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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, AIME KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO***

Public

**Prosecution Response to Aimé Kilolo Musamba's Application for Leave to Appeal
the Confirmation Decision**

Source: Office of the Prosecutor

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Introduction

1. The Kilolo Defence's application for leave to appeal¹ the Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute ("Statute")² should be dismissed. The three alleged issues ("Issues") amount to mere disagreements with the Pre-Trial Chamber's properly grounded and well-reasoned findings. They are not appealable issues in terms of Article 82(1)(d).

2. The Application makes only passing reference to the statutory criteria for leave to appeal³ and, apart from perfunctorily claiming an "absence of reasoning" and alleging a flawed Confirmation Decision, fails to particularise and concretely demonstrate that the criteria for leave to appeal for each of the three Issues are met. The fact is, none of the Issues alleged significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* the Appeals Chamber's immediate resolution would not materially advance the proceedings.

Submissions

3. 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."⁴ Moreover, according to the Appeals Chamber's consistent case law, mere disagreements or conflicting opinions fall short of constituting appealable issues.⁵ None of the Issues identified by the Defence meet this test.

¹ ICC-01/05-01/13-771 (Application).

² ICC-01/05-01/13-749 (Confirmation Decision or Decision).

³ Application, paras.28-32.

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, (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."

⁵ See for example, 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.

(a) The First Issue is not appealable and does not meet the criteria for leave to appeal

4. The First Issue, alleging a lack of reasoning in the Confirmation Decision, is simply a disagreement with the Chamber's conclusions. It is not an appealable issue. The Defence's argument hinges on three particular aspects: the telephone intercepts and Independent Counsel's appointment, the Pre-Trial Chamber's alleged failure to include an analysis after each witness referred to in the Confirmation Decision, and the length of the Decision.⁶ However, they fail to show that the Decision was not properly reasoned in accordance with the Appeals Chamber's legal requirements.

5. The Appeals Chamber has held that a reasoned decision does not necessarily require a Chamber to recite and summarise each and every factor before it; rather a Chamber must identify the facts relevant to its conclusion. A Chamber must indicate with sufficient clarity the basis of its decisions, but the extent of the reasoning will depend on the circumstances of each case.⁷ The Decision is properly reasoned in accordance with this standard, with the Pre-Trial Chamber sufficiently clarifying its basis. While the Defence refers to Article 74(5) of the Statute requiring a "full and reasoned statement",⁸ this provision must be interpreted in light of the appellate legal standard for reasoned decisions: the Appeals Chamber's case law is binding.

6. Firstly, by raising the First Issue, and in the guise of a purported lack of reasoning,⁹ the Kilolo Defence is in effect attempting to re-litigate the settled issues of the Independent Counsel's appointment, telephone intercepts and the waiver of

⁶ Application, paras.7-22.

⁷ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

⁸ Application, para.18.

⁹ Application, paras.9-12.

immunity. To the contrary, as the Pre-Trial Chamber correctly found,¹⁰ the Single Judge,¹¹ the Presidency and the Appeals Chamber¹² have already adjudicated these issues in a number of decisions. The Kilolo Defence, and the other Defence teams, have unsuccessfully challenged the decisions on the Independent Counsel's appointment, the telephone intercepts and the immunity waiver on previous occasions.¹³ An application for leave to appeal the Confirmation Decision is not a channel to re-litigate settled issues.

7. Contrary to the Defence's suggestion,¹⁴ Kilolo is fully aware of the prior decisions of the Single Judge and the Presidency. The Pre-Trial Chamber was not obliged to list these decisions, given its finding that "most of the above issues have already been raised in the course of these proceedings, some of them before different organs of the Court, and decided upon by the Single Judge, the Registrar and the Presidency[...]" and that "[i]t cannot review previous decisions issued by the Single Judge or by other organs of the Court."¹⁵ These aspects of the Application do not even arise from the Confirmation Decision.

8. Secondly, the Defence's claim that the Chamber's failure to include a separate analysis for each witness in its Decision¹⁶ is unfounded. The Defence's approach would unreasonably require the Chamber to follow its pre-confirmation

¹⁰ Confirmation Decision, para.14.

¹¹ For example, ICC-01/05-01/13-41-Red, pp.3-7; ICC-01/05-52-Red2, paras.3-8; ICC-01/05-01/13-366-Red.

¹² For example, ICC-01/05-68, paras.8-13, where the Presidency addressed Kilolo's immunity; 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 and the waiver of immunity of lead counsel and the case manager. See also ICC-01/05-01/13-648-Red3, paras.57-62, where the Appeals Chamber dismissed the Defence arguments to disqualify the Prosecutor on similar grounds.

¹³ For example, 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-01/05-01/13-187, pp.3-10, rejecting applications for leave to appeal by Kilolo, Mangenda and Bemba challenging the telephone intercepts; ICC-01/05-01/13-295, paras.14-22, rejecting *inter alia* Mangenda's challenge to the telephone intercepts; ICC-01/05-01/13-362-Red, pp.3-7, dismissing Bemba's request to disqualify the Independent Counsel; ICC-01/05-01/13-492, pp.3-6, where Kilolo supported Babala's request for access to the telephone intercepts.

¹⁴ *Contra* Application, para.12.

¹⁵ Confirmation Decision, para.10.

¹⁶ Application, para.13.

submissions to the letter, including providing an analysis of each witness. Instead, the Chamber addressed the evidence relating to witnesses as relevant to its factual findings on Kilolo's criminal role, and grouped their analysis as needed.¹⁷ The Chamber was free to decide how best to deal with the evidence in its Decision, and was not required to follow the Kilolo Defence's presentation of its pre-confirmation submissions to the exclusion of all other parties and indeed the Chamber's own preference. Further, any claim of an alleged failure by the Pre-Trial Chamber to reason¹⁸ cannot succeed, given the Chamber's detailed consideration of Kilolo's criminality, along with references to particular witnesses, in at least 20 reasoned paragraphs supported by approximately 50 detailed footnotes. The Chamber is not obliged to individually list every witness or piece of evidence it considers.

9. Thirdly, although the Defence acknowledges that the length of a Confirmation Decision is immaterial—somewhat contradictorily—it simultaneously appears to claim that 55 pages is insufficient.¹⁹ However, there is no statutory or legal requirement stipulating the number of pages for a confirmation decision, as this obviously depends on the nature and circumstances of each individual case and what is required for a reasoned decision. As the Defence recognises, such an argument is “simplistic”²⁰ and cannot establish the Pre-Trial Chamber's failure to provide a reasoned decision.

10. In addition, the First Issue fails to meet the criteria for leave to appeal. Since it is premised on a fundamentally flawed understanding of what is required for a reasoned decision, the First Issue cannot affect the fairness of the proceedings or the outcome of the trial. Nor is the Appeals Chamber required to restate its existing law

¹⁷ Confirmation Decision, paras.53-72.

¹⁸ *Contra* Application, para.13.

¹⁹ Application, paras.14-16.

²⁰ Application, para.16.

on reasoned decision at this stage. For these reasons, the First Issue should be dismissed.

(b) The Second Issue is not appealable and does not meet the criteria for leave to appeal

11. The Second Issue, alleging the Chamber's confusion between the offences under Articles 70(1)(a) and 70(1)(b),²¹ merely disagrees with the Chamber's findings and is not appealable. The Application wrongly asserts that the Chamber failed to define the Article 70(1) offences in the Decision.²² To the contrary, the Chamber undertook a detailed analysis of the elements of the offences under Articles 70(1)(a), (b) and (c).²³ Limiting the analysis to one paragraph (paragraph 48—a factual finding on the *mens rea*), as the Kilolo Defence does,²⁴ does not properly represent the Decision. Contrary to the Defence's claim,²⁵ the Chamber properly outlined the elements for each sub-section of Article 70(1). However, the Application omits reference to these clearly relevant portions of the Decision.

12. The Defence also incorrectly asserts that the Chamber extended Article 70(1)(b) to cover oral evidence, thus purportedly confusing the elements of Articles 70(1)(a) and 70(1)(b).²⁶ Although the Defence claims that a literal reading of Article 70(1)(b) shows that it is limited to only documentary evidence,²⁷ it fails to substantiate this submission, and indeed, explain why the term "evidence" would exclude oral evidence. Essentially, the Kilolo Defence disagrees with the Chamber's finding that "[...]the reference to "evidence" in this provision (Article 70(1)(b)) has to be construed so as to include all types of evidence, namely documents, material

²¹ Application, paras.23-26.

²² Application, paras.23-24.

²³ Confirmation Decision, paras.27-30.

²⁴ Application, para.23.

²⁵ Application, para.24.

²⁶ Application, paras.25-26.

²⁷ Application, para.25.

and tangible objects, as well as oral evidence.”²⁸ However, disagreeing with the Chamber’s statement of the law and repeating failed pre-confirmation submissions does not transform the matter into an appealable issue.

13. Additionally on the Second Issue, the Kilolo Defence also fails to address the criteria for appeal. Even if the Pre-Trial Chamber had erred in its findings on the elements of the offences, this would not affect the fairness of the proceedings or the outcome of the trial. A Trial Chamber would be free to recharacterise the facts and circumstances confirmed as legally different offences pursuant to Regulation 55 of the Regulations of the Court. Given this potential remedy at trial, no unfairness results nor is an appellate decision warranted at this early stage. For these reasons, the Second Issue should be dismissed.

(c) The Third Issue is not appealable and does not meet the criteria for leave to appeal

14. The Third Issue, alleging a failure to provide a reasoned decision in finding that Article 70(1)(c) is a conduct—and not a consequence—offence,²⁹ is not an appealable issue. Yet again, the Defence simply disagrees with the Decision.

15. First, the Defence misreads the Decision to claim a lack of reasoning. To the contrary, the Chamber provided a sufficient basis to find that Article 70(1)(c) is a conduct offence. Paragraph 30 of the Decision states that “[a]s the use of the word “corruptly” suggests, the relevant conduct is aimed at contaminating the witness’s testimony.” Based on this reasoning, *inter alia*, the Chamber found that “[...]the offence of corruptly influencing a witness is constituted independently from whether the pursued impact or influence is actually achieved and must therefore be

²⁸ Confirmation Decision, para.29.

²⁹ Application, para.27.

understood as a conduct crime, not a result crime.”³⁰ In addition, the Kilolo Defence cursorily claims that the Chamber failed to specify if Articles 70(1)(a) and (b) were conduct or result offences.³¹ Absent any elaboration, this submission should be dismissed *in limine*. Moreover, the Chamber was not obliged to specify—in the abstract—if Articles 70(1)(a) and (b) were conduct, or consequence offences.

16. Second, the Chamber’s rejection of the Defence’s submissions does not in and of itself show that its Decision was unreasoned. The Chamber considered these submissions, but found no merit in them. This fails to show an appealable issue.

17. The Defence’s argument on the Third Issue is sparse and fails to address the criteria for appeal. Nevertheless, neither the fairness of the proceedings nor the outcome of the trial is affected. Even assuming *arguendo* that it is a result crime—which it is not, the evidence confirmed supports such a finding under Article 70(1)(c). While the evidence showed Kilolo’s criminal conduct, including engaging in prohibited contact with the witnesses,³² it equally demonstrated the consequence of that criminal conduct, i.e., that the witnesses falsely testified before Trial Chamber III. The false testimony (or consequence) included issues of (i) their previous contacts with the Defence; (ii) their meetings with other prospective witnesses; (iii) their acquaintance with some of the Suspects, or other persons associated with them; (iv) the fact that promises had been made to them in exchange for their testimony; (v) the fact that they had received reimbursements or transfers by Bemba or on his behalf, regardless of their purpose; and (vi) other substantive issues related to the charges against Bemba in the Main Case, such as the witnesses’ membership of certain groups or entities, the structure of these groups or entities, their movements on the ground, and names of officials.³³ Since

³⁰ Confirmation Decision, para.30.

³¹ Application, para.27.

³² Confirmation Decision, paras.53-63, 65-71.

³³ Confirmation Decision, para.64.

the evidence is capable of supporting both interpretations of Article 70(1)(c), no unfairness arises in the proceedings. A Trial Chamber could still recharacterise these facts and circumstances according to Regulation 55. For the same reasons, an appellate determination is also premature at this stage. The Third Issue should be dismissed.

Relief Sought

18. None of the three Issues advanced in the Application are appealable issues. In addition, the Application fails to substantiate and meet the criteria under Article 82(1)(d). As a result, the Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 4th December 2014

At The Hague, The Netherlands