

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 11/02/2014

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 Motion for the lifting of redactions of the 9 April 2013 status conference transcript

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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(Participation/Reparation)

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A. BACKGROUND

1. The Defence presentation of evidence in the present case commenced on **14 August 2012**.¹

2. 3 months later, on **15 November 2012**, by way of its confidential *ex parte Prosecution Request for Record of Payments made by the Registry to Witnesses called by the Defence of Mr Jean-Pierre Bemba Gombo*, the Prosecution informed Trial Chamber III (“the Chamber”) that it was conducting an investigation pursuant to Article 70 of the Rome Statute (“the Statute”) into alleged payments to Defence witnesses.²

3. On **2 December 2012**, the Chamber rendered its *Decision on the Registry’s observations on the prosecution’s request relating to Article 70 investigations*, in which it dismissed the Prosecution’s Request - not on the basis of the Chamber’s lack of competence - but because the Registry had already provided all the information that the Prosecution was seeking concerning payments to Defence witnesses.³

4. On **20 March 2013**, the Prosecution filed its confidential *ex parte Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence*. This Notice contained a wealth of information concerning the Prosecution investigation into Defence witnesses and members of the Defence team, most notably an *ex parte* Annex A, being an internal Prosecution memorandum entitled “Break down of the money paid using Western Union.”⁴ The Prosecution seized the Chamber with a request to:⁵

- a) Order the Registry to verify whether any of the following telephone numbers - [...] - are listed in Registry records and, if so, to

¹ ICC-01/-5-01/08-T-229.

² ICC-01/05-01/08-2606-Conf, para. 1.

³ ICC-01/05-01/08-2606-Conf, para. 3.

⁴ ICC-01/05-01/08-2606-Conf, para. 5.

⁵ ICC-01/05-01/08-2606-Conf, para. 4.

whom they belong;

b) Order the Registry to provide to an independent counsel appointed by the Prosecution access to (1) all calls made to BABALA and (2) all calls made to third parties through BABALA. The Registry should make available to the independent counsel all calls of the Accused that could potentially be to BABALA, including calls made to numbers identified as KILOLO but in fact to BABALA;

c) Order the Registry to provide to the independent counsel all telephone log information pertaining to calls identified as "relevant" by the independent counsel;

d) Should the Chamber apply Regulation 92 of Regulations the Prosecution applies under Regulation 92(4) of Regulations for an Order not requiring the disclosure of requested information until such time that disclosure would not prejudice the investigation; especially interviews with Defence witnesses; and

e) Vary the terms of the protocol governing contact with Defence witnesses to allow the Prosecution to conduct interviews with Defence witnesses who received payments as set forth in the Western Union records without prior notice to the Defence

5. On **9 April 2013**, the Chamber convened an *ex parte* Prosecution and Registry only status conference ("9 April 2013 Status Conference") "in order, *inter alia*, to obtain additional information relating to the Second Request and to hear the Registry's views on the technical implications of the investigative steps requested by the prosecution."⁶ At this Status Conference, the Prosecution discussed in detail the steps which had been taken in relation to its investigation into allegations of bribery of Defence witnesses; the type of evidence collected thus far and what - in the view of the Prosecution - this evidence tended to prove; the investigative steps the Prosecution was proposing to take; and hypothetical assertions about the types of incriminating material the Prosecution was expecting to find. The Status Conference was in no way limited to the question of the Chamber's competence to order the assistance the Prosecution sought; rather the Prosecution and the Registry made concrete and lengthy submissions as to the substance of the investigative assistance, the need for such assistance, and how it could or would be provided.

⁶ ICC-01/05-01/08-2606-Conf, para. 6.

6. On **26 April 2013**, 5 months after first having been informed about the Prosecution's Article 70 investigation, the Chamber held that it did not have jurisdiction to decide on the Prosecutions investigative requests, finding that:

In light of the above, the Chamber finds that the interpretation of the Court's legal framework, in accordance with Article 21 of the Statute, and as confirmed by the travaux préparatoires, **makes it clear** that a Pre-Trial Chamber is the competent judicial authority to make determinations on any investigative measures requested by the prosecution in relation to an Article 70 investigation.

7. Following the arrests of the five suspects in the ICC-01/05 case ("Article 70 Case") on 23 November 2013, by its Order of **6 December 2013**, the Chamber held that the transcript of the 9 April Status Conference "should be made available to all parties and participants, subject to the application of any necessary redactions."⁷ It ordered "the Registry to submit for the Chamber's approval proposed confidential redacted versions of [...] Transcript T-303-CONF-EXP. These proposals shall be communicated to the Chamber by email by 13 December 2013."

8. The Defence received a redacted copy of Transcript T-303-CONF ("9 April Transcript") on 30 January 2014.

B. CONFIDENTIAL NATURE OF THE PRESENT FILING

9. The present request concerns the lifting of redactions of a transcript which is currently not in the public domain. As such, the Defence files this request confidentially.

⁷ ICC-01/05-01/08-2920-Conf, para. 5.

C. APPLICABLE LAW

10. The Chamber has the duty to guarantee the accused's rights to: (i) have adequate time and facilities for the preparation of the defence (Article 67(l)(b) of the Statute); and (ii) have access to information that “may affect the credibility of prosecution evidence” (Article 67(2) of the Statute) or that is “material to the preparation of the defence” (Rule 77 of the Rules).

11. The Chamber ordered that the 9 April Transcript be provided to the Defence “in line with its duty under Article 64(2) of the Rome Statute to ensure that the trial is fair and conducted with full respect of the rights of the accused.”⁸

12. A starting principle of adversarial proceedings, as set out in decisions of the European Court of Human Rights (“ECtHR”) and the *ad hoc* Tribunals,⁹ requires that both parties have knowledge of, and be accorded the ability to adduce, any evidence which may influence the ultimate decision of a Chamber.¹⁰

13. The ECtHR has held that “it is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.”¹¹

⁸ ICC-01/05-01/08-2920-Conf, para. 4.

⁹ See, for example, *Prosecutor v. Krajišnik*, IT- 00- 39- T, Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavšić and Branko Derić and Decision on Admission into Evidence of Biljana Plavšić’s Statement and Book Extracts, 14 August 2006, paras. 16, 20.

¹⁰ *Morel v. France* (Application no. 34130/96), ECHR Judgment of 6 June 2000 at para 27.

¹¹ *Edwards and Lewis v. United Kingdom*, (Applications nos. 39647/98 and 40461/98) 27 October 2004

14. If a Chamber to has been exposed to incriminating allegations to which the Defence has no access, an accused will be deprived of his ability to counter these allegations, in contravention of his right to adversarial proceedings.¹² Lord Denning in a Privy Council decision, described the right to be heard as one of the essential characteristics of natural justice, stating that:¹³

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other."

D. SUBMISSIONS

15. The version of the 9 April Transcript provided to the Defence contains a significant number of redactions. The redactions are not limited to the submissions from the Prosecution or the Registry. Interventions by two members of the bench have also been withheld.¹⁴ In order effectively to advise Mr. Bemba on the impact of Trial Chamber III's involvement in the Article 70 case, the Defence requests that the Chamber order that it be provided with an unredacted version of the 9 April Transcript.

¹² See *Re K (Infants)* ([1965] AC 201, in which Lord Devlin referred at p 237 to "the fundamental principle of justice that the judge should not look at material that the parties before him have not seen". See also the ECHR case of *Edwards and Lewis v. The United Kingdom* (*Applications nos. 39647/98 and 40461/98*) 27 October 2004, in which the European Court expressed that two principles were of fundamental importance: 1) the trial process was adversarial; 2) there had to be equality of arms. Putting these two principles together, it became manifestly unfair for the trial judge to view material which supported the Prosecution case, but which he held should not be disclosed on the grounds of public interest immunity, since it meant that the applicants had no opportunity to seek to challenge the way in which the material ostensibly assisted the Prosecution.

¹³ *Kanda v Government of the Federation of Malaya* [1962] AC 322, 337.

¹⁴ ICC-01/05-01/08-T-303-CONF-Red-ENG ET 09-04-2013 8/30; ICC-01/05-01/08-T-303-CONF-Red-ENG ET 09-04-2013 6/30.

16. No information has been provided as to why certain submissions on the part of the Prosecution, the Registry or questions from the bench (and the answers thereto) have been withheld from the Defence. The Registry was permitted to make “necessary redactions”,¹⁵ but no indication has been given to Mr. Bemba as to the justification for redacting parts of the 9 April discussions. The Chamber, after considering its duty under Article 64(2) of the Statute to ensure that the trial is fair and conducted with full respect of the rights of the accused and considering “the existence of other related decisions and underlying documents”,¹⁶ ordered that the Defence be given access to 9 April Transcript. No directions were given that redactions should be made to protect, for example, the identity of vulnerable witnesses or the location of witnesses subject to protective measures, or the working practices or procedures of the Registry or the Detention Unit (which are in fact discussed in great detail). The transcript is disclosable, and the Defence submits it should be disclosed in full. In particular, the impression given to the accused by the redaction of judicial interventions on the part of those ultimately deciding on his guilt or innocence in the present case is understandably troubling.

17. The Chamber has previously emphasized its limited involvement in and exposure to the elements of the Article 70 Case. The Chamber stated in April 2013 that:¹⁷

The fact that this Trial Chamber **has not been previously involved in an Article 70 investigation and prosecution** will serve to ensure that the Trial Chamber may make such a decision with due regard of the rights of the defence.

18. Accordingly, the 9 April Transcript must address matters peripheral to the Prosecution’s investigations, and as such no prejudice can arise if this same information is provided to the Defence. Even if the redacted portions of the

¹⁵ ICC-01/05-01/08-2920-Conf, para. 5.

¹⁶ ICC-01/05-01/08-2920-Conf, para. 5.

¹⁷ ICC-01/05-01/08-2606-Conf, para. 20.

transcript are in some way related to the state of the Prosecution's Article 70 investigations in April 2013, these investigations are now effectively concluded. The suspects are in custody and search and seizure procedures have been carried out. In such circumstances, there can be no justification that information contained in the 9 April Transcript will jeopardise ongoing Prosecution investigations, particularly given that the transcripts will be provided on a confidential basis to members of the Defence team who are bound by duties in this regard.

19. It is also significant that the focus of the 9 April Status Conference discussion was an investigation into alleged payments to, or subordination of, Defence witnesses. As such, such information should rightly be in the accused's possession, given the broad definition championed by this Chamber to the disclosure obligations under Rule 77 of the Rules of Procedure and Evidence. As the Chamber recently noted, the Appeals Chamber has held that "the concept of information 'material to the preparation of the defence' needs to be interpreted broadly so as to include documents that were not directly linked to exonerating or incriminating evidence."¹⁸ Trial Chamber I has explicitly ruled that information which undermines or supports the evidence, or the credibility, of proposed defence witnesses falls within the scope of Rule 77 of the Rules.¹⁹ It is accordingly plain that all information concerning allegations of suborning perjury of Defence witnesses, and the credibility of Defence witnesses generally, is material to the Defence's preparation and should therefore be provided to the accused.

¹⁸ ICC-01/05-01/08-2845-Conf-Red, para. 9, citing to: Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, paragraphs 77 to 78 ICC-01/04-01/06-1433, paragraph 77; 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, paragraph 38.

¹⁹ ICC-01/04-01/06-2624, at para. 18.

20. On this point, the Trial Chamber in the *Banda & Jerbo* case recently addressed the fair trial implications of a potential failure to provide material disclosable under Rule 77 to the Defence. The Chamber noted:²⁰

[I]f the prosecution is unable to locate, contact and secure the consent of the witnesses at issue, or otherwise resolve the underlying disclosure issue, the Trial Chamber will need to consider **whether a fair trial may still be conducted in the absence of the full disclosure to the defence of the potentially exculpatory or Rule 77 material**. This applies also to the lifting of redactions to confidential information contained in both statements relevant to the defence's investigation and statements of prosecution witnesses.

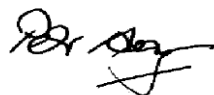
21. Similarly, maintaining redactions of matters which go to the heart of the Defence case – namely the credibility of its witnesses – would accordingly require an assessment of whether it is possible to have a fair trial in the absence of full disclosure.

D. RELIEF REQUESTED

22. In light of all of the above, the Defence requests that the Chamber:

ORDER the Registry to provide the Defence with an unredacted version of Transcript ICC-01/-05-01/08-T-303-CONF.

The whole respectfully submitted:



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

²⁰ ICC-02/05-03/09-535-Red, para. 58.

The Hague, The Netherlands

11 February 2014