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No.: ICC-01/05-01/08

Date: 17/01/2014

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR
v. Jean-Pierre Bemba Gombo

Public Redacted

Defence Request for Leave to Appeal the “Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’”

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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Section**

A. BACKGROUND

1. The [REDACTED] is a State Party to the Rome Statute of the International Criminal Court (“Statute”).

2. The intimidation of Defence witnesses and Defence team members¹ in the [REDACTED] has been a feature of the present case. Trial Chamber III (“the Chamber”) has heard sworn evidence concerning intimidation, threats² and the arrest of a Defence witness³ as a result of contact with the Defence team, in addition [REDACTED]⁴ In November 2012, the Chamber heard evidence [REDACTED].⁵ This evidence remains unchallenged.

3. Against this backdrop, a number of Defence witnesses [REDACTED], who are undoubtedly in the best position to appreciate the realities of the security risks arising out of an association with the Defence, expressed an unwillingness to testify if disclosure of their identities [REDACTED] was a precondition. These witnesses included D04-44 and D04-14.

4. The International Criminal Court appears to have no mechanism in place to facilitate the presentation of witnesses [REDACTED] without disclosing their identities [REDACTED].

5. Despite their unwillingness to have their identities disclosed to their superiors, the Defence elected not to remove Witnesses D04-44 and D04-14 from its list, as they were deemed critical to the Defence case. The importance of these witnesses stems from their being uniquely placed to provide the Chamber with

¹ [REDACTED]

² CAR-D04-PPPP-0049: T-271-ENG, page 36; T-271-ENG, page 38, T-271-ENG, page 26 -29; T-271-ENG, page 31-38; CAR-D04-PPPP-0019: T-285-ENG, page 23 - 25; T-290-ENG, page 77.

³ ICC-01/05-01/08-T-352-ENG RT, p.35.

⁴ [REDACTED]

⁵ T-271-ENG, page 36, line 23 – page 37, line 5; T-241-ENG, page 13, line 22 - page 14, line 4

evidence from the perspective of soldiers who were amongst MLC contingent in the Central African Republic during the events in question. [REDACTED] from within the MLC troops who crossed into Bangui, these witnesses can provide vital details as to the operational command structure in place, the implementation of this command structure at ground level, the commission of crimes, the movement and location of troops, and other significant details directly relevant to the charges against the accused. Their testimony is of particular importance given the failure of the Prosecution to present witnesses who were part of the MLC contingent on the ground in the Central African Republic at the time.

6. Accordingly, as a proposed solution to the inability of the ICC to bring the witnesses to The Hague without formal authorisation [REDACTED], the Defence suggested in October 2012 to the Victims and Witnesses Unit (“VWU”) that [REDACTED]:⁶

[REDACTED]

7. [REDACTED] the Registry provided the Chamber with its own alternate proposed solution to the problem of witnesses who did not want authorisation sought on their behalf:⁷

[REDACTED]

8. The Chamber did not implement this solution. Rather, [REDACTED].

9. Between December 2012 and October 2013, no workable solution was proposed by the Registry or VWU to facilitate the presentation of the evidence of these witnesses.

⁶ [REDACTED]

⁷ [REDCATED]

10. As such, and through extensive efforts and regular contact by its resource person in the [REDACTED], the Defence eventually secured the agreement of Witness D04-14 and D04-44 that their identities be disclosed. The Defence immediately [REDACTED].⁸ However, another feature of the present proceedings has been the consistent obstruction on the part of the [REDACTED] authorities in facilitating the presentation of Defence witnesses. This obstruction was acknowledged by the Registry [REDACTED]:⁹

[REDACTED]

11. The obstruction also resulted in the Chamber rendering its [REDACTED].¹⁰ Specifically, the Chamber:

[REDACTED]

12. Witnesses D04-14 and D04-44 were ready and available to testify, and the Registry had requested formal authorization, presumably through its official focal point, over a month before the Defence was ultimately ordered to conclude the presentation of its oral evidence on 15 November 2013. The obstacle to hearing Witnesses D04-14 and D04-41 was the failure, or refusal, on the part of the relevant authorities in the [REDACTED] to authorize their testimony.

13. As such [REDACTED].¹¹

14. The same day, Chamber rendered its *Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'* ("Impugned Decision"), holding in relevant part:¹²

⁸ [REDCATED]

⁹ [REDACTED]

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² ICC-01/05-01/08-2899-Conf, para. 19.

The defence being fully aware of the **usual required time for securing cooperation**, should have reasonably anticipated that such late request [sic] on 11 October 2013 was likely to be problematic. Consequently, the Chamber in exercising its discretionary power, finds that no good cause has been shown in order to extend the deadline for the completion of the defence's presentation of oral evidence.

15. The Impugned Decision did not consider the Defence arguments concerning the importance of [REDACTED].¹³ The Chamber made no finding that the proposed evidence of Witness D04-44 and D04-14 would be repetitive, irrelevant or unnecessary.

B. REQUEST FOR LEAVE TO APPEAL

(a) Conditions for Leave to Appeal

16. Leave to appeal pursuant to Article 82(1)(d) will be granted if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned decision, and that meets the following two cumulative criteria as set out in that provision:¹⁴

- a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

17. The Defence notes that the Appeals Chamber has held that '[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a

¹³ [REDACTED]

¹⁴ ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4

question over which there is disagreement or conflicting opinion.’¹⁵

(b) Identification of Appealable Issues

18. The Defence submits that the Impugned Decision gives rise to the following identifiable subjects or topics requiring a decision for their resolution, which meet the criteria set out under Article 82(1)(d), and warrant consideration by the Appeals Chamber. These appealable issues are not merely “disagreements” or “conflicts of opinion” between the Defence and the Chamber but rather consist of discrete legal questions which arise directly out of the Impugned Decision.

19. The appealable issues identified are as follows:

- (a) Whether the Trial Chamber erred in rendering the Impugned Decision in the absence of submissions from the Prosecution and Legal Representatives of Victims, and a response from the Defence, to ensure a full airing of the disputed issues;
- (b) Whether the Trial Chamber erred in law failing to consider Defence arguments on the significance of the testimony of Witnesses D04-14 and D04-44;
- (c) Whether the Chamber erred in law in applying a different standard to the presentation of evidence by the Prosecution and the Defence, in violation of Article 67(1)(e) of the Statute, particularly as concerns the availability of Prosecution witnesses CAR-OTP-PPPP-0015; CAR-OTP-PPPP-0045; and CAR-OTP-PPPP-0044;

¹⁵ Situation in the Democratic Republic of the Congo, "Judgment 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, para. 9.

- (d) Whether the Trial Chamber erred in preventing the Defence from presenting the evidence of key exculpatory witnesses despite [REDACTED]
- (e) Whether the Trial Chamber erred in preventing the Defence from presenting critical exculpatory evidence on the basis of the “usual time required”, [REDACTED] thereby accepting the obstruction on the part of [REDACTED] authorities and failing to ensure the provision of conditions for a fair trial pursuant to its obligation under Article 64(2) of the Statute; and
- (f) Whether the Trial Chamber erred in failing to consider the lack of cooperation on the part of a State Party to the ICC as good cause for extending the deadline for the presentation of Defence oral evidence to afford the accused the right to bring evidence to counter the allegations against him.

(c) *Satisfaction of the Conditions for Leave to Appeal*

20. Each of these identified appealable issues significantly affects the **fair conduct of the proceedings**. Preventing an accused from presenting evidence to rebut the allegations against him goes to the heart of a fair trial. In refusing to order cooperation, the decision also affects the **expeditious conduct of the proceedings**. Witnesses D04-14 and D04-44 are ready to testify immediately, [REDACTED]¹⁶ all that is lacking for the trial to be concluded in a manner which ensures compliance with the Chamber's obligations under Article 64(2) is authorisation on the part of the [REDACTED] authorities. In refusing to order cooperation to resolve this impasse, the Chamber has left this critical issue of fairness open, requiring further litigation at both first instance and on appeal.

21. **An immediate resolution by the Appeals Chamber** would materially advance the proceedings. Although the Defence notes that the current trial is entering its final phase, the Impugned Decision contains issues which can not be safely left for any potential appeal from a Judgement in first instance. Should the Appeals Chamber identify errors in the Chamber's approach and quash the Impugned Decision, the error can be corrected before a final judgement is rendered, thus avoiding a retrial or the reopening of the proceedings to allow the presentation of the evidence of Witnesses D04-44 and D04-14.

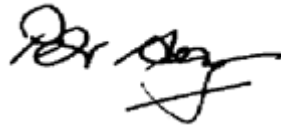
C. **RELIEF REQUESTED**

22. In light of the above arguments, the Defence respectfully requests that the Chamber:

GRANT the Defence request for leave to appeal the *Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the*

¹⁶ [REDACTED]

"Defence Request for an Order for Cooperation"

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Peter Haynes
Lead Counsel for M. Bemba

Done at The Hague, the Netherlands

17 January 2014