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No.: **ICC-01/05-01/13**

Date: **26/11/2014**

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,
AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO,
FIDÈLE BABALA WANDU & NARCISSE ARIDO**

Public

Defence request for leave to appeal decision ICC-01/05-01/13-749

Source: Defence for Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

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Unrepresented Victims

**Unrepresented Applicants
(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

Introduction

1. Pursuant to Article 82(1)(d) of the Rome Statute, Jean-Pierre Bemba Gombo ("the Suspect") seeks leave to appeal Pre-Trial Chamber II's "*Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute* of 11 November 2014 ("the Impugned Decision") pursuant to which he was committed to trial for certain offences against the administration of justice.¹

2. The confirmation proceedings were exceptional in their complexity. By contrast, the Impugned Decision is unprecedented in its extreme brevity. The relevant part of the Impugned Decision which concerns the Suspect's individual responsibility is encapsulated in ten paragraphs of which the first two are introductory in nature. The vast majority, if not all, of the arguments raised by the Suspect were not even mentioned in the Impugned Decision and were thus impliedly rejected without any proper consideration whatsoever. An appeal would be justified – even if only to dispel the potentially disheartening message that the Impugned Decision was merely the formalistic rubber-stamping of the Prosecution case theory.

3. As required under Rule 155 of the Rules of Evidence and Procedure, this request for leave to appeal is filed within five days of notification of the Impugned Decision to the Defence.

Submission

4. Article 82(1)(d) of the Rome Statute sets out the requirements to be satisfied when bringing an application for leave to appeal an interlocutory decision:

"Either Party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

.....

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and

¹ ICC-01/05-01/13-749.

for which, in the opinion of the Pre-Trial Chamber or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”.

The existence of “issues” arising out of the Impugned Decision

5. The Defence respectfully submits that the issues to be raised on appeal arise directly out of the Impugned Decision. It is settled precedent of the International Criminal Court that an issue for which leave to appeal is sought should comprise a topic which is subject to judicial determination² and must not express a mere disagreement with the findings of the Impugned Decision.³ Accordingly, the Defence identifies the following two issues for appeal:

Issue 1: Whether the Pre-Trial Chamber erred in law by breaching fundamental principles of natural justice in particular:

- (a) by demonstrably failing to entertain a number of Defence submissions, and;
- (b) by demonstrably failing to properly motivate its legal conclusions on those Defence submissions which it did, albeit perfunctorily, entertain;

Issue 2: Whether the Pre-Trial Chamber erred in law by failing to apply an appropriate test for the analysis of circumstantial evidence concluding, as it did, without any proper foundation that there were substantial grounds to believe that the Suspect both "solicited" criminality and did so with "criminal intent" – even on the basis of the facts which the Pre-Trial Chamber established.

6. The Defence submits that the aforementioned issues arise directly out of the Impugned Decision and comprise topics which are subject to judicial determination.⁴

² Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at paragraph 9.

³ ICC-01/04-01/06-915 at paragraph 22.

⁴ ICC/01/04-168 at para. 9.

These issues do not formulate mere disagreements with the factual findings of the Impugned Decisions.⁵

7. **Issue 1(a)** raises fundamental procedural matters for which the common denominator is the denial of due process. The Suspect requested that the Single Judge excuse himself and that a permanent stay of proceedings be ordered on the basis of a number of procedural irregularities, namely; the Single Judge's alleged predetermined view of the evidence,⁶ the unfair denial of an investigative budget until it was too late for it to be of any use,⁷ the unfair and erroneous denial of a Defence request for an investigative measure⁸ and the illegal interception of the Suspect's non-privileged and privileged communications (despite the Suspect, in the latter case, not being the subject of a specific order for interception).⁹ The arguments in support of the request for excusal and a stay of proceedings were ignored both by the Pre-Trial Chamber and, for the most part, even by the Prosecution.

8. The issues raised by the Suspect are not, as the Prosecution has high-handedly argued elsewhere, "*feeble*" or "*thinly-veiled*" attempts to re-litigate matters on which judgment has already been pronounced.¹⁰ The Suspect, for example, never sought to disqualify the Single Judge but rather argued that he should excuse himself. As previously stated, the grounds for seeking excusal encompass degrees of professional embarrassment less severe and far broader than what may be deemed a "*frivolous*" accusation of bias. The Pre-Trial Chamber similarly failed to rule on the effect of the denial of a meaningful defence budget for the specific purpose of conducting an investigation – especially in light of the Prosecution's former acknowledgment as follows:

⁵ ICC-01/04-01/06-915 at para. 22.

⁶ ICC-01/05-01/13-599-Conf at para. 3.

⁷ Ibid at para. 6.

⁸ Ibid at para. 15.

⁹ Ibid at para. 17.

¹⁰ ICC-01/05-01/13-762 at paras. 6 and 8.

"...it is axiomatic that adequate Defence funding is important to achieving procedural parity and trial fairness. As such, the Prosecution does not oppose the Request insofar it seeks via the auspices of the Chamber the Registrar's temporary assistance whether by loan or full provision of funds "to enable [Bemba] to fund his Defence..."¹¹

9. **Issue 1(b)** is directed at the following finding: *"the Chamber finds that the interception of telephone communications and the appointment of Independent Counsel were not unlawful. Consequently, it does not consider that the evidence obtained as a result of the interception has been "obtained by means of a violation of the Statute or internationally recognized human rights..."¹²* The Defence argued extensively why it believed that the appointment of the said Independent Counsel and the interceptions to which he was afforded access infringed the Statute and internationally recognized human rights respectively. The Pre-Trial Chamber's finding that they were *"not unlawful"* (and nothing more) is demonstrably devoid of legal reasoning and, as a result, appears to be arbitrary.

10. Once again it should be stressed that the Suspect is not regurgitating previously rejected submissions. The Suspect's submissions with respect to the interception of communications were unique.¹³ The Suspect submitted that Regulation 175 of the Regulations of the Registry was *lex specialis*¹⁴ and that the interception of his non-privileged telephones calls at the detention facility (performed without "probable cause" and without giving him an opportunity to make submissions in advance) was illegal. These submissions were totally ignored by the Pre-Trial Chamber. The Pre-Trial Chamber similarly ignored the Suspect's submission that the interception of his privileged conversations was illegal because it was performed without a judicial order naming him and examining the prejudice which may be caused to him. The privileged conversations were merely handed to

¹¹ ICC-01/05-01/13-121-Conf at para 3.

¹² Impugned Decision at para. 14.

¹³ Unlike the other parties, the Suspect was a detainee and the interception of his non-privileged telephone communications was performed, initially, without judicial order.

¹⁴ ICC-01/05-01/13-599-Conf at para. 24.

the Prosecution as a collateral product of the interception of KILOLO and MANGENDA's communications.¹⁵

11. **Issue 2:** The Defence respectfully submits that the Pre-Trial Chamber failed to adopt and apply an appropriate test for the analysis of circumstantial evidence at confirmation. In so doing, the Pre-Trial Chamber completely neglected any analysis of the circumstances from which the subjective elements of the crimes could be imputed to the Suspect.

12. The Pre-Trial Chamber is reminded of its finding that there was "abundant evidence showing that [...] Mr Bemba [...] was at the origin of many of the acts committed by the other suspects and was systematically informed of the status of those acts and of their results". The Pre-Trial Chamber also found – without any cogent explanation – that the Suspect "devised" a criminal "strategy"¹⁶ – something which is absolutely denied. Not one of the acts identified by the Pre-Trial Chamber as "originating" from the Suspect,¹⁷ however, can be seen as an act of instigation to criminality whether it be by way of solicitation or inducement. The acts identified were perfectly legitimate. The only way such legitimate acts can be seen as criminal is if the circumstances tend to show that they were performed with criminal intent. The Impugned Decision, however, provides no explanation as to how the established circumstances give rise to substantial grounds to believe that the subjective elements of the discrete crimes attributed to the Suspect and the modes of liability were fulfilled. This lacuna in the analysis of the evidence pertaining to the Suspect is even more striking in light of the fact that the offences relating to the fourteen allegedly false documents were not confirmed precisely because the Suspects were found to lack the requisite *mens rea*.¹⁸

¹⁵ Ibid at para. 30 *infra*.

¹⁶ Impugned Decision at para.105.

¹⁷ Telephone calls with Defence witnesses to express gratitude for testimony, discussing the contents of testimonies with Counsel, giving instructions to Counsel as to how to adduce testimony in Court in accordance with pre-trial statements, ordering the transfer of negligible amounts of monies from friends for legitimate investigation purposes and raising the irrelevant issue of Walter Barasa (in a conversation which clearly concerned developments at the Court – as evidenced by discussion, in the same train of thought, of the warrant issued for the arrest of Charles Blé Goudé (CAR-OTP-0080-0407)).

¹⁸ Impugned Decision at para. 43.

Impact on the fairness/expeditiousness of the proceedings and the trial outcome

13. The right of a party to be properly heard by a judicial panel which is poised to take a decision impacting on his rights and interests is a basic principle of natural justice. Consequently, any judicial decision which fails to provide the reasons for rejecting a party's submissions in reaching its operative disposition is inherently unfair. In the circumstances, an appeal procedure is required precisely in order to permit the Defence to raise issues which ought to have been considered in the first instance.

14. The Defence appreciates that reasons for certain findings of fact were given. The right to a reasoned ruling, however, encompasses the demonstrable consideration of both parties' submissions and not, merely, a bland recitation of the Prosecution's document containing the charges to the exclusion of any Defence argument. None other than HHJ Cuno Tarfusser, himself, has championed the concept of transparency in the judicial decision-making process ordering, on an occasion, the reclassification of a transcript both for the benefit of the Suspect *and* for the general public.¹⁹ The Defence expects the Prosecution to support this ground of appeal in light of the emphasis that it has also placed, in the past, on the right to a reasoned decision:

"The Prosecutor, making reference to decisions of the ICTY, the International Criminal Tribunal for Rwanda and of the European Court of Human Rights, stresses the importance of reasoned decisions and puts the right to a reasoned decision in the context of the right to appeal and the ability of the Appeals Chamber to review decisions in a meaningful way".²⁰

15. The Defence presented comprehensive and persuasive arguments for negating the criminal state of mind imputed to the Suspect. In particular, the Defence highlighted certain comments made by the Suspect in intercepted telephone conversations, warning KILOLO to abide by the ethics of his profession and not to

¹⁹ ICC-01/05-01/13-746.

²⁰ ICC-01/04-01/06-773 at para. 16 and confirmed by the Appeals Chamber at para. 20.

adopt unethical ways of approaching witnesses.²¹ None of this disregarded evidence is compatible with “instigation” liability under article 25(3)(b) of the Rome Statute. The Pre-Trial Chamber demonstrably failed to analyze the Defence evidence and, as a result, prejudiced the fairness of the proceedings.

16. It will be recalled that Trial Chamber III has stipulated that “[o]n applications under Article 82(1)(d), the Chamber’s assessment of the merits of the proposed appeal is an irrelevant consideration”.²² Accordingly, in determining whether the issues raised for appeal affect the fairness of the proceedings, the Pre-Trial Chamber should be precluded from relying upon its own assessment as to the substantive merits of the proposed appeal. Rather, the Pre-Trial Chamber should take into consideration the possible impact on the fairness of the proceedings if the issues identified herein are found by the Appeals Chamber to be correct.

“The proceedings in case ICC-01/05-01/13 are the first before the Court pursuant to article 70 of the Statute. The ensuing lack of precedence for this case suggests that many legal and procedural issues remain open to interpretation and litigation in the course of the proceedings. Whereas the Defence, in the Applications, might have put forward plausible arguments on the interpretation of the law, there exist equally plausible interpretations motivating the decisions of the Judge. Nonetheless, the issues raised by the Defence in the Applications are precisely the types of issues governed by the Court’s appellate process”.

An immediate Appeals Chamber decision would materially advance the proceedings;

14. The Pre-Trial Chamber is reminded that the Appeals Chamber has previously ruled as follows:

"A wrong decision on an issue in the context of Article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the

²¹ ICC-01/05-01/13-669-Conf. at paras 23-25.

²² ICC-01/05-01/08-1169.

*judicial process. In those circumstances, the proceedings will not be advanced but on the contrary they will be set back."*²³

15. The Defence submits that immediate resolution by the Appeals Chamber of the identified issues could expedite proceedings in this case and avoid the risk that lengthy and costly trial activities are nullified at a later stage.

Relief Sought

16. In light of the aforementioned, the Pre-Trial Chamber is requested to grant leave to appeal the two identified issues arising out of decision ICC-01/05-01/13-749.



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Jerusalem, Israel
Wednesday, November 26, 2014

²³ ICC-01/04-168 at paragraph 16.