

**Cour
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**International
Criminal
Court**

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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

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)

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

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Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

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 ('Court'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 64 (2) and (9), 69 and 74(2) of the Rome Statute ('Statute'), Rules 63-64 of the Rules of Procedure and Evidence ('Rules') and Regulations 29 and 37 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Conf, ICC-01/05-01/13-1113-Conf, ICC-01/05-01/13-1170-Conf)'.

I. Procedural history and preliminary issues

1. On 16 June 2015,¹ 31 July 2015² and 21 August 2015,³ the Office of the Prosecutor ('Prosecution') sought admission of a total of 1,028 documentary materials from the 'bar table' ('First Prosecution Request', 'Second Prosecution Request' and 'Third Prosecution Request', respectively). The Prosecution seeks admission of various categories of materials: (i) intercepted communications and their corresponding phone logs and transcripts/translations; (ii) call data records from independent private carriers; (iii) financial records from commercial money transfer companies;⁴ (iv) Detention Centre recordings and call logs of Mr Bemba's non-privileged phone line (including transcriptions/translations and contact lists);⁵ (v) materials disclosed by the five defence teams ('Defence'); (vi) other statements of the accused; (vii) materials obtained from the accused; (viii) Victims and Witnesses Unit documents; (ix) Independent Counsel reports and related

¹ Public redacted version of "Prosecution's First Request for the Admission of Evidence from the Bar Table", 16 June 2015, ICC-01/05-01/13-1013-Conf, 23 June 2015, ICC-01/05-01/13-1013-Red (confidential version notified 17 June 2015; with annex).

² Public redacted version of "Prosecution's Second Request for the Admission of Evidence from the Bar Table", 6 August 2015, ICC-01/05-01/13-1113-Red (confidential version notified 31 July 2015; with annex).

³ Public redacted version of the "Prosecution's Third Request for the Admission of Evidence from the Bar Table", 21 August 2015, ICC-01/05-01/13-1170-Conf, 18 September 2015, ICC-01/05-01/13-1170-Red (confidential version notified 21 August 2015, with annex).

⁴ ICC-01/05-01/13-1013-Red, para. 3.

⁵ ICC-01/05-01/13-1113-Red, paras 2-3.

materials; (x) other Detention Centre materials; (xi) open source materials; (xii) photographs; and (xiii) other materials.⁶

2. Responses to these motions have been duly filed⁷ by the defence teams for Mr Bemba ('Bemba Defence'),⁸ Mr Kilolo,⁹ Mr Mangenda ('Mangenda Defence'),¹⁰ Mr Babala ('Babala Defence')¹¹ and Mr Arido ('Arido Defence').¹² Subject to limited

⁶ ICC-01/05-01/13-1170-Conf, para. 2.

⁷ A request for an extension of time to respond to the Second Prosecution Request was partially granted. Decision on Joint Defence Request for Variation of the Deadline to Respond to the Second Bar Table Request, 17 August 2015, ICC-01/05-01/13-1153.

⁸ Defence Response to Prosecution's First Request for the Admission of Evidence from the Bar Table (ICC-01/05-01/13-1013-Conf), 9 July 2015, ICC-01/05-01/13-1074-Conf (with three annexes); Defence Response to the Prosecution's Second Bar Table Motion, 31 August 2015, ICC-01/05-01/13-1199-Conf (with annex); Defence Response to Prosecution's Third Request for the admission of Evidence from the Bar Table (ICC-01/05-01/13-1170), 14 September 2015, ICC-01/05-01/13-1245-Conf. The Bemba Defence was permitted to exceed the word limit for its response to the Second Prosecution Request. Email from a Legal Officer of the Chamber to the parties, 8 September 2015 at 12:35, *ruling on Defence Request to Exceed the Word Limit*, 7 September 2015, ICC-01/05-01/13-1223. The Bemba Defence also requested an additional 900 words to respond to the Third Prosecution Request; this request is granted.

⁹ Réponse de la Défense de M. Aimé Kilolo à la «Prosecution's First Request for the Admission of Evidence from the Bar Table ICC-01/05-01/13-1013-Conf», 9 July 2015, ICC-01/05-01/13-1075-Conf; Kilolo Defence Response to 'Prosecution's Second Request for the Admission of Evidence from the Bar Table' (ICC-01/05-01/13-1113-Conf), 31 August 2015, ICC-01/05-01/13-1201-Conf (notified 1 September 2015; with annex); Kilolo Defence Response to "Prosecution's Third Request for the Admission of Evidence from the Bar Table", 14 September 2015, ICC-01/05-01/13-1246-Conf (notified 15 September 2015; with annex). The response to the Second Prosecution Request was filed one minute after the filing deadline and the response to the Third Prosecution Request required re-filing and was notified one day late, but these responses will nevertheless be accepted on this occasion.

¹⁰ Response to "Prosecution's First Request for the Admission of Evidence from the Bar Table", 9 July 2015, ICC-01/05-01/13-1076-Conf; Response to "Prosecution's Second Request for the Admission of Evidence from the Bar Table", 31 August 2015, ICC-01/05-01/13-1200-Conf; Response to "Prosecution's Third Request for the Admission of Evidence from the Bar Table", 14 September 2015, ICC-01/05-01/13-1243-Conf.

¹¹ Requête de la Défense de M. Fidèle Babala aux fins d'obtenir une version amendée de la «Bar Table Motion» telle que soumise pour admission dans la «Prosecution's First Request for the Admission of Evidence from the Bar Table» (ICC-01/05-01/13-1013-Conf), 2 July 2015, ICC-01/05-01/13-1051-Conf; Réponse de la Défense de M. Fidèle Babala à «Prosecution's First Request for the Admission of Evidence from the Bar Table» (ICC-01/05-01/13-1013-Conf), 9 July 2015, ICC-01/05-01/13-1073-Conf; Réponse de la Défense de M. Fidèle Babala à «Prosecution's Second Request for the Admission of Evidence from the Bar Table» (ICC-01/05-01/13-1113-Conf), 31 August 2015, ICC-01/05-01/13-1203-Conf (notified 1 September 2015; with annex); Réponse de la Défense de M. Fidèle Babala à «Prosecution's Third Request for the Admission of Evidence from the Bar Table» (ICC-01/05-01/13-1170-Conf), 14 September 2015, ICC-01/05-01/13-1244-Conf (with two annexes). The Babala Defence of 9 July 2015 was made as a supplement to its response to the First Prosecution Request. Emails from a Legal Officer of the Chamber to the parties, 3 July 2015 at 14:03 and 17:50. The response to the Second Prosecution Request was filed 49 minutes after the filing deadline, but will nevertheless be accepted on this occasion. The response to the Third Prosecution Request was filed one hour late with authorisation. Email from a Legal Officer of the Chamber to the parties, 14 September 2015 at 14:26.

¹² Narcisse Arido's Request for an Order to the Prosecution to Re-File its First Bar Table Motion (ICC-01/05-01/13-1013-Conf), 26 June 2015, ICC-01/05-01/13-1038-Conf; Narcisse Arido's Response to the Prosecution's First Bar Table Motion (ICC-01/05-01/13-1013-Conf), 9 July 2015, ICC-01/05-01/13-1077-Red (with annex; redacted version notified 1 September 2015); Narcisse Arido's Response to the Prosecution's Second Bar Table Motion (ICC-01/05-01/13-1113-Conf), 31 August 2015, ICC-01/05-01/13-1197-Red (with annex; redacted version notified 1 September 2015); Narcisse Arido's Response to the Prosecution's Third Bar Table Motion (ICC-01/05-01/13-1170-Conf), 14 September 2015, ICC-01/05-01/13-1241-Conf (with annex). The Arido Defence of 9 July 2015 was made as a supplement to its response to the First Prosecution Request. Emails from a Legal Officer of the

exceptions,¹³ the Defence requests that the Chamber reject all three Prosecution requests.

3. As a preliminary issue, the Chamber notes the Arido and Babala Defence requests for the Prosecution to provide further information and re-file the First Prosecution Request.¹⁴ The Babala Defence also requests that the annex to the First Request be re-filed in both English and French and to suspend the response timeline.¹⁵ The Prosecution,¹⁶ Bemba Defence¹⁷ and Mangenda Defence¹⁸ oppose the re-filing requests, with the latter two arguing that the Prosecution should not be given a second opportunity to cure deficiencies in the First Prosecution Request. The Chamber considers that it has sufficient information to rule on the First Prosecution Request and, now that all the defence teams have responded to it, there is no reason to order the Prosecution to re-file or translate this request prior to making its ruling. These requests from the Arido Defence and Babala Defence are rejected.
4. As a further preliminary issue, the Prosecution requests that the Chamber disregard certain paragraphs of the Mangenda Defence Response to the Second Prosecution Request or, alternatively, to grant the Prosecution leave to reply to the arguments made in these paragraphs.¹⁹ The Prosecution argues that, in these paragraphs, the Mangenda Defence is supplementing arguments made in another

Chamber to the parties, 3 July 2015 at 14:03 and 17:50. The Arido Defence was granted an additional five pages to respond to the Third Prosecution Request. Email from a Legal Officer of the Chamber to the parties, 11 September 2015 at 11:26.

¹³ The Mangenda Defence and Arido Defence do not object to – or do not take a position on – certain items sought for admission in the Third Prosecution Request. ICC-01/05-01/13-1243-Conf, para. 28; ICC-01/05-01/13-1241-Conf, paras 83-84.

¹⁴ ICC-01/05-01/13-1038-Conf, ICC-01/05-01/13-1051-Conf.

¹⁵ ICC-01/05-01/13-1051-Conf, page 7.

¹⁶ Prosecution's Consolidated Response to the Arido and Babala Requests regarding the Prosecution's First Request for the Admission of Evidence from the Bar Table (ICC-01/05-01/13-1038-Conf, ICC-01/05-01/13-1051-Conf), 8 July 2015, ICC-01/05-01/13-1070-Conf.

¹⁷ Defence Response to Narcisse Arido's Request for an Order to the Prosecution to Re-File its First Bar Table Motion (ICC-01/05-01/13-1013-Conf), 10 July 2015, ICC-01/05-01/13-1079-Conf.

¹⁸ Response to Narcisse Arido's Request for an Order to the Prosecution to Re-File its Bar Table Motion, 10 July 2015, ICC-01/05-01/13-1078-Conf.

¹⁹ Prosecution's Motion to Strike or, in the alternative, Request to Seek Leave to Reply to Mangenda's Response to "Prosecution's Second Request for the Admission of Evidence from the Bar Table" (ICC-01/05-01/13-1200-Conf), 4 September 2015, ICC-01/05-01/13-1215-Conf.

request in contravention of Regulation 23(1)(d) of the Regulations. In view of the Chamber having ruled on the Mangenda Defence request which the Prosecution argues was being impermissibly supplemented,²⁰ this request is dismissed as moot.

II. Analysis

5. Article 74(2) of the Statute provides that, in rendering its final judgment on the merits, the Chamber 'may base its decision only on evidence submitted and discussed before it at the trial'. Evidence is 'submitted' if it is presented to the Chamber by the parties on their own initiative or pursuant to a request by the Chamber for the purpose of proving or disproving facts in issue.²¹ An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to the Chamber, subject to exceptional circumstances.²² The Chamber emphasises at the outset that submitting evidence is not only the prerogative of the parties. All materials disclosed *inter partes* in this case are also transmitted to the Chamber, irrespective of whether the disclosing party intends to use them as evidence,²³ and Article 69(3) of the Statute expressly vests the Chamber with the authority to request the submission of all evidence that it considers necessary for the determination of the truth.
6. Whereas the Chamber has not hitherto regulated how it wishes to receive and consider requests for the admission of evidence which is not presented through a witness,²⁴ the Chamber considers that the Prosecution, by way of its three requests for admission of these 1,028 items, clearly intends for them to be considered as

²⁰ Decision on Request to declare telephone intercepts inadmissible, 24 September 2015, ICC-01/05-01/13-1284.

²¹ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386, OA 5 OA 6 ('Bemba OA 5 OA 6 Judgment'), para. 43.

²² Rule 64 of the Rules.

²³ Decision on Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959, paras 24-29 (with annex).

²⁴ Compare Annex D to the Prosecution's Observations on the Agenda of the First Status Conference, 20 March 2015, ICC-01/05-01/13-859-AnxD, paras 45-47 with Observations conjointes des équipes de défense concernant la conduite de la procédure, 13 April 2015, ICC-01/05-01/13-899, paras 107-20.

‘submitted’ within the meaning of Article 74(2) of the Statute. In response, the defence teams have presented detailed submissions discussing why these materials should not be considered by the Chamber.

A. The general rule for when the Chamber will consider relevance, probative value and potential prejudice of submitted items

7. Article 64(9)(a) of the Statute gives the Chamber the power to rule on the admissibility or relevance of evidence. Article 69(4) of the Statute provides that:

The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

8. In relation to Article 69(4) of the Statute, the Appeals Chamber has clarified as follows:

[...] As borne out by the use of the word “may” in article 69 (4), the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber. Consequently, the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial. [...] Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person. Nevertheless, 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”. In particular, 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. Moreover, it should be underlined that irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and 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.²⁵

9. The issue the Chamber will turn to now is when it will make its assessments of the relevance, probative value and potential prejudice of each item of evidence submitted. The Chamber determines that, as a general rule, these proceedings will be conducted more efficiently if the Chamber defers its assessment of the admissibility of evidence until deliberating its judgment pursuant to Article 74(2)

²⁵ Bemba OA 5 OA 6 Judgment, ICC-01/05-01/08-1386, para. 37.

of the Statute. The Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted at that time, though it may not necessarily discuss these aspects for every item submitted in the final judgment.²⁶ This approach is based on the following considerations.

10. First, the Chamber is able to more accurately assess the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial. The relevance of a particular piece of evidence may not be possible to determine without consideration of other items of evidence, or even the totality of the evidence. A decision on relevance and admissibility upon submission restricts the Chamber's clarity in making these very rulings. The Chamber's evaluation of relevance may also change during the course of the hearing, risking inconsistent admissibility rulings and forcing the Chamber to continuously review an item's irrelevance throughout the proceedings. Deferring these assessments is also more consonant with the Chamber's right and duty, as enshrined in Rule 63(2) of the Rules, 'to assess **freely** all evidence submitted in order to determine its relevance or admissibility in accordance with article 69'.
11. Second, a significant amount of time is saved by not having to assess an item's relevance and probative value at the point of submission and again at the end of the proceedings. Relevance and probative value, which are closely related in any event, will only require one Chamber assessment if they are deferred to the final judgment. An extensive discussion and ruling on admissibility of evidence also risks infringing the principle of expeditious proceedings and the accused's right to be tried without undue delay.²⁷

²⁶ ICTR, Appeals Chamber, *Siméon Nchamihigo v. The Prosecutor*, Judgement, 18 March 2010, ICTR-2001-63-A, paras 165-66; ICTY, Appeals Chamber, *The Prosecutor v. Fatmir Limaj et al.*, Judgement, 27 September 2007, IT-03-66-A, para. 86; ICTY, Appeals Chamber, *Prosecutor v. Miroslav Kvočka et al.*, Judgement, 28 February 2005, IT-98-30/1-A, para. 23 ('It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record').

²⁷ Articles 64(2) and 67(1)(c) of the Statute.

12. Third, there is no reason for the Chamber to make admissibility assessments in order to screen itself from considering materials inappropriately. The notion of a fair trial does not require that the Chamber rule on the admissibility of each piece of evidence upon submission – Article 69(4) of the Statute clearly gives the Chamber discretion in this respect. Unlike situations where submitting marginally relevant or prejudicial material may unduly compromise the proceedings,²⁸ such as when these materials are introduced in trials where fact-finding is done by a jury, these issues do not apply when professional judges are evaluating the evidence presented.
13. Fourth, the Chamber always retains the discretion to rule on admissibility related issues upfront when appropriate. This is consistent with the Appeals Chamber's holding that the Chamber must balance its discretion to defer consideration of admissibility issues with its obligations under Article 64(2) of the Statute.²⁹ The general rule articulated above does not stop the Chamber from giving earlier consideration to admissibility objections related to, as examples, certain motions made under Article 69(7) of the Statute (where it is noted that the Chamber has an obligation to rule on the admissibility of the evidence),³⁰ or whether certain statutory pre-requisites are met for admitting prior recorded testimony under Rule 68 of the Rules.
14. Indeed, the Chamber has already ruled on two Article 69(7) requests prior to the commencement of trial.³¹ In this regard, the Chamber notes that the Bemba Defence and Arido Defence raise further Article 69(7) challenges, this time in

²⁸ In this regard, the Chamber notes that broadly similar concerns arise in the present proceedings when the Chamber has to decide whether it is necessary to provide the accused's private intercepted communications, which are selected by the Independent Counsel, to the other parties. The Chamber has had to assess the communications' general relevance to the case as a safeguard, though these decisions are explicitly made without prejudice to 'the admission of any items into evidence or [the Chamber's] ultimate decision on the merits'. Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 15 May 2015, ICC-01/05-01/13-947, para. 17.

²⁹ *Bemba* OA 5 OA 6 Judgment, ICC-01/05-01/08-1386, para. 37.

³⁰ Rule 63(3) of the Rules.

³¹ ICC-01/05-01/13-1284; Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, ICC-01/05-01/13-1257.

relation to materials seized from the detention unit which are submitted in the Second Prosecution Request³² and statements allegedly made by Mr Arido to the French authorities which are submitted in the Third Prosecution Request.³³ The Chamber considers these submissions to be new requests, and directs that any responses to them be filed within two weeks of notification of the present decision.

15. The Chamber also notes that certain arguments have been raised which amount to disputes between the Prosecution and Defence as to whether certain materials (statements of the accused, Independent Counsel reports, intercepted communications, etc.) need to satisfy the requirements of Rule 68 of the Rules before being admitted.³⁴ The Chamber notes that two applications have already been made by the Prosecution under Rule 68 of the Rules,³⁵ and the Chamber will give additional guidance in due course as to which materials require introduction through this provision.

B. Consequences of the Chamber's determination with respect to the 1,028 submitted items

16. Bearing the above in mind, the Chamber decides that it will not make any ruling on the relevance and/or admissibility of the 1,028 submitted items at this time beyond its previous decisions taken under Article 69(7) of the Statute. The Chamber considers these items to be submitted and discussed within the meaning of Article 74(2) of the Statute.

³² ICC-01/05-01/13-1199-Conf, paras 43-104.

³³ ICC-01/05-01/13-1241-Conf, paras 33-58 (regarding CAR-OTP-0074-1065 and CAR-OTP-0077-0169).

³⁴ *Eg* ICC-01/05-01/13-1243-Conf, paras 14, 27; ICC-01/05-01/13-1197-Red, paras 9-11; ICC-01/05-01/13-1241-Conf, para. 15.

³⁵ Prosecution Request for the Admission of Previously Recorded Testimony of P-0020, P-0243, P-0214 and P-0272, pursuant to Rule 68(3), 17 September 2015, ICC-01/05-01/13-1262-Conf (with five annexes); Prosecution Request for the Admission of the Previously Recorded Testimony of P-0270, pursuant to Rule 68(2)(b), 14 September 2015, ICC-01/05-01/13-1247-Conf.

17. Consistently with the approach taken in the confirmation decision in this case, the Chamber considers it unnecessary to assign an 'EVD' number to these 1,028 items. These items will continue to be referenced by their pre-existing unique identification number³⁶ which is stamped on each page of each item. However, the Registry is to ensure that the e-court metadata clearly reflects which items have been formally submitted to the Chamber as the trial advances.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Arido Defence and Babala Defence requests to order the Prosecution to re-file the First Prosecution Request;

DISMISSES the Prosecution request to strike part of the Mangenda Defence response to the Second Prosecution Request as moot;

RECOGNISES the items discussed in the First, Second and Third Prosecution Requests as 'submitted', subject to paragraph 14 above;

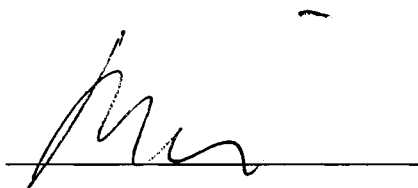
DEFERS any ruling under Article 69(7) of the Statute for the items in the Second Prosecution Request and Mr Arido's statements to the French authorities advanced in the Third Prosecution Request in accordance with paragraph 14 above;

ORDERS the Registry to ensure that the e-court metadata reflects that the items recognised have been formally submitted to the Chamber; and

ORDERS the parties to prepare and submit public redacted versions of their respective filings (excluding annexes) if they have not already done so, or request reclassification thereof, within fourteen days of notification of the present decision.

³⁶ Regulation 28(1) of the Regulations of the Registry.

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



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul Pangalangan

Dated 24 September 2015

At The Hague, The Netherlands