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**International
Criminal
Court**

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Date: 3 June 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Redacted document

Public Redacted Version of "Prosecution's Response to Defence Request for Leave to Appeal Decision ICC-01/05-01/13-408", ICC-01/05-01/13-447-Conf, 30 May 2014

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Court to:

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I. Introduction

1. The Prosecution opposes the “Request for Leave to Appeal Decision ICC-01/05-01/13-408” (“Request”) by the Defence for Jean-Pierre Bemba Gombo in case ICC-01/05-01/08 (“Bemba Main Trial Defence”).¹ The Request should be dismissed because the Bemba Main Trial Defence lacks standing in this case. Were the Single Judge to consider that there is standing in this case, the Request still fails because it does not meet the requirements of Article 82(1)(d).

2. This filing is classified as “Confidential” as it refers to a confidential decision.

II. Submissions

A. The Request Fails for Lack of Standing

3. The Bemba Main Trial Defence is not party to this case and therefore does not have standing in the proceedings. As is clear from the submissions made in the Request, the appropriate forum to raise the matters contained therein is the case ICC-01/05-01/08 (“Main Case”).

4. Previously, the Bemba Main Trial Defence has conceded to Trial Chamber III that it has “no *locus [standi]*” before the Single Judge.² The Request erroneously suggests that a subsequent ruling by the Single Judge negates this fact and instead confers standing to appeal the Decision.³ However, the decision relied upon in the Request merely held that an accused involved in more than one case is “entitled to decide whether, and to what extent, he shall or shall not share” *access to documents*

¹ ICC-01/05-01/13-428-Anx1.

² See ICC-01/05-01/08-3059, para. 23.

³ Request, para. 4; See ICC-01/05-01/13-408, 19 May 2014 (“Decision”).

with his counsel.⁴ To suggest that this statement, which sits in a decision rejecting the Bemba Main Trial Defence's access application to these proceedings, confers standing for a counsel to intervene in proceedings other than that in which they are briefed is incorrect.

5. Further, there is no jurisprudential basis for the Bemba Main Trial Defence's claim of "derivative standing to act" based solely on its representation of the Suspect in different proceedings.⁵ Such an expansive rationale would provide standing in every case in which an accused may be involved to any and all counsel briefed by said accused. Moreover, such a flawed assertion disregards accepted jurisprudence regarding *locus standi* in criminal proceedings.⁶

6. The Suspect's authorisation⁷ does not change this. Trial Chamber III noted that "[p]articipants are only those specifically granted the right to participate in the proceedings by the relevant Chamber".⁸ Nicholas Kaufman, the Counsel of record in this case, has been granted the right to defend the Suspect's interests – not the Bemba Main Trial Defence. Only Mr Kaufman is authorised to act on the suspect's behalf. Further, nothing in the Request establishes that Mr Kaufman has consented to Counsel for Bemba in the Main Case to represent his client in these proceeding.⁹

⁴ Decision on the "Defence Request for Access to Confidential Transcripts and Filings" dated 1 April 2014 Submitted by the Defence for Jean-Pierre Bemba Gombo in Case ICC-01/05-01/08, ICC-01/05-01/13-338, 15 April 2014, p. 4.

⁵ Request, para. 5.

⁶ See, e.g. *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification and Motion on Behalf of Staniši and Župljanin, para. 5; *Prosecutor v. Veselin Šljivan anin*, Case No. IT-95-13/1-R.1, Order on Mile Mrkšić's Motion Regarding the Appeals Chamber's Order for a Hearing, 1 June 2010.

⁷ ICC-01/05-01/13-428-Anx2.

⁸ See ICC-01/05-01/08-2922, para. 9.

⁹ See ICC-ASP/4/Res.1, Code of Professional Conduct for counsel, Article 28, 2 December 2005 (requiring that Counsel shall not address directly the client of another counsel except through or with the permission of that counsel). Direct representation in the same proceedings can require nothing less.

7. Trial Chamber III confirmed that the Suspect's representation between two Chambers does not give rise to a "legal vacuum", noting that "counsel in both cases have a number of procedural remedies available to them before the competent Chamber to ensure that the accused's rights and interests are fully protected".¹⁰ Here, the appropriate remedy for the Bemba Main Trial Defence in respect of the Decision is to raise any attendant issues affecting the conduct of that trial before Trial Chamber III.

B. The Request Fails to Meet the Requirements of Article 82(1)(d)

8. In the event that the Single Judge considers that the Bemba Main Trial Defence has standing in the present case, the Request fails to meet the requirements under Article 82(1)(d). Rather, given its focus on the impact of the Decision in the Main Case and not on the current proceedings, the Request seeks the interlocutory intervention of the Appeals Chamber by bypassing the applicable procedure.

i. The Request fails to identify appealable issues arising from the Decision

9. The question of the Single Judge's competence to lift legal professional privilege emanating from a different case has already been clearly and definitively addressed.¹¹ In its decision designating the Single Judge, the Pre-Trial Chamber set down that the Single Judge is "responsible for addressing and determining the issues arising" from the investigation of "potential offences against the administration of justice under Article 70 of the Statute in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*".¹²

¹⁰ ICC-01/05-01/08-3059, para. 23.

¹¹ *Contra* Request, paras. 7-10.

¹² ICC-01/05-45, reclassified as public on 3 February 2014, 6 May 2013, paras. 4 and 5.

10. The Single Judge was therefore specifically tasked with assessing whether Article 70 violations – necessarily involving issues of legal professional privilege – had arisen in the context of the Main Case for the purposes of the present proceedings. There is consequently no question of the Single Judge’s competence to do so.

11. Regarding the legal standard applied for the lifting of legal professional privilege, the Request misconstrues the Decision and improperly seeks to isolate statements of the Single Judge both from the Decision’s context and from a previous decision.¹³ The Bemba Main Trial Defence justifies doing so on the basis that it is the first time that the Single Judge has pronounced on the interpretation of Rule 73(1) “on an *inter partes* basis”.¹⁴

12. Though not expressly stated, it is apparent from the Decision, wherein the Single Judge reiterates the importance of the right to privilege by referring to previous “state[ments] by the Chamber”,¹⁵ that the legal standard applied by the Single Judge in the Decision was that set down in a previous decision.

13. The Request itself acknowledges that the proper threshold for lifting professional privilege – “an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice”¹⁶ – was enunciated in a previous decision. That same decision further noted that “such communications are ordinarily privileged unless an abuse is suspected or shown”.¹⁷

¹³ Request, paras. 12-17.

¹⁴ Request, para. 11.

¹⁵ Decision, p. 5.

¹⁶ Request, para. 21, quoting ICC-01/05-52-[REDACTED], 29 July 2013, para. 3 (“Single Judge Decision July 2013”).

¹⁷ Single Judge Decision July 2013, para. 6.

14. The Decision therefore cannot be read in isolation, and absent context provided by the previous decision issued by the Single Judge on the question of the lifting of the right to professional privilege.

15. Further, the Decision's rejection of the test for lifting privilege proposed by the Defence was because it apparently conflates the standard applicable to the seizure and examination of potentially privileged material by the Single Judge or independent counsel with the disclosure of such reviewed material *inter partes*.¹⁸ The Single Judge correctly dismissed this blanket assertion. The Decision rightly notes that requiring an actual link to the Article 70 investigation in order for the Single Judge or independent counsel to examine potentially privileged material would virtually nullify "the usefulness of the seizure of documents".¹⁹

16. Moreover, the Request's failure to view the Decision in the context of the relevant previous decision also undermines the Bemba Main Trial Defence's suggestion that the Single Judge failed to consider the impact of the Decision on Article 67(1)(b).²⁰ To the contrary, the Single Judge previously set down "the need for safeguards aimed at duly circumscribing the exception to the privilege".²¹ It was on this basis that the Single Judge appointed the independent counsel to review communications, such that "privilege would be strictly maintained" and only lifted "for the limited purposes of the Prosecutor's [Article 70] investigation".²²

¹⁸ The underlying Defence submission is *ex parte*. However, see, e.g., ICC-01/05-01/13-170 (previously advancing a similar position).

¹⁹ Decision, p. 6.

²⁰ Request, paras. 17-19.

²¹ Single Judge Decision July 2013, para. 6.

²² Single Judge Decision July 2013, para. 7.

17. The Request fundamentally amounts to a disagreement on the part of the Bemba Main Trial Defence as to the outcome of the Decision and consequently does not give rise to any appealable issues.²³

- ii. The fair and expeditious conduct of the proceedings or the outcome of the trial will not be significantly affected

18. The Request fails to establish any effect of the Decision on the *present* case. Though reference is made to “Article 70 allegations”,²⁴ it is in the context of consultations between the Suspect and the Bemba Main Trial Defence and therefore does not have any bearing on these proceedings.

19. By improperly conflating the Main Case and the present proceedings for the purposes of the Request, the Bemba Main Trial Defence fails to establish that the issues raised therein affect the fairness or the outcome of the present case, or significantly advance the present proceedings.²⁵

20. In supports of its arguments, the Request focuses exclusively on the alleged impact of the issues raised by the Bemba Main Trial Defence on the Main Case.²⁶ However, in the Decision, the Single Judge is confined to assessing the right to professional privilege as it relates to this case alone. Therefore, submissions on the fairness of the proceedings by reference to the duty and means of the Single Judge to “assess the impact of [the] Decision on Mr. Bemba’s fair trial rights in the Main Case” are inapposite. They do not bear relevance to these proceedings.²⁷

²³ See, ICC-01/04-168 OA3, 13 July 2006, para. 9.

²⁴ Request, para. 51.

²⁵ See ICC-01/04-168 OA3, para.13 (“the possible implications of a given issue being wrongly decided on the outcome of *the case*”) (emphasis added). In interpreting “proceedings” for the purposes of Article 82(1)(d), the Appeals Chamber notes that it refers to “the proceedings in their entirety”; see also ICC-01/09-01/11-912, para. 65.

²⁶ Request, para. 33.

²⁷ Request, para. 32.

21. The Bemba Main Trial Defence also incorrectly argues that the expeditiousness of the trial proceedings in the Main Case justifies the Request in this case. By referring to the impact of the Decision on the ability of the Bemba Main Trial Defence to “prepare its case in an expeditious manner”,²⁸ the Request demonstrably shows that the present case is not the correct forum for the matters raised.

iii. Immediate resolution by the Appeals Chamber will not advance the proceedings

22. The assertions made in the Request as regards the material advancement of the proceedings are predicated not on the material advancement of this case, but rest on the alleged effect on the trial proceedings in the Main Case.²⁹ Consequently, the Defence fails to establish that the immediate resolution of the alleged issues will advance these proceedings.

III. Requested Relief

23. The Prosecution requests the Single Judge to dismiss the Request.



Fatou Bensouda, Prosecutor

Dated this 3rd Day of June 2014
At The Hague, The Netherlands

²⁸ Request, para. 52. See also, Request, para. 50.

²⁹ Request, paras. 55-57.