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**International
Criminal
Court**

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Date: 27 January 2016

TRIAL CHAMBER III

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

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

Confidential

Response of the Legal Representative of Victims to the “Urgent Request for Classification” of the Defence for Mr Jean-Pierre Bemba Gombo (ICC-01/05-01/13)

Source: Ms Marie-Edith Douzima-Lawson, Legal Representative of Victims

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

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Trial Chamber VII

I. INTRODUCTION

1. On 20 January 2016, the Registry transmitted to Trial Chamber III (“the Chamber”) the request dated 19 January 2016 and its annex A on behalf of the Defence for Jean-Pierre Bemba Gombo, a party to Case No. ICC-01/08-01/13 (“the Defence”).¹

2. On 21 January 2016, the Defence request appended to the Registry’s communication of 20 January 2016 and a redacted confidential version of Annex A were notified to the parties to Case No. ICC-01/05-01/08 and the Legal Representative of Victims (“the Legal Representative”).² That same day, the Chamber set 27 January 2016 as the deadline for submitting any response to the Defence request and any request for redactions.³

II. LEVEL OF CONFIDENTIALITY

3. Pursuant to regulation 23 *bis*(2) of the Regulations of the Court, the Legal Representative submits the present response as confidential.

III. SUBMISSIONS

4. In its request, the Defence asks the Chamber to authorise the disclosure to the parties to Case No. ICC-01/08-01/13 of some 60 documents in Case No. ICC-01/05-01/08 that are classified either “confidential”⁴ or “confidential, *ex parte* the Registry and the Defence” and listed in Annex A. It alleges that these documents

¹ “Registry transmission of ‘Urgent Defence Request for Reclassification’”, 20 January 2016, ICC-01/05-01/08-3317.

² “Urgent Defence Request for Reclassification”, 19 January 2016, ICC-01/05-01/08-3317-Anx1, and “Confidential Redacted Annex A to Urgent Defence Request for Reclassification,” 21 January 2016, ICC-01/05-01/08-3317-Conf-AnxA-Red.

³ E-mail from the Chamber to the parties and the Legal Representative dated 21 January 2016.

⁴ The Legal Representative observes that some documents listed in Annex A are classified as “public”, namely: ICC-01/05-01/08-987 (3317-AnxA, No. 42); ICC-01/05-01/08-460 and its annexes (3317-AnxA, No. 47); ICC-01/05-01/08-452 (3317-AnxA, No. 48). It is not therefore necessary to order any particular measures for their disclosure.

contain crucial background information on the conduct of the Defence and the system of assistance and payment to witnesses in Case No. ICC-01/05-01/08.⁵

5. The Defence submits that these documents concern issues that are relevant to Case No. ICC-01/08-01/13. It requests that access to them be granted so that it can explain, clarify and contextualise the manner in which the Defence case was put in Case No. ICC-01/05-01/08.⁶

6. The Legal Representative submits that some of the documents which the Defence wishes to have disclosed affect her clients' personal interests within the meaning of article 68(3) of the Statute:

1. Documents relating to the intermediaries charged with collecting victims' applications for participation and reparations

7. The Legal Representative notes that three of the confidential documents listed in Annex A⁷ relate to the use of intermediaries to collect applications for participation and reparations from victims located in the Central African Republic. It submits that these documents affect the personal interests of the victims whom she represents inasmuch as they contain personal particulars and details of how their applications for participation and reparations were collected.

8. The Defence seeks access to this material on the grounds that it "relates to threshold for article 70 conduct, obligation of parties re verification, question of responsibility of parties and participants for acts of intermediaries"⁸ and "concerns

⁵ 3317-Anx1, paras. 1 and 2.

⁶ 3317-Anx1, para. 16.

⁷ "Report on issues concerning intermediaries' involvement in completion of applications for participation", 3 June 2011, ICC-01/05-01/08-1418-Conf, see 3317-AnxA, No. 1; "Decision on Registry's 'Report on issues concerning intermediaries' involvement in completion of applications for participation'", 11 July 2011, ICC-01/05-01/08-1593-Conf, see 3317-AnxA, No. 2; "Observations on the Registry's Report drawing to the Chamber's attention an issue regarding an application for participation in the proceedings", ICC-01/05-01/08-918-Conf-Red, 8 November 2012, see 3317-AnxA, No. 7.

⁸ 3317-AnxA, see Nos. 1 and 2.

issues regarding the reliability and accuracy of information provided by persons in CAR with limited knowledge of Court proceedings”.⁹

9. The Legal Representative submits that the reasons given above for requesting disclosure of these documents cannot be regarded as “substantiated justification” within the meaning of the Court’s case-law. She recalls that, in its decisions on several previous requests made by Defence teams in Case No. ICC-01/05-01/13 for access to confidential documents in Case No. ICC-01/05-01/08, the Chamber has required the requesters to identify, on the basis of publicly available material, the specific documents that they consider necessary for the effective representation of [the accused] in Case No. ICC-01/05-01/13 and provide a substantiated justification for any specific request.¹⁰

10. In its request, the Defence only identifies the issues raised by these documents. It does not explain how these relate to issues pertinent to Case No. ICC-01/08-01/13, nor does it elaborate how the information contained in these documents will enable it to explain, clarify and contextualise the manner in which the Defence case was put in Case No. ICC-01/05-01/08.¹¹

11. The Defence submits that Annex A includes documents that relate to general structural matters or that shed light on the overall context within which the charged incidents in Case No. ICC-01/08-01/13 allegedly took place.¹² In this regard, it refers to an Appeals Chamber decision in *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, according to which, in the Defence’s submission,

⁹ 3317-AnxA, see No. 7.

¹⁰ “Decision on ‘Transmission of a submission from Mr Nick Kaufman dated 22 January 2014’”, 13 February 2014, ICC-01/05-01/08-2972, para. 11; “Decision on ‘Registry Transmission of a Submission received from the Defence for Mr Narcisse Arido dated 18 August 2014’”, 5 September 2014, ICC-01/05-01/08-3134-Conf, paras. 9 and 12; “Decision on ‘Registry Transmission of a Joint Request received from the Defence teams in the Bemba *et al.* case (ICC-01/05-01/13)’”, 18 September 2015, ICC-01/05-01/13-3298, para. 20; “Decision on ‘Registry Transmission of a submission from the Defence for Mr Bemba in the Bemba *et al.* case (ICC-01/05-01/13)’”, 30 September 2015, ICC-01/05-01/08-3302, para. 7; “Decision on ‘Registry Transmission of a document submitted by the Defence for Mr Jean-Jacques Kabongo Mangenda on 12 November 2015’”, 8 January 2016, ICC-01/05- 01/08-3312, para. 7.

¹¹ 3317-Anx1, para. 16.

¹² 3317-Anx1, para. 10.

contextual information and evidence regarding patterns of conduct by persons in the same area or situation can assist Defence preparation, as can information concerning violations committed by other persons in the same area.¹³

12. The Legal Representative submits that the Defence has arrived at an overly broad and erroneous interpretation of the Appeals Chamber judgment, which – referring to a particular situation – held that “material relating to the general use of child soldiers in the DRC’, and not only information relating to the alleged use of child soldiers by the accused, was material to the preparation of the defence in that case”.¹⁴

13. The Legal Representative submits that the information in the documents concerned that relates to difficulties encountered in using intermediaries to collect *victims’* applications for participation and reparations in Case No. ICC-01/05-01/08 has no bearing on the charges in Case No. ICC-01/08-01/13. Those charges relate to the conduct of several members of *the Defence* in Case No. ICC-01/05-01/08 who are accused of having committed or having contributed to the commission of the offences of corruptly influencing *witnesses*, giving *false testimony* and presenting *false evidence*, and not to the use of intermediaries.¹⁵

14. The Defence claims that these documents relate to the “use of intermediaries as part of the evidence gathering process amongst CAR victims”.¹⁶ The Legal Representative recalls that, according to the precedents set by the Chamber, victims’ applications for participation and reparations are *not* evidence.¹⁷

¹³ 3317-Anx1, para. 17.

¹⁴ “Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”, 28 August 2013, ICC-02/05-03/09-501, para. 38.

¹⁵ “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 11 November 2014, ICC-01/05-01/13.

¹⁶ 3317-Anx1, para. 8(vii).

¹⁷ See in this respect “Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011”, 9 February 2012, ICC-01/05-01/08-2012-Red, para. 100: “[T]he majority is of the view that the *probative value of the*

15. In the light of these considerations, the Legal Representative therefore asks the Chamber to dismiss the Defence's request for the disclosure of these three documents.

2. Documents concerning Defence allegations in Case No. ICC-01/05-01/08 regarding alleged professional misconduct by the Legal Representative

16. The Legal Representative observes that Annex A lists two confidential documents that relate to her alleged professional misconduct during a familiarisation session with Witness D04-07.¹⁸ She submits that these documents affect her clients' personal interests since they contain allegations directed against the counsel appointed to represent them before the Court.

17. The Legal Representative has noted the Defence's justification for requesting access to these documents.¹⁹ Having analysed them thoroughly from the perspective of the personal interests of the victims whom she represents, the Legal Representative does not object to their disclosure to the parties in Case No. ICC-01/08-01/13. She adds that she has not identified any sensitive information in them.

18. Nevertheless, the Legal Representative recalls the Court's previous practice on protective measures and levels of confidentiality – it is applicable here. The Chamber

application forms is limited. Unlike evidence collected to support or challenge the substantive criminal charges in the case, the application forms are *administrative in nature* and are created through a relationship of confidence between a potential victim and the Registry of the Court. They are intended to serve a limited purpose: to provide the Chamber with a basis for determining whether individual victims should be permitted to participate in the proceedings pursuant to Rule 89 of the Rules. For this reason, no formal requirements govern their creation, such as those applicable to the collection of 'formal statements' under Rules 111 and 112 of the Rules." The majority of the Chamber further stated in the same paragraph that: "Moreover, *third parties* often fill out the application forms on behalf of victim applicants or assist them in doing so; *a process that may increase errors.*" [Emphasis added.]

¹⁸ "Report to the Chamber on the familiarization session of 18 September 2012", 22 February 2013, ICC-01/05-01/08-2513-Conf, see 3317-AnxA, No. 16; "Decision on the Registry's 'Report to the Chamber on the familiarization session of 18 September 2012'", 25 April 2013, ICC-01/05-01/08-2605-Conf. See 3317-AnxA, No. 18.

¹⁹ The Defence seeks access to these documents on the grounds that the incident referred to "is relevant to the willingness (or lack thereof) of subsequent defence witnesses to testify, and the protection concerns of the 14 witnesses [...]", see 3317-AnxA, Nos. 16 and 18.

has already ruled that confidential documents in Case No. ICC-01/05-01/08 can be disclosed to the parties to Case No. ICC-01/05-01/13 provided that witness protection measures and levels of confidentiality of documents remain in full force and effect and that they apply *mutatis mutandis* to the recipients of the material in question.²⁰

19. Accordingly, the Legal Representative requests the Chamber to order the maintaining of the measures to protect the witnesses concerned and the level of confidentiality of all documents mentioned in this response, with regard to the parties to Case No. ICC-01/05-01/13.

3. Documents containing particulars of the victims represented

20. The Legal Representative notes that five of the documents listed in Annex A contain particulars of victims whom she represents²¹ and that as a result their personal interests are affected.

21. The Legal Representative informs the Chamber that she does not object to the disclosure of these documents. Nevertheless, she submits that three of them contain sensitive information on the identities of dual-status witnesses whom she represents.²² In this respect, she notes that, with regard to document ICC-01/05-01/08-3203-Conf-AnxIX, the Defence proposes that “the names of witnesses in the third column [of the relevant annex] be redacted”.²³ Accordingly, the

²⁰ See, for example, “Decision on ‘Prosecution’s Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding’”, 27 May 2014, ICC-01/05-01/08-3074, para. 20.

²¹ “Defence Response to Prosecution Further Revised Submissions on Scheduling”, 8 November 201, ICC-01/05-01/08-1893-Conf, see 3317-Annex A, No. 46; “Corrected version of ‘Prosecution’s Additional Submissions to the Closing Brief regarding P-169’”, 31 October 2014, ICC-01/05-01/08-3182-Conf”, 4 November 2014, ICC-01/05-01/08-3182-Conf-Corr, see 3317-Annex A, No. 32; “Defence Supplemental Submissions arising from the further testimony of P-169”, 7 November 2014, ICC-01/05-01/08-3200-Conf, see 3317-Annex A, No. 34; confidential annex IX to “Defence Request for Relief for Abuse of Process”, 11 November 2014, ICC-01/05-01/08-3203-Conf-AnxIX, see 3317-AnnexA, No. 35; transcript of trial hearing, 22 October 2014, ICC-01/05-01/08-T-361-CONF-ENG ET, see 3317-AnxA, No. 33.

²² The identity of Witness-Victim P-42 is mentioned in document 3182 at para. 19; p. 37, line 16; p. 38, lines 7, 11, 22, 24 and 25; p. 39, lines 18, 21, 22 and 23; p. 69, lines 18 and 25; and p. 70, lines 2 and 6. Document 3203-AnxIX indicates the identities of Witness-Victims P-22, P-87, P-68, P-23, P-82, P-80, P-42, P-73, P-29, P-110, P-112 and P-69 (third column of the table).

²³ 3317-AnxA, No. 38

Legal Representative calls on the Chamber to ensure that these particulars are redacted from the documents concerned before they are disclosed.

4. Discrepancies concerning documents in Annex A

22. The Legal Representative draws attention to a discrepancy in item No. 36 of the table in Annex A. The second column of the table refers to document ICC-01/05-01/08-3141-Conf, which is the “Prosecution’s Response to the Defence Closing Brief,” and not the “Prosecution Final Trial Brief”²⁴ as indicated in the third column of the table.

23. The Legal Representative submits that this discrepancy is particularly problematic with regard to her clients’ personal interests when it comes to the paragraphs cited in the fifth column of the table. Paragraphs 96, 98, 100 and 109 of the “Prosecution Final Trial Brief” do not affect the personal interests of the victims represented, unlike paragraphs 96, 98 and 100 of filing ICC-01/05-01/08-3141-Conf, which refer to dual-status witnesses and contain sensitive information in their respect.²⁵ Yet, in the light of the Defence justification, it would appear that the paragraphs concerned are indeed those contained in the filing ICC-01/05-01/08-3141-Conf. However, upon analysis – in both filings – of paragraphs 3, 10, 11, 17, 18, 127, 130 and 151, to which the Defence refers in the second part of its justification, it can be clearly seen that the paragraphs in question are to be found in the “Prosecution Final Trial Brief”.

24. Furthermore, the Legal Representative observes that the Defence has not stated whether it will seek the disclosure of the documents in their entirety or of only the paragraphs cited in Annex A.

25. In the light of these considerations, the Legal Representative asks the Chamber to dismiss the Defence request in respect of both these documents.

²⁴ “Corrected version of ‘PROSECUTION’S CLOSING BRIEF’”, 2 June 2014, ICC-01/05-01/08-3079-Conf, 20 June 2014, ICC-01/05-01/08-3079-Conf-Corr.

²⁵ 3141, paras. 96, 98 and 100.

Should the Chamber grant the Defence request in respect of disclosure of either or both of them, she requests that the Chamber order the Defence to clarify which document(s) it wishes to have disclosed (ICC-01/05-01/08-3141-Conf and/or “Prosecution Final Trial Brief”) and to what extent (full disclosure of the document(s) or solely the paragraphs cited). Should the Chamber authorise the full disclosure of the document(s) in question, the Legal Representative calls on it to grant her additional time to conduct an in-depth analysis of the documents and propose appropriate redactions.

IN THE LIGHT OF THE FOREGOING, the Legal Representative respectfully requests the Chamber to:

DISMISS the Defence request for disclosure of documents ICC-01/05-01/08-1478-Conf, ICC-01/05-01/08-1593-Conf and ICC-01/05-01/08-978-Conf-Red;

ORDER that the measures protecting the witnesses concerned and the level of confidentiality of all documents mentioned in this response be maintained vis-à-vis the parties to Case No. ICC-01/05-01/13.

ORDER the application of redactions proposed by the Legal Representative to documents ICC-01/05-01/08-3200-Conf, ICC-01/05-01/08-3203-Conf-AnxIX and ICC-01/05-01/08-T-361-CONF-ENG ET;²⁶

ORDER the Defence to clarify whether it wishes to have documents ICC-01/05-01/08-3141-Conf and/or the “Prosecution Final Trial Brief” disclosed and to specify the extent of the disclosure requested, should the Defence seek full disclosure of the document(s) and the Chamber accede to that request:

GRANT the Legal Representative additional time for an in-depth examination of documents ICC-01/05-01/08-3141-Conf and/or the “Prosecution Final Trial Brief,” with a view to proposing appropriate redactions.

[signed]

Ms Marie-Edith Douzima-Lawson

Dated this 27 January 2016
At The Hague, the Netherlands

²⁶ See this response, footnote 28.