

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 21/04/2011

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 request for the reclassification of documents

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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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

The Office of Public Counsel for the Defence

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Section
Other**

Introduction

1. Between 4 April 2011 and 12 April 2011, the Trial Chamber heard the testimony of Mr. Firmin FINDIRO, the Prosecutor for the Republic with the Court of First Instance in Bangui.¹ Mr. FINDIRO testified under his own name, was not the subject of witness protective measures, and testified predominantly in open session. In the upcoming session of proceedings scheduled for 3 May 2011, the Trial Chamber is scheduled to hear the testimony of Mr. Pamphile ORADIMO, the '*Doyen des Juges d'Instruction*' of the '*Tribunal de Grande Instance*' in Bangui, who will also testify under his own name, and without recourse to protective measures.

2. During the examination of Mr. FINDIRO, Counsel for the Defence asked the witness to comment on judicial documents coming from the Central African Republic which had been classified by the Prosecution as "confidential" at the time of their disclosure to the Defence.² On the second day of the Defence examination, the Prosecution objected to the reading of extracts of these documents in open session, on the basis of their confidential status.³ The Prosecution had not objected to the same procedure when it had been undertaken on the previous day.⁴

3. For the reasons set out below, the Defence moves the Chamber to re-classify as public the judicial documents coming from the Central African Republic which were used during the examination of Mr. FINDIRO pursuant to regulation 23 *bis* (3) of the Regulations of the Court, namely CAR-OTP-0004-0065; CAR-OTP-0019-0234; CAR-OTP-0019-0207; CAR-OTP-0019-0215; CAR-OTP-0019-0230 and CAR-

¹ ICC-01/05-01/08-T-94-ENG ET WT 04-04-2011 9/50.

² CAR-OTP-0004-0065; CAR-OTP-0019-0234; CAR-OTP-0019-0207; CAR-OTP-0019-0215; CAR-OTP-0019-0230 and CAR-OTP-0042-0237.

³ ICC-01/05-01/08-T-98-CONF-ENG ET 11-04-2011, 5/72: "MR YILLAH: With your indulgence, Madam President, we're just a bit concerned. When your Honour asked about the level of confidentiality of this document, counsel indicated that it is confidential, and we are still in public session and the record is being read, content of this statement is being read into the record of the case in public session. I'm wondering whether your Honour could solve that problem."

⁴ See, for example, ICC-01/05-01/08-T-97-ENG ET WT 07-04-2011, pages 39 to 41.

OTP-0042-0237. Following their re-classification, the Defence also respectfully requests that the Chamber direct the Registry to re-classify as public those portions of the transcripts of 11 April 2011, in which the Defence read extracts from these judicial documents in private session.⁵

4. Similarly, the Defence may also ask Mr. ORADIMO to comment on these and other judicial documents coming from the Central African Republic in the upcoming session. As such, the Defence moves the Chamber to re-classify as public the following additional documents: CAR-OTP-0001-0539; CAR-OTP-0019-0245; and CAR-OTP-0004-0265, thereby allowing the Defence to have the option of questioning Mr. ORADIMO on the content of these documents in open session.

Submissions

5. Article 67(1) of the Rome Statute of the ICC provides that '[i]n the determination of any charge, the accused shall be entitled to a public hearing...'⁶ The European Court of Human Rights has been unequivocal that the public nature of trials:

'protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.'⁷

6. The importance of public trials has been recognised at the ICC, most recently in the *Katanga & Ngudjolo* case. Trial Chamber II, in setting down best practices in an attempt to limit recourse to private sessions, stated that: 'the public nature of proceedings... constitutes for the Defence a safeguard, an essential

⁵ ICC-01/05-01/08-T-98-CONF-ENG ET 11-04-2011, pages 5 – 18; pages 37 – 38; pages 44 – 45; pages 48 – 50; pages 54 – 56; pages 59 – 63.

⁶ See also, Article 21(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 20(2) of the Statute of the International Criminal Tribunal for Rwanda; Article 16(2) of the Statute of the Special Tribunal for Lebanon; Article 34 of the ECCC Law; Article 17(2) of the Statute of the Special Court for Sierra Leone.

⁷ Judgement, *Werner v. Austria*, 24 November 1997, para. 45.

safeguard. It contributes to preserving the trust that all those subject to the law have to have in justice, and it is one of the best means of controlling the way in which such justice is rendered.’⁸

7. It is on this basis that the Defence respectfully submits that recourse to private sessions should be an exception to the rule that the proceedings against Mr. Bemba should be heard in public. The re-classification of the documents in question would allow for significant testimony going to the heart of the issues in the present proceedings to also be either re-classified as public, or heard in public. The Defence submits that this would be consistent with both preserving the public nature of the proceedings, and with the rights of the accused to a public trial.

8. The re-classification of the nominated documents and transcripts would also assist the Chamber in rendering a public version of its judgement which contains all relevant evidential elements. It would also ensure that the parties could present more complete public versions of their final submissions and arguments. This is of particular significance given the historical importance of the proceedings and the interest that many concerned parties have in accessing as broad and complete a record as possible.

9. The requested re-classification would also alleviate Defence concerns that the selective redaction of materials and transcripts could create a distorted public perception of Mr. Bemba’s alleged responsibility, which could render the judgement difficult to comprehend for a public (and in particular victims) which does not have a complete understanding of the record in the proceedings.

10. As to the proper procedure to be adopted for the re-classification of the documents in question, the Defence respectfully agrees with and endorses the statement of Her Honour Judge Steiner during the discussion of this issue that

⁸ Transcript, *Katanga & Ngudjolo Chui* (ICC-01/04-01/07-T-189-ENG ET WT 20-09-2010), at 10.

“[h]ere it is the Chamber who decides on the level of confidentiality, after consulting the parties.”⁹ The Defence agrees that it is the Chamber that holds a discretion in this regard, and has the ability to re-classify these documents pursuant to regulation 23 *bis* (3) of the Regulations of the Court.

11. The Defence notes that during the pre-trial proceedings, the Appeals Chamber directed the Registry to consult with the Central African Republic authorities concerning whether certain documents, or information contained therein, could be re-classified as public.¹⁰ The Defence, however, respectfully submits that a distinction can be drawn between the pre-trial and trial phase, in which the Chamber charged with facilitating the fair and expeditious conduct of the trial¹¹ is often required to react rapidly to requests as and when they arise during the course of the proceedings. Moreover, the Defence submits that there has been a relevant change in circumstances, as the interest of maintaining the confidentiality of material up until the trial to protect and assist the Prosecution’s investigative effort no longer exists.

12. The Defence also notes that the Appeals Chamber’s order in the pre-trial phase directing the Registry to consult with the Central African Republic authorities on the question of re-classification of the documents was based on the Prosecution’s representation that the documents in question had been classified as confidential because, *inter alia*, it is “standard practice” to accord restricted access to documents received from States unless indicated otherwise.¹² The Defence notes, however, that in the present case, the Prosecution has failed to advance any specific basis for the documents to retain their confidential classification, despite

⁹ ICC-01/05-01/08-T-98-CONF-ENG ET 11-04-2011 8/72

¹⁰ Order to consult with the authorities of the Central African Republic, ICC-01/05-01/08-973

¹¹ ICC Statute, Article 64.

¹² ICC-01/05-01/08-951, para. 5.

the issue being litigated extensively by the parties during the course of the proceedings on 11 April 2011.¹³

13. Moreover, the Prosecution's approach to the status of the judicial documents coming from the Central African Republic has been less than consistent. On 7 April 2011, Counsel for the Defence posed questions to Mr. FINDIRO on the basis of CAR-OTP-0004-0065, being the *Requisitoire de Non-Lieu Partiel et de Renvoi Devant le Cour Criminelle*, namely a court document originating in the Central African Republic and classified by the Prosecution as confidential.¹⁴ The Defence, on 15 occasions, posed questions to the witness on the basis of this document by reading extracts from the text.¹⁵ The Prosecution did not object.¹⁶ It was only the following day when the Defence continued the same procedure that the Prosecution first raised an objection.¹⁷

12. Accordingly, the Defence respectfully submits that it falls within the discretion of the Chamber to re-classify the designated documents as public. This would allow for the re-classification of several significant portions of the evidence in the present case,¹⁸ which the Defence submits is integral to preserve the public nature of the proceedings, which itself constitutes an essential safeguard for the fairness of the trial. It would also allow for the testimony of the next witness Mr. ORADIMO to be heard in public session, without the need to come in and out of private session depending on the document being used.

¹³ ICC-01/05-01/08-T-98-CONF-ENG ET 11-04-2011 48/72

¹⁴ ICC-01/05-01/08-T-97-ENG ET WT 07-04-2011 30/6.

¹⁵ ICC-01/05-01/08-T-97-ENG ET WT 07-04-2011 pages 38 – 50.

¹⁶ ICC-01/05-01/08-T-97-ENG ET WT 07-04-2011.

¹⁷ ICC-01/05-01/08-T-98-CONF-ENG ET 11-04-2011, 5/72: "MR YILLAH: With your indulgence, Madam President, we're just a bit concerned. When your Honour asked about the level of confidentiality of this document, counsel indicated that it is confidential, and we are still in public session and the record is being read, content of this statement is being read into the record of the case in public session. I'm wondering whether your Honour could solve that problem."

¹⁸ ICC-01/05-01/08-T-98-CONF-ENG ET 11-04-2011.

Relief Sought

13. In light of all the aforementioned, the Defence requests that the learned Trial Chamber re-classify the following judicial documents used during the testimony of Mr. FINDIRO as public pursuant to regulation 23 *bis* (3) of the Regulations of the Court: CAR-OTP-0004-0065; CAR-OTP-0019-0234; CAR-OTP-0019-0207; CAR-OTP-0019-0215; CAR-OTP-0019-0230 and CAR-OTP-0042-0237.

14. Following their re-classification, the Defence also respectfully requests that the sections of the transcripts of 11 April 2011 in which the Defence read extracts from these judicial documents in private session also be reclassified as public.

15. The Defence also respectfully requests that the Trial Chamber re-classify as public the following additional documents which the Defence may use during the examination of Mr. ORADIMO as public pursuant to regulation 23 *bis* (3) of the Regulations of the Court; CAR-OTP-0001-0539; CAR-OTP-0019-0245; and CAR-OTP-0004-0265.



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Associate Counsel

Done at The Hague, the Netherlands

21 April 2011