

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 19 January 2015

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

**Decision on “Defence Request for a Hearing and for Leave to Reply to the
Prosecution Response to Defence Request for Relief for Abuse of Process”**

Decision to be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

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

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case") issues the following Decision on "Defence Request for a Hearing and for Leave to Reply to the Prosecution Response to Defence Request for Relief for Abuse of Process" ("Decision").

I. Background and Submissions

1. On 26 November 2014, the Chamber, *inter alia*, rejected the 87-page "Defence Request for Relief for Abuse of Process" and related documents,¹ and granted an extension of the page limit up to 40 pages for the refileing of the request and any responses thereto.²
2. On 15 December 2014, the defence filed its "Defence Request for Relief for Abuse of Process" ("Abuse of Process Request").³ It submits that the prosecution requested States to perform actions which violated defence privileges and immunities;⁴ had access to privileged information relating to the *Bemba* case;⁵ failed to disclose crucial information in a timely manner;⁶ and "contaminated the appearance of the impartiality of the proceedings".⁷ On these bases, the defence claims that "the constituent elements of Mr. Jean-Pierre Bemba Gombo's right to a fair, impartial and independent trial have been ruptured, irreparably".⁸ The defence argues

¹ Defence Request for Relief for Abuse of Process, 11 November 2014, ICC-01/05-01/08-3203-Conf-Exp with confidential ex-parte Annexes I to III and confidential Annexes IV to IX. The defence filed confidential and public redacted versions of its filing on 25 November 2014, respectively: ICC-01/05-01/08-3203-Conf-Red and ICC-01/05-01/08-3203-Red2 with Annexes IV to VIII-Red. On 18 November 2014, the defence filed an addendum, a nine-page filing in which the defence added further arguments to the First Request. *See* Addendum to Defence Request for Relief for Abuse of Process, ICC-01/05-01/08-3203, 18 November 2014, ICC-00/05-01/08-3207-Conf-Exp. This document was reclassified as confidential on 26 November 2014. Further, on 25 November 2014, the defence filed a public redacted version of Document 3207: ICC-01/0501/08-3207-Red.

² Decision on defence request for an extension of the page limit, 26 November 2014, ICC-01/05-01/08-3210.

³ Defence Request for Relief for Abuse of Process, 15 December 2014, ICC-01/05-01/08-3217-Conf-Exp. The Defence also filed a confidential version of its Refiled Request: ICC-01/05-01/08-3217-Conf-Red.

⁴ ICC-01/05-01/08-3217-Conf-Red, paragraphs 2, 7, 22 to 90.

⁵ ICC-01/05-01/08-3217-Conf-Red, paragraphs 4-5, 7, 40 to 90.

⁶ ICC-01/05-01/08-3217-Conf-Red, paragraphs 7, 91-95, 113 to 127.

⁷ ICC-01/05-01/08-3217-Conf-Red, paragraphs 3, 7, 96 to 112.

⁸ ICC-01/05-01/08-3217-Conf-Red, paragraph 1.

that Mr Bemba was denied an effective remedy for these abuses⁹ and requests that the Chamber order a permanent stay of proceedings and release Mr Bemba.¹⁰

3. On 7 January 2015, the prosecution filed its "Response to the Re-filed Defence Request for Relief for Abuse of Process (ICC-01/05-01/08-3217-Conf-Exp)" ("Abuse of Process Response").¹¹ The prosecution argues that the defence failed to indicate any prejudice to the integrity of the trial;¹² the Court has effectively guarded the privileges and immunities of the defence;¹³ the prosecution acted fairly, ethically and professionally at all times;¹⁴ the Trial Chamber is fair and impartial;¹⁵ and the defence retains an adequate remedy in relation to alleged prejudice, namely the right to appeal any guilty verdict.¹⁶ The prosecution submits that the defence fails to meet the high threshold required to stay the proceedings for an abuse of process. It maintains that Mr Bemba had a fair trial and that the Chamber should dismiss the Abuse of Process Request.¹⁷
4. On 14 January 2015, the defence filed the "Defence Request for a Hearing and for Leave to Reply to the Prosecution Response to Defence Request for Relief for Abuse of Process" ("Defence Request").¹⁸ The defence seeks leave to reply to nine discrete and defined issues arising from the Abuse of Process Response:¹⁹

(i) The propriety of the prosecution's reliance on findings of Pre-Trial Chamber II;

⁹ ICC-01/05-01/08-3217-Conf-Red, paragraphs 6, 128 to 142.

¹⁰ ICC-01/05-01/08-3217-Conf-Red, paragraphs 8, 138 to 139, 142 to 143.

¹¹ Prosecution Response to Refined Defence Request for Relief for Abuse of Process (ICC-01/05-01/08-3217-Conf-Exp), 7 January 2015, ICC-01/05-01/08-3229-Conf-Exp. The prosecution filed a confidential redacted version of its Abuse of Process Response on 16 January 2015: ICC-01/05-01/08-3229-Conf-Red.

¹² ICC-01/05-01/08-3229-Conf-Exp, paragraphs 4, 14 to 18.

¹³ ICC-01/05-01/08-3229-Conf-Exp, paragraphs 5 to 6, 19 to 45.

¹⁴ ICC-01/05-01/08-3229-Conf-Exp, paragraphs 46 to 64.

¹⁵ ICC-01/05-01/08-3229-Conf-Exp, paragraphs 2, 7, 65 to 69.

¹⁶ ICC-01/05-01/08-3229-Conf-Exp, paragraphs 70 to 72.

¹⁷ ICC-01/05-01/08-3229-Conf-Exp, paragraphs 1 to 2, 7, 9 to 13, 73.

¹⁸ Defence Request for a Hearing and for Leave to Reply to the Prosecution Response to Defence Request for Relief for Abuse of Process, 14 January 2015, ICC-01/05-01/08-3231-Conf-Exp.

¹⁹ ICC-01/05-01/08-3231-Conf-Exp, paragraphs 7 to 9.

(ii) The accuracy of the prosecution's assertions concerning its right to violate privileges and immunities of defence counsel on the basis of a suspicion of "criminal activity", and whether the scope of its violation in the present case was in fact legal;

(iii) Whether the "crime fraud" exception to legal professional privilege is applicable at the ICC, and whether some or all of the material to which the prosecution had access in the present case falls within that exception;

(iv) Whether the findings of the Single Judge of Pre-Trial Chamber II concerning the impartiality, working methods, contact with the Prosecution and legality of the appointment of the "Independent Counsel" preclude the Trial Chamber from adjudicating these issues as far as they directly impact on the fairness of the present proceedings;

(v) Whether the fact that the charges under Article 70 may be dealt with in the same proceedings as charges for crimes under Articles 6 to 8 without this necessarily giving rise to a conflict of interest means that, in the specific circumstances of this case, no conflict of interest in fact arose;

(vi) Whether the Prosecutor's stated prioritisation of its Article 70 investigation over its compliance with its Rule 77 disclosure obligations is in conformity with the Statute and Rules;

(vii) Whether the prosecution's examination of defence witnesses concerning alleged payments or benefits obviated its disclosure obligations concerning information material to the preparation of the defence, and whether the prosecution is correct in law to make the (uncited) assertion that it "was not obliged to put its broader suspicions concerning the origin of payments or benefits provided to witnesses";

(viii) Whether the Trial Chamber's eventual order that matters associated with the investigation of offences under Article 70 of the Statute should be addressed by Pre-Trial Chamber II mitigated the prejudice suffered during the five months during which it was seized with the prosecution's requests for judicial assistance;

(ix) Whether it is necessary for the defence to demonstrate the precise impact of access to privileged information in order to seek a remedy.

5. The defence claims that it purposely avoided raising matters that were already adjudicated.²⁰ Accordingly, the defence submits that procedural fairness requires that the Chamber grant leave to reply, hold an oral hearing, or disregard prosecution submissions concerning matters that have already been adjudicated.²¹ The defence further submits that leave to reply is justified by the fact that the legal issues raised are unique to international criminal trials; these issues have no apparent precedent in

²⁰ ICC-01/05-01/08-3231-Conf-Exp, paragraph 9.

²¹ ICC-01/05-01/08-3231-Conf-Exp, paragraph 9.

domestic criminal proceedings; and the Abuse of Process Response mischaracterises and incorrectly states the applicable law, defence submissions and the prosecution's prior conduct.²²

6. In relation to its request for an oral hearing, the defence suggests that a hearing would expedite the proceedings.²³ The defence submits that the complexity, novelty and number of factual and legal issues raised in the Abuse of Process Request are "comparable to subjects which have prompted oral hearings at the ICC, such as challenges to admissibility, or the sentencing of convicted defendants".²⁴
7. Finally, the defence claims that the prosecution has made unsworn, and in some cases contradictory, assertions of fact which, it submits, the Chamber cannot rely upon in deciding on the Abuse of Process Request.²⁵ The defence suggests that a hearing would provide members of the prosecution with the opportunity to make assertions of fact after being sworn in as witnesses, as well as permit the defence to call witnesses to testify on issues of disputed fact.²⁶

II. Analysis and Conclusion

8. As a preliminary matter, the Chamber notes that the Defence Request is currently classified as confidential *ex parte*.²⁷ The Chamber further notes that the defence and prosecution have filed confidential redacted and confidential *ex parte*, but not public, versions of the Abuse of Process Request and Abuse of Process Response.²⁸ However, the Chamber considers that its reference to these submissions does not warrant

²² ICC-01/05-01/08-3231-Conf-Exp, paragraph 10.

²³ ICC-01/05-01/08-3231-Conf-Exp, paragraph 12.

²⁴ ICC-01/05-01/08-3231-Conf-Exp, paragraph 13 (citations omitted).

²⁵ ICC-01/05-01/08-3231-Conf-Exp, paragraphs 14 to 16.

²⁶ ICC-01/05-01/08-3231-Conf-Exp, paragraph 17.

²⁷ ICC-01/05-01/08-3229-Conf-Exp; ICC-01/05-01/08-3231-Conf-Exp.

²⁸ ICC-01/05-01/08-3217-Conf-Red; ICC-01/05-01/08-3217-Conf-Exp; ICC-01/05-01/08-3229-Conf-Red; ICC-01/05-01/08-3217-Conf-Exp.

confidential classification of this Decision. Accordingly, in light of the principle of publicity enshrined in Articles 64(7) and 67(1) of the Rome Statute ("Statute") and Regulations 20 and 23*bis* of the Regulations of the Court ("Regulations"), the present Decision is classified as public.

9. Turning to the merits of the Defence Request, in accordance with Article 21(1) of the Statute, the Chamber has considered Articles 64 and 67 of the Statute, Rule 134(3) of the Rules of Procedure and Evidence ("Rules"), and Regulations 24(5), 34(c) and 37(1) of the Regulations.

10. The Chamber recalls its prior finding that the issues raised in the Abuse of Process Request are complex,²⁹ and notes defence submissions concerning new matters and alleged mischaracterisations in the Abuse of Process Response.³⁰ Consequently, the Chamber considers it may benefit from the defence's views on the nine issues identified in paragraph 8 of the Defence Request. The Chamber does not authorise submissions exceeding the scope of these nine identified issues. The Chamber also reminds the defence that its reply may not exceed the 20-page page limit applicable to all documents filed with the Registry.³¹

11. In relation to its request for an oral hearing, the defence submits that a hearing "would ensure that all issues are addressed in an adversarial manner".³² The Chamber has already found that a 40-page submission was adequate and sufficient to address the matters raised in the Abuse of Process Request³³ and, by the present Decision, authorises the defence to file a 20-page reply on nine discrete issues raised in the Abuse of Process

²⁹ ICC-01/05-01/08-3210, paragraph 11.

³⁰ ICC-01/05-01/08-3231-Conf-Exp, paragraphs 9-10.

³¹ Regulation 37 of the Regulations.

³² ICC-01/05-01/08-3231-Conf-Exp, paragraphs 9, 12. The defence claims, but fails to substantiate, that the matters raised in the Refiled Request are similar to matters, such as admissibility challenges and sentencing, which have prompted oral hearings at the ICC. ICC-01/05-01/08-3231-Conf-Exp, paragraph 13. The defence also failed to substantiate similar submissions it made in requesting an extension of the page limit. *See* ICC-01/05-01/08-3210, paragraph 11.

³³ ICC-01/05-01/08-3210, paragraph 11.

Response.

12. The Chamber notes defence submissions that an oral hearing would provide a “forum in which the parties could seek to reach agreement”.³⁴ However, the defence does not explain why any consensus cannot be reached in written submissions or through *inter-partes* communications. The defence also fails to explain why a hearing is necessary for the prosecution to make sworn assertions of fact or for the defence to call witnesses to testify on issues of disputed fact.³⁵ The Chamber emphasises that it will consider the value of all submissions and related information, including assertions of fact, in deciding upon the Abuse of Process Request.

13. In view of the above, the Chamber hereby:

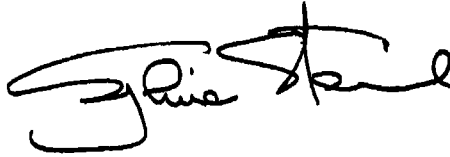
- a. GRANTS the request for leave to reply and ORDERS that the reply be filed by 20 January 2015;
- b. REJECTS the request for the Chamber to hold an oral hearing;
- c. ORDERS the defence, should it file its reply as confidential *ex parte*, to simultaneously file a confidential redacted version and thereafter file a public redacted version by 30 January 2015;
- d. ORDERS the defence to file a confidential redacted version of the Defence Request or inform the Chamber that this filing may be reclassified as confidential without redactions by 23 January 2015; and
- e. ORDERS the prosecution and defence to file public redacted versions of the Abuse of Process Request, Abuse of Process Response and Defence Request or inform the Chamber that these

³⁴ ICC-01/05-01/08-3231-Conf-Exp, paragraph 12.

³⁵ ICC-01/05-01/08-3231-Conf-Exp, paragraph 17.

filings may be reclassified as public without redactions by 30
January 2015.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 19 January 2015

At The Hague, the Netherlands