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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
With Confidential Annex A

Defence Request for Authorisation to File a Public Version of its Final Trial Brief

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

Melinda Taylor

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 Victims

Paolina Massidda

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

A. BACKGROUND

1. Mr. Bemba has a right to a public trial.¹

2. In proceedings which have lasted over five years and generated thousands of filings, the Final Trial Brief is the principal document filed by the Defence.² At 410 pages in length, the Final Trial Brief sets out Mr. Bemba's position on the Prosecution case against him. It summarises not only a five-year evidentiary record, but also provides the Defence position on the law relevant to superior responsibility and the crimes for which the Accused is charged.

3. Rather than entrusting the parties with the preparation of public redacted versions of their final trial briefs, as was the practice before the *ad hoc* tribunals and in the *Lubanga* and *Katanga* cases, Trial Chamber III ("the Trial Chamber") established a system whereby it was the final arbiter of the content of public versions of closing submissions.

4. The Trial Chamber put in place a two-step process. During the first phase, the parties reviewed confidential versions of the transcripts of their witnesses (requiring the review of 230 transcripts by the Defence), and made proposals as to information which could, in fact, be placed in the public domain. The parties then reviewed each others' proposed redactions, with disputed redactions being submitted to VWU, for final arbitration by the Trial Chamber.³ Only then were the transcripts reclassified as public. This process was completed in mid-September 2015.⁴

¹ Article 67(1) of the Statute. See also ICC-01/05-01/08-1904-Red, para. 18; *Prosecutor v Mbarushimana*, Decision on issues relating to the publicity of proceedings in the case, 11 October 2010, ICC-01/04-01/10-7, para. 7; *Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15-150, Second decision on objections concerning access to confidential material on the case record, 21 July 2015, para. 13.

² ICC-01/05-01/08-3121-Conf.

³ ICC-01/05-01/08-2153; ICC-01/05-01/08-2223; ICC-01/05-01/08-3038.

⁴ Email Chamber to the Parties and VWU, 16 September 2015 at 15:19.

5. Following the completion of the reclassification of the transcripts, the Trial Chamber ordered the parties to prepare public redacted versions of their Final Trial Briefs. The parties were then instructed to review each other's proposed redactions, with disputed substance being submitted to VWU by 11 November 2015. The VWU was then required to submit a report to the Trial Chamber.⁵

6. On 25 November 2015, VWU provided its report to the Trial Chamber on the remaining disputed redactions.

7. The Judgment was rendered on 21 March 2016.⁶

8. On 5 April 2016, the Defence wrote to the Trial Chamber, asking for an indication of whether the Trial Chamber anticipated authorising the circulation of public redacted versions of the Final Trial Briefs, and whether the Defence could be provided with an estimated timeframe for their circulation. The Chamber responded in the following terms:

With reference to your email below, please be informed that any instructions regarding the proposed public redacted versions of the Closing Submissions will be provided in due course.

B. APPLICABLE LAW

9. In accordance with Article 67(1) of the Statute, Mr. Bemba "[i]n the determination of any charge, [...] shall be entitled to a public hearing".

10. The jurisprudence of the ICC is replete with statements as to the fundamental nature of this right.⁷ Her Honour, Judge Steiner has previously emphasised that "it's

⁵ Email Chamber to the Parties and VWU, 16 September 2015 at 15:19.

⁶ ICC-01/05-01/08-3343.

⁷ ICC-01/05-01/08-1904-Red, para. 18; See also *Prosecutor v Mbarushimana*, Decision on issues relating to the publicity of proceedings in the case, 11 October 2010, ICC-01/04-01/10-7, para. 7; *Prosecutor v. No. ICC-01/05-01/08*

a fundamental principle of criminal proceedings in national and international courts, the principle of publicity.”⁸ As recently as March 2016, the Pre-Trial Chamber in *Ongwen* again reiterated that “the right to a public trial is indeed a fundamental right of each accused person.”⁹

11. The rationale behind having public trials is a simple one. Public proceedings directly contribute to ensuring that the process is fair. As emphasised by the European Court of Human Rights, the public nature of trials “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.”¹⁰

12. Trial Chamber II ascribed the same importance to the publicity of the proceedings in the *Katanga & Ngudjolo* case. In attempting to limit recourse to private session testimony, the Chamber held that: “the public nature of proceedings... constitutes for the Defence a safeguard, an essential safeguard. It contributes to preserving the trust that all those subject to the law have to have in justice, and it is one of the best means of controlling the way in which such justice is rendered.”¹¹

13. The ICTY made a similar link between the fairness of trials and their public nature. In its first case, the ICTY held that:¹²

The benefits of a public hearing are well known. The principal advantage of press and public access is that it helps to ensure that

Gbagbo & Blé Goudé, ICC-02/11-01/15-150, Second decision on objections concerning access to confidential material on the case record, 21 July 2015, para. 13.

⁸ ICC-01/05-01/08-T-343-ENG RT 11-09-2013 T.

⁹ ICC-02/04-01/15-422-Red.

¹⁰ Judgement, *Werner v. Austria*, 24 November 1997, para. 45.

¹¹ Transcript, *Katanga & Ngudjolo Chui* (ICC-01/04-01/07-T-189-ENG ET WT 20-09-2010), at 10.

¹² *Prosecutor v. Dusko Tadić*, IT-94-01, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 32. See also *Prosecutor v. Delalić et al.*, IT-96-21, Decision on the Prosecution’s motion for the redaction of the public record, 5 June 1997, para. 26; *Prosecutor v. Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Prosecutor for Protective Measures, 3 July 2000, para. 53; *Prosecutor v Stakić*, IT-97-24-A, Decision on the Defence Motion for Extension of Time, 26 April 2004, para. 7.

a trial is fair. As the European Court of Human Rights noted: ‘By rendering the administration of justice visible, publicity contributes to the achievement of the aim of... a fair trial, the guarantee of which is one of the fundamental principles of any democratic society...’. In addition, the International Tribunal has an educational function and the publication of its activities helps to achieve this goal.

14. The ICTR Appeals Chamber has been consistent in requiring “exceptional reasons” for confidential filings,¹³ and held that the only good cause for a party filing a document confidentially is if “exposure would risk damaging the proceedings themselves”.¹⁴ The MICT has followed suit.¹⁵

15. Unsurprisingly, therefore, the Tribunals have required the filing of public redacted versions of trial and appellate briefs. In *Naletilić & Martinović*, the ICTY Appeals Chamber recalled that “all proceedings before an Appeals Chamber, which include the parties’ filings as part of the proceedings, shall be public unless there are exceptional reasons for keeping them confidential and that, it is the practice of the International Tribunal that parties shall file public redacted versions of all confidential briefs filed on appeal from the Trial Chamber’s judgement in light of the fact that the Appeals Chamber shall, after giving due consideration to the parties’ briefs and the record on appeal, pronounce and issue its judgement publicly pursuant to Rule 117 of the Rules.”¹⁶ Similarly at the ICTR, when seized with a Defence request to order the Prosecution to file a redacted public version of its Pre-Trial Brief, the Trial

¹³ *Gacumbitsi v. Prosecutor*, ICTR-01-64-A, Decision on the Appellant’s Rule 115 Motion and Related Motion by the Prosecution, 21 October 2005, para. 5; See also *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Order for Transfer of Detained Witnesses, 1 March 2007, para. 5.

¹⁴ *Prosecutor v. Muvunyi*, ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para. 4.

¹⁵ *Prosecutor v. Sreten Lukić*, MICT-14-67-R.1, Decision on Sreten Lukić’s Application for Review, 8 July 2015, para. 8: “Since all proceedings before the Mechanism shall be public unless there are exceptional reasons for keeping them confidential the Appeals Chamber finds it necessary, in the interests of justice, to order the parties to file public redacted versions of their submissions. For the same reasons, the Appeals Chamber renders this decision publicly.”

¹⁶ *Prosecutor v. Naletilić & Martinović*, IT-98-34-A, Decision on Vinko Martinović’s Withdrawal of Confidential Status of Appeal Brief, 4 May 2005.

Chamber in *Bizimungu* agreed that “[i]n principle, it is preferable that hearings are conducted in public, and this includes making public as much of the written pleadings and Decisions as is possible.”¹⁷

C. SUBMISSIONS

16. In April 2011, the Defence foreshadowed the importance of the filing of a public version of its Final Trial Brief. In a request for the reclassification of documents the Defence emphasised that the publication of documents would “ensure that the parties could present more complete public versions of their final submissions and arguments.” The Defence noted that “[t]his is of particular significance given the historical importance of the proceedings and the interest that many concerned parties have in accessing as broad and complete a record as possible.”¹⁸

17. Now in April 2016, these arguments are only strengthened by the existence of a public version of the Judgment of conviction against Mr. Bemba. The public has been given access to a Judgment, but is being prevented from having access to Mr. Bemba’s arguments and submissions on the charges for which he was convicted. The continued confidentiality of the Final Trial Brief cannot be reconciled with the emphasis placed at the ICC on the direct link between the public nature of the proceedings and their fairness. As noted at the ICTY, “the principle of publicity of the proceedings is of paramount importance to the public perception of the judicial process in ensuring not only that justice is done but also that it is seen to be done.”¹⁹

18. The absence of a public redacted Closing Brief also puts this case out of step with others before the ICC. In the *Lubanga* case, a public redacted version of the

¹⁷ *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion to Remove Confidentiality from Portions of the Prosecutor’s Pre-Trial Brief, 10 December 2004, para. 14.

¹⁸ ICC-01/05-01/08-1380, para. 8.

¹⁹ *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, Decision on Prosecution’s Motion to Change Private/Closed Session Testimony and 92ter Statements Admitted under seal To Public Status, 10 July 2009, p. 3.

Defence Final Trial Brief was circulated by the Defence one month after the original document was filed²⁰ and – most importantly – five months prior to the Judgment being rendered.²¹ The Katanga Final Trial Brief was circulated by the Defence two months after the original confidential version,²² and nearly two years before the judgment was rendered.²³

19. The prejudice caused by the non-publication of the Final Trial Brief in the *Bemba* case is also self-perpetuating. The Defence is prevented from relying on this document in other public filings, meaning that Mr. Bemba's submissions on sentence and on appeal which cite to the Final Trial Brief must also be filed confidentially or, again, redacted.

20. Given the importance of the publication of this central Defence document, and the lapse of over four months since the Trial Chamber received VWU's report on the remaining disputed redactions, the Defence seeks leave to circulate its Final Trial Brief in the form annexed. This version of the brief contains all the redactions deemed necessary by the Defence, having had regard to the public redacted versions of transcripts approved by the Trial Chamber. It also includes all disputed redactions suggested by the Prosecution and Legal Representative of Victims. As such, it can invite no possible objection on the basis of witness protection or confidentiality.

21. In the alternative, the Defence asks that the Trial Chamber authorise the filing of a public redacted version of the Final Trial Brief in a form approved by the Chamber by 18 April 2016, to allow the Defence to cite publicly to this document in its Sentencing Request.²⁴

²⁰ ICC-01/04-01/06-2773- Red.

²¹ ICC-01/04-01/06-2842.

²² ICC-01/04-01/07-3266-Corr2-Red.

²³ ICC-01/04-01/07-3436.

²⁴ ICC-01/05-01/08-3344.

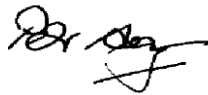
D. RELIEF REQUESTED

22. For the reasons set out above, the Defence respectfully requests that the Trial Chamber:

AUTHORISE the Defence to file a public redacted version of its Final Trial Brief in the form annexed hereto; or, in the alternative,

AUTHORISE the filing of a public redacted version of the Final Trial Brief in a form approved by the Trial Chamber by 18 April 2016.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

8 April 2016