



Original: **English**

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

Date: **19/04/2018**

TRIAL CHAMBER III

**Before: Judge Goeffrey Hendersen, Presiding Judge
Judge Chang-ho Chung
Judge Kimberly Prost**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

**THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public

**Request for Leave to Reply to the "Prosecution's response to Bemba's article 70
Defence's request for access to filings in ICC-01/05-01/08"**

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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Trial Chamber VII

Introduction

1. The Defence for Mr. Jean-Pierre Bemba in the Article 70 case respectfully seeks leave to file:
 - a. A discrete reply in relation to an issue arising from the 'Prosecution's response to Bemba's article 70 Defence's request for access to filings in ICC-01/05-01/08' ("the Response"); and
 - b. An authority from the Article 70 case, which the Prosecution has omitted to refer to.

Submissions

2. In the Response, the Prosecution appears to have confirmed firstly, the existence of ongoing investigations into the status of Mr. Bemba's assets, and secondly, that at least some of the requested information concerns these investigations and/or measures taken to preserve his assets.¹ The Prosecution also suggests that the existence of such investigations can constitute a legitimate basis for withholding information from the Defence.² In the absence of any guidance or indicia as to when the confidentiality can be lifted, it appears that the default Prosecution position is that this information can be withheld from the Defence indefinitely.
3. The fact that the *ex parte* nature of the filings relates to the existence of ongoing investigations, and is designed to further the Prosecution's ability to investigate these matters (rather than to protect specific persons) arises from the Response.

¹ Response, paras. 3, and 9.

² Response, para. 9.

4. Given that the ICC Appeals Chamber has clarified that the Prosecution is not a party for the purpose of reparations proceedings,³ this new information raises a fundamental question as to whether the Prosecution has the power under Article 54(1) of the Statute to investigate, or request States to take measures in connection with Mr. Bemba's assets for the purposes of proceedings that do not concern his criminal responsibility (that is, reparation proceedings as opposed to the implementation of fines or forfeiture).

5. This question obviously falls outside the remit of the Article 70 defence, but if such investigations have occurred, then they would need to fall within the scope of criminal proceedings at the Court, which in turn, triggers Mr. Bemba's rights as a defendant in these proceedings. This therefore raises the subsidiary issue as to the balance between the *ex parte* nature of such investigations, and Mr. Bemba's rights:
 - as a defendant, in the Article 70 sentencing proceedings, to challenge Prosecution arguments that the sentence imposed on him should take into consideration his alleged non-cooperation on issues concerning his assets or legal complexities concerning their seizure;⁴ and
 - as a person, whose property has been seized and surveilled, to be apprised of such measures and to either challenge them if appropriate to do so, or factor them into consideration in any Article 70 calculations concerning Mr. Bemba's future living costs and those of his family.

³ ICC-01/04-01/06-3129, para. 24.

⁴ ICC-01/05-01/13-2168-Conf, paras 72-73; ICC-01/05-01/13-2202-Conf-Red, para. 111 and fn. 209

6. The Defence therefore seeks leave to file a limited reply in relation to:
- Whether, it can be extrapolated from ICC case law concerning Rule 81(2), that there is a point at which Mr. Bemba's right, as a defendant, to challenge inaccurate information concerning his assets or repeated claims that he is not 'cooperating' with the Court's investigations, should take precedence over the Prosecution's right to investigate his property, and make *ex-parte* adverse allegations in the context of reparations proceedings;⁵
 - If so, where that bright line falls; and
 - ECHR case law concerning the Article 6 right of defendants – in criminal forfeiture proceedings - to be informed, at the soonest point possible, of any domestic seizure or preservation measures, and to be afforded a fair opportunity to challenge or respond to them.
7. Since the Defence was unaware of the specific reasons for the *ex parte* nature of these filings, it was unable to address these issues in a concrete manner in its initial request. If leave is granted, the Defence can also file its reply within 24 hours, and will require no more than 5 pages.
8. Finally, the inconsistency should be immediately apparent between the Prosecution's claim, at paragraph 9 of the Response, that the *ex parte* nature of this information falls within the exclusive remit of Trial Chamber III, and its later claims that firstly, the Defence should place its request before the Article 70 Trial Chamber,⁶ and secondly, that this request has in fact been disposed of in appellate rulings (that concerned requests for unrelated information).

⁵ The language employed in the Response (see paras. 3 and 9 in particular) suggests that the *ex parte* filings might also include language and allegations which are adverse to Mr. Bemba.

⁶ Response, para. 20.

9. For the sake of clarity, the Defence respectfully informs Trial Chamber III of a previous ruling in which the Article 70 Single Judge indicated that he would not rule on a request for the disclosure of Main Case filings, whilst a request for access to filings was pending before Trial Chamber III.⁷

Relief sought

10. For the reasons set out above, the Defence for Mr. Bemba in the Article 70 case respectfully seeks leave to file a reply in relation to:

- Whether, it can be extrapolated from ICC case law concerning Rule 81(2), that there is a point at which Mr. Bemba's right, as a defendant, to challenge inaccurate information concerning his assets or repeated claims that he is not 'cooperating' with the Court's investigations, should take precedence over the Prosecution's right to investigate his property, and make *ex-parte* adverse allegations in the context of reparations proceedings;⁸
- If so, where that bright line falls; and
- ECHR case law concerning the Article 6 right of defendants – in criminal forfeiture proceedings - to be informed, at the soonest point possible, of any domestic seizure or preservation measures, and to be afforded a fair opportunity to challenge or respond to them.



⁷ ICC-01/05-01/13-1188, para. 13.

⁸ The language employed in the Response (see paras. 3 and 9 in particular) suggests that the *ex parte* filings might also include language and allegations which are adverse to Mr. Bemba.

Melinda Taylor
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Dated this 19th day of April 2018

The Hague, The Netherlands