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Date: **27 February 2015**

TRIAL CHAMBER VII

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
Judge Olga Herrera Carbuccia
Judge Robert Fremr

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 Defence's Objection to the Form of the Document Containing the Charges", 10 July 2014, ICC-01/05-01/13-555-Conf

Source: **The Office of the Prosecutor**

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the Jean-Pierre Bemba Gombo ("Bemba") Defence's request for the Single Judge to dismiss the Document Containing the Charges ("DCC") ("Request").[1] First, the Request is procedurally flawed, as it challenges the substance of the allegations against Bemba in the DCC rather than its form. Second, the DCC is sufficiently specific with respect to Bemba. The Request fails to consider the DCC as a whole and in light of the evidence cited therein.

II. Confidentiality

2. This filing is classified as "Confidential" as it responds to a filing of the same designation.

III. Submissions

A. The Request is procedurally flawed

3. While the Request purportedly objects to the form of the DCC, it amounts to a challenge to the DCC's substance. Of the Defence's "analysis" of 17 paragraphs of the DCC, only three arguably involve a claim of lack of specificity.[2] The remainder selectively address the merits of the charges.[3]

4. The Request thus inappropriately challenges the substantive allegations against Bemba. The question of how to frame the charges is distinct from whether the evidence supports the charges, which is properly dealt with during the confirmation

[1] ICC-01/05-01/13-530-Conf-Corr.
[2] Request, paras. 14, 19, 23.
[3] Request, paras. 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 20, 21, 22, 24.

process. As the Appeals Chamber has held, "[t]he confirmation of charges hearing […] was deliberately established as a hearing before a Pre-Trial Chamber of three judges at which the person charged has the right […] *to contest* the evidence and following which the Pre-Trial Chamber must assess the evidence."[4] Article 61(6) of the Rome Statute ("Statute") plainly reflects this.[5]

B. The DCC is sufficiently specific

5. Pursuant to Regulation 52 of the Regulations of the Court, the DCC filed in this case contains, *inter alia*, "a sufficient legal and factual basis to bring the person or persons to trial". The Appeals Chamber has set out that at the confirmation stage, the factual allegations which support each of the legal elements of the crime(s) charged "must be identified with sufficient clarity and detail".[6] These requirements have been met in respect of Bemba[7] and the other Suspects in this case.

6. As Pre-Trial Chamber I has previously noted, a DCC "is to be understood as the document which frames the confirmation hearing" and "must establish in detail the nature, cause and content of the charges brought against the suspect".[8] This requirement demands that a DCC be read as a whole and in light of its underlying supporting evidence. Here, the DCC sets out fully and in detail the allegations against Bemba, as well as the objective and subjective elements of the crimes as they relate to him.

7. The Request relies on jurisprudence striking out facts alleged in an *amended* DCC, filed *after* confirmation, for having exceeded the Pre-Trial Chamber's findings

[4] ICC-01/04-01/10-514, para. 43 (emphasis added).
[5] See Article 61(6)(a)-(c) of the Statute.
[6] ICC-01/04-01/06-2205 OA15 OA16, fn. 163.
[7] *Contra* Request, paras. 3, 6.
[8] ICC-01/04-01/10-465-Red, para. 90.

on confirmation.[9] This is inapposite here, as the cited decision does not relate to an alleged lack of specificity in a DCC as asserted in the Request; no confirmation decision has been made in this case; and, the DCC cannot, therefore, be said to exceed any findings of the Pre-Trial Chamber.

(i) The Request relies on a deliberately fragmented construction of the DCC

8. Even the three paragraphs in the DCC (paragraphs 41, 76, and 94) which are suggested to lack specificity in the Request are each analysed by the Defence without regard to the underlying evidence or the context of the allegations.[10]

9. First, the Request erroneously suggests that the allegation at paragraph 41 of the DCC, that Bemba directed Aimé Kilolo ("Kilolo") to illicitly coach witnesses, is "totally unsupported by any 'hyper-linked' or 'hypo-linked' reference to the evidence."[11] In fact, the citations to the evidence supporting this allegation are found at paragraphs 46 to 109 of the DCC.[12]

10. Second, the Request suggests that Kilolo's financial "present" from Bemba to D-2 was not specifically pleaded to allege that the payment was to ensure false testimony.[13] However, the DCC makes the context clear: Kilolo illicitly coached the witness to testify falsely that he was a soldier and "immediately before testifying" made a payment to the witness which [REDACTED].[14] The Request misstates the evidence as to the date the alleged payment was made, claiming it was made [REDACTED].[15] Based on this incorrect assertion, the Request implies that the payment occurred long before the witness's testimony, which was heard

[9] Request, para. 28.
[10] Request, paras. 14, 19, 23.
[11] Request, para. 14.
[12] DCC, fn. 124.
[13] Request, para. 19.
[14] DCC, para. 76.
[15] Request, para. 19.

[REDACTED]. The DCC, however, specifically provides and substantiates that [REDACTED],[16] *shortly* before the witness testified.

11. Third, the Request suggests that an alleged conversation between Bemba and Fidèle Babala ("Babala") concerning the payment of a witness lacks clarity about whether: (i) the conversation related to a payment; (ii) the conversation concerned witness D-64; and (iii) the payment was for an illicit purpose. [17] Again, the Request flatly disregards detailed references provided in the DCC. These show that Bemba and Babala's conversation concerned a money transfer, similar to a transfer involving another Defence witness executed the day before.[18] Further, records show that D-64 was the subject of the payment made the day after the conversation.[19] Finally, the illicit purpose of the transaction must be determined in view of the context in which it occurred. Here, the DCC establishes: Kilolo's repeated contacts with the witness prior to his testimony; the conversations about payments and the use of codes in this regard; and the witness's false denial of contacts with, and the receipt of money from, the Defence.[20]

12. The Defence adopts this selective approach throughout the Request. Though claiming to conduct a "paragraph by paragraph" analysis of the DCC,[21] the Request isolates and compartmentalises a limited number of paragraphs concerning Bemba. Such an approach is untenable, particularly in light of the fact that Bemba is charged with individual criminal responsibility in the DCC, *inter alia*, as a member of a Common Plan and/or as acting with others pursuant to a common purpose, under Articles 25(3)(a) and 25(3)(d), respectively. Thus, the allegations against Bemba cannot be read in isolation.

[16] DCC, para. 76.
[17] Request, para. 23.
[18] DCC, para. 94.
[19] DCC, para. 94.
[20] DCC, paras. 91, 93-96.
[21] Request, para. 7.

13. The DCC consists of over 50 operative pages encompassing over 400 footnotes. By contrast, the Request, filed within two days of the DCC's notification, rests on a handful of isolated paragraphs. This both illustrates and underscores that the Defence did not, and indeed, could not analyse all of the relevant evidence contained in the DCC supporting the allegations against Bemba.

14. The Request "analyses" sentences pulled from paragraphs of the DCC in a vacuum. For instance, the Request quotes the allegation that Bemba was communicating with the other co-perpetrators and third parties in contravention of the rules of the detention unit and claims that this evinces no criminal conduct.[22] However, this selectivity ignores relevant evidence in the DCC that such communication by Bemba involved his furtherance of the Common Plan, such as discussing with Babala paying witnesses to testify falsely,[23] and discussing the false testimony of witnesses with Kilolo and Jean-Jacques Mangenda ("Mangenda").[24] This is symptomatic of the Request as a whole; quotes are taken out of context despite clear evidence supporting the allegations against Bemba.

15. The same is true of the Request's treatment of Bemba's: (i) use of codes[25] – which disregards cited evidence showing their use in attempting to cover up his and the other Suspects' criminal actions;[26] (ii) instruction to Babala to make payments[27] – which disregards cited evidence alleging that payments were authorised by Bemba to ensure the false testimony of witnesses;[28] (iii) instruction to Kilolo that a witness testify in a certain way and his satisfaction with the testimony of that witness[29] –

[22] Request, para. 8.
[23] DCC, paras. 31-32.
[24] DCC, paras. 36, 39.
[25] Request, para. 9.
[26] DCC, para. 31.
[27] Request, para. 10.
[28] DCC, paras. 32, 91, 94.
[29] Request, para. 11.

which disregards cited evidence that the witness was illicitly coached by Kilolo to give false testimony, and did so;[30] (iv) conversations with Babala in which the latter referred to giving money to witnesses[31] – which disregards cited evidence that these witnesses subsequently testified falsely about receiving such payments;[32] (v) conference call with Kilolo and a witness before the latter came to testify[33] – which disregards cited evidence that the witness testified falsely on Kilolo's instructions and with Bemba's knowledge;[34] (vi) contact with witnesses shortly before their testimony[35] – which disregards cited evidence that such contact was to illicitly coach witnesses to testify falsely;[36] (vii) gratitude to a witness for testifying[37] – which disregards cited evidence that the witness testified falsely;[38] and, (viii) payment of a so-called "sweetener" to a witness[39] – which disregards cited evidence that the witness was paid to fabricate his testimony.[40]

16. Further, in relation to the use of codes, the Request mischaracterises a previous decision by Judge Trendafilova on Bemba's conditional release. Contrary to the Request's suggestion that the Judge examined Bemba's use of codes and found it not to be motivated by a criminal purpose,[41] the Judge noted that reports from the Registrar on the monitoring of Bemba's non-privileged communications showed no threat to victims or witnesses in 2008.[42] The Registry's analysis was therefore conducted almost two years *before* the opening of the Bemba Defence in the Main Case. Thus, the ruling has no bearing on the manner in which the Common Plan, as alleged in the DCC, was implemented and concealed in this case. Moreover, the

[30] DCC, paras. 53-59.
[31] Request, paras. 22-23.
[32] DCC, paras. 91-92, 94-96.
[33] Request, para. 24.
[34] DCC, paras. 99-100.
[35] Request, para. 13.
[36] DCC, paras. 47, 49, 53, 56, 61, 70, 78, 83, 92, 96, 104.
[37] Request, para. 16.
[38] DCC, paras. 47-50.
[39] Request, para. 19.
[40] DCC, paras. 74-75, 77-78.
[41] Request, para. 9.
[42] ICC-01/05-01/08-475, para. 74.

Registrar noted, at the time, that ''[REDACTED]'',[43] which confirms their effectiveness as a means of concealment.

17. All of the individual instances cited in the Request are isolated from the rest of the paragraphs from which they are drawn, from the underlying evidence cited in the DCC, and from the DCC as a whole. While the Defence claims that none of these instances as presented in the Request establishes criminal conduct, a proper reading of the DCC in its entirety and the evidence cited therein readily demonstrates the contrary. The Request's superficial and contrived analysis of the DCC fundamentally lacks merit.

18. Similarly, the Request relies on a number of isolated sections of the DCC which the Defence claims could only amount to "knowledge" of criminal conduct on Bemba's part.[44] Yet again, the inherent contradiction of the Request is clear. Divorcing evidence of Bemba's knowledge of the criminal actions of the other Suspects from his own involvement in implementing and facilitating those same actions is both arbitrary and illusory.

19. The DCC and its referenced supporting evidence provide ample specifics as to the objective elements of the crimes attributed to Bemba.[45] He was the architect of the Common Plan involving the commission of Article 70 offences, with the other Suspects – principally Kilolo, Mangenda, and Babala – constantly reporting to him,[46] including on whether witnesses were sufficiently reliable to stick to scripted testimony and could therefore be called to testify for the Defence;[47] discussing how witnesses were to be prepared to testify falsely,[48] including parts of the script not to

[43] ICC-01/05-01/08-346-Conf-Anx3, para. 13.
[44] Request, paras. 12, 15, 18, 20-21.
[45] *Contra* Request, p. 3.
[46] DCC, paras. 36, 39, 114-115.
[47] DCC, paras. 40-41.
[48] DCC, paras. 37, 39-40, 113.

be forgotten;[49] organising and implementing payments to witnesses,[50] detailed in Bemba's written ledger showing payment amounts, names, and dates;[51] and even discussing the potential of the Suspects prosecution for Article 70 crimes, including Bemba instructing Kilolo to conduct a "*tour d'horizon*" to contact all Defence witnesses and find out who had revealed details of the Common Plan to the Prosecution and ensure that others did not follow suit.[52]

20. In respect of the false or forged documents, the Request again fails to consider the DCC as a whole.[53] Bemba was the principal orchestrator of the Common Plan. Given that: (i) the Suspects who prepared and presented the false or forged documents were in direct and constant contact with each other and Bemba regarding the implementation of the plan;[54] (ii) the Suspects agreed that keeping Bemba satisfied was the main priority;[55] (iii) the Suspects followed his instructions in furtherance of the plan;[56] and (iv) the presentation of the false or forged documents were for Bemba's benefit,[57] the evidence supporting this charge is sufficiently clear.[58]

21. The Request's attempt to isolate Bemba's actions from those of the other Suspects is transparent. In addition to the instances which the Request claims could only demonstrate Bemba's knowledge of the criminal conduct of other Suspects,[59] the Request also notes that evidence in the DCC shows "that KILOLO had given instructions to D-54 to lie",[60] and that "KILOLO and MANGENDA were pursuing their own private strategy of extorting money from the Suspect behind his back".[61]

[49] DCC, para. 36.
[50] DCC, paras. 32-34, 113.
[51] DCC, para. 119.
[52] DCC, para. 119.
[53] Request, para. 25.
[54] DCC, paras. 114-115.
[55] DCC, paras. 36, 115.
[56] DCC, paras. 32-33, 36-38, 41.
[57] DCC, paras. 42-43.
[58] *Contra* Request, para. 25.
[59] Request, paras. 12, 15, 18, 20-21.
[60] Request, para. 17.
[61] Request, para. 32.

When assessed in the context of the DCC as a whole: (i) Bemba's knowledge of criminal conduct – which the evidence shows he authorised, directed or instructed,[62] and (ii) Kilolo's instruction to D-54 to lie – which the evidence shows Bemba instructed, *via* Mangenda,[63] the specifics of the objective elements of the crimes with which Bemba is charged are readily apparent.[64]

22. Further, Bemba was not extorted by Kilolo and Mangenda, but was scammed out of money which he was requested to provide for the commission of a crime. Being asked, and agreeing, to provide money to bribe witnesses in order for them to refrain from admitting to the Article 70 offences clearly demonstrate Bemba's intent to commit the crimes and his central place in the Common Plan. That Kilolo and Mangenda may have been exploiting an opportunity arising as a result of the Common Plan to get more money from Bemba, does not alter the existence of the Common Plan involving the commission of Article 70 offences, which Bemba was central to. Rather, it shows only that Kilolo and Mangenda were also opportunists, in working with and for Bemba to implement the Common Plan.

23. Given the nature of the alleged criminal plan – involving the subversion of the administration of justice by Bemba, Kilolo, Mangenda, Babala, Narcisse Arido and others – the allegations against the other Suspects are necessarily relevant to the charges against Bemba. The Request's distancing of Bemba from the other Suspects' actions is at complete odds with the reality of the case and the basis of the charges.

(ii) The term "illicit coaching" is properly defined and used in the DCC

24. The Request incorrectly suggests that the term "illicit coaching" used to

[62] DCC, paras. 23, 30-32, 36, 38-41, 113.
[63] DCC, para. 53.
[64] *Contra* Request, p. 3.

describe the criminal actions of the Suspects in the DCC is "not clarified" or is "ambiguous".[65] To the contrary, the DCC clearly defines what is meant by illicit coaching at paragraph 22, namely:

> "instructing witnesses on what to say when questioned in court, including scripting their evidence, dictating and rehearsing false answers and/or questions to be posed by the parties and participants in the *Bemba* case, or to contested issues in the trial proceedings, shortly before or after witnesses had been administered the solemn undertaking under Article 69(1) of the Statute and Rule 66 of the Rules".[66]

25. Moreover, the context in which the term is used throughout the DCC and particularly, in paragraph 53 (Bemba's instruction that Kilolo illicitly instruct a witness not to forget to mention certain topics when testifying falsely) leaves no question as to the nature of the illicit coaching in that instance.[67]

(iii) The modes of liability are correctly pleaded

26. The DCC correctly pleads the modes of liability at issue in this case.[68] As has been previously held, "the Prosecution is under no obligation to articulate in the Document Containing the Charges its legal understanding of the various modes of liability".[69] Further, the Request ignores the current jurisprudence of the Court regarding indirect co-perpetration under Article 25(3)(a).[70] The recent *Katanga* Trial Judgment states, "*[c]omme cela a été rappelé, le seul critère indispensable, selon elle, est que*

[65] Request, para. 17.
[66] See also, DCC, fn. 40, which cites ICC-01/09-01/11-524 for the definition of "witness coaching" as "preparing the witness in a manner that involves improper influence upon the witness, intentionally exerted by counsel, with the view to rendering false evidence into testimony. As far as it goes, coaching is truly subornation of perjury, since the witness is being fraudulently manipulated to give testimony that is false".
[67] *Contra* Request, para. 17.
[68] *Contra* Request, paras. 30-34.
[69] ICC-01/04-01/06-803-tEN, para. 151.
[70] Request, paras. 31-33.

l'auteur indirect exerce, d'une façon ou d'une autre y compris, le cas échéant, au sein d'une organisation, un contrôle sur le crime commis par l'intermédiaire d'une autre personne".[71] The DCC's pleading of Article 25(3)(a) is thus consistent with the Court's jurisprudence. Moreover, the Request's attempt to transpose elements previously used in cases involving hierarchical organisational structures is inapposite for the purposes of the present proceedings: "control over the crime", within the terms of the *Katanga* judgment, quoted above, may be exercised in different ways.

27. In relation to Article 25(3)(b), the DCC properly pleads the *mens rea* requirements in accordance with Articles 70 and 30.[72] The Request's assertion of a "double intent" based on an academic article[73] is totally misplaced in these circumstances. Bemba is charged under Article 25(3)(b) as having solicited the giving and presenting of false testimony – acts which the DCC alleges were instructed, directed, and authorised by Bemba.[74] Given the direct interaction between Bemba and the perpetrators of these crimes and their concerted commission of the crimes – Bemba's awareness of the intention of the direct perpetrators to commit the crimes is manifest.

(iv) The Prosecution's written submissions will expound upon the DCC

28. The allegations in the DCC will be elaborated in the Prosecution's written submissions in support of the confirmation of charges. These submissions will provide yet more context and evidence for the allegations against Bemba, and the other Suspects, and should be read together with the DCC and the List of Evidence when analysing the charges.[75]

[71] ICC-01/04-01/06-803-tEN, para. 1406.
[72] DCC, para. 140. *Contra* Request, para. 33.
[73] Request, para. 33.
[74] DCC, paras. 23, 30-32, 36, 38-41, 113.
[75] See, *e.g.*, ICC-01/04-01/07-1547, paras. 12, 30.

IV. Requested Relief

29. For the foregoing reasons, the Prosecution respectfully requests the Single Judge to deny the Request.

Fatou Bensouda, Prosecutor

Dated this 27th Day of February 2015
At The Hague, The Netherlands