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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding
Judge Marc Perrin de Brichambaut
Judge Raul C. 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 Babala, Arido and Mangenda Defence Requests to Appeal 'Decision
on Requests to Exclude Western Union Documents and other Evidence Pursuant
to Article 69(7)'**

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

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Trial Chamber VII ('Chamber') of the International Criminal 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 Article 82(1)(d) of the Rome Statute ('Statute') and Rule 155 of the Rules of Procedure and Evidence ('Rules'), issues the following Decision on Babala, Arido and Mangenda Defence Requests to Appeal 'Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)'.

I. Procedural background

1. On 29 April 2016, the Chamber issued its 'Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)' ('Decision').¹
2. Between 4 and 6 May 2016, the Defence for Mr Babala ('Babala Defence'),² the Defence for Mr Arido ('Arido Defence'),³ and the Defence for Mr Mangenda ('Mangenda Defence')⁴ sought leave to appeal the Decision ('Applications').
3. On 6 May⁵ and 10 May 2016,⁶ the Office of the Prosecutor ('Prosecution') responded that the Applications should be rejected on the grounds that the

¹ ICC-01/05-01/13-1854.

² Requête sollicitant autorisation d'interjeter appel de la 'Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)' (ICC-01/05-01/13-1854), 4 May 2016, ICC-01/05-01/13-1866 ('Babala Application').

³ Narcisse Arido's Request for Leave to Appeal the Trial Chamber VII's Decision on Requests to Exclude Western Union Documents and Other Evidence Pursuant to Article 69(7), 4 May 2016, ICC-01/05-01/13-1869 ('Arido Application').

⁴ 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), 6 May 2016, ICC-01/05-01/13-1878 ('Mangenda Application').

⁵ 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)', ICC-01/05-01/13-1872; Prosecution's Response to Narcisse Arido's Request for Leave to Appeal the 'Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)', ICC-01/05-01/13-1873.

⁶ 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)', ICC-01/05-01/13-1884 ('Response to Mangenda Application').

issues set out therein are not appealable and fail to meet the leave to appeal criteria.

II. Defence Submissions

4. The Babala Defence seeks leave to appeal to:⁷

- (i) démontrera que ce n'est pas parce que les cours autrichiennes ont postérieurement donné l'autorisation aux demandes de requêtes en sachant que l'Accusation a eu des contacts et accès aux documents Western Union préalables que l'autorisation donnée en résultat n'est pas viciée ;
- (ii) démontrera que l'Accusation a un devoir de suivi de la légalité de ses actes, et qu'une telle obligation n'est pas remplie par la simple réception d'un conseil juridique de la part du Procureur général autrichien, sans le vérifier ou du moins chercher à le corroborer par ses propres recherches;
- (iii) démontrera 'que l'Accusation a divulgué tardivement ces informations relatives aux procédures d'obtention des registres Western Union a résulté en une atteinte injustifiée au droit de l'Accusé au silence' et 'le comportement de l'Accusation peut être considéré comme délibéré et intentionnel'.

5. The Arido Defence seeks leave to appeal the following four issues – whether the Chamber:⁸

- (i) erred in failing to provide and substantiate grounds for establishing the minimum threshold of 'manifestly unlawful';
- (ii) erred in failing to find that the misrepresentation of the facts of Mr. Arido being suspected of Genocide violated Mr. Arido's right not to be subjected to arbitrary or unlawful interference with his privacy and unlawful attacks on his honour and reputation;
- (iii) erred by failing to provide any reasoned opinion about the Prosecution's breach of its duties and powers by not fully respecting 'the rights of persons arising under the Statute' pursuant to Article 54(1)(c) of the Statute;
- (iv) erred in failing to decide and provide reasons about the application of Rule 111 of the [Rules] with respect to Mr. Arido's French Statements.

6. The Mangenda Defence seeks leave to appeal the following 15 issues – whether the Chamber:⁹

- (i) erred in law in determining that it had 'to balance its obligations under Article 69(7) and (8) of the Statute,' whereas the investigatory conduct in question does not implicate Article 69(8);

⁷ Babala Application, ICC-01/05-01/13-1866, paras 18, 21 and 23-24.

⁸ Arido Application, ICC-01/05-01/13-1869, para. 14,

⁹ Mangenda Application, ICC-01/05-01/13-1878, para. 7.

- (ii) erred in law in determining that violations of Part IX of the Statute by investigators of the Office of the Prosecutor 'do[] not necessarily mean that this Statute has been violated for purposes of Article 69(7) of the Statute';
- (iii) 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' without, however, considering whether Article 99(1) also imposes obligations on the Prosecution;
- (iv) erred in law or in fact in relying upon a statement prepared for this litigation, which was unsigned;
- (v) erred in fact in determining that an Austrian prosecutor said that it was permissible to obtain financial records in Austria without judicial authorization;
- (vi) 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;
- (vii) 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;
- (viii) 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;
- (ix) erred in law and in fact in relying on post facto judicial authorizations;
- (x) erred in fact in failing to consider the Prosecution's contradictory submissions about the purpose of the October 2012 mission;
- (xi) 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;
- (xii) 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;
- (xiii) 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;
- (xiv) erred in law as to the burden of proof applied throughout the Decision in respect of factual issues; and
- (xv) as a result of the foregoing errors...erred in fact and in law in determining that the request for exclusion of the intercepted communications is inadmissible.

III. Analysis

7. Article 82(l)(d) of the Statute sets out the cumulative requirements for considering requests for leave to appeal, which are as follows:

- (i) whether the decision involves an issue that would significantly affect:
 - a) the fair and expeditious conduct of proceedings; or

b) the outcome of the trial; and

(ii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. It is recalled that an 'issue' is defined as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.'¹⁰

9. This Chamber has previously found that the parties are required to articulate 'discrete' issues for appellate resolution and that 'it is generally insufficient to argue that the entirety of the Chamber's reasoning is erroneous' in an application for leave to appeal.¹¹

10. Turning to the merits, the Chamber finds that the first and third issues listed for appeal by the Babala Defence are expressions of disagreement with the Decision for which leave to appeal cannot be granted. Furthermore, they fail to appreciate that the alleged errors are not essential for the determination of the Decision given the Chamber's finding that the criteria of Article 69(7) of the Statute had not been satisfied. In arguing in support of the first issue that 'la fin ne peut pas justifier les moyens; le résultat postérieur d'enquêtes viciées

¹⁰ Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

¹¹ Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800, 27 March 2015, ICC-01/05-01/13-877, para. 7.

ne peut intervenir dans l'évaluation de la régularité de la procédure',¹² the Babala Defence ignores the Chamber's finding that the Austrian Authorities were aware of the screening exercises conducted between the Prosecution and by Western Union.¹³ Finally, arguments under the third issue that the Prosecution's belated disclosure was deliberate and intentional, merely contest the Chamber's contrary findings that the Prosecution did not display any intention to circumvent the national law.¹⁴ In any case, given that the Babala Defence presented no evidence on the Western Union documents, the Chamber fails to see how their late disclosure by the Prosecution could significantly affect the accused's right to remain silent.

11. The second issue raised by the Babala Defence - in support of which it argues that the Chamber found that the Prosecution 'a été mal orientée par des conseils juridiques d'autorités autrichiennes qui ont assuré que l'accès aux documents financiers était légal s'il n'était pas à des fins probatoires' and is obliged to ensure the legality of its acts in national law¹⁵ – does not arise from the Decision and is therefore not appealable. This is due to the fact that: (i) the Chamber did not make a finding that the Prosecution had been misled by the Austrian Authorities and merely completed a theoretical exercise to assure itself of the absence of a hypothetical violation which would have engaged Article 69(7) of the Statute, and (ii) the Chamber, in any case held, that it would review the application of national law only to the extent necessary to determine whether a violation occurred under Article 69(7) of the Statute.¹⁶

12. The first issue raised for appeal by the Arido Defence, concerning the argument that the Chamber failed to give reasons in arriving at its test of

¹² Mangenda Application, ICC-01/05-01/13-1878, para. 16.

¹³ Decision, ICC-01/05-01/13-1854, para. 67.

¹⁴ Decision, ICC-01/05-01/13-1854, para. 69.

¹⁵ Babala Application, ICC-01/05-01/13-1866, para. 20.

¹⁶ Decision, ICC-01/05-01/13-1854, para. 34.

‘manifestly unfounded’, fails to articulate a sufficiently discrete issue for resolution by the Appeals Chamber. This issue also fails to arise from the Decision – the basis for the ‘manifestly unlawful’ standard was plainly provided by the Chamber as the result of its balancing exercise between Articles 69(7)-(8) of the Statute.¹⁷

13. In defining the second issue for appeal, the Arido Defence states that it ‘concerns the correctness of the Chamber’s finding’ that the Austrian authorities were misled by false statements in the Prosecutor’s request for assistance which indicated that Mr Arido and others were suspected of genocide.¹⁸ This ground of appeal amounts to a disagreement with the decision of the Chamber which found no indication that the order from the Austrian Authorities granting the request was based on a misrepresentation of facts or that the Austrian Authorities were misled by the Prosecutor.¹⁹ The third issue for appeal follows from the second, in that the Arido Defence claims that the Chamber erred in not addressing whether the Prosecution breached its duties in failing to advise the Austrian Authorities of the misrepresentative title of their order. This issue is based on a distortion of the Chamber’s reasoning, which disposed of that question in reaching its finding that the Prosecutor did not misrepresent any facts, and, as such, similarly amounts to a disagreement with the Chamber’s reasoning. The final issue challenging the ‘absence of a decision’ on the alleged violation of Rule 111 of the Rules with respect to Mr Arido’s statements to French Authorities,²⁰ fails to acknowledge the Chamber’s finding that the application had previously been rejected and does not arise from the Decision.²¹

¹⁷ Decision, ICC-01/05-01/13-1854, paras 32-33.

¹⁸ Arido Application, ICC-01/05-01/13-1869, para 16.

¹⁹ Decision, ICC-01/05-01/13-1854, para. 52.

²⁰ Arido Application, ICC-01/05-01/13-1869, para 21.

²¹ Decision, ICC-01/05-01/13-1854, para. 75.

14. With respect to the 15 issues raised for appeal by the Mangenda Defence, the Chamber notes the Prosecution's argument that they should be dismissed *in limine* for failure to explain individually how each satisfies the relevant criteria for appellate certification.²² Notwithstanding the possible merit in that submission, the Chamber shall proceed to consider each issue in light of its potential significance.

15. The Chamber finds that the fourth, fifth,²³ sixth, seventh, eighth and ninth²⁴ issues raised by the Mangenda Defence are mere disagreements with the Decision and do not amount to appealable issues. In considering the tenth, eleventh, twelfth and thirteenth issues the Chamber recalls that it is not required to recite and each and every argument that was before it in reaching a decision²⁵ and views these arguments as an attempt to re-litigate previously determined matters. Finally, the Chamber does not find the fourteenth and fifteenth issues to be sufficiently discrete to amount to appealable issues.

16. With respect to the remaining issues – one, two and three – the Chamber considers that these do arise from the Decision. The Mangenda Defence asserts that the impact of the correctness of the Decision as a whole significantly affects the fair and expeditious conduct of the proceedings,²⁶ and with respect to affecting the outcome of the trial, argues that '[t]he extent of reliance on the intercepts by the Prosecution, in itself, means that any decision concerning their admissibility affects the outcome of the trial'.²⁷

²² Response to Mangenda Application, ICC-01/05-01/13-1884, para. 4.

²³ As similarly raised by the Babala Defence in its fifth issue.

²⁴ As similarly raised by the Babala Defence in its first issue.

²⁵ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', 14 December 2006, ICC-01/04-01/06-773, para. 20.

²⁶ Mangenda Application, ICC-01/05-01/13-1878, para. 10.

²⁷ Mangenda Application, ICC-01/05-01/13-1878, para. 9.

17. Even if the Chamber were to accept these arguments, it should be noted that not every issue that would significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial will be certified for interlocutory appeal. It must also be an issue for which, in the opinion of the Chamber, immediate resolution by the Appeals Chamber may materially advance the proceedings. However, in the instant case, the remaining issues do not overcome that final threshold. The Chamber is not of the opinion that their immediate resolution by the Appeals Chamber may materially advance the proceedings.²⁸ As held elsewhere: ‘To form such a view, the Chamber needs to be persuaded, inter alia, that there is advantage in resolving the [i]ssues at this stage, bearing in mind that issues of this kind may also be raised in an appeal against the final decision under Article 74 of the Statute’.²⁹ No such advantage exists here. A determination of whether the Chamber erred in law in finding that violations of Part IX of the Statute by the Prosecution do not amount to violations of Article 69(7) of the Statute, would not materially advance the proceedings as the Chamber found that the Article 69(7)(a)-(b) criteria were not met even independently of any violation. Moreover, the presentation of evidence in the case has closed, closing submissions are due on 24 May 2016 and the Chamber will commence hearing the closing statements on 31 May 2016.³⁰ The Chamber remains unpersuaded that the issues for which interlocutory resolution is sought could not be remedied on appeal³¹ or that such resolution would not significantly interrupt the current schedule.³² At this stage of the proceedings,

²⁸ *The Prosecutor v. Ruto and Sang*, Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, 21 January 2014, ICC-01/09-01/11-1154, para. 28.

²⁹ ICC-01/09-01/11-1154, para. 28.

³⁰ Decision Closing the Submission of Evidence and Further Directions, 29 April 2016, ICC-01/05-01/13-1859.

³¹ Mangenda Application, ICC-01/05-01/13-1878, para. 11.

³² Mangenda Application, ICC-01/05-01/13-1878, para. 10.

a 'potentially reversible error' may be 'better and justly deferred to any final appeal under Article 81'.³³

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Applications.

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



Judge Bertram Schmitt, Presiding



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 23 May 2016

At The Hague, The Netherlands

³³ ICC-01/05-01/13-T-10-RED-ENG, p 11, lines 10-12. See also p 10, line 23–p 11 line 9.