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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

Public

**Public Redacted Version of Defence Request for Leave to Appeal the Decision on
the Defence Motion concerning [REDACTED] Witnesses 169 and 178 and
[REDACTED]**

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. With the exception of its experts, the Prosecution witnesses who testified in the present case did so with the benefit of protective measures.¹ Accordingly, their status as witnesses in the present proceedings was not to be revealed either to the public at large, or to other witnesses.

2. In November 2013, following an order from the Chamber,² the Prosecution disclosed information concerning [REDACTED] Prosecution Witnesses CAR-OTP-WWWWW-0169 (“Witness 169) and CAR-OTP-WWWWW-0178 (“Witness 178”) and [REDACTED].³

3. This filing, made 4 months after the Prosecution was first made aware of the information contained therein, contained two significant pieces of information. The first was that each of the [REDACTED]witnesses called by the Prosecution had been promised by and/or were receiving payments of money from the International Criminal Court. The second was that [REDACTED] the widespread application of protective measures, [REDACTED]. According to the information disclosed by the Prosecution, Witness 169 stated that “ [REDACTED] by [Witness 178], mainly to look at loss of income claims.”⁴

4. On 11 November, the Defence filed its “Defence Motion concerning

¹ T-50-Conf-ENG, page 37, line 24 – page 42, line 9; T-63- Conf-ENG, page 50, line 2 – page 51, line 19; T-32-ENG, page 61, line 8 – page 62, line 19; T-66- Conf-ENG, page 41, line 18 – page 44, line 9; T-66-Conf -ENG, page 1 line 25 – page 4 line 5; T-79- Conf-ENG, page 44 line 11 – page 46 line 2; T-81- Conf -ENG, page 54, line 21 – page 56, line 24; T-115- Conf-ENG, page 53, line 19 – page 55, line 19; ICC-01/05-01/08-1940-Conf, 25-11-2011; T-134-CONF-ENG, page 26, line 5 – page 28, line 2; ICC-01/05-01/08-1021-Conf, 19-11-2010; T-176- Conf-ENG, page 6, line 4 – page 10, line 11; T-107- Conf -ENG, page 1, line 21 – page 3, line 5; T-47- Conf-ENG, page 45, line 12 – page 46, line 12; T-149- Conf -ENG, page 63, line 23 – page 65, line 25; T-123- Conf-ENG, page 31, line 23 – page 33, line 20; T-127- Conf-ENG, page 58 line 12 – page 60 line 10; T-90- Conf-ENG, page 57 line 19- page 60 line 1.

² ICC-01/05-01/08-2845-Conf-Red.

³ ICC-01/05-01/08-2827-Conf (hereinafter “Prosecution Submissions”).

⁴ ICC-01/05-01-08-2827-Conf-Red, para. 9.

‘Information on [REDACTED]’,⁵ in which it seized the Chamber with the following requests:⁶

ORDER the provision of public redacted versions of all filings associated with the conduct of Witnesses 169 and 178;

ORDER the Prosecution to provide the Defence with a lesser-redacted version of the Prosecution Submissions in compliance with paragraph 12 of the Chamber’s Decision, and to formally disclose and attribute an ERN number to Annexes A and B to the Prosecution’s Submissions;

ORDER the disclosure of any requests for payments or other benefits made by Witness 169, Witness 178, [REDACTED]. and all details and dates of the payments or benefits provided to Witness 169, Witness 178, [REDACTED] by the Prosecution, VWU or the Registry, including those made in the period between 25 June 2013 and 3 October 2013;

ORDER the disclosure of any recordings, statements or notes of interviews generated by the Prosecution during the contact with both Witness 169 and Witness 178, as well as Witness 119, Witness 42, Witness 38, Witness 68 [REDACTED].

ORDER the recall of Witness 169 and Witness 178.

5. On 18 December 2013, the Chamber rendered its “Decision on “Defence Motion concerning ‘Information on [REDACTED] [of] Witnesses 169 and 178 [REDACTED]’⁷ (“the Impugned Decision”). While granting the Defence Motion in part, the Chamber declined to order the provision of public redacted versions of the relevant filings.⁸ The Chamber noted that VWU had been ordered to prepare a report on the issues addressed in the Prosecution Submission as soon as practicable, and “that publication of the relevant information might prejudice the Registry's assessment and have a negative impact on the well-being of the individuals

⁵ ICC-01/05-01/08-2872-Conf

⁶ ICC-01/05-01/08-2872-Conf, para. 50.

⁷ ICC-01/05-01/08-2924-Conf

⁸ ICC-01/05-01/08-2924-Conf, para 17.

concerned.”⁹ The Chamber also considered submissions from the Legal Representative of Victims Maitre Zarambaud that publication of the relevant filings would lead to confusion and negatively affect victims participating in the case.¹⁰

6. In the Defence submission, appropriate redactions to the identified filings could inform the public as to the very important issues which have arisen in the present case without in any way identifying the witnesses involved. As such, there is no risk that security assessments of these individuals will be compromised or the completion of VWU’s work could be in any way prejudiced. The Defence respectfully submits that, in the absence of any concrete information that appropriately redacted filings would have any negative impact on any witnesses or victims, the balance should favour publicity of the proceedings over hypothetical and unspecified assertions as to confusion; confusion which could be managed through appropriate outreach on behalf of the Legal Representatives of Victims and/or the relevant organs of the Registry.

7. The Chamber also rejected the Defence request for “the opportunity to investigate and explore the potential collusion between witnesses and the apparent promise of payments to witnesses” and denied the request to recall Witness 169 and Witness 178. The Chamber reasoned as follows:¹¹

[REDACTED]

8. The Chamber did not, however, address the Defence’s concern as to how the [REDACTED] each subject to [REDACTED] ordered by the Chamber, [REDACTED] in the present case. While it is plain that the information recently disclosed by the Prosecution relates to [REDACTED] **after** their testimony, and that the small number of witnesses contacted by the Prosecution **said** that they had [REDACTED]. There is

⁹ ICC-01/05-01/08-2924-Conf, para 17.

¹⁰ ICC-01/05-01/08-2924-Conf, para 17.

¹¹ ICC-01/05-01/08-2924-Conf, para. 34.

an irresistible inference that there had been [REDACTED], and the possibility of [REDACTED]¹² The parties and participants remain utterly in the dark as to how such a manifest [REDACTED] could have occurred, and how such a complete and accurate [REDACTED] witnesses could have been compiled by a Prosecution witness.¹³ The Defence submits that any analysis of the credibility of the Prosecution case in general, and of the testimony of these particular witnesses, warrants further investigation as to how this occurred, and the timing and extent of [REDACTED] between Prosecution witnesses.

9. Accordingly, the Defence seeks leave to appeal these two aspects of the Impugned Decision, on the grounds set out below.

B. REQUEST FOR LEAVE TO APPEAL

(a) Conditions for Leave to Appeal

10. Leave to appeal pursuant to Article 82(1)(d) will be granted if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned decision, and that meets the following two cumulative criteria as set out in that provision:¹⁴

- a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

¹² ICC-01/05-01/08-2872-Conf, para. 44.

¹³ ICC-01/05-01/08-2827-Conf-Red-AnxB, page 7.

¹⁴ ICC-01/04-01/07-108, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, 14 December 2007, p. 3; ICC-01/04-01/07-116, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007, page 4.

11. The Defence notes that the Appeals Chamber has held that '[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.'¹⁵

(b) Identification of Appealable Issues

12. The Defence submits that the Impugned Decision gives rise to the following identifiable subjects or topics requiring a decision for their resolution, which meet the criteria set out under Article 82(1)(d), and warrant consideration by the Appeals Chamber. These appealable issues are not merely "disagreements" or "conflicts of opinion" between the Defence and the Chamber but rather consist of discrete legal questions which arise directly out of the Impugned Decision.

13. The appealable issues identified are as follows:

(a) Whether the Trial Chamber erred in law in failing to meet its obligations under Articles 64(7) and 67(1) of the Statute and Regulation 20 of the Regulations of the Court by declining to order the provision of public redacted versions of the relevant filings, in the absence of any identified or concrete risk to the safety or well-being of any witness or victim; and

(b) Whether the Trial Chamber erred in failing to consider the Defence arguments concerning the [REDACTED] in place, and preventing further investigation and exploration of issues central to the credibility of the Prosecution evidence in this case.

(c) Satisfaction of the Conditions for Leave to Appeal

¹⁵ Situation in the Democratic Republic of the Congo, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 9.

14. Each of these identified appealable issues significantly affects the **fair and expeditious conduct of the proceedings**. Concerning the provision of public redacted versions of the relevant filings, the Rome Statute is unambiguous; an accused has a right to a public trial.¹⁶ The European Court of Human Rights has been unequivocal that the public nature of trials¹⁷

protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.

Only in exceptional circumstances can proceedings against accused at international courts and tribunals be hidden from the public. The significance of the information contained in the filings concerning Witnesses 169 and 178 to the credibility of the Prosecution case against Mr. Bemba provides further justification for the public being informed. The Chamber's decision to keep these filings confidential also affects the **expeditious conduct of the proceedings**. Further litigation as to the publicity of these filings and documents, coupled with the Chamber's decision to wait for security assessments and submission of a report by VWU inevitably leads to delays. It also gives rise to another issue which must ultimately be resolved before a decision can be rendered declaring the presentation of evidence closed pursuant to Rule 141.

15. The decision to prevent further investigation and exploration of the widespread breach of witness [REDACTED] also significantly affects the **fair and expeditious conduct of the proceedings**. An accused has a right to challenge the case against him. A necessary corollary of this right is the ability to test the credibility of Prosecution evidence. The Prosecution Submissions indicate, at a minimum, that [REDACTED] to discuss (further) payments from the International

¹⁶ Article 67(1) of the Rome Statute.

¹⁷ Judgement, *Werner v. Austria*, 24 November 1997, para. 45.

Criminal Court. This necessarily raises questions as to the timing and extent of [REDACTED], particularly given that [REDACTED]. Recall of Witnesses 169 and 178 would allow the Defence to investigate and explore many unanswered questions which have a direct impact on the credibility of the inculpatory testimony of these witnesses. The Chamber's decision rejecting the Defence request for recall of these witnesses accordingly impacts on Mr. Bemba's right to test this evidence, and the overall fairness of the proceedings.

16. Also impacting the fairness of the proceedings is the Chamber's ruling that the Prosecution witnesses did not collude,¹⁸ without having given the Defence an opportunity to substantiate its claim that collusion indeed occurred. In effect, the Chamber has denied the Defence request to recall witnesses in order to establish collusion on the grounds that the Defence has failed to establish collusion. While the Chamber was entitled to assess whether there **could** have been collusion between witnesses warranting further investigation, a definitive finding on whether collusion in fact occurred, in the absence of Defence submissions, cannot be reconciled with the adversarial nature of the proceedings or the right of Mr. Bemba to be heard on issues before the Chamber. In basing its decision only on information provided by the Prosecution, the fairness of the proceedings has been adversely affected. Again, ongoing litigation on this issue affects the **expeditious conduct of the proceedings**.

17. The decision to prevent further investigation will also affect **the outcome of the trial**. Widespread collusion between all the Prosecution's [REDACTED] witnesses is an issue that could affect the credibility of the majority of the Prosecution case which, in turn, will impact on the ability of the Prosecution to meet the requisite standard of proof on the charges against the accused. The information provided by the Prosecution indicates that it is not one or two Prosecution witnesses who are affected, but [REDACTED], representing the

¹⁸ ICC-01/05-01/08-2924-Conf, para. 34.

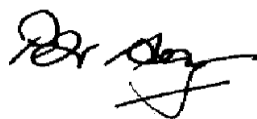
majority of the Prosecution case. As such, the appealable issue is one which will certainly impact on the outcome of the trial.

18. **An immediate resolution by the Appeals Chamber** of these issues would materially advance the proceedings. Although the Defence notes that the current trial is in its final phase, the Impugned Decision contains issues which impact on the credibility of such a significant proportion of the Prosecution's evidence that they cannot be safely left for any potential appeal from a Judgement at first instance. Should the Appeals Chamber identify errors in the Chamber's approach to the actions of Witness 169 and 178 and quash the Impugned Decision, the error can be corrected before a final judgement is rendered, thus the reopening of the proceedings to allow the presentation of the evidence of these two witnesses.

C. RELIEF REQUESTED

19. In light of the above arguments, the Defence respectfully requests that the Chamber:

GRANT the Defence request for leave to appeal the Decision on "Defence Motion concerning 'Information on [REDACTED]".



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

Done at The Hague, the Netherlands

24 September 2014