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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

Request for Leave to Appeal “Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)” (ICC-01/05-01/13-1854)

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 Trial Chamber's decision¹ rejecting his request to exclude Western Union financial records and all telephonic surveillance authorized on the basis of those financial records.² If appellate resolution is deferred until after a final judgment, then the evidential basis of the final judgment could be altered so fundamentally that the Appeals Chamber would be unable to re-assess the evidence as it should have been heard by the Trial Chamber. The consequence, barring an outright acquittal, would be a re-trial, which would consume substantially greater judicial resources than would an interlocutory appeal.
2. Interlocutory appellate resolution need not interrupt or delay trial proceedings. Closing arguments and submissions can proceed. Any subsequent reversal of the Decision could be taken into account by the Trial Chamber in its deliberations without any further hearings.

II. APPLICABLE LAW

3. 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.
4. 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."³ "Essential" in this context must be understood as meaning essential to some judicial disposition, and "not merely a question over which there is disagreement or conflicting opinion."⁴

¹ *Bemba et al.*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7), ICC-01/05-01/13-1854, 29 April 2016 ("Decision").

² *Bemba et al.*, Request to Exclude Evidence Pursuant to Rule 69(7), ICC-01/05-01/13-1791-Conf, 8 April 2016 ("Motion").

³ *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 ("Leave to Appeal Judgment"), para.9.

⁴ *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.

5. 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.”⁵ 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”⁶ and “remove[] doubts about the correctness of the decision or map[] a course of action along the right lines.”⁷ 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.”⁸ The applicable threshold, importantly, is “*may* materially advance,” and not “*will* materially advance”.
6. 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*.⁹ 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. LEAVE TO APPEAL IS WARRANTED BECAUSE THE ISSUES ARE APPEALABLE, AND THE DECISION SIGNIFICANTLY AFFECTS THE OUTCOME OF PROCEEDINGS

(i) *The Appealable Issues*

7. Leave to appeal is sought in respect of the following issues:
 - (a) whether the Trial Chamber erred in law in determining that it had “to balance its obligations under Article 69(7) and (8) of the Statute,”¹⁰ whereas the investigatory conduct in question does not implicate Article 69(8);
 - (b) whether the Trial Chamber erred in law in determining that violations of Part IX of the Statute by investigators of the Office of the Prosecutor “do[] not

⁵ Leave to Appeal Judgment, para.14.

⁶ *Id.* para.15.

⁷ *Id.* paras.14-15.

⁸ *Id.* para.16.

⁹ *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.

¹⁰ Decision, paras.34,60.

necessarily mean that this Statute has been violated for purposes of Article 69(7) of the Statute”;¹¹

- (c) whether the Trial Chamber erred in law in finding that Article 99(1) “indicates how States execute requests for cooperation, and do[es] not establish independent rights for the accused”¹² without, however, considering whether Article 99(1) also imposes obligations on the Prosecution;
- (d) whether the Trial Chamber erred in law or in fact in relying upon a statement prepared for this litigation, which was unsigned;¹³
- (e) whether the Trial Chamber erred in fact in determining that an Austrian prosecutor said that it was permissible to obtain financial records in Austria without judicial authorization;¹⁴
- (f) whether the Trial Chamber erred in fact in determining that information obtained prior to the first judicial authorization fell within the definition of “screening” as purportedly explained to the Prosecution;¹⁵
- (g) whether the Trial Chamber erred in fact in failing to give weight to the absence of any evidence that any Austrian authority was aware of the extent of information gathering that occurred prior to the issuance of the first judicial order;¹⁶
- (h) whether the Trial Chamber erred in law in only considering whether there was a “deliberate intention” to violate Austrian law, without also considering the reasonableness of any belief that financial data could be obtained in any European country – let alone Austria, where such data is assiduously protected – without judicial authorization;¹⁷

¹¹ *Id.* para.36.

¹² *Id.* para.40.

¹³ *Id.* paras.56,68.

¹⁴ *Id.* para.68.

¹⁵ *Id.*

¹⁶ *Id.* paras.57-59.

¹⁷ *Id.* para.69.

- (i) whether the Trial Chamber erred in law and in fact in relying on *post facto* judicial authorizations;¹⁸
 - (j) whether the Trial Chamber erred in fact in failing to consider the Prosecution's contradictory submissions about the purpose of the October 2012 mission;¹⁹
 - (k) whether the Trial Chamber erred in fact in failing to consider the Prosecution's apparent failure to abide by its express promise not to copy documents while conducting missions on Austrian territory;²⁰
 - (l) whether the Trial Chamber erred in fact by not giving weight to the Prosecution's failure to disclose until long after the close of the Prosecution case the two notices to the Government of Austria and, even then, only after repeated requests;²¹
 - (m) whether the Trial Chamber erred in fact in failing to consider the Prosecution's continuing failure to disclose highly relevant and important information that would shed light on issues that are directly relevant to the Decision;²²
 - (n) whether the Trial Chamber erred in law as to the burden of proof applied throughout the Decision in respect of factual issues; and
 - (o) whether, as a result of the foregoing errors, the Trial Chamber erred in fact and in law in determining that the request for exclusion of the intercepted communications is inadmissible.²³
8. These issues are not matters upon which there is mere disagreement; rather, the disagreement concerns issues that are essential to the Trial Chamber's conclusions that (i) no violation of the Statute occurred; and (ii) any such hypothetical violation as may have occurred is not serious enough to warrant exclusion under Article 69(7). Any

¹⁸ *Id.* paras.59,69.

¹⁹ Motion, para.26. This argument does not appear to be addressed in the Decision.

²⁰ *Id.* paras.7,10,12,52.

²¹ *Id.* para.53; *cf.* Decision, para.66.

²² *Id.* para.52 (“[t]o this day, the Defence does not have disclosure of any electronic files or other files that were obtained by the Prosecution during its missions in Vienna on 19-20 October and 4-5 November 2012.”) This argument does not appear to be addressed in the Decision.

²³ Decision, para.74.

single one of the issues above, especially when viewed in conjunction with the other issues, would have had a substantial impact on the outcome of the Decision.

(ii) *The Appealable Issues Significantly Affect the Fair and Expeditious Conduct of Proceedings or the Outcome of the Trial, and Immediate Resolution May Materially Advance the Proceedings*

9. The issues, and their impact on the correctness of the Decision as a whole, significantly affect the fair and expeditious conduct of proceedings and their outcome. The extent of reliance on the intercepts by the Prosecution, in itself, means that any decision concerning their admissibility affects the outcome of the trial.
10. Immediate resolution may materially advance the proceedings. First, an interlocutory appeal need not interrupt in any way the current schedule of proceedings. The appeal can be determined by the Appeals Chamber in time to be taken into account by the Trial Chamber at any time prior to the pronouncement of the final judgment in this case. No additional hearings would be necessary subsequent to any such appellate ruling, which would permit this Trial Chamber to discharge its fact-finding upon a proper evidential basis.
11. Second, the issue for which interlocutory resolution is sought could not be easily remedied in the course of a final appeal. If the Appeals Chamber were to reverse the Decision in the course of a final appeal, the Appeals Chamber would face such a profoundly altered evidential basis of the case that it would probably be unable to reach *de novo* findings of fact.²⁴ The Appeals Chamber of the ICC has likewise determined that, unlike some civil law systems, the Appeals Chamber does not conduct a *de novo* review of the evidence on appeal.²⁵

IV. CONCLUSION AND RELIEF REQUESTED

12. Leave to appeal the Decision is requested pursuant to Article 82(1)(d). Immediate resolution may materially advance the proceedings because of the Decision's substantial impact on the evidential basis of this case. The issues as previously described are evidently essential to the correctness of the Decision and are,

²⁴ See e.g. *Stanišić & Simatović*, ICTY-03-69-A, Appeal Judgement, 9 December 2015, paras.123-124.

²⁵ *Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, paras.21-27.

accordingly, appealable. The issues are matters upon which there is not only disagreement, but that are essential to the Trial Chamber's determination.



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Dated this 6 May 2016,
At The Hague, The Netherlands