

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 23 January 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

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 and NARCISSE ARIDO*

Public

Joint decision on the applications for leave to appeal the “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute”

Decision 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 Gombo
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

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Others

REGISTRY

Registrar
Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

I, Judge Cuno Tarfusser, having been designated as Single Judge of Pre-Trial Chamber II (“the Chamber”) of the International Criminal Court;

NOTING the “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute”, dated 11 November 2014 (the “Confirmation Decision”);¹

NOTING the “Requête d’autorisation d’appel de la décision ICC-01/05-01/13-749 11-11-2014 de la Chambre préliminaire II quant à la confirmation des charges – art. 82.1(d) du Statut de Rome”, dated 14 November 2014 (“Mr Mangenda’s Application”),² requesting to be granted leave to appeal the Confirmation Decision in respect of the following issues:

Issue 1 : “[le] manque d’impartialité du Juge unique” (“Mr Mangenda’s First Issue”);

Issue 2 : “[l’]illégalité de la procédure pour cause d’actes d’instruction illégaux” (“Mr Mangenda’s Second Issue”) :

(a) “la légalité de la nomination d’un ‘conseil indépendant’”;

(b) “[la] légalité des écoutes téléphoniques entre avocats, telles qu’autorisées par le Juge unique”;

Issue 3 : “[l’]absence de responsabilité pénale du requérant” (“Mr Mangenda’s Third Issue”);

Issue 4 : “[l’]absence, insuffisance de moyens pour le défense, non paiement du conseil de la défense, violation du principe de l’égalité des armes” (“Mr Mangenda’s Fourth Issue”);

Issue 5 : “[le] refus de faire interroger des témoins” (“Mr Mangenda’s Fifth Issue”);

NOTING the “Prosecution Response to Jean-Jacques Mangenda Kabongo’s Application for Leave to Appeal the Confirmation Decision” dated 20 November 2014;³

¹ ICC-01-05/01-13-749.

² ICC-01/05-01/13-755.

³ ICC-01/05-01/13-762.

NOTING the “Defence request for leave to appeal decision ICC-01/05-01/13-749” dated 26 November 2014 (“Mr Bemba’s Application”),⁴ requesting to be granted leave to appeal the Confirmation Decision in respect of the following issues:

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 (“Mr Bemba’s First Issue”);

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 (“Mr Bemba’s Second Issue”);

NOTING the “Demande d’autorisation d’appel de la Défense de monsieur Fidèle Babala Wandu contre la ‘Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute’ rendue par la Chambre Préliminaire II en date du 11 novembre 2014 (ICC-01/05-01/13-749)” dated 27 November 2014 (“Mr Babala’s Application”),⁵ requesting to be granted leave to appeal the Confirmation Decision in respect of the following issues:

Issue 1: “[l]a Décision confirmative des charges viole l’article 30 du Statut” (“Mr Babala’s First Issue”);

Issue 2: “[l]a Décision confirmative des charges viole le principe de l’équité de la procédure” (“Mr Babala’s Second Issue”);

⁴ ICC-01/05-01/13-768.

⁵ ICC-01/05-01/13-769.

NOTING the “Requête de la Défense de M. Aimé Kilolo Musamba aux fins d’obtenir autorisation d’interjeter appel contre la Décision (ICC-01/05-01/13-749 du 11-11-2014) de la Chambre Préliminaire II portant sur la confirmation des charges. Article 82-1-d du Statut de Rome”, dated 28 November 2014 (“Mr Kilolo’s Application”),⁶ requesting to be granted leave to appeal the Confirmation Decision in respect of the following issues:

Issue 1: “de la violation de l’article 74-5 du Statut quant à l’obligation de motivation” (“Mr Kilolo’s First Issue”);

Issue 2: “de la confusion entretenue par la Cour, assimilant les atteintes prévues au paragraphe a) de l’article 70-1 à celles prévues au paragraphe b) du même article” (“Mr Kilolo’s Second Issue”);

Issue 3: “de l’absence d’explication sur les atteintes sous l’article 70-1-c) considérées comme des atteintes de conduite et non de conséquence” (“Mr Kilolo’s Third Issue”);

NOTING “Narcisse Arido’s Request for Leave to Appeal the ‘Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute’ (ICC-01/05-01/13-749)”, dated 1 December 2014 (“Mr Arido’s Application”)⁷ requesting to be granted leave to appeal the Confirmation Decision in respect of the following issues:

Issue 1: Whether the standard of proof under Article 25 (3) (c) of the Statute requires that the Suspect’s act(s) have only “an effect” on the commission or attempted commission of the offence (“Mr Arido’s First Issue”);

Issue 2: Whether a correct interpretation of Article 70 (1) (c) and Article 25 (3) (c) of the Statute permits the application of an accessory mode of liability to a conduct offence (“Mr Arido’s Second Issue”);

Issue 3: Whether the standard of proof under Article 61 (7) of the Statute requires the Pre-Trial Chamber to provide a reasoning for its legal interpretation of Article 70 offences (“Mr Arido’s Third Issue”);

⁶ ICC-01/05-01/13-771.

⁷ ICC-01/05-01/13-772.

Issue 4: Whether the standard of proof under Article 61 (7) of the Statute requires the Pre-Trial Chamber to draw conclusions from witnesses' evidence where there are ambiguities, contradictions, inconsistencies or doubts as to their credibility and therefore provide detailed reasoning as to its conclusion ("Mr Arido's Fourth Issue");

Issue 5: Whether the standard of proof under Article 61 (7) of the Statute allows the Pre-Trial Chamber to find that Mr. Arido encouraged the testimony of witnesses with money transfers in the absence of evidence of Mr. Arido transferring money to witnesses ("Mr Arido's Fifth Issue");

Issue 6: Whether the standard of proof under Article 61 (7) of the Statute permits the Pre-Trial Chamber to find that there were substantial grounds to believe that Mr. Arido committed the alleged offences related to false testimony in the absence of objective evidence that the witnesses lied under oath and on the sole basis of the witness' evidence ("Mr Arido's Sixth Issue");

Issue 7: Whether the standard of proof under Article 61 (7) of the Statute permits the Pre-Trial Chamber to confirm three separate charges based on the exact same set of facts (cumulative charging) ("Mr Arido's Seventh Issue");

NOTING the "Prosecution Response to Fidèle Babala Wandu's Application for Leave to Appeal the Confirmation Decision", dated 1 December 2014;⁸

NOTING the "Prosecution Response to Jean-Pierre Bemba Gombo's Application for Leave to Appeal the Confirmation Decision", dated 1 December 2014;⁹

NOTING the "Prosecution Response to Aimé Kilolo Musamba's Application for Leave to Appeal the Confirmation Decision", dated 4 December 2014;¹⁰

NOTING the "Prosecution response to Narcisse Arido's Request for leave to appeal the 'Decision pursuant to article 61(7)(a) and (b) of the Rome Statute'" dated 5 December 2014;¹¹

⁸ ICC-01/05-01/13-774.

⁹ ICC-01/05-01/13-775-Red.

¹⁰ ICC-01/05-01/13-778.

¹¹ ICC-01/05-01/13-780.

HEREBY RENDERS THE FOLLOWING DECISION.**A. APPLICABLE LAW**

1. The Single Judge notes article 21(1)(a), (2), (3) and 82(1)(d) of the Rome Statute (“Statute”), rule 155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations of the Court, as well as the well-established case law of the Appeals and Pre-trial Chambers of the Court in the matter of interlocutory appeals pursuant to article 82(1)(d) of the Statute.

B. CHAMBER’S DETERMINATIONS

2. At the outset, the Single Judge recalls the well-established principle that only an issue emanating “from the ruling of the decision concerned”, which “does not merely represent an abstract question or a hypothetical concern”¹² or a “mere disagreement”, may constitute an “appealable issue” for the purposes of the granting of the leave to appeal pursuant to article 82(1)(d) of the Statute. Furthermore, it is likewise well-established that the cumulative nature of the requirements set forth in the provision makes it unnecessary, once a proposed issue is found lacking in one respect, to proceed to the analysis as to the presence of any other of the additional requirements.

3. Since many of the issues raised by the Applicants are similar in nature and content, the principles of judicial economy make it appropriate to regroup and address them jointly. The analysis will be conducted in compliance with the afore-mentioned case law, according to which, first and foremost, an analysis for the purposes of article 82(1)(d) of the Statute is only required if the issue at stake arises from the Confirmation Decision.

¹² See *inter alia* ICC-01/05-01/08-532.

Whether the issues arise from the Confirmation Decision

4. The Chamber finds that Mr Mangenda's First, Fourth and Fifth Issues do not arise from the Confirmation Decision.

5. Mr Mangenda's First Issue centres on the alleged lack of impartiality of the Single Judge. This allegation, in various forms, dates back to the early stages of the pre-trial proceedings and has led to an entire thread of litigation before the Plenary of the Judges, triggered by as many as three requests for disqualification pursuant to the statutory framework of the Court. That phase was concluded by the decision of the Plenary of Judges dated 20 June 2014, which unanimously rejected all of the requests for disqualification. The Defence for Mr Mangenda itself acknowledges the fact that its First Issue does not arise from the Confirmation Decision, by stating that this issue is premised on "un attend du Juge unique, tel que repris dans sa décision du 24 juillet 2014", that is the decision rejecting Narcisse Arido's request for interim release.

6. Even more distanced from the Confirmation Decision are Mr Mangenda's Fourth and Fifth issues. The Fourth Issue revolves around complaints relating to the extent of the legal aid awarded to Mr Mangenda in the course of the proceedings, as initially determined by the Registry and later confirmed by the Presidency. The matter of a suspect's entitlement to legal aid, as well as its extent, is one of an administrative nature, in respect of which the statutory framework of the Court sets forth specific procedural avenues and remedies. As such, it is entirely extraneous to a decision rendered pursuant to article 61(7) of the Statute; hence the Chamber's decision not to address it in the Confirmation Decision. The fact that the same issue had also been addressed in Mr Mangenda's final submissions is not suitable to alter such extraneousness.

7. Mr Mangenda's Fifth Issue is based upon the rejection of Mr Kilolo's request to have *viva voce* testimonies in the context of the confirmation hearing: as correctly stated by the Defence for Mr Mangenda, this rejection occurred "par décision du 25 avril 2014" (i.e. decision ICC-01/05-01/13-363). This statement amounts to conceding that the Fourth Issue does not arise from the Confirmation Decision.

Whether an issue amounts to "a subject the resolution of which is essential for the determination of matters arising in the judicial cause"¹³ as opposed to a mere disagreement

(a) *With regard to factual findings*

8. Several of the issues raised in the Applications consist in challenges directed to factual and legal findings made by the Chamber in the context of the Confirmation Decision. As regards findings of a factual nature, this is the nature of Mr Babala's First Issue and of Mr Arido's Fourth, Fifth and Sixth Issues.¹⁴

9. Mr Babala submits that the Confirmation Decision is vitiated by "a major violation" of article 30 of the Statute, since neither the usage of codes in communication with the other suspects, nor, in particular, recourse to the expression "service après-vente" would be suitable to constitute the mental element required under that provision for a suspect's individual criminal responsibility to be established; more generally, it is argued that the Confirmation Decision fails to establish that Mr Babala had "d'une part, connaissance de la stratégie et des pratiques qui auraient été mises en oeuvre par les autres suspects ... et, d'autre part, l'intention de participer à ces stratégies et pratiques".

¹³ ICC-01/04-168, para. 9.

¹⁴ ICC-01/04-168, para. 9.

10. By its very formulation, Mr Babala's First Issue reveals its nature of "mere disagreement" with the Chamber's findings. As repeatedly clarified by the relevant case law, it takes more than the highlighting of the existence of a possible alternative interpretation of facts for an "issue" to be suitable to trigger the leave to lodge an interlocutory appeal. The Appeals Chamber has clearly stated that a Pre-trial Chamber enjoys broad discretion as to the analysis of the evidence for the purposes of its determinations under article 61 of the Statute. The Chamber devoted as many as five pages of the Confirmation Decision to illustrate its findings on the facts establishing substantial grounds to believe that Mr Babala incurred individual criminal responsibility. Furthermore, no submission is made by Mr Babala as to the way in which such issue would affect the fairness and expeditiousness of the proceedings, even less as to how and to what extent its immediate submission to the Appeals Chamber on an interlocutory basis, as opposed to having the issue benefitting from a full-fledged debate at trial, would result in "materially advancing the proceedings". As such, it does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

11. Similar shortcomings affect Mr Arido's Fourth, Fifth and Sixth Issues. They are all centred on the fact that the Chamber would have erroneously interpreted "the standard of proof under article 61(7) of the Statute" in, respectively, failing "to draw conclusions from witnesses' evidence where there are ambiguities, contradictions, inconsistencies or doubts as to their credibility and therefore provide detailed reasoning as to its conclusion" (Fourth Issue); in finding "that Mr. Arido encouraged the testimony of witnesses with money transfers in the absence of evidence of Mr. Arido transferring money to witnesses" (Fifth Issue); and in finding "that there were substantial grounds to believe that Mr. Arido committed the alleged offences related to false testimony in the

absence of objective evidence that the witnesses lied under oath and on the sole basis of the witness' evidence" (Sixth Issue).

12. Although all formally premised as constituting as many "abstract" legal issues purportedly arising from the Confirmation Decision (by way of referring them to "the standard of proof under 61(7) of the Statute"), the Chamber takes the view that Mr Arido's Fourth, Fifth and Sixth Issues all mirror his personal assessment of some specific items of evidence and of their probative value, which assessment happens to be different from and alternative to the one embraced by the Chamber. In the view of the Chamber, there were no such "ambiguities, contradictions, inconsistencies or doubts" marring the probative value of the evidence to such an extent as to make them unsuitable to support a finding of substantial grounds to believe that Mr Arido had committed the charges as confirmed; the evidence as available was found to be sufficient and adequate to support such finding, without the need to recur to supplemental evidence (such as "objective evidence that the witnesses lied under oath"). Furthermore, the Fourth Issue also seems to misrepresent the Confirmation Decision: it overlooks the fact that the Chamber (in particular, in paragraphs 88 through 94 of the Confirmation Decision) relied on several items of evidence which, in its view, adequately supported its finding that Mr Arido encouraged the testimony of witnesses by way of making promises as to what they might obtain should they accept to testify in favour of Mr Bemba. Similarly, the Sixth Issue misrepresents the Confirmation Decision by omitting to mention the considerations contained in its paragraph 64 as to the elements persuading the Chamber that some of the witnesses (including D2, D3, D4 and D6) had falsely testified before Trial Chamber III in case 01/05-01/08.

(b) *With regard to the interpretation of law*

13. Challenges to the interpretation and application of the law as contained in the Confirmation Decision are to be found in Mr Kilolo's Second Issue, as well as in Mr Arido's First, Second and Seventh Issues.

14. In his Second Issue, Mr Kilolo argues that the Chamber incurred in "confusion" by way of "assimilant les atteintes prévues au paragraphe a) de l'article 70-1-a à celles prévues au paragraphe b) du meme article": in his view, only evidence of a documentary nature, as opposed to oral evidence, can be the subject matter of the offence enshrined in sub-paragraph b of Article 70(1).

15. Mr Kilolo fails to make even an attempt to demonstrate to what extent this purported "confusion" would constitute an issue within the meaning of article 82(1)(d), except by saying that the Chamber, by adhering to an interpretation whereby the presentation of oral evidence could be subsumed under article 70(1)(b) of the Statute, would have committed "un grave manquement à [son] devoir". The submission of an alternative interpretation of the applicable law amounts to a mere disagreement with the Chamber, as such unsuitable to trigger leave to appeal pursuant to article 82(1)(d) of the Statute.

16. Mr Arido's First Issue consists in proposing an alternative reading of article 25(3)(c) of the Statute, whereby only an act having a "substantial effect" on the commission, or the attempted commission, of an offence would trigger individual criminal responsibility under this heading. In stating that, if leave were to be granted, it would submit "a reasonable interpretation" of the provision precisely along these lines, the Defence for Mr Arido reveals the nature of mere disagreement of its First Issue. Contrary to what stated in paragraphs 22 and 23 of Mr Arido's Application, the interpretation of article 25(3)(c) contained in the Confirmation Decision has nothing to do with the standard of proof

applicable at the pre-trial stage (and hence with the precedents quoted therein, granting leave to appeal on issues relating to that matter), but rather to the constitutive elements of the specific form of individual responsibility set forth in that provision.

17. It is obvious that any interpretation of a legal provision favoured by a Chamber will have an impact on its assessment of the evidence pertaining to that provision and hence to its determinations, including those made pursuant to article 61 of the Statute. This, however, is not and cannot be tantamount to saying that proposing an alternative interpretation of the same relevant provision is enough to frame an issue which might qualify as an appealable issue for the purposes of granting leave to lodge an *interlocutory* appeal; holding otherwise would result in obliterating the difference between interlocutory appeals and appeals pursuant to article 81 of the Statute, which is the proper procedural avenue where alternative views to the ones held by the Trial Chamber can be subjected to the scrutiny of the Appeals Chamber, once the matter has been extensively debated at trial. The material advance to the proceedings entailed by the pre-emptive submission of an issue to the Appeals Chamber, which a Chamber must be satisfied exists before granting leave to appeal under article 82(1)(d), cannot simply consist of the fact that the interlocutory appeal “would provide the parties and the Trial Chamber with an authoritative interpretation of the elements required”, as purported by the Defence for Mr Arido; if that were the case, all issues would be suitable to trigger an interlocutory appeal and the restrictive nature of the remedy enshrined in article 82(1)(d) would be nullified. As clarified in the very first decision construing article 82(1)(d) of the Statute, the fact that a given issue comes for the first time before the Court, and is therefore

“new”, is likewise per se unsuitable to support a finding that the immediate resolution of the issue would result in materially advancing the proceedings.

18. These considerations make it apparent that also Mr Arido’s Second Issue, aimed as it is at obtaining a statement of the Appeals Chamber as to the “correct” interpretation of article 25(3)(d) as regards the application “of an accessory mode of liability to a conduct offence”, falls short of the requirements established for the granting of an interlocutory appeal.

19. Mr Arido’s Seventh Issue is based upon his view that, as a matter of law, the Pre-Trial Chamber cannot “confirm three separate charges based on the exact same set of facts”. As such, it is also unsuitable to qualify as an issue for the purposes of article 82(1)(d). Again, under no circumstances would a determination of the Appeals Chamber on an interlocutory basis as to the “correctness” of confirming more than one charge on the basis of the same set of facts (or, otherwise stated, to confirm charges in the alternative) result in materially advancing the proceedings: if such correctness were to be confirmed, the result would simply consist in having delayed the start of the trial for such a time as it will take the Appeals Chamber to determine the issue; if it were to be denied, the result is that the Pre-Trial Chamber would have to select one of the forms of individual criminal responsibility which it found supported by substantial grounds to believe that such responsibility was incurred. This would only result in delaying the opening of the trial, without this preventing the Trial Chamber to consider any alternative form of individual responsibility at a later stage, most notably pursuant to regulation 55 of the Regulations of the Court.

(c) With regard to the content or the extent of the reasoning contained in the Confirmation Decision

20. Several issues centre on criticism levelled against the Confirmation Decision, whether relating to its content, the methodology followed by the Chamber in assessing the evidence, or the extent of its reasoning. These are the following: Mr Mangenda's Third Issue, Mr Babala's Second Issue, Mr Kilolo's Third Issue, Mr Bemba's First and Second Issues and Mr Arido's Third Issue.

21. Mr Mangenda's Third Issue argues that the Chamber would have erred in confirming the charges "sans avoir rencontré cette exception d'absence de responsabilité pénale". Mr Babala's Second Issue is very similar in nature to Mr Mangenda's Third Issue, only broader in its scope: the Chamber would have failed to provide adequate reasoning, and therefore erred, in that the Confirmation Decision "n'a rencontré et pris en compte que les arguments du Procureur" and "aucune évocation, aucune discussion n'est faite concernant les arguments de la Défense". Mr Kilolo's Third Issue identifies an "error" in the fact that the Chamber failed to provide a reasoned statement as to article 70(1)(c) offences being conduct and not result offences. Mr Bemba's First Issue alleges that the Chamber would have erred in "failing to entertain a number of defence submissions", as well as in "failing to properly motivate its legal conclusions on those Defence submissions which it did, albeit perfunctorily, entertain". Mr Bemba's Second Issue centres on the Confirmation Decision's alleged failure to provide an "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". Finally, Mr Arido's Third Issue requires a determination as to whether "the standard of proof under Article 61 (7) of the Statute requires the Pre-Trial Chamber to provide a reasoning for its legal interpretation of Article 70 offences".

22. The reasoning underlying all these issues is that failure to entertain one or more of the submissions made by the Defence, or entertaining it in such terms that the Defence considers “perfunctory”, would amount to an issue affecting the fairness of the proceedings. However, as clarified by the Appeals Chamber, the Chamber has the discretion to determine the extent of its reasoning, in light of the circumstances of the case, and is not under an obligation to address every single argument raised, as long as it can be said that “it indicates with sufficient clarity the basis of the decision”, including by “identify[ing] which facts it found to be relevant in coming to its conclusion”. As stated in the Confirmation Decision, the Chamber reached its conclusions by carrying out its own assessment of the Prosecutor’s allegations, and providing an explicit response to the arguments and the challenges raised by the Defence only when considered necessary, i.e. instrumental to its determination as to whether there were substantial grounds to believe that the crimes alleged by the Prosecutor had been committed.¹⁵ The fact that one or more of the Defence teams does not share the assessment made by the Chamber when determining such necessity or instrumentality *vis-à-vis* one or more specific lines of arguing constitutes a mere disagreement, as such not suitable to constitute an appealable issue within the meaning of article 82(1)(d).

23. The discretion enjoyed by the Chamber, coupled with the absence of legal requirements as to the length of a decision on the confirmation of charges, also entails that the latter can freely determine the extent of its reasoning, as long as the substantive requirement that such reasoning exists is met. This makes it apparent that also Kilolo’s First Issue, insofar as it consists of the claim that the Confirmation Decision would consist of a too “faible nombre de pages” to be

¹⁵ ICC-01/05-01/13-749, para. 26.

sufficiently reasoned, falls short of an appealable issue within the meaning and for the purposes of article 82(1)(d).

24. Finally, it is significant that none of the Defence teams submitting the issues falling in this group explains in any detail how an intervention of the Appeals Chamber on an interlocutory basis on the allegedly “overlooked” items, or “shortness” of reasoning, would result in “materially advancing the proceedings”. The Chamber notes that, far from “avoid[ing] the risk that lengthy and costly trial activities are nullified at a later stage”¹⁶, allowing an interlocutory appeal on the length, structure or content of the Confirmation Decision, even if successful, would only result in reopening the pre-trial phase and have a Pre-Trial Chamber re-examine the specific submissions at stake. As stated in the Decision, the fact that no express position on a specific argument is given does not mean that the Chamber has ignored or overlooked the argument, but simply that the Chamber found it not directly relevant to the conclusions reached, or otherwise adequate to counter its findings. It seems worth recalling that the purpose of an interlocutory appeal, and the very reason for providing for and granting it, is to advance a decision by the Appeals Chamber which, if taken at a later stage, would allow the judicial process to continue “clouded”, or to “unravel”, because of the erred decision. Absent these circumstances, there is no reason for a pre-emptive intervention of the Appeals Chamber. Only the trial will provide the most suitable scenario where the parties will benefit from ample opportunities to present their arguments, both as regards the issues raised in the applications as well as any other issues relating to the procedural or substantial aspects of the case, thereby triggering a decision of the Trial Chamber, which will then be subject to the ordinary and full scrutiny of the Appeals Chamber.

¹⁶ ICC-01/05-01/12-768, para. 15.

25. Accordingly, the Chamber finds that Mr Mangenda's Third Issue, Mr Babala's Second Issue, Mr Kilolo's Third Issue, Mr Bemba's First and Second Issues and Mr Arido's Third Issue do not constitute appealable issues.

26. Furthermore, as regards Mr Bemba's First Issue, the Chamber notes that its first limb could also be regarded as not being an issue arising from the Confirmation Decision. As noted by the Prosecutor, most of the issues listed by the Defence for Mr Bemba as having been purportedly neglected by the Chamber constitute nothing else than slight variations of arguments which had already been submitted, and decided upon, in the course of the proceedings. This is the case for the arguments relating to Mr Bemba's request that the Single Judge "excuse" himself from the decision under article 61 of the Statute, in support of which only arguments otherwise raised in the context of the determination of the requests for the Single Judge's disqualification are submitted; and also for the arguments revolving around the Chamber's purported "failure" to address the adequacy of the legal aid granted to the Defence for Mr Bemba, which matter – by its very nature extraneous to a confirmation decision - had also been previously addressed and ruled upon in the context of the procedures specifically designed for it.

27. As to the arguments relating to the purported failure by the Chamber to entertain the Counsel's "suggestion" to the Single Judge to excuse himself from the decision on the confirmation of the charges, the Chamber notes that the grounds which might lead to a judge to excuse himself or herself are the same as those which, should he or she fail to do so, would constitute a ground for having that judge's disqualification. As recalled above, a request for leave to appeal cannot become the path whereby litigation on issues previously debated in the same or in related proceedings can be reopened.

28. As regards Mr Bemba's Second Issue, it could also be construed as merely enshrining a disagreement as to the relevance given by the Chamber to the items of evidence considered in support of its findings on Mr Bemba's criminal responsibility. As such, it amounts to a mere disagreement on the Chamber's factual findings and fails to satisfy the requirements set forth under article 82(1)(d) of the Statute.

Issue relating to Independent Counsel's appointment and the lawfulness of telephone intercepts

29. Mr Mangenda's Second Issue addresses a topic which has been critical in these proceedings: the lawfulness of Independent Counsel's appointment and the telephone intercepts – and the Chamber's failure to address explicitly and extensively it in the context of the Confirmation Decision. More specifically, it is alleged that, in light of the amount of items of evidence resulting from Independent Counsel's revision of intercepts of the suspects' phone communications, as relied upon by the Chamber in reaching its determinations, a decision by the Appeals Chamber stating the unlawfulness of Independent Counsel's appointment and the ensuing revision of communications would entail "nécessairement la nullité des toutes les preuves obtenues par ces moyens, de telle sorte que la Chambre préliminaire n'aurait pu confirmer les charges sur cette base". Echoes of this line of arguing can also be found in the context of Mr Bemba's First Issue, albeit under the different perspective of a purported lack of motivation in dismissing the challenge brought to the evidentiary material before the Chamber resulting from Independent Counsel's mandate.

30. At the outset, it should be recalled that the unlawful nature of the intercepts of privileged communications and the appointment and role of Independent Counsel were the object of several decisions by the Single Judge in

the pre-trial phase. By accepting the reasoning contained in the Single Judge's decisions on these matters, the Chamber obviously intended to reiterate and confirm it in its entirety. Accordingly, it could be argued (as the Prosecutor does) that they do not arise from the Confirmation Decision.

31. Nevertheless, in light of the importance of the subject matter of this issue within the context of these proceedings, the Chamber wishes to point out that Mr Mangenda's Second Issue would not meet all relevant requirements, even if it were to be held that the Chamber should have ruled anew on the matter within the context of the Confirmation Decision. Even if it were to be acknowledged that these issues do arise from the Decision and that they do affect the fairness and expeditiousness of the proceedings, the Chamber is not persuaded that, at this stage, their submission to the Appeals Chamber in the context of an interlocutory appeal would be the appropriate way with a view to achieving the ultimate objective underlying article 82(1)(d) of the Statute (i.e., that its resolution at this stage by the Appeals Chamber would materially advance the proceedings), namely by making it necessary for the Pre-Trial Chamber to deny to confirm the charges. The Dutch intercepts represented only one of the categories of items of evidence on the basis of which the Chamber reached its determinations under article 61. These categories also included several witness statements and highly specific documents, such as telephone logs and receipts of transfers of money made by and between the suspects, for most of which the Defence teams failed to provide plausible alternative justifications; they were also critically instrumental in allowing the Chamber to refuse to confirm the charges relating to the alleged forgery of the documents. While it would not be appropriate for the Chamber to entertain now speculative submissions as to what its determinations would have been, if the Dutch intercepts had not been made available to it, the Chamber

believes that, at this stage, the trial is the sole appropriate venue where a full-fledged debate on the admissibility, relevance and probative value of each of the evidentiary items included in the record will take place and that an attempt to curtail or otherwise hinder that debate by the early involvement of the Appeals Chamber as regards a fraction of the probative material would not result in materially advancing the proceedings. It is significant that no conclusive submission in respect of this fundamental requirement is made by any of the Defence teams. It is true, as recalled by the Defence for Mr Bemba, that the plenary of judges, when dismissing the requests for the disqualification of the Single Judge, found that “many legal and procedural issues remain open to interpretation and litigation in the course of the proceedings” and that those issues “are precisely the types of issues governed by the Court’s appellate process”; however, there is no reason to conclude, as the Defence for Mr Bemba seems to do, that this “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.

32. In light of the above, the Chamber concludes that none of the issues raised by the Applicants satisfies all the cumulative requirements set forth under article 82(1)(d) of the Statute.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS Mr Mangenda’s, Mr Babala’s, Mr Bemba’s, Mr Kilolo’s and Mr Arido’s Applications;

ORDERS the Registrar to transmit the Confirmation Decision and the record of the proceedings of the case *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*

to the Presidency, as provided for in rule 129, second sentence, of the Rules of Procedure and Evidence, in order for the Presidency to constitute a Trial Chamber.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser

Single Judge

Dated this Friday, 23 January 2015

The Hague, The Netherlands