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TRIAL CHAMBER III

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

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

Public Document

**Legal Representative's Response to Prosecution's request for restriction on the use
of non-public material for Defence investigations**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Procedural Background

1. On 27 May 2010, Trial Chamber III (the “Trial Chamber”) requested the Prosecution to file written submissions by 01 June 2010 on whether it would be seeking the Trial Chamber’s authorisation to restrict the use of materials disclosed to the Defence¹, and further ordered that any response by the Defence or Legal Representatives of Victims be filed by 08 June 2010.²

2. In accordance with the above-mentioned instructions, the Prosecution filed on 1 June 2010 its Request for restriction on the use of confidential material for Defence investigations (the “Prosecution’s Request”).³

3. The Principal Counsel of the Office of Public Counsel for Victims, as Legal Representative in the Case,⁴ (the “Legal Representative”) hereby files her Response to the Prosecution’s Request, and makes the following observations:

II. The Legal Representative supports the Prosecution’s Request that the Trial Chamber impose restrictions on the circumstances and manner in which the Defence may be authorised to disclose non-public information during its investigations

4. In its Request, the Prosecution discusses at length the jurisprudence of Trial Chambers I and II, which have set out similar guidelines for the manner and circumstances under which the Defence may theoretically disclose non-public information to third parties in preparation of its case, namely, that such information

¹ See the email from the Trial Chamber’s Legal Officer received on 27 May 2010, at 12:07 hrs.

² *Ibid.*

³ See the “Prosecution’s request for restriction on the use of confidential material for Defence investigations”, No. ICC-01/05-01/08-784, 01 June 2010.

⁴ The Office has been appointed as Legal Representative of the following victims, who have been authorised to participate at trial: a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 and a/0467/08.

can only be disclosed to the public when it is truly necessary for the preparation and presentation of the case,⁵ and that the Defence must strictly avoid the risk of disclosing the identity of protected witnesses to the public as much as possible and must only do so if it is necessary and no alternatives are available, while ensuring that at no time the fact that the person is a witness or involved with the Court is disclosed.⁶

5. The Legal Representative generally agrees with the Prosecution's proposed mechanism, or protocol, to be followed when the Defence seeks to disclose otherwise non-public information to a third party, as well as with the underlying principles advocated by Trial Chambers I and II by which certain restrictions on the divulgation by the Defence of non-public information or material are necessary in order to fulfil the Court's obligation, pursuant to article 68 of the Rome Statute, to protect witnesses, victims and other persons who might be at risk. Nevertheless, the Legal Representative wishes to propose a few but relevant alterations to the Prosecution's overall approach concerning the issue *sub-judice*.

II. The Prosecution's proposed guidelines to be followed prior to disclosure of non-public information to third parties should be extended to victims, as such term has been defined for purposes of protective measures by Trial Chamber I and the Appeals Chamber

6. Significantly to the interests of victims, Trial Chamber II expressly made the Protocol endorsed by the VWU with regard to disclosure of non-public information

⁵ See the "*Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses*", (Trial Chamber I), No. ICC-01/04-01/06-1372, 04 June 2008, par. 9.

⁶ See the "*Décision sur le 'Protocole régissant les enquêtes concernant les témoins bénéficiant de mesures de protection'*", (Trial Chamber II), No. ICC-01/04/01/07-2047, 26 April 2010, paras. 10-11, endorsing the Protocol proposed by the Victims and Witnesses Unit (VWU) in the "*Victims and Witnesses Unit's observations on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'*", No. ICC-01/07-01-07-2007-Conf. with Conf. Anx 1, 26 March 2010 (the "Protocol"). Pursuant to Trial Chamber II's Decision No. ICC-01/04/01/07-2047 dated 26 April 2010, said Annex 1 was reclassified as public.

to third parties also applicable to and for the benefit of victims who are anonymous *vis-a-vis* the public.⁷ Indeed, this extension of the applicability of restrictions on disclosure of non-public information by the Defence to third parties for the benefit of anonymous victims seems self-evident, since, as Trial Chamber I has previously held, “[p]rotective measures are not favours but are instead the rights of victims, enshrined in Article 68(1) of the Statute.”⁸

7. However, it is not just victims who have been admitted to participate at any particular stage of the proceedings, in the Legal Representative’s view, who should be covered by the Court’s above-mentioned obligation to provide protection, and as a consequence, by guidelines on restrictions on disclosure of non-public material or information. When dealing with the larger but related issue of whether or not the VWU has protective responsibility for victims who have applied to participate prior to the Court’s determination of their application, Trial Chamber I has held that victims “*who appear before the court*”, pursuant to the language in article 43(6) of the Rome Statute, are determined from the moment when their application is received by the Court, regardless of the outcome of their application request.⁹

8. Moreover, the Appeals Chamber decision in the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (the *Katanga/Ngudjolo Chui* Case), enounced that “[r]ule 81(4) of the Rules of Procedure and Evidence should be read to include the words “persons at risk on account of the activities of the Court” so as to reflect the intention of the States that adopted the Rome Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons.”¹⁰

⁷ *Idem*, par. 15.

⁸ See the “*Decision on victims’ participation*”, (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 129.

⁹ *Idem*, paras. 136-137.

¹⁰ See the “*Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”*”, (Appeals Chamber) No. ICC-01/04-01/07-475 OA, 13 May 2008, par. 1.

9. Consequently, the Legal Representative submits that the Prosecution's proposed mechanism to prevent and manage risks that could arise from disclosure by the Defence of non-public information to third parties should be extended to cover victims who have been admitted to participate in the proceedings, as well as any other person, as identified by the practice of the different Chambers, who might be at risk, including applicants.

10. Paragraph 21 of the Prosecution's Request sets out in detailed sub-sections the steps that it recommends to be followed by the Defence and the VWU in the event that the Defence is seeking to disclose non-public information to third parties and which information concerns victims, witnesses or any other person at risk on account of the activities of the Defence. Said proposed mechanism, however, does not provide for the consultation by the VWU with the legal representatives of victims in those cases where the Defence activities potentially risk the safety of one of the former's clients. On this point, and by way of analogy, the Legal Representative would like to draw this Chamber's attention to the jurisprudence in the *Prosecutor v. Thomas Lubanga Dyilo* (the "*Lubanga*" Case) in relation to the modalities of contact with individuals enjoying dual-status, wherein Trial Chamber I held that parties wishing to contact an individual with dual status shall provide notice thereof to the victim-witness' legal representative, if any.¹¹

11. Similarly, in its decision on the Defence's request for disclosure of victims' applications, Trial Chamber I held that, before the disclosure to the Defence of applications by dual-status victims pursuant to exculpatory material obligations, the Prosecution must seek the views of their legal representatives, and if objections to disclosure are raised by them, the matter should be brought to the attention of the

¹¹ See the "*Decision on certain practicalities regarding individuals who have the dual status of witness and victim*", (Trial Chamber I), No. ICC-01/04-01/06-1379, 05 June 2008, par. 59.

Chamber for determination.¹² The practice of Trial Chamber I has since consistently held that legal representatives of victims should be consulted beforehand concerning any redactions to be made to their clients' applications¹³ or, in the case of dual-status victims, their witness statements. Indeed, Trial Chamber I has held that, "[a]s a general rule, a legal representative of a victim, whose personal interests the Chamber has determined are materially affected, shall receive notification of any filing concerning their clients, unless there is a contrary order from the Chamber."¹⁴

12. As a consequence, just as it is essential for a party or participant to notify in advance the counsel of a victim when seeking contact with his/her client, or when redactions to any document or material pertaining to said client are being considered, it is all the more crucial to provide notification to counsel of a victim, as that term has been interpreted by Trial Chamber I and Appeals Chamber decisions cited above, when the security of his/her client may become compromised on account of a party or participant's activities.

III. The Legal Representatives of Victims should be consulted in advance when one of their clients is concerned by a) any risk assessment made by the VWU pursuant to the Prosecution's proposed mechanism and b) any proposed security measure to be recommended by the VWU as a result thereof

¹² See the "Decision on the defence application for disclosure of victims applications", (Trial Chamber I), No. ICC-01/04-01/06-1637, 21 January 2009, par. 13. See also the Transcript of the Hearing of 27 January 2009, (Trial Chamber I), No. ICC-01/04-01/06-T-109-ENG WT, p 45, lines 4-17.

¹³ See, *inter alia*, the Transcripts of the Hearing of 08 May 2009, (Trial Chamber I), No. ICC-01/04-01/06-T-171-ENG WT, p. 44, lines 20-24; see also the Transcripts of the Hearing of 12 June 2009, (Trial Chamber I), No. ICC-01/04-01/06-T-191-ENG-WT, p. 58, lines 25, p. 59, lines 1-24.

¹⁴ See the Transcripts of the Hearing of 12 June 2009, (Trial Chamber I), No. ICC-01/04-01/06-T-191-ENG-WT, p. 59, lines 13-21. The Legal Representative further notes that this practice is consistent with the principle established by the Single Judge of Pre-Trial Chamber II in his decision on victims' applications according to which it is hardly debatable that "[t]he 'personal interests' of victims may be affected by the adoption of, or the failure to adopt, measures bearing upon their security and privacy. See the "Decision on victims' application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/127/06", (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-101, 10 August 2007, par. 98, pp. 37-38.

13. Furthermore, the Legal Representative would like to stress at this juncture that she can envisage a scenario where the Prosecution's proposed mechanism, as set out in its Request, could equally govern the activities of either of the parties or another legal representative when coming into contact with witnesses, victims or other persons at risk on account of their activities with the Court. As such, she respectfully submits that if the Trial Chamber were to endorse the Prosecution's proposed protocol, it should be made to apply to all the parties and participants equally.

14. Therefore, the Legal Representative submits that, under the specific mechanism provided under paragraph 21, sub-section C) of the Prosecution's Request, the VWU should be required to also consult with the legal representative of any victim or applicant on any risk to his/her client once the VWU has been notified by a party or participant that it wishes to disclose non-public information that could concern them. In addition, the VWU should be required to liaise and consult with said legal representative before it provides any direction on measures that the party or participant must take to prevent or reduce any assessed risk to his/her client pursuant to sub-paragraph C). This additional requirement is consistent with the recent Trial Chamber I practice which has requested the VWU to consult with the relevant legal representative in matters related to the redactions concerning his/her client(s) as indicated above¹⁵.

IV. A party or participant should ensure that a victim or witness' psychological well-being, dignity and privacy are also safeguarded to the greatest extent possible when conducting investigations or inquiries in preparation of their cases

15. Furthermore, the Legal Representative would like to emphasise that, under article 68(1) of the Rome Statute, the Court is under the obligation to protect not only the physical safety of victims and witnesses, but also their psychological well-being, dignity and privacy, so long as the measures taken to do so are not prejudicial to or

¹⁵ See *supra* footnotes 12 and 13.

inconsistent with the rights of the accused and a fair and impartial trial. As such, subsection A) of paragraph 21 of the Prosecution's Request should impose upon the Defence, and according to the Legal Representative's previous arguments, upon all parties and participants, the obligation to exercise care and ensure that victims and witnesses' psychological well-being, dignity and privacy are also safeguarded to the greatest extent possible when conducting investigations or inquiries in preparation of their cases. Indeed, the likelihood of a victim or witness suffering social stigmatisation, psychological re-victimisation, and forced displacement are all factors that, like physical safety issues, must be considered and kept at all times in mind when a party or participant is contemplating the disclosure of non-public information, and their likelihood should also be assessed by the VWU when implementing the mechanism set out by the Prosecution in its Request.

FOR THE FORGOING REASONS, the Legal Representative hereby respectfully requests that the Trial Chamber grant the Prosecution's request for restriction on the use of confidential material by the Defence and approve its proposed mechanism for managing the risks associated with the use of such material, with the specific alterations as proposed by the Legal Representative in her Response.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 08 June 2010

At The Hague, The Netherlands