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Date: **1 December 2014**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van den Wyngaert

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

***v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO***

Public Redacted

**Public redacted version of "Prosecution Response to Jean-Pierre Bemba Gombo's
Application for Leave to Appeal the Confirmation Decision", 1 December 2014**

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The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart
Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Göran Sluiter

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

Introduction

1. The Bemba Defence application for leave to appeal¹ the Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute (“Statute”)² on three issues (“Issues”)³ should be dismissed. Issues 1(a) and 1(b) do not arise from the Confirmation Decision, but from prior decisions. In fact, the matters raised thereunder have already been litigated and adjudicated in this case. The Defence impermissibly re-litigates previously settled issues extraneous to the Confirmation Decision, which the Pre-Trial Chamber was not required to revisit. Issue 2 is not an appealable issue within the meaning of Article 82(1)(d) of the Statute, but constitutes a mere disagreement by the Defence with the Pre-Trial Chamber’s factual determination that Bemba solicited criminality and did so with criminal intent.

2. In addition, none of the Issues meet the criteria for leave to appeal under Article 82(1)(d). The Application fails to show that the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* that the Appeals Chamber’s immediate resolution may materially advance the proceedings.

Confidentiality

3. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, the Office of the Prosecutor (“Prosecution”) files this response confidentially, *ex parte*, Prosecution and Bemba Defence only, because it refers to a decision and other filings that are subject to the same classification. The Prosecution will simultaneously file a public redacted version, in which it will redact also references to other confidential decisions and filings.

¹ ICC-01/05-01/13-768 (“Application”).

² ICC-01/05-01/13-749 (“Confirmation Decision” or “Decision”).

³ The Defence advances three Issues: Issue 1 has two sub-issues (Issues 1(a) and 1(b)) and Issue 2. See Application, para.5.

Submissions

A) The Issues do not arise from the Decision or do not qualify as “appealable issues” within the terms of Article 82(1)(d)

4. The Appeals Chamber has ruled that “only an issue may form the subject-matter of an appealable decision. [...] 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.”⁴ None of the Issues identified by the Bemba Defence meet this test.

(i) Issue 1(a) does not arise from the Decision

5. Issue 1(a), which alleges the Pre-Trial Chamber’s failure to entertain a number of Defence submissions, and in particular those supporting its request for a permanent stay of the proceedings,⁵ does not arise from the Confirmation Decision. As demonstrated below,⁶ all subjects raised by the Defence in its Application in relation to Issue 1(a)⁷ have been previously litigated and decided in this case and those interlocutory decisions were all final by the time the Pre-Trial Chamber rendered the Confirmation Decision. As a result, the matters raised by the Defence in relation to Issue 1(a) arise from those prior decisions and cannot be challenged by seeking leave to appeal the Confirmation Decision.

6. The arguments advanced by the Bemba Defence in its confirmation submissions—although fashioned as a new request for a permanent stay of the proceedings—are nothing more than an attempt to re-litigate previously

⁴ 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.”

⁵ ICC-01/05-01/13-599-Conf, paras.1-41.

⁶ See paras.8-11 below.

⁷ Application, paras.7-8.

adjudicated matters.⁸ This is not permissible under the terms of Article 82(1)(d). Nor is an application for leave to appeal the Confirmation Decision the proper avenue to challenge those prior decisions. The only way those prior decisions could have been challenged was through an appeal after certification pursuant to Article 82(1)(d) being granted. Accordingly, they became final and binding in this case, subject to any issues being raised in any final appeal, if appropriate. Because of the finality of the prior decisions on the subjects, the Pre-Trial Chamber was not required to depart from those prior rulings.⁹ In fact, absent a request for reconsideration that would be based on additional facts (as opposed to mere legal arguments), the Pre-Trial Chamber had no room to depart from those rulings.

7. In its Decision, the Pre-Trial Chamber took the correct approach. It acknowledged that the suspects “have raised a series of procedural objections in relation to discrete aspects of the pre-trial proceedings”.¹⁰ However, it also noted that “most of [those] issues have already been raised in the course of these proceedings [...] and decided upon”.¹¹ Therefore, the Pre-Trial Chamber only entertained those challenges “which have not been decided and only to the extent that they are instrumental to the Chamber’s decision under article 61(7)”.¹² The subjects raised now by the Bemba Defence in relation to Issue 1(a) all fall within the category of issues that had been previously adjudicated.

8. First, the matters underlying the Defence’s allegation concerning the Single Judge’s predetermined view of the evidence¹³ have been ruled upon by the Plenary of Judges in its decision of 23 June 2014, in which it dismissed “any allegations of bias [of Judge Cuno Tarfusser], or the appearance thereof”.¹⁴ The Bemba Defence

⁸ ICC-01/05-01/13-599-Conf., paras.1-41.

⁹ ICC-01/05-01/13-599-Conf. *Contra*, Application, para.8.

¹⁰ Decision, para.9.

¹¹ Decision, para.9.

¹² Decision, para.10.

¹³ Application, para.7; ICC-01/05-01/13-599-Conf, paras.2-5.

¹⁴ ICC-01/05-01/13-511-Anx, para.35.

incorrectly suggests that the threshold for an excusal of a judge under Rule 33(1) of the Rules of Procedure and Evidence (“Rules”) is lower than that for disqualification under Rule 34.¹⁵ However, even if, *arguendo*, that was true, it would not matter in this case, because the Plenary concluded that the arguments before it, which are similar to those advanced by the Bemba Defence,¹⁶ were factually unfounded. As a result, no bias was found, and it is immaterial at this stage whether the Bemba Defence sought excusal or disqualification of the Single Judge.

9. Second, the Defence’s allegations regarding the unfair denial of an investigation budget¹⁷ have been adjudicated in the Single Judge’s decision [REDACTED].¹⁸ [REDACTED].¹⁹ [REDACTED].²⁰ [REDACTED].²¹ [REDACTED],²² [REDACTED].

10. Third, the Defence acknowledges that the subject of the allegedly unfair and erroneous denial for a specific investigative measure²³ was already decided by the Single Judge in two prior decisions.²⁴ [REDACTED].²⁵ This unsubstantiated plea, however, did not require the Pre-Trial Chamber to revisit the Single Judge’s prior rulings.

11. Fourth, the alleged unlawful role of Independent Counsel and the alleged illegal interception of Bemba’s telecommunications²⁶ have been the subject of extensive litigation in this case. The Pre-Trial Chamber correctly found that these

¹⁵ Application, para.8; ICC-01/05-01/13-599-Conf, para.2.

¹⁶ ICC-01/05-01/13-511-Anx, paras.37-44.

¹⁷ Application, para.7; ICC-01/05-01/13-599-Conf, paras.6-14.

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ Application, para.7.

²⁴ ICC-01/05-01/13-599-Conf, para.15, referring to decisions ICC-01/05-01/13-298 and ICC-01/05-01/13-337.

²⁵ ICC-01/05-01/13-599-Conf, para.15.

²⁶ Application, para.7; ICC-01/05-01/13-599-Conf, paras.17-33.

issues have already been adjudicated.²⁷ In fact, in this case there are at least eight decisions that deal with the legality of intercepted telephone calls or their use²⁸ and ten orders and decisions regarding the legality of the appointment of Independent Counsel.²⁹ All these prior decisions and orders were final by the time the Pre-Trial Chamber issued the Confirmation Decision.³⁰ Despite the Bemba Defence's protestations to the contrary, raising them yet again at this stage is a thinly veiled and inappropriate attempt to re-litigate these issues *via* the Confirmation Decision.³¹

²⁷ Confirmation Decision, para.14.

²⁸ ICC-01/05-52-Red2—Single Judge Decision on the Prosecutor's 'Request for judicial order to obtain evidence for investigation under Article 70'; ICC-01/05-68—Presidency Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19 November 2013 for the waiver of the immunity of lead defence counsel and the case manager for the defence in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*; ICC-01/05-01/13-48—Single Judge Decision on the Prosecution's Request for Recordings of Telephone Calls between Messrs Bemba and Mangenda to be referred to Independent Counsel; ICC-01/05-01/13-187—Single Judge Joint decision on applications for leave to appeal decisions issued in the situation following their reclassification, submitted by the defence for Mr. Mangenda, Mr. Kilolo and Mr. Bemba; ICC-01/05-01/13-295—Single Judge Decision on the '*Requête d'autorisation d'appel de la décision publique* ICC-01/05-01/13-187 [...]' submitted by the Defence for Mr. Mangenda; ICC-01/05-01/13-492—Single Judge Decision on the '*Requête urgente de la Défense de Monsieur Fidele Babala Wandu sollicitant de la Chambre préliminaire II d'ordonner au Conseil indépendant et/ou au Greffe de lui communiquer l'intégralité des conversations téléphoniques intervenues entre M. Babala et les autres suspects de l'affaire en cours*' dated 4 June 2014 and related filings; ICC-01/05-01/13-494-Conf—Single Judge Joint Decision on Mr. Kilolo's 'Defence Request to the Pre-Trial Chamber to order the Prosecution to transmit to the Kilolo Defence all requests made by the Office of the Prosecutor to the Belgian authorities for State cooperation on the wiretapping and logging of Mr. Kilolo's privileged telephone calls and to transmit to the Kilolo's Defence the response of the Belgian authorities to such requests' and Mr. Bemba's 'Defence request for the disclosure of all Prosecutor's requests for foreign assistance'; ICC-01/05-01/13-648-Red—Appeals Chamber Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff.

²⁹ ICC-01/05-01/13-41-Red—Single Judge Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings; ICC-01/05-01/13-50—Single Judge Decision on '*Demande d'autorisation d'interjeter appel contre la* 'Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings'(ICC-01/05-01/13-41-Conf-Red)'; ICC-01/05-01/13-51—Single Judge Decision on 'Defence request for leave to appeal decision ICC-01/05-01/13-41-Conf-Red'; ICC-01/05-01/13-56-Conf—Single Judge Decision on the '*Requête d'autorisation d'appel de la décision ICC-01/05-01/13-41-Conf-Red*'; ICC-01/05-01/13-347-Red—Single Judge Decision reclassifying documents in the record, lifting protective measures and taking additional measures related to the implementation of Decision ICC-01/05-01/13-41-Red; ICC-01/05-01/13-362-Red—Single Judge Decision on the request for the disqualification of Independent Counsel filed by the Defence of Jean-Pierre Bemba Gombo; ICC-01/05-01/13-366-Red—Single Judge Decision on the 'Prosecution's request to refer potentially privileged materials to independent counsel'; ICC-01/05-01/13-457-Conf—[REDACTED]; ICC-01/05-01/13-511-Anx—Plenary of Judge Notification of the decision on the defence requests for the disqualification of a judge in case ICC-01/05-01/13.

³⁰ Some of them became final after the Bemba Defence, along with the other Defence teams, has unsuccessfully sought leave to appeal the relevant decisions. See for example, ICC-01/05-01/13-51, pp.3-6, rejecting Bemba's application for leave to appeal the decision appointing Independent Counsel; ICC-01/05-01/13-362-Red, pp.3-7, dismissing Bemba's request to disqualify the Independent Counsel; ICC-01/05-01/13-50, pp.3-6, rejecting Kilolo's application for leave to appeal the decision appointing Independent Counsel; ICC-01/05-01/13-295, paras.14-22, rejecting *inter alia* Mangenda's challenge to the telephone intercepts.

³¹ *Contra*, Application, para.8.

12. In its request for a permanent stay of proceedings, the Bemba Defence merely ventilates its disagreement with prior decisions in this case. The Pre-Trial Chamber was under no obligation to entertain those regurgitated submissions. Because it did not do so, Issue 1(a) does not arise from the Confirmation Decision. For these reasons, Issue 1(a) should be dismissed.

(ii) Issue 1(b) does not arise from the Decision

13. Under Issue 1(b), the Defence alleges that the Pre-Trial Chamber failed to properly reason its legal conclusions and in particular the conclusion that the interception of telephone communications and the appointment of Independent Counsel were not unlawful.³² This Issue does also not arise from the Confirmation Decision. As demonstrated above,³³ all matters concerning the lawfulness of the interception of telephone communications and the appointment of Independent Counsel have been previously decided in this case before the Single Judge, the Appeals Chamber, the Presidency and the Plenary of Judges. All these decisions were properly reasoned. Even if some of the Defence's arguments were not previously before the Chambers,³⁴ the submission of these arguments in its 30 July 2014 filing is not the proper way to challenge those prior decisions.

14. The Bemba Defence, and the other Defence teams in this case, were privy to this litigation and have access to the relevant decisions. Therefore, the Pre-Trial Chamber was correct by simply recalling that the matters had been previously decided and reiterating the overall conclusion that derived from them, namely that "the interception of the telephone communications and the appointment of Independent Counsel were not unlawful".³⁵ As a result, the issue concerning the degree of reasoning provided in the Confirmation Decision in relation to this

³² Application, paras.7, 9-10.

³³ See para.11, above.

³⁴ Application, para.10.

³⁵ Decision, para.14.

conclusion does not arise from the Confirmation Decision. For these reasons, Issue 1(b) should be dismissed.

(iii) Issue 2 is not an appealable issue, but a mere disagreement

15. Issue 2 is not an appealable issue within the meaning of Article 82(1)(d). Here, the Bemba Defence merely disagrees with the Pre-Trial Chamber's factual conclusions that Mr Bemba solicited criminality and did so with criminal intent.³⁶

16. The Defence alleges that the "Pre-Trial Chamber failed to adopt and apply an appropriate test of the analysis of circumstantial evidence at confirmation [and that it] neglected any analysis of the circumstances from which the subjective elements of the crimes could be imputed to [Mr Bemba]."³⁷ To support its arguments, the Defence discusses some of the evidence, suggesting that inferences other than Bemba's solicitation with criminal intent can be inferred.³⁸ It also suggests that the Decision does not provide any explanation as to how the Pre-Trial Chamber found that the subjective elements of the crimes were met with respect to Bemba.³⁹

17. The Defence's characterisation and interpretation of the Confirmation Decision is incorrect. In its Decision, the Pre-Trial Chamber points out specific facts and evidence⁴⁰ to ground its conclusion that there are substantial grounds to believe that Bemba is responsible for the crimes charged under specific modes of liability.⁴¹ This conclusion necessarily includes a finding that there are substantial grounds to believe that Bemba held the necessary criminal intent.

³⁶ Application, para.5, 11-12.

³⁷ Application, para.11.

³⁸ Application, para.12.

³⁹ Application, para.12.

⁴⁰ Decision, paras.97-104.

⁴¹ Decision, paras.105-106.

18. Although this conclusion may in part be based on inferences that the Pre-Trial Chamber has drawn from all the facts and the evidence referred to in the Decision,⁴² the Bemba Defence fails to identify any specific subject-matter concerning the approach taken by the Chamber, other than alleging, in the broadest terms, that it is inappropriate. This falls short of identifying an “issue” or “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”⁴³

19. In fact, Issue 2 is nothing more than a mere disagreement with the Pre-Trial Chamber’s conclusion that the evidence establishes that there are substantial grounds to believe that Bemba acted with criminal intent. According to the consistent jurisprudence of this Court, such disagreement or conflicting opinion does not constitute an appealable issue.⁴⁴ Thus, Issue 2 should be dismissed.

B) The Issues do not meet the criteria for leave to appeal under Article 82(1)(d)

(i) The Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

20. As demonstrated above, the three Issues do not arise from the Confirmation Decision and are not appealable. In addition, they do not meet the criteria for leave to appeal.

21. The Bemba Defence’s submissions on fairness erroneously assume that the Defence was not heard on the matters raised in its request for a stay of proceedings and that the matters have been disposed of without proper reasoning.⁴⁵ As demonstrated above,⁴⁶ those issues were all extensively litigated in this case and there are numerous well-reasoned decisions that address the arguments of the

⁴² See in particular paras.97-104.

⁴³ ICC-01/04-168 OA3, para.9.

⁴⁴ ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

⁴⁵ Application, paras.13-14.

⁴⁶ See paras.8-11, above.

parties. The fact that this litigation took place and the decisions were entered prior to the Confirmation Decision does not affect the fairness of the proceedings.

22. The Defence's argument with respect to Issue 2⁴⁷ does not demonstrate how that issue affects the fairness of the proceedings. Rather, it highlights that Issue 2 is nothing more than a disagreement with the conclusions derived by the Chamber from the evidence.

23. In spite of its claim that the Issues raised in the Application meet the criteria for leave to appeal,⁴⁸ the Bemba Defence does not advance a single argument to demonstrate that the Issues affect the expeditious conduct of the proceedings or the outcome of the trial. The Application must fail on that ground alone.

(ii) Immediate resolution of the Issues would not materially advance the proceedings

24. The Defence cursorily argues that the Appeals Chamber's immediate resolution of the Issues could expedite the proceedings by avoiding the risk that lengthy and costly trial activities are nullified at a later stage.⁴⁹ However, it does not provide any reasons why the trial proceedings would need to be nullified. Even if, *arguendo*, the Issues were appealable and they would arise from the Confirmation Decision, there is no reason why the trial proceedings cannot be fair in this case or why they would be vitiated by any incurable defect that would warrant their annulment absent immediate appellate intervention. The Defence does not even demonstrate that is the case.

⁴⁷ Application, para.15.

⁴⁸ Application, title prior to para.13.

⁴⁹ Application, page 10.

Relief Sought

25. As Issue 1(a) and 1(b) do not arise from the Decision and Issue 2 is not appealable, and none of the Issues meet the criteria for leave to appeal under Article 82(1)(d), the Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 1st day of December 2014

At The Hague, The Netherlands