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No.: ICC-01/05-01/13  
Date: 20 November 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 Request for Leave to Appeal 'Decision on Bemba and Arido Defence  
Requests to Declare Certain Materials Inadmissible'**

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

**The Office of the Prosecutor**

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Mr James Stewart

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Ms Melinda Taylor

**Counsel for Aimé Kilolo Musamba**

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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 Article 82(1)(d) of the Rome Statute ('Statute') and Rule 155 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Request for Leave to Appeal "Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible"'.<sup>1</sup>

1. On 30 October 2015, the Chamber rejected objections raised by the defence team for Mr Bemba ('Bemba Defence') that certain materials obtained from the detention centre ('Detention Centre Materials') are inadmissible under Article 69(7) of the Statute ('Impugned Decision').<sup>1</sup>
2. On 9 November 2015, the Bemba Defence sought leave to appeal the Impugned Decision in respect of seven issues ('Request').<sup>2</sup>
3. On 12 November 2015, the defence team for Mr Babala attempted to join the Request.<sup>3</sup> This filing was submitted past the prescribed time limit of Rule 155(1) of the Rules and, therefore, cannot be considered further.<sup>4</sup>
4. On 13 November 2015, the Office of the Prosecutor ('Prosecution') responded to the Request, submitting that it be rejected in full.<sup>5</sup>
5. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.<sup>6</sup>

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<sup>1</sup> Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, ICC-01/05-01/13-1432.

<sup>2</sup> Public Defence Request for Leave to Appeal, with Confidential Annex A, ICC-01/05-01/13-1472 (with confidential annex).

<sup>3</sup> Adjonction de la Défense de M. Fidèle Babala Wandu à «Public Defence Request for Leave to Appeal, with Confidential Annex A» (ICC-01/05-01/13-1472) déposée le 9 novembre 2015, ICC-01/05-01/13-1479.

<sup>4</sup> See also Decision on the Request for Leave to Appeal the Decision ICC-01/05-01/13-893-Red, 28 May 2015, ICC-01/05-01/13-966, para. 11.

<sup>5</sup> Prosecution's Response to the Bemba Defence's Request for Leave to Appeal the "Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible" and Request to Dismiss *In Limine* the Babala Defence's Joinder, ICC-01/05-01/13-1483.

6. As a preliminary matter, the Chamber notes that the Bemba Defence's 'appealable issues' are in fact a series of determinations allegedly made in the Impugned Decision. The Chamber considers that it can discern what the Bemba Defence seeks leave to appeal, but the Bemba Defence's argumentation creates unnecessary difficulties in identifying the legal or factual topic proposed for determination on appeal.
7. The first proposed issue is '[t]he Trial Chamber's legal approach which placed the burden of argumentation concerning the criteria in Article 69(7) and application/waiver of privilege on the Defence rather than the Prosecution'.<sup>7</sup> The Impugned Decision did not articulate or apply any particular 'burden of argumentation' – the Chamber concluded that, on all the information available, the Detention Centre Materials' admission was not prohibited by Article 69(7) of the Statute. This issue is not essential for the determination of the decision. Even if the Chamber had explicitly placed a 'burden of argumentation' on the Prosecution (despite the fact that the party requesting an inadmissibility finding under Article 69(7) clearly needs to give some substantiation for its alleged violations), the Impugned Decision would have been the same. As a result, the first proposed issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. To the extent that the Bemba Defence challenges the Chamber's decision to seek an additional submission from the Prosecution on the Detention Centre Materials' admissibility, this issue has already been found not to meet the leave to appeal criteria.<sup>8</sup>
8. The second proposed issue is '[t]he Trial Chamber's legal determination that passively monitored calls are not subject to the same legal safeguards as concerns

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<sup>6</sup> Decision on Motion for Reconsideration or Leave to Appeal Decision ICC-01/05-01/13-1284, 27 October 2015, ICC-01/05-01/13-1425; 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>7</sup> Request, ICC-01/05-01/13-1472, paras 2(i), 8-12, 21-23.

<sup>8</sup> *Similarly*, 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, para. 9.

actively monitored calls as concerns notice and prior vetting by the Defence'.<sup>9</sup> This issue appears to relate to footnote 18 of the Impugned Decision, which notes a difference in the Regulations of the Registry as to passive and active monitoring of phone calls.<sup>10</sup> However, this reasoning is part of an *obiter dictum* in the section analysing the existence of any violation of the Statute.<sup>11</sup> The Chamber's actual finding on this point noted that the Pre-Trial Chamber Single Judge's legal basis was Articles 57(3)(a) and 70 of the Statute and reasoned that 'there is no requirement that a detained person have an opportunity to be heard where an application is made under Article 57(3)(a) of the Statute'.<sup>12</sup> Given that any distinction in safeguards between passively and actively monitored calls does not affect the Chamber's reasoning, this issue is not essential for the determination of the Impugned Decision. As a result, the second proposed issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

9. The third proposed issue is '[t]he Trial Chamber's legal determination that a broad, discretionary power in Article 57(3)(a) constituted a sufficiently specific, certain, and foreseeable legal basis for circumventing explicit privacy rights set out in the Regulations of the Court, the Regulations of the Registry, and internationally recognised human rights law'.<sup>13</sup> This issue misrepresents the Impugned Decision and, accordingly, does not arise from it – the Chamber clearly

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<sup>9</sup> Request, ICC-01/05-01/13-1472, paras 2(ii), 13-14, 24-35, 39-46.

<sup>10</sup> Request, ICC-01/05-01/13-1472, para. 13; Impugned Decision, ICC-01/05-01/13-1432, para. 13 footnote. 18 ('The Chamber further notes that, although Regulation 175(10) of the Regulations of the Registry provides that telephone conversations actively monitored and transcribed by the Registry shall not be handed over as evidence of contempt of court without prior notice and disclosure to counsel for the detained person, this provision does not apply to recordings of passively monitored calls subject to a judicial order providing access').

<sup>11</sup> The sentence containing footnote 18 in the Impugned Decision begins: '[e]ven assuming, *arguendo*, that the Detention Centre Materials were part of the detention record [...]'].

<sup>12</sup> Impugned Decision, ICC-01/05-01/13-1432, para. 12.

<sup>13</sup> Request, ICC-01/05-01/13-1472, paras 2(iii), 15-16, 24-35, 39-46.

relied on other legal provisions besides Article 57(3)(a) of the Statute to conclude that Mr Bemba had sufficient information in order to regulate his conduct.<sup>14</sup>

10. The fourth proposed issue is '[t]he Trial Chamber's determination that the standard of "reasonable suspicion" was both applied and met in circumstances in which the [Pre-Trial Chamber] Single Judge did not verify or examine the evidence relied upon by the Prosecution in support of its assertions concerning Mr. Bemba's alleged involvement in Article 70 offences'.<sup>15</sup> This issue also misrepresents the Impugned Decision. The Chamber did not apply a 'reasonable suspicion' standard in the Impugned Decision – it only noted that this standard seems to have been applied by the Pre-Trial Chamber Single Judge when he decided to give the Detention Centre Materials to the Prosecution.<sup>16</sup> This Chamber merely noted this standard in setting out the Pre-Trial Chamber Single Judge's conclusions which demonstrate that any infringement on Mr Bemba's right to privacy was 'necessary' in accordance with internationally recognised human rights. This issue does not arise from the Impugned Decision – it arose, if at all, from the original decisions of the Pre-Trial Chamber Single Judge.<sup>17</sup> Trial Chambers do not have appellate review powers over Pre-Trial Chambers;<sup>18</sup> these kinds of issues are better advanced before the Appeals Chamber against the final judgment.

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<sup>14</sup> Impugned Decision, ICC-01/05-01/13-1432, para. 15 (citations removed: '[f]irst, the Chamber recalls that the measures taken had a basis in law. Articles 57(3)(a) and 70 of the Statute, when read in conjunction with Regulation 100(3) of the Regulations of the Court ("Regulations") and Regulations 174 and 175 of the Regulations of the Registry, are accessible, foreseeable as to their effects and sufficiently precise in order to enable Mr Bemba to regulate his conduct').

<sup>15</sup> Request, ICC-01/05-01/13-1472, paras 2(iv), 17, 24-35, 39-46.

<sup>16</sup> Impugned Decision, ICC-01/05-01/13-1432, para. 16.

<sup>17</sup> Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70", 8 May 2013, ICC-01/05-46; Decision on the "Registry's Observations pursuant to regulation 24 *bis* of the Regulations of the Court on the implementation of the 'Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70"'", 27 May 2013, ICC-01/05-50.

<sup>18</sup> Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 43.

11. The fifth and sixth proposed issues are '[t]he Trial Chamber's finding (based on the [Pre-Trial Chamber] Single Judge's prior decisions and a factually incorrect assertion from the Prosecution) that the communications of Mr. Mangenda were not privileged, and could be accessed directly by the Prosecution without any prior vetting'<sup>19</sup> and '[t]he Trial Chamber's definition of the exception to privilege and/or Defence confidentiality as encompassing a communication which was 'made on a non-privileged line, falls within the relevant time period and relates to the role of and communications between two accused'.<sup>20</sup> The Impugned Decision only engaged with the issue of privilege with respect to a single recording in the Detention Centre Materials.<sup>21</sup> Absent any indication by the Bemba Defence of this particular recording's importance, the Chamber fails to see how its conclusions significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>22</sup>
12. The seventh proposed issue is '[t]he Trial Chamber's legal determination that a decision on the admissibility of evidence can be split into separate elements, which can be adjudicated at different points of the proceedings'.<sup>23</sup> The decision separating the Article 69(7) challenges to the Detention Centre Materials from the rest of the admissibility assessment of them was made on 24 September 2015.<sup>24</sup> This issue does not arise from the Impugned Decision, nor does the Chamber see how the sequencing of its admissibility analysis significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

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<sup>19</sup> Request, ICC-01/05-01/13-1472, paras 2(v), 18, 24-35, 39-46.

<sup>20</sup> Request, ICC-01/05-01/13-1472, paras 2(vi), 19, 24-35, 39-46.

<sup>21</sup> Impugned Decision, ICC-01/05-01/13-1432, para. 18.

<sup>22</sup> The Chamber has also previously ruled that its interpretation of the crime/fraud privilege exception does not meet the leave to appeal criteria. Decision on Defence Request for Leave to Appeal the 'Decision Providing Materials in Two Independent Counsel Reports and Related Matters', 21 July 2015, ICC-01/05-01/13-1096, paras 8-11.

<sup>23</sup> Request, ICC-01/05-01/13-1472, paras 2(vii), 20, 36-46.

<sup>24</sup> 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.

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

**REJECTS** 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 20 November 2015

At The Hague, The Netherlands