

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **8 July 2016**

TRIAL CHAMBER III

Before: Judge Joyce Aluoch
Judge Geoffrey Henderson
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*V. JEAN-PIERRE BEMBA GOMBO***

**Public Redacted Document
With
Confidential Annexes A, B, C and D**

Public redacted version of “Prosecution Response to Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests”, 19 June 2012, ICC-01/05-01/08-2229-Conf

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution” or “OTP”) opposes the Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests (“Defence motion”).¹ The Defence motion requests Trial Chamber III (“Chamber”) to withhold the identity and identifying particulars of 23 Defence witnesses (“[REDACTED] witnesses”) from the Prosecution until 30 days prior to each witness’ anticipated testimony. The Defence motion further requests the Chamber to prohibit the Prosecution from disclosing the identity of [REDACTED] witnesses to third parties and requests the Chamber to compel the Prosecution to provide a list of Prosecution staff with access to Defence witness information.

2. The Defence motion is without merit and should be denied. The Defence fails to justify the relief requested, particularly in light of the Prosecution’s statutory obligations to protect the well-being of witnesses, as well as restrictions already in place concerning the disclosure of the identities of witnesses. In addition, the Defence proposal will prejudice the Prosecution’s ability to prepare adequately for the Defence witnesses and will likely result in delays and inefficiencies in the presentation of the Defence case.

II. Background

3. On 24 May 2012, the Chamber rendered its “Decision on the starting date of the presentation of defence evidence and related issues”² and ordered the Defence to

¹ ICC-01/05-01/08-2226-Conf, Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests, 13 June 2012.

² ICC-01/05-01/08-2221, Decision on the starting date of the defence presentation of evidence and related issues, 24 May 2012.

disclose the name of its witnesses and summaries of their anticipated testimony one month prior to the commencement of its case.

4. On the same day, the Principal Defence Counsel addressed a crowd gathered on the anniversary of Jean-Pierre Bemba's arrest and spoke about the Defence case.³ He subsequently gave interviews with the media in which he referred specifically to the [REDACTED] witnesses.⁴ Although he did not identify specific Defence witnesses, he did identify a relatively small pool of individuals from which the Defence witnesses could derive.

III. Request for confidentiality

5. Pursuant to Regulation 23 *bis* of the Regulations of the Court, the Prosecution files this document and its annexes confidentially to maintain the confidentiality of the Defence Motion.

IV. Submissions

Request for redaction of witnesses' identifying particulars and "rolling disclosure"

6. The Defence fails to make a particularized showing of how the security of any of its witnesses will be compromised by disclosure to the Prosecution, which is statutorily bound to protect the well-being of *all* witnesses.⁵ The Defence alleges to have received "consistent, corroborated and grave concerns from the [REDACTED] witnesses".⁶ However, these vague and general assertions fail to show how any particular witnesses could be endangered by disclosure of their identities to the

³ See Annex B.

⁴ See Annexes A and B. The English translation of the transcription of the video interview referred to in Annex A can be found in Annex C. The French transcription of this video can be found in Annex D to this submission.

⁵ Articles 54 (3)(f) and 68(1) of the Rome Statute.

⁶ ICC-01/05-01/08-2226-Conf, para.15.

Prosecution. In all cases, including this one, the Prosecution has gone to great lengths to respect its obligations to witnesses, and it goes without saying that it will continue to do so in the future. The Defence bears the burden of justifying limits on disclosure, and its complete failure to discharge its burden here is basis alone to deny its motion.

7. In addition, the Defence fails to explain why protections that are already in place fail to address its generalized concerns. The Defence broadly asserts that [REDACTED] witnesses have expressed fears that “[REDACTED]”.⁷ But the Defence fails to explain how disclosure to the Prosecution could have such consequences. All of the parties in this case are already prohibited from revealing to any third party that an individual is a witness (or potential witness) in this case without express leave of the Chamber.⁸ Therefore, there is absolutely no danger that disclosure of witness identities to the Prosecution could lead in turn to third parties learning of the identities of witnesses and then retaliating against them. As further protection, the Defence is free to apply for protective measures under Rule 87 of the Rules of Procedure and Evidence (“Rules”) for specific witnesses if there exists justification.

8. In addition, the rolling disclosure proposed by the Defence risks compromising the efficiency of the proceedings, a cost worth bearing if it served to protect the security and integrity of witnesses, but not in the absence of such a justification. If the Prosecution does not have the full picture of the Defence case as it questions witnesses, it may be required to recall witnesses later in the proceedings once the full Defence list of witnesses becomes known to the Prosecution. The rolling disclosure would therefore incapacitate the Prosecution’s ability to assess the influence of a witness’ account on another, leaving the prosecutorial strategy at the mercy of the Defence witness order and the Chamber with an incomplete understanding of the witness testimony. In addition, it is likely that the Defence will

⁷ ICC-01/05-01/08-2226-Conf, para.16.

⁸ ICC-01/05-01/08-813-Conf, Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 July 2010, para. 84.

have to reshuffle its witness list at times (for logistical and availability reasons) and significant delays could ensue if the Defence has not effected complete disclosure (since the Prosecution will require at least 30 days after disclosure to prepare).

9. Finally, the Prosecution will be prejudiced in its ability to prepare for the Defence case if it is not provided with full disclosure in advance of the beginning of the Defence case. The Defence disclosure process is meant to provide the Prosecution with the bare minimum of reasonable time to prepare for the questioning of Defence witnesses.⁹ The legal regime of the Court does not envision that any party or participant be entitled to conduct a trial by ambush by unnecessarily delaying the disclosure of information vital to preparation for trial to create some type of perceived tactical advantage. It should be highlighted that while the Chamber and the Prosecution have the duty to establish the truth regarding the crimes committed in the Central African Republic, the Defence's sole duty is to zealously and ethically represent their client.

10. The Defence request is further unjustified in light of the Principal Defence Counsel's recent comments to the [REDACTED] media, which indicate the type of witnesses it will be calling and the nature of evidence it will deliver.¹⁰ Although the Defence did not identify any specific witnesses by name, it identified a relatively small pool of potential witnesses. By doing so, the Defence is either itself recklessly bringing attention to the very witnesses it now claims merit protection or the Defence's claim of risk to its [REDACTED] witnesses is frivolous. In either case, the Defence should not be now permitted to limit disclosure to the Prosecution based on generalized concerns that are already addressed by the current rules.

Prohibition for the Prosecution to disclose identity of witnesses to third parties

⁹ Indeed, though the disclosure obligations are divergent, it should be noted that the Defence were in possession of the Prosecution's evidence more than one year prior to the commencement of trial.

¹⁰ [REDACTED].

11. The Defence request to prohibit the disclosure of information related to witness identities to third parties is overly broad and not necessary. The Defence motion fails to recognize the critical distinction between discussing a named individual with a third party and disclosing the fact that such individual is a witness for the Defence in the instant case at the International Criminal Court. The Prosecution is always very careful and prudent when using names and identifying information during the course of an investigation and will not take steps that will reveal that any persons are in fact witnesses. However, it will be impossible to obtain relevant information from third parties regarding the witnesses if their names cannot be used (e.g. to discover issues impacting Defence witness credibility such as criminal records which, unlike the Prosecution, the Defence has no duty to disclose). The inability to refer to the [REDACTED] witnesses by name would be tantamount to a general prohibition against the Prosecution investigation of the proposed Defence evidence. The Defence has provided no justification whatsoever for such a drastic measure.

12. As noted above, should the Defence wish to request protective measures for the [REDACTED] witnesses, it must do so by addressing the personal situation of every witness for which it is requesting protective measures, as provided by Article 68 of the Rome Statute (“Statute”) and Rule 87 of the Rules. Such requests must be done individually, explaining the risk faced by the particular witness in light of his personal situation. The Statute and the Rules do not provide for a bulk request without particulars.

Demand to compel list of the Prosecution’s staff

13. The Defence request to compel the disclosure of Prosecution staff with access to Defence witness information has no basis in law. No Chamber of this Court has

ever required the Prosecution to provide blanket disclosure to the Defence of the identity of all OTP persons, both within and outside the team working in a particular situation, who may receive information about Defence witnesses. Such disclosure is not just unprecedented, it is also unnecessary, it constitutes an unwarranted intrusion into the prosecutorial prerogative to staff its case, and it also will create serious risks to the staff members themselves.

14. The Defence does not establish the relevance of such information to the purported security risks to the [REDACTED] witnesses. When necessary, the Defence has been provided with the identity of certain members of the Prosecution staff (i.e. the investigators who interviewed witnesses), but there has always been a particular reason for disclosure. Moreover, every member of the Prosecution staff is bound by the same duty to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”,¹¹ and undertakes an oath to protect the confidentiality of information, including confidential information about witness protection.

15. Article 42 of the Statute confers full authority to the Prosecutor “over the management and administration of the Office, including the staff, the facilities and other resources thereof.” Accordingly, it is within the power of the Prosecutor to appoint staff and decide who will conduct investigations and proceedings in various cases. Any involvement by the Chamber or the Defence in this process, even if limited only to requiring that staff persons’ identities be disclosed, would be impractical and would unnecessarily infringe the prerogative of the Prosecutor to assign staff to meet the requirements of her office. It would also unnecessarily jeopardize the well-being of the staff members themselves.

¹¹ Article 68(1) of the Rome Statute.

V. Conclusion

16. For the reasons set out above, the Prosecution requests that the Chamber reject the Defence motion.



Fatou Bensouda, Prosecutor

Dated this 8th Day of July 2016

At The Hague, The Netherlands