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Date: 09/05/2014

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

**Defence Request for Leave to Appeal the Decision on the Defence Request for
Interim Relief**

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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A. INTRODUCTION

1. The Defence for Jean-Pierre Bemba Gombo (“the Defence”) respectfully requests that the Trial Chamber grant leave to appeal the “Decision on the Defence Request for Interim Relief (“Impugned Decision”).¹

2. The Defence is concerned by the potential implications of the Impugned Decision on Mr. Bemba’s rights to a fair trial. The fact that the Trial Chamber refused to take measures to protect Mr. Bemba’s privileges under Article 67(1)(b) and Rule 73(1) in relation to the seizure and review of privileged Defence materials by the Prosecution in connection with the Article 70 has a potentially fatal impact on the overall fairness of the instant case.

B. PROCEDURAL BACKGROUND

3. In its 26 April 2013 “Decision on the prosecution’s request relating to Article 70 investigation”,² the Trial Chamber decided that it had no competence to address any application concerning Article 70 matters and that the Pre-Trial Chamber was thus “the competent judicial authority to make determinations on any investigative measures requested by the prosecution in relation to an Article 70 investigation”.³

4. On 21 January 2014, the Defence filed its “Defence Request for Interim Relief” (“Defence Request”),⁴ in which it seized the Chamber with the following requests: (i) order the Prosecution to: (a) desist from accessing any material, which emanated from Mr. Bemba or the Defence team, or from utilising the contents of this material or the Prosecution’s knowledge of the contents of this material in any manner; and (b) prepare a log of any persons who have had access to the material, and inform the Defence as to

¹ ICC-01/05-01/08-3059.

² ICC-01/05-01/08-2606-Red.

³ ICC-01/05-01/08-2606-Red, para. 21.

⁴ ICC-01/05-01/08-2945.

whether this material has served as the basis for any investigative actions or submissions before the ICC or domestic authorities; (ii) order all States which have been requested to monitor Defence communications or seize Defence property, including but not limited to Belgium, France, the Democratic Republic of Congo, the Netherlands, and the United Kingdom, to immediately desist from taking any steps concerning the seizure, monitoring or disclosure of information concerning the Defence of Mr. Bemba; and (iii) request that the Prosecution ask for a suspension of the Article 70 proceedings in their entirety or in part pending full litigation as to the legality of the seizure of Defence material and the monitoring of Defence communications.⁵

5. On 10 February 2014, the Prosecution filed its "Prosecution's Response to 'Defence Request for Interim Relief'" ("Prosecution Response"),⁶ in which it asked the Chamber to reject the Defence Request in its entirety,⁷ asserting, *inter alia*, that it "is not privy to any information that is protected by legitimate professional privilege",⁸ and that the Defence Request is therefore speculative and unsubstantiated.⁹

6. On 2 May 2014, Chamber rendered the Impugned Decision, holding in relevant part:¹⁰

In addition to its lack of competence, the Chamber is also of the view that it would be inappropriate for it to review the legality of investigative measures ordered by the Single Judge of Pre-Trial Chamber II.

At this stage, taking the above into account and based on the information before it, the Chamber has no reason to doubt the prosecution's assertion that it "is not privy to any information that is protected by legitimate professional privilege."

⁵ ICC-01/05-01/08-2945-Red, para. 78.

⁶ ICC-01/05-01/08-2965.

⁷ ICC-01/05-01/08-2965, para. 22.

⁸ ICC-01/05-01/08-2965-Red, paras. 2-3.

⁹ ICC-01/05-01/08-2965-Red, para. 3.

¹⁰ ICC-01/05-01/08-3059, paras. 16, 19 and 24.

[...] the Chamber considers that the defence has failed to substantiate its claim that the accused has suffered or is suffering prejudice in the Bemba case, caused by the proceedings related to case ICC-01/05-01/13, giving rise to "an immediate need" for the Chamber to grant interim relief. The Chamber also considers that the defence has failed to identify any deficiency in the legal representation of the accused.

7. At its heart, the Impugned Decision was grounded in an alleged Defence failure to demonstrate concrete instances of prejudice. With respect, this is to miss the point. The Defence Request, was aimed at seeking the assistance of the Chamber in preventing the prejudice **before** it occurred. Framed as a request for **interim** relief, the Defence Request handed the Chamber an opportunity to protect the accused's right to a fair trial before procedural steps taken by the Prosecution in an attempt to build a case against the Article 70 accused caused irremediable prejudice and undermined the fairness of the current proceedings.

8. The Chamber also dispensed with the Defence's submissions concerning the Prosecution's disclosure violations by finding that the Defence should have, in its view, directed these concerns to the Single Judge in the Article 70 case.¹¹ As such, it failed to address the central issue; namely that the Prosecution was obliged to disclose identified materials to the Defence in a timely manner, and thus to safeguard against the resultant concrete prejudice and unfairness.

9. The Impugned Decision is also remarkable for the Chamber's failure to address a significant number of Defence submissions. The Chamber failed to consider Defence arguments concerning the Prosecution's violation of its obligations to notify the Defence of any requests or orders which impacted either on the ability of Counsel to communicate with the defendant in a confidential manner, or the ability of the defendant to communicate with other persons.¹² The Chamber also failed to acknowledge the Prosecution's access to privileged information setting out Defence strategy and information. Moreover, the Chamber ignored the Defence request that the Chamber order

¹¹ ICC-01/05-01/08-3059, para. 15 and 23.

¹² ICC-01/05-01/08-2945-Red, para. 32.

States of Belgium, France, the Democratic Republic of Congo, The Netherlands, and the United Kingdom to desist from taking any legal steps in connection with materials seized from the Defence.

10. Accordingly, the Defence seeks leave to appeal these aspects of the Impugned Decision, on the grounds set out below.

C. REQUEST FOR LEAVE TO APPEAL

(a) *Conditions for Leave to Appeal*

11. 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 which meets the following two cumulative criteria as set out in that provision:¹³

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.

12. The Defence notes that the Appeals Chamber has previously held that '[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.'¹⁴

(b) *Identification of Appealable Issues*

¹³ ICC-01/04-01/07-108, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, 14 December 2007, page 3; ICC-01/04-01/07-116, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007, page 4.

¹⁴ 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.

13. The Defence submits that the Impugned Decision gives rise to the following identifiable subjects or topics requiring a decision for its resolution, which meet the criteria set out under Article 82(1)(d), and warrants 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.

14. The appealable issues identified are as follows:

- (i) Whether the Trial Chamber erred in law in requiring the Defence to provide concrete instances of prejudice when the Defence Request was one for interim relief; namely for steps to be taken to avoid prejudice occurring;
- (ii) Whether the Trial Chamber erred in failing to take steps to address the Prosecution’s failure to disclose identified materials by directing the Defence to a different Chamber¹⁵ before which (as the Chamber knew) the Prosecution concurrently submitted it had neither mandate nor *locus standi*;¹⁶
- (iii) Whether the Trial Chamber erred in law in failing to consider Defence submissions concerning:
 - a. Disclosure of materials from States requested to monitor Defence communications or seize Defence property, and the immediate cessation of such monitoring;

¹⁵ ICC-01/05-01/08-3059, paras. 15 and 23.

¹⁶ ICC-01/05-01/08-2965-Red, para. 3; ICC-01/05-01/08-3059, para. 9.

- b. The Prosecution's violation of its obligation to notify the Defence of any requests or orders which impacted either on the ability of Counsel to communicate with the defendant in a confidential manner, or the ability of the defendant to communicate with other persons;
- c. Access of the Prosecution to materials that undoubtedly contain privileged information concerning Defence strategy in the main case.

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

15. Each of these identified appealable issues significantly affects the fair conduct of the proceedings.

16. The protection of legal professional privilege; disclosure of information material to the preparation of the Defence; the monitoring of privileged and confidential Defence communications; all of these questions undoubtedly go to the heart of any fair judicial process. Denial of leave to appeal will prevent the proper appellate consideration of whether the Trial Chamber has effectively intervened to ensure the protection of Mr. Bemba's rights in the main case.

17. It is unrealistic, moreover, to consider the Impugned Decision out of context. For, whilst the Chamber has, for the time being, refused to allow the Prosecution to admit certain items of evidence from the Article 70 investigation into evidence in the main case, it has not done so definitively, holding rather that "it would be premature" to admit the Article 70 materials in the present proceedings before findings are made by the Pre-Trial Chamber.¹⁷

¹⁷ ICC-01/05-01/08-3029, para. 31.

18. Accordingly, the Chamber, having abrogated its duty to regulate the fairness of the conduct of the Prosecution towards the accused in its invasion of his privileged communications with his lawyers under the guise of evidence gathering in a separate case, concurrently allows for the possibility that it will admit as evidence into the main case at some unspecified stage in the future material gathered in that way. The accused, thus, has no way of knowing what case he will ultimately have to meet, nor how to approach the drafting of his final submissions. With respect, the approach is inconsistent. Either the Chamber proceeds to deal with the main case and injuncts further prejudicial conduct towards the accused in the interim, or it stays the process in the main case pending a full examination of the probity and probative value of the evidence gathered in the Article 70 case.

19. Similar factors bear upon the expeditious conduct of proceedings, as it will be an impossible task for the present proceedings to be completely sealed off from the Article 70 case. It is inevitable that the Chamber will again be seized of many of the issues raised in the Defence Request in the coming months as the full impact of the Article 70 case becomes more apparent. As such, a timely and definitive ruling on the part of the Appeals Chamber will contribute to the efficient and expeditious conduct of the proceedings and ensure that the parties have an indication as to how these issues should be resolved.

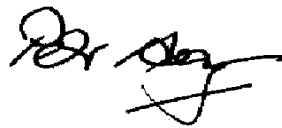
20. An immediate resolution by the Appeals Chamber would also materially advance the proceedings. Although the Defence notes that the current trial is entering its final phase, the Impugned Decision contains issues which cannot safely be left for any potential appeal from a Judgement at first instance. Should the Appeals Chamber identify errors in the Chamber's approach and quash the Impugned Decision, the error can be corrected before any final Judgement is rendered, thus avoiding a retrial or the reopening of the proceedings.

D. RELIEF REQUESTED

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

GRANT the Defence request for leave to appeal the “Decision on the Defence Request for Interim Relief”.

The whole respectfully submitted.

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

Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

9 May 2014