

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 13/06/2012

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 Delayed Disclosure of
Witness Identifying Particulars and Summaries of Anticipated Testimony, and
other Related Requests**

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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Section**

A. BACKGROUND

1. The Prosecution evidence in the present case commenced on 22 November 2010, and concluded on 20 March 2012. As such, the Prosecution case spanned approximately 16 months. During this time, the Prosecution presented 40 witnesses.

2. On 24 February 2012, Trial Chamber III (“the Chamber”) rendered its *Decision on Defence Disclosure and Related Issues* (“First Disclosure Decision”)¹ in which it ordered the Defence to disclose, *inter alia*, the names of its witnesses and summaries of their anticipated testimony, “**two weeks** prior to the commencement of the defence presentation of evidence.”² This two-week time period was consistent with the practice set by Trial Chamber II.³ Leave to appeal was not sought by either party.

3. The Chamber’s First Disclosure Decision grounded its decision to order the Defence to disclose “at least some essential information on the content of the witness’ testimony” in the following reasoning:⁴

In order to facilitate the conduct of the defence’s presentation of evidence, the Chamber is of the view that **at least some essential information on the content of witness’ testimony** should be disclosed to the prosecution and communicated to the legal representatives and the Chamber. Such disclosure will allow the Chamber to prepare for and understand the witness’ testimony, and allow the prosecution to **adequately prepare its examination of witnesses called by the defence**

4. During a status conference held over a month later on 27 March 2012, the Prosecution raised for the first time their concern that Defence disclosure referred to above would occur during the judicial recess.⁵

¹ICC-01/05-01/08-2141

²*Ibid.*, para. 36.

³ICC-01/04-01/07-2388, para. 23.

⁴ICC-01/05-01/08-2141, para. 27.

⁵ICC-01/05-01/08-T-219-ENG ET WT 27-03-2012 32/35

5. In response, the Presiding Judge, Her Honour Judge Steiner, referred to Regulation 19^{bis} of the Regulations of the Court which establishes that “at least in principle, the Court recess does not affect the time limits for any procedural act. It is only in relation to hearings that are supposed to be suspended unless in the face of an emergency”⁶.

6. On 24 May 2012, the Chamber rendered its *Decision on the starting date of the presentation of defence evidence and related issues* (“Second Disclosure Decision”)⁷ in which it *proprio motu* reconsidered its decision of three months earlier on 24 February 2012, and held that the Defence was now required to disclose, *inter alia*, its witness names and summaries of their anticipated testimony one month prior to the commencement of the presentation of Defence evidence, namely by 16.00 on 13 July 2012.⁸

B. RELEVANT LAW

7. Article 67(1)(e) protects the right of the accused

“to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.”

8. The Prosecution has an obligation pursuant to Rule 76(i) to “provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.”

9. No such obligation exists on the part of the Defence.

⁶ICC-01/05-01/08-T-219-ENG ET WT 27-03-2012 33/35

⁷ICC-01/05-01/08-2221

⁸*Ibid.*, para. 19.

10. As regards witness protective measures, under article 68(1) of the Statute, the Court must take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

11. Rule 81(4) of the Rules authorises the Chamber to restrict the evidence disclosure obligation to protect the safety of witnesses, victims and members of their families, “including by authorizing the non-disclosure of their identity prior to the commencement of the trial”.

12. Article 64(2) of the Statute provides that “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. Paragraph 3(c) of the same article recalls that the Chamber must provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial – “[s]ubject to any other relevant provisions of th[e] Statute”.

13. While it is clear that the Defence is not subject to the same disclosure obligations incumbent on the Prosecution, it submits that witness protective measures, including authorization of non-disclosure for the purpose of witness safety, must be equally applicable to Defence witnesses.

C. SUBMISSIONS

(a) An Objective and Identified Risk

14. The Defence has presented the Chamber with a list of its witnesses, which represents not just the culmination of lengthy investigations, but also an exercise in providing the Chamber with the minimal quantity of direct oral evidence to rebut the assertions made throughout the Prosecution case.

15. The vast majority of Defence witnesses have expressed concerns for their safety, and that of their families, arising out of their association with the defence of Mr. Bemba. In particular, the Defence has received consistent, corroborated and grave concerns from a specific group of witnesses; namely those who are still living in the Democratic Republic of Congo ("DRC") and working as part of the Forces Armées de la République Démocratique du Congo ("FARDC"), or within - or in positions associated with - the present Government (together "DRC witnesses").

16. These DRC witnesses have expressed fear that they or their families will be the subject of harassment, subjected to pressure, or that they will be removed from their posts, transferred to areas of ongoing military conflict, or detained in order to prevent their testimony on the part of the Defence.

17. The Defence submits that these fears expressed consistently by the DRC witnesses are not mere feelings of insecurity, but are expressions of objective and precisely identified risks, being made by people who have full knowledge of the inner workings, prior conduct and political motivations of both the FARDC and the present regime in the DRC.

18. The evidence of these witnesses is of crucial importance to the Defence presentation of evidence, and to the exercise of Mr. Bemba's right pursuant to Article 67(1)(e) to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

19. Given the unique situation of these DRC witnesses, and the fears they have consistently expressed, the Defence requests the authority of the Chamber to provide the Prosecution and Legal Representatives of Victims with redacted witness identifying particulars and redacted versions of their summaries of anticipated testimony, **until 30 days prior** to their anticipated testimony, at which

time unredacted versions would be provided. Unredacted full witness particulars and summaries would therefore be provided on a rolling basis.

20. In the absence of an order for delayed disclosure, the identities of the DRC witnesses will be revealed potentially many months prior to their testimony, which dramatically increases the risk that they will be subject to the pressures about which they expressed objective and legitimate fears.

(b) The Basis for Delayed Disclosure

21. In support of this request, the Defence submits that delayed disclosure (i) is authorized by the Statute and finds precedent in the practice of both the ICC and other international criminal courts; (ii) meets the need to protect those witnesses against an objective risk; and (iii) does not unnecessarily inhibit Prosecution trial preparation.

22. Firstly, the Defence recalls that Rule 81(4) of the Rules authorises the Chamber to restrict the evidence disclosure obligation to protect the safety of witnesses, victims and members of their families, “including by authorizing the non-disclosure of their identity prior to the commencement of the trial”. The Defence submits that the use of the word “including” in that provision authorises the implementation of other solutions, such as non-disclosure of the identity of witnesses outside the pre-trial period.

23. Deferred or “rolling” disclosure of witness identifying particulars has been considered an acceptable means of disclosure at both international criminal courts,⁹ and at the ICC.¹⁰ As an example, Trial Chamber II has authorized delayed

⁹*Prosecutor v. Augustine Gbao*, “Decision on Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 10 October 2003, SCSL-2003-09-PT, where a period of 42 days prior to testimony was approved for the purposes of rolling disclosure; *Prosecutor v. Tharcisse Renzaho*, “Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses

disclosure of unredacted versions of the transcripts of interview of a Prosecution witness until 45 days prior to a particular testimony.¹¹ This delayed disclosure was ordered despite the obligation on the Prosecution pursuant to Rule 76(i), which is not incumbent on the Defence, and after the Chamber weighed the right of victims and witnesses to be protected and the Defence's right to have adequate time and facilities for its preparation.

24. Secondly, delayed disclosure meets the need to protect witnesses against an objective risk. Exposing the identities of witnesses within the DRC for lengthy periods before they testify increases the risk that they will be exposed to the risks about which they have expressed fears. As outlined above, these witnesses have not indicated subjective or mere feelings of insecurity, but have expressed detailed and objective fears as to concrete acts for which they will be at risk should their link to the Defence case become known in DRC. Reducing the amount of time in which they are identified as "Defence witnesses" will reduce this risk. It will also reduce the risk that Mr. Bemba will be prevented from obtaining the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

25. Thirdly, the delayed disclosure requested will not unnecessarily impinge on Prosecution preparation for the Defence case. The redacted summaries will allow the Prosecution to have a fair idea of the content of the testimony, and commence initial preparation and investigations. Moreover, the Defence submits that 30 days is more than enough time for preparation and any potential investigation into a witness' evidence on the basis of concise summaries. In contrast to the Defence team, the Prosecution has a broader base of analysts and investigators who are not required to be in The Hague when the trial is in session, and who are able to

to the Crimes Alleged in the Indictment", 17 August 2005, ICTR-97-31-I, where a period of 21 days prior to testimony was similarly approved.

¹⁰See, for example, Public redacted version of the *Decision on the Protection of Prosecution Witnesses* 267 and 353 of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp) ICC-01/04-01/07-1179-tENG; See also ICC-01/04-01/06-T-310-Red-ENG CT WT 06-07-2010, pages 53 -56.

¹¹ICC-01/04-01/07-1179-tENG

perform investigations during the 30-day period after which full disclosure is provided. The Defence submits that it cannot be the case that the Prosecution needs to immediately begin investigating each and everyone one of the Defence witnesses simultaneously, and the delayed disclosure requested is more likely to reflect the Prosecution's actual investigative sequence.

26. The Defence submits that a balancing of the need to ensure the safety of the DRC witnesses against the need for the Prosecution to prepare for the presentation of the Defence case, warrants the granting of the present motion.

(c) Other Related Requests

27. Given the risks identified above to the DRC witnesses, the Defence also requests that the Chamber order that members of the Office of the Prosecutor and the Legal Representatives of Victims be prohibited, pursuant to Rule 87(3)(b), from disclosing the identity of the DRC witnesses to any third parties.

28. As part of this request, the Defence notes that the composition of the Defence team is a matter of public record, and is well known to the Prosecution and Legal Representatives for Victims. By contrast, the Defence is unaware of which individual lawyers within the Office of the Prosecutor are currently working on the present case and will be given access to the identifying particulars and summaries of anticipated testimony of the Defence witnesses. Nor is the Defence aware whether investigators or other intermediaries are working with, or may be given this material by the Legal Representatives for Victims. In order to assist in the management and implementation of the witness protective measures requested in the current motion, the Defence requests that the Chamber order the Prosecution and Legal Representatives for Victims to provide to the Chamber and the Defence a complete list of all lawyers, paralegal, investigative or support staff who will have access to Defence witness identities and summaries of anticipated testimony, and to

notify the Defence and the Chamber on an ongoing basis should this list alter during the course of the case.

C. RELIEF REQUESTED

29. Given the reasons cited above, the Defence respectfully requests that the Chamber:

GRANT the Defence request for delayed disclosure and **AUTHORISE** the provision of unredacted witness identifying particulars and unredacted summaries of anticipated testimony to the Prosecution and Legal Representatives for Victims **30 days prior** to the anticipated testimony of the following proposed Defence witnesses:

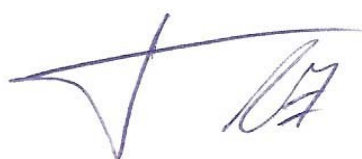
- CAR-D04-PPPP-0046
- CAR-D04-PPPP-0061
- CAR-D04-PPPP-0013
- CAR-D04-PPPP-0044
- CAR-D04-PPPP-0017
- CAR-D04-PPPP-0012
- CAR-D04-PPPP-0014
- CAR-D04-PPPP-0041
- CAR-D04-PPPP-0062
- CAR-D04-PPPP-0045
- CAR-D04-PPPP-0019
- CAR-D04-PPPP-0049
- CAR-D04-PPPP-0039
- CAR-D04-PPPP-0015
- CAR-D04-PPPP-0020
- CAR-D04-PPPP-0018

- CAR-D04-PPPP-0048
- CAR-D04-PPPP-0054
- CAR-D04-PPPP-0040
- CAR-D04-PPPP-0016
- CAR-D04-PPPP-0043
- CAR-D04-PPPP-0042
- CAR-D04-PPPP-0047

ORDER that the Prosecution and the Legal Representatives for Victims provide to the Chamber and the Defence a complete list of all lawyers, paralegal, investigative or support staff who will have access to Defence witness identities and summaries of anticipated testimony; and

ORDER that members of the Office of the Prosecutor and Legal Representatives for Victims be prohibited, pursuant to Rule 87(3)(b), from disclosing the identity of the DRC witnesses to any third parties.

The whole respectfully submitted.



Kilolo Musamba
Lead Counsel



Peter Haynes
Co-Counsel

Done on the 13th of June 2012

At The Hague, the Netherlands