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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 Document

**Prosecution's Response to Fidèle Babala Wandu's Request for Leave to Appeal the
"Decision on Requests to Exclude Western Union Documents and other Evidence
Pursuant to Article 69(7)"**

Source: Office of the Prosecutor

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I. Introduction

1. The Babala Defence's request for leave to appeal¹ the Decision rejecting the Defence Requests to Exclude Western Union Documents and other Evidence under article 69(7) of the Rome Statute² should be dismissed. Not only is the Application filed at the penultimate stage of the trial proceedings (when the resolution of issues, if any, is better left to the final appeal in the case), it is also no more than "an automatic reflex" against the Decision—"a legal tool to express mere disagreement" with the Decision.³ The Application disregards the exceptional nature of the article 82(1)(d) remedy.

2. None of the three issues⁴ advanced in the Application are appealable. The Babala Defence merely disagrees with the Decision. Rather than meeting the article 82(1)(d) criteria for leave to appeal, they simply offer subjective opinions and rehash their earlier failed arguments.

3. Moreover, the Application fails to show any impact on the fairness and expedition of the proceedings, or the outcome of the trial. Further, a few weeks short of the deadline for filing closing briefs in the case, the Appeals Chamber's intervention is unnecessary. As this Chamber has previously stated and noting the stage of the proceedings, "any potentially reversible error" can be "justly deferred to any final appeal under [a]rticle 81."⁵

¹ ICC-01/05-01/13-1866 ("Application").

² ICC-01/05-01/13-1854 ("Decision").

³ ICC-01/05-01/13-T-10-RED-ENG (open session), p. 11 lns. 3-12, where the Presiding Judge noted that "[w]hile the Chamber is mindful of the rights of the parties to seek legal remedy under [a]rticle 82(1)(d) of the Statute, I would like to remind 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 decisions. And we all know that it lies in the nature of things that usually at least one party is not completely satisfied with what the Chamber decides. Furthermore, even if we talk about potentially reversible error this may be particular at the stage of proceedings that we have now reached better and justly deferred to any final appeal under [a]rticle 81."

⁴ Here, "Issues".

⁵ See fn. 3.

II. Submissions

4. The Application fails at the threshold. The three Issues raised by the Defence are not appealable. They fail to show “[a]n identifiable subject or topic requiring a decision for its resolution.”⁶ Rather, the Defence merely disagrees with the Decision, disregards the findings and in part, rehearses previously rejected submissions.

A. The First Issue is not appealable

5. The First Issue—“*la question du vice entachant les autorisations judiciaires autrichiennes*”⁷—is not appealable. Rather, in repetitively claiming alleged irregularities affecting the Austrian authorities’ approval of the Prosecution’s access to the Western Union records, the Defence merely re-opens a closed debate—without good cause. Indeed, the Chamber, as demonstrated in its reasoned Decision, considered all possibilities relating to the Austrian authorities’ approval,⁸ and remained unpersuaded by the Defence submissions. This First Issue only expresses the Defence’s discontent with the Decision.

6. First, the Issue simply disputes the Chamber’s delineation of the scope of its determination, *i.e.* , that it “[w]ill only assess whether there are grounds which render this authorisation manifestly unlawful so as to void it, and not if the

⁶ See ICC-01/04-168 OA3, para. 9; ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. See also ICC-01/04-01/06-1433 OA11 (Partly Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.” See also ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 25; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

⁷ Application, paras. 12-18.

⁸ See *e.g.*, Decision, para. 50, noting that following the Prosecution’s three RFAs, “[t]he Austrian public prosecutor issued [...] three separate orders which were approved by an Austrian Judge, in accordance with the procedure prescribed in Article 38(2) No.1 of the Banking Act.”; paras. 54-59, noting “[t]he orders were issued in accordance with Article 116 of the Austrian Code of Criminal Procedure.” and that “[a] senior public prosecutor of the Austrian Ministry of Justice advised that the Prosecution was allowed to screen material from Western Union unless it was required for evidentiary purposes, in which case a RFA was needed in order to obtain a court order” and that “[t]he Austrian public prosecutor was aware of the prior contacts between the Prosecution and Western Union and that the Prosecution had access to financial data beforehand when requesting that the orders be approved by an Austrian judge.”

authorisation itself was lawfully provided under Austrian law as such.”⁹ By claiming—without substantiation—“*c’est la violation initiale de la loi nationale dans l’obtention des informations bancaires protégées sans autorisations judiciaires*”¹⁰ and “[l]a Chambre s’est concentrée plus sur le résultat des enquêtes[.]”¹¹—the Application merely disputes the Decision’s properly established remit.

7. Second, the Babala Defence’s attempt to contest the Austrian authorities’ approval allegedly given “*postérieurement*”¹² not only repeats a failed argument,¹³ but also disregards the import of the Chamber’s findings. Indeed, the Chamber found that “[t]he Austrian authorities granted the RFAs in knowledge of the prior contacts of the Prosecution with Western Union and the exchange of information.”¹⁴ The Chamber further found that not only had “[t]he Prosecution [not acted] with the deliberate intention to circumvent the national law [nor] (hypothetically) [violated] the right to privacy”, but the information that was received through the (hypothetical) violation was later also provided lawfully via cooperation with the Austrian authorities.”¹⁵ The Babala Defence’s speculation on possible violations of national law at this stage is therefore irrelevant.

8. Since the First Issue is not appealable, but rather a mere disagreement, it should be dismissed.

⁹ Decision, para. 51; Application, paras. 13-14.

¹⁰ Application, para. 14.

¹¹ Application, paras. 15-16.

¹² Application, paras. 17-18.

¹³ See e.g., ICC-01/05-01/13-1785-Conf (“Babala Defence’s article 69(7) Request”), para. 37.

¹⁴ Decision, para. 68.

¹⁵ Decision, para. 69.

B. The Second and Third Issues are not appealable

9. Both the Second Issue—“*la question de la part de responsabilité du Bureau de l’Accusation dans la violation de la loi nationale autrichienne*”¹⁶—and the Third Issue—“*la question de l’atteinte à l’intégrité de la procédure*”,¹⁷— attempt to raise the spectre of the propriety of the Prosecution’s conduct in obtaining the Western Union records. Yet, neither Issue is founded, nor are they appealable. Both Issues misguidedly dispute the Chamber’s findings; they do no more than to merely disagree with them. Both Issues are also speculative, offering a subjective and unsubstantiated opinion to contest the Chamber’s objective findings.

10. Regarding the Second Issue, the Defence’s claim is mere conjecture. It wrongly assumes a violation of law, when none has been shown.¹⁸ Nor does it acknowledge that the Chamber was “expressly precluded [...] by the terms of article 69(8) of the Statute and Rule 63(5) of the Rules [...] from applying Austrian law to determine a mere infringement of national procedure.”¹⁹ Likewise, it also unduly disputes the Austrian authorities’ determination “[t]hat a previous screening of financial information was in accordance with the Austrian law”²⁰—but offers no substantiation to show otherwise. In these circumstances, its claim that “*l’Accusation a un devoir de suivi de la légalité de ses actes*[...]”²¹, or that the Prosecution was somehow ill-advised on the national procedures, is abstract, and detached from the reality of the case and the Decision.

11. Regarding the Third Issue, yet again, the Defence merely disagrees with the Chamber’s findings. Despite the Chamber’s finding that the Prosecution screened

¹⁶ Application, paras. 19-21.

¹⁷ Application, paras. 22-25.

¹⁸ *Contra* Application, para. 21. See e.g., Decision, para. 60, finding “[t]hat no violation of an internationally recognised human right has occurred.”

¹⁹ Decision, para. 60.

²⁰ Decision, para. 68; *Contra* Application, para. 20.

²¹ Application, para. 21.

material from Western Union on the legal advice of the senior public prosecutor of the Austrian Ministry of Justice,²² that the Prosecution believed itself to act in accordance with the existing law during the prior contacts,²³ and that the Prosecution neither acted with deliberate intention to circumvent the national law nor (hypothetically) violated the right to privacy,²⁴ the Defence ignores these findings. Rather, it only hypothesises that “[l]e comportement de l’Accusation peut être considéré comme délibéré et intentionnel.”²⁵ In this context, the Defence submissions neither assist the Chamber, nor do they persuade.

12. Likewise, the Application’s attempt to challenge the Chamber’s findings on the belated disclosure of Western Union related information merely rehearses the Defence’s earlier rejected submissions.²⁶ The Babala Defence has already made extensive submissions on this: an application for leave to appeal is not the appropriate forum to renew these arguments and merely disagree with the Decision.

13. Because both the Second and Third Issues merely disagree with the Decision and are thus not appealable, they should be dismissed.

C. The remaining article 82(1)(d) criteria are not met

14. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.²⁷ Because all three Issues identified in the Application are mere contrary opinions, the Application should be dismissed, without further consideration.

²² Decision, paras. 56, 68.

²³ Decision, para. 68.

²⁴ Decision, para. 69.

²⁵ Application, para. 23.

²⁶ Application, para. 24. See Babala Defence’s article 69(7) Request, paras. 44-50.

²⁷ ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. See also ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria is cumulative, and “[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal.”

15. Even so, the Application simply does not meet the remaining article 82(1)(d) criteria.

16. First, the Defence fails to show any impact on the fair and expeditious conduct of the proceedings, or the outcome of the trial.²⁸ Apart from claiming (in two sentences) that the admissibility of the Western Union materials will affect both the conduct and outcome of the criminal proceedings against Babala,²⁹ the Application expresses no further argument. Yet, this cursory approach neither demonstrates why, and how, “fairness” may be affected in terms of the “norms of fair trial”, or why, if at all, the trial process should be purged of error to safeguard the integrity of the proceedings.³⁰

17. Nor does the Application show any significant impact on the outcome of the trial, in terms of the article 74 decision.³¹ Merely because the Western Union records are not excluded under article 69(7),³² and thus available to the Chamber to consider, does not yet directly affect the outcome of the trial. To claim otherwise would be to prejudge the outcome of the Chamber’s consideration of the totality of the available evidence in its article 74 decision and unduly speculate on the outcome of the proceedings.

18. Second, and finally, the Appeals Chamber’s immediate resolution of the Issues will not materially advance the proceedings. The Appeals Chamber need not intervene at this belated stage of the proceedings. Contrary to the Application,³³ an interlocutory appeal at this stage will only delay the proceedings. Moreover, no “safety net for the integrity of the proceedings”³⁴—through appellate intervention—is needed, particularly when the Defence fails to demonstrate any article 69(7)

²⁸ Application, para. 26.

²⁹ Application, para. 26.

³⁰ ICC-01/04-168 OA3, para. 11.

³¹ ICC-01/05-01/08-1169, para. 35.

³² Decision, paras. 70-71.

³³ Application, para. 27.

³⁴ ICC-01/04-168 OA3, para. 15.

violation. The Decision is not “fraught with error to cloud or unravel the judicial process.”³⁵ And indeed, even if there may be potential for a reversible error, such issues may justly be deferred to the stage of the final appeal,³⁶ which is imminent.

19. For these reasons, the Application does not meet the article 82(1)(d) criteria, and should be dismissed.

III. Relief Requested

20. The three Issues are not appealable. They also fail to meet the remaining article 82(1)(d) criteria for leave to appeal. The Application should therefore be dismissed.



Fatou Bensouda, Prosecutor

Dated 6th Day of May 2016
At The Hague, The Netherlands

³⁵ ICC-01/04-168 OA3, para. 16.

³⁶ ICC-01/05-01/13-T-10-RED-ENG, p. 11, lns. 3-12. *See also* ICC-01/05-01/08-3382, para. 13, stating that “[o]nce a judgement pursuant to Article 74 of the Statute is issued, the Defence is able, if it so wishes, to raise matters that it considers relevant directly with the Appeals Chamber.”