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**International
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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

**Prosecution's Response to the Defence Request for Leave to Appeal Decision
ICC-01/05-01/08-3101**

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I. Introduction

1. The Defence seeks leave to appeal¹ the “Decision on ‘Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications’ and Addendum”² on the following two issues (“the Issues”):³

- (i) “Whether the Trial Chamber erred by finding that it had no competence either to order the Prosecution to disclose information, which was the property of the Defence in this case, or to refrain from accessing information which was the property of the Defence in the Main Case” (“First Issue”); and
- (ii) “Whether the Trial Chamber erred by imposing too high an evidential threshold in a request for provisional measures/injunctive relief” (“Second Issue”).

2. The Application should be rejected. The First Issue is not an appealable issue under Article 82(1)(d) of the Statute and the Second Issue does not arise from the Decision. In addition, neither of the Issues meets the criteria for leave to appeal.

II. Submissions

(i) The First Issue is not an appealable issue

3. The Defence discusses at length the merits of the First Issue.⁴ It essentially disagrees with the Decision, as well as the Single Judge’s decision in the case ICC-01/05-01/13, and re-litigates matters that were before the Trial Chamber.⁵ However, the correctness of a decision is irrelevant in assessing an application for leave to appeal under Article 82(1)(d), and the sole question is whether the issue meets the

¹ ICC-01/05-01/08-3103-Conf-Exp; ICC-01/05-01/08-3103-Conf-Red; and ICC-01/05-01/08-3103-Red2 (“Application”).

² ICC-01/05-01/08-3101 (“Decision”).

³ Application, paras.1, 65.

⁴ Application, paras.2-25.

⁵ Application, para.25.

criteria set out in the provision.⁶ Therefore, the Prosecution will not address the Defence's arguments on the merits of the First Issue, but will limit its response to the Defence's submissions concerning the criteria for leave to appeal under Article 82(1)(d).

4. 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."⁷

5. The First Issue is not an appealable issue within the meaning of Article 82(1)(d). Determining the Chamber's competence either to order the Prosecution to disclose information, or to refrain from accessing such information in the Main Case, was not essential for the Chamber's decision denying the Defence's First Request and Alternate First Request. Although the Chamber noted that granting those two requests "would interfere with the competence of the Single Judge in case ICC-01/05-01/13, and Decision ICC-01/05-01/13-366-Red",⁸ and that it "lacks competence in relation to matters arising from that case",⁹ it did not reject these requests on that basis.

6. Instead, the Chamber recalled that it is "bound by its duty to ensure that the trial in the *Bemba* case is fair, expeditious, and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses[...]"¹⁰ On that basis, it examined the Defence's arguments that the relief sought in its First Request and Alternate First Request was necessary to avoid

⁶ ICC-02/04-01/05-20-US-Exp, para.22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

⁷ 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, (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."

⁸ Decision, para.22.

⁹ Decision, para.21.

¹⁰ Decision, para.23.

potential prejudice in the Main Case and to protect Mr Bemba's right to a fair trial.¹¹ It concluded that the Defence's submissions to that effect "are impermissibly speculative", that the relief sought "is not warranted" and that "in these circumstances", "the Chamber does not consider it appropriate to interfere with the regime of review established by the Single Judge."¹²

7. As a result, the First Issue relates to a finding that was not essential for the determination of the matter before the Chamber and the arguments advanced by the Defence in the Application are no more than mere disagreements with the Chamber's decision. It is therefore not an appealable issue.

(ii) The Second Issue does not arise from the Decision

8. The Second Issue, namely the question "whether the Trial Chamber erred by imposing too high an evidential threshold in a request for provisional measures/injunctive relief", does not arise from the Decision.

9. Although the Defence frames its Second Issue in terms of "an evidentiary threshold" purportedly imposed in the Decision for a provisional measures request, it is unable to point to a specific finding that establishes such a threshold. Rather, the Defence focuses on contesting the Chamber's finding that its arguments in support of the disclosure requests were "impermissibly speculative."¹³ The Defence's arguments, however, do not relate to a particular standard of proof or a finding by the Chamber to that effect. Instead, they relate to the Chamber's assessment and findings on whether the Defence has supported its contention that absent the relief sought, "potential prejudice will accrue in the Main Case".¹⁴ In fact, contrary to the contention of the Defence, the Chamber did not rule that it was "impermissibly speculative" to argue that e-mails may include information that should not be

¹¹ Decision, paras.24-25.

¹² Decision, para.26.

¹³ Application, paras.27, 33, see also paras.28-38.

¹⁴ Decision, para.24.

transmitted to the Prosecution.¹⁵ Rather, it found that in the context of this case, and in particular in light of the extensive safeguards put in place by the Single Judge in the case ICC-01/05-01/13,¹⁶ the Defence's argument that "potential prejudice will accrue in the Main Case"¹⁷ is "impermissibly speculative".¹⁸

10. As a result, the Second Issue as framed by the Defence does not arise from the Decision and its arguments advanced in the Application express a mere disagreement with the manner in which the Chamber disposed of its request for disclosure and injunctive relief.

(iii) The Issues do not impact the fair and expeditious conduct of the proceedings

11. Since the two Issues are not appealable issues arising from the Decision, the Application should be dismissed on that ground alone. However, in case the Chamber finds that they constitute issues within the terms of Article 82(1)(d), the Prosecution submits that they do not meet the criteria for leave to appeal.

12. The Defence's argument that the Issues affect the fairness of the proceedings assumes that the Trial Chamber declared itself incompetent to rule on the Defence's request for disclosure and interim relief, while neglecting its duty under Article 64(2) to ensure the fairness of the trial and the rights of the accused in the Main Case and thereby preventing the Defence from having an effective remedy.¹⁹ These submissions do not accurately reflect the Decision. As stated above, the Chamber, while noting that it "lacks competence in relation to matters arising from the case [ICC-01/05-01/13]",²⁰ examined the Defence request for disclosure and interim relief in light of its "duty to ensure that the trial in the *Bemba* case is fair, expeditious, and conducted with full respect for the rights of the accused and due regard for the

¹⁵ Application, paras.32-33.

¹⁶ Decision, paras.25-26.

¹⁷ Decision, para.24.

¹⁸ Decision, para.26.

¹⁹ Application, paras.40-47.

²⁰ Decision, para.21.

protection of victims and witnesses [...].”²¹ The Defence disagrees with the Chamber’s conclusions, but that is insufficient to demonstrate that the Issues affect the fair conduct of the proceedings.

13. The Defence’s arguments that the Issues affect the expeditious conduct of the proceedings²² are equally unsupported. The Defence submits that “[a] request for interim and injunctive relief is, by its nature, designed to facilitate the expeditiousness of the proceedings by limiting the occurrence of further prejudice and damage to the Defence rights”²³ and that “[t]he evidential threshold set by the Trial Chamber is contrary to, and thus undermines, the expeditiousness of the proceedings”. However, these statements are unsubstantiated. Leave to appeal cannot be granted on the basis of abstract²⁴ or hypothetical arguments.²⁵ Nor can the Defence rely on unsubstantiated arguments²⁶ or purely general complaints²⁷ like those advanced in the Application. Leave to appeal may only be granted on a concrete showing of how the Issues impact the proceedings,²⁸ which the Defence fails to do.

(iv) The Issues do not impact the outcome of the trial

14. Yet again, the Defence’s arguments that the Issues impact the outcome of the trial²⁹ are predicated on a chain of hypothetical assumptions, namely (a) that the Prosecution has access to internal Defence discussions on the strengths and weaknesses of the respective Prosecution and Defence cases;³⁰ (b) that the

²¹ Decision, para.23; see also paras.24-27.

²² Application, paras.48-52.

²³ Application, para.50.

²⁴ See ICC-01/04-168 OA3, para.10; ICC-02/04-01/05-316, p.6; ICC-01/09-02/11-211 paras.33 and 39; ICC-01/09-02/11-88, para.25, see also paras.23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para.36; ICC-01/09-02/11-275, paras.28-29; ICC-01/09-01/11-301, para.30.

²⁵ ICC-01/04-01/07-1958, para.20. See also: ICC-02/04-01/05-367, paras.21-22.

²⁶ ICC-01/09-01/11-1154, para.26.

²⁷ ICC-01/04-01/06-2463, para.31.

²⁸ ICC-01/05-01/08-2925, para.34.

²⁹ Application, paras.53-61. The Prosecution has no access to the argument included at paragraph 57, as it is redacted from the versions that are available to the Prosecution. Because the Prosecution cannot respond to it, the Chamber should refrain from relying on it.

³⁰ Application, paras.53, 55, 58.

Prosecution uses such information in support of its submissions in the Main Case;³¹ (c) that the Prosecution's use of such information would have "implications for the ability of the Defence to defend the charges against Mr Bemba";³² and (d) that the Trial Chamber in its judgement relies on the submissions influenced by the Prosecution's knowledge such that it affects the outcome of its decision under Article 74. Such abstract and hypothetical arguments, completely divorced from the record of the case and the Trial Chamber's findings, are insufficient to demonstrate that an issue has an impact on the outcome of the trial.³³

(v) Immediate resolution of the Issues by the Appeals Chamber will not materially advance the proceedings

15. The Defence does not establish that the immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings. Rather, it suggests that the integrity of the proceedings in the Main Case could be preserved if the Appeals Chamber were to grant suspensive effect of the Decision.³⁴ This is a separate question and unrelated to the requirements for leave to appeal under Article 82(1)(d).

16. Similarly, the Defence's unsubstantiated assertion that matters pertaining to the "violation of privilege should not be deferred to the final judgment or appeal"³⁵ is insufficient to meet the threshold for leave to appeal.

17. Finally, having regard to the speculative and hypothetical nature of the Defence's arguments of prejudice,³⁶ an immediate resolution of the Issues would not materially advance the proceedings.³⁷

³¹ Application, para.55.

³² Application, paras.59-60.

³³ ICC-01/04-01/07-1958, para.20; ICC-01/09-02/11-406, paras.42-43.

³⁴ Application, paras.62-63.

³⁵ Application, para.64.

³⁶ See the Defence's arguments that the Issues affect the fair and expeditious conduct of the proceedings.

³⁷ ICC-01/09-01/11-1154, para.28; ICC-01/04-01/06-2109, para.22.

III. Conclusion

18. For the above reasons, the Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 14th day of July 2014

At The Hague, The Netherlands