

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 20/01/2015

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR
v. Jean-Pierre Bemba Gombo**

Confidential

**Defence Response to "Prosecution Third Request for Access to Evidence for a
Related Article 70 Proceeding"**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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I. INTRODUCTION

1. The Defence hereby submits its response to the Prosecution's Third Request for Access to Evidence for a Related Article 70 Proceeding ("The Request").¹

II. PROCEDURAL BACKGROUND

2. On 30 January 2014, the Prosecution filed a "Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding".²

3. On 12 March 2014, the Chamber issued its "Decision on 'Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding'"³ in which it decided to vary protective measures of all witnesses called by the Defence, in order to, *inter alia*, comply with disclosure obligations in Case ICC-01/05-01/13.

4. On 22 April 2013, the Prosecution filed its "Prosecution's Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding"⁴ in which it requested the Chamber, to permit the disclosure in case ICC-01/05-01/13 of: (i) 44 confidential transcripts of the testimony of 14 witnesses called by the defence in the Bemba case; (ii) five confidential transcripts of the testimony of Witness CHM-01; (iii) two confidential filings of the legal representatives of victims containing lines of questioning for Witness D04-15; (iv) the confidential defence list of evidence for trial; (v) the confidential summary of the proposed testimony of the witnesses to be called by the defence; and (vi) a confidential Registry filing ("the Items").

¹ ICC-01/05-01/08-3218-Conf.

² ICC-01/05-01/08-2951.

³ ICC-01/05-01/08-3014.

⁴ ICC-01/05-01/08-3052-Conf.

5. On 27 May 2014, the Chamber granted the Prosecution's Request considering that disclosure of the Items "would not have a negative impact on the "safety, physical and psychological well-being, dignity and privacy of victims and witnesses", pursuant to Article 68(1) of the Statute."⁵

6. On 17 December 2014, the Prosecution in Case ICC-01/05-01/13 requested that Trial Chamber III "grant the parties in *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba et al.* ("Article 70 case") access to the confidential video recordings of trial hearings of 17 witnesses called by the Defence and the Trial Chamber in this case ("Prosecution's Third Request").⁶

III. CONFIDENTIALITY

7. This application is filed confidentially to reflect the confidential status of the Request, in accordance with regulation 23bis(2) of the Regulations of the Court.

IV. APPLICABLE LAW

8. Article 68 of the Rome Statute imposes a duty on the Trial Chamber to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses.⁷

V. SUBMISSIONS

⁵ ICC-01/05-01/08-3074, para. 18.

⁶ ICC-01/05-01/08-3218-Conf.

⁷ ICC-01/05-01/08-813-Red, para. 85.

(a) The provision of videos to the Prosecution is inconsistent with previous practice and the priority afforded by the Chamber to the protection of victim and witnesses

9. The Prosecution's Third Request differs from those previously made, given that it concerns the video-recordings of protected Defence witnesses. Visual and/or non-textual material such as photographs depicting witnesses should be used only when no satisfactory alternative investigative avenue is available.⁸ Trial Chamber II in the *Katanga & Ngudjolo* case consulted the VWU about communicating photographs and identification documents of witnesses to other parties in the proceedings. The VWU submitted observations explaining that:⁹

The use of photos potentially has a very high impact on the level of risk for the individuals concerned. This may be the case both for witnesses who are participants in the Court's protection programme and witnesses who benefit from procedural protective measures. By the use of photos a much larger group of people may identify an individual by sight (rather than by name), thus much less intricate knowledge of the individual concerned is required and a link to the Court can be established far more easily.

The Unit added that:

There is a high risk of adverse psychological impact if photos are used without prior knowledge and consent of the concerned witness. These concerns are amplified in the circumstance of witnesses who are considered to be vulnerable. A key factor for traumatisation is the loss of control and a sense of intrusion. Using the photos, in particular if this done without informing and seeking the

⁸ ICC-02/11-01/11-49-Anx, p.4; ICC-02/05-03/09-451-Anx, para. 8; ICC-01/05-01/08-813-Red, para. 87; ICC-01/04-02/06-412-AnxA, para. 9.

⁹ Victims and Witnesses Unit's observations on different questions in relation to the documents ICC-01/04-01/07-2061 and ICC-01/04-01/07-2060-Red, ICC-01/04-01/07-2092-Conf et ICC-01/04-01/07-2092-Conf-Anx.

consent of the respective witnesses first, may reinforce their helplessness and sense of intrusion and as such be experienced as a re-violation. In addition, some witness might feel deceived or betrayed by the Court.

10. Trial Chamber II accordingly held that the use of photographs should be kept to a minimum and only where no other tools are available, with express reference to its obligation under Article 68.¹⁰ Patently, the impact is even greater with a video-recording of a witness, where no question of identification can reasonably arise. As such, the Prosecutions assertion that “there are no additional security concerns for the witnesses associated with granting the parties access to the confidential video recordings”¹¹ cannot be reconciled with the opinion of VWU.

11. In the present case, the Prosecution previously asked the Chamber to impose restrictions on the use of confidential material relying on “the VWU’s strong advice against a ‘blanket’ approach to authorising the use of such information.” It further reminded that the Chamber had denied authorisation in relation to one witness because it considered that the Defence should explore alternative means of investigation.¹² In this context, the Defence reiterates its position that “different standards should not be applied because the witnesses in question were called by the Defence.”¹³

12. Given the above practice in the present case, the views of VWU in relation to visual and/or non textual material concerning protected witnesses, and the practice of Trial Chamber II in *Katanga and Ngudjolo*, the Prosecution’s desire for access to video-recordings to assist in its Article 70 case must be outweighed by considerations as to the safety, physical and psychological wellbeing, dignity and privacy of the witnesses concerned.

¹⁰ ICC-01/04-01/07-2148, para. 9.

¹¹ ICC-01/05-01/08-3218-Conf, para. 9.

¹² ICC-01/05-01/08-784, para. 8.

¹³ ICC-01/05-01/08-3060, para. 2.

(b) The Prosecution failure to make submissions on witness credibility in the Main Case undermines its Request

13. The Prosecution's Closing Brief and oral closing submissions are remarkable for their lack of their submissions on the credibility of Defence witnesses.

14. The Prosecution failed to make any arguments whatsoever concerning the demeanour of witnesses, any "distress" they exhibited when answering questions, or their manner, or conduct, or appearance when testifying. This failure directly undermines its submissions that such recordings are "vital" to the Trial Chamber in the Article 70 Case of evaluating the credibility of the very same witnesses.¹⁴

15. On this point, the Defence also notes with concern that the Prosecution Request represents a continuation of the practice of using the Article 70 procedural devices as a means of contaminating the Trial Chamber outside the framework of the Main Case. At a time when the Chamber is deliberating as to the credibility of Defence witnesses, the Prosecution files a Request detailing its – still unfounded – allegations as to the credibility of Defence witnesses. The Defence underscores the difficulties that this practice raises in terms of the fairness of these proceedings, and reserves the right to make further submissions on the impact of the Prosecution Request in further filings.

(c) The reference to forthcoming "tailored request[s]" underlies the true nature of the Prosecution Request

16. The Prosecution Request concludes with the following:¹⁵

¹⁴ ICC-01/05-01/08-3218-Conf, para. 12.

¹⁵ ICC-01/05-01/08-3218-Conf, para. 13.

Finally, the Prosecution notes that its trial preparation may require additional "tailored request[s], relating to a specific number of transcripts and filings of the Bemba case", as trial transcripts and other materials from this case become relevant to the prosecution of the Article 70 case.

17. This submission underscores the nature of the Prosecution Request; that of a fishing expedition. The Prosecution certainly had the ability to seize the Trial Chamber with a detailed, tailored and specific request for the video extracts of particular exchanges. The present request for the entirety of the testimony of 17 Defence witnesses is wildly disproportionate, particularly given the Prosecution's failure to identify a concrete or tangible need for video-footage to supplement the transcripts already in their possession.

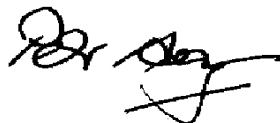
18. The Defence also notes with concern that the parties and the Chamber would have engaged in innumerable exchanges in private and closed session during the testimony of these 17 witnesses, patently because the issues being discussed were never intended to be heard outside the courtroom or shared with anyone other than the participants in the Main Case. It is not simply a question of witness protection – numerous procedural, administrative, legal and other exchanges would have taken place. Again, the Prosecution's desire for "vital" assistance in prosecuting another case, cannot trump the confidentiality and privacy afforded to the parties, participants (and Chamber) in the present proceedings, who made submissions and conducted exchanges on the basis that they would not be shared outside the confines of the Main Case.

VI. RELIEF REQUESTED

19. For the reasons set out above, the Defence respectfully requests the Chamber to:

REJECT the Prosecution Request in its entirety.

The whole respectfully submitted.

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

20 January 2015