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No: **ICC-01/05-01/13**
Date: **1 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

Leave to Appeal Decision on Defence Requests for Disclosure (ICC-01/05-01/13-1188)

Source: Defence for Jean-Jacques Kabongo Mangenda

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

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I. INTRODUCTION

1. Jean-Jacques Mangenda seeks leave to appeal the Single Judge's decision¹ rejecting the Joint Defence Request for an order requiring the Prosecution to disclose *inter partes* material from *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) ('Main Case').² The Single Judge's determination that the request is "premature"³ implies that the Prosecution has no independent disclosure obligations once an access request has been filed under Regulation 42(3) of the Regulations of Court.⁴ This would substantially curtail the scope of the Prosecution's disclosure obligations, which, in turn, directly affects the "fair" conduct of proceedings, as required for leave to appeal under Article 82(1)(d). The proceedings may be materially advanced by immediate resolution of an issue that is so fundamental to trial fairness that it would otherwise likely "cloud or unravel the judicial process."⁵ The efficiency of the proceedings, in these circumstances, will be served by interlocutory resolution rather than deferring appellate resolution until the end of the case.

II. APPLICABLE LAW

2. A decision is subject to interlocutory appeal, pursuant to Article 82(1)(d), where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

3. The Appeals Chamber has defined an "issue" as "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."⁶ "Essential" in this context must be understood as meaning essential to

¹ *Bemba et al.*, Decision on Defence Requests for Disclosure of Materials from the Record of the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo* and Related Matters, ICC-01/05-01/13-1188, 27 August 2015 ("Impugned Decision").

² *Bemba et al.*, Corrigendum to Urgent Joint Request for Order Compelling the Prosecution to Disclose Materials from the Case of *Prosecutor v. Bemba*, ICC-01/05-01/13-1133-Conf-Corr, 17 August 2015.

³ *Id.* para. 13.

⁴ All subsequent references to "Regulation" shall be understood as referring to a regulation of the Regulations of Court.

⁵ *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, 13 July 2006, para. 16.

⁶ *Id.* para. 9.

some judicial disposition, and “not merely a question over which there is disagreement or conflicting opinion.”⁷

4. The notion of “materially advance” involves examination of the degree to which an “authoritative determination” of the “matter posing for decision” will “rid [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”⁸ The Appeals Chamber has also held that the criterion is met if immediate determination would “move forward” the proceedings, by “ensuring that the proceedings follow the right course”⁹ and “remove[] doubts about the correctness of the decision or map[] a course of action along the right lines.”¹⁰ The purpose of such appeal is to avoid the consequences that would otherwise be embedded in the proceedings and which could “cloud or unravel the judicial process.”¹¹ The applicable threshold, importantly, is “*may* materially advance,” and not “*will* materially advance”.
5. A request for certification is not concerned with whether a decision was correctly reasoned, but only whether the issues *significantly affect the fairness of the proceedings*.¹² This being the case, the “materially advance” criterion can be assessed only in relation to the consequences, not the correctness, of the decision from which interlocutory appeal is sought.

III. THE IMPUGNED DECISION AFFECTS THE FAIR AND EXPEDITIOUS CONDUCT OF PROCEEDINGS

6. The Impugned Decision holds that the disclosure request was “premature” because the matter was ostensibly already in the hands of Trial Chamber III:

Trial Chamber III, not this Chamber, has primary authority to decide whether to provide access to material in the Main Case record. Further, those portions of the Requests alleging – and requesting remedies for –

⁷ *Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victim’s Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, para. 8.

⁸ *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, 13 July 2006, para. 14.

⁹ *Id.* para. 15.

¹⁰ *Id.* paras. 14-15.

¹¹ *Id.* para. 16.

¹² *Muthaura et al.*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)’”, ICC-01/09-02/11-253, 18 August 2011, para. 28.

disclosure violations are directly related to access to material (speculated to be) in the Main Case record and are therefore premature.¹³

7. This holding, accordingly, rejects the Defence argument presented at paragraphs 15 through 18 of the Joint Request that the Prosecution has an independent and justiciable obligation of disclosure which is in no way diminished or affected by any Defence request for modification of witness protection measures in another case under Regulation 42(3).
8. The consequences of the Impugned Decision are substantial and will irremediably affect the course of these proceedings. The Trial Chamber's decision means that the Prosecution's disclosure obligations are not subject to any judicial supervision, since an application for access under Regulation 42(3) does not involve those obligations. Indeed, aside from a parenthetical reference to the Defence's claim of disclosure violations being "speculative", the Impugned Decision did not adjudicate the merits of the assertion. The Defence maintains that there are strong circumstantial indications, based on the Prosecution's own submissions and the known content of evidence submitted by the Prosecution in the Main Case, that a substantial volume of relevant or exculpatory information has not been disclosed.
9. One example illustrates the ramifications of the Impugned Decision on the conduct of proceedings. The Defence may wish to show that the testimony of D-2 (P-0260) and D-3 (P-0245) was not known to be false because it was consistent with evidence heard from Prosecution, as well as Defence, witnesses. The current position is that the Defence should have no access to this material.
10. The Defence understands the Single Judge's injunction that "the Chamber has already cautioned the parties that the purpose of these proceedings is not to re-litigate the Main Case."¹⁴ However, issues from the Main Case have already been placed in issue by both the Prosecution (by way of its Pre-Trial Brief) and the Pre-Trial Chamber (by way of paragraph 64 of the confirmation decision).¹⁵ The example in the previous paragraph provides but one further example of the many ways in which material from the main case is relevant to the defence case and, in fact, fall within Article 67(2). The

¹³ Impugned Decision, para. 13.

¹⁴ *Id.* para. 12.

¹⁵ *Bemba et al.*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, 11 November 2014, para. 64.

Trial Chamber has itself already recognised that Main Case material can be “relevant and material to the preparation of the defence” in ordering the disclosure of all records of payments to P-169 and P-178, neither of whom are witnesses in this case, because this information explains “the overall system of money transfer and payment of witnesses’ in the Main Case.”¹⁶

11. The practical consequences of the Impugned Decision cannot be over-stated. This Trial Chamber is the only Chamber capable, given its familiarity with the present proceedings, of adjudicating whether Article 67(2) and Rule 77 require disclosure in relation to this case. The Bemba Trial Chamber is not in a position to make that assessment, nor is it called upon to do so under Regulation 42(3).
12. The Defence’s claim that the current state of disclosure is woefully deficient, whether correct or not, deserves adjudication. Depriving the Defence of such adjudication will render, and tends to render, the proceedings unfair. As stated by the Appeals Chamber:

The Appeals Chamber emphasizes that the disclosure process is essential in ensuring the fairness of the proceedings and that the rights of the defence are respected, in particular the principle of equality of arms. This must remain paramount in decisions that are taken in relation to disclosure. The Prosecutor has an obligation to disclose information that is material to the preparation of the defence pursuant to rule 77 independently of any request from the defence.¹⁷

13. The consequences of the Impugned Decision for the fair conduct of proceedings, and possibly their outcome, are substantial.

IV. IMMEDIATE RESOLUTION BY THE APPEALS CHAMBER MAY ADVANCE THE PROCEEDINGS

14. Immediate resolution of this issue is vital to avoid irremediable prejudice. Leaving this issue to be adjudicated after a trial judgment, which is the alternative to interlocutory adjudication, risks wasting substantial judicial resources on a trial whose foundations may be deemed deficient retrospectively. Given the importance of disclosure to trial

¹⁶ *Bemba et al.*, Décision on “Requête de la défense de monsieur Aimé Kilolo Musamba aux fins de divulgations d’informations relatives au témoin de l’Accusation 169” and Related Additional Requests, ICC-01/05-01/13-1154, 17 August 2015, para. 12.

¹⁷ *Banda and Jerbo*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, ICC-02/05-03/09-501, 28 August 2013, para. 34.

fairness as recognised by the Appeals Chamber, and given the extent of non-disclosure that is believed to have occurred in the present case, the Impugned Decision could affect virtually every aspect of the present proceedings.

15. Appellate disposition of the issues raised in the Impugned Decision may – and almost undoubtedly will – materially advance the proceedings, given the consequences that would arise if the Impugned Decision is subsequently deemed erroneous.

V. CONCLUSION AND RELIEF REQUESTED

16. Mr. Mangenda respectfully requests leave to appeal the Impugned Decision. In particular, the Defence requests leave to appeal the Trial Chamber’s holding that its adjudication of the Joint Request is “premature” based on the pendency of a request for access pursuant to Regulation 42(3).



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Dated this 1 September 2015,
At The Hague, The Netherlands