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Criminal
Court

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No.: **ICC-01/05-01/13**
Date: **03/07/2014**

PRE-TRIAL CHAMBER II

Before: **Judge Cuno Tarfusser, Single Judge**

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

Annex A

Public Redacted Document
[originally filed as ICC-01/05-01/13-530-Conf-Corr]

Defence objection to the form of the document containing the charges

Source: **Defence for Jean-Pierre Bemba Gombo**

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

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Jean-Pierre Bemba Gombo ("the Suspect") hereby submits that the Prosecutor's document containing the charges, in so far as it relates to him, is entirely defective for lack of specificity as to the objective elements of the crimes attributed to him. In the circumstances, the Suspect requests that the Single Judge strike out the Suspect's name from the DCC and order the dismissal of the charges levelled against him in their present format. Pending decision on this application, the Single Judge is requested to suspend the deadline for the Suspect's response to the DCC due to be submitted on 30 July 2014.

Introduction

1. On 30 June 2014, the Prosecutor submitted her document containing the charges ("DCC").[1]

2. At paragraph 23 of her DCC, the Prosecutor alleges that the Suspect orchestrated and directed a plan to defend himself by perpetrating offences against the administration of justice ("the Common Plan"). The Prosecutor further submits that the Suspect "instructed and/or authorized" actions carried out by others in furtherance of the Common Plan.[2] The Suspect's objective involvement in the Common Plan is further amplified at paragraph 113 of the DCC which deals with the Suspect's contribution thereto; namely by instructing i) the implementation of the common plan, ii) the payment of witnesses and/or their relatives and close associates in exchange for false testimony, iii) the transfer of money to facilitate implementation of the common plan, iv) the illicit coaching and/or the corrupt influencing of witnesses, v) the provision of guidance on which witnesses should testify, vi) the presentation of forged evidence and vii) the concealment of the common plan.[3]

3. Despite the detail which the Prosecutor devotes to particularizing the modes of the Suspect's alleged contribution to the common plan, nowhere in her DCC does

[1] ICC-01/05-01/13-526-Conf-AnxB1 (hereinafter referred to as "DCC").
[2] DCC at para. 23.
[3] This amplification is not hyperlinked, for the most part, by reference to evidence but to earlier paragraphs in the DCC.

she give a specific example of an instruction which the Suspect gave for the purpose of procuring or presenting false testimony. Indeed, the Prosecutor does not cite to one utterance of the Suspect which can support the allegation that he instructed anyone to engage in an act of criminality.

4. The Suspect will not deny that he directed Fidèle BABALA ("BABALA") to transfer sums of money even, on occasion, to Aimé KILOLO and Jean-Jacques MANGENDA ("MANGENDA"). The transfer of money, *per se*, however is not a criminal offence. Nor, for that matter, is coaching witnesses on how to testify, as ethically and professionally reprehensible as it may be, a criminal offence. The aforementioned activities only become criminal when they are performed for the specific purpose of perverting the course of justice or, more particularly, in order to procure false testimony or to corruptly influence a witness.

5. The Suspect is charged with no less than 42 counts of soliciting false testimony, corrupt influencing and presenting forged evidence with respect to 14 witnesses and 1 count of knowingly presenting forged documentary evidence. At the outset, it should be stressed that the DCC is clear in one thing alone; namely, that the objective of the co-perpetrators' alleged corrupt influencing was attained in that false testimony was allegedly heard before Trial Chamber III of the International Criminal Court ("the Trial Chamber" and "the ICC" respectively). In other words, the Prosecutor's case cannot, without serious internal contradiction, be that 14 witnesses were corruptly influenced (or encouraged) to tell the truth but, rather, that they were corruptly influenced to lie. The Suspect feels it necessary to draw this distinction because the legal parameters of the concept of "corruptly influencing" are yet to be defined in the jurisprudence of the ICC.[4] In any event, while the Suspect is prepared to accept for the purpose of this petition that corrupt influencing is achieved once an offer is made without regard to the result thereof, it is reasonable to assume that the Prosecutor would not have initiated criminal proceedings under article 70 unless she was of the opinion that the corruption had, indeed, engendered perjured testimony.

[4] ICC-01/09-01/13-1 at paragraphs 19 and 20 (Prosecutor v. Walter Barasa).

6. Despite the aforementioned, the body of the DCC does not provide one discrete example of how and when the Defendant instructed the transfer of money or how and when he ordered the coaching of one witness – let alone three dozen or more - specifically in order to procure false evidence.

7. The Suspect will now proceed to examine the DCC, paragraph by paragraph, and show how each and every reference to his conduct lacks the requisite specificity and, more importantly, fails to support an allegation of criminality. It should be stressed that the critique presented hereinafter is directed at the form of the allegations and NOT at their substance. The substance of the allegations will only be challenged in the Suspect's response to the document containing the charges should this petition fail.

Analysis of the DCC

8. **Paragraph 30** - "*BEMBA called third parties through KILOLO…so BEMBA could communicate with the other co-perpetrators*": Although it may infringe internal policy of the detention centre, there is nothing criminal in such behavior.

9. **Paragraph 31** - "*On 18 January 2013, BEMBA interrupted BABALA who was speaking openly on the telephone, telling him that* [REDACTED]: The Suspect's use of codes is not criminal. The Suspect's use of code with BABALA was intended in order to conceal purely political conversation from third parties. The Suspect does not assert this in a vacuum. [REDACTED].[5] In any event, nothing in paragraph 31 of the DCC, nor in the footnotes thereto, suggests that the use of code was designed to conceal a criminal plan.

10. **Paragraph 32** – "*In BEMBA's almost daily conversations with BABALA, he periodically instructed BABALA to make payments in furtherance of the Common Plan. BEMBA was consistently informed of money transfers among the co-perpetrators and*

[5] [REDACTED].

payments to witnesses. BEMBA instructed or authorized BABALA to arrange such transfers to the other co-perpetrators, including KILOLO and MANGENDA…": Although, it is true that BEMBA periodically instructed BABALA to make payments, no details are given as to the recipients of such payments and as to how the payments were designed to influence the testimony of witnesses. This is quite distinct from the more appropriately pleaded and specific details provided with respect to ARIDO's alleged criminality set out in paragraph 33 where the recipients of money transfers are mentioned as well as the way in which they were instructed to pervert the course of justice. Knowledge of payments to witnesses, furthermore, is not criminal.

11. **Paragraph 36** – "*BEMBA directed or authorized the illicit coaching of witnesses. He instructed in detail the other co-perpetrators, including MANGENDA and BABALA on how and to what witnesses were to testify. For example, MANGENDA told KILOLO that BEMBA [REDACTED]*: The Suspect notes the selective and misleading fashion in which the Prosecutor has presented this particular allegation. Missing from her citation are the words [REDACTED], such that the allegedly incriminating excerpt should read: [REDACTED]. When read properly, it is most likely that MANGENDA was reporting an an opinion that the Suspect had expressed and not an instruction that he had given. Notwithstanding the aforementioned, for a suspect to instruct his counsel to insist on precision from a witness is not criminal. Nothing in paragraph 36 suggests that the Suspect gave an instruction for [REDACTED] to lie. Finally, expressing satisfaction with the manner in which a witness testified is also not criminal.

12. **Paragraph 39** – "*KILOLO informed BEMBA and MANGENDA about his illicit coaching of witnesses*": Even if such an allegation is true – which is denied – the Suspect's knowledge of criminality committed by another person does fix him with any form of criminal liability.

13. **Paragraph 40** – "*…KILOLO sought to be, and was, in contact with witnesses as shortly prior to their testimonies as possible…in violation of VWU's contact cut-off date.*

BEMBA approved and supported this conduct": Even if this allegation is true – which is denied – the Suspect supported conduct which is not, *per se*, criminal.

14. **Paragraph 41** – "*As directed by BEMBA, KILOLO illicitly coached witnesses to testify falsely about the substance of their evidence, such as their [REDACTED] and key facts bearing on the Defence's case theory*": This allegation not only lacks specificity as to the dates on which the direction for such "illicit coaching" was given and what aspects of the Defence case theory were to be supported by false evidence, but it is, also, totally unsupported by any "hyper-linked" or "hypo-linked" reference to the evidence. The Suspect reminds the Single Judge of the rationale which he gave for rejecting the Defence request for an in-depth analysis chart: "*The Single Judge cannot but take note of these submissions and defer to the Prosecutor's professional judgment. It is for the parties only to identify, in light of the features of any given case, their preferred method and format of presentation, or line of arguing, selecting such method or format as might be more suitable to effectively convey the points they wish to make before the bench. This discretion is to be regarded as an integral and critical part of the professional duties of both the Prosecutor and the defence; its exercise should be ultimately guided by the paramount need for exhaustiveness, clarity, thoroughness, factual and legal accuracy which should characterise all judicial submissions, in the interest of both the relevant party and, more significantly, the overall efficiency of judicial proceedings. The Prosecutor's proposal of constructing the document containing the charges "in a way which will be footnoted and hyperlinked", so as to "readily direct the Chamber and Defence to the relevant supporting evidence", may be welcomed, as any practical proposal aimed at enhancing the easiness of access to the evidence should*".[6] The lack of reference to the evidence supporting this wantonly general yet highly incriminating allegation prejudices the Defence and hampers the Pre-Trial Chamber in their respective tasks of ascertaining the truth. The Suspect is unable to defend himself against such an unsupported allegation which is neither anchored in time nor correlated with any specific aspect of the Defence strategy. The allegation should be struck out of the DCC and its re-inclusion should be subject to the

[6] ICC-01/05-01/13-134 at paragraph 8.

provision of the necessary details which will supply the "*exhaustiveness, clarity, thoroughness, factual and legal accuracy which should characterize all judicial proceedings*".

15. **Paragraph 49** – "*On the morning of [REDACTED] 2013, before* [REDACTED] *started his testimony that day, KILOLO informed BEMBA of* [REDACTED]*'s illicitly coached testimony*": The Suspect will deny such an allegation yet, as discussed above, his mere knowledge of "illicit coaching" - even if it were true – does not, in itself, make him criminally liable for KILOLO's conduct.

16. **Paragraph 51** – "*On [REDACTED] 2013, KILOLO called* [REDACTED] *with BEMBA's thanks*": The Suspect's alleged approval of or gratification from KILOLO's criminal conduct, which is denied in the present instance, is not a recognized mode of liability under article 25 of the Rome Statute.

17. **Paragraph 53** – "*On 30 August 2013, MANGENDA passed on BEMBA's instruction for KILOLO to illicitly coach [REDACTED] regarding topics that [REDACTED] "[REDACTED]*"…*KILOLO confirmed to MANGENDA that he spoke to [REDACTED] who agreed to testify falsely according to BEMBA's instructions*. The illicit nature of the coaching is not clarified. If the witness had been coached to tell a truthful version of events in violation of VWU protocol and the Trial Chamber's policy for pre-testimony contact with witnesses, then such conduct could very well be deemed "illicit coaching" and highly unethical but not necessarily criminal. Throughout the DCC, the Prosecutor exploits the ambiguity afforded by the expression "illicit coaching" and, as in the present instance, fails in her duty to clarify the criminal aspect of the conduct imputed to the Suspect. Nowhere is it mentioned in paragraph 53, that the Suspect gave an instruction for [REDACTED] to lie. Indeed, the assertion that []REDACTED] had "*agreed to testify falsely according to BEMBA's instructions*" is deceptive given that the Suspect is not mentioned in the conversation which is cited in support of the same allegation. With a lack of clarity which characterises the DCC, the Prosecutor has, in the present instance, confused her case theory or random hope (namely that the Suspect was soliciting perjury) with the

evidence at her disposal (that KILOLO had given instructions to [REDACTED] to lie).

18. **Paragraph 58** – "*On 1 November 2013, KILOLO informed BEMBA of the details of this illicit coaching*": On this matter, the Single Judge is referred to paragraph 12 hereinabove.

19. **Paragraph 76** – "*…KILOLO coached and paid [REDACTED], including a payment of approximately [REDACTED] immediately before testifying. KILOLO told the witness that it was a present from BEMBA*": This scurrilous accusation is denied. But even if it were true – which it is not – the Prosecutor does not argue with sufficient clarity that the "present" was calculated to procure false testimony. The reason for such is apparent from the timing of the facts as presented in the DCC. The "present" was allegedly bestowed upon [REDACTED] in [REDACTED] 2013 yet [REDACTED] evidence was heard in [REDACTED] 2013. At best, the disputed "present" (the alleged existence of which is established by a hearsay report) could be described as a "sweetener". Even the Prosecutor herself, however, does not specifically allege that the grant of the "present" was an inducement to lie.

20. **Paragraph 83** – "*KILOLO, who was on mission in Cameroon, told MANGENDA to inform BEMBA of his illicit coaching*": The DCC does not allege that MANGENDA actually complied with the instruction to inform the Suspect of KILOLO's illegal activity. Notwithstanding, even if MANGENDA had informed the Suspect of KILOLO's criminality, the mere possession of such knowledge is not a crime nor a recognized mode of liability under article 25 of the Rome Statute.

21. **Paragraph 89** – "*MANGENDA reported to KILOLO BEMBA's satisfaction with the results: [REDACTED]*: The Suspect reiterates that knowledge of criminality is not, in itself, criminal conduct. In the present instance, however, the Suspect is forced, once again, to criticize the seriously misleading manner in which the Prosecutor has presented her evidence in the DCC. The actual citation should read as follows:

[REDACTED]. A casual reader of the DCC would understand the citation to mean that the Suspect had actually witnessed and rejoiced in what he (i.e., the Suspect) appreciated to be embellished (and not necessarily false) testimony. Had the Prosecutor exercised the diligence expected of her and provided the Single Judge with an accurate citation, it would be understood that the phrase is disjunctive. In other words, the expression "*[REDACTED]*" stands alone and is more consistent with MANGENDA venting sentiments of joy to KILOLO without any connection at all to the Suspect.

22. **Paragraph 91** – "*The same day, on 16 October, while discussing the payment to [REDACTED], BABALA told BEMBA that "[REDACTED]*": In drafting her DCC, the Prosecutor was under an obligation to clearly attribute facts to the Suspect and not to taint him by association with BABALA's ambiguous comments. Furthermore, the fact that the Suspect might have endorsed the transfer of money to [REDACTED], does not, in itself, comprise criminal conduct. The DCC, with respect to [REDACTED], does not allege that the Suspect paid money in order to procure false testimony (or to corruptly influence) but rather that the Suspect heard BABALA pontificate on the virtues of sweetening the lives of the less fortunate.

23. **Paragraph 94** – "*On 16 October 2012, BEMBA and BABALA discussed a payment to [REDACTED]. BABALA told BEMBA that "[REDACTED]*": Assuming that the citation actually refers to [REDACTED] (an unsupported allegation) and to the transfer of money – which is highly debatable and lacks the requisite clarity - the facts specific to this paragraph do not clearly allege that the transfer was effected for an illicit purpose. The reference to BABALA's views, once again, creates the impression of underhand dealing without properly attributing any form of criminality to the Suspect in the requisite manner. It is an unfair and inappropriate way of drafting a DCC.

24. **Paragraph 99** – "*On 5 October 2012, [REDACTED] spoke directly with BEMBA in an unmonitored conference call with KILOLO*": No criminality arises out of an alleged telephone contact between a defence witness and a Suspect.

The Forged Documents

25. Although charged at count 43 with presenting to the Trial Chamber 14 documents which he knew to be false, not one word or one reference to supporting evidence appears in the DCC to detail how the Suspect was supposed to have effected or known about the presentation of bogus documentation – let alone endorse such conduct. Paragraph 42 describes, in suitably specific fashion, the role of ARIDO, KILOLO and MANGENDA in such an enterprise. The Suspect's name, however, is conspicuous by its absence. The Suspect is unable to mount a defence to this charge.

Submission

26. Regulation 52 of the Regulations of the Court states as follows:

> "The document containing the charges referred to in article 61 shall include:
>
> (a) The full name of the person and any other relevant identifying information;
>
> (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;
>
> (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28".

27. The purpose of a DCC is to provide a suspect with sufficient details of the charges levelled against him to allow him to prepare his defence. This is implicit from the wording of article 67(1) of the Rome Statute and endorsed by the Court's jurisprudence. In rejecting the Prosecutor's first request for an arrest warrant against

Sylvestre Mudacamura, the Single Judge (and his colleagues) ruled that "*[t]he need for specificity in detailing the conduct underlying the alleged crimes is also apparent in light of the provisions governing the proceedings following the issuance of an arrest warrant. Article 60(1) of the Statute requires that the Pre-Trial Chamber satisfies itself that the person "has been informed of the crimes which he or she is alleged to have committed*".[7]

28. The Trial Chamber in the Suspect's principal case (ICC-01/05-01/08) held that a DCC must describe the charges by reference to the "statement of facts" underlying the charges confirmed by the Pre-Trial Chamber namely its precise factual findings."[8] The Trial Chamber also stated that a DCC should provide "a readily accessible statement of the facts that underlie each charge".[9] Where the facts alleged by the Prosecutor in an amended DCC, filed post-confirmation, exceeded the findings of the Pre-Trial Chamber, the Trial Chamber ordered the striking out of offending details. The same theory should apply in the present instance. Given that the facts cited in the DCC do not detail how the Suspect executed the basic objective elements of the crimes but merely cite the bare provisions of the Statute and circumstantial evidence pertaining to his alleged knowledge, the charges should be struck out and the Prosecutor should either amend them or exercise her discretion to drop the case.

29. The DCC, in its present format, is more a carnival of smoke and mirrors than a narration of criminal conduct attributed to the Suspect. It is an attempt to fix the Suspect with criminal liability on the basis of "guilt by association" as if being linked, by force of circumstance, to allegedly corrupt lawyers necessarily entails that he, as the client, endorsed every aspect of their errant behaviour.

[7] ICC-01/04-613 at paragraph 5.
[8] ICC-01/05-01/08-836 at paragraph 35.
[9] *ibid* at paragraph 30.

<u>The modes of liability are incorrectly pleaded</u>

30. The Prosecutor's latest and novel decision to charge the Suspect with indirect co-perpetration pursuant to article 25(3)(a) of the Rome Statute has not gone unnoticed and speaks volumes. By attributing involvement in a common plan, the Prosecutor has attempted to divest herself of the need to particularise the Suspect's conduct (for which it will be shown, if necessary, that she has no evidence) substituting, in the process, reference to a generalised conspiracy which details nothing more than the bare provisions of articles 25 and 70 of the Rome Statute.

31. Even pursuant to this new case theory, however, the DCC does not correctly plead the concept of indirect co-perpetration under article 25(3)(a). The Prosecutor, herself, has cited the correct test for this mode of liability in one of her filings in the Kenya situation:[10]

> (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other coperpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime; (iii) the suspect must have control over the organization; (iv) the organization must consist of an organized and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).[11]

32. Notably lacking from the DCC, nevertheless, is a description of how the fifth element cited above is fulfilled; namely, an explanation as to how the ultimate beneficiary and orchestrator of the Common Plan (i.e., the Suspect) engineered "automatic compliance" with his orders. It is not reasonable to presume that the Suspect chose his lawyers, with malice forethought, on the basis of their propensity

[10] ICC-01/09-01/11-433 at paragraph 5.

to act corruptly thereby engaging them with a view that they should automatically comply with a plan to win a case at all costs including by perverting the course of justice. That would damn both herein undersigned Counsel and the Suspect's other lawyers on case ICC-01/05-01/08. To the contrary, there is abundant evidence in the Third Independent Counsel's report to suggest that KILOLO and MANGENDA were [REDACTED] and thus not compelled by any regime of automatic compliance whatsoever.

33. The mode of liability under article 25(3)(b) of the Rome Statute is also incorrectly pleaded. The Prosecutor avers that it is suffice to allege that the Suspect "*was at least aware that the offences would be committed in the ordinary course of events as a consequence of the execution or implementation of his instructions*".[11] Counsel refers the Single Judge to the comprehensive statement of the law set out by Albin Eser:[12]

> **4. Mental Requirements with Regard to the Instigator**
>
> **Other than in the case of aiding and abetting, which must be carried out 'for the purpose' of facilitating the commission of the crime,[124] no special *mens rea* requirements are referred to in case of instigation. Consequently, the general requirements of Article 30 of the ICC Statute must be observed. These, however, must be put in more concrete terms in two respects: first, with regard to his own conduct, the instigator must exert his influence with intent and knowledge. This means that the intent of the instigator must be directed at causing the principal to commit the crime. Secondly, the instigator must presuppose that the principal will carry out the crime in a state of mind required by the Statute. If, for instance, the crime requires intent (and not merely negligence or recklessness), the instigator must foresee and recognize that the principal will perform the crime intentionally and in fulfilling all definitional elements thereof. In this sense, the instigator must have a 'double intent' with regard to his own conduct and that of the principal.**

34. Given the aforementioned, the Suspect suggests that it is not appropriate for the Prosecutor to allege "dolus eventualis". The Prosecutor should be obliged to provide the requisite specificity as to how the Suspect foresaw and recognized that

[11] DCC at paragraph 140.
[12] Antonio Cassese (Hrsg.): The Rome Statute of the International Criminal Court : a commentary. Oxford: Oxford Univ. Press. Bd. 1 (2002), S. 767-948

his co-perpetrators would pervert the course of justice – intentionally and not in the ordinary course of events.

Classification

35. The DCC was filed confidentially because it contains many details which were defined as "sensitive" and "unavailable to the public". Nothing contained in this filing, however, is liable to expose the identities of protected witnesses or expose sensitive information. It is thus filed as a public document.

Regulation 35(2) of the Regulations of the Court

36. In light of the pending deadlines and the need to ensure an expeditious resolution of this case, "good cause" is shown to require an immediate response to this petition from the Prosecutor.

Relief Sought

37. In light of all the aforementioned, the Suspect alleges that he has not been provided with adequate notice of the "nature, cause and content" (or even scope) of the charges as provided for in article 67(1) of the Rome Statute. More particularly, the Suspect has not been provided with details as to how his conduct is related to the each and every one of the 43 counts which have been levelled against him and has been denied hyperlinked facts appropriately describing his alleged individual criminal liability.

38. In the circumstances, the Single Judge is respectfully requested to dismiss the DCC in its entirety in so far as it relates to the Suspect. The Prosecutor should be ordered either to amend her DCC and to supply the requisite specificity within a short period of time or to drop the case against the Suspect. In the interim, the Single

Judge should order that the 30 days for the Suspect to provide his written confirmation submissions should only start running from the date on which he receives a properly drafted DCC which correctly informs him of the conduct attributed to him.

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Thursday, July 03, 2014