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Date: **07 August 2009**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Single Judge**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO

Public

Prosecution's Response to the Defence's Urgent « *REQUÊTE AUX FINS DE SUSPENSION DE TOUTE LA PROCEDURE EN COURS* »

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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Unrepresented Victims	**Unrepresented Applicants for Participation/Reparation**
The Office of Public Counsel for Victims Ms Paolina Massidda	**The Office of Public Counsel for the Defence**
States Representatives	**Amicus Curiae**

REGISTRY

Registrar Ms Silvana Arbia	**Defence Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

Background

1. On 9 May 2008, the Office of the Prosecutor (hereinafter referred to as the "Prosecution") filed its arrest warrant application in the Situation of the Central African Republic requesting, *inter alia*, the issuance of a warrant of arrest for Jean-Pierre Bemba Gombo (hereinafter referred to as the "Accused") under Article 58(1) of the Rome Statute (hereinafter referred to as the "Statute") and the provisional freezing or seizure of the Accused's assets, pursuant to Article 93(1) (k) of the Statute.[1]

2. On both 23 May and 10 June 2008, Pre-Trial Chamber III (hereinafter referred to as the "Chamber") issued a warrant and an amended warrant of arrest, together with requests to various states provisionally requesting the freezing or seizure of the Accused's assets in order to preserve the assets to satisfy any order(s) that may accrue to the benefits of victims at a later stage in the proceedings.

3. After the arrest and transfer of the Accused to the seat of the Court, the Defence filed various applications requesting partial unfreezing of the Accused's assets in order to meet the costs of its case preparation and to provide support to the Accused's family.[2] On two occasions the Chamber granted the Defence's requests for partial lifting of seizure of assets.[3]

4. On 29 June 2009, the Single Judge held a hearing on interim release (hereinafter referred to as the "29 June hearing") pursuant to Rule 118(3) of the Rules of Procedure

[1] ICC-01/05-13-US-Exp, transferred to the Case under the reference ICC-01/05-01/08-26-US-Exp
[2] *See* ICC-01/05-01/08-81-Conf, *see also*ICC-01/05-01/08-193-Conf, ICC-01/05-01/08-337-Conf and ICC-01/05-01/08-387-Conf
[3] ICC-01/05-01/08-149-Conf, 10 October 2008, ICC-01/05-01/08-339-Conf, 31 December 2008.

and Evidence (hereinafter referred to as the "Rules").[4] At the hearing, the Defence informed the Single Judge of its financial difficulties due to inaccessibility of the Accused's funds and the impact on its case preparation since March 2009.

5. The Registrar's representative at the hearing undertook to assist in the resolution of the issue by provisionally providing financial assistance to the Defence, until access to funds for its case preparation is restored.

6. At the same hearing, both the Single Judge and the Registrar's representative observed that this was the first time the Defence had raised the issue. The Single Judge directed the Defence to file a written submission on the issue of access to funds for its case preparation,[5] which the Defence undertook to do.[6]

7. On 17 July 2009, the Defence filed its Urgent *"Requête aux fins de suspension de toute la procédure en cours"*[7] to which it subsequently filed a corrigendum on 20 July 2009,[8] (hereinafter referred to as the "Defence's Application"). In its Application, the Defence requests that the Chamber grants a stay of all proceedings on grounds that its right had been violated. In support, the Defence advanced the following reasons; (a) that the seizure of the Accused's assets was not done consistently with the Statute; (b) that the Registry failed to provide financial legal assistance it undertook at the 29 June hearing and; (c) that as a result of these violations, the Accused has been unable to honour his financial obligations to both his Defence team and the support of his family.

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[4] ICC-01/05-01/08-425
[5] ICC-01/05-01/08-T-13-CONF-ENG, p. 11, lines 9-24, p. 63, lines 12-15
[6] *Ibid,* p. 63, lines 18-19 also p. 10 lines 9-12.
[7] ICC-01/05-01/08-452
[8] ICC-01/05-01/08-452-Corr

8. On 21 July 2009, the Single Judge issued an "Order for Clarification of Defence-Related Issues" ordering *inter alia* that; (a) the Defence provide and clarify all information pertaining to the current composition of the Defence team, the name of the counsel whose mandate was not renewed, the circumstances surrounding the non-renewal of counsel's mandate as well as those surrounding the resignation of the legal assistant by 23 July 2009 and; (b) the Defence Support Section within the Registry provides its observations on the Defence-related issues raised in both the Defence's Application and its related annexes by 23 July 2009.

9. On 23 July 2009, the Defence filed its "Réponse à l'Ordonnance de la Chambre Préliminaire II du 21 Juillet 2009 intitulée «Order for Clarification of Defence-Related Issues»"[9] (hereinafter referred to as the "Defence's Response"). The Defence's Response confirms the non-renewal of the mandate of one of its counsel and that its legal assistant had resigned and accepted another position.[10] It identifies the current composition of its team as follows: Mr. Nkwebe Liriss, Lead Counsel, Mr. Pierre Legros, Associate Counsel (both on a *pro bono* basis), Mr. Aimé Kilolo Musamba, Associate Counsel and Mr. Jean Jacques Kabongo Mangenda, Case Manager.

10. On that same day, the Registry filed its "Observations du Greffier suite à l'Ordonnance de la Chambre en date du 21 Juillet 2009"[11], in which it disputes information from the Defence that the mandate of one of its counsel has not been renewed.[12] It reports an additional Defence's request to appoint a new counsel, which it urgently granted. With regard to the provision of legal aid, the Registry submits that

[9] ICC-01/05-01/08-460
[10] The counsel referred to in the Defence's Application is Mr. Karim A. A. Khan. The Legal Assistant referred to is Madam Virginia Lindsay.
[11] ICC-01/05-01/08-459
[12] According to Registry's submission, Counsel Karim A. A. Khan confirms that he maintains his position in the Defence team as a co-counsel. Further, the Registry indicates that it has not received information indicating that he is no longer a member of the Defence team, *Ibid,* para. 5-7.

while it has been exploring possibilities for a provisional solution to the non-payment of fees to the Defence team, it does not consider the accused to be indigent[13] and consequently not entitled to judicial financial assistance. Nevertheless, the Registry stresses that its negotiations with national authorities to unfreeze the assets in question are advancing progressively and a solution is expected in the foreseeable future.[14]

11. Pursuant to Regulation 24(1) of the Regulations of the Court (hereinafter referred to as the "Regulations"), the Prosecution files its response to the Defence's Application for a stay of all proceedings.

Prosecution's Response

12. The Prosecution submits at the outset that the Defence has not adhered to the procedures set out in the applicable Rules and Regulations regulating the provision of legal assistance. Accordingly, its legal challenge to the provisional freezing of assets is both premature and legally unfounded. The Prosecution requests that the Single Judge dismisses the Defence's Application for a stay of all proceedings because the Application is unsupported both by the facts and the Court's legal regime (the Statute, the Rules and the Regulations).

The Defence's request for a stay of all proceedings is unfounded legally and factually

13. The Prosecution submits that the Defence's Application should be dismissed on two grounds; first, because of its failure to exhaust the due process regime established

[13] Pursuant to the decision ICC-01/05-01/08-76 – *see* ICC-01/05-01/08-459-Conf-Anx3
[14] ICC-01/05-01/08-459-Conf-Anx3

by the Court's legal framework and; second, because the Defence has failed to establish that the Accused's rights have been violated.[15]

14. Amongst a range of measures open to the Defence to resolve the issue are those contained in Regulation 85 of the Regulations. The Appeals Chamber has provided guidance on Regulation 85 of the Regulations in the *Lubanga* case. It determined that decisions on payment of legal assistance are reviewable by the Presidency (Regulation 85(3) of the Regulations), while those concerning the scope of legal assistance are reviewable by the relevant Chamber (Regulation 83(4) of the Regulations).[16] Consistent with the *Lubanga* decision, the Defence was required to bring the purported failure of the Registry to pay for legal assistance to the attention of the Presidency (Regulation 85(3) of the Regulations). Instead of pursuing the above-mentioned options, the Defence has chosen to apply for the most drastic measure available, a stay of all proceedings.

15. The Prosecution notes that the records of the proceedings do not support the Defence's Application. First, the available record does not indicate that the Defence applied to the Presidency to seek a resolution of the issue. Second, there is no evidence that the Defence has filed any application requesting partial relief from seizure or freezing of assets within the time period relevant to its Application.

16. The Defence's assertion that it has encountered financial difficulties as a result of the Chamber's orders relating to the provisional freezing or seizure of the Accused's

[15] The Defence has not followed the procedure envisaged in Regulation 85 to enable it make at a minimum a case of violation of its rights. This submission assumes critical importance because the power to stay proceedings is not expressly provided for in the Statute, but has been held to be applicable by the Appeals Chamber on the basis of the provisions of Article 21(3) of the Statute. In this regard, the Appeals Chamber stated that: "the power to stay proceedings for abuse of process, as indicated, is not generally recognized as an indispensable power of a court of law, an inseverable attribute of the judicial power. The conclusion to which the Appeals Chamber is driven is that the Statute does not provide stay of proceedings for abuse of process as such". ICC-01/04-01/06-772 OA4, 14 December 2006, para. 35.

[16] *Prosecutor v. Lubanga,* ICC-01/04-01/06-873 OA8, 27 April 2007, para. 7- 8.

assets is also unsupported by the facts. First, the Prosecution notes that an issue relating to financial difficulties encountered by the Defence from March to date, the time period relevant to its Application, was raised for the first time at the 29 June 2009 hearing. Second, the Chamber directed the Defence to file a written submission stating its position.[17] The Defence agreed. But it did not do so.

17. In light of the foregoing, it is submitted that the Defence's Application for a stay of all proceedings should be dismissed.

The Defence's request for a stay of proceedings is disproportionate

18. The Prosecution further submits that the Defence's request for a stay of proceedings is also disproportionate, given both the nature of the alleged violation as well as the excessive measure sought to address the alleged violation. The alleged violation envisaged by the Defence's Application does not rise to the threshold of gravity that necessitates resorting to the measure sought, given both the availability of other lesser remedies, as well as Registry's expressed determination to seek an urgent resolution of the issue.[18] This submission finds support in the jurisprudence of the Appeals Chamber, when it held that "[n]ot every infraction of the law or breach of the rights of the accused in bringing him/her to justice will justify a stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial. As a consequence, the power of a court of law to stay proceedings should be sparingly exercised"[19].

[17] ICC-01/05-01/08-T-13-CONF-ENG, p. 11, lines 9-24, p. 63, lines 12-15 and lines 18-19 also p. 10 lines 9-12
[18] The Registry stresses that its negotiations with national authorities to unfreeze the assets in question are progressively advancing and a solution is expected in the foreseeable future. ICC-01/05-01/08-459-Conf-Anx3
[19] *Prosecutor v. Lubanga*, ICC-01/04-01/06-772 OA4, 14 December 2006, paras. 30-31.

19. The Prosecution submits that a stay of *all proceedings* cannot be the inevitable consequence and the "only correct course" to take in respect of seeking relief on a conditional request.[20] The Defence requests a stay of all proceedings, an unqualified relief, but does so on the basis of a condition (provisional legal aid), resolution of which it has not fully explored within the Court's legal framework. It is submitted therefore that until the Defence exhausts the range of due process measures still available for a resolution of the issue, its Application for a stay of all proceedings should be dismissed.

20. Moreover, the Appeals Chamber has emphasized that the grant of a stay should be sparingly exercised, given its implications for the various legal interests at stake in the investigation and prosecution of international crimes. In this regard, Trial Chamber 1 recognized in the *Lubanga* case that a stay has adverse implications for "the international community, the peoples of the Democratic Republic of Congo, the victims and the accused himself."[21]

The Defence's allegation that its property is unlawfully frozen is legally and factually unsubstantiated

21. The Defence's Application alleges that the Registry unlawfully sought the restraint of the Accused's property. The Defence further contends that Article 93(1)(k) of the Statute only authorizes the freezing of assets related to the crimes. For the reasons elaborated below, the Prosecution submits that the Defence's allegation is legally and factually unsupported.

[20] The Appeals Chamber made a similar finding in the *Lubanga case*. See ICC-01/04-01/06-1487, p. 3, para.1.
[21] ICC-01/04-01/06-1401, 13 June 2008, para. 95. Trial Chamber 1's comments on the peoples of the Democratic Republic of Congo should be viewed within the particular context of that case. Nevertheless the principle enunciated by Trial Chamber 1 holds true for the peoples of the Central African Republic.

22. The Prosecution disputes the Defence's submission that Article 93(1)(k) of the Statute is strictly related to the crimes. This interpretation ignores Article 57(3)(e) of the Statute which establishes that the Pre-Trial Chamber may seek the cooperation of States Parties to take protective measures for the purpose of forfeiture, "in particular for the ultimate benefit of victims." While both Articles 57(3)(e) and 93(1)(k) of the Statute make reference to "forfeiture", it will be contrary to the "ultimate benefit of victims" if the possibility of seeking the cooperation of the States Parties to take protective measures under these Articles were limited to guaranteeing the future enforcement of forfeiture of product of crimes.[22] Moreover, Rule 99 of the Rules, in the subsection dealing with reparations to victims, gives the Pre-Trial Chamber the power to determine whether measures pursuant to Article 57(3)(e) of the Statute should be requested, including at the request of the victims or their legal representatives who have made a request for reparations.

23. Accordingly, the Chambers have consistently held that they may, pursuant to Article 57(3)(e) of the Statute, seek the cooperation of States Parties to take measures under Article 93(1)(k) of the Statute for the purpose of securing the enforcement of a future reparation award.[23] In none of the relevant decisions were requests for cooperation in identification, tracing and freezing or seizure limited to the property or assets connected to the crimes charged.

24. As noted by Pre-Trial Chamber in *Lubanga*, "the reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. […] early tracing, identification and freezing or seizure of the property and assets of the

[22] *Ibid*., p. 135
[23] *Prosecutor v. Lubanga*, ICC-01/04-01/06-8-Corr, para 134. See also *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/07-33-US, pp. 2-3; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-7-US-tENG, p. 2; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/07-7-US. p. 2. *Prosecutor v. Al Bashir*, ICC-02/05-01/09-4-US-Exp, p. 5.

person against whom a case is launched […] is a necessary tool to ensure that, if that person is finally convicted, individual or collective reparation awards ordered in favor of victims will be enforced. Should this not happen, the Chamber finds that by the time an accused person is convicted and a reparation award ordered, there will be no property or assets available to enforce the award".[24] Thus, in light of the object and purpose, Article 93(1)(k) of the Statute should be broadly interpreted and not restricted to crime-related assets.[25]

25. The Prosecution submits that the Defence's allegation discounts the Chamber's factual findings on pillaging of property in the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo"[26] (hereinafter referred to as "the Confirmation Decision"). In that decision, the Chamber unanimously found that; "having reviewed the disclosed evidence as a whole, [.]... the evidence shows that as MLC soldiers moved in battle from on or about 26 March 2003 throughout the Central African Republic territory, they appropriated for their own private and personal use belongings of civilians...[.] The evidence shows that MLC soldiers went through the neighborhoods in groups and searched for money and other valuable items"[27]. Accordingly, it unanimously confirmed that "Jean-Pierre Bemba Gombo is criminally responsible within the meaning of Article 28(a) of the Statute for pillaging, constituting a war crime (count 8) within the meaning of Article 8(2)(e)(v) of the Statute."[28]

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[24] *Prosecutor v. Lubanga*, ICC-01/04-01/06-8-Corr, para 136 reclassified public pursuant to the Decision ICC-01/04-01/06-37. *See also* ICC-01/05-01/08-339-Conf, para 11.
[25] This interpretation finds support in some commentaries on the drafting history of the Statute ; See also; Kimberly Prost and Claus Kreß, revised by Christopher K. Hall, Commentary on the Rome Statute of the International Criminal Court, second edition, Triffterer ed., 2008, at p. 1578
"This provision obligates State Parties to have mechanisms in place which will allow for the freezing of any of the listed items, to ensure that they are available should the Court ultimately order forfeiture of them."
[26] ICC-01/05-01/08-424, pps. 107-112
[27] *Ibid,* p. 107
[28] *Ibid*, pps. 184-185

26. In view of the unanimous factual finding by the Chamber, the Prosecution submits that it is lawful to freeze property when there exists a legitimate basis to believe that the property seized or frozen constitutes assets derived directly or indirectly from the confirmed charge(s), and, second, to preserve any such assets for the sake of any reparation order(s) which may accrue to the benefits of victims at a later stage in the proceedings.[29] Accordingly, a request for cooperation that seeks the freezing of assets in order to give effect to a future reparation judgment is thus both appropriate and consistent with the Statute, the Rules, and the purpose and intent of the reparations scheme.

27. Thus, the request to freeze assets was properly made; it served the purposes of the Statute and is consistent with its language. The Defence's allegation that it is improper as a matter of law should be dismissed.

A stay of proceedings will affect the fair and expeditious conduct of the proceedings

28. A stay of proceedings will inherently impact on the fair and expeditious conduct of the proceedings and adversely affect the rights and interests of the parties and participants in the proceedings, in particular, those of the victims, who will, as a consequence, be excluded from justice.[30] This submission gains additional significance because the conduct alleged in the Defence's Application is neither attributable to the Prosecution nor the victim participants. Consequently, a stay of these proceedings will affect these legal interests, whose collective conducts are not in issue in the Defence's Application.

[29] *See* Article 75.
[30] "The judges are acutely aware that by staying these proceedings the victims have, in this sense, been excluded from justice" *Prosecutor v. Lubanga,* ICC-01/04-01/06-1401, 13 June 2008, para. 95

29. Moreover, Chambers of this Court have consistently held that fairness requires that the procedural and substantive rights and obligations of all participants be respected,[31] finding; "that the Prosecution must be able to exercise the powers and fulfill the duties listed in article 54"[32] and to present its case.[33] A stay of proceedings if imposed would not only interfere with the Prosecution's ability to present its case, but would also affect the victims' ability to present the full extent of their victimization, thus perpetuating their trauma.

30. Equally, the grant of a stay will affect the expeditiousness of these proceedings because it would hamper the Prosecution's ability to present its case in a timely manner. Furthermore, it would severely hamper the Prosecution's conduct of its investigations because its operational means for doing so would have been halted. A stay will equally affect the rights of the Accused to be tried without undue delay pursuant to Article 67(1)(c) of the Statute. This delay will in turn affect the overall fairness of the proceedings. The Prosecution recalls that the Appeals Chamber has stated in this regard that; "[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial."[34]

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[31] See further Situation in the DRC, ICC-01/04-141, 25 April 2006, para. 48; *Prosecutor v Kony et al*, ICC-02/04-01/05-212, 26 February 2007, paras. 10-11. This has been held to include respect for the norms of a fair trial (Situation in the DRC, ICC-01/04-168, 13 July 2006, para. 11), equality and the principle of adversarial proceedings (Situation in the DRC, ICC-01/04-135-IEN, 31 March 2006, para. 38)
[32] Situation in the DRC, ICC-01/04-13 5-tEN, 31 March 2006, para. 39.
[33] Fairness has also been linked to the ability of a party to present its case - see *Prosecutor v Kony et al,* ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.
[34] ICC-01/04-168, 13 July 2006, para. 11.

The Prosecution has an interest in upholding the Statute and ensuring overall fairness of the proceedings

31. As stated, the conduct complained of in the Defence's Application is not attributable to the Prosecution. The Prosecution has discharged its obligations in these proceedings in accordance with the Statute; both in relation to the conduct of its investigations on the provisional freezing or seizure of the Accused's assets as well as the conduct of its case in general.

Conclusion

32. For all above-explained reasons, the Prosecution requests that the Defence's Application be dismissed.

Luis Moreno-Ocampo, Prosecutor

Dated this 7th day of August 2009

At The Hague, The Netherlands