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No.: ICC-01/05-01/08
Date: 29 January 2015

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public

**Prosecution Response to Defence Request to File Additional Submissions in
Support of its Appeal concerning Provisional Release**

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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Overview

1. The Defence request to make additional submissions under regulation 28(1) of the Regulations of the Court (“Regulations”) should be dismissed.¹ The Request is based upon a misapprehension of the decision of the Single Judge of Pre-Trial Chamber II,² and the relevant law. Properly understood, the matter which the Defence wishes to address is wholly irrelevant, and therefore cannot assist the Appeals Chamber in determining this appeal.

Submissions

2. As a general rule, for interlocutory appeals, an appellant may not seek leave to reply to a response to the document in support of the appeal.³ Whereas exceptionally the Appeals Chamber may at its discretion request further submissions from the Parties under regulation 28, it does so only to clarify an ambiguity or new understanding of the issues on appeal, balancing the need for equality of arms with the need for expeditious proceedings.⁴ Regulation 28 submissions are not intended to reiterate a position or to demonstrate mere disagreement with the position of another Party.⁵

3. The Request incorrectly asserts that the Single Judge’s Decision “significantly undermines” Pre-Trial Chamber II’s decision confirming the charges against Mr Bemba and others in case ICC-01/05-01/13,⁶ and hence the Trial Chamber’s decision in this case denying interim release to Mr Bemba.⁷ This premise is mistaken in key respects. As such, Mr Bemba’s provisional release in case ICC-01/05-01/13 has no

¹ ICC-01/05-01/08-3240 (“Request”).

² ICC-01/05-01/13-798 (“Single Judge’s Decision”).

³ See e.g. ICC-01/05-01/08-1846 OA9, para.6; ICC-01/09-02/11-206 OA, para.8; ICC-01/09-01/11-239 OA, para.8; ICC-01/04-01/07-148 OA, para.3; ICC-01/04-01/06-424 OA3, para.5.

⁴ See e.g. ICC-01/09-01/11-239 OA, para.9; ICC-01/09-02/11-206 OA, para.9.

⁵ ICC-01/11-01/11-442 OA4, para.13.

⁶ See ICC-01/05-01/13-749 (“Confirmation Decision”).

⁷ Request, para.6. See ICC-01/05-01/08-3221 (“Impugned Decision”).

“direct impact on the present appeal”,⁸ and therefore the Parties’ submissions on this matter will not assist the Appeals Chamber.⁹

4. The Single Judge’s Decision—which the Prosecution has appealed¹⁰—is concerned only with the question of pre-trial detention, based upon article 60 of the Rome Statute (“Statute”).¹¹ As such, it has no legal significance with regard to Pre-Trial Chamber II’s determination that there are substantial grounds to believe that Mr Bemba committed offences under article 70 of the Statute.¹²

5. The question of pre-trial detention is entirely distinct from the Pre-Trial Chamber’s assessment of the case against a person on the merits. Rather, pre-trial detention is concerned only with whether the grounds in article 58(1)(b) necessitating a person’s incarceration exist, and the need to ensure that the person is not detained for an unreasonable period due to inexcusable delay by the Prosecutor.¹³ The Defence is thus mistaken in its apparent assumption that the Single Judge’s Decision implies any kind of retrenchment from the Confirmation Decision. To the contrary, the same Single Judge has more recently rejected Mr Bemba’s application for leave to appeal the Confirmation Decision.¹⁴ The record in

⁸ *Contra* Request, para.6.

⁹ *Contra* Request, para.8.

¹⁰ See ICC-01/05-01/13-802.

¹¹ See *e.g.* Single Judge’s Decision, pp.3-4 (“[t]he 21 October 2014 Decision was premised on the paramount need to avoid that the duration of pre-trial detention—as enshrined *inter alia* in article 60(4) of the Statute—becomes unreasonable [...] [A]s far as proceedings in case 01/05-01/13 are concerned, the same reasoning applies to Jean-Pierre Bemba’s situation”). Given the close reliance in the Single Judge’s Decision on the 21 October 2014 Decision, the Prosecution considers that it contains similar errors. See ICC-01/05-01/13-727 (appealing the 21 October 2014 Decision on the basis, *inter alia*, that the Single Judge erred in his purported application of article 60(4) of the Statute; any alternative lines of reasoning under articles 67(1) or 60(3) would in any event necessarily also be erroneous).

¹² See *e.g.* Confirmation Decision, paras.97-106.

¹³ See Statute, arts.60(2), (4).

¹⁴ See ICC-01/05-01/13-801. The Prosecution did not seek leave under regulation 28 to raise this matter before the Appeals Chamber, even though the Defence relied on the rejected application for the purpose of this appeal: ICC-01/05-01/08-3230-Red, para.27 (“Mr Bemba has sought leave to appeal the very findings upon which the Trial Chamber relies. Should these findings be overturned on appeal, this in turn would undermine the Impugned Decision”).

case ICC-01/05-01/13 has now been transmitted to the Presidency to convene a Trial Chamber.¹⁵

6. Furthermore, a decision under article 60(4), unlike article 60(3), does not mean that the circumstances justifying detention under article 58(1)(b) have in any way materially changed, much less been mitigated.¹⁶ Rather, an article 60(4) decision connotes only the judicial view that the length of pre-trial detention has been unreasonable owing to inexcusable delay by the Prosecutor.¹⁷ Nor indeed does the Single Judge's Decision refer to any material change of circumstance reducing his assessment that Mr Bemba constitutes a flight risk.¹⁸ Likewise, although the Single Judge seems without explanation to observe in passing that other relevant risks may have "reduc[ed]",¹⁹ he does not state that they are now absent.

7. In any event, even if the Single Judge's Decision did consider that there had been a material change in circumstance for the purpose of Mr Bemba's detention in case ICC-01/05-01/13 under article 60(3) of the Statute, it would still be irrelevant to the Appeals Chamber's review in this case. The Trial Chamber in the Impugned Decision did not consider that there was a risk that Mr Bemba might obstruct or endanger the proceedings before this Court on the basis that the Single Judge considered there was such a risk. Rather, the Trial Chamber *independently* determined the existence of such a risk on the basis, among others, that there were

¹⁵ See ICC-01/05-01/13-803.

¹⁶ See ICC-01/04-01/06-824 OA7, para.120 ("even if a detainee is appropriately detained pursuant to article 60 (2) of the Statute, the Pre-Trial Chamber shall consider releasing the detainee under article 60 (4) of the Statute"). *Contra* Request, para.8 ("That these findings were not held to warrant continued detention in the Article 70 Case necessarily impacts on the question of whether the Trial Chamber's approach was in error"). Although the Prosecution notes that the Single Judge's Decision also makes passing reference to article 67 of the Statute in this regard, it does not alter the analysis. See *further above* fn.11 (citing ICC-01/05-01/13-727).

¹⁷ For the reason *inter alia* that, in case ICC-01/05-01/13, there has been no such delay by the Prosecutor, and no finding thereof, the Prosecution is appealing the Single Judge's Decision. See *above* fn.10.

¹⁸ See ICC-01/05-01/13-1-Red2, paras.21-23 (concluding with respect to Mr Bemba that arrest and detention is justified on the basis of "*l'ensemble des raisons énoncées à l'article 58-1-b du Statut*" [all of the grounds laid down by article 58(1)(b) of the Statute], namely: i) to ensure that the person appears at trial; or ii) to ensure that the person does not obstruct or endanger the proceedings; or iii) to prevent the person from continuing with the commission of the crime).

¹⁹ See Single Judge's Decision, p.4 (referring to a reduction in "the risks that the proceedings or the investigations might be obstructed or endangered, as well as that the alleged crimes be continued or related offences be committed").

substantial grounds to believe that Mr Bemba has previously committed offences against this Court's administration of justice.²⁰ Nothing in this regard has changed.

8. Finally, the Prosecution notes that the Request has not observed the Appeals Chamber's instruction for all parties to certify their compliance with regulation 36 and the number of words employed.²¹

Conclusion

9. For the reasons above, the Single Judge's Decision has no impact on either the Confirmation Decision or the Impugned Decision, and so the Request should be dismissed.

Word Count: 1,433²²



Fatou Bensouda, Prosecutor

Dated this 29th day of January 2015

At The Hague, The Netherlands

²⁰ See ICC-01/05-01/08-3235-Red, paras.20-22.

²¹ See below fn.22. See further ICC-01/05-01/08-3235-Red, para.7; ICC-02/05-03/09-630.

²² It is hereby certified that this document contains the number of words specified and complies in all respects with the requirements of Regulation 36 of the Regulations. This statement (56 words), not itself included in the word count, follows the Appeals Chamber's direction to "all parties" appearing before it: ICC-01/11-01/11-565 OA6, para.32; ICC-01/09-01/11 OA7 OA8, para.26.