

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 03/03/2014

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 Reply to the 'Prosecution's Response to "Defence Motion on Prosecution
contact with its witnesses"'**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for the Victims

Paolina Massida

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Patrick Craig

Detention Section

Victims Participation and Reparations Other Section

A. BACKGROUND

1. On 12 February 2014, the Defence filed its 'Motion on Prosecution contact with its witnesses',¹ in which it seized Trial Chamber III ("the Chamber") with a request to:

ORDER that the Prosecution refrain from contacting any Defence witnesses outside the procedure set by the Trial Chamber in its 'Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure"'; and

ORDER that if such contact has occurred, the Prosecution immediately disclose all interview notes, statements, or transcripts of interview generated during the course of this contact.

2. The Prosecution opposed the Defence motion in its entirety, in its 'Prosecution's Response to "Defence Motion on Prosecution contact with its witnesses"' ("Prosecution Response").² In particular, the Prosecution asserted that:³

The Defence request for disclosure of Article 70 material conflicts with its allegations that the Prosecution is attempting to "contaminate" this Chamber with Article 70 evidence **as it is fully aware that the E-Court Protocol requires communication of all disclosed materials to the Chamber, which can thereafter access this information...** The disclosure of any witness related Article 70 material is intrinsically linked to the Chamber's decision on the relevance of any such evidence for the current trial proceedings.

3. On 26 February 2014, the Chamber granted the Defence request for leave to reply to the above argument.⁴ The Chamber also granted the Defence request to

¹ ICC-01/05-01/08-2971-Red.

² ICC-01/05-01/08-2990-Conf.

³ ICC-01/05-01/08-2990-Conf, paras. 3, 18.

“submit short and focused pleadings on the propriety of [specific aspects of the prosecution's] pleadings.”⁵ Pursuant to that decision, the Defence files the below reply.

B. CLASSIFICATION

4. The Defence filed a public redacted version of its ‘Defence Motion on Prosecution contact with its witnesses’.⁶ The Prosecution filed its Response confidentially, on the basis that “it refers to the Defence Motion and other decisions of the same classification.”⁷ Despite an urgent request made to the Prosecution on 24 February 2014 for a public redacted version of the Prosecution Response, this has not been produced. As such, the Defence files the current document confidentially, but submits that it could and should be reclassified as public.

C. DEFENCE REPLY

(i) The disclosure of statements taken from Defence witnesses by the Prosecution is not linked to the question of the admissibility of other Article 70 material

5. The Prosecution has contacted and spoken with Defence witnesses, with no subsequent disclosure having been made to the Defence.

6. In response to Defence arguments that this failure undoubtedly puts the Prosecution in breach of its disclosure obligations, the Prosecution inexplicably claims that the request for disclosure is inconsistent with the Defence’s opposition

⁴ ICC-01/05-01/08-2995, para. 3.

⁵ ICC-01/05-01/08-2995, para. 5.

⁶ ICC-01/05-01/08-2971-Red.

⁷ ICC-01/05-01/08-2990-Conf, para. 4.

to the admission as evidence of “one audio recording, one report, and one financial chart” relevant to the Article 70 investigation.⁸

7. It submits that the Defence cannot oppose the admission of Article 70 materials on the one hand, but still request that the Prosecution comply with its disclosure obligations on the other, on the basis that the Defence “is fully aware that the E-Court Protocol requires communication of all disclosed materials to the Chamber, which can thereafter access this information.”⁹

8. This argument is utterly illogical. The Prosecution tries to equate *inter partes* disclosure with the admission of evidence. The E-Court protocol to which the Prosecution refers was produced by Pre-Trial Chamber III in 2008 for the purposes of the confirmation of charges. It is entitled “Technical protocol (“e-Court Protocol”) for the provision of evidence, material and Witness Information in electronic form for the confirmation of charges,”¹⁰ and is grounded in Section V of the Rules of Procedure and Evidence concerning “Proceedings with regard to the confirmation of charges under article 61”. The Pre-Trial Chamber in 2008 held in explicit terms that:¹¹

The Chamber observes that the provisions on disclosure, especially rule 121(2)(c) of the Rules [Proceedings before the confirmation hearing], draw a clear distinction between “disclosure” which is *inter partes* and “communication” to the Chamber. Therefore, the Chamber is of the view that the concept of “disclosure” should not be confused with the concept of “communication” of evidence to the Chamber. The Chamber is not a party to the proceedings and does not take part in the disclosure process. Pursuant to rule 121(2)(b) of the Rules, the Chamber shall ensure that disclosure takes place under satisfactory conditions. Thus, for the Chamber to be in a position to ensure that proper disclosure takes place and to make an informed decision in accordance with its statutory mandate, as

⁸ ICC-01/05-01/08-2937-Conf.

⁹ ICC-01/05-01/08-2990-Conf, para. 3.

¹⁰ ICC-01/05-01/08-55-Anx.

¹¹ ICC-01/05-01/08-55, para. 42.

already set out in part I, the Chamber shall be informed by way of communication of all the evidence disclosed between the parties.

9. Thus, the Pre-Trial Chamber was clear that it does not take part in the disclosure process, and its access to any material disclosed *inter partes* is only to ensure that disclosure has properly taken place. This is consistent with the Appeals Chamber's subsequent ruling in the present case that the inclusion of documents within a case management tool cannot be equated to the submission of evidence to the Chamber.¹² Moreover, in considering the terms of an identical E-Court protocol in *Ruto et al.*, the Single Judge rejected the Prosecution argument that disclosure of exculpatory material would prejudice the fairness of the proceedings. In particular, the Single Judge emphasised that the disclosure of such materials was without prejudice to the right of the Defence to invoke its right of silence or to decline to rely on the disclosed material.¹³

10. The Prosecution's suggestion otherwise, namely that the Judges or their Legal Officers of Trial Chamber III somehow trawl through the E-Court database accessing or reviewing the material disclosed between the parties is bordering on contemptuous. If this were the reality, the Prosecution could simply flood E-Court with allegedly incriminating material in the knowledge that it would be reviewed by the Chamber, obviating any need for the process of admission of evidence and considerations of probity, relevance or reliability. This cannot be the case, and is presumably why in other international tribunals the Chambers have no access to documents disclosed *inter partes*.¹⁴

¹² ICC-01/05-01/08-1386 paras. 43-45.

¹³ ICC-01/09-01/11-74, para. 36.

¹⁴ See, for example, *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Status Conference, 23 October 2007, page 1651 line 19 - page 1652, line 1, JUDGE ANTONETTI: [Interpretation] Fine, Mr. Seselj. I'm trying to move ahead regarding this very important issue, which for the moment we don't have a solution. It is true that disclosure of documents suffered from a drawback which came from the fact that this disclosure is done without the Judge's control. So when Mrs. Dahl is sending documents over to you, I have no idea what she's sending. This is what -- actually, because there's nothing in the Rules providing for this, and a great number of Judges do not want to interfere with the disclosure between parties.

11. The Prosecution's position that "disclosure of any witness related Article 70 material is intrinsically linked to the Chamber's decision on the relevance of any such evidence for the current trial proceedings"¹⁵ is similarly erroneous. The Prosecution's disclosure obligations are fixed. They do not vary depending on the context in which disclosable information was created. Although the Defence has not seen the subsequent statements of its Defence witnesses, it is absolutely inconceivable that these statements do not concern the veracity of the testimony given in the present proceedings. They are disclosable to the Defence, independent of the admissibility as evidence of other material produced as a result of the Article 70 investigations.

(ii) The Prosecution's pleadings on material not in evidence should be struck from the record of the case

12. In its Response, the Prosecution pleads allegations of which there is no evidence before the Chamber. It asserts, for example: "[s]hould the Chamber allow, the Prosecution stands ready to provide evidence showing former lead Counsel dissuaded witnesses from meeting with the Prosecution. This information is contained in a report pending admission as additional evidence."¹⁶ The Prosecution also alleges that the information it has collected from the Defence witnesses is "incriminating",¹⁷ and asserts that "[i]f the Defence made representations to witnesses that their association with the Court was over without explaining their obligation to tell the truth and the possible consequences flowing from false testimony, then it wrongly informed these witnesses."¹⁸

¹⁵ ICC-01/05-01/08-2990-Conf, paras. 3, 18.

¹⁶ ICC-01/05-01/08-2990-Conf, para. 16.

¹⁷ ICC-01/05-01/08-2990-Conf, para. 3.

¹⁸ ICC-01/05-01/08-2990-Conf, para. 11.

13. Leaving aside the fact that, even taken at their highest, these matters cannot possibly amount to any proof of the commission of a crime by the accused in this case, in making these allegations the Prosecution is making arguments on factual matters which have no evidential foundation in this case. This is utterly improper, and the Defence is extremely concerned that the Prosecutor of the International Criminal Court has put her signature to a document which attempts to argue in front of the Chamber on the basis of the Prosecution's own view of material which is not only confidential in another proceeding, but for which it opposes disclosure in the present case.

14. There is no basis upon which the Chamber could rely upon these assertions in determining the instant issues without the underlying material being disclosed and considered. The Defence requests that the Chamber order that these paragraphs be struck from the record of the case, and form no part of the Chamber's deliberations.

15. Further and/or alternatively, the Defence avers that the Prosecution's reliance upon the contents of these statements is a plain admission on its part that the material is disclosable to the Defence. Either it wishes to rely on the material, in which case it discloses it, or it does not (which does not in any event alter its duty of disclosure).

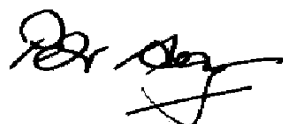
D. REQUESTED RELIEF

16. On the basis of the submissions made above, the Defence respectfully requests that the Chamber

GRANT the 'Defence Motion on Prosecution contact with its witnesses';
and

STRIKE OUT paragraphs 3, 11 and 16 of the Prosecution Response.

The whole respectfully submitted.

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Peter Haynes, QC

Counsel for Mr. Jean-Pierre Bemba

The Hague, The Netherlands

3 March 2014