

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/05-01/13**

Date: **10 May 2016**

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 Jean-Jacques Kabongo Mangenda'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

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

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I. Introduction

1. The Mangenda 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 *in limine*. The Application lacks a colourable basis to even qualify as an article 82(1)(d) request for leave to appeal. Rather, the Defence puts forward a mere generic "list of issues"—ignoring the requisite legal test. The Trial Chamber VII ("Chamber") should not entertain the Application.

2. Even if the Chamber were minded to consider this Application, it should dismiss it. None of the issues³ are appealable. The Application is no more than a litany of mere disagreements and conflicting opinions. Several of the Issues do not even arise from the Decision.

3. Moreover, the Application fails to show any impact on the fairness and expedition of the proceedings, or the outcome of the trial. Following the close of evidence in the case and 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 given the late stage of the proceedings, "any potentially reversible error" can be "justly deferred to any final appeal under [a]rticle 81."⁴

¹ ICC-01/05-01/13-1878 ("Application").

² ICC-01/05-01/13-1854 ("Decision").

³ Here, "Issues".

⁴ See ICC-01/05-01/13-T-10-RED-ENG, p. 11, lns. 3-12.

II. Submissions

A. The Application should be dismissed *in limine*

4. The Chamber should dismiss the Application *in limine*. Any applicant seeking remedy under article 82(1)(d) is required to *explain*, on an issue by issue basis, how each satisfies the legal criteria.⁵ This Application abjectly fails to do so. The Mangenda Defence's list of fifteen Issues does not even attempt to articulate a link to the criteria, let alone demonstrate the same.⁶ As the *Bemba* Trial Chamber has recently recognised,⁷ the failure to explain and link the issues to the article 82(1)(d) criteria and/or the Decision is fatal to an application for leave to appeal. Thus, the Application should be dismissed *in limine*.

B. The Issues do not arise from the Decision and are not appealable

5. Even if the Chamber were minded to consider the Application, it fails at the threshold. Several Issues do not arise from the Decision and many are mere disagreements.

a. Mere disagreements

6. Contrary to the Application,⁸ the Mangenda Defence—in the following Issues—merely disagrees with the Decision. Its catalogue of mere contrary opinions is not appealable. The Application fails to show “[a]n identifiable subject or topic requiring a decision for its resolution.”⁹

⁵ Italics added.

⁶ See Application, para. 7.

⁷ ICC-01/05-01/08-3382, para. 12.

⁸ Application, para. 8.

⁹ 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

- i. The First Issue—alleging that the Chamber erred when it determined that it had “to balance its obligations under [a]rticle 69(7) and (8) of the Statute”¹⁰—is not appealable. Its claim, despite the Chamber’s clear findings, is no more than the Defence’s mere contrary opinion.¹¹
- ii. The Fourth Issue—alleging that the Chamber erred “in relying upon a statement prepared for this litigation, which was unsigned”¹²—is not appealable. The Mangenda Defence only seeks to revive a lost argument.¹³
- iii. The Fifth, Sixth, Seventh and Ninth Issues¹⁴ contesting various aspects of the Austrian judicial authorisation are misguided. Without acknowledging the Decision’s proper import, the Mangenda Defence simply reiterates its failed positions in law and fact.¹⁵
- iv. The Eighth Issue,¹⁶ in claiming that “financial data is assiduously protected in Austria” is a veiled attempt to re-litigate rejected arguments on the right to privacy under Austrian law.¹⁷
- v. The Tenth, Eleventh, Twelfth and Thirteenth Issues¹⁸ incorrectly claim, absent any substantiation, purported Prosecution failures. These arguments merely express the Defence’s discontent with the Decision—apparent in the Application’s frequent recourse to the Mangenda Defence’s failed submissions.¹⁹ Contrary to the Application, the Mangenda Defence’s failure to persuade the Chamber does not imply the latter’s own error. To the contrary,

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.

¹⁰ Application, para. 7(a).

¹¹ Decision, paras. 28-39; *contra* Application, para. 7(a).

¹² Application, para. 7(d).

¹³ Decision, para. 56; *see e.g.*, ICC-01/05-01/13-1791-Conf-Corr (“Mangenda Defence’s article 69(7) Request”), paras. 5-30.

¹⁴ Application, paras. 7 (e), (f), (g) and (i).

¹⁵ Decision, paras. 48-51; 54-60, 63-69; *see e.g.*, Mangenda Defence’s article 69(7) Request, paras. 5-34.

¹⁶ Application, para. 7(h).

¹⁷ Decision, paras. 43-71; *see e.g.*, Mangenda Defence’s article 69(7) Request, paras. 18-30.

¹⁸ Application, paras. 7 (j), (k), (l) and (m).

¹⁹ *See e.g.*, Application, fns. 19-22.

the Decision was reasoned: the Chamber identified the facts relevant to its conclusion.²⁰

b. Do not arise from the Decision

7. Several Issues do not even arise from the Decision. Rather, they emanate from the Mangenda Defence's misreading of the Decision.

- i. The Second Issue incorrectly alleges "[v]iolations of Part IX of the Statute by investigators of the Office of the Prosecutor[...]",²¹ when none were found.²² The Mangenda Defence misstates the Decision.
- ii. The Third Issue, in querying if the Chamber failed to consider the Prosecution's obligations,²³ parses the Decision in a piecemeal manner.²⁴ Further, the Mangenda Defence has previously advanced these issues,²⁵ but failed to persuade the Chamber.
- iii. Likewise, the Fourteenth Issue alleging an error regarding the "burden of proof" applied for factual issues²⁶ is speculative. The Decision clearly does not rely on this issue. Nor does the Mangenda Defence demonstrate otherwise.
- iv. The Fifteenth Issue claiming an omnibus error in fact and law "as a result of the foregoing errors"²⁷ is generic. The Issue is mere conjecture, and does not even arise from the Decision.

8. None of the fifteen Issues therefore are appealable in article 82(1)(d) terms.

²⁰ ICC-01/04-01/06-773 OA5, para. 20; ICC-01/04-01/06-774 OA6, para. 30.

²¹ Application, para. 7(b).

²² Decision, paras. 28-71.

²³ Application, para. 7(c).

²⁴ Decision, para. 40, stating *inter alia* "[t]he reference to national law in [a]rticle 99(1) of the Statute describes obligations between the Court and member states—it indicates how States execute requests for cooperation, and do not establish independent rights for the accused. A State's failure to respect its own national procedures does not automatically result in a 'violation of this Statute' for [a]rticle 69(7) purposes." See also Decision, paras. 28-71.

²⁵ See e.g., Mangenda Defence's article 69(7) Request, paras. 31-34.

²⁶ Application, para. 7(n).

²⁷ Application, para. 7(o).

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

9. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one criterion is fatal to an application for leave to appeal.²⁸ As none of the fifteen Issues are appealable, the Application should be dismissed without further consideration.

10. Nor does the Application advance any cogent reasons to meet the remaining article 82(1)(d) criteria.

11. *First*, the Defence barely addresses any potential impact on the fair and expeditious conduct of the proceedings.²⁹ Nor is there any such impact, in terms of the “norms of fair trial”.³⁰ Likewise, unfounded claims of a “retrial” are neither appropriate nor relevant at this stage.³¹

12. *Second*, the Application fails to show any significant impact on the outcome of the trial, in terms of the article 74 decision.³² Merely because the evidence is not excluded under article 69(7),³³ and thus available to the Chamber to assess its admissibility, does not affect the outcome of the trial. To claim that “[t]he extent of reliance on the intercepts by the Prosecution, in itself[...]³⁴ somehow implies that the outcome of the trial is affected is premature. It prejudices the Chamber’s consideration of the totality of the available evidence in its article 74 decision.

13. *Third*, and finally, the Appeals Chamber’s immediate resolution of the Issues will not materially advance the proceedings. To the contrary, the Defence’s request for an interlocutory appeal at this late stage of the trial proceedings³⁵ is speculative,

²⁸ 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.”

²⁹ Application, para. 9.

³⁰ ICC-01/04-168 OA3, para. 11.

³¹ *Contra* Application, para. 1.

³² ICC-01/05-01/08-1169, para. 35; *contra* Application, para. 9.

³³ Decision, paras. 70-74.

³⁴ Application, para. 9.

³⁵ Application, paras. 2, 10, 11.

unwieldly, and will only delay the proceedings. Nor is any “safety net for the integrity of the proceedings”³⁶—through appellate intervention—needed, particularly when the Defence fails to demonstrate any article 69(7) violation. The Appeals Chamber is not an advisory body. If the Decision gives rise to a potentially reversible error, this may justly be deferred to the stage of the final appeal,³⁷ which is imminent.

III. Relief Requested

14. The Application should be dismissed *in limine*: it fails to cogently express appealable issues in article 82(1)(d) terms. Even if the Chamber were minded to consider this Application, it should be dismissed. It fails to meet the criteria for leave to appeal.



Fatou Bensouda, Prosecutor

Dated 10th Day of May 2016
At The Hague, The Netherlands

³⁶ ICC-01/04-168 OA3, para. 15.

³⁷ 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.”