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Date: **20 April 2015**

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccia
Judge Bertram Schmitt

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

**Prosecution Response to Jean-Pierre Bemba Gombo's Request for Leave to Appeal
ICC-01/05-01/13-893-Red**

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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I. Introduction

1. The Bemba Defence application for leave to appeal¹ the Trial Chamber’s “Decision on ‘Request concerning the review of seized material’ and related matters”² should be dismissed. The Application is only one more in a series of unsuccessful attempts by the Bemba Defence (“Defence”) to relay its dissatisfaction with the established procedure for the review of seized material in this case. The alleged Issue (“Issue”) merely disagrees with the Decision, and is therefore not appealable. Further, the Issue misunderstands the Decision and so does not arise from it.

2. The Application fails to meet the article 82(1)(d) of the Rome Statute (“Statute”) criteria for granting leave to appeal. The Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Appeals Chamber’s immediate resolution would not materially advance the proceedings.

3. On 17 April 2015—two days after the expiry of the deadline to file applications for leave to appeal this Decision³—the Kilolo Defence sought to join the Application.⁴ The Kilolo Application is out of time. Neither does it advance any arguments of its own.⁵ The Chamber should therefore dismiss it *in limine*. Alternatively, should the Chamber consider the Kilolo Application, its dismissal is warranted for the same reasons that the Bemba Application fails, as set out below.

¹ ICC-01/05-01/13-908 (“Application” or “Bemba Application”).

² ICC-01/05-01/13-893 (“Decision”).

³ Rule 155(1), Rules of Procedure and Evidence (“Rules”).

⁴ ICC-01/05-01/13-911 (“Kilolo Application”), notified on 17 April 2015.

⁵ Kilolo Application, para.2.

II. Submissions

A. The Issue is not appealable

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.”⁶ Moreover, according to the Appeals Chamber’s consistent case law, mere disagreements or conflicting opinions fall short of constituting appealable issues.⁷ The Issue, alleging that the Trial Chamber erred by finding that the continued appointment of the Independent Counsel was both “necessary and appropriate to prevent undue access by any party to privileged information in this case”,⁸ fails to meet this test.

5. The Issue is not appealable. Despite several earlier failed attempts to challenge the necessity and propriety of the Independent Counsel’s appointment to review the seized material,⁹ the Defence continues to disagree with the established procedure. But, such disagreement—no matter how many times it is repeated—is irrelevant to any application for leave to appeal. Further, the Application variously misunderstands the Decision, and fails to acknowledge several aspects of the unsealing and review procedure stipulated. Because the Issue incorrectly reads the Decision, it also does not arise from it.

⁶ 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.”

⁷ *See e.g.*, ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.25; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

⁸ Application, para.3.

⁹ *See e.g.*, ICC-01/05-01/13-366-Red, pp.3-11; ICC-01/05-01/13-362-Red, pp.3-7; ICC-01/05-01/13-457, pp.3-5, ICC-01/05-52-Red2, pp.3-8; ICC-01/05-01/13-801, paras.29-32.

6. First, the Application merely disagrees with the Decision. The Defence's preference for any particular system for the review of seized material, including from domestic systems,¹⁰ is immaterial to an article 82(1)(d) application. Moreover, it fails to acknowledge the Chamber's findings of its thorough review of the procedure, involving the Independent Counsel, established by the Single Judge.¹¹ Indeed, the Chamber considered *inter alia* Mr Bemba's interest in protecting his privilege regarding the seized material¹² when it reviewed the Single Judge's procedure, as reflected in his various Decisions.¹³ More so, it agreed *inter alia* that the "confidentiality of any privileged material is only lifted to a necessary and proportional extent; and that privileged or irrelevant original material is promptly returned to its rightful owner."¹⁴ The Chamber then decided to maintain the existing review procedure, subject to certain modifications to the unsealing process.¹⁵ Contrary to the Application,¹⁶ no further explanation was required. As the Appeals Chamber has held, a reasoned decision does not necessarily require a Chamber to recite and summarise each and every factor before it; a Chamber need only to indicate with sufficient clarity the basis of its decisions.¹⁷

7. Second, the Application misunderstands the Decision: it ignores certain key aspects of the review procedure, including the Chamber's oversight of the Independent Counsel's work.¹⁸ The Defence claim that the Chamber did not instruct on the "criteria" of "relevance, incriminating, exculpatory and privilege"¹⁹ is both

¹⁰ See e.g. Application, paras.19-20.

¹¹ See Decision, para.13, *contra* Application, paras.5-7.

¹² Decision, para.12.

¹³ Decision, para.13, fn.26, citing *inter alia*, Decision on Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70", 29 July 2013, ICC-01/05-52-Conf; Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings, 13 December 2013, ICC-01/05-01/13-41-Conf (ICC-01/05-01/13-41-Red); Decision on the "Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel", 25 April 2013, ICC-01/05-01/13-366-Conf (ICC-01/05-01/13-366-Red).

¹⁴ Decision, para.13.

¹⁵ Decision, para.16.

¹⁶ Application, paras.6,7-11,15-17.

¹⁷ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

¹⁸ Decision, paras.19-25.

¹⁹ Application, paras.7-18.

premature and unfounded. Neither the Chamber nor the Independent Counsel was required to engage with further “criteria” in the abstract, before the materials are either unsealed or reviewed.²⁰ Moreover, the Application disregards aspects of the Decision requiring the Chamber and the Defence to be notified of the results of the Independent Counsel’s work through confidential *ex parte* reports. The Defence may also file observations at that stage, including on any relevant criteria relating to specific seized material.²¹ Equally, the Defence argument disregards the Chamber’s own role in the review of the seized materials. Not only will the Chamber examine “the results of [the Independent Counsel’s] review”,²² it retains its “other statutory obligations, including to rule on the relevance or admissibility of any evidence at the appropriate time pursuant to [a]rticle 69 of the Statute.”²³ Likewise, the Defence’s contention, that “the Chamber is also not in a position to exercise any oversight over the [Independent Counsel’s] discretion”,²⁴ misapprehends the Decision and the Chamber’s role in overseeing the proceedings. The Defence’s failure to acknowledge the Chamber—and not the Independent Counsel—as the ultimate arbiter in determining the evidence to be made available to the Parties from the seized materials is fatal to the Application.

8. Third, the Application is speculative. To support its disagreement with the review procedure, the Application offers mere conjecture. The Defence claim that the Independent Counsel’s previous analysis was “based on the Prosecution’s strategic theories and suppositions, rather than objective and impartial information”²⁵ is unfounded. So too is the claim that the Independent Counsel’s reports are “peppered with assumptions, and Prosecution-oriented argument.”²⁶ The Application remains unsupported when it claims “an obvious reflection of the inherent illegality of the

²⁰ *Contra* Application, paras.7-11, 15-18.

²¹ Decision, paras.22, 23.

²² Decision, paras.21-23.

²³ Decision, para.17.

²⁴ Application, para.27.

²⁵ Application, paras.12-14.

²⁶ Application, para.13.

national requests for seizure”²⁷ or “the investigative failures of the Prosecution.”²⁸ Neither does it demonstrate how the Defence would be “potentially deprive[d]” of “access to key contextual information”.²⁹ Such claims can only be speculative if they are made in the abstract, as they are at present. Yet again, the Defence argument misreads the Decision to wrongly assume that the Prosecution can gain access to “exculpatory material” emanating from the seized material without the Chamber’s review.³⁰

9. The Application merely disagrees with the Decision. It also variously misunderstands the Decision and the unsealing and review procedure adopted. For these reasons, the Issue should be dismissed.

B. Article 82(1)(d) criteria are not met

10. The Application also fails to meet the article 82(1)(d) criteria.

11. The Defence fails to show that the Issue affects the fairness of the proceedings in any manner. Its arguments, once again, stem from misreading the Decision and disregard the Chamber’s findings and its role in the proceedings. Contrary to the Application,³¹ the Chamber considered the rights and interests of the Accused, specifically referring *inter alia* to article 67 and rule 73.³² The Chamber was therefore fully alive to the issue. At this stage, the Defence continues to disagree on “the use of a particular Counsel” who, according to it, “has received instructions from the Prosecution”.³³ This insinuation, however, is unsupported. On the other hand, the Chamber considered the matter and remained convinced of the Independent

²⁷ Application, paras.21-22.

²⁸ Application, paras.23-24.

²⁹ Application, paras.25-26.

³⁰ Application, paras.16-17.

³¹ Application, para.30.

³² Decision, paras.16, 12-13.

³³ Application, para.31.

Counsel's neutrality and independence.³⁴ The Defence's repetitive submissions remain equally irrelevant in the article 82(1)(d) context.³⁵ Likewise, the Defence claims of a "lack of clarity" on the Independent Counsel's system of review and "the gap in judicial accountability"³⁶ fail to acknowledge the Chamber's role in the review process, as reflected in the Decision.

12. The Defence fails to demonstrate that the expeditiousness of the proceedings is affected. Although the Defence claims that the Independent Counsel's review would delay its ability to vet and use the materials,³⁷ it fails to recognise that the Trial Chamber's continuation of the established procedure would in fact be a more timely and efficient way of reviewing seized materials. More so, the Defence argument appears to reject all other procedures save its own suggestions. This is insufficient to show any impact on the expedition of proceedings.

13. Equally, the Defence fails to show any impact on the outcome of the trial. Because its submissions misread and disregard certain key aspects of the established review procedure outlined in the Decision, they are incorrect. Contrary to the Application,³⁸ the Independent Counsel's involvement in the review would not "taint" and has not tainted the process, which the Chamber continues to oversee directly. Moreover, while it is correct that any assessment on "the outcome of the trial" must forecast the consequences,³⁹ this does not entail a license to speculate. Yet again, the Defence's allegations that the "Independent Counsel's [analysis] is based on [the Prosecution's instructions]" and the "absence of an effective and neutral review process"⁴⁰ are repetitive and unsubstantiated. Further, the Defence fails to persuade why it would be "extremely difficult" for the Chamber to review the

³⁴ Decision, paras.15, 21.

³⁵ See *e.g.* Decision, paras.14-15.

³⁶ Application, paras.32-33.

³⁷ Application, paras.34-35.

³⁸ Application, para.37.

³⁹ Application, para.36.

⁴⁰ Application, paras.38-39.

process, including to disallow the Prosecution's access to privileged information.⁴¹ More so, any "unfair trial advantage" to the Prosecution⁴² that could bypass the Chamber's regulation of the proceedings is only hypothetical. The Defence arguments remain conjecture at this stage.

14. Finally, the Application does not demonstrate that the Appeals Chamber's immediate resolution would materially advance the proceedings. As shown above,⁴³ the Appeals Chamber's intervention is not needed to correct the Defence's misunderstanding of the Decision and the established review procedure. Absent the Trial Chamber's consideration of the results of the Independent Counsel's review of the actual materials, any claim of "violation of privilege"⁴⁴ is premature. The Defence fails to show why this matter, raised previously in several unsuccessful applications for leave to appeal,⁴⁵ now deserves the Appeals Chamber's attention. The Appeals Chamber is not an advisory body on purely hypothetical matters,⁴⁶ nor is it required to clarify "principles" and "procedures" in the abstract.⁴⁷

15. For these reasons, the Application fails to meet the article 82(1)(d) criteria for leave to appeal.

⁴¹ Application, paras.38-44.

⁴² Application, paras.41-42.

⁴³ See above paras.6-9.

⁴⁴ Application, paras.46-48.

⁴⁵ See e.g. ICC-01/05-01/13-801, paras.29-32, dismissing Mangenda's and Bemba's arguments on the Independent Counsel. In doing so, the Pre-Trial Chamber rejected the Bemba Defence argument that "the appellate process should take place now, on an interlocutory basis, rather than at a stage when a full-fledged debate on all the issues relevant to the outcome of the trial will have taken place before the Trial Chamber." See also ICC-01/05-01/13-50, pp.3-6, rejecting Kilolo's application for leave to appeal the decision appointing Independent Counsel; ICC-01/05-01/13-51, 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. See also ICC-01/05-01/13-511 and ICC-01/05-01/13-511-Anx (Plenary Decision), paras.36-41, where the Plenary of Judges dismissed, among others, the Defence allegations contesting the Single Judge's decisions on the appointment of Independent Counsel.

⁴⁶ ICC-01/04-503 OA4 OA5 OA6, para.30.

⁴⁷ Contra Application, paras.46-48.

III. Relief Sought

16. The Issue is not appealable. Nor does it meet the criteria for leave to appeal under article 82(1)(d) of the Statute. As a result, the Application should be rejected.

17. The Kilolo Application should be dismissed *in limine* because it is out of time, or alternatively on the same basis for which the Bemba Application fails.



Fatou Bensouda, Prosecutor

Dated this 20th day of April 2015

At The Hague, The Netherlands