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Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER VII

Before: Judge Olga Herrera Carbuccion
Judge Robert Fremr
Judge Chile Eboe-Osuji

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 Document

**Public Redacted version of "Prosecution's Response to the Bemba Defence's
Request for Leave to Appeal Decisions ICC-01/05-01/13-362-Conf and ICC-01/05-
01/13-366-Conf", 9 May 2014, ICC-01/05-01/13-386-Conf**

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for Jean-Pierre Bemba

Melinda Taylor

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

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

I. Introduction

1. The Prosecution opposes the Bemba Defence's application for leave to appeal ("Application")¹ the Single Judge's "Decision on the request for disqualification of [REDACTED] Independent Counsel filed by the Defence of Jean-Pierre Bemba Gombo" ("First Decision")² and the "Decision on the 'Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel'" ("Second Decision")³. The Application fails because it does not establish an appealable issue arising from the Decisions. Moreover, and in any event, the issues identified do not meet the criteria for leave to appeal under Article 82(1)(d).

II. Confidentiality

2. Pursuant to Regulation 23*bis*(2), the Prosecution files this response confidentially, because the Application is subject to the same classification.

III. Submissions

3. The Defence seeks leave to appeal the First Decision on the following issues ("Four Issues"):
 - (i) "Whether the Single Judge erred by holding that his relationship with - [REDACTED], *inter alia*, a relevant factor in determining [REDACTED] 'independence'" ("First Issue");
 - (ii) "Whether the Single Judge erred by holding that the need to disqualify [REDACTED] was only necessitated by virtue of the tasks mentioned in the First Impugned Decision which were assigned to him 'at the moment'" ("Second Issue");

¹ ICC-01/05-01/13-376-Conf.

² ICC-01/05-01/13-362-Conf.

³ ICC-01/05-01/13-366-Conf.

- (iii) “Whether the Single Judge erred by failing to appreciate correctly the facts giving rise to the appearance of bias” (“Third Issue”); and
- (iv) “Whether the Single Judge erred by factoring into his decision making process an irrelevant consideration; namely, a purported Defence suggestion that [REDACTED] was carrying out improper actions ‘behind the scene (sic)’” (“Fourth Issue”).

4. In addition, the Defence seeks leave to appeal the Second Decision on the following issue (together, “Five Issues”):

- (v) “Whether the Single Judge erred by referring potentially privileged materials to [REDACTED] in light of Grounds of Appeal One to Four inclusive herein above” (“Fifth Issue”).

(a) *The Five Issues are not appealable issues that arise from the Decisions*

5. The Appeals Chamber has held that “[a]n 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

First Issue

6. The First Issue, as framed by the Defence, does not properly characterise the First Decision and therefore does not arise from it. Consistent with the jurisprudence of this Court, an application for leave to appeal must be rejected where an issue is predicated on a misinterpretation of the relevant portion of a decision.⁵

7. The Single Judge found that:

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, (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-01/09-02/11-406, para.46; ICC-01/04-01/07-1732, paras.15, 17-18; ICC-01/04-01/10-487, paras.32-33; ICC-01/04-01/07-1088, paras.33-35; ICC-01/04-535, paras.26-29; ICC-01/04-01/10-106, p. 6.

the determination of whether the independence of [REDACTED] as Independent Counsel may be reasonably doubted to the point that his immediate disqualification appears necessary cannot but be informed by proper consideration of [among others] his relationship with the Single Judge who has entrusted him with his mandate [...].⁶

8. The Defence argues, incorrectly, that “such reliance is flawed in that the full extent of such a relationship has not been disclosed in the case or situation record”.⁷ Yet it was not necessary for the Decision to list all the contacts between the Single Judge and Independent Counsel. Rather, the Decision sets out with sufficient clarity the extent to which it relies on the relation between the Single Judge and Independent Counsel. It specifies in this context that “the Independent Counsel does not replace either the Single Judge [nor] the Chamber in the exercise of their judicial responsibility, and that his mandate can in no way be equated to the performance of functions of a judicial nature”.⁸

Second Issue

9. The Second Issue is likewise based on the Defence’s misunderstanding of the relevant portions of the Decision, and therefore does not arise from the First Decision. When deciding on the Defence request to disqualify Independent Counsel, the Single Judge did not limit himself to assessing the tasks performed by Independent Counsel “at the moment”.⁹ To the contrary, the Decision exhaustively lists all the tasks assigned to Independent Counsel¹⁰ and states that that one of the relevant considerations are “the tasks assigned to him”, without limiting those tasks in time.¹¹ The Single Judge’s reference in a subsequent portion of the First Decision to the tasks performed by the Independent Counsel “at the moment” is merely to express that the disqualification of Independent

⁶ First Decision, p.4, second paragraph.

⁷ Application, para.14.

⁸ First Decision, p.5, second paragraph.

⁹ Application, para.15.

¹⁰ First Decision, p.3, second paragraph and p5, first paragraph.

¹¹ First Decision, p.3, second paragraph.

Counsel sought by the Defence would only have the effect of suspending those tasks currently performed by him.¹²

Third Issue

10. The Third Issue—whether the Single Judge erred by failing to appreciate correctly the facts giving rise to the appearance of bias—relates to observations that were not determinative for the resolution of the Defence’s request for disqualification. As such, it does not constitute an appealable issue within the terms of Article 82(1)(d), which must be “essential” to the resolution of the Decision.¹³ The Defence challenges observations concerning the past working relationship between Independent Counsel and [REDACTED].¹⁴ However, the Single Judge expressly mentioned that his conclusion to reject the Defence’s request for disqualification of Independent Counsel was fully based on other considerations, and that it was not necessary to entertain the arguments advanced by the Defence, including the one related to the Third Issue.¹⁵
11. In addition, and in any event, the Third Issue does not arise from the Decision as it is predicated on a misunderstanding of the First Decision. Contrary to the Defence’s position, the Single Judge did not disregard its submission that the Prosecution failed to disclose the existence of a prior working relationship between Independent Counsel and [REDACTED]. Instead, having concluded that such prior working relationship was irrelevant to the Defence request for the Disqualification of Independent Counsel, the Single Judge ruled that the Prosecution was not required to mention it to the Defence.¹⁶

¹² First Decision, p.4, third paragraph.

¹³ See *para.5 above*.

¹⁴ Application, para.16.

¹⁵ First Decision, p.5, third paragraph.

¹⁶ First Decision, p.6, fourth paragraph.

Fourth Issue

12. Like the Third Issue, the Fourth Issue also relates to findings that were not determinative for the Single Judge's resolution of the Defence's request for disqualification.¹⁷ Accordingly, it is not an appealable issue. The Defence's suggestion that Independent Counsel was carrying out improper action "behind the scene"¹⁸ was not among the factors leading to the Single Judge's conclusion. To the contrary, the Single Judge merely referred to this allegation in order to admonish Defence Counsel for making "particularly disturbing [and] extremely grave allegations [...] in the absence of any substantiation of any kind".¹⁹ Contrary to the Defence's contention, this reference was not therefore an "irrelevant consideration" factored into the First Decision. Indeed, the Single Judge expressly stated that this allegation "does not deserve serious consideration" in the context of the Defence request for disqualification of Independent Counsel.²⁰

Fifth Issue

13. The Fifth Issue—whether the Single Judge erred by referring potentially privileged materials to Independent Counsel given the other Four Issues—does not arise from the Second Decision.²¹ As the Defence concedes, the Fifth Issue is "contingent on Grounds One to Four", which are alleged to arise from the First Decision. Yet since the Four Issues are not addressed in any way in the Second Decision, the Fifth Issue—which relies entirely upon them—likewise cannot arise from the Second Decision and so must be rejected. The Defence fails to make any showing to the contrary.

¹⁷ Application, para.17.

¹⁸ First Decision, p.5, third paragraph. See also the manner in which the Defence frames the Fourth Issue: Application, p.7.

¹⁹ First Decision, p.6, fifth paragraph.

²⁰ First Decision, p.6, fifth paragraph.

²¹ Application, para.18.

14. The Fifth Issue is also not an issue within the terms of Article 82(1)(d). Rather than articulating a discrete subject *in the Second Decision* essential to its determination, the Defence merely suggests that the Second Decision should not have been issued because of errors contained in the *First Decision*.²²
15. Finally, and in any event, the remedy sought by the Defence for the Fifth Issue—namely, the suspension of the Second Decision until any appeal on the Four Issues allegedly arising from the First Decision has been resolved—is procedurally flawed and must be rejected. Pursuant to Article 82(3) and Rule 156(5), it is the Appeals Chamber, and not the Chamber seised of an application under Article 82(1)(d), which has the discretionary power to order suspensive effect of an appealed decision.²³ Moreover, that power is limited to the decision under appeal and does not extend to a subsequent decision, as would be the effect of the remedy sought by the Defence in this case.

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

16. The Defence does not even attempt to show how the Five Issues meet the criteria for leave to appeal under Article 82(1)(d). Instead, it merely states abstractly that the issues meet this test.²⁴ This Court has repeatedly emphasised that unsubstantiated arguments,²⁵ hypothetical arguments,²⁶ or purely general complaints are insufficient.²⁷ An applicant cannot speculate in the abstract that a decision causes prejudice to the rights of the accused in order to invoke that the

²² Application, para.18.

²³ ICC-01/04-01/06-1290 OA11, para.7; ICC-01/04-01/06-1444 OA12, para.8; ICC-01/05-01/08-499 OA2, para.11; ICC-01/05-01/08-817 OA3, para.6; ICC-01/09-01/11-862 OA5, para.6; ICC-01/11-01/11-387 OA4, para.22; ICC-01/04-12-12 OA, para.18; ICC-01/04-01/06-2536 OA17, para.7.

²⁴ Application, para.19.

²⁵ ICC-01/09-01/11-1154, para.26.

²⁷ ICC-01/04-01/06-2463, para.31.

²⁷ ICC-01/04-01/06-2463, para.31.

fairness of the proceedings are affected.²⁸ Thus, the Application should be rejected on this basis alone.

17. Furthermore, the Five Issues do not meet the criteria for leave to appeal under Article 82(1)(d) because, as noted in the First Decision, the Defence retains the ability to challenge the results of the Independent Counsel's review of the material concerned.²⁹

IV. Conclusion

18. The Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 10th day of February 2015
At The Hague, The Netherlands

²⁸ ICC-01/04-168 OA3, para.10; ICC-02/04-01/05-316, p.6; ICC-01/09-02/11-211 paras.33, 39; ICC-01/09-02/11-88, para.25, *see also* paras.23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para.36; ICC-01/09-02/11-275, paras.28-29; ICC-01/09-01/11-301, para.30.

²⁹ First Decision, p.5, last paragraph.