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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
with Confidential ex parte Annex A (Prosecution and Defence only)

**Defence Request for Leave to Appeal the 'Decision on 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:

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A. INTRODUCTION

1. The Prosecution's investigations into alleged offenses against the administration of justice in case 01/05-01/13 ("Article 70 Case") had an undoubted impact on the conduct of the present proceedings.

2. The Defence request for a relief for abuse of process, filed on 15 December 2015,¹ set out a catalogue of legal issues stemming from the Prosecution's investigation of Mr. Bemba and his counsel while the current proceedings were ongoing, and the Trial Chamber's knowledge of, and involvement in, these investigative steps.² Many, if not the majority of these legal issues were novel before the ICC, and international criminal courts more generally. They have yet to be the subject of appellate scrutiny.

3. These legal issues include the protection provided by privileges and immunities of the Defence, in particular when violated by third States following requests by the ICC Prosecution;³ the consequences of the Prosecution's receipt of privileged information, internal work product and *ex parte* information;⁴ and the impact of Prosecution's failure to disclose information concerning the credibility of Defence witnesses and evidence and its non-compliance with Rule 81(2) of the Rules of Procedure and Evidence.⁵ The Defence Request also addressed the Prosecution's error in providing the Trial Chamber with detailed information concerning the Article 70 Case, despite the statutory requirement that such matters be raised before the Pre-Trial Chamber, coupled with the Trial Chamber

¹ ICC-01/05-01/08-3217-Red2, Public Redacted Version of Defence Request for Relief for Abuse of Process With Confidential *ex parte* Annexes I, II, III, X and Public Redacted Annexes IV, V, VI, VII, VIII and Confidential Annex IX, 15 December 2014; and ICC-01/05-01/08-3239-Red2, Public Redacted Version of Defence Reply for the Abuse of Process Motion, 30 January 2015, (together, 'Defence Request').

² ICC-01/05-01/08-3217-Red2.

³ ICC-01/05-01/08-3217-Red2, paras. 7, 22-39.

⁴ ICC-01/05-01/08-3217-Red2, paras. 7, 40-90.

⁵ ICC-01/05-01/08-3217-Red2, paras. 7, 91-95.

entertaining these matters for a period of five months, thereby jeopardising its own appearance of impartiality.⁶

4. The Defence Request for a stay of proceedings was dismissed in its entirety,⁷ largely on the basis that the Defence failed to ‘substantiate’ how the Prosecution’s transgressions meant that it was ‘impossible to piece together the constituent elements of a fair trial’, or that it would be ‘repugnant or odious to the administration of justice to allow the case to continue’.⁸ In its consideration of the Defence Request, the Trial Chamber made a number of significant errors of fact and law, including in its articulation of the legal standard for a stay of proceedings. These errors give rise to distinct appealable issues that warrant review on the part of the Appeals Chamber, and justify the present request for leave to appeal.

B. REQUEST FOR LEAVE TO APPEAL

(a) Conditions for Leave to Appeal

5. 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:⁹

- 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

⁶ ICC-01/05-01/08-3217-Red2, paras. 96, 112; ICC-01/05-01/08- 3239-Red2, paras. 39-48.

⁷ ICC-01/05-01/08-3255 (‘Impugned Decision’).

⁸ ICC-01/05-01/08-3255, paras. 33, 47, 64, 72, 74.

⁹ 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.

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.

6. 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 question over which there is disagreement or conflicting opinion.'¹⁰

(b) Identification of Appealable Issues

7. 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.

8. The appealable issues identified are as follows:

- (i) Whether the Trial Chamber's error in enunciating the test for a stay of proceedings¹¹ warrants a remand of the issues in the Defence Request to be decided in line with the correct standard?
- (ii) Whether the Trial Chamber erred in finding that it had no 'positive obligation to take measures to ensure the confidentiality of Defence information' on the basis that this would have required the

¹⁰ 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.

¹¹ ICC-01/05-01/08-3255, para. 10: 'Consequently, a stay of proceedings is only justified where the situation is such that it is "impossible to piece together the constituent elements of a fair trial", and "it would be 'repugnant' or 'odious' to the administration of justice to allow the case to continue"' (Emphasis added).

Chamber to review measures ordered by the Single Judge in the Article 70 Case, when the acts in question took place in 2012 before the matter was referred to the Single Judge and concerned Prosecution investigations into Defence witnesses for the purposes of the present case.¹²

- (iii) Whether the Trial Chamber erred in rejecting Defence arguments concerning the privilege which inheres in Defence work product with reference to a prior decision which is: (a) limited to privilege for the purpose of communications with a detained accused;¹³ and (b) inconsistent with more recent jurisprudence of Trial Chamber III in the Article 70 Case.¹⁴
- (iv) Whether the Trial Chamber erred in applying a different standard to Prosecution and Defence submissions on whether the Prosecution accessed privileged material, (accepting unsubstantiated Prosecution submissions that it had not,¹⁵ while dismissing Defence submissions that it had on the basis that they were unsubstantiated)¹⁶ particularly given (a) the Trial Chamber's failure to enquire how the Prosecution defined privilege and whether the Prosecution's understanding was reasonable or consistent with the Court's jurisprudence; and (b) the Prosecution's recent identification of materials transmitted by the Independent Counsel for which privilege should never have been lifted.¹⁷

¹² ICC-01/05-01/08-3255, para. 34.

¹³ ICC-01/05-01/08-3255, para. 61, citing ICC-01/05-01/08-3080, para. 19.

¹⁴ ICC-01/05-01/13-983-Conf (Confidential ex parte Annex A); ICC-01/05-01/13-907.

¹⁵ ICC-01/05-01/08-3255, para. 73.

¹⁶ ICC-01/05-01/08-3255, paras. 46, 47, 56, 62.

¹⁷ ICC-01/05-01/13-1013-Red, fn. 23.

- (v) Whether the Trial Chamber erred in finding that no prejudice arose from the two-year delay in the disclosure of Rule 77 material,¹⁸ by failing to address the inability of the accused to contemporaneously confront his witnesses with information arising from the disclosure in 2012;
- (vi) Whether the Trial Chamber erred in finding that the relevant Rule 77 material was disclosed on 22 July 2014, when it was made aware prior to the rendering of the Impugned Decision on 15 June 2015 that the Prosecution's disclosure violations were in fact ongoing in the present proceedings;¹⁹
- (vii) Whether the Trial Chamber erred in excusing the Prosecution's non-disclosure of Rule 77 material on the basis that the undisclosed material 'was neither submitted nor admitted into evidence in the Bemba case',²⁰ when the prejudice inheres in the Prosecution having failed to put its case to the witnesses, and substantiating its case with a solid evidential foundation;

¹⁸ ICC-01/05-01/08-3255, para. 84.

¹⁹ Trial Chamber III was listed on the cover page of ICC-01/05-01/13-1005-Conf-Red, Defence Response to "Confidential redacted version of "Prosecution Application for Delayed Disclosure", 4 June 2015, ICC-01/05-01/13-985-Conf-Exp", 15 June 2015, paras 52-55: 'It is, however, apparent from the most recent batch of disclosures that the Prosecution has delayed disclosing such materials until disclosure is first effectuated in the Article 70 case. For example, given the fact that the existence of the October 2012 interview was revealed in a public filing, on 20 February 2014, the Defence requested the Prosecution to disclose it in the Main Case on the grounds that it appeared to concern the credibility of Defence witnesses. The Prosecution only disclosed it last week. Moreover, notwithstanding the existence of a direct order of the Trial Chamber in the Main Case, the transcripts of interviews with Defence witnesses, which were conducted in October and November last year, were also only disclosed last week. Given the advanced stage of the Main Case, the level of prejudice engendered by such delayed disclosure is much greater in the Main Case. In particular, as a result of the Prosecution's failure to disclose these materials contemporaneously, the Defence was deprived any ability to employ these materials in its preparation.' (citations omitted).

²⁰ ICC-01/05-01/08-3255, para. 87.

- (viii) Whether the Trial Chamber erred in its determination of the 'Fourth Allegation' by not addressing its own critical failure to refer the Prosecution's *ex parte* filings and submissions immediately to the Pre-Trial Chamber as required by the Statute, rather than erroneously entertaining these requests for a period of five months;²¹
- (ix) Whether the Trial Chamber erred in its determination of the 'Fourth Allegation' by failing to apply the correct legal standard of 'whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge', but rather focusing on whether the Chamber itself could see anything giving rise to doubts as to its own impartiality.²²
- (x) Whether the Trial Chamber's conclusion that it did not 'provide direct guidance' to the Prosecution (and in fact that such a suggestion was 'misleading'),²³ can be reconciled with examples of the Presiding Judge providing direct guidance to the Prosecution, such as:²⁴

PRESIDING JUDGE STEINER: Maître Badibanga, for instance, would be a good start for the Prosecution investigation just to check the log-book that Detention Centre's – nodding does not help. I need your answer.

MR BADIBANGA: (Interpretation) Yes, your Honour, that is a very welcome suggestion from you.

²¹ ICC-01/05-01/08-3255, paras. 91-115.

²² ICC-01/05-01/08-3255, para. 103: '...the Chamber sees nothing giving rise to any doubt as to its impartiality.'; ICC-01/05-01/08-3255, para. 104: '...the Chamber does not consider that [...] raise reasonable doubts as to the Chamber's impartiality'; para. 113: 'The Chamber sees nothing in the Defence's submissions demonstrating any impropriety or the appearance of impropriety in the Chamber's approach'.

²³ ICC-01/05-01/08-3255, para. 114.

²⁴ ICC-01/05-01/08-T-303-Red3-ENG-ET, p.24, lines 8-12. See Defence Request, para. 99.

- (xi) Whether the Trial Chamber erred in failing to address Defence submissions concerning the Trial Chamber's knowledge of *ex parte* submissions about P-178 showing that the witness had solicited and received funds from the Prosecution, at the time that it stopped Defence Counsel from asking questions on funding;²⁵ or in failing to provide any or sufficient reasoning addressing the Defence submissions on this point.

The issues significantly affect the fairness and expeditiousness of the proceedings

9. The Defence Request, at its core, concerns the failure of the Prosecution in the conduct of its Article 70 investigations, to give due regard to the fairness of the proceedings in the present case, and the concurrent failure of the Trial Chamber to ensure that the proceedings, and the bench, remained untainted by this process. The Defence Request relates directly to the objective fairness of the trial, and its fairness as perceived by those who follow the work of the Court, as well as the objective impartiality of the present bench. As such, questions raised by the Defence submissions on abuse of process cannot be divorced from the overall fairness of the proceedings, which are significantly affected by the appealable issues as defined above.

10. The fact that the proceedings in this case are now in the deliberations phase does not preclude a finding that the appealable issues affect their expeditiousness. The issues raised in the Defence Request are of such significance that proper consideration by an impartial trier of fact would, in the view of the Defence, render any deliberations on the merits of the case unnecessary. It could well be the case that the outcome of these proceedings will turn on the impropriety which has plagued their conduct over the course of the last two

²⁵ ICC-01/05-01/08-3239-Red2, para. 41.

years. As such, it is difficult to contemplate an Impugned Decision which raises issues which have a greater potential to impact on the expeditiousness of a trial.

11. Moreover, a failure to definitively and correctly resolve the issues raised in the Defence Request prior to the delivery of a judgement pursuant to Article 74 of the Statute, will mean that issues of Prosecutorial investigative impropriety will also plague any subsequent appeal. The Trial Chamber's ultimate judgement in the present case will be open to challenge on the basis of the errors identified above, coupled with a refusal to permit appellate intervention at the appropriate juncture. The expeditiousness of the proceedings is therefore greatly advanced by the appealable issues being resolved by the Appeals Chamber prior to the issuance of a judgement.

An immediate decision by the Appeals Chamber would materially advance the proceedings

12. As noted by the Appeals Chamber:²⁶

A wrong decision on an issue in the context of Article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances, the proceedings will not be advanced but on the contrary they will be set back.

13. In deciding a request under article 82(1)(d), the Trial Chamber 'must ponder the possible implications of a given issue being wrongly decided on the outcome of the case [which] involves a forecast of the consequences of such an occurrence'.²⁷ In the Defence submission, any one of the appealable issues identified above, if wrongly decided at first instance, would have irreparable

²⁶ ICC-01/04-168, para. 16.

²⁷ ICC-01/04-168, para. 13.

consequences on the proceedings and have the ability to ‘unravel the judicial process’.

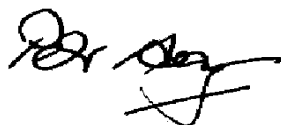
14. Abuses of the Prosecutor’s investigative functions, and a concomitant lack of oversight or an effective remedy for these abuses, have the ability to affect the entire trial process in which the parties have been engaged for four and a half years. If the Appeals Chamber were to determine that the Trial Chamber erred in the Impugned Decision in dismissing the Defence concerns as to the impact of the Prosecution’s investigations on the fairness of the trial, or otherwise in its interpretation or application of the relevant legal standards, any negative impact would be minimized if such a finding is made prior to a judgment being rendered. As such, an immediate decision by the Appeals Chamber would materially advance the proceedings.

C. RELIEF SOUGHT

15. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Trial Chamber to:

GRANT the present request for leave to appeal the ‘Decision on Defence Request for Relief for Abuse of Process’.

The whole respectfully submitted.



Peter Haynes, QC

Lead Counsel of Mr. Jean-Pierre Bemba

Done this day 23 June 2014

In The Hague, The Netherlands