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

Date: **25 April 2018**

TRIAL CHAMBER III

Before: Judge Geoffrey Henderson, Single Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO**

Public

Decision on the Defence's "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'"

Order to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes QC

Ms Kate Gibson

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

Counsel for the Defence in ICC-01/05-01/13

Ms Melinda Taylor

Ms Mylène Dimitri

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 Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Mr Philipp Ambach

Trust Fund for Victims

Mr Pieter de Baan

Others

Trial Chamber VII

Judge Geoffrey Henderson, acting as Single Judge on behalf of Trial Chamber III (“Single Judge” and “Chamber”, respectively) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba Case”), having regard to Regulation 24(5) of the Regulations of the Court (“Regulations”), issues the following “Decision on the Defence’s “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’””.

I. Procedural background and submissions

1. On 26 March 2018, the Chamber was informed by the Registry that Mr Bemba’s Defence in the case *The Prosecutor v. Bemba et al.* (“Article 70 Case Defence” and “Article 70 Case”, respectively) had requested access by email to all confidential and confidential *ex parte* filings in this case, which are available to Mr Bemba’s Defence in the Bemba Case (“Bemba Case Defence”).¹
2. On 9 April 2018, as instructed,² the Article 70 Case Defence filed a formal request (“Access Request”), seeking access to all confidential and confidential *ex parte* filings in the Bemba Case concerning Mr Bemba’s assets and financial status, as follows: (i) confidential *ex parte* filings, available only to the Registry and/or experts appointed by it (“category 1”); (ii) confidential *ex parte* filings available only to the Office of the Prosecutor (“Prosecution”) and the Registry in the Bemba Case (“category 2”); and (iii) confidential and confidential *ex parte* filings available to the Bemba Case Defence (“category 3”).³ The Article 70 Case Defence submits that access is needed to assist the preparation of Mr Bemba’s Defence in connection with the sentencing proceedings in the Article 70 Case.⁴

¹ Email from CMS to Trial Chamber III, 26 March 2018 16:29.

² Email from the Legal Advisor to CMS, 29 March 2018 12:56.

³ Request for Access to Filings in case ICC-01/05-01/08, 9 April 2018, ICC-01/05-01/08-3622.

⁴ Access Request, ICC-01/05-01/08-3622, para. 1.

3. On 12 April 2018, the Chamber invited the Registry, the Prosecution, and the Bemba Case Defence to file their views on the Access Request, by 19 April 2018.⁵
4. On 19 April 2018, the Prosecution submitted its response to the Access Request (“Prosecution’s Response”). The Prosecution opposes the Article 70 Case Defence’s access to filings in category 1, subject to the Registry’s views, as well as to those in category 2.⁶ It submits that the Access Request is insufficiently specific, lacks a “substantiated justification” and is based on an “incorrect reading of the relevant decisions.”⁷ In the Prosecution’s view, access to material in categories 1 and 2 would be detrimental to ongoing financial investigations, particularly in view of Mr Bemba’s “demonstrated non-cooperation with these investigations”.⁸ Moreover, the Prosecution submits that the Registry’s updated solvency report filed in the Article 70 Case on 13 April 2018, sufficiently informs Mr Bemba of the financial details pertinent to his sentencing submissions.⁹ The Prosecution does not have any objections with regard to the filings in category 3 to the extent that this information is already available to the Bemba Case Defence, and thus to Mr Bemba, and Mr Bemba has consented to such information being shared with the Article 70 Defence team.¹⁰
5. On 19 March 2018, the Registry filed its observations on the Access Request.¹¹
6. No observations were filed by the Bemba Case Defence.
7. On 19 April 2018, the Article 70 Case Defence submitted a Request for Leave to Reply to the Prosecution’s Response (“Leave to Reply Request”). It requests leave to file (i) a discrete reply to an issue arising from the Prosecution’s Response,¹² and (ii) an authority from the Article 70 case, in which the Single Judge ruled that

⁵ Email from Associate Legal Officer to Counsel and the Registry, 12 April 2018 16:25.

⁶ Prosecution’s response to Bemba’s article 70 Defence’s request for access to filings in ICC-01/05-01/08, 19 April 2018, ICC-01/05-01/08-3624, para. 2.

⁷ Prosecution’s Response, ICC-01/05-01/08-3624, paras 5-8, 14.

⁸ Prosecution’s Response, ICC-01/05-01/08-3624, paras 3, 9.

⁹ Prosecution’s Response, ICC-01/05-01/08-3624, paras 3, 13.

¹⁰ Prosecution’s Response, ICC-01/05-01/08-3624, paras 2, 22.

¹¹ Registry’s Observations on Defence Request ICC-01/05-01/08-3622, 19 April 2018, ICC-01/05-01/08-3625.

¹² 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”, 19 April 2018, ICC-01/05-01/08-3626, para. 1.

he would not decide over a request for access to filings in the Bemba Case.¹³ The Article 70 Case Defence submits that the Prosecution's Response reveals the Prosecution's involvement in financial investigations, as well as that the *ex parte* classification of the requested filings "relates to the existence of ongoing investigations, and is designed to further the Prosecution's ability to investigate these matters".¹⁴ In the Article 70 Case Defence's view, this raises the question of 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."¹⁵ The Article 70 Case Defence essentially seeks leave to file a reply in relation to: (i) whether, according to the Court's case law on Rule 81(2) of the Rules of Procedure and Evidence, a defendant's right 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", and (ii) "[European Court of Human Rights] case law concerning Art[icle] 6 rights of defendants – in criminal forfeiture proceedings – to be informed, at the soonest point possible, of any domestic seizure and preservation measures, and to be afforded a fair opportunity to challenge or respond to them".¹⁶

II. Analysis

8. Pursuant to Regulation 24(5) of the Regulations, participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the relying participant could not reasonably have anticipated.

¹³ Leave to Reply Request, ICC-01/05-01/08-3626, paras 1, 9.

¹⁴ Leave to Reply Request, ICC-01/05-01/08-3626, para. 3.

¹⁵ Leave to Reply Request, ICC-01/05-01/08-3626, para. 4.

¹⁶ Leave to Reply Request, ICC-01/05-01/08-3626, paras 6, 10.

9. The Single Judge notes that decisions on whether leave to reply should be granted lie within its discretionary powers and must be considered on a case-by-case basis.¹⁷
10. After consideration of the issues in relation to which the Article 70 Defence seeks leave to reply, the Chamber is of the view that the submissions, which the Article 70 Defence requests to be authorised to make, would not be of assistance to the Chamber for its eventual decision on the Access Request. The Request is accordingly rejected.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Leave to Reply Request.

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



Judge Geoffrey Henderson
Single Judge

Dated this 25 April 2018

At The Hague, The Netherlands

¹⁷ *See for instance*, Appeals Chamber, Decision on Mr Bemba's request for leave to reply to the Prosecutor's response to the additional evidence request, 2 December 2016, ICC-01/05-01/08-3479, para. 7; Decision on Mr Bemba's request for leave to reply to the "Prosecution's Response to Bemba's 'Request for Additional Evidence on Appeal'", 4 September 2017, ICC-01/05-01/13-2214, para. 5.