

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **29 September 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**

Public

**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)**

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I. INTRODUCTION

1. The Arido and Babala Defence teams (hereinafter ‘the Defence’) hereby seek leave to appeal the Trial Chamber’s decision on Prosecution Requests for Admission of Documentary Evidence, dated 24 September 2015.¹

II. APPLICABLE LAW

2. The Defence refers to the applicable law cited in paragraphs 4 to 9 of the its request for leave to appeal the Single Judge’s decision on the Arido Defence request to interview prosecution investigators.²

III. SUBMISSIONS

A. Appealable issues arising from the impugned decision

1. Issues related to the contents of bar table motions

3. The Impugned Decision failed to address the Defence’s arguments regarding the category of material which can form the subject of a bar table motion. The Defence submits that the following two issues immediately arise from the decision.

4. **Issue 1:** Whether 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.³

5. The Defence submits that the Trial Chamber failed to follow the applicable law regarding the level of details required in a bar table motion⁴ as necessary for a proper ruling on the request,⁵ and therefore committed an error of law.

¹ ICC-01/05-01/13-1285 (‘Impugned Decision’).

² ICC-01/05-01/13-1311-Conf.

³ Impugned Decision, para. 3.

⁴ See ICC-01/04-01/07-1665, para. 101; ICC-01/09-02/11-847-corr, para. 27; ICC-01/09-01/11-1353, para. 3; ICC-01/09-02/11-867, para. 34; ICC-01/09-02/11-867, para. 34; ICC-01/09-02/11-847-corr, para. 27; ICC-01/09-01/11-1353, para. 3.

⁵ The Trial Chamber is compelled to assess their relevance or admissibility on an item by item basis, as held by the Appeals Chamber, ICC-01/05-01/08-1386 (OA5, OA6), paras 2, 53, 57.

6. **Issue 2:** Whether 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.

7. The Defence submits that the Trial Chamber ignored the Defence's arguments that certain type of materials - namely those constituting "testimonial" evidence and those going to the acts and conducts of the Accused -⁶ cannot form the subject of a bar table motion. The result is the absence of an opportune reasoned decision on crucial evidentiary matters, contrary to Rule 64 (2) of the RPE.

2. *Issues related to the proper timing for filing and deciding on Bar Table Motions*

8. In addition to the two issues listed above, the Defence submits that two other issues arise from the Trial Chamber's decision to delay its ruling on the items forming the subject of the Prosecution's three bar table motions until its Article 74 Judgement, as discussed below.

9. **Issue 3:** Whether 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.⁷

10. The Defence notes that the Appeals Chamber has held that "under article 64 (2) of the Statute, the Chamber must always ensure that the trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses" and that "if a party raises an issue regarding the relevance or admissibility of evidence, the Trial Chamber must balance its discretion to defer consideration of this issue with its obligations under that provision."⁸ The Defence submits that the Trial Chamber failed to consider the impact of its decision on the Accused's rights, particularly their right to an effective Defence, and instead focused on "practicalities" and expeditiousness. Moreover, the Trial Chamber failed to take into account the untimeliness of the Prosecutor's three bar Table motions, presented just on the eve of trial, and containing a substantial amount of technical evidence.

⁶ ICC-01/05-01/13-1197-Conf, paras 8-13; ICC-01/05-01/13-1241-Conf, paras 7-9, 10-22; *see also*: ICC-01/05-01/13-1199-Conf, paras 3-16; ICC-01/05-01/13-1246-Conf, para. 6; ICC-01/05-01/13-1243-Conf, paras 14-21; ICC-01/05-01/13-1245-Conf, paras 24-26, 53-54, 61-64; ICC-01/05-01/13-1244-Conf, paras 26-31.

⁷ Impugned Decision, paras 9-13.

⁸ ICC-01/05-01/08-1386 (OA5 OA6), para. 37.

11. **Issue 4:** Whether 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”.⁹

12. The Defence submits that the Trial Chamber’s finding contravenes the Appeals Chamber unequivocal ruling that “irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of **each item** of evidence at some point in the proceedings - when evidence is submitted, during the trial, or at the end of the trial”.¹⁰

3. *Issue regarding Article 69 (7) arguments*

13. Finally, the Defence submits that an additional issue arises from the Trial Chamber’s ruling regarding the admissibility of the statements of the Accused and of the materials seized from the detention centre,¹¹ namely: 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 (**issue 5**).

14. The Defence recalls that the burden to establish the relevance and probative value rests on the party seeking to introduce the evidence,¹² and that the Bemba and Arido Defence were responding to the Prosecution’s position that such documents were legitimately obtained.¹³ Therefore, it is submitted that the Trial Chamber reversed the burden of proof to the Defence and committed an error of law in doing so.

B. The issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

15. The Defence wishes to emphasise that when determining whether a request for leave to appeal should be granted, the Trial Chamber must not justify or defend the correctness of its

⁹ Impugned Decision, para. 9.

¹⁰ ICC-01/05-01/08-1386 (OA5 OA6), para. 37 (emphasis added).

¹¹ Impugned Decision, para. 14.

¹² ICC-01/04-01/06-1399, para. 25; ICC-01/05-01/08-2299-Red, para. 10. The assessment of the probative value will always be “a fact-specific inquiry and may take into account innumerable factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness that inherent in the item of potential evidence, as well as the circumstances in which the evidence arose. It may also take into account the extent to which the item has been authenticated.” ICC-01/05-01/08-2299-Red, para. 8.

¹³ ICC-01/05-01/13-1170-Conf, paras 26-27.

decision, but instead focus on determining whether the issues presented significantly affect the fairness of the proceedings. The Defence submits that each of the issues has a significant impact on the fair and expeditious conduct of the proceedings or the outcome of the trial, as each detrimentally affects the fundamental rights of the Accused, as well as, for some, the outcome of the trial. In sum, the errors tainting the Impugned Decision create judicial uncertainty for all the parties, prevent the Accused from exercising their right to an effective defence, and may also result in delays in the proceedings. Since there is an exponential growth in the use of Bar Table Motions by the Prosecution, the fair and expeditious conduct of the proceedings is hindered by the uncertainty surrounding the admission of evidence through that vehicle. Issues such as the timing at which such motions should be made, the level of justification required for each item of evidence or the type and nature of evidence that can or cannot be admitted through the Bar Table need proper delineation to avoid the repetition of the scenario of this case, where reduced Defence teams learned five days before trial that 1027 items of evidence would not be adjudicated upon until the Judgment.

1. First and second issues

16. It is submitted that the Trial Chamber's finding that the Prosecution's first bar table motion contained sufficient details for an assessment of the admissibility of evidence violates the Accused's right to challenge the evidence against them. The Defence maintains that in the absence of information regarding the relevance, provenance or authenticity of the documents tendered, it was precluded from effectively challenging the admissibility of the items contained in the Prosecution's first bar table motion. Further, it may affect the outcome of the trial since the Trial Chamber's possible error would result it in being unable to properly assess the relevance, probative value and potential prejudice of each item of evidence submitted, as required by the Appeals Chamber,¹⁴ in light of the absence of essential information.

17. This issue also has the effect of diminishing the parties' certainty regarding the factual scope of the trial. Indeed, certain items submitted by the Prosecution were outside of the scope of the charges, whether temporally or materially. The Trial Chamber's failure to take into consideration the impact that relying on such items throughout the trial - while a determination on admissibility could be done at the present stage- may have on the expeditiousness of the trial, constitute further cause for intervention of the Appeals Chamber.

¹⁴ ICC-01/05-01/08-1386, para. 37.

18. The Defence recalls that requests for leave to appeal issues that identified implicit or poorly articulated reasoning by a Chamber have been granted in other cases before the Court,¹⁵ and notes that Rule 64 (2) of the RPE creates a right for the Defence to know the reasons for any ruling on evidentiary matters. The absence of reasoned ruling on the first and second issues impact the Defence's right as protected by Rule 64 (2) of the RPE. Further, they affect the Defence's right to challenge evidentiary decisions, since it will not be aware of the legal or factual basis underlying the ultimate decision of the Trial Chamber for a substantial amount of evidence.¹⁶ In addition, the non-resolution of these issues would create judicial uncertainty for the parties regarding the type of material which can form the subject of bar table motions, and affect the expeditiousness of the trial as arguments will in all likelihood continue to be made on this aspect in the future.

2. *Third issue*

19. The Trial Chamber failed to properly take into account the rights of the Accused when allowing the Prosecution to file three massive Bar Table Motions on the eve of trial - thus forcing the Defence teams to spend considerable resources to discuss the admissibility and weight of hundreds of items of technical evidence - and postponing any decision on the matter to the end of trial. The Defence submits that it violates the fundamental rights of the Accused to defend themselves. First, by making such a ruling, the Trial Chamber created legal uncertainty for the Accused, thereby preventing them from exercising an effective Defence: until the trial judgement, the Defence will not know which documents are considered to be relevant or to have probative value, and, as importantly, those that are not admissible. As a result, the Defence is left in a judicial conundrum. The Impugned Decision puts it in an impossible situation where it must select material to use for cross-examination, has limited time for its investigations and to decide which witnesses to call, before even knowing which evidence is considered relevant and probative by the Trial Chamber.

¹⁵ ICC-02/11-01/11-464, para. 35; ICC-01/04-01/10-487, para. 38.

¹⁶ See *inter alia* Article 14 (5) of International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>; ICTY, *Prosecutor v Naletilić and Martinović*, Case No. IT-98-34-A, Appeals Judgement, 3 May 2006, para. 603, available at: http://icty.org/x/cases/naletilic_martinovic/acjug/en/nal-aj060503e.pdf; ICTY, *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A., Appeals Judgement, 12 June 2002, para. 41, available at: <http://icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>; HRC, Communication No. 283/1988, *A. Little v. Jamaica* (Views adopted on 1 November 1991), in UN doc. GAOR, A/47/40, para. 9 read in conjunction with para. 8.5, available at: <http://www1.umn.edu/humanrts/undocs/html/dec283.htm>; ECtHR, *Van Hulst v the Netherlands*, HRC Communication 903/1999, UN Doc CCPR/C/82/D/903/1999 (2004), para. 6.4, available at: http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/82/D/903/1999

20. The Defence further submit that the particular circumstances of the present case - where most of the Prosecution's evidence is presented through the bar table, through Rule 68 or through expert witnesses - it is particularly important that the Defence be made aware, in a timely manner, of which evidence tendered is considered to meet Article 69 requirements. Without such crucial information, the Accused are effectively deprived from the right to defend themselves in an effective manner. In fact, the Trial Chamber's alleged error *de facto* puts an onus of rebuttal on the Defence, violating Article 67 (1) (i) of the Statute, since the Defence has to challenge every piece of document used by the Prosecution without the Trial Chamber making a determination as to their relevance and probative value, while the onus of establishing the relevance and probative value of a piece of evidence normally falls on the party tendering it.¹⁷

21. It is worth noting that in the present case, extensive challenges regarding the legality, provenance and authenticity of evidence have already been raised, despite the incomplete character of the disclosure of the information used by the Prosecution to justify the obtention of that evidence. Failure to address this question at this stage of the proceedings may lead to a situation where hundreds of items will eventually be found inadmissible, after having been extensively discussed at trial - during cross-examination of Prosecution's witnesses, examination of Defence witnesses and in written submissions. Defence witnesses and documentary evidence will have to be presented in order to challenge the substance of such items, using valuable court time, while they may eventually not be found admissible. The whole exercise will be significantly longer than if the Trial Chamber made a decision on the admissibility of evidence at the time it is tendered. This current situation significantly affect the expeditiousness of the proceedings, as well as the Accused's right to be tried without undue delay. It recalls that the Appeals Chamber has unequivocally held that expeditiousness was an important component of a fair trial,¹⁸ and that the "expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial".¹⁹

22. Finally, should the Trial Chamber be incorrect in its decision, significant delays may occur as a result, as the issue would only be resolved at the time of the final appeal, and may lead – should the Appeals Chamber then consider that the relevance and probative value of the documents tendered should have been assessed during trial in the specific circumstances of the case – to the recall of witnesses (for instance to authenticate certain documents) or to the

¹⁷ ICC-01/04-01/06-1399, para. 25; ICC-01/05-01/08-2299-Red, para. 10.

¹⁸ ICC-01/05-01/08-1386, para 55.

¹⁹ ICC-01/04-168, para. 11.

submission of additional arguments, which would affect the expeditiousness of the trial. In the worse case scenario, a retrial could be ordered.

3. *Fourth issue*

23. The fourth issue significantly affects the outcome of the trial, since, if one follows the Trial Chamber's reasoning that it need not rule on each aspect of admissibility of a document tendered in the trial judgment, the Accused could therefore be convicted on the basis of documents for which the Trial Chamber would have failed to determine the relevance, probative value, and prejudice to the Accused. It would also violate the Trial Chamber's obligation to convict an Accused only if there is no reasonable doubt as to his guilt.

4. *Fifth issue*

24. This issue impacts the Accused's fundamental right not to have imposed a reversal of the burden of proof, as it shifts the burden of establishing the probative value of documents tendered by the Prosecution to the Defence by requiring it to establish that it was obtained by means of violation of the Statute, in violation of the principle according to which the tendering party must demonstrate the legality of the items it seeks to tender,²⁰ and in contravention to Article 67 (1) (i) of the Statute. It also violates the Defence's right to have the last word, to which it is entitled on issues of such importance.²¹

C. The immediate resolution by the Appeals Chamber will materially advance the proceedings

25. As stated by the Appeals Chamber, the purpose of interlocutory appeal is to "[remove] doubts about the correctness of a decision or mapping a course of action along the right lines", which "provides a safety net for the integrity of the proceedings".²² In the present case, there is no such "safety net" since the Impugned Decision touches upon the fundamental rights of the Accused and is affected by significant legal errors which ought to be resolved by the Appeals Chamber immediately.

²⁰ ICC-01/04-01/06-1399, para. 25; ICC-01/05-01/08-2299-Red, para. 10.

²¹ It is widely accepted that the Defence should always have "the last word", and that this principle extended to written submission; *see* Rule 140 (2) (d) and Rule 141 (2) of the Rules; *see also* ICC-01/04-01/06-2722, para. 2; ICC-01/04-01/06-T-29-EN, pp. 26-27; ICC-01/05-01/08-T-13-ENG, pp. 7-8.

²² ICC-01/04-168, para. 15.

26. The immediate resolution by the Appeals Chamber on the above-mentioned issues will materially advance the proceedings. First of all, regarding the first two issues, it would clarify the applicable framework to bar table requests, thereby providing judicial security for the tendering and ruling upon such requests.

27. Secondly, the Trial Chamber's errors go to the heart of the case: the documents upon which the Trial Chamber will rely to make its ruling on the innocence or guilt of the Accused. As a result of the Trial Chamber's decision, the relevance and probative value of any document used or merely referred to by one of the parties will not be considered by the Trial Chamber until its final judgement. The intervention of the Appeals Chamber is required in order to ensure the correctness of the Trial Chamber's approach in the Impugned Decision, and to avoid any unnecessary delay resulting from the Defence having to prepare and present a Defence case on the basis of documents which may never be found admissible.

28. In a nutshell, failure to decide the relevance and admissibility of the hundreds of exhibits which the Prosecution adduced through the bar table before trial will have far-reaching negative consequences on the fairness and expeditiousness of these proceedings up to the judgement day. The intervention of the Appeals Chamber is warranted to sweep the increased uncertainty that this decision has brought to the present case.

29. With regards to the resolution of the fifth issue, it would certainly move the proceedings as the determination of the applicable process for Article 69 (7) challenges is particularly important, given the emphasis the Prosecution places on the evidence so challenged by the Defence.

30. Finally, the question of admissibility of evidence and issues arising in relation thereto are bound to be discussed again at trial. As a result, a decision from the Appeals Chamber would permit to materially advance the proceedings in clarifying the procedural consequences of the Trial Chamber's decision and provide concrete guidance on the applicable law and framework in which the parties must operate. In other words, the immediate resolution of the Appeals Chamber would set the appropriate course of action and guidelines for the Trial Chamber, and ensure that the trial proceeds on a sound legal basis.²³

²³ See e.g. ICC-02/11-01/15-212, para. 12.

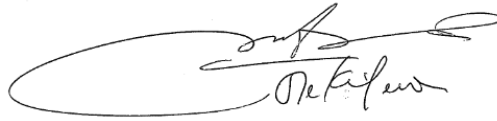
IV. CONCLUSION

31. In light of the above, the Defence respectfully requests leave to appeal the Trial Chamber's decision on Prosecution Requests for Admission of Documentary Evidence, dated 24 September 2015.

Respectfully submitted,



Chief Charles Achaleke Taku, Counsel for Mr. Arido



Jean-Pierre Kilenda Kakengi Basila, Counsel for Mr. Babala Wandu

Dated this 29th Day of September 2015

The Hague, The Netherlands.