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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

**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**

Source: Office of the Prosecutor

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I. Introduction

1. The motion filed by Counsel for Mr Bemba (“the Bemba Defence”)¹ should be dismissed. It fails to show any basis for granting leave to appeal the decision concerning the request by the Bemba Defence and Counsel for Mr Arido to exclude certain evidentiary materials,² and expresses no more than disagreement with the Trial Chamber. This is not the purpose of article 82(1)(d) of the Rome Statute.³ Indeed, the Motion merely rehearses a catalogue of complaints which have previously been adjudicated and rejected. Repetition lends no greater force to legal arguments than justified by their own merits.

2. Furthermore, the request by Counsel for Mr Babala (“the Babala Defence”) to join the Motion⁴ should be dismissed *in limine* because it is filed out of time.

II. Submissions

3. None of the seven issues proposed for certification by the Bemba Defence is an ‘appealable’ issue arising from the Decision. 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 article 82(1)(d) requires.

¹ ICC-01/05-01/13-1472 (“Motion”).

² ICC-01/05-01/13-1432 (“Decision”).

³ See ICC-01/05-01/13-T-10-Red-ENG, p. 11 (“I would like to remind [the Parties] that such interlocutory appeals are exceptional. And they are not or should not be an automatic reflex as it sometimes appears. They are neither meant to be a hidden application for reconsideration nor a legal tool to express mere disagreement with any of the Chamber[’s] decisions”).

⁴ See ICC-01/05-01/13-1479 (“Joinder”).

A. The Motion identifies no ‘appealable’ issue arising from the Decision

4. 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 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

5. The “issues” framed in the Motion are poorly formulated and obscure. They comprise no more than a series of “determinations” upon which the Decision was allegedly based and leave open to inference the specific legal or factual “topic” proposed for determination on appeal. They are also repetitive, not only of issues previously (and unsuccessfully) litigated before this Chamber and the Pre-Trial Chamber, but also of one another.⁹ The Prosecution has thus endeavoured to provide responses to the arguments advanced as they may best be understood.

i. *The First Issue merely disagrees with the Decision*

6. The First Issue — whether the Chamber’s legal approach improperly “placed the burden of argumentation concerning the criteria in Article 69(7) and

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

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 For example, the distinction between the essence of the First and Seventh Issues, and Second and Third Issues, and Fifth and Sixth Issues, appears hard to discern.

application/waiver of privilege on the Defence”¹⁰—does no more than disagree with the Decision. In this context, the Bemba Defence takes issue only with two aspects of the Chamber’s reasoning: its view of the proper approach when certain matters had already been decided by the Single Judge of the Pre-Trial Chamber,¹¹ and its view that the Bemba Defence’s submissions constituted a motion.¹²

7. *First*, the Bemba Defence recalls the Chamber’s conclusions that no cogent reason was shown to depart from the Single Judge’s decisions that certain materials are not part of the detention record, and that certain communications are not privileged.¹³ However, in circumstances in which a relevant matter has previously been decided, there is nothing controversial in requiring the moving party to show cogent reasons to justify departing from that prior decision. This accords with the binding nature of judicial decisions. Not only has the Bemba Defence failed to develop any argument to the contrary, but the Chamber has rejected previous applications for leave to appeal by the Bemba Defence on a similar basis.¹⁴ It should do so again.

8. *Second*, the Bemba Defence acknowledges that the Chamber’s determination to regard Defence submissions under article 69(7) as a fresh motion was made in a previous decision.¹⁵ Notwithstanding the Bemba Defence’s effort to show that it is not barred from raising an issue for which it did not previously seek certification,¹⁶ it

¹⁰ See Motion, paras. 2, 10, 21.

¹¹ See Motion, para. 11.

¹² See Motion, paras. 8, 12.

¹³ Motion, para. 11 (quoting Decision, paras. 13, 18).

¹⁴ See ICC-01/05-01/13-1282, para. 10 (denying the Bemba Defence’s application for leave to appeal). In its application, the Bemba Defence had likewise suggested that the Chamber had in this manner improperly reversed the burden: see ICC-01/05-01/13-1198 (reclassified as public by ICC-01/05-01/13-1282), para. 5.

¹⁵ See ICC-01/05-01/13-1285 (“Article 69(4) Decision”).

¹⁶ See Motion, para. 12, fn. 9. The Prosecution notes that the Bemba Defence does not provide a pinpoint citation in the authority presented, sustaining its assertion. See also ICC-01/05-01/13-1361 (“Admissibility ALA Decision”), para. 2 (“the defence teams for Mr Babala and Mr Arido sought leave to appeal”).

omits that the Chamber denied leave to appeal the Article 69(4) Decision based on the very same argument now recapitulated as the First Issue. It stated:

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’. 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. The Chamber fails to see how that could significantly affect the fair or expeditious conduct of the proceedings or the outcome of the trial.¹⁷

9. The Bemba Defence fails to show anything different in the Motion, even for the sake of argument. Its arguments conflate distinct principles and circumstances. Thus, the appellate authority upon which it relies identifies an error when a Chamber has “*prima facie*” admitted “all the evidence”.¹⁸ In this case the Chamber did no such thing. Rather, it clearly reserved its assessment of the admissibility of evidence until the end of the case, unless a ruling was required sooner.¹⁹

10. This general position is unaltered by the Chamber’s further recognition that—as in this instance—it has a duty to entertain motions under article 69(7).²⁰ It is consistent with the established practice of the Court in such circumstances for the

¹⁷ Admissibility ALA Decision, para. 9.

¹⁸ See ICC-01/05-01/08-1386 OA5 OA6, paras. 71-73. See also Motion, para. 21.

¹⁹ See e.g. Article 69(4) Decision, para. 9.

²⁰ See e.g. Article 69(4) Decision, para. 13.

moving party to bear the burden of persuasion.²¹ This does not reverse the burden with regard to *admissibility* since, even if such a motion fails and the Chamber declines to *exclude* evidence at this stage, this still does not mean the evidence will be treated as admissible. Indeed, the Decision expressly states as much.²² Accordingly, the Bemba Defence's concern in this respect simply does not arise from the Decision.²³

ii. The Second Issue is not an 'appealable' issue in this case

11. The Second Issue—which must be understood as asking whether transcripts of passively monitored calls may not be handed over as evidence of contempt of court without prior notice and disclosure to counsel, like actively monitored calls²⁴—was not essential for the resolution of the Decision, and therefore is not 'appealable'.

12. The Bemba Defence sought to exclude such materials on the basis that the Single Judge wrongly granted the Prosecution access to them under article 57(3)(a) of the Statute and without notice.²⁵ The Chamber rejected this primarily because article 57(3)(a) does not require notice to the detained person, especially in circumstances where such notice would have defeated the purpose of the requested access.²⁶ The Chamber was further supported in its view that the materials were obtained lawfully by the fact that access even to the “detention record”—whose confidentiality is required by regulation 92 of the Regulations of the Court—may, in exceptional circumstances, be granted without notice, provided that the Defence has

²¹ To the extent that this requires the moving party to overcome previous decisions against them on matters of fact or law, there is likewise nothing exceptional in requiring a showing of cogent reasons to depart from that prior decision: *see above* para. 7. *Contra* Motion, para. 21.

²² Decision, para. 19 (“the Detention Centre Materials’ admission is not prohibited by Article 69(7) of the Statute. In line with the Chamber’s approach set out in the Article 69(4) Decision, the Chamber defers consideration of the material concerned under Article 69(4) [...] until deliberating on its judgment”).

²³ *Contra* Motion, paras. 21-23.

²⁴ *See* Motion, paras. 2, 13.

²⁵ *See* ICC-01/05-01/13-1199-Red, para. 48.

²⁶ Decision, para. 12.

an opportunity to be heard as soon as possible, as it was in this case.²⁷ Nor in any event did the Chamber consider that “recordings of the telephone conversations made or received by an accused at the detention centre” are part of the detention record.²⁸

13. In this context, the Chamber’s further observation that “regulation 175(10) of the Regulations of the Registry [...] does not apply to recordings of passively monitored calls subject to a judicial order providing access” —made in a footnote— appears to have been made primarily for the sake of legal completeness.²⁹ The Bemba Defence had not advanced any specific arguments in this respect. Nor does it now show how the Second Issue was essential to the resolution of the Decision, or develop its arguments concerning the Second Issue at all.³⁰

iii. The Third Issue merely disagrees with the Decision

14. The Third Issue—whether the power in article 57(3)(a) is sufficiently specific, certain, and foreseeable in order to found the measures ordered by the Single Judge³¹—is plainly a disagreement with the Decision.

15. The Chamber determined that:

[T]he 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

²⁷ Decision, para. 13.

²⁸ See Decision, para. 13; ICC-01/05-46, para. 9.

²⁹ See Decision, para. 13, fn. 18.

³⁰ See Motion, paras. 2, 13, 24-36.

³¹ See Motion, paras. 2, 15.

Mr Bemba to regulate his conduct. In particular, Mr Bemba was on notice that his non-privileged communications were passively monitored and could be disclosed and/or reviewed if there were reasonable grounds to believe that the detained person or interlocutory may be attempting to, *inter alia*, interfere with a witness or the administration of justice.³²

16. The Bemba Defence merely states that “the provisions and procedural safeguards in these Regulations were entirely disregarded by the Single Judge”,³³ but fails to explain in any way how the Third Issue arises from the *Decision*. To the contrary, the Chamber’s reasoning appears expressly to address the relevant requirements of regulation 174 of the Regulations of the Registry, relating to passive monitoring, including notably regulation 174(3) (requiring that the “detained person shall be informed of the monitoring of telephone calls”).

17. The Bemba Defence’s assertion that “the Trial Chamber [...] noted the Single Judge had granted the Prosecution access to Article 57(3)(a) of the Statute, and not Article 57(3)(a) in combination with Regulation 100(3) of the Regulations” is unsubstantiated.³⁴ To the extent the Bemba Defence refers to the Chamber’s observation in paragraph 16 of the *Decision*,³⁵ nothing in the context of this statement shows that the Chamber intended to suggest the Single Judge was not mindful of the relevant regulations. Nor in any event would such a statement prejudice Mr Bemba, given the Chamber’s conclusion that he had sufficient notice to regulate his conduct.

³² Decision, para. 15.

³³ Motion, para. 15.

³⁴ Motion, para. 13 (emphasis supplied).

³⁵ See Decision, para. 16 (“Pursuant to Article 57(3)(a) of the Statute [...] the Single Judge was satisfied”).

iv. The Fourth Issue mistakes the reasoning of the Decision and merely disagrees with the outcome

18. The Fourth Issue—whether the standard of “reasonable suspicion” was properly applied by the Single Judge³⁶—mistakes the Decision and does not arise from it. Again, in substance, the Fourth Issue is no more than a disagreement.

19. *First*, the Bemba Defence is incorrect to assert that “[t]he decisions cited by the Trial Chamber do not refer to such a standard”.³⁷ To the contrary, the Chamber cited the Single Judge’s observation that “the main purpose for recording telephone conversations [...] is to allow the relevant authorities to access them at a later stage *when the reasonable suspicion as to the commission of a crime arises*”.³⁸

20. *Second*, consistent with the Chamber’s approach to matters previously adjudicated by the Single Judge, it did not purport to “conduct[] an independent analysis as to whether such information existed”, nor was it required to do so.³⁹ It did, however, note the basis upon which the Single Judge reached such a determination.⁴⁰ The Bemba Defence has showed nothing, either in its original motion or now, to substantiate its claim that the Single Judge’s assessment was inadequate. Not only was the Single Judge’s assessment “independent”—insofar as it was a neutral judicial assessment as to whether the material in the Prosecution’s original request sufficed to establish a “reasonable suspicion”—but the Single Judge expressly recalled, not only that the Prosecution was in possession of evidence it

³⁶ See Motion, paras. 2, 17.

³⁷ *Contra* Motion, para. 17, fn. 13.

³⁸ ICC-01/05-50, para. 10 (emphasis added). See also ICC-01/05-46, para. 9 (referring to “a suspicion as to the behaviour of an accused”). See Decision, para. 16, fn. 26.

³⁹ *Contra* Motion, para. 17.

⁴⁰ Decision, para. 16, fn. 27.

considered relevant to its claims, but that “some” of that information had been provided to the Single Judge in a confidential annex.⁴¹

v. The Fifth and Sixth Issues merely disagree with the Decision

21. The Fifth and Sixth Issues are virtually indistinguishable. Both concern whether communications between Mr Bemba and Mr Mangenda were privileged.⁴² Neither amounts to anything more than a disagreement with the Decision.

22. The Chamber expressly considered that the access granted to the Prosecution by the Single Judge was proportionate, having regard to the Prosecution’s ability only to access directly recordings of relevant and non-privileged calls.⁴³ The Chamber noted in particular the Bemba Defence’s claim that the Single Judge had erred in this respect, but determined that no cogent reason had been shown to depart from the Single Judge’s decision.⁴⁴

23. The Bemba Defence raises various matters in the context of the Fifth Issue, but fails to identify how they constitute an identifiable topic or subject requiring resolution, as opposed merely to matters which they would prefer to have been decided differently. Merely asserting that the Chamber “adopted the Single Judge’s finding that the ‘nature and legal status’ of communications between Mr Bemba and Mr Mangenda on a non-privileged line did not preclude direct access” does not frame any appealable issue.⁴⁵ Nor does noting that the Prosecution’s access was limited to communications with relevant persons,⁴⁶ or that the communications took place over a “non-privileged line”, in a certain period, and in light of the

⁴¹ ICC-01/05-46, para. 1.

⁴² See Motion, paras. 2, 18-19.

⁴³ See Decision, para. 17.

⁴⁴ Decision, para. 18. See also above para. 7.

⁴⁵ Contra Motion, para. 18.

⁴⁶ Contra Motion, para. 18.

professional role of Mr Mangenda.⁴⁷ These are naked disagreements with the premises of the Chamber's reasoning, which have been litigated on multiple previous occasions.

24. The Bemba Defence further asserts that the Single Judge's observation concerning the composition of Prosecution teams in this case and the case ICC-01/05-01/08 is "factually incorrect".⁴⁸ This not only takes the Decision out of context, but is—at best—no more than tangentially relevant. Since the communications between Mr Bemba and Mr Mangenda are not privileged (as the Single Judge found),⁴⁹ the staffing of the Prosecution is immaterial.⁵⁰ The Prosecution is not obliged to maintain a separation between related article 5 and article 70 cases,⁵¹ even if it may be operationally preferable in some instances.⁵²

vi. The Seventh Issue disagrees with the Decision and does not arise from it

25. The Seventh Issue—whether the Chamber may defer its ruling on the admissibility of evidence until the conclusion of the trial⁵³—is a mere disagreement with the Decision, based on the Chamber's reasoning in the Article 69(4) Decision. The Bemba Defence makes no effort to identify a topic or subject within this determination requiring resolution by the Appeals Chamber, nor does it acknowledge that the Chamber has previously denied certification of this same issue, or make any attempt to explain why the Chamber should reason differently on this occasion.⁵⁴ As the Chamber recalled, an issue of such breadth "is comparable to

⁴⁷ *Contra* Motion, para. 19.

⁴⁸ Motion, para. 18, fn. 16. *See also* para. 2.

⁴⁹ *See e.g.* ICC-01/05-01/13-48, para. 3.

⁵⁰ *Contra* Motion, para. 18, fn. 16 (citing Annex A).

⁵¹ *See* ICC-01/05-01/13-648-Red3 OA, para. 35.

⁵² *See* ICC-01/05-01/13-648-Red3 OA, para. 40.

⁵³ *See* Motion, paras. 2, 20.

⁵⁴ *See also above* para. 8.

challenging the entirety of the Chamber's reasoning" and hence "insufficiently discrete to qualify as an appealable issue".⁵⁵

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

26. Since none of the proposed issues constitutes an 'appealable' issue arising from the Decision, they cannot meet the requirements of article 82(1)(d). The Motion should thus be rejected without further consideration. Yet in any event the Motion fails to show that any of the issues significantly affects the fairness and expedition of the proceedings or the outcome of the trial, nor that immediate resolution of any of the proposed issues will materially advance the proceedings.

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

27. 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.⁵⁶

28. The Bemba Defence shows no such link between the proposed issues (which are primarily disagreements with the Decision) and the necessary impact on the fairness and expedition of the proceedings or the outcome of the trial.

⁵⁵ Admissibility ALA Decision, para. 7.

⁵⁶ See *Gbagbo and Blé Goudé* Trial Date ALA Decision, para. 23.

29. Regarding the First Issue, the Bemba Defence asserts only that “the placement of this burden on the Defence therefore affects the fairness of the proceedings.”⁵⁷ However, as explained above, the only instances to which the Bemba Defence refers plainly do not represent a reversal of the burden on the admissibility of Prosecution evidence, but reflect instead the orthodox allocation of the burden to the moving party for a motion.⁵⁸ In such circumstances, the fairness of the proceedings cannot be “significantly” affected.

30. Regarding the Second, Third, Fourth, Fifth and Sixth Issues, the Bemba Defence asserts generally that they “impact significantly on the principle of legality” and Mr Bemba’s article 67(1)(b) right to adequate time and facilities to prepare his defence, including by communicating freely with counsel in confidence.⁵⁹ The Bemba Defence makes uncontentious assertions as to the nature of some of these underlying rights,⁶⁰ but for many of the proposed issues fails to explain in concrete terms *how* these rights were thus significantly affected.

31. With particular regard (presumably) to the Fifth and Sixth Issues, the Bemba Defence presents further substantive arguments for why communications with case managers should be privileged,⁶¹ and why inferences as to the privileged nature of communications should not be drawn from the medium by which they are transmitted.⁶² Again, these fail to show in concrete terms any impact on this case, much less that any such impact is “significant”. The assertion that “[i]ssues linked to the question” of any privilege for case managers and their work product *per se* “strike at the heart” of defence preparation is, again, too broad to meet the standard

⁵⁷ Motion, para. 23.

⁵⁸ See above paras. 6-10.

⁵⁹ Motion, para. 24.

⁶⁰ See Motion, paras. 25-27.

⁶¹ See Motion, paras. 28-30.

⁶² See Motion, paras. 31-32.

of article 82(1)(d).⁶³ Likewise, the Bemba Defence does not explain *how* anything in the Decision, let alone the proposed issues, significantly affects Mr Bemba's right to silence and privilege against self-incrimination,⁶⁴ or that the Prosecution's statutory duty and responsibility to detect, investigate and, where appropriate, prosecute offences under article 70 "affect[s] the notion of equality of arms."⁶⁵

32. Regarding the Seventh Issue, the Bemba Defence asserts that the Chamber's determination to assess the admissibility of the evidence at the conclusion of the trial "was unforeseen [...] and has created a situation in which the Trial Chamber has issued a predetermination on issues of legality", vitiating equality of arms.⁶⁶ This is incorrect. *First*, in the Article 69(4) Decision, the Chamber merely interpreted readily accessible provisions of the Statute and jurisprudence of the Appeals Chamber.⁶⁷ *Second*, the Article 69(4) Decision—which the Bemba Defence did not seek leave to appeal—placed it on notice of the Chamber's determination prior to the Decision now challenged.⁶⁸ *Third*, the Chamber's approach—in its own plain terms—does not constitute "a predetermination" on admissibility. To the contrary, as noted above, a decision not to exclude evidence presently is not a decision necessarily to admit such evidence at the conclusion of the trial. ⁶⁹ *Fourth*, there is no basis to consider that there is any inequality of arms—the approach taken by the Chamber can apply equally to all the Parties. For all these reasons, the Seventh Issue did not significantly affect the fairness of the proceedings.

33. In any event, the Bemba Defence fails to demonstrate that any of the proposed issues also significantly affects the expeditious conduct of the proceedings. The

⁶³ *Contra* Motion, para. 33.

⁶⁴ *Contra* Motion, para. 35.

⁶⁵ *Contra* Motion, para. 34.

⁶⁶ *See* Motion, para. 36.

⁶⁷ *See* Article 69(4) Decision, paras. 5-8.

⁶⁸ *See above* para. 8.

⁶⁹ *See above* para. 10.

undeveloped argument that all issues relating to defence preparation, *arguendo*, necessarily “affect[] the expeditiousness of the proceedings” is much too broad.⁷⁰ Nor indeed does the Bemba Defence even attempt to argue that such an effect is *significant*, as the Statute requires. The Bemba Defence’s further argument that the Court’s approach to the proposed issues “affects the volume[] and nature of information which can be relied upon by the Prosecution in this case”, and thereby prolongs duration of the trial, is tenuous, as well as speculative.⁷¹ Excluding particular evidence would not necessarily prevent the Prosecution eliciting alternative evidence. In any event, this argument does not relate to the impact of the *proposed issues* upon the expedition of the proceedings but rather the impact of the disposition of the *Decision*. This plainly does not satisfy the test under article 82(1)(d).

34. The Bemba Defence’s assertion that the proposed issues “affect” the outcome of the trial is also speculative, and does not even contend that the proposed issues “significantly” affect the outcome, as required by article 82(1)(d).⁷² In any event, the Bemba Defence incorrectly conflates the “admissibility” and “potential exclusion” of evidence—as stated above. The Chamber’s determination not to exclude certain evidence does not predetermine its ultimate admissibility,⁷³ and therefore is not dispositive of the evidence upon which the Chamber will determine guilt or innocence.⁷⁴ Reference to a decision in *Katanga and Ngudjolo* does not assist the Bemba Defence in showing the necessary impact in this case.⁷⁵

⁷⁰ *Contra* Motion, para. 37.

⁷¹ *Contra* Motion, para. 38.

⁷² *See* Motion, p. 14 (sub-title: “The issues affect the outcome of the trial”). *See also* para. 40 (“[t]he issues are therefore germane to the outcome of the trial”).

⁷³ *See above* para. 10.

⁷⁴ *Contra* Motion, para. 39.

⁷⁵ *Contra* Motion, para. 40 (citing ICC-01/04-01/07-1303-tENG-Red, para. 15).

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

35. The Motion fails to show that immediate resolution by the Appeals Chamber of any of the proposed issues will materially advance the proceedings, much less that it is “absolutely critical”.⁷⁶

36. *First*, any election by the Bemba Defence “to lead no evidence during the Defence case in relation to several or many counts or allegations” is not contingent upon the Decision,⁷⁷ nor does the Chamber’s legal approach “irrevocably” deny the Parties “the benefit of legal certainty concerning what evidence is or is not admitted”.⁷⁸ To the contrary, the Chamber has previously stated that it “always retains the discretion to rule on admissibility related issues up front when appropriate”⁷⁹—and nothing in the Decision prevents the Parties thus seeking any necessary relief directly from the Chamber if reasonably required to enable the further preparation or presentation of their cases.

37. *Second*, the apparent implication of the Bemba Defence that the intervention of the Appeals Chamber is in some way necessary to preserve Mr Bemba’s right to silence is unfounded.⁸⁰ In particular, electing to present a defence case—which is never “compelled”,⁸¹ and certainly not by the Decision—does not necessarily require waiving the “right to silence” in a sense prejudicial to the interests of the accused person.⁸² Nor in any event can a question of trial strategy be said to have been determined *ipso facto* by a decision of the Chamber.

⁷⁶ *Contra* Motion, para. 41.

⁷⁷ *Contra* Motion, para. 42.

⁷⁸ *Contra* Motion, para. 46.

⁷⁹ Article 69(4) Decision, para. 13.

⁸⁰ *Contra* Motion, para. 43.

⁸¹ *Contra* Motion, para. 44.

⁸² *Contra* Motion, para. 44.

C. The Joinder should be dismissed *in limine*

38. The Prosecution recalls that, on 12 November 2015, the Babala Defence filed the Joinder, supporting the Motion.⁸³ This was more than three days after the deadline for filing applications for leave to appeal the Decision—and one day prior to the deadline for this response to the Motion—and therefore, consistent with the established practice of the Chamber, should be dismissed *in limine*.⁸⁴

III. Relief requested

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



Fatou Bensouda, Prosecutor

Dated this 13th day of November 2015

At The Hague, The Netherlands

⁸³ See *e.g.* Joinder, paras. 3-4.

⁸⁴ See *e.g.* ICC-01/05-01/13-966, para. 11 (declining to consider further a joinder filed by Counsel for Mr Kilolo “past the prescribed time limit of Rule 155(1)”).