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

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TRIAL CHAMBER III

Before: Judge Joyce Aluoch, Presiding Judge
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

**Public Redacted Version of Request for re-classification of ICC-01/05-01/08-3493-
Conf and its annexes, ICC-01/05-01/08-3538-Conf**

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. INTRODUCTION

1. On 26 June 2017, the Defence was given access to a report of meetings held in December 2016 between the Trust Fund for Victims (“TFV”), [REDACTED], and a number of parties to the reparations proceedings in the present case, including “representatives of Chambers” and “OTP staff involved in the Bemba case” (“TFV Report”).¹

2. The TFV report was originally filed by the TFV on 2 February 2017 as an *ex parte* Registry only filing.² No legal or factual basis was given by the TFV for the documents’ *ex parte* classification, nor was the information therein characterised as confidential.

3. Having now reviewed the TFV Report and its four annexes, the Defence can see no factual or legal basis for its confidential classification. It contains no information which identifies protected witnesses or victims in the present case, or could be considered as sensitive or confidential, or at risk of damaging the integrity of the proceedings. Much of the material which originates from the [REDACTED] is available on the internet.

4. As such, by the present application, the Defence seizes the Trial Chamber with a request for the reclassification of the TFV Report as public or, if deemed necessary, public with redactions.

B. PROCEDURAL BACKGROUND

5. On 21 December 2016, a meeting was held between [REDACTED] and “staff and management of the Trust Fund Secretariat, OTP staff involved in the Bemba

¹ ICC-01/05-01/08-3493-Conf, para. 2.

² ICC-01/05-01/08-3493-Conf-Exp.

case, staff of the OPCV, representatives of Chambers (the head of Chambers and a visiting professional), and staff members of the team of the legal representatives of victims in the Bemba case.”³

6. On 22 December 2017, the [REDACTED] representatives met with “staff of the VPRS and the Registry’s Legal Office [...], followed by a concluding meeting between the [REDACTED] delegation and the Trust Fund Secretariat.”⁴

7. The content of these meetings was summarised in the TFV Report, which was filed *ex parte* Registry only by the TFV with the Trial Chamber on 2 February 2017, together with four annexes.⁵

8. The case record since the delivery of the Trial Judgement on 21 March 2016 contains a number of gaps, presumably because filings have been filed as *ex parte* before the Trial Chamber.⁶ On 24 May 2017, the Defence filed its *Defence’s Observations on three alternative proposed experts*,⁷ in which it raised the issue of *ex parte* filings to which it did not have access.⁸

9. On 23 June 2017, the Trial Chamber sent an email to the parties and participants, stating “Trial Chamber III orders the reclassification of ICC-01/05-01/08-3493-Conf-Exp and its associated annexes from confidential, *ex parte* Registry only to confidential.”

³ ICC-01/05-01/08-3493-Conf, para. 2.

⁴ ICC-01/05-01/08-3493-Conf, para. 3.

⁵ ICC-01/05-01/08-3493-Conf-Exp.

⁶ As far as the Defence can discern, the following filings are missing from the case file: ICC-01/05-01/08-3394, ICC-01/05-01/08-3492, ICC-01/05-01/08-3504, ICC-01/05-01/08-3510, ICC-01/05-01/08-3515, and ICC-01/05-01/08-3521.

⁷ ICC-01/05-01/08-3525-Conf.

⁸ ICC-01/05-01/08-3525-Conf, fn. 19: “The Defence notes further that filings ICC-01/05-01/08-3515 and ICC-01/05-01/08-3521 are missing from the record of the case.”

10. On 27 June 2017, ICC-01/05-01/08-3493-Conf-Exp (“TFV Report”) and its four annexes were reclassified as confidential, and as such were made accessible to the Defence.

C. APPLICABLE LAW

11. Article 64(7) of the Rome Statute provides that: “the trial shall be held in public”; thus setting publicity of hearings and proceedings as the rule. Article 67(1) of the Statute also provides that: “[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially and to the following minimum guarantees, in full equality [...]”.

12. Accordingly, all submissions “shall be public unless there are exceptional reasons for keeping them confidential”.⁹ This is because “the openness of the proceedings is important to ensure their integrity and to secure public respect for the judicial process.”¹⁰ Moreover, any restrictions on public filings must be limited to “a necessary and proportional extent”.¹¹

13. A document can be filed on a confidential basis when it contains information which, if disclosed, might cause prejudice, concerns about safety, or serious embarrassment to a party or a witness, or where the very fact of filing might have the same result.¹² The ICTR Appeals Chamber held, for example, “[t]he only good

⁹ *Prosecutor v. Ndindiliyimana et al*, ICTR-00-56-A, Decision on Innocent Sagahutu’s Motion for Clarification or for Variation of Protective Measures, 22 March 2012, para. 13.

¹⁰ *Prosecutor v. Stakić*, IT-97-24-A, Decision on Defence Motion for an Extension of Time, 26 April 2004, para. 7.

¹¹ ICC-02/11-01/15-101, para. 13.

¹² See, for example, *Ngirabatware v. The Prosecutor*, MICT-12-29-A, Decision on Defence Requests for Reclassification, 22 August 2013, p. 2; *Prosecutor v. Stakić*, IT-97-24-A, Decision on Defence Motion for an Extension of Time, 26 April 2004, para. 7; *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Order on the Transfer of Detained Witnesses, 1 March 2007, para. 5.

cause for a party filing a document confidentially is if the information in the filing is confidential and exposure would risk damaging the proceedings themselves.”¹³

14. Regulation 23 *bis* of the *Regulations of the Court* requires that, any document filed by the Registrar or a participant and marked “ex parte”, “under seal”, or “confidential”, “shall state **the factual and legal basis** for the chosen classification.”

15. The Appeals Chamber has previously emphasised the importance of the explanation under 23*bis* being so framed as to allow the Chamber to assess whether or not the classification chosen by the participant should be retained or altered. It is not sufficient merely to file a public redacted version of the document at a later stage.

D. SUBMISSIONS

16. Neither the TFFV’s *ex parte* filing in February 2017, nor the email from the Trial Chamber re-classifying the TFFV Report as confidential in June 2017, provide any basis for the information contained therein being kept from the public. In the respectful submission of the Defence, no such basis exists.

17. The **fact** of a meeting between stakeholders and various organs of the ICC to discuss the potential implementation of reparations in the Bemba case is already in the public domain. In its public filing “*Observations relevant to reparations*” of 31 October 2016,¹⁴ the TFFV observed that Rule 98(4) of the Rules would require that consultations between various stakeholders take place prior to the Trial Chamber making such an award in the order for reparations.

¹³ *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.

¹⁴ ICC-01/05-01/08-3457.

18. The **content** of these meetings is also not confidential. The TFV Report makes no reference to the identity of individual witnesses, or victims, nor does it even refer to pseudonyms or victim application numbers. There is no risk that any individual could be identified or put at risk by the publication of this summary. Nor is there any potential risk to damage to the integrity of the proceedings. As such there are no special circumstances warranting a departure from the principle of publicity of the proceedings.

19. Moreover, one of the areas of agreement on the part of participants to the December meetings was that the next step should be “a public hearing on reparations, allowing parties and participants, the Central African Republic, the Trust Fund, Registry as well as the [REDACTED] and other interested experts or expert bodies, to make observations on procedural and substantive topics selected by the Chamber.”¹⁵ The Defence agrees that these are the kind of issues which should receive a public airing. The position of the stakeholders at the meeting undermines any suggestion that the TFV Report – which discusses these very issues – should continue be kept from the public.

20. The TFV Report also appends four annexes, which consist of informational and outreach leaflets concerning [REDACTED]’s project work in the Central African Republic. Annexes 2 and 3 are available on the internet.¹⁶

21. Annex 1 is the [REDACTED] report into the Central African Republic, the content of which appears to be subsumed into [REDACTED] Report on the Central African Republic, which is available on the internet.¹⁷ It has the same formatting

¹⁵ ICC-01/05-01/08-3493-Conf-AnxA, p.15.

¹⁶ [REDACTED] (last accessed 3 July 2017).

¹⁷ [REDACTED] (last accessed 3 July 2017).

and presentation as other [REDACTED] materials produced for public information and outreach purposes, and concludes with “[REDACTED].”¹⁸

22. Annex 4 is a map, entitled “[REDACTED]”, and provides the information referred to in the publically available outreach information, in pictorial form.¹⁹ Similar [REDACTED] maps are available on the internet.²⁰

23. There is no indication that any of this [REDACTED] material is confidential and should be kept from the public. This, of course, makes sense. The [REDACTED] (and indeed the TFV) are publically funded bodies, and have corresponding duties of transparency in relation to how these funds are spent.

24. This Trial Chamber has characterized the publicity of proceedings as a “fundamental principle of criminal proceedings in national and international courts”.²¹ Ensuring the transparency of the reparations proceedings is not only consistent with the approach taken in the *Lubanga* and *Katanga* cases,²² the public nature of proceedings fosters confidence in the process, by allowing both the parties and the public to see how justice is being administered. Allowing the public to have access to the progress of the reparations proceedings, will be an important factor in managing expectations of those who expect to benefit, and in ensuring fairness to the Accused by administering the process in the open.

¹⁸ ICC-01/05-01/08-3493-Conf-Anx1, p. 3.

¹⁹ ICC-01/05-01/08-3493-Conf-Exp-Anx4.

²⁰ See, for example [REDACTED] (last accessed 3 July 2017).

²¹ ICC-01/05-01/08-T-343-ENG, p. 19.

²² Consultations on reparations in the *Lubanga* case were made public: <https://www.icc-cpi.int/legalAidConsultations?name=pr1136>; the Chamber also ordered the Registry and the Trust Fund for Victims to file a public version of their Report on Reparations, ICC-01/04-01/06-2844; the reparations order was public, and the parties filed appeals publicly, see ICC-01/04-01/06-3129, paras. 9-28. See also, the “Draft Implementation Plan for collective reparations to victims”, ICC-01/04-01/06-3177-AnxA. Similarly in *Katanga*, the transparency of the proceedings is apparent from the case records, with *inter alia*, the public reparations order, ICC-01/04-01/07-3728.

25. Even if the Trial Chamber finds there is information contained in the TFV Report that cannot be made public, redactions (as strictly necessary) could be applied to a public redacted version. To this end, the Defence recalls that any restrictions on public filings must be limited to “a necessary and proportional extent”.²³

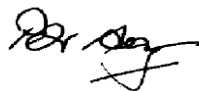
E. RELIEF REQUESTED

26. On the basis of the above submissions, the Defence respectfully requests that the Trial Chamber:

ORDER that the TFV Report and its five annexes be re-classified as public or, in the alternative;

ORDER that the TFV Report and its five annexes be re-classified as public with redactions as strictly necessary.

The whole respectfully submitted.



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

Done at The Hague, The Netherlands, 19 September 2017

²³ ICC-02/11-01/15-101, para. 13.