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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

**Reply to Defence Observations on the Prosecution Request for a Variance of
Protective Measures**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") files this Reply to the Defence's observations on its Request to vary protective measures,¹ pursuant to Regulation 24(5) of the Regulations of the Court ("RoC") and Trial Chamber III ("Chamber")'s 11 February Decision.²

2. The Prosecution replies to the Defence submissions that: (1) the informed consent of protected witnesses is a precondition to any variation of protective measures under Regulation 42 of the RoC; and (2) the consent obtained must explain to the witnesses the possibility of being called *viva voce* as a consequence of access being provided to their transcripts of evidence.

3. For the reasons provided below, the Defence Observations are without merit and should be dismissed.

II. Classification

4. This application is filed as "Confidential", as it refers to and responds to filings of the same designation.

¹ ICC-01/05-01/08-2959-Conf, Defence Observations on the "Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding", 5 February 2014 ("Defence Observations"); ICC-01/05-01/08-2951-Conf, Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding, 30 January 2014 ("Request").

² ICC-01/05-01/08-2968-Conf, Decision on "Prosecution Request for leave to reply to Defence Observations on the Prosecution Request for a Variance of Protective Measures", 11 February 2014 ("Defence Observations").

III. Submissions

A. Consent under Regulation 42(4) of the RoC is not a dispositive prerequisite for the determination of a variance application

5. The Defence's suggestion that the consent of witnesses to the variation of protective measures is a dispositive prerequisite of Regulation 42(4) of the RoC³ is contrary to a plain reading of the Regulation's text. Further, the *Lubanga* case is factually inapposite and the Defence's reliance on it therefore misplaced.⁴ In any case, the *Lubanga* decision is not binding on this Chamber.

6. Regulation 42(4) of the RoC provides that a Chamber shall seek to obtain the consent of protected persons before making a variance determination under sub-regulation 3 "whenever possible."⁵ It does not provide that the determination of an application to vary protective measures shall only be made where the protected person has consented.

7. The Regulation's text is clear on two important points: (1) a Chamber may determine the variance of protective measures under sub-regulation 3 without the consent of a protected witness (*e.g.*, when it is not possible to obtain it); and (2) obtained consent is not dispositive. The Regulation provides that a Chamber shall seek to obtain the consent of the protected person — not that a Chamber is precluded from determining a variance application without it.⁶ If the consent of a protected person limited the Chamber's discretion in determining a variance

³ Defence Observations, para. 6.

⁴ Defence Observations, para. 6.

⁵ See Regulation 42(4).

⁶ Compare, International Criminal Tribunal of the Former Yugoslavia, Rules of Procedure and Evidence (ICTY RPE), Rule 75(J) (unqualifiedly requiring consent, in that "the Chamber determining an application [to rescind, vary, or augment protective measures] *shall ensure* through the Victims and Witnesses Section that the protected *victim or witness has given consent* to the rescission, variation, or augmentation of protective measures") (emphasis added).

application, sub-regulations 3 and 4 of Regulation 42 of the RoC would reflect that. Instead, read together, the two sub-regulations make clear that the consent of a protected person is a non-dispositive factor for the Chamber's consideration.

8. In any event, the Court has the inherent power to determine an application for the variance of protective measures without a witness's consent, for example, where compelling exigent grounds exist or where injustice or damage to the fairness or integrity of the proceedings might otherwise result.⁷

B. Consent does not apply to the Prosecution's discharge of disclosure obligations in subsequent proceedings

9. The question of consent under Regulation 42 of the RoC is specifically limited to a sub-regulation 3 application. However, Regulation 42(2) of the RoC governs disclosure in subsequent proceedings in the context of protective measures. Importantly, it is not conditioned, to any extent, on the consent of protected witnesses. The Defence Observations overlook this fact.

10. As noted, the Request responds directly to the Order of the Single Judge requiring the Prosecution's 'disclosure' of all evidence upon which it intends to rely at confirmation:

[A]s regard [*sic*] the evidence...on which she intends to rely for the purpose of the confirmation...the Prosecutor shall *disclose* it to the Defence.⁸

⁷ See ICC-01/04-01/07-412, Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12, 18 April 2008, pp. 8-9 (concerning Article 68(1) admitting the evidence of a witness without consent) at footnote 15, *infra*; see also e.g., ICTY RPE, Rule 75(J) ("on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, the Chamber may, in exceptional circumstances, order proprio motu the rescission, variation, or augmentation of protective measures in the absence of such consent.") (emphasis added).

⁸ See Request, para. 1 (citing ICC-01/05-01/13-T-2-CONF-ENG ET, 4 December 2013, p. 32, line 9 to line 13 (emphasis added); see also ICC-01/05-01/13-T-2-CONF-ENG ET, 4 December 2013, p. 31, line 18 to p. 32,

11. To this extent, the Request seeks disclosure in a subsequent proceeding, as required by the Single Judge.⁹ Admittedly, the Request is framed more broadly as a Regulation 42(3) of the RoC application, but this is only to the extent that the Chamber may determine that the disclosure required by the Single Judge entails a substantive variation of the existing proactive measures beyond that envisioned under Regulation 42(2) of the RoC.

12. However, at its core, the Request coincides with sub-regulation 2. The variance sought is to allow the Prosecution to discharge its disclosure obligations in accordance with the Single Judge's order and to provide the Defence in subsequent proceedings full access to relevant transcripts of evidence.

C. The Defence mischaracterises the scope of the variance sought

13. The Defence mischaracterises the Request in asserting "the Prosecution wants all protective measures waived, for all witnesses, for all of their respective testimonies."¹⁰ To the contrary, the Prosecution accepts that certain protective measures may have to remain in place.¹¹

14. The Request covers all Defence witnesses specifically to avoid any potential suggestiveness to the Trial Chamber.¹² Were the Prosecution to particularise the specific Defence witnesses on which it intends to rely in the Article 70 Case, this would conversely and perhaps unfairly signal to the Trial Chamber the Defence witnesses that are least reliable in the ongoing trial. Further, the scope of the Request

line 3).

⁹ Request, paras. 1, 10 and 11 (noting the objectives for which the variance is sought (1) disclosure; (2) statutory obligations; and (3) access to material required to be disclosed).

¹⁰ Defence Observations, para.8.

¹¹ See Request, paras. 3 and 11 (acknowledging that protective measures may remain indeed tact and limiting the requested variance to that necessary to comply with the Prosecution's disclosure obligations).

¹² Request, para.4.

is expressly tied to the Prosecution's disclosure obligations imposed by the Single Judge.

D. Consent cannot reasonably be required where the testimony sought is itself part of the crime

15. The alleged offences in the Article 70 case include, *inter alia*, the subornation of false testimony procured by a variety of unlawful means. Thus, witnesses' transcripts of testimony comprise more than simply relevant evidence. They are a part of the crimes perpetrated. In short, the alleged false testimonies comprise direct evidence of the coaching, bribery and corrupt influence that allegedly produced them.

16. The use of such transcripts of testimony provided before the Court comprising crimes within its jurisdiction cannot reasonably depend wholly upon the preferences of witnesses who may be considered co-conspirators and co-perpetrators of the crimes charged in the Article 70 case.

17. However, the Defence takes precisely this position, contending that, "in these circumstances, it [is] imperative that the Defence witnesses be contacted and consent to their protective measures being waived and their testimonies being handed over."¹³ The Defence further asserts that consent is required because these witnesses "participated, often at great personal risk, in the present case."¹⁴ However true this may be, it can in no way immunize witnesses from the consequences of perpetrating crimes or fraud against the Court during the course of their testimony.

18. Although the Defence Observations note the Court's duty to protect witnesses

¹³ See Defence Observations, para. 12.

¹⁴ See Defence Observations, para. 13.

under Article 68(1) of the Rome Statute ("Statute"), this obligation does not *per se* override the Court's duty under Article 69(3) of the Statute, which authorises the Court to request the submission of all evidence necessary for the determination of the truth; it does not override witnesses' obligation to tell the truth when testifying under Article 69(1) of the Statute¹⁵ or shield them from the attendant consequences of failing to do so; and it does not override the Prosecution's obligation to establish the truth under Article 54(1)(a) of the Statute.¹⁶

E. The Court should preclude the Defence's contact with the witnesses concerning the obtaining of consent

19. The Defence Observations imply the Defence's involvement in contacting protected witnesses in respect of obtaining their consent to a modification of their protective measures. The Defence Observations provide that, "even if these witnesses were in possession of a phone, and their phone numbers were known to the current Defence team, they may be unwilling to receive calls from The Hague without first knowing the identity of the caller and the reason for the communication."¹⁷ The suggestion here is that the Defence might be involved in contacting the protected witnesses.

20. The Prosecution opposes any such involvement or contact, which is inappropriate in the context of this case. First, the Accused is a suspect and interested party in the Article 70 proceedings. His interests are antithetical to those of the protected witnesses. The Accused may have a concrete interest in ensuring that these witnesses do not provide consent (if required) to the variance of protective measures. Moreover, he may have an interest in thwarting any Prosecution efforts to

¹⁵ See also Rule 66 of the Rules of Procedure and Evidence.

¹⁶ See *e.g.*, ICC-01/04-01/07-412, Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12, 18 April 2008, pp. 8 to 9 (declining to exclude transcript of an interview where the witness's consent to its use could not be obtained due to exceptional circumstances).

¹⁷ Defence Observations, para. 12.

procure their evidence for use against him in the Article 70 case. Second, to the extent that witnesses have provided false evidence allegedly at his behest and on his behalf, permitting the Accused further contact with them directly or through his Defence team threatens to compound the alleged Article 70 violations.

21. If contact with witnesses is to be undertaken, the Victims and Witnesses Unit is far better positioned to determine how best to approach them in these circumstances.

F. The possible *viva voce* testimony of the protected witness is irrelevant to the disposition of the Request

22. Finally, the Defence contends that the consent of a protected witness to the variance of protected measures must cover every possible scenario that may potentially arise from a modification of the protective status. This argument is unsubstantiated and unrealistic.

23. First, the fact that protected witnesses in this case may be called to testify *viva voce* does not arise solely from the prospect of disclosing their transcript of evidence in a subsequent proceeding. The Defence's contention that the consequence of varying these protective measures includes "wide-ranging implications"¹⁸ is conjecture.

24. It is not the case that, to the extent it may be required, a witness's consent to the variation of protective measures depends upon being apprised of every speculative possibility concerning a possible change (no matter how remote or tangentially related). In this respect, it not surprising that the Defence Observations fail to provide legal authority for this contention.

¹⁸ Defence Observations, para. 9.

25. Second, to the extent that protected witnesses may find themselves in the position of having to testify in a subsequent proceeding, a determination as to the appropriate protective measures to be applied in that circumstance should be made at that time.

IV. Requested Relief

26. For the foregoing reasons, the Prosecution requests that the Chamber grant the Request and dismiss the Defence Observations.



Fatou Bensouda, Prosecutor

Dated this 17th Day of February 2014

At The Hague, The Netherlands