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

Date: **07/08/2017**

THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

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 Bemba Defence only*

Public Redacted Version of "Amended Application for Measures to be Taken to Ensure the Availability of Funds", 27 July 2017, ICC-01/05-01/08-3548-Conf-Exp

Source: Defence for Mr. Jean-Pierre Bemba Gombo in ICC-01/05-01/13

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

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Detention Section

Victims Participation and Reparations Section **Other**

Introduction

1. On 30 June 2017, the Article 70 Defence for Mr. Bemba requested the Honourable Appeals Chamber to:¹

Firstly, clarify whether the Defence would be in breach of the freezing order if the Defence were to request the DRC bank to disclose to the Defence the exact amount in Mr. Bemba's account;
Secondly, if such direct interaction with the bank would be incompatible with the freezing order, instruct the Defence as to the appropriate mechanism for verifying the amount in this account;
Thirdly, take such steps as are necessary to ensure the availability to the Court of the funds in this account, in the event that the fine is upheld on appeal.

2. Pursuant to an order of the Appeals Chamber, on 24 July 2017, the Registry filed observations concerning the specific amount of funds that are in Mr. Bemba's bank account in the Democratic Republic of Congo.²
3. This information has rendered the first two requests above moot, and raised an additional issue, which requires the intervention of the Court.
4. The Defence therefore hereby amends its application in light of this new information, and at the same time, requests the Appeals Chamber to reclassify the information annexed to the Registry Observations, so that the Defence can cite to them on a confidential Bemba Defence, Prosecution only basis, in the Article 70 case.
5. This request has been filed confidential *ex parte* Defence, Prosecution only basis due to the fact that it cites information protected by this classification. The Defence will file a public redacted version forthwith.

¹ ICC-01/05-01/08-3537, para. 10.

² ICC-01/05-01/08-3545.

Submissions

6. According to the information provided by the Registry, the amount in Mr. Bemba's account is apparently [Redacted] CDF.³ At the current rate of exchange, this equates to [Redacted] US dollars.⁴

7. In the absence of any information concerning the monthly amounts that are deposited in the account, the Defence is not in a position to ascertain why there is a discrepancy between the Registry's estimate of [Redacted] euros provided 7 months ago,⁵ and the amount which is actually in the account. Although an obvious source of the discrepancy is the fact that the Registry's estimation was based on the assumption that Mr. Bemba would continue to receive a salary in connection with his former position as Vice-President, the Defence will liaise with the Registry in order to ascertain whether future particulars might be available (such as the amount which is transferred into the account on a monthly basis, if any).

8. It is, moreover, notable that the amount has been provided in Congolese francs rather than US dollars. Accordingly, a further source of the discrepancy could be that either:
 - the monthly salary communicated by the authorities in 2008 was based on an exchange rate that is no longer applicable, and the amount has been significantly impacted through the devaluation of the CDF; or
 - the Congolese government changed from paying salaries in dollars to paying in local currency, which results in a lower US dollar amount due to currency devaluation.

³ ICC-01/05-01/08-3545-Conf-Exp-Anx1

⁴ Annex A.

⁵ ICC-01/05-01/13-2081-Conf-Exp-AnxI-A-Red, p.4

9. Nonetheless, notwithstanding the specific cause of this discrepancy, the fact that the funds appear to be held in Congolese francs rather than US dollars raises a significant risk of further devaluation. In particular, although the initial purpose of the freezing order was to preserve the value of Mr. Bemba's assets,⁶ unless steps are taken by the Court, the value of these funds might depreciate substantially due to significant currency fluctuations in the DRC. As observed in a June 2017 analysis concerning the impact of political turmoil in the DRC on its economy, "[t]he country's currency, the Congolese franc, has depreciated immensely to reach a loss of up to 50% (an additional 30% from the start of this year) (...)"⁷

10. In order to guard against further loss, the Defence requests that measures be taken to protect the value of these funds against such currency fluctuations. This would be consistent with the practice of United Nations' freezing regimes,⁸ case law of the European Court of Human Rights and European Court of Justice enjoining States to ensure that the implementation of sanction regimes interfere with the rights of targeted persons (including the right to property and the related value of frozen assets), to the least extent possible,⁹ and domestic practice concerning the duty to take measures to preserve the value of frozen assets.¹⁰

⁶ ICC-01/05-01/08-339-Red, para. 11; ICC-01/05-01/08-3-Conf.

⁷ <https://politicsmeanspolitics.com/doing-business-in-the-drc-5fb5a2d74d11>

⁸ Under the Security Council sanction regime, it is possible obtain a licence/request an exemption to take specific steps to preserve the value of frozen assets: See legal guidance issued by UK HM Treasury, April 2017, p. 13,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/605980/OFSI_Financial_Sanctions_-_Guidance_-_April_2017.pdf.

See also A/63/223, para. 16; See A/HRC/4/88, paras. 23-31, and A/61/267, para. 40, in which the UN Special Rapporteur on Terrorism and Human Rights, cites to the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985), as a legal basis for remedying harm caused by the implementation of asset freezes.

⁹ *Nada v Switzerland*, app. no. 10593/08, paras. 195-198; *Al-Dulimi and Montana Management Inc. v. Switzerland*, app. no. 5809/08; *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, para. 355. Article 8 of Directive 2014/42/EU of the European Parliament further

provides that “Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights”.

¹⁰ S185(1) of the *Portuguese Code of Criminal Procedure* reads ‘If the seizure is imposed on (...) perishable items, the judicial authority may order, as appropriate, their necessary preservation or maintenance measures (...)’ (emphasis added). In terms of analogous provisions from Portuguese insolvency law, Portuguese law, *Código Da Insolvência E Da Recuperação De Empresas* (DL n.º 53/2004 as amended) provides the applicable legal framework.

S31 reads ‘the provisional liquidator who is granted exclusive administration powers should provide for the maintenance and preservation of the debtor’s property, and the continued operation of the company, unless she considers that the suspension of activity is most advantageous to the interests of creditors and such action is authorized by a judge’ (emphasis added)

S55(1)(b) reads ‘(...) the insolvency administrator with the cooperation and under the supervision of the committee of creditors (...) provides, in the meantime, the preservation and culmination of the insolvent’s rights and the continued operation of the company, if applicable, avoiding as possible worsening of their economic situation’ (emphasis added).

S59(1) reads ‘the insolvency administrator is liable for the damage caused to the debtor and creditors on insolvency and bankrupt estate by culpable breach of his duties; the fault is assessed by the diligence of a careful administrator and orderly insolvency’ (emphasis added).

S99-2 of the *French Code of Criminal Procedure* reads ‘(...) the investigating judge may also order that ownership of personal property placed under judicial safekeeping which belongs to the persons being prosecuted (...) be surrendered to the State property service with a view to their disposal, where to continue the seizure would decrease the value of the property. If the sale of the asset is then carried out, the proceeds of this are deposited for a period of ten years. Where the proceedings are dropped, or end in a discharge or acquittal, or where the court does not order confiscation, these proceeds are given back to the owner of the items, if he so requests’ (emphasis added).

Under UK law and more specifically SS27-30 of the *2003 Proceeds of Crime Act*, restraint and charging orders serve the purpose of preventing the dissipation or depreciation of assets which may be confiscated from a convicted criminal.

S27(6) reads ‘Where the Court has made a restraint order, the Court (a) may at any time appoint a receiver- (i) to take possession of any realizable property; and (ii) in accordance with the directions of the Court, to manage or otherwise deal with any property in respect of which he is appointed (...)’ (emphasis added).

Similarly, S29(7) reads ‘Where the Court has made a charging order, the Court may give such directions to such person as the Court thinks fit to safeguard the assets under the charging order’ (emphasis added).

S34 regulates the liability of the receiver; provided that he/she acts pursuant to his reasonable beliefs with regard to his rights, he/she is not liable to any person in respect to any loss or damage resulting from his action, except in so far as the loss or damage is caused by his negligence.

Under German law, the *Insolvency Statute of 5 October 1994* is relevant.

According to S21(1), ‘The insolvency court shall take all measures appearing necessary in order to avoid any detriment to the financial status of the debtor for the creditors until the insolvency court decides on the request’ (emphasis added).

This obligation is further clarified in the next paragraph, providing for the possibility of appointing a ‘provisional insolvency administrator’ to ensure the satisfactory management of the property in question.

S22(1) elaborating on the provisional administrator’s rights and responsibilities reads ‘the provisional insolvency administrator shall (...) see to the arrestment and preservation of the debtor’s property’ and ‘verify whether the debtor’s property will cover the costs of the insolvency proceedings’ (emphasis added).

S60(1) reads ‘The insolvency administrator shall be held liable to damages for all parties to the proceedings if he wrongfully violates the duties incumbent on him under this Statute. He shall ensure the careful action of a proper and diligent insolvency administrator’ (emphasis added).

11. Although the freezing order implemented in this case was directed towards the objective of future reparations for victims, this should not prevent the defendant from seeking preservation measures, in order to facilitate the ability of the defendant to pay any fine imposed by the Court.

12. Firstly, the question as to whether the funds in question will be directed to a fine or reparations cannot be determined while appeals are pending in both cases. The technical distinction between whether the funds might be paid to victims as reparations in this case, or to victims by virtue of a fine paid into the Trust Fund for Victims in the Article 70 case, should not operate to the detriment of the accused.

13. The ECHR has emphasised that the question as to whether an adverse judicial measure constitutes a penalty is a matter of substance and not form.

Under EU law, *Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings* provides the applicable framework governing Member State cooperation in such cases.

A21(3) of the Regulation reads 'In exercising its powers, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action'.

A52 of the Regulation reads 'Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of a debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that Member State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings' (emphasis added).

For the United States, see *United States of America, v. Richard H. Thier, No. 85-4857, 10 October 1986, United States Court of Appeals, Fifth Circuit*, para. 67: Due process is not a procedural absolute. What is required may depend on the weight of the interests involved. The Government certainly has a valid interest in assuring that funds illegally obtained are not laundered or secreted between the time a defendant is indicted and the time when his criminality is determined by actual conviction. This is sufficiently important to weigh heavily in deciding what due process requires when the Government seeks to protect its interest. But due process must be determined on a scale whose balances weigh both sides, not simply the Government's interest. *The scale must also weigh the private interests of the affected individual, the risk of an erroneous deprivation of that interest under the procedures used, and the probable value and additional costs, if any, of additional or substitute procedural safeguards* (<https://www.courtlistener.com/opinion/476830/united-states-v-richard-h-thier/>)

Thus, in *Öztürk v. Germany*¹¹ the Court held that if the Contracting States were able at their discretion, by classifying an offence as ‘regulatory’ instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 of the Convention, the application of these provisions would be subordinated to their sovereign will. Accordingly, for the protections of Article 6 to apply, it suffices that the offence in question is by its nature to be regarded as “criminal” from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere.¹² A freezing order directed towards a future financial award, irrespective as to whether it is termed a payment of reparations or a fine, can have a nature and degree of severity that belongs to the criminal sphere.¹³ This in turn, triggers the right to due process protections.

14. Secondly, in line with the right to such due process protections, Mr. Bemba has a right to protection against loss of value while these appeals are pending. Former ICTY Judge, S. Trechsel has observed in this connection that whilst human rights jurisprudence does not prohibit national authorities from seizing the assets of a defendant such measures “may become so intrusive that they must be viewed as anticipating the punishment. This could even be the case with seizure, if it lasts for an excessive length of time and if the goods seized consequently lose their value.”¹⁴

¹¹ *Öztürk v. Germany*, Application no. 8544/79, 21 February 1984; *Engels and others v Netherlands* ECHR judgment 6\8\1976, Series A, No. 22.

¹² *Öztürk*, paras. 53-54.

¹³ This is consistent with the fact that “although reparations were seen as a way of providing redress for victims, it was clear to many delegations [at Workshop 4 of the Paris Seminar, (PCNICC/1999/WGRPE/INF/2, 6 July 1999)] that they were nevertheless part of the sanction of the Court to be ordered against a convicted defendant.” Peter Lewis and Håkan Friman in Roy Lee (Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*) 474, at 488

¹⁴ S Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2006) at p. 180, citing the case of *Raimondo v. Italy* at footnote 126.

15. In terms of specific protection measures that can be taken, Mr. Bemba's understanding of the account is that it should be possible to request the bank to immediately convert the funds in this account to US dollars (which is a more stable currency) to guard against this risk.

Relief sought

16. In light of new information provided by the Registry, the Defence for Mr. Jean-Pierre Bemba in the Article 70 case:

- a. Withdraws its application for the Honourable Appeals Chamber to take steps to assist the Defence to verify the amount of funds in the account;
- b. Supplements the remainder of its application by respectfully requesting the Appeals Chamber to further amend the freezing order, to the extent required, to enable the Defence, through the Registry, to request the DRC bank to convert the funds immediately to US dollars; and
- c. Requests the Appeals Chamber to reclassify ICC-01/05-01/08-3545-Conf-Exp-Anx 1 so that it is available on a confidential *ex parte* Bemba Defence and Prosecution only basis in ICC-01/05-01/13.



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Dated this 7th day of August 2017

The Hague, The Netherlands