced any new arguments that would warrant reconsideration. Accordingly, this part of the Request is rejected.

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<sup>5</sup> Decision on Arido Defence Requests for Disclosure and to Delay the Testimony of Witnesses P-245 and P-260, 28 September 2015, ICC-01/05-01/13-1309, para. 8; Decision on Kilolo Defence Request for Reconsideration, 15 July 2015, ICC-01/05-01/13-1085-Conf, para. 4.

<sup>6</sup> Request, ICC-01/05-01/13-1319-Red, paras 14-17.

<sup>7</sup> Request, ICC-01/05-01/13-1319-Red, paras 18-23.

<sup>8</sup> Impugned Decision, ICC-01/05-01/13-1284, paras 21-24.

## B. Request for Leave to Appeal

10. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.<sup>9</sup> The Mangenda Defence seeks leave to appeal in respect of five issues.
11. The first issue raised is '[w]hether the Trial Chamber erred in failing to provide a reasoned opinion'.<sup>10</sup> 'Failing to provide a reasoned opinion' is comparable to challenging the entirety of the Chamber's reasoning - this is insufficiently discrete to qualify as an appealable issue.
12. The second issue raised is '[w]hether the Trial Chamber erred in (a) the minimum threshold of suspicion to be met in the *ex parte* application seeking judicial authorisation to conduct highly intrusive surveillance; [and] (b) failing to define any positive duty of disclosure of all relevant facts, and to diligently inquire into exculpatory information'.<sup>11</sup> The Impugned Decision analysed the Mangenda Defence's arguments on an allegation-by-allegation basis.<sup>12</sup> As all allegations were deemed unsubstantiated, the Chamber did not further assess the definition of any positive duty of disclosure (or of diligent inquiry) or the standard for seeking judicial authorisation in the abstract. The legal standards raised in this issue therefore are not essential for the determination of the decision. Even if the Chamber had resolved them to the Mangenda Defence's satisfaction, the Impugned Decision would not have changed.
13. As to the last three issues, the third issue raised is '[w]hether the Trial Chamber erred in fact in failing to find that the Prosecution had made a misrepresentation in the Authorisation Request in asserting that Mr. Mangenda "ha[d] sent Western

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<sup>9</sup> 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), 12 October 2015, ICC-01/05-01/13-1361; 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.

<sup>10</sup> Request, ICC-01/05-01/13-1319-Red, paras 33(i), 34, 39-42.

<sup>11</sup> Request, ICC-01/05-01/13-1319-Red, paras 33(ii), 35, 39-42.

<sup>12</sup> Impugned Decision, ICC-01/05-01/13-1284, para. 18.

Union payments to Defence witnesses”<sup>13</sup>. The fourth issue raised is ‘[w]hether the Trial Chamber erred in law or fact in finding that the allegation that Mr. Mangenda may have been paying witnesses in The Hague “was supported by sufficient circumstantial evidence”<sup>14</sup>. The fifth issue raised is ‘[w]hether the Trial Chamber erred in fact or law in failing to find that the possible interpretations set out in paragraph 20 of the Decision constituted a misrepresentation, given the proper meaning of that term in the context of an *ex parte* application for judicial authorisation to intercept a person’s telephone communications’<sup>15</sup>.

14. Prior to the trial judgment being rendered, it is speculative to suggest that these issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Even if these criteria were met, the Chamber is not of the opinion that an immediate resolution by the Appeals Chamber on any of these particular determinations would materially advance the proceedings. The Chamber emphasises that the Impugned Decision only decided that the challenged materials were ‘not inadmissible’ under Article 69(7) of the Statute. How these materials will be considered by the Chamber will only be specified in the trial judgment.<sup>16</sup>
15. As the Chamber indicated at the commencement of trial, the potential of reversible error at this point in the proceedings may be ‘better and justly deferred to any final appeal under Article 81’.<sup>17</sup> Rather than initiating an interlocutory appeal over materials which might not even have a material effect on the final judgment, it seems more efficient for all concerned that a discussion on the issues raised by the Mangenda Defence takes place in court during the trial.

<sup>13</sup> Request, ICC-01/05-01/13-1319-Red, paras 33(iii), 36, 39-42.

<sup>14</sup> Request, ICC-01/05-01/13-1319-Red, paras 33(iv), 37, 39-42.

<sup>15</sup> Request, ICC-01/05-01/13-1319-Red, paras 33(v), 38, 39-42.

<sup>16</sup> See 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), 24 September 2015, ICC-01/05-01/13-1285.

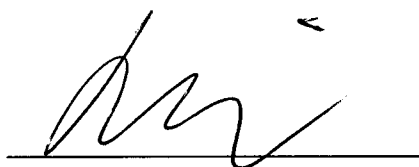
<sup>17</sup> Transcript of hearing, ICC-01/05-01/13-T-10-Red-ENG, page 11, lines 3-12.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

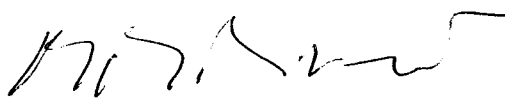
**REJECTS** the Mangenda Defence request for leave to reply; and

**REJECTS** the Request in its entirety.

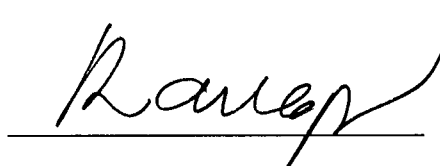
Done in both English and French, the English version being authoritative.



**Judge Bertram Schmitt, Presiding Judge**



**Judge Marc Perrin de Brichambaut**



**Judge Raul C. Pangalangan**

Dated 27 October 2015

At The Hague, The Netherlands