



Original: **English**

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

Date: **5 October 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 Document

**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"**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. Introduction

1. The motion filed by Counsel for Mr Babala and Mr Arido (“the Joint Defence”),¹ seeking leave to appeal the decision concerning the Prosecution’s request for admission of documentary evidence,² expresses no more than disagreement with the Trial Chamber. This is not the purpose of article 82(1)(d) of the Rome Statute.³

2. Leave to appeal should not be granted.⁴ None of the five issues proposed for certification is an ‘appealable’ issue which arises from the Decision. And nothing in the Motion demonstrates either that any of the proposed issues significantly affects the fairness and expedition of the proceedings or the outcome of the trial, or that the immediate intervention of the Appeals Chamber will materially advance the proceedings, as required by article 82(1)(d).

II. Submissions

A. The Motion fails to identify any issue arising from the Decision

3. The Motion fails to meet the threshold requirement of any application for leave to appeal, which is the identification of an ‘appealable’ issue arising from the Decision. As this Trial Chamber has consistently ruled, an “issue” is “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.”⁵ Such issues must, moreover, be of such significance in the context that their resolution is “essential for the

¹ ICC-01/05-01/13-1317 (“Motion”).

² ICC-01/05-01/13-1285 (“Decision”).

³ See ICC-01/05-01/13-T-10-Conf-ENG ET, p. 11 (reporting public comments of the Trial Chamber, made in open session, concerning recent applications for leave to appeal).

⁴ *Contra* Motion, para. 31.

⁵ See *e.g.* ICC-01/05-01/13-1258, para. 8 (citing ICC-01/04-168 (“DRC Appeal Decision”), para. 9).

determination of matters arising in the judicial cause under examination.”⁶ The Trial Chamber has also reminded the Parties that an issue must arise from the impugned decision.⁷ Where an issue is premised on an “erroneous assertion” that the Chamber “decided” on a particular matter, it fails to meet this requirement.⁸

4. The five issues proposed by the Joint Defence fail to meet these requirements, and cannot be certified for appeal.⁹

i. The First Issue is no more than a disagreement with the Decision

5. The First Issue—whether the Trial Chamber erred in considering that the Prosecution’s original motion “contained sufficient information to permit it to rule”¹⁰—merely disagrees with the rejection of the Joint Defence’s prior objection.¹¹ Since the authorities highlighted in the Motion do not conflict with the approach in the Decision, they do not give rise to any issue for the Appeals Chamber to adjudicate.¹²

6. The authorities cited by the Joint Defence are inapposite—and thus the First Issue cannot be certified for appeal—because the Motion mistakes the disposition of the Decision. Although the Trial Chamber determined that the documents tendered by the Prosecution were validly “submitted”, it deferred its assessment of the

⁶ DRC Appeal Decision, para. 9.

⁷ See *e.g.* ICC-01/05-01/13-1278 (“Disclosure ALA Decision”), paras. 9-10.

⁸ See Disclosure ALA Decision, para. 9. See also ICC-02/11-01/15-117 (“*Gbagbo and Blé Goudé* Trial Date ALA Decision”), para. 19.

⁹ *Contra* Motion, paras. 3, 8, 13.

¹⁰ Motion, para. 4.

¹¹ See Decision, para. 3 (rejecting the “Arido and Babala Defence requests for the Prosecution to provide further information” and considering that the Trial Chamber has “sufficient information to rule”); Motion, para. 4, fn. 3.

¹² *Contra* Motion, para. 5. See also fns. 4-5 (citing ICC-01/05-01/08-1386 OA5 OA6 (“*Bemba* Document Admission Decision”), ICC-01/04-01/07-1665 (“*Katanga and Ngudjolo* Rule 140 Directions”), ICC-01/09-01/11-847-Corr (“*Ruto and Sang* Rule 140 Directions”), ICC-01/09-01/11-1353 (“*Ruto and Sang* Bar Table Decision”), ICC-01/09-02/11-867 (“*Kenyatta* Rule 140 Directions”)). The Prosecution notes that three of these decisions appear to be cited twice in footnote 4, and that one decision (cited as “ICC-01/09-02/11-847-corr”) is understood to refer to ICC-01/09-01/11-847-Corr.

admissibility of those documents (subject to specific requests by the Parties) until the end of trial.¹³

7. The decision of the Appeals Chamber in *Bemba*, cited in the Motion but also quoted in the Decision,¹⁴ plainly endorses in principle the discretion exercised by the Trial Chamber as it did in this case.¹⁵ The error in *Bemba* lay in the attempt *to rule* on the admissibility of evidence which had not been submitted, without hearing appropriately from the Parties, and without assessing the evidence on an item-by-item basis.¹⁶ By contrast, in this case, the Trial Chamber made no such ruling. Rather, it stressed that it will at the conclusion of the trial “consider the relevance, probative value and potential prejudice of *each item* of evidence submitted”.¹⁷

8. Reference to the approach of other Trial Chambers under rule 140 likewise discloses no appealable issue. The adoption of different approaches in this respect by different chambers does not raise an issue for appeal, nor does anything in the cited decisions suggest the existence of any “law” regarding “the level of details required in a bar table motion”.¹⁸

¹³ See Decision, paras. 5-6, 9, 16, Disposition.

¹⁴ See Motion, para. 5; Decision, para. 8. The Motion does not address the fact that the Trial Chamber expressly relied on this *Bemba* Document Appeal Decision.

¹⁵ See *Bemba* Document Appeal Decision, para. 37. See also paras. 42-43.

¹⁶ See e.g. *Bemba* Document Appeal Decision, paras. 46, 50, 57.

¹⁷ Decision, para. 9 (emphasis added).

¹⁸ *Contra* Motion, para. 5. See *Katanga and Ngudjolo* Rule 140 Directions, para. 2 (acting under rule 140), Annex, para. 101 (citing no legal basis for its direction for the form of bar table motions submitted to it); *Ruto and Sang* Rule 140 Directions, paras. 1 (acting under rule 140), 3 (having regard to “the practice of other Trial Chambers”), 27 (citing no legal basis for its direction for the form of bar table motions submitted to it); *Kenyatta* Rule 140 Directions, paras. 1 (acting under rule 140), 5 (having regard to “the practice of other Trial Chambers”), 34 (citing no legal basis for its direction for the form of bar table motions submitted to it). The *Ruto and Sang* Bar Table Decision, in the passage cited by the Joint Defence, merely refers to the *Ruto and Sang* Rule 140 Directions: see *Ruto and Sang* Bar Table Decision, para. 3.

ii. *The Second Issue mistakes the Decision, and hence does not arise from it*

9. The Second Issue—whether the Trial Chamber erred in “failing to render a decision as to the type of material which can be submitted through the bar table” — mistakes the disposition of the Decision, and thus does not arise from it.¹⁹

10. The Trial Chamber did not fail to decide regarding the materials which can be *submitted* to it.²⁰ It expressly “[r]ecognise[d] the items discussed in the First, Second and Third Requests as ‘submitted’”,²¹ with the exception only of those materials subject to outstanding challenges by Counsel for Mr Bemba and Mr Arido under article 69(7).²² In the latter respect, the Trial Chamber set a timetable to hear further submissions,²³ and thus plainly contemplated making a future ruling in that respect.

11. To the extent the Joint Defence intended to frame the Second Issue rather as relating to the *admissibility* of certain material tendered through the bar table (notwithstanding the plain terms of the Motion), this concern is speculative and likewise cannot arise from the Decision. Although the Decision made no determination as to the admissibility at this stage of *any* document,²⁴ the Trial Chamber expressly reminded the Parties that it “always retains the discretion to rule on admissibility related issues upfront when appropriate” and that its “general rule” does not stand in the way, for “example[.]”, of hearing applications under article 69(7).²⁵ Otherwise, the Trial Chamber will assess admissibility at the conclusion of the trial.²⁶ Accordingly, to the extent the Joint Defence wishes to contest the admissibility of certain kinds of material, it is not deprived of the opportunity to do

¹⁹ *Contra* Motion, para. 6.

²⁰ *Contra* Motion, para. 6.

²¹ See Decision, Disposition (cross-referring to para. 14).

²² See Decision, para. 14.

²³ Decision, para. 14.

²⁴ See *above* para. 6.

²⁵ Decision, para. 13.

²⁶ See *above* para. 6.

so.²⁷ Directing the Parties to the appropriate procedural recourse in the circumstances of this case does not amount to “ignor[ing]” their arguments.²⁸

12. In both these respects, in any event, the reasoning of the Trial Chamber was transparent and wholly adequate for the purpose of rule 64(2).²⁹

iii. The Third Issue is impermissibly vague, and merely disagrees with the Decision

13. The Third Issue—whether the Trial Chamber erred by “failing to take into account the rights of the Accused” in the Decision—is impermissibly vague and no more than a disagreement with the Decision as a whole.³⁰ By alleging generally that the Trial Chamber ignored a crucial aspect of the fairness of the trial—the rights of the Accused—the Third Issue challenges the totality of the Decision’s reasoning. This is impermissible, and alone requires the rejection of the Third Issue.³¹

14. In any event, the plain terms of the Decision demonstrate that the Trial Chamber did not fail “to consider the impact of its decision on the Accused’s rights”.³² Thus, the Trial Chamber expressly cited articles 64(2) and 67(1)(c) of the Statute, and acknowledged the “accuseds’ right to be tried without undue delay.”³³ Likewise, the Trial Chamber gave a reasoned opinion on the question whether the “notion of a fair trial” required a ruling “on the admissibility of each piece of evidence upon submission”—and decided that it did not.³⁴ Finally, the Trial Chamber justified its observation that it “must balance its discretion to defer consideration of admissibility issues with its obligations under Article 64(2) of the

²⁷ *Contra* Motion, para. 7 (referring to the “absence of an opportune reasoned decision on crucial evidentiary matters”).

²⁸ *Contra* Motion, para. 7.

²⁹ *Contra* Motion, para. 7.

³⁰ *Contra* Motion, para. 9.

³¹ See ICC-01/05-01/13-1282, para. 10; ICC-01/05-01/13-877, paras. 7, 10-11.

³² *Contra* Motion, para. 10.

³³ Decision, para. 11.

³⁴ Decision, para. 12.

Statute” expressly on the basis of the same appellate guidance cited by the Joint Defence.³⁵

15. Furthermore, since the Decision deferred any assessment of admissibility until the conclusion of the trial³⁶—and reminded the Parties that it may, meanwhile, hear applications for exclusion of evidence, where appropriate³⁷—the timing of the Prosecution bar table requests has no impact on the rights of the Accused.³⁸

16. Since the Third Issue thus disregards key aspects of the reasoning in the Decision, it does not arise from it, and may not be certified for appeal.

iv. The Fourth Issue mistakes the Decision and hence does not arise from it

17. The Fourth Issue—whether the Trial Chamber erred by acknowledging that it may not exhaustively “discuss” the admissibility of each piece of evidence in its judgment—mistakes the reasoning of the Decision, and does not arise from it.³⁹

18. Simply put, the Fourth Issue is misconceived because it confuses the judicial duty to *consider* the admissibility of each piece of evidence submitted to it with its duty to give *adequate reasoning* in its judgment. These considerations are distinct, as the Trial Chamber plainly recognised when it stated:

- The Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted [in its deliberations], *though it*

³⁵ See Decision, para. 13, fn. 29 (citing *Bemba* Document Appeal Decision, para. 37); Motion, para. 10, fn. 8 (citing *Bemba* Document Appeal Decision, para. 37).

³⁶ See *above* para. 6.

³⁷ See *above* para. 11.

³⁸ *Contra* Motion, para. 10 (“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”).

³⁹ *Contra* Motion, para. 11.

*may not necessarily discuss these aspects for every item submitted in the final judgment.*⁴⁰

19. If the Joint Defence had not quoted this passage selectively, this misconception might not have occurred.⁴¹

20. Certainly, the Trial Chamber's reasoning is entirely consistent with the Appeals Chamber's (almost identically worded) guidance that "it will have to *consider* the relevance, probative value and potential prejudice of each item of evidence at some point in the proceedings".⁴² Nor does the Joint Defence contend that there is anything erroneous in the Trial Chamber's reference to the well-established law—and principle of ordinary common sense—that a judgment need not exhaustively address every step of analysis, provided that the reasoning as a whole is adequate.

v. The Fifth Issue mistakes the Decision and hence does not arise from it

21. The Fifth Issue—whether the Trial Chamber erred by considering the submissions of Counsel for Mr Bemba and Mr Arido as "new requests" under article 69(7)—mistakes the reasoning of the Decision and so does not arise from it.⁴³ This issue turns on the claim that, by treating certain Defence objections to admissibility as article 69(7) applications, "the Trial Chamber reversed the burden of proof".⁴⁴ Yet this interpretation of the Decision is strained and artificial.

22. The natural understanding of the Decision is that it establishes a "general rule" in this case that admissibility will be assessed at the conclusion of the trial.⁴⁵ At that

⁴⁰ Decision, para. 9 (emphasis added).

⁴¹ See Motion, para. 11.

⁴² See Motion, para. 12 (emphasis added); *Bemba Documents Appeal Decision*, para. 37.

⁴³ *Contra* Motion, para. 13.

⁴⁴ See Motion, para. 14.

⁴⁵ See *above* para. 6.

time, the Trial Chamber will still need to be satisfied that each item of evidence is relevant and probative.⁴⁶ If it is not so satisfied, that item of evidence will not be relied upon. In this way, the Decision applies exactly the approach to admissibility specified in the Motion, and does not reverse the burden.⁴⁷

23. This general position is unaltered by the Trial Chamber's further recognition that—as in the case of the objections raised by Counsel for Mr Bemba and Mr Arido—it has a duty to entertain motions under article 69(7).⁴⁸ It is consistent with the established practice of the Court in such circumstances for the moving party to bear the burden of persuasion. Furthermore, even if such a motion fails and the Trial Chamber declines to *exclude* evidence, this still does not necessarily mean that it will treat the evidence as admissible without the necessary consideration. Accordingly, the concern identified in the Motion simply does not arise from the Decision.

24. In any event, since the Decision expressly indicated that it “defer[red] any ruling under Article 69(7)” regarding the objections of Counsel for Mr Bemba and Mr Arido, it is more than arguable that the complaint in the Fifth Issue does not arise from this Decision, but should be addressed in the context of any further decision that the Trial Chamber may issue in this respect.

B. The requirements of article 82(1)(d) are not met

25. Since none of the proposed issues arise from the Decision, they necessarily cannot meet the requirements of article 82(1)(d). The Motion should thus be rejected without further consideration.

⁴⁶ See Decision, paras. 8-10.

⁴⁷ See Motion, para. 14.

⁴⁸ See *above* para. 11.

26. Nevertheless, even accepting the proposed issues *arguendo*, a “general reference” to “the accused’s fundamental rights and how the alleged violation necessarily affects the fairness of the proceedings, without more, cannot satisfy the leave to appeal criteria”. Rather, to justify certification for appeal, a “specific link” must be shown between the proposed issue(s) and the procedural impact and urgency implicit in the criteria required for leave to appeal.⁴⁹

27. Although the Prosecution agrees that circumstances could *in principle* arise in which the Trial Chamber may yet need to rule on the admissibility of the submitted materials prior to its deliberations,⁵⁰ the Motion fails to show that any of the five issues proposed, in the present circumstances, significantly affects the fairness and expedition of the proceedings or the outcome of the trial, or that immediate resolution of any of these issues would materially advance the proceedings. Accordingly, certification of the Decision should be denied. To the contrary, the Decision reflects the Trial Chamber’s willingness to address the needs of the Parties as they arise during the trial itself, including by entertaining requests for rulings on the admissibility of submitted evidence, when appropriate. The concerns of the Joint Defence at this stage are thus generally speculative.

i. None of the issues significantly affects the fairness and expedition of the proceedings or the outcome of the trial

28. Consistent with the requirement for specificity, broad assertions in the Motion that the proposed issues “detrimentally affect[] the fundamental rights of the

⁴⁹ See *Gbagbo and Blé Goudé* Trial Date ALA Decision, para. 23.

⁵⁰ See ICC-01/05-01/13-T-10-Conf-ENG, pp. 6-7 (reporting public comments of the Trial Chamber, made in open session, noting the dynamic and evolving process of a criminal trial and the possibility that the conduct of proceedings may require adjustment “as need be”). See also Decision, para. 13 (“the Chamber always retains the discretion to rule on admissibility related issues upfront when appropriate”); *Bemba* Documents Appeal Decision, para. 37 (“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”).

Accused, as well as, for some, the outcome of the trial” are insufficient to warrant certification.⁵¹ Without a showing that the article 82(1)(d) criteria are satisfied with regard to *these* proceedings, arguments concerning the desirability of certification for the clarification of the law governing future cases are likewise insufficient.⁵²

29. The specific claims made in the Motion fail to show the necessary degree of impact on the proceedings. Thus:

- The claim that the First and Second Issues significantly affect the right of the Accused to challenge the evidence against them is mere speculation.⁵³ The Motion fails to acknowledge that the Decision expressly recognises that the Parties may move to exclude the submitted evidence, and by this means, among others, challenge it.⁵⁴
- The claim that the First and Second Issues diminish the Parties’ “certainty regarding the factual scope of the trial” is completely unsupported.⁵⁵ To the contrary, the scope of the trial continues to be regulated in the Document Containing the Charges. This remains so regardless of any position taken on the admissibility of evidence.
- The claim that the First and Second Issues mean that the Parties are “not [...] aware of the legal or factual basis underlying the ultimate decision of the Trial Chamber for a substantial amount of evidence” misapprehends the Decision.⁵⁶ The reasoning in the Decision, accepting evidence as submitted but deferring the admissibility determination, is transparent. Since this approach may be presumed to apply equally to all the Parties,

⁵¹ *Contra* Motion, paras. 15, 19.

⁵² *Contra* Motion, para. 15 (referring to the possibility that certification may “avoid the repetition of the scenario in this case”).

⁵³ *Contra* Motion, para. 16.

⁵⁴ *See above* paras. 11, 23.

⁵⁵ *Contra* Motion, para. 17.

⁵⁶ *Contra* Motion, para. 18.

the fairness of the proceedings is unaffected. Nothing in the Decision suggests that the ultimate assessment of admissibility will not be adequately reasoned.

- Although the Prosecution acknowledges that the deferred approach to admissibility means that the status of the submitted evidence may (to a lesser or greater extent) not be known until the judgment, the Third Issue still would not significantly affect the fairness of the proceedings.⁵⁷ Since the Trial Chamber made clear that it will entertain appropriate motions for rulings on admissibility, the Decision leaves the Parties with a clear means of recourse.
- The Fourth Issue does not significantly affect the fairness of the proceedings because it simply does not mean the Trial Chamber would fail “to determine the relevance, probative value and [potential] prejudice” of the submitted evidence, and therefore cannot have the consequences feared.⁵⁸
- Likewise, the Fifth Issue does not significantly affect the fairness of the proceedings because it does not mean that the burden is shifted.⁵⁹ Nor in any event does the Decision contain any determination on the admissibility of the evidence relevant to the Fifth Issue.

30. Moreover, the Motion fails to show that many of the proposed issues significantly affect the expedition of the proceedings.⁶⁰ Indeed, the Joint Defence

⁵⁷ *Contra* Motion, para. 19. *See also* para. 20. *But see above* paras. 27.

⁵⁸ *Contra* Motion, para. 23.

⁵⁹ *Contra* Motion, para. 24.

⁶⁰ For example, the Motion only argues the impact of the Fourth and Fifth Issues upon the fairness of the proceedings: *see e.g.* Motion, paras. 23-24.

concedes that the Decision generally shows particular concern for “‘practicalities’ and expeditiousness”.⁶¹ To the extent the Joint Defence does address this matter:

- The assertion that the Trial Chamber failed “to take into account” the possible impact of the Decision on the expeditious conduct of the trial does not show the required degree of “significant” impact of the First and Second Issues.⁶²
- The claim that the Third Issue significantly affects the expeditious conduct of the trial because the “whole exercise will be significantly longer than if the Trial Chamber made a decision” on admissibility at this stage is no more than speculation.⁶³ There is no basis for the premise underlying this view that “hundreds of items will eventually be found inadmissible, after having been extensively discussed at trial”.⁶⁴ If anything, the reverse is likely.
- The claim that the Third Issue significantly affects the expeditious conduct of the trial due to the consequences of any reversal of the Decision as part of an appeal under article 81 is even more speculative.⁶⁵ Even if the Trial Chamber erred in *deferring* its admissibility assessment, it is by no means established that it will then err in ultimately conducting that analysis.

31. Finally, the Motion is also speculative in its passing effort to show that any of the proposed issues would significantly affect the outcome of the trial. Thus, on the basis of its assertion that the Trial Chamber lacks “essential information” concerning the submitted documents, as a result of the First and Second Issues, the Joint Defence

⁶¹ See Motion, para. 10. See also above para. 14.

⁶² *Contra* Motion, para. 17 (“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”, sic).

⁶³ *Contra* Motion, para. 21.

⁶⁴ *Contra* Motion, para. 21.

⁶⁵ *Contra* Motion, para. 22.

still only suggests that the outcome of the trial “*may*” be affected.⁶⁶ This is insufficient.

ii. *Immediate resolution by the Appeals Chamber will not materially advance the proceedings*

32. The Motion fails to show that immediate resolution by the Appeals Chamber of any of the proposed issues will materially advance the proceedings.⁶⁷ The organ best placed to clarify the “procedural consequences” of the Decision, in this instance, is not the Appeals Chamber, but the Trial Chamber.⁶⁸ Nothing in the Decision prevents the Parties from seeking the Trial Chamber’s further guidance, as necessary, and requesting any relief required.

33. Moreover, since the Decision directly follows a previous dictum of the Appeals Chamber,⁶⁹ there is little basis to assume that an interlocutory appeal will result in a requirement for the Trial Chamber to rule forthwith on the admissibility of the submitted evidence. Nor is an appeal judgment likely to answer the practical questions which a deferred approach to admissibility may raise. Even immediate resolution by the Appeals Chamber, therefore, is unlikely to materially advance the proceedings in the manner suggested in the Motion.⁷⁰

34. As previously noted, if the Motion fails to show that immediate resolution by the Appeals Chamber will materially advance *these* proceedings, the impact on other proceedings is immaterial.⁷¹

⁶⁶ See Motion, para. 16 (emphasis added).

⁶⁷ *Contra* Motion, para. 26.

⁶⁸ *Contra* Motion, para. 30.

⁶⁹ See above para. 7.

⁷⁰ *Contra* Motion, paras. 27-29.

⁷¹ *Contra* Motion, para. 26. See above para. 28.

III. Relief requested

35. For all the reasons above, the Motion should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 5th day of October 2015
At The Hague, The Netherlands