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

Date: **7 May 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 Access to Filings in case ICC-01/05-01/08

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

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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

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Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Mr Philipp Ambach

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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 Articles 64(6)(c),(f), 75 of the Rome Statute (“Statute”), Rule 166(3) of the Rules of Procedure and Evidence (“Rules”) and Regulation 23*bis* of the Regulations of the Court (“Regulations”), issues the following “Decision on the Defence’s Request for Access to Filings in case ICC-01/05-01/08”.

I. Procedural background and submissions

1. On 22 March 2017, Mr Bemba was sentenced to one year imprisonment and a fine of EUR 300,000 in the case *The Prosecutor v. Bemba et al.* (“Article 70 Case”).¹
2. On 8 March 2018, the Appeals Chamber, *inter alia*, reversed Mr Bemba’s sentence and remanded the matter back to Trial Chamber VII to determine a new sentence in light of its findings.²
3. On 14 March 2018, the Single Judge of Trial Chamber VII (“Single Judge of TC VII”), Judge Schmitt, ordered (i) the Registry to, *inter alia*, provide an updated report on the solvency of Mr Bemba, by 13 April 2018; (ii) the Office of the Prosecutor (“Prosecution”) in the Article 70 Case to file submissions on sentencing, by 30 April 2018; (iii) the Defence for Mr Bemba in the Article 70 Case (“Article 70 Case Defence”) to file submissions on sentencing, by 30 May 2018 (“Order on Sentencing Submissions”).³ The Single Judge of TC VII further specified that “[p]arty submissions related to solvency are expected to address the amounts required to satisfy the financial needs of the convicted persons and their dependents”, in accordance with Rule 166(3) of the Rules.⁴

¹ Decision on Sentence pursuant to Article 76 of the Statute, 22 March 2017, ICC-01/05-01/13-2123-Corr.

² Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”, 8 March 2018, ICC-01/05-01/13-2276-Red.

³ Order on Sentencing Submissions Following Appeals Chamber Judgments, 14 March 2018, ICC-01/05-01/13-2277.

⁴ Order on Sentencing Submissions, ICC-01/05-01/13-2277, fn. 3.

4. On 26 March 2018, the Chamber was informed by the Registry that the Article 70 Case Defence 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").⁵

5. On 9 April 2018, as instructed,⁶ the Article 70 Case Defence filed a formal request ("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 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").⁷ 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.⁸ It argues that access is "necessary for the Defence to have an accurate picture" of (i) the specific assets attributed to Mr Bemba and/or members of his household; (ii) the legal and factual basis for attributing ownership to specific persons; (iii) the current value of these assets; (iv) the status of any asset freeze concerning these assets; (v) any legal impediments/liens/debts to *bona fide* third persons or States; and (vi) whether the asset in question is capable of generating an income.⁹ It submits that the Request is justified insofar as (i) the filings concern ongoing issues before Trial Chamber VII and are therefore relevant to the preparation of the Article 70 Case Defence; (ii) it has identified the category of information to

⁵ Email from CMS to Trial Chamber III, 26 March 2018 16:29.

⁶ Email from the Legal Adviser to CMS, 29 March 2018 12:56 instructing the Registry to inform the Article 70 Case Defence that a formal filing is required, and that such filing should contain a specific and substantiated request, having regard to the Chamber's previous decisions on similar requests.

⁷ Request for Access to Filings in case ICC-01/05-01/08, 9 April 2018, ICC-01/05-01/08-3622, para. 8. *See also*, paras 9-20 (category 1), 21-31 (category 2), 32-37 (category 3).

⁸ Request, ICC-01/05-01/08-3622, para. 1.

⁹ Request, ICC-01/05-01/08-3622, para. 5.

which access is sought; and (iii) there are no countervailing reasons for denying the Article 70 Case Defence access to these filings.¹⁰

6. On 12 April 2018, the Chamber invited the Registry, the Prosecution, and the Bemba Case Defence to file their views on the Request, by 19 April 2018.¹¹
7. On 13 April 2018, the Registry submitted in the Article 70 Case its “Updated Report on Solvency of the Convicted Persons“, including confidential, *ex parte* Annex I on Mr Bemba’s solvency (“Report”).¹²
8. On 19 April 2018, the Prosecution submitted its response to the Request (“Prosecution’s Response”).¹³ 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 2.¹⁴ It submits that the Request is insufficiently specific, lacks a “substantiated justification” and is based on an “incorrect reading of the relevant decisions.”¹⁵ 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”.¹⁶ Moreover, the Prosecution submits that the Registry’s Report sufficiently informs Mr Bemba of the financial details pertinent to his sentencing submissions.¹⁷ 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 Case Defence.¹⁸

¹⁰ Request, ICC-01/05-01/08-3622, para. 7.

¹¹ Email from Associate Legal Officer to Registry and Counsel, 12 April 2018 16:25.

¹² Registry’s Updated Report on Solvency of the Convicted Persons, 13 April 2018, ICC-01/05-01/13-2278 and confidential *ex parte* Annex I, ICC-01/05-01/13-2278-Conf-Exp-AnxI, available only to the Registry, Prosecution and Article 70 Case Defence.

¹³ 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.

¹⁴ Prosecution’s Response, ICC-01/05-01/08-3624, para. 2.

¹⁵ Prosecution’s Response, ICC-01/05-01/08-3624, paras 5-8, 14.

¹⁶ Prosecution’s Response, ICC-01/05-01/08-3624, paras 3, 9.

¹⁷ Prosecution’s Response, ICC-01/05-01/08-3624, paras 3, 13.

¹⁸ Prosecution’s Response, ICC-01/05-01/08-3624, paras 2, 22.

9. On 19 April 2018, the Registry filed its observations on the Request (“Registry’s Observations”).¹⁹ With regard to category 3, the Registry does not oppose the Article 70 Case Defence’s access to information which has been filed before this Chamber, and to which Mr Bemba himself, or the Bemba Case Defence, has access.²⁰ The Registry opposes the Article 70 Case Defence’s access to filings in categories 1 and 2.²¹ It argues, *inter alia*, that (i) the Request is too general and partially moot;²² (ii) the basis for the under seal classification of the information still exists;²³ (iii) the Request is irrelevant to the calculation of Mr Bemba’s financial needs and those of his dependents as required by Trial Chamber VII, and, in any case, Mr Bemba himself appears best-placed to know such information;²⁴ (iv) the question of how to make assets *known to* Mr Bemba and his defence teams available should be addressed first, as opposed to the Article 70 Case Defence “seeking additional information on unspecified assets”;²⁵ (v) the Request is premature as the Presidency will be the competent authority to give timely access to relevant information when enforcing a potential fine or reparations order pursuant to Rule 217 of the Rules and 116(1) of the Regulations;²⁶ and (vi) any request for information on, *inter alia*, the current value for Mr Bemba’s assets or the Registry’s conclusions concerning the ownership of particular assets are best addressed to the Presidency pursuant to Rules 217-222 of the Rules.²⁷ The Registry further notes that all under seal financial information derives from cooperating states, which would have to be consulted before any disclosure could take place.²⁸

10. No observations were filed by the Bemba Case Defence.

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

²⁰ Registry’s Observations, ICC-01/05-01/08-3625, para. 6.

²¹ Registry’s Observations, ICC-01/05-01/08-3625, para. 9.

²² Registry’s Observations, ICC-01/05-01/08-3625, paras 8, 10, 11.

²³ Registry’s Observations, ICC-01/05-01/08-3625, para. 11.

²⁴ Registry’s Observations, ICC-01/05-01/08-3625, para. 13.

²⁵ Registry’s Observations, ICC-01/05-01/08-3625, paras 15-16. Emphasis added.

²⁶ Registry’s Observations, ICC-01/05-01/08-3625, para. 17.

²⁷ Registry’s Observations, ICC-01/05-01/08-3625, para. 18.

²⁸ Registry’s Observations, ICC-01/05-01/08-3625, para. 14.

II. Analysis

11. Pursuant to Regulation 23*bis*(1) of the Regulations, “[a]ny document filed by the Registrar or a participant and marked “*ex parte*”, “under seal” or “confidential”, shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings.”
12. The Single Judge recalls the Court’s jurisprudence in relation to *ex parte* classifications. *Ex parte* submissions should be exceptional, only used when truly necessary and when no alternative procedures are available, and be proportionate given the potential prejudice to the accused.²⁹ Complete secrecy would, for instance, be justified if “providing information about the procedure would risk revealing the very thing that requires protection.”³⁰
13. The Single Judge further notes that the identification, tracing, freezing and seizure of the property and assets of Mr Bemba is, *inter alia*, necessary in the interest of the victims in order to ensure that, should Mr Bemba’s conviction be confirmed on appeal, the victims may, under Article 75 of the Statute, obtain reparations for the harm they may have suffered.
14. In the Single Judge’s view, the circumstances justifying the *ex parte* classification of filings in categories 1 and 2 have not changed. There being no alternative procedure available at this stage, the *ex parte* classification thus remains necessary.
15. It is also not clear to the Single Judge why Mr Bemba would not be in a position to assess *his own* financial needs and those of *his dependants*, pursuant to Rule 166(3) of the Rules for the purpose of his sentencing submissions in the Article 70 Case, without the assistance of the requested filings in category 1 and 2.

²⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the procedures to be adopted for *ex parte* proceedings, 6 December 2007, ICC-01/04-01/06-1058, para. 12; *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on expedited Defence request for reclassification of *ex parte* documents, 15 February 2018, ICC-01/04-02/06-2230, para. 8.

³⁰ ICC-01/04-01/06-1058, para. 12; ICC-01/04-02/06-2230, para. 8.

Consequently, upon balancing any potential prejudice to Mr Bemba's rights as a result of the lack of access to filings in categories 1 and 2, against the victims' interests in reparations, the Single Judge considers the *ex parte* classifications not unduly prejudicial and therefore proportionate.

16. In light of the above, the Single Judge is satisfied that a sufficient factual and legal basis for the *ex parte* classification of the filings in categories 1 and 2 remains.

17. Noting that the Request in relation to category 3 is uncontested, and that Mr Bemba has consented to such information being shared with the Article 70 Case Defence, the Single Judge sees no reason to deny the Request for access to filings in category 3. He understands this category to include filings which have been filed before this Chamber and to which Mr Bemba himself or the Bemba Case Defence already have access.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

PARTIALLY REJECTS the Request;

GRANTS the Request in relation to filings in category 3, as specified in paragraph 17 of this decision;

ORDERS the Registry to provide the Article 70 Case Defence with access to filings in category 3, in accordance with paragraph 17 of this decision.

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



Judge Geoffrey Henderson
Single Judge

Dated this 7 May 2018

At The Hague, The Netherlands