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

Date : 05/02/2014

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**

Public

**Public Redacted Version of 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”**

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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A. BACKGROUND

1. On 30 January 2014, the Prosecution filed its *Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding* (“Request”).¹ The Request was confidential, and was filed on an *ex parte* basis. It was reclassified by Trial Chamber III (“the Chamber”) the same day, and provided to the Defence.²

2. In the Request, the Prosecution asserts that in order to, *inter alia*, “allow the Prosecution to rely on such evidence for the confirmation proceedings” in Case ICC-01/05-01/13 (“Article 70 Case”), it was requesting a “variance” of the protective measures of every single Defence witness for whom protective measures were granted by the Chamber in the present proceedings. The Prosecution states that this “variance” would allow this material to then be disclosed and relied upon in the Article 70 case.³

3. The Prosecution Request makes no reference to the safety or security of Defence witnesses, seeking the consent of Defence witnesses, or indeed even the need for the Defence to be consulted.

4. On 30 January 2014, the Chamber rendered its *Order requesting observations on prosecution document ICC-01/05-01/08-2951-Conf*,⁴ in which it directed “the defence, the legal representative of victims and the VWU to submit their observations on the Request by Wednesday, 5 February 2014.” Pursuant to that Order, the Defence files the following observations.

¹ ICC-01/05-01/08-2951-Conf-Exp.

² ICC-01/05-01/08-2951-Conf.

³ ICC-01/05-01/08-2951-Conf, paras. 3, 13.

⁴ ICC-01/05-01/08-2954-Conf.

B. APPLICABLE LAW

5. The Prosecution bases its Request on Regulation 42 of the Regulations of the Court,⁵ which provides for the variation of protective measures.⁶ The Prosecution does not acknowledge the requirement in Regulation 42(4) that:

Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made

6. In the *Lubanga* case, Trial Chamber I recognized that the consent of the witness in question was a prerequisite of confidential transcripts being provided to anyone outside the case. Presiding Judge Fulford held that:⁷

we have certainly given 316, and I suspect 321, an undertaking that his evidence, their evidence, will not go outside the four walls of this courtroom. By showing their evidence to 582, we would be breaching that undertaking. Therefore, both for the Katanga application as regards 316, and for this very limited request in relation to the preparation of 582, it seems to us that both of those witnesses should be asked whether they consent to their evidence being disclosed more widely than the undertaking that I gave them. I think in the circumstances Mr Walley is right and we should respect what we said in court.

⁵ ICC-01/05-01/08-2951-Conf, para. 13.

⁶ Regulation 42(3): Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.

⁷ ICC-01/04-01/06-T-330-Red2-ENG-WT, 10-11-2010, pages 62-63.

C. SUBMISSIONS

7. Defence witnesses who testified in the *Bemba* case have expressed deeply held fears for their safety, and that of their families, arising out of their association with the present proceedings. Following interviews, assessments and recommendations on the part of the Victims and Witnesses Unit (“VWU”), the Chamber granted protective measures to 30 Defence witnesses.⁸ The witnesses consented to these measures being granted, and testified on the basis that their identities and testimony given in private session would not be revealed to anyone other than those involved in present case. In such circumstances, compliance with the requirement in Regulation 42(4) that their consent should be sought is of the utmost importance.

8. Complicating matters, however, is the wholesale nature of the Prosecution Request, which is in no way tailored to minimize the required variation of protective measures. The Prosecution wants all protective measures waived, for all witnesses, for all of their respective testimonies. Although three of the accused in the Article 70 Case have previously had access to this protective information, two have not. No consideration has been given to the stress or confusion that may arise if Defence witnesses are informed that the Prosecution is now intending to give copies of their entire testimony to two other accused persons and their lawyers, for its potential use in other proceedings.

9. Nor can it be assumed that the provision of transcripts is the only consequence of protective measures being stripped. For example, admission of testimony in the Article 70 Case may well trigger requests for these witnesses to be recalled to give *viva voce* testimony about other issues which fall outside the scope

⁸ [REDACTED].

of their testimony in the main case. It therefore cannot be assumed that any consent given by these witnesses extends to such wide-ranging implications, absent assurances that these implications have been properly explained and understood.

10. In terms of the latter aspect, the Prosecution has predicated its request on an assertion that intends to “rely on such evidence for the confirmation proceedings in the Article 70 proceedings”.⁹ The ICC has no subpoena powers, and as a result, the parties cannot adduce testimony without the consent of the person concerned. This prohibition applies to the confirmation stage.¹⁰ The requirement that the Prosecution must first obtain the consent of a person before it can rely on that person’s statement is also a mandatory obligation, which stems from the Court’s duty to ensure the protection of witnesses, as set out in Article 68(1).¹¹

11. Given that the Prosecution has never notified the Defence of its intention to contact Defence witnesses, as required by the Trial Chamber’s decision of 4 September 2012,¹² it must be presumed that the Prosecution has not obtained the consent of these persons to use their transcripts as evidence at the Article 70 confirmation hearing.¹³

12. In these circumstances, it imperative that the Defence witnesses be contacted and consent to their protective measures being waived and their testimonies being handed over. Practically, however, this would be difficult. The presentation of Defence evidence commenced in August 2012. As such, many of the Defence witnesses in question completed their testimony over a year ago. Many are refugees or without any formal status in the states in which they are residing, and without

⁹ ICC-01/05-01/08-2951-Conf, para.3.

¹⁰ ICC-01/04-01/06-803, para. 59.

¹¹ ICC-01/04-01/07-412, page 6.

¹² ICC-01/05-01/08-2293.

¹³ If the contrary is true, then the Defence must be notified immediately of the existence of any contacts between the Prosecution and Defence witnesses, and provided with an explanation as to the legal basis for such contacts.

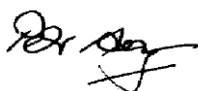
fixed addresses. At the time of their testimony, the majority had limited communication facilities, and without regular access to telephones. The Defence team as currently composed is not aware of any efforts to stay in contact with Defence witnesses, apart from ensuring they been returned safely to the areas from which they were collected by the Court. It cannot be discounted 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.

13. As such, the Prosecution's desire to build a case against accused in other proceedings is an insufficient basis to undo the measures which were properly put in place to protect the safety and security of witnesses who participated, often at great personal risk, in the present case. The Defence also notes for the record its concern at the Prosecution's attempt to have these protective measures varied on an *ex parte* basis.

C RELIEF REQUESTED

14. Accordingly, the Defence requests that the Chamber reject the Prosecution Request to vary the protective measures which were issued in the present case.

The whole respectfully submitted:



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

The Hague, The Netherlands

5 February 2014