

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 December 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 "Decision on the prosecution's 'Information on contacts of Witnesses 169 and 178 with other witnesses [REDACTED]' (ICC-01/05-01/08-2827-Conf-Exp)"

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section Other**

Trial Chamber III ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Decision on the prosecution's "Information on contacts of Witnesses 169 and 178 with other witnesses [REDACTED]" (ICC-01/05-01/08-2827-Conf-Exp) ("Decision").

I. Background and Submissions

1. On 3 October 2013, the Office of the Prosecutor ("prosecution") filed its confidential *ex parte*, prosecution and Victims and Witnesses Unit ("VWU") only, "Information on contacts of Witnesses 169 and 178 with other witnesses [REDACTED]" together with Annexes A and B ("Prosecution Submissions").¹ The prosecution informs the Chamber that the Registrar's denial of Witness CAR-OTP-PPPP-0169 ("Witness 169") and Witness CAR-OTP-PPPP-0178's ("Witness 178") loss of income claims caused frustration and complaints from both witnesses.² As a result of the denial, Witness 169 sent communications to the prosecution and the VWU,³ in which he, *inter alia*, (i) lists outstanding claims, including loss of income and "money promised by the Prosecutor for witnesses"; (ii) provides a list of [REDACTED] of 22 prosecution witnesses ("Exposed Witnesses");⁴ and (iii) alleges that many of these witnesses were contacted and gathered by Witness 178 to look at loss of income claims.⁵

2. The prosecution further submits that following the receipt of Witness 169's communications, it contacted Witnesses 169 and 178 to "brief them on potential

¹ Information on contacts of Witnesses 169 and 178 with other witnesses [REDACTED], 3 October 2013, ICC-01/05-01/08-2827-Conf-Exp and confidential *ex parte* Annexes A and B.

² ICC-01/05-01/08-2827-Conf-Exp, paragraph 6.

³ The communications are appended in Annexes A and B to the Prosecution Submissions and appear addressed to several Court's officials and [REDACTED]. Annex A includes the letter sent by Witness 169 to the prosecution and an email emanating from Witness 169 on 7 June 2013. Annex B includes the letter sent by Witness 169 to the prosecution, a letter sent by Witness 169 to the VWU as well as an email emanating from Witness 169 on 10 June 2013. One of the addressees of the letters is the Presiding Judge of this trial, who has never received this letter before.

⁴ ICC-01/05-01/08-2827-Conf-Exp, paragraphs 7 and 10. There are [REDACTED].

⁵ ICC-01/05-01/08-2827-Conf-Exp, paragraph 9.

offences under Article 70 of the Statute and instruct them to desist from [REDACTED] as well as to obtain the source of [REDACTED], if possible".⁶ According to the prosecution, "Witness 178 confirmed his role in organising meetings with witnesses[REDACTED]. He further stated that he would 'continue' to act in this way until he receives his loss of income."⁷

3. [REDACTED].⁸ That notwithstanding, given the demonstrated persistence of Witnesses 169 and 178 in contacting other witnesses and Witness 178's statement that he will not desist, the prosecution considers that "[REDACTED]".⁹

4. Finally, the prosecution seeks the Chamber's guidance as to the possible need, appropriateness and legal basis of any disclosure requirements resulting from the information contained in the Prosecution Submissions.¹⁰

II. Analysis and conclusions

5. For the purpose of the present Decision and in accordance with Article 21 of the Rome Statute ("Statute"), the Chamber has considered Articles 64(2), (6)(c) and (e) and (7), 67 and 68(1) and (4) of the Statute, Rules 17(2)(a), 16 to 18, 77, 81(2) and (4) of the Rules of Procedure and Evidence ("Rules") and Regulations 23bis and 28 of the Regulations of the Court ("Regulations").

On the provision of further information in relation to the issues raised in the Prosecution Submissions

6. The Chamber notes with concern the prosecution's assessment that the "disclosure of the list of Witness 169 and the potential involvement of

⁶ ICC-01/05-01/08-2827-Conf-Exp, paragraph 15.

⁷ Ibid.

⁸ ICC-01/05-01/08-2827-Conf-Exp, paragraph 16.

⁹ ICC-01/05-01/08-2827-Conf-Exp, paragraph 17.

¹⁰ ICC-01/05-01/08-2827-Conf-Exp, paragraph 20.

[REDACTED]”.¹¹

7. The prosecution affirms that the risk to the Exposed Witnesses is manageable with the measures currently in place.¹² However, [REDACTED]¹³ and in line with its obligation under Article 68(1) of the Statute, “to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”, the Chamber considers that further measures are required to address [REDACTED]. For that purpose, the Chamber considers it necessary to receive the VWU’s observations on the Prosecution Submissions, including [REDACTED].

8. The Chamber also notes, again with concern, that both Witnesses 169 and 178 demonstrated persistence in contacting other protected witnesses and after being informed of the possible consequences of their actions Witness 178, in particular, stated that he will “continue to act in this way until he receives his loss of income.”¹⁴ In light of the above, the Chamber orders the prosecution to provide further information as to the course of action and specific measures it intends to take to address Witnesses 169 and 178’s conduct, including any measures pursuant to Article 70 of the Statute.

On the disclosure of the information contained in the Prosecution Submissions

9. 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(1)(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). As to the application of Rule

¹¹ ICC-01/05-01/08-2827-Conf-Exp, paragraph 16.

¹² Ibid.

¹³ [REDACTED].

¹⁴ ICC-01/05-01/08-2827-Conf-Exp, paragraph 15.

77 of the Rules, 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,¹⁵ and that any assessment in this respect “will depend upon the specific circumstances of the case”¹⁶ and “should [...] be made on a *prima facie* basis”.¹⁷

10. In the case at hand, the Chamber notes that the Prosecution Submissions refer to allegations made by Witness 169 as to “outstanding claims” and “money promised by the Prosecutor for witnesses”.¹⁸ In the view of the Chamber, any information relating to such claims may be “material for the preparation of the defence” and therefore should be disclosed under Rule 77 of the Rules.

11. Accordingly, in order for the accused’s rights under Article 67(1)(b) and (2) of the Statute and Rule 77 of the Rules to be meaningful, the information contained in the Prosecution Submissions needs to be made available to the defence as soon as practicable. For that purpose, the Chamber instructs the prosecution to file, in coordination with the VWU, a confidential redacted version of its Submissions, including Annexes A and B. In light of its obligations under Articles 64(2) and 67(2) of the Statute, the Chamber orders the prosecution to first submit to the Chamber the proposed redactions.

12. Redactions shall be limited to: (i)[REDACTED]; and (ii) the identities and

¹⁵ 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.

¹⁶ ICC-02/05-03/09-501, paragraph 39.

¹⁷ ICC-02/05-03/09-501, paragraph 42. The ICTY has interpreted the phrase “material to the preparation of the defence” as referring to material that is “significantly helpful to an understanding of important inculpatory or exculpatory evidence; it is material if there is a strong indication that [...] it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal”: ICTY, *Prosecutor v. Delalić et al*, Case No. IT-96-21, Decision on the motion by the accused Zejnil Delalić for the disclosure of evidence, 26 September 1996.

¹⁸ ICC-01/05-01/08-2827-Conf-Exp, paragraph 9 and ICC-01/05-01/08-2827-Conf-Exp-AnxA, page 3.

location of the Court's field staff.

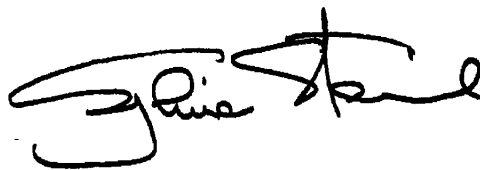
13. In view of the above, the Chamber hereby ORDERS

(i) the VWU to submit a report on the issues addressed in the Prosecution Submissions, including [REDACTED]; this report shall be filed as soon as practicable and classified as confidential, *ex parte*, prosecution and VWU only;

(ii) the prosecution to submit for the Chamber's approval a proposed redacted version of the Prosecution Submissions, including Annexes A and B, in accordance with the guidelines and procedure set out in paragraphs 11 and 12 above; these proposals shall be communicated to the Chamber by way of an email by 1 November 2013; subject to the Chamber's approval of redactions proposed by the prosecution, the Chamber will decide on the disclosure of the Prosecution Submissions and order that they be notified to the defence and the legal representatives of victims as appropriate.

(iii) the prosecution to submit a report on the measures it intends to take in relation to the conduct of Witnesses 178 and 169. This report shall be filed within 3 days of the notification of the redacted versions of the documents referred to in paragraph 13(ii), and be classified as confidential, available to the Chamber, the Registry, the parties and participants.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 11 December 2014

At The Hague, The Netherlands