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

Date: **11 July 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 Hofmánski

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public

Public redacted version of "Prosecution's response to Mr Bemba's application concerning the freezing order (ICC-01/05-01/08-3537)", 11 July 2017

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Court to:

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Ms Helen Brady

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Counsel for Mr Bemba in case ICC-01/05-01/13

Ms Melinda Taylor

Ms Mylène Dimitri

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

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 Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section **Other**

Introduction

1. Mr Bemba's application, filed in this case by his counsel in case ICC-01/05-01/13 ("Article 70 Counsel"), is unnecessary.¹ Although purporting to make an essentially procedural request, its broader implications may draw the Appeals Chamber prematurely into an important question, which will need to be decided on its merits in due course, and over which the Presidency has exclusive competence.
2. That question is the priority of allocating Mr Bemba's assets to meet his various liabilities. It cannot simply be assumed that Mr Bemba can spend his finite liquid assets to pay the fine he incurred in case ICC-01/05-01/13 ("Article 70 case")—and thus potentially avoid further time in prison resulting from his convictions in that case²—in preference to making any reparations ordered to the victims in *this* case (which may be substantial), let alone making any required contribution to the costs of his legal defence.
3. The Appeals Chamber should thus dismiss the Application, including the open-ended request for assistance in ensuring "the availability" of Mr Bemba's funds to pay his fine in the Article 70 case.³ The existing measures apparently taken by the Registry suffice to obtain the information sought, with the cooperation of the DRC authorities.
4. If that cooperation is not provided in timely fashion, the Court can and should intervene to facilitate the process. But it is neither necessary to lift or otherwise to vary the freezing order in place, or to engage at this stage with the priority in which Mr Bemba's liabilities (reparations, litigation costs, fines) are to be settled.

¹ See ICC-01/05-01/08-3537 A ("Application").

² Application, para. 4.

³ *Contra* Application, para. 10.

Confidentiality

5. Although responding to a motion filed publicly, this response addresses confidential information contained in the confidential annex to that motion. Accordingly, consistent with regulation 23*bis*(2) of the Regulations of the Court, it is filed confidentially. A public redacted version is also filed.

Submissions

6. The Application concerns a single bank account belonging to Mr Bemba, located in the DRC, which is presently subject to a freezing order issued in this case (“DRC Account”).⁴ It is estimated—but not confirmed—that the DRC Account may contain, at least, the proceeds of Mr Bemba’s salary paid to him in recent years as a senator of the DRC.⁵

7. The Application should be dismissed because the requested relief extends far beyond that necessary to determine the present contents of the DRC Account. Moreover, although somewhat ambiguous in its scope, it appears to invite the Appeals Chamber to rule, directly or indirectly, on a matter (allocation of assets) which is in the exclusive competence of the Presidency.

8. Dismissing the Application in whole or in part does not prevent the Court from taking any necessary measures, at the appropriate time, to support the Registry in ascertaining the contents of the DRC Account through the DRC authorities. To this end, the Appeals Chamber should ensure that an appropriate chamber remains seized of the matter of the DRC Account. Once this information is obtained, it may be disseminated within the Court among the concerned Parties, without prejudice to the subsequent allocation of the funds in question. But there is no demonstrated need for judicial intervention at the present time.

⁴ Application, para. 5.

⁵ Application, para. 5.

A. The relief sought in the Application is unjustified

9. The relief sought in the Application is ambiguous. To the extent it is understood narrowly, it is unjustified. There are alternative means to confirm the contents of the DRC Account, which are more effective and less risky. Likewise, to the extent the relief sought is understood broadly, it goes beyond mere information-gathering, to touch on matters concerning the allocation of Mr Bemba's assets. If so, it is not only premature but addressed to the wrong forum. Both interpretations require the Application to be dismissed.

10. The operative paragraph of the Application requests the Appeals Chamber to grant at least two of the following three remedies:

- To "clarify" whether Mr Bemba or "his Defence", presumably meaning Article 70 Counsel, would breach the freezing order if they "request the DRC bank to disclose [...] the exact amount" in the DRC Account; *or*, alternatively,
- To "instruct the Defence as to the appropriate mechanism for verifying the amount" in the DRC Account; *and*, in any event,
- To "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 [in the CAR Article 70 case]."⁶

11. Closer inspection of the Application, and its background, casts important additional light on these requests.

12. Concerning the first and second remedies, the Prosecution notes that the title of the Application suggests expressly that Article 70 Counsel wishes the Appeals

⁶ Application, para. 10.

Chamber “to lift the freeze” on the DRC Account so that she can approach the DRC bank. And, indeed, this seems to be the necessary implication of the suggestion by the Registry—which Article 70 Counsel quite rightly approaches with caution⁷—that, due to some delay in the DRC authorities’ response to the Registry, “[REDACTED]” [REDACTED] “[REDACTED]” [REDACTED].⁸

13. In the Prosecution’s understanding, however, attempts by Mr Bemba, or any nominee of Mr Bemba, to access the DRC Account should indeed be futile, due to the effect of the present freezing order. Although the freezing order is addressed to the DRC,⁹ and hence does not directly bind any individual (such as Article 70 Counsel), the DRC is required under article 93(1)(k) of the Statute to implement effective measures under its domestic law which *would* prevent the access Mr Bemba contemplates. Accordingly, the course of action suggested by the Registry should be impossible, unless the freezing order is lifted. Yet, for the following reasons, lifting the freezing order is excessive and unjustified.

14. Neither the Registry proposal nor the Application outlines how the freezing order could be “partially” lifted as seems to be envisaged,¹⁰ in the sense of being tailored to permit some kinds of access to relevant assets (*e.g.* permitting verification of the balance of a bank account) while prohibiting other kinds of access (*e.g.* withdrawing or transferring the contents of the same account). Nor is there any indication that this is feasible under DRC law. Nor is there any proposal for other safeguards to prevent unauthorised interactions with the DRC Account beyond merely ascertaining its contents, if the freezing order were lifted entirely in this respect.

⁷ Application, para. 8.

⁸ [REDACTED]. *See also* Application, para. 7.

⁹ The Prosecution is aware that [REDACTED], but does not consider this precludes sharing this information, which follows from the correct interpretation of the Statute itself.

¹⁰ Application, para. 4 (“the Defence [Article 70 Counsel] underscores that Mr Bemba is not seeking direct access to the frozen assets”).

15. For these reasons, although the Prosecution is wholly assured of the probity of Article 70 Counsel, the risks associated with the proposed course of action—in particular, interference with the DRC Account, if unfrozen, by other persons—are significant.

16. Nor are these risks necessary to ascertain the contents of the DRC Account. Although the DRC authorities have not responded to the Registry’s request to confirm the contents of the DRC Account in the two-month period from 18 April 2017, it seems premature in these circumstances to assume that they will not respond. Nor can the Court simply ‘give up’ on the prospect of the DRC meeting its obligations. This would be to resile from the fundamental principles of the Statute, such as articles 93, 97, and 99, which assume State cooperation in good faith. Indeed, the Registry has already expressly informed Article 70 Counsel that “[REDACTED].”¹¹

17. There is no reason why Article 70 Counsel cannot wait for the proper response from the DRC authorities. Indeed, the Application frankly acknowledges that the relief sought is “pre-emptive[.]”¹² Although intended “to ensure that [Mr Bemba] is in a position to cooperate fully with the payment of any fine upheld in whole or in part by the Appeals Chamber in the Article 70 case”,¹³ that “fine is suspended” until the resolution of the pending appeals in the CAR Article 70 case.¹⁴ Likewise, as Trial Chamber III (seised of the reparations proceedings in this case) has recently reminded Mr Bemba, no reparations order will be executed until resolution of the appeal pending before this chamber.¹⁵ For these reasons, although there is a real need for clarity about Mr Bemba’s assets, that need is not so immediately pressing that the Court should depart from its cooperation procedures.

¹¹ [REDACTED].

¹² Application, para. 4.

¹³ Application, para. 1.

¹⁴ Application, para. 4.

¹⁵ See ICC-01/05-01/08-3536, paras. 11-14, 16.

18. Moreover, to any extent that the DRC authorities remain unresponsive to the pending request of the Registry, it is unlikely that this state of affairs will be improved by attempting to vary or to complicate the existing freezing order.¹⁶ Rather, *if* it becomes necessary, the Court may instead take steps to reinforce the informal request of the Registrar.¹⁷ Cogent policy reasons also dictate an approach along these lines. It cannot be conducive to the cooperation regime in the Statute, and especially its provisions on the freezing of assets—which play an important role in ensuring the viability of reparations proceedings—if it is accepted that the only way for the Court or the Parties effectively to acquire information about frozen assets is to lift the freezing order in the first place. It must be implicit in articles 57(3)(e) and 93(1)(k) that State authorities will not only comply with requests to freeze identified assets, but will also supply appropriate information about those assets to the Court, when requested, in a timely fashion.

19. For all these reasons, the first and second remedies sought in the Application are unnecessary. The “clarification” requested is moot, because the legal restriction on Mr Bemba’s access to the DRC Account will emanate from DRC law, imposed as a consequence of this Court’s freezing order. Inquiries about these funds, while frozen, should be futile. Nor does Article 70 Counsel require any instruction from the Appeals Chamber as to how to proceed because, from the information they report, the Registry has already taken the necessary steps. At present, no further action is required.

20. Furthermore, the Prosecution notes the open-ended nature of the third remedy sought: to take steps to ensure the availability of any funds in the DRC Account to pay the fine ordered in the Article 70 Case.

¹⁶ *Cf.* Application, para. 4 (noting “that previous attempts by the Court to lift or vary the freeze on Mr Bemba’s bank accounts have entailed a considerable degree of time and effort”).

¹⁷ *See further below* paras. 26-29.

21. Read narrowly, this request is futile. The amount of funds in the DRC Account cannot be varied by any order of the Appeals Chamber, nor is there any danger—provided the DRC Account remains frozen—that those funds (whatever they may be) will not be “available” to satisfy Mr Bemba’s financial liabilities in due course. Any other conclusion is inconsistent with articles 75 and 93 of the Statute. The resolution of the difficulty in ascertaining the precise amount of funds in the DRC Account is, moreover, adequately addressed along the lines described above.¹⁸

22. Accordingly, this third request can only be read as inviting the Appeals Chamber in this case to “ensure” the availability of the funds in the DRC Account for the specific purpose of *paying any fine enforced in the Article 70 case*. However, such a request is flawed for two reasons. First, as the Prosecution will further explain—when this issue becomes ripe for adjudication—the assumption that liabilities associated with the Article 70 case take priority over liabilities associated with this case cannot be correct.¹⁹ Most particularly, there is an obvious tension with the reparations scheme in the Statute and the recognition of the interests of the victims, for which purpose Mr Bemba’s assets were frozen in the first place.²⁰ Second, such a question—the “allocation of assets”—is exclusively reserved to the Presidency, and may not be decided by other judicial bodies of the Court.

¹⁸ See above paras. 12-19.

¹⁹ Nor has it yet been judicially determined, to the knowledge of the Prosecution, whether litigation costs in this case take priority over liabilities associated with any reparations award in this case. [REDACTED].

²⁰ See also below para. 24.

B. The Presidency is the correct forum to determine the allocation of property or assets realized through enforcement of a Court order

23. The drafters of the Rules and Procedure and Evidence foresaw similar issues to those which may arise concerning Mr Bemba's assets,²¹ and made express provision accordingly. Thus, rule 221 states, with emphasis added:

1. The Presidency shall, after having consulted, as appropriate, with the Prosecutor, the sentenced person, the victims or their legal representatives, the national authorities of the State of enforcement or any relevant third party, or representatives of the Trust Fund provided for in article 79, decide on *all matters related to the disposition or allocation of property or assets realized through enforcements of an order of the Court.*
2. *In all cases, when the Presidency decides on the disposition or allocation of property or assets belonging to the sentenced person, it shall give priority to the enforcement of measures concerning reparations to victims.*

24. The reaffirmation in rule 221(2), that "priority" shall be given to the enforcement of measures concerning reparations to victims, was wholly advertent,²² and is moreover consistent with article 57(3)(e) of the Statute,²³ as well as the jurisprudence of this Appeals Chamber.²⁴

25. The Application does not challenge or even address this clear law, which underlines the need to avoid pre-judging the ultimate decision to be taken by the Presidency on the allocation of assets. The relief requested in the Application must, therefore, be delimited accordingly.²⁵

²¹ Kimberly Prost, 'Enforcement,' in Lee et al (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsey: Transnational, 2001), p. 696 ("There was general recognition that in dealing with orders of reparation and forfeiture there would be various complex scenarios. It would be necessary for decisions to be made [...] on the allocation of property or derivative funds amongst different claimants").

²² Prost, p. 697 (rule 221 "recognizes the accepted principle that reparations orders should take priority in terms of the allocation of property or funds obtained from the sentenced person").

²³ Statute, art. 57(3)(e) (empowering the Court to take "protective measures for the purpose of forfeiture"—such as the freezing order issued by Trial Chamber III in this case—"in particular for the ultimate benefit of victims", emphasis added). See also rule 99(1).

²⁴ ICC-ACRed-01/16, paras. 45-46, 49 (article 57(3)(e) orders may be made to preserve assets for purposes including reparations awards), 53 ("reparations to victims are a prominent feature of the Statute").

²⁵ Cf. Application, para. 9.

C. The Appeals Chamber should nonetheless ensure that a relevant chamber of the Court is seised of the matter concerning the contents of the DRC Account

26. Notwithstanding its disagreement with the course of action proposed by the Registry and Article 70 Counsel, the Prosecution agrees that there is uncertainty about the extent of Mr Bemba's salary income in recent years, and that this fact should be capable of objective determination. It also agrees that this information is likely to assist all the Parties and participants in the future, and does not prejudice the ultimate decision of the Presidency concerning the priority of allocation of Mr Bemba's assets.

27. Consistent with articles 57(3)(e), 61(11), and 83(1), the Prosecution also agrees that the Appeals Chamber has, among others, the power to supervise existing requests made to States under article 93(1)(k) and to make any consequential orders that may be necessary, consistent with rule 221.²⁶

28. Yet, on the other hand, the Prosecution notes that reparations proceedings in this case are presently ongoing before Trial Chamber III, and that this chamber may likewise be competent to supervise existing article 93(1)(k) requests, consistent with its own power under article 75(4). Moreover, it may not be in the interest of judicial economy for two chambers both to be active in this area at the same time.

29. Accordingly, while the Prosecution considers that a chamber of the Court should remain formally seised of the matter concerning the contents of the DRC Account—and specifically the pending inquiry with the DRC authorities made by the Registrar or his staff—it takes no position whether the Appeals Chamber should undertake this function itself, or whether it should refer the matter to Trial Chamber III.

²⁶ Application, para. 9. *See above* paras. 23-25.

30. The Prosecution is mindful that it is required by the applicable time limit to file this response to the Application without the benefit of the Registrar's submissions,²⁷ which may shed further light on the measures necessary to facilitate the DRC authorities' cooperation.

31. Yet, in the event that the Registrar reports that the DRC authorities have still not provided the information requested, but does not suggest that additional judicial measures are appropriate at the present time, the Appeals Chamber should order the Registrar to report further to the designated chamber on the DRC authorities' response to his inquiry at a suitable interval, with a view to considering whether any further measures may be required.

Conclusion

32. For all the reasons above, the Application should be denied. However, the Appeals Chamber should ensure that a chamber of the Court remains seised of the issue regarding the contents of the DRC Account, and if necessary order the Registrar to submit a further report to the designated chamber, at a suitable interval, on the DRC authorities' response to the pending request.



Fatou Bensouda, Prosecutor

Dated this 11th day of July 2017²⁸
At The Hague, The Netherlands

²⁷ See ICC-01/05-01/08-3539 A (ordering the Registrar to file submissions by 24 July 2017).

²⁸ This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.