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

Date: 09/02/2015

**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 Redacted***

**Public Redacted Version of Defence Request for a Hearing and for Leave to Reply  
to the Prosecution Response to Defence Request for Relief for Abuse of Process**

**Source: Defence for Mr. Jean-Pierre Bemba Gombo**

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

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Section**

## A. BACKGROUND

1. On 11 November 2014, the Defence for Mr. Jean-Pierre Bemba in the present proceedings (“Main Case”) filed its Defence Request for Relief for Abuse of Process (“First Request”).<sup>1</sup> This 87-page filing contained a request for an extension of the page limit. The Defence submitted that the Prosecution’s litigation before two Chambers of the ICC, often conducted *ex parte*, and widespread investigations across multiple jurisdictions for a period of years raised a large number of relevant and complex issues that warranted an extension of the pages within which these arguments would be presented.<sup>2</sup>

2. On 21 November 2014, the Prosecution filed a response to this request for an extension of the page limit, asking Trial Chamber III (“the Chamber”) to reject the First Request in its entirety, and order the Defence to submit a new request within the 20-page limit.<sup>3</sup>

3. On 25 November 2014, the Defence informed the Chamber that it intended to exercise Mr. Bemba’s right to file a request for leave to reply to the Prosecution Request.<sup>4</sup> On 26 November, without waiting for the Defence request for leave to reply,<sup>5</sup> the Chamber issued a decision, in which it rejected the First Request as non-compliant with Regulation 37(1) of the Regulations of the Court, and instructed the Defence to re-file the First Request condensed into 40 pages.<sup>6</sup>

4. On 15 December 2014, the Defence filed its second Request for Relief for Abuse of Process (“Defence Request”), in which it argued in 40 pages that steps taken by the Prosecution in conducting investigations into Mr. Bemba’s Defence

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<sup>1</sup> ICC-01/05-01/08-3203-Red.

<sup>2</sup> ICC-01/05-01/08-3203-Red.

<sup>3</sup> ICC-01/05-01/08-3209-Conf, para. 7.

<sup>4</sup> Email from the Defence to the Chamber on 25 November 2014, at 15.29.

<sup>5</sup> Email from the Chamber to the Defence on 27 November 2014 12:33.

<sup>6</sup> ICC-01/05-01/08-3210.

witnesses and Defence lawyers (“Article 70 Case”) meant that the constituent elements of Mr. Jean Pierre Bemba Gombo’s right to a fair, impartial and independent trial have been ruptured, irreparably.<sup>7</sup>

5. On 7 January 2015, the Prosecution filed its confidential and *ex parte* ‘Response to Re-filed Defence Request for Relief for Abuse of Process (ICC-01/05-01/08-3217-Conf-Exp)’.<sup>8</sup> In this Response, the Prosecution argued, in essence, that privileges and immunities of the Defence had not been breached;<sup>9</sup> legal professional privilege had not been breached;<sup>10</sup> Pre-Trial Chamber II implemented appropriate measures to address potentially privileged material and to respect the fairness of this trial,<sup>11</sup> and that the Prosecution at all times acted fairly, ethically, and professionally.<sup>12</sup>

6. In support of these submissions, the Prosecution Response contains a significant number of unsworn assertions of fact.

7. By way of the present motion, the Defence seizes the Chamber with two requests. The first is a request for leave to reply to several discrete and defined issues arising out of the Prosecution Response. The second is a request to allow the parties to make oral submissions concerning the Defence Request.

## **B. SUBMISSIONS**

### **(a) Request for Leave to Reply**

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<sup>7</sup> ICC-01/05-01/08-3217-Conf-Exp.

<sup>8</sup> ICC-01/05-01/08-3229-Conf-Exp (hereinafter “Prosecution Response”).

<sup>9</sup> ICC-01/05-01/08-3229-Conf-Exp, paras. 20-26.

<sup>10</sup> ICC-01/05-01/08-3229-Conf-Exp, paras. 27-39.

<sup>11</sup> ICC-01/05-01/08-3229-Conf-Exp, paras. 40-49.

<sup>12</sup> ICC-01/05-01/08-3229-Conf-Exp, paras. 46-64.

8. The Defence seeks leave to present a focused and limited reply to the arguments contained in the Prosecution Response, in particular on the following points:

- (i) The propriety of the Prosecution's reliance on findings of Pre-Trial Chamber II;<sup>13</sup>
- (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;<sup>14</sup>
- (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;<sup>15</sup>
- (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;<sup>16</sup>
- (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

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<sup>13</sup> ICC-01/05-01/08-3229-Conf-Exp, para. 5.

<sup>14</sup> ICC-01/05-01/08-3229-Conf-Exp, paras. 20-26.

<sup>15</sup> ICC-01/05-01/08-3229-Conf-Exp, paras. 27-39.

<sup>16</sup> ICC-01/05-01/08-3229-Conf-Exp, paras. 40-45.

in the specific circumstances of this case no conflict of interest in fact arose;<sup>17</sup>

- (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;<sup>18</sup>
- (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";<sup>19</sup>
- (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;<sup>20</sup>
- (ix) Whether it is necessary for the Defence to demonstrate the precise impact of access to privileged information by the Dutch, Belgian, DRC, French and Cameroonian authorities in order to seek a remedy.<sup>21</sup>

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<sup>17</sup> ICC-01/05-01/08-3229-Conf-Exp, paras. 48-52.

<sup>18</sup> ICC-01/05-01/08-3229-Conf-Exp, para. 54.

<sup>19</sup> ICC-01/05-01/08-3229-Conf-Exp, para. 59.

<sup>20</sup> ICC-01/05-01/08-3229-Conf-Exp, paras. 65-69.

<sup>21</sup> ICC-01/05-01/08-3229-Conf-Exp, para. 17.

9. The issues outlined above arise directly out of the Prosecution's Response. In filing its Request, the Defence was cognisant of, and complied with, the Trial Chamber's ruling that it must avoid raising "matters that have already been adjudicated".<sup>22</sup> The Prosecution's Response, by contrast, raises a number of issues that formed part of its previous submissions, and often repeats and relies on prior rulings of the Single Judge, Pre-Trial Chamber III or Trial Chamber. Given that these issues have been raised in the context of the Prosecution Response, procedural fairness dictates that Mr. Bemba be afforded an opportunity to reply, failing which these Prosecution submissions should be disregarded by the Trial Chamber in line with its earlier ruling. In the alternative, an oral hearing – discussed further below – would ensure that all these issues are addressed in an adversarial manner.

10. Moreover, there is good cause for the Defence to be accorded an opportunity to address the issues outlined above. The legal questions raised by the Prosecution's simultaneous prosecution of Mr. Bemba, and its investigations into his witnesses and Defence team members has raised a plethora of legal issues which are not only unique to international criminal law trials, but have no apparent precedent in domestic criminal proceedings. Such issues require a full and complete hearing, and detailed submissions on the many areas of law including, but not limited to: the waiving of the privileges and immunities afforded to the Defence; the scope and application of legal professional privilege; conflicts of interest within the Office of the Prosecutor; and whether the Prosecution's approach to prioritising Article 70 investigations over its disclosure obligations to the Defence should be sanctioned by the International Criminal Court. In the Defence submission, the Prosecution Response contains incorrect statements of law, mischaracterises the Defence submissions, and the Prosecution's own prior conduct. The Defence requests the opportunity to make such submissions in a reply, and accordingly submits that a

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<sup>22</sup> ICC-01/05-01/08-3210, para. 11

limited and focused filing will benefit the Chamber in its determination of the issue.<sup>23</sup>

**(b) Request for an Oral Hearing**

11. Article 64(2) of the ICC Statute obliges a Trial Chamber to ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused. Article 69(3) gives the Chamber with the authority to request the submission of all evidence that it considers necessary for the determination of the truth. By Rule 134 of the Rules of Procedure and Evidence, the Chamber, whether on its own motion or at the request of the parties, may rule on any issue concerning the conduct of the proceedings.

12. The issues raised in the Defence Request are sufficiently complex, and significant to the overall fairness of the proceedings to warrant their amplification in an oral hearing. A hearing would give the parties the opportunity to address the Chamber fully on the questions raised in the Defence Request and the Prosecution Response, respond to the assertions of the other party, and provide any additional information necessary for the Trial Chamber's adjudication of the matter. A hearing would also contribute to the expeditiousness of the proceedings, by providing a forum in which the parties could seek to reach agreement or make concessions on live issues raised by the Defence Request.

13. By virtue of its complexity, novelty, and the number of factual and legal issues raised, the Defence Request is comparable to subjects which have prompted

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<sup>23</sup> ICC-01/05-01/08-2942, para. 4.



oral hearings at the ICC, such as challenges to admissibility,<sup>24</sup> or the sentencing of convicted defendants.<sup>25</sup>

14. Moreover, in its Response, the Prosecution has again made numerous and significant unsworn assertions of fact. This follows the Prosecution's practice in litigation concerning the impact of the Article 70 proceedings on the Main Case, of simply asserting that everything was above board, presuming the Trial Chamber will unquestioningly accept the submissions of the lawyers implicated in the impugned conduct. Some examples are worth noting. The Prosecution asserts as fact that it implemented an appropriate and practicable degree of separation between the counsel working on the two cases.<sup>26</sup> The Prosecution asserts as fact that the Independent Counsel did not seek directions from the Prosecution in relation to the execution of his tasks.<sup>27</sup> [REDACTED].<sup>28</sup> The Prosecution asserts as fact that it at all times acted fairly, ethically, and professionally.<sup>29</sup>

15. The Chamber cannot rely on these assertions of fact to resolve questions of evidence, unless they are given under oath. Most recently, Trial Chamber V in the *Ruto and Sang* case reminded the parties of the prohibition on making unsworn assertions of fact, finding:<sup>30</sup>

HENCEFORTH where such factual allegations are critical to a Chamber's determination of an application, the requesting party or participant must support the assertion with evidence in the manner of documents or other evidential material. In the absence of such evidential documents or material, the party or participant must provide a solemn declaration attesting to (a)

<sup>24</sup> ICC-01/11-01/11-207; ICC-01/04-01/07-1112, para. 4; ICC-01/05-01/08-T-22-ENG.

<sup>25</sup> ICC-01/04-01/06-2871; ICC-01/04-01/07-3437. Oral hearings have also been convened at the *ad hoc* Tribunals in relation to, for example, Rule 98bis litigation. See also *Prosecutor v. Radovan Karadžić*, IT-95-5/18-AR98bis.I, Scheduling Order for Appeal Hearing, 22 March 2013.

<sup>26</sup> ICC-01/05-01/08-3229-Conf-Exp, para. 51.

<sup>27</sup> ICC-01/05-01/08-3229-Conf-Exp, para. 44.

<sup>28</sup> [REDACTED].

<sup>29</sup> ICC-01/05-01/08-3229-Conf-Exp, paras. 46-64.

<sup>30</sup> ICC-01/09-01/11-1312, p.3.

the truth of any critical factual assertion or (b) information (indicating its source) and belief of the truth of such critical factual assertions.

16. Moreover, the Prosecution's practice of relying on unsworn assertions means that the Trial Chamber is now faced with contradicting and unsworn statement of fact, with no basis upon which to determine which is reflective of the truth. As an illustration, the Prosecution asserts as fact in its Response that "the anonymous informant provided lead information which could help to identify certain Defence witnesses **but did not name them.**"<sup>31</sup> This stands in direct contrast with its submissions in the Article 70 Case, [REDACTED],<sup>32</sup> [REDACTED],<sup>33</sup> [REDACTED].<sup>34</sup>

17. A hearing would accordingly facilitate the Chamber's adjudication of the Defence Request, as it would give members of the Prosecution the opportunity to make such assertions after having been sworn in as a witness. A hearing would also provide an opportunity for the Defence to call witnesses to testify on issues of disputed fact. Given that, for example, the Prosecution disputes the Defence's assertions concerning the partiality of the Independent Counsel, a hearing would give the Chamber the opportunity to question the Independent Counsel about his methodology, his contact with the Prosecution, any predisposition in favour of the Prosecution and bias against the accused or the Defence.

### C. RELIEF REQUESTED

18. Based on the above submissions, the Defence accordingly requests that the Chamber:

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<sup>31</sup> ICC-01/05-01/08-3229-Conf-Exp, para. 62.

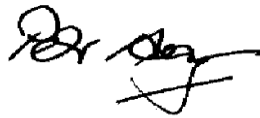
<sup>32</sup> [REDACTED].

<sup>33</sup> [REDACTED].

<sup>34</sup> [REDACTED].

**GRANT** the Defence request for leave to reply to the Prosecution Response; and

**GRANT** the Defence request for an oral hearing for the parties to make submissions on the issues raised in the Defence Request for Relief for Abuse of Process.

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

Peter Haynes

Lead Counsel of Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

9 February 2015